
By Iyabode Ogunniran

I. Introduction

For over half a century, nations around the world have been very concerned with the plight of children. As a result, the international community adopted several declarations and conventions that articulated protective rights for children. These efforts culminated in the adoption of the United Nations Convention on the Rights of the Child (CRC) by almost all nation states in 1989. Although this convention is not the first international instrument addressing children’s rights, it is very significant in certain respects. First, it signified international acceptance of the view that children’s human rights were neither adequately defined nor protected by the existing regimes of human rights treaties. A separate treaty for children permits a wide range of their specific needs and interests to be addressed. Second, it established a new human rights standard, both in its substantive content and its implementation procedure. Most importantly, it set out in legally binding terms the comprehensive rights of the child.

Nigeria signed the CRC in January 1990 and ratified it in April 1991. However, under Nigerian laws, treaties are mainly implemented by express legislative assent. Section Twelve of the 1999 Constitution of the Federal Republic of Nigeria states that “No treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has enacted into law by the National Assembly.”

According to Akin Oyebode, it is the “enabling statute enacted pursuant to implementation of a treaty rather than the treaty per se which is considered by the courts as source of law.” This implies that the CRC can only be enforced in Nigeria after its re-enactment as part of the laws of the Federal Republic of Nigeria.

A combination of factors impedes its re-enactment by the country and its adoption in some states. First, Nigeria’s federal structure impedes its passage. The National Assembly can only pass laws regarding matters on the Exclusive Legislative List. The Constitution further provides that the National Assembly may make laws for the federation or any part of it, even on matters not included in the Exclusive Legislative List, for the purpose of implementing a treaty. However, such a bill passed pursuant to this subsection 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.

It is noteworthy that matters relating to children are not on the Exclusive List. Hence, the National Assembly may make laws to implement the Convention, but the laws are subject to ratification by a majority of the Houses of Assembly. Ordinarily, this should not be difficult because the Convention provisions provide for the child’s overall development and protection. However, the necessary approval was not obtained, as is detailed below.

The second impeding factor is that Nigeria operates simultaneously under three different legal regimes: English common law, Islamic Sharia law, and the customary law. The first Bill on Children’s Rights was introduced in 1993, but could not be passed into law by the military government due to opposition from religious groups and traditionalists. Consequently, a Special Committee was created to “harmonize the Children’s Bill with Nigerian religious and customary beliefs.” In 2002, the revised Children’s Bill, which encapsulated Nigerian children’s rights and responsibilities, was rejected for the same reasons. Due to passionate appeals by international and national NGOs, the National Assembly, acting under its power to legislate for the Federal Capital Territory (FCT), enacted the Child Rights Act (CRA) into law for only the FCT in September 2003. The various states could then adopt the CRA as part of their laws.

There are strong arguments in favor of the countrywide adoption of the CRC in Nigeria. First, neither of the provisions on Fundamental Human Rights nor Fundamental Principles of State Policy under the Nigerian 1999 Constitution are limited to only children’s rights. Furthermore, the philosophy of the various Children and Young Persons Laws, meant to regulate juvenile justice administration, is at variance with the “child oriented justice” of the CRA. Furthermore, the CRA will provide comprehensive, child-specific legislation in Nigeria, which is in accordance with international standards.

Despite these logical and well-intentioned arguments, the Supreme Council of Sharia in Nigeria takes the position that “[the] CRA will demolish the
very basis and essence of Sharia and Islamic culture," citing instances of the CRA’s provisions giving equal rights to male and female children in inheritance, and the establishment of a Family Court that replaces Sharia Courts’ jurisdiction in all matters relating to children.\(^24\) The Council then enjoined the Northern states, and by implication, the Sharia-implementing states from adopting the CRA.\(^25\) It appears that the Council’s admonishment is effective, as only four northern states, including one Sharia-implementing state, have adopted the CRA.\(^26\)

In reality, several issues are raised by the call of the Supreme Council of Sharia, as there are fundamental differences in the philosophical underpinnings and provisions of the CRA and Sharia law. For instance, the CRA’s provisions in respect to adoption, marriage, custody, and family court are fundamentally different from Islamic personal law.\(^27\) Moreover, the CRA’s child-oriented justice approach in respect to child offenders is contrary to Sharia criminal law, under which both adults and children can be subjected to stiff punishment and penalties. Consequently, out of the twelve Sharia-implementing states, the CRA has been formally adopted in only one state.\(^28\) However, there is a proposed Child Rights Bill in another state.\(^29\) Opposition by other Sharia-implementing states is mounting by the day, leading to the non-adoption of the CRA.\(^30\) In this author’s opinion, the utmost challenge is to reconcile these differences in order to pave the way for the implementation of the CRA in these states, rather than “throw away the baby with the bath water.”

Drawing copious examples from the Jigawa Child Rights Law and the proposed Borno Child Rights Bill\(^31\) this article attempts to reconcile both legal regimes in order to ensure that even the Sharia-implementing states benefit from the lofty objectives of the CRA. Section II of this article will briefly trace the historical background of Sharia law in Nigeria, as this may explain its radical difference from the provisions of the CRA. In Section III, this article analyzes the issues and challenges that Sharia-implementing states may face when adopting the CRA.\(^32\) The areas of divergence based on philosophical underpinnings and religious hegemony are so diverse and distinct, such that reconciliation seems a Herculean task. Against this background, Section IV attempts to reconcile these differences in order to pave a way forward.

II. Historical Background of Sharia Law in Nigeria

Sharia, or Islamic law, has been defined as “the way or road to follow” by the Muslims.\(^33\) The Muslims believe that all other laws have human origin, but Sharia law is fixed by the Almighty Allah through his Messenger, the Holy Prophet Mohammed, who disseminated the message from its immediate Arab home to the rest of the world by using divine power.\(^34\) According to Dr. M.O. Junaid, a leading Islamic jurist,

Sharia is a legal system highly upheld by the adherents of the Islamic faith. It is comprehensive in nature, it is divine in origin and people believe it is a component part of their religion. Sharia is based on the fact that God is the creator and He is so merciful enough to provide a code of conduct which influences our conduct, be it personal, societal, family or whatever.\(^35\)

Hence, Sharia is all-encompassing; it is a religion, a way of life, a society, and a State. Thus, “whilst Islam is a package of tenets, Sharia encompasses the full description of the tenets.” The scope of both addresses the entire aspect of human life.\(^36\) Obviously, Sharia or Islamic law connotes the same meaning, as both refer to the Muslim legal system.

In another parlance, “Sharia” as an Arabic term connotes a road that leads to a watering place.\(^37\) Since it is embedded in the Islamic religion, which symbolizes complete and unalloyed submission to the will of Allah, Muslims must totally and absolutely obey the religion’s rules and regulations as depicted in the Quran.\(^38\) This likely explains Muslims’ passion to enforce Sharia law \textit{stricto sensu} without incorporating other ideals, which will be seen later in this article.

Historically, Islam entered Nigeria around the eleventh century and spread throughout the country.\(^39\) It has its own distinctive legal system, and for almost a century, the Bornu Empire was the upholder of Islam and the Sharia legal system.\(^40\) By the fifteenth century, Sharia had spread to the neighboring states of Kano and Katsina, which subscribed to its cause.\(^41\) The Fulani Jihad and the creation of the Sokoto Caliphate in the nineteenth century further solidified the influence of the Sharia legal system.\(^42\)

Upon the British colonization and amalgamation of Nigeria, the administration realized that Sharia was more in force in northern Nigeria than anywhere else in the world, apart from Saudi Arabia.\(^43\) In the words of Norman Anderson,\(^44\) a leading researcher on application of Islamic law in several parts of the world, “When we turn to West Africa . . . we find that it is unequivocally and exclusively as native law and custom that Islamic law is more extensively followed and enforced in Northern Nigeria . . . .”\(^45\)

Consequently, the Sharia legal system was allowed in several northern states as a native law and
To that end, Section Two of the Native Court Ordinance of 1914 provided that native law and custom included Islamic law. The Native Courts (Protectorate) Ordinance Number Forty-Four of 1933 equally empowered native courts to administer the native law and customs prevailing in the areas of their jurisdiction. Hence, Sharia remained operative in northern Nigeria as a class of customary law and was recognized under the Constitution of the Federal Republic of Nigeria as an existing law.

This was the state of affairs in Nigeria until 2002 when Zamfara State officially adopted the Sharia legal system. This was quickly followed by eleven other Northern states. The preamble to the Zamfara State legislation, as in most others, provides for the: Establishment of Sharia courts to exercise all civil and criminal jurisdiction subject only to the provisions of the Constitution and any other laws vesting certain courts with exclusive jurisdiction over certain causes and matters) based on Sharia law to curb the high rate of crime, moral decadence and anti social behaviors now increasingly on the rise in the state.

This author submits that the implication of this provision is that Islamic law is intended to apply exclusively to criminal and civil matters in these “Sharia states.” Herein lies the crux of the matter. As noted above, Sharia adherents regard it as a law from the Almighty Allah to guide Muslims affairs, and believe that it is superior to all other “man-made” laws. The concept of rights for children as articulated under the CRA does not appear to have a place in Sharia jurisprudence. Artz has underscored this position, as follows:

Quran has numerous references to duties (farud) but the few references to rights (huqiq) are better translated as claims and have particular and specialized application to penal laws. The only rights that are inalienable in the Western natural rights sense are those belonging to Allah and to the state, Allah’s servant. Hence, there is a catalogue of specific Quranic injunctions on the rights of Muslim children. According to Islamic scholars, these rights begin before birth. For instance, before birth, children have the right to pious parents. The Prophet Mohammed reportedly admonished Muslims to be careful in their choice of spouse when he said, “[m]ake a good choice for [your] spouses, for blood will tell.”

Also, children are protected from harm because the Holy Quran provides thus: “they are losers who have slain their children without knowledge and have forbidden that which Allah bestowed upon them, inventing a lie against Allah.” After birth, the child has a right to life. For Allah says “say . . . that ye slay not your children because of poverty we provide for you and for them . . . ” They have a right to be raised as Muslims, though there is no compulsion in religion. Such Muslim children also have a right to a name, a right to legitimacy, a right to breastfeeding, a right to equal life chances, a right to sustenance, and a right to education, amongst others. Since the foregoing rights are supported by many provisions in the Quran, the rights that will be accorded to children are those laid down in the Quran, and as may have been interpreted by Islamic jurists and scholars.

Islam also accords children with lofty status and high rank since they are considered worldly treasures after which a Muslim should pursue. This is understood to be ordained by Allah: “So now seek sexual relations with [your] wives and seek what Allah has ordained for you,” and “wealth and children are the adornment of the life of this world.” Equally, Prophet Mohammed also urges a man to marry a woman whom he loves and would bear him many children because their outnumbering other nations will delight him. In sum, Islam views child upbringing as a source of pleasure in this world and a reward in the hereafter.

The all-encompassing rights under the CRA are poles apart from the Islamic perspectives of child rights. As a result, there are fundamental differences between several provisions of the CRA and Sharia law in Nigeria. This article will analyze the divergent perspectives of the CRA and Sharia law in such areas as marriage, adoption, custody, family court, and the overall philosophies of both regimes.

III. Divergence of the CRA and Sharia Law

The CRA is based on the “best interest” principle. In other words, in every action concerning a child, whether undertaken by an individual, public or private body, institution or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration. This principle constitutes the heart and soul of all provisions found in the CRA.

Admittedly, the principle is somewhat subjective, as it is prone to several interpretations depending on who is making the decision, the circumstances, and the cultural milieu in which the decision is made. Nevertheless, it is the internationally acceptable parameter for scrutinizing practices that infringe on
the well-being of children and assessing government actions relating to children.\textsuperscript{78} On the other hand, Sharia law is derived from fixed and immutable sources such as Quran, Sunna, and Ijma.\textsuperscript{79} As a result, it is unsurprising that there are divergent areas that pose challenges to the adoption of the CRA in Sharia-implementing states. The following sections will further examine various areas of conflict in some detail.

1. Child Marriages under Sharia Law and the CRA

The strongest opposition to the CRA by Islamic leaders pertains to the age of marriage.\textsuperscript{80} A Nigerian cleric, Imam Sani, declared that if the government imposed the CRA, there would be violent conflicts from some Muslims to the extent that some would even die in the process.\textsuperscript{81} Islamic jurists have tackled the issue of age of marriage based on the interpretations of the Quran.\textsuperscript{82} According to these jurists, a child “experiencing [a] wet dream” or “experiencing [a] monthly course,” as stated in the Quran in relation to the age of marriage, indicates the age of maturity for males and females.\textsuperscript{83} However, the ihlitalam (wet dream) for males and haidah (menstruation) for females are not attained at any particular age. The age of marriage is determined by a combination of other factors, including environment, climatic conditions, and physical growth.\textsuperscript{84}

Support for the view that the age of marriage is not fixed is also found in the Quranic verse which states: “If you are in doubt as to the prescribed period for such women as have despaired of monthly courses, then know that the prescribed period for them is three months and also for such as do not have their monthly courses yet.”\textsuperscript{85} In essence, it is lawful for a girl who has not attained the age of puberty to enter into marriage. Therefore, Islamic law does not fix any age for marriage, and this has resulted in the “marriage of minors” or “child marriage,” especially for young girls.\textsuperscript{86}

Several reasons have been provided for this practice, and the emphasis is that whatever may be the age of marriage, final consummation must be delayed until the parties are ready for marital relations, a condition determined by puberty.\textsuperscript{87} To prevent possible misapplication, marriage of minors is invalid without the consent and participation of the guardian, and the responsibility for such marriage is vested in persons who, apart from being the parent or guardian, have a good sense of judgment and consciousness.\textsuperscript{88} Such minors, upon attaining the age of majority, can also repudiate the marriage.\textsuperscript{89}

Obviously, there is Quranic backing for child marriages. Indeed, it was reported that one of Prophet Mohammed’s wives, Aisha, was married to him when she was only twelve years old.\textsuperscript{90} Hence, all four Sunni schools unanimously agree that there is no age minimum dictating when a girl can marry.\textsuperscript{91} Consequently, in northern Nigeria and the Sharia-implementing states, child marriages are prevalent.\textsuperscript{92} Whilst not condemning this practice, which is firmly rooted in the Quran, the caveat that copulation should be delayed until when such girls are mature is often abused.\textsuperscript{93} Today, underage girls are married to men older than their fathers or even grandfathers.\textsuperscript{94}

Apart from the fact that the girls’ education and self-development are hindered,\textsuperscript{95} the health implications are even more worrisome. Since these girls may start bearing children at such tender ages, they are often exposed to health problems related to child-birth.\textsuperscript{96} For example, it has been reported that early pregnancy is a main cause for high maternal mortality and greater prevalence of birth-related conditions, such as vesico vagina fistula (VVF) and recto vaginal fistula (RVF) in northern Nigeria.\textsuperscript{97} The continual leakage of urine and/or feces by VVF/RVF victims results in their being rejected by their husbands and being socially ostracized.\textsuperscript{98} Pitifully, many of such girls resort to begging for alms for survival.\textsuperscript{99}

In contradistinction, the CRA explicitly prohibits child marriages. A person under the age of eighteen years is incapable of contracting a valid marriage, and where such marriage is contracted, it is null and void.\textsuperscript{100} Furthermore, a parent, guardian, or any other person cannot betroth a child in contravention of this section, and such a betrothal will be null and void.\textsuperscript{101} The Act clearly states that the category of persons contemplated by this provision consists of people who marry children, to whom children are betrothed, who promote the marriage of a child, or who betroth children.\textsuperscript{102} In order to show the seriousness of this issue, the Act makes it an offense liable on conviction to a fine of N500,000, which is about $3,205, or imprisonment for a term of five years, or both.\textsuperscript{103}

Already, there appears to be some manipulation of this section. The Jigawa State Child Rights Law prohibits child marriage, but a child under the law is a person below the age of puberty.\textsuperscript{104} It defines this age as when one is physically and psychologically capable of consummating a marriage.\textsuperscript{105} Even though this is to be determined by the courts,\textsuperscript{106} it is this author’s opinion that there will be different judicial opinions depending on each case, hence, a lack of uniformity. It must be stressed that the definition section identifies a “child” as any person below eighteen years of age, but specifically excludes the
section on child marriage.\textsuperscript{107} To further show its obvious disapproval of the prohibition of child marriages, the penal provision ridiculously states that a person is liable on conviction to a fine of N5,000, which is about $32,\textsuperscript{108} or a term of imprisonment for one year, or both.\textsuperscript{109}

In the same vein, the proposed Child Rights Law in Borno State cleverly provides that no person under the age of eighteen years is capable of contracting a valid marriage unless, regarding the law being applied to the child, majority is attained earlier.\textsuperscript{110} As explained above, in Islamic law applicable to all Muslims, there is no fixed minimum age for marriage.\textsuperscript{111} Hence, a child may not necessarily be eighteen years old when he or she is married. Also, the penal sanction is a fine of N10,000, which is about $64, or a six-month-long term of imprisonment, or both.\textsuperscript{112} It is glaringly obvious from these two provisions that child marriages are indirectly encouraged. The reason for this is not far-fetched; it is embedded in the Islamic religion with highly-revered Quranic support. As will later be discussed in this article, there is room for reform within this context.

2. Adoption under the CRA and Sharia Law

The CRA comprehensively provides for adoption of children and related matters.\textsuperscript{113} In this regard, it is required that an application be made to the court in the prescribed manner.\textsuperscript{114} To qualify for an adoption order, the applicants must be a married couple where each spouse is at least twenty-five years old, and they must have obtained an order authorizing them to jointly adopt a child; a married person may also adopt if he has obtained the consent of the spouse.\textsuperscript{115} After an adoption order is created, it vests in the adopter all rights, duties, obligations, and liabilities in respect to the future custody, maintenance, supervision, and education of the child.\textsuperscript{116} In other words, adoption entirely extinguishes any claim of the biological parents.\textsuperscript{117}

On the other hand, Islam forbids legal adoption that confers on the child the name of the adopted father, the rights of inheritance, and permission to mix with non-\textit{Mahram} members of the household.\textsuperscript{118} This assertion is based on the Quranic provisions thus:

\begin{quote}
[Nor] has He made your adopted sons your real sons. That is but your saying with your mouths . . . Call them by [the names of] their father . . . Mohammad is not the father of any of your men, but [he is] the Apostle of God.\textsuperscript{119}
\end{quote}

According to Islamic proponents, adoption is prohibited because Islam attaches great importance to the protection of legitimacy and paternity; hence, every child must be related to its own father, and Islam views ascribing paternity to another as unjust and illegal.\textsuperscript{120} It is this author’s opinion that the practice of polygamy in these Sharia-implementing states will not encourage the practice of adoption. Where couples are unable to bear children, the man will most likely marry another wife, rather than choosing to adopt a child.

3. Custody Rights Under the CRA and Sharia Law

Differences regarding custody rights under the CRA and Sharia law appear to be unimaginably vast. For instance, the CRA states that family courts may, based on the application of either the father or mother, make an order as it deems necessary regarding the custody of the child and either parents’ right of access.\textsuperscript{121} However, the court must give consideration to the welfare of the child and conduct of the parents and wishes of the both parents.\textsuperscript{122} Prior to the enactment of the CRA, statutory provisions and judicial decisions guided the courts on the granting of custody, especially in statutory marriages.\textsuperscript{123} For instance, Section Seventy-One of the Matrimonial Causes Act provides inter alia that with respect to custody and maintenance of children, the best interest of the child is the key consideration.\textsuperscript{124} Thus, the interest of the child is of first importance in determining custody and will supersede the warring parents’ interests.

The Nigerian Supreme Court, in \textit{Williams v. Williams}\textsuperscript{125} emphasized that “the determination of the welfare of the child is a composite of many factors . . . all the relevant factors ought to be considered . . . the paramount consideration being the welfare of the child . . . .”\textsuperscript{126} Over the years, the courts have taken cognizance of the character and conduct of the parties,\textsuperscript{127} age and sex of the child,\textsuperscript{128} welfare and economic factors,\textsuperscript{129} emotional and psychological stability, and other factors as important indicators in determining welfare of the child. Hence, the “best interest principle” and “welfare of the child” may be described as the twin pillars of justice in custody cases. In line with the doctrine of judicial precedents, family courts may refer to these decisions in interpreting a similar provision stipulated in the CRA. Against this backdrop, the custody of a child will be awarded to either parent based on the above considerations.\textsuperscript{130}

This is radically different from the position under the Sharia legal system. There are fixed custody rules when the parents divorce or separate.\textsuperscript{131} The right to custody of children during the subsistence or termination of marriage is vested in the woman.\textsuperscript{132} The custody of a male child remains with the mother.
until he is mature, and custody of the female child also remains with the mother until she is married and the marriage is legally consummated.133

In awarding custody of a child to a woman who complained that her ex-husband denied her custody after divorce, the Prophet (SAW) addressed the husband that, “her smell, her touch, and her kiss to him [the child] is better to him than the best thing you might have.”134 When the mother loses the right to custody, there are specified people entitled to custody of the child.135 Interestingly, a State Sharia Court of Appeal in Nigeria once interpreted the best interest principle in relation to custody to mean “rules of custody as formulated by Islamic law.”136 It is this author’s opinion that under Islamic law, there is an entrenched and rigid formula guiding the grant of custody, and not the best interest principle found in the CRA. In other words, the utmost consideration in the award of custody may not be in terms of care and adequate provisions for the child, but rather consists of conditions laid down by the Islamic law, with little or no regard for the best interest of the child.

4. Custody of Children Between Unmarried Parents Under the CRA and Sharia Law

Whilst the provision of the CRA explicitly covers children of unmarried parents, Sharia law expressly forbids custody of such children.137 Under the CRA, there is an acquisition of parental responsibility between unmarried parents.138 The family court may, on the application of either parent, grant parental responsibility to such a parent, or grant joint parental responsibility for the child upon both parents' agreement.139

This provision under the CRA is novel because either or both parents can apply to the court to take responsibility or joint parental responsibility of the child, notwithstanding the parents' marital status. Therefore, children born out of wedlock will not be under any form of disability, as parents can acquire responsibility over them. It is this author's opinion that all over the world, including Nigeria, there is a paradigm shift in marital relations, seen in the advent of single parenthood; this provision appears to be more aligned with reality by providing for possession and custody of children born out of wedlock. Consequently, these children will not be deprived of the provisions necessary for their growth and development.

Under Sharia law, children born to unmarried parents are regarded as bastards. In Islam, the legitimacy of the child is based on the maxim, “[the son belongs to the marriage bed [al walad lil firash].”140 In other words, a child is legitimate only when conceived in holy wedlock. Since a child of unmarried parents is not acknowledged, the question of the father taking care of him may not arise, as legitimization is completely outlawed.141 As a matter of fact, under Islamic law, an illegitimate child does not inherit from the father.142 In this author's opinion, the CRA's position is more in line with social realities. Without necessarily encouraging immorality in any form, this author believes that a child born out of wedlock should not bear the brunt of some other peoples' "recklessness."

5. Sharia Courts and Family Courts143

Sharia-implementing states have enacted several laws for the smooth administration of the Sharia corpus juris. The Sharia Courts Laws provide inter alia for the jurisdiction and grades of Sharia courts and implementation of Islamic law in the states.144 For instance, under Section Three, Subsection One of the Sharia Courts Law 1999 of Zamfara State, three grades of Sharia courts were established in the state: Sharia, higher Sharia, and upper Sharia courts.145 The courts are vested with jurisdiction and power to hear and determine both civil and criminal proceedings under Islamic law.146 The Sharia Court of Appeal has the jurisdiction to hear and entertain appeals from the decisions of the Sharia courts in both civil and criminal matters decided on Islamic law.147 It is noteworthy that all Muslims in such states, whether they are adult or children, are subject to the full jurisdiction of these courts.148

Conversely, the CRA establishes family courts in the states, and vests in them unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation, or claim of a child is in issue; and any criminal proceedings involving or relating to any penalty, forfeiture, punishment, or other liability in respect to an offense committed by a child, in the interest of a child, or against a child.149

According to Black's Law Dictionary, “unlimited” connotes “unrestricted or boundless.”150 The Act further imbues the courts with exclusive jurisdiction;151 for instance, no other court, except the family court, shall exercise jurisdiction in any matter relating to children as are specified under it. Hence, the courts have unrestricted, limitless, and reserved jurisdiction on issues concerning children.

Obviously, in Sharia-implementing states, the exclusive or unlimited jurisdiction of family courts is called into question. It is this author's opinion that in such states, Muslim children are subject to the jurisdiction of the Sharia courts, notwithstanding the existence of family courts.
6. The Jigawa State and Borno State Examples

The Jigawa State Child Rights Act establishes a family court for the purposes of hearing matters relating to children.152 However, the court consists of a High Court, Sharia Court of Appeal, Magistrate Court, and Sharia Court.153 Similarly, in the proposed Child Rights Bill of Borno State, family courts consist of two levels: High Court/Sharia Court of Appeal and Magistrate Court/Upper Sharia Court.154 In these instances, it is implicit that the Sharia and Magistrate courts have concurrent jurisdiction; in other words, litigants can appear before either of the courts. Furthermore, an appeal shall lie from the Magistrate to the High Court and from the Sharia to the Sharia Court of Appeal. It is this author’s opinion that in these states, the creation of family courts was just a smoke-screen, as it is most likely that Sharia courts will be the adjudicator on matters relating to the children.

Some critical issues arise from the provision for “family courts” and Sharia courts in the same legislation. To start with, the latter courts are entirely different from the former. A Sharia Court is properly constituted if presided by a single Sharia Court Alkali.155 Although the appointment is by the State Judicial Service Commission, it is subject to the recommendation of the Council of Ulamas.156 Such a person must have “considerable experience in the knowledge of Islamic law, or [must be] a distinguished scholar of Islamic law.”157 In addition, “the applicable laws and rules of procedure for the hearing and determination of all civil and criminal proceedings before [the courts] are as prescribed under Islamic law.”158

Conversely, under the CRA, the family courts at both the Magistrate and High courts shall be duly constituted if it consists of a judge and two assessors, and one of the assessors must be knowledgeable in child psychology education.159 Also, the Chief Justice of Nigeria may make rules regulating procedure in the courts.160

It is clear that judges with different educational backgrounds and who apply different rules of procedure operate in both courts. While one is trained in Islamic law, the other is trained in Common Law and Nigerian Law. Islamic procedure and the normal rules of court are also dissimilar.161 It is therefore not surprising that decisions on the same issues affecting children will be poles apart under the two systems. The implication is seen in the Jigawa and Borno examples: notwithstanding the Child Rights Laws, decisions affecting children will be based on Islamic law simpliciter for children who appear in Sharia courts.

It is submitted that this approach will deprive children of due protection as stipulated under the CRA. This becomes highly imperative in criminal cases, wherein the CRA provides for use of discretion and diversionary measures by the police, due process rights, and a catalogue of non-custodial disposition methods by the courts.162 Even where the children and young persons laws of those states are incorporated into the Sharia courts’ procedure, the due protection measures are not provided for in those laws.163 As shall be addressed later in this article, children who commit offenses are not treated differently from adults, irrespective of their age and vulnerability. This author joins the line of opinion that “when one carefully analyses the conduct of criminal proceedings by the lower courts, especially in cases of . . . fornication (zina) and other huudud related offenses, the performance of such courts is not encouraging. This is because the courts tend to disregard rules of procedure and evidence as provided even under Islamic law . . . .”165

IV. Child Justice Under CRA and Sharia Law

The underpinning philosophy of the CRA is “child-oriented justice,”166 in which the utmost consideration in the treatment of a child offender is re-integration, so the child may later be able to play a constructive role in the society. Fundamentally, this is at variance with the applicable Islamic jurisprudence in northern Nigeria.167 Under the Sharia legal system, there are offences (huudud) for which the punishments are divinely ordained.168 These are fixed by the Quran, and as a result, are immutable.169 In view of the non-specific definition of a child’s age, the child offender is subject to Sharia criminal justice. The contradictions which inevitably arise in the context of this article are detailed in the following instances.

1. Re-integrative Versus Retributive Model of Punishment

Generally, the CRC requires State parties to recognize the right of every child who is accused of infringing the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, and which takes into account the child’s age and the desirability of promoting the child’s reintegration and constructive role in society.170 The overwhelming consensus is in favor of the “reintegration rather than rehabilitation of the offender,” with a new notion that individual treatment is not the main concern, but that children should be assisted within the community to develop a
sense of responsibility which can only be accomplished where they develop a sense of belonging. In other words, it emphasizes a child-oriented justice system which stresses reintegration of the child offender into society so he or she can play a constructive role in it.

In line with that penal objective, the CRA articulates more non-custodial dispositions on child justice than the previous Nigerian legislations. The disposition method includes “placement under care order, guidance order and supervision order; placement under a supervision officer; commitment by means of corrective order to the care of a guardian and supervision of a relative or any other fit person; participating in group counseling and similar activities or undertaking community service.” The Act recognizes the significance of correcting the child offender within the family and community so that such a child is easily reintegrated back into society.

This approach may be more effective in reaching out to such children because in traditional African societies, children were trained by communal and cooperative efforts, and children that exhibited acts of infraction were punished by their community’s agents of social control. In furtherance of this, courts must always ensure that their reaction is in proportion not only to the circumstances and gravity of the offense, but also to the circumstances and the needs of both the child and the society.

On the other hand, crimes in the Sharia penal codes are divided into three groups, namely the **huudud** and non-**huudud** offenses, **Qisas** and **Qisas** related offenses, and **ta’zir** offenses. Whilst the punishments for the latter offense is not divinely ordained, and hence, is fixed by the State, **Qisas** means punishment inflicted on the offenders by way of retaliation or payment of **diyya** (compensation) for causing death or injuries to a person. However, for **Huudud** offenses, punishments are divinely ordained. This presupposes that such punishments are not amenable to changes in their application to adults and children. The Holy Prophet prohibited any mediation in carrying the punishment for **hadd** offenses; in a recognized **Hadith** (sayings and deeds of Prophet Mohammed), he said, “Do you intercede with Me to violate one of the legal punishments of Allah? By Allah had Fatimah, the daughter of Muhammad committed theft, Muhammad would have her hand cut-off.” It is clear from this injunction that the main fulcrum of the CRA is antithetical to the Islamic penal system.

However, some Sharia-implementing states appear to have responded differently concerning punishment for **huudud** child offenders. In the Kaduna State Criminal Procedure Code, no sentence of **huudud** or **qisas** shall be imposed on a person under the age of **taklif**; instead, the court deals with him in accordance with Section Eleven of the Children and Young Persons Law and Section Ninety-Eight of the Sharia Penal Code. This Code provides that when an accused person who has completed his seventeenth, but not eighteenth, year of age is convicted by a court of any offense, the court may subject the convict to **ta’zir** punishment, rather than passing the sentence prescribed under the code. Similarly in Zamfara state, where an accused that has completed his seventeenth but not eighteenth birthday is convicted, the court may subject the accused to confinement in a reformatory home for a period not exceeding one year, or caning, which may extend to twenty lashes with a fine, or both measures.

Paradoxically, these provisions appear to be more of black letter laws judging from the cases already decided in those states. In Zamfara State, seventeen-year-old Bariya Magazu Ibrahim was flogged for becoming pregnant outside marriage; in fact, she was given 100 strokes of the cane. More recently, an Upper Sharia Court in the state found a teenage girl, Zuwarya Shinkafi, and her boyfriend, Sani Yahaya, estimated to be about eighteen years old, guilty of extra-marital sex. They were sentenced to flogging; Zuwarya was given thirty lashes, while her boyfriend was given eighty lashes and sentenced to ten months imprisonment. In contrast to the decisions of the courts, the statutory provisions as stated above stipulate that child offenders should be taken to reformatory homes or given twenty lashes of the cane. This shows the insincerity of the exclusion of children for **huudud** offenses.

It is disheartening that the trend in Sharia-implementing states is to punish child offenders for **huudud** offenses. For instance, a Birnin Kebbi State Upper Sharia Court ordered a fifteen-year-old Abubakar Aliyu’s hand to be amputated for stealing. In yet another instance, a Lower Sharia Court in Maska, Katsina State sentenced a fifteen-year-old to amputation for theft of a bull. Similarly, a Sharia Court in Bauchi State sentenced a girl no older than thirteen or fourteen who claimed her stepfather raped her to a hundred lashes of the cane for pre-marital sex.

2. Age of Criminal Responsibility

Closely related to this issue is the age of criminal responsibility. The age of criminal responsibility is the determining age for children who are alleged to have contravened the penal laws. International law recognizes that such an age must relate to when...
children can understand the consequences of their activities. In Nigeria, the CRA defines a child as a person under the age of eighteen years. Since child justice administration is under the CRA, children under eighteen years are implicitly protected against the full rigors of criminal law and are instead subjected to the juvenile justice system.

On the other hand, the Sharia Penal Code states that criminal liability for *huudud* offenses begins from the age of *ta'khif*, that is, the age of attaining religious and legal responsibilities. Since there is no specific age, it seems rather ambiguous. However, the Criminal Procedure Code appears to shed some light by providing:

[W]here the age of any person, or whether a person is under or above a specified age is in question in any judicial proceeding under this Sharia Criminal Procedure Code, the court may determine such questions by taking into account apparent physical appearance of the person concerned, the evidence in relation to the age of the person concerned . . . the evidence of a witness who is not an expert . . .

These are not clear provisions, and the procedure may not be fault proof, as it may be difficult to determine the ages of some children. This author submits that some children may be tried for *huudud* offences and sentenced under the penal sections, as can be seen from the above analysis.

3. Diversionary Measures and Reformatory Homes

Under the CRA, there is a paradigm in favor of shielding child offenders from the formal aspects of the legal system through diversionary measures. The police are vested with power to dispose such cases without resorting to formal trial through the use of other means of settlement, including supervision, guidance, restitution, and compensation of victims.

A diversionary measure at this stage is critical because the offender will avoid both a criminal record and the stigma or negative effects of entering into the criminal justice system.

However, where such an offender has been tried, the courts have a variety of non-custodial dispositions, as enumerated above: care, guidance, supervision orders, counseling, foster care, and community service. This author believes that child offenders are given the opportunity to learn empathy, family values, and societal values; they also develop an overall positive attitude to life. Where these measures are continuously overhauled to meet the needs of these offenders, this method is preferable to the supposedly reform-oriented homes.

Ordinarily, confining children to a reformatory home is consistent with the rehabilitative model of treatment. However, several studies in Nigeria have shown that there is a significant decay in both the infrastructure and training in reformatory homes, such that offenders emerge worse than when they entered. It has been observed that “there are numerous factors militating against proper and efficient functioning of the institutions. These include shortage of personnel, lack of fund, inadequate facilities . . . there was near complete absence of medical and educational facilities at both Yola and Bauchi remand homes.”

Since these researchers covered more than half of the states in Nigeria, this author asserts that keeping the child offenders in reformatory homes may not be a viable option.

It is this author’s opinion that the position in Kaduna State, where the child offenders are subjected to *ta’zir* punishments, should also be thoroughly reviewed. As earlier noted, since the punishments are fixed by the state, discretion is given to the judges for punishing an offense. The essence is to permit judges some flexibility in making decisions according to the dictates of each case; however, in Nigeria, application of discretionary justice is fraught with problems.

4. Flogging as Corporal Punishment

The CRA prohibits corporal punishment because it is an act of torture, and is an inhuman and degrading treatment. The view is that “any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society . . . is repulsive.” Hence, the emerging consensus in civilized international communities is to accord the citizens with rights against torture, inhuman, and degrading treatment.

Meanwhile, flogging has been said to be the most applied corporal punishment provided by the Sharia legislation in Nigeria. This is corroborated by the instances enumerated above. One bad feature in awarding cane lashes is that defendants’ rights to appeal are often ignored; in most cases, the caning is carried out within a few days after people have been found guilty. According to a renowned Professor of Criminology, caning is designed to inflict pain on or to disgrace the offender. In the former, the objective is deterrence; whilst in the latter, it is the invocation of the machinery of public ridicule. He concluded that it is more of a retributive punishment because it lacks any deterrent or reformative element.

Despite this assertion, corporal punishment through flogging may be a permanent feature of the Sharia penal philosophy, as depicted in the Child
Rights Law, which is enacted by some Sharia-implementing states. For instance, the Jigawa State Child Rights Act restricts the imprisonment and the death penalty on children, but the CRA provision prohibiting corporal punishment has been excluded.214

IV. Conclusions and A Way Forward

From the above considerations, it may appear that attempting reconciliation between the Sharia and the CRA is an exercise in futility because of the difficulty in finding a point of convergence between the two legal regimes. However, in spite of the bundle of contradictions highlighted above, it is submitted that in view of the lofty objectives of the CRA, Nigeria must strive to ensure that a section of the population is not deprived of its benefits in the name of religion.

Religion is a powerful force in human life. In fact, a man’s religion has been declared the center of his total orientation of life.215 However, a foremost Islamic writer has rightly suggested that rather than base the legal authority of family law on Sharia jurisprudence that has ceased to exist as a living and evolving system, it is better to recognize openly that this field, like all other areas of law, derives its authority from the political will of the state.216 This makes it possible to establish the area of family law based on sound social policy for present-day Islamic societies. Human agencies today should decide how to realize the underlying rationale of the texts of the Quran and Sunna as sound social policy in the seventh-century Arabia, and seek to articulate an equivalent purpose in the modern context.217 In other words, modern Muslim jurists should acquire a new understanding of the intent and purpose of Sharia, while being informed by contemporary social, economic, and political circumstances.218 Based on such a recommendation, it is therefore possible for the areas of Sharia Law discussed herein to accommodate the lofty ideals and objectives of the CRA.

Moreover, the reintroduction of the criminal aspect of Sharia law, as mentioned earlier in this article, created an emotional religious issue with a grave political undertone. The former Governor of Zamfara State dared the federal government to go to court.219 Conversely, the former President, Olusegun Obasanjo, sought a political solution and called a meeting for the National Council of State (NCS).220 It included powerful people, such as former heads of state, presidents of senate, state governors, the president and vice-president; all possessing the highest decision-making authority.221 The vice-president then told the press that the NCS had agreed that every state which adopted the supreme Sharia should return to the status quo, but some governors openly disagreed.222 A former head of state actually declared publicly that the Sharia issue was not an agenda before that meeting.223

Recently, there has been concern over whether Sharia proponents have the capacity and political will to meet the expectations of its supporters without infringing upon the civic rights and privileges of non-Muslims in the community.224 Also, there is a need for the system to address mass illiteracy, poverty, and moral degeneration.225 It is within the peculiar Nigerian situation that this author proffers the following ways forward.

First, based on the economic and health implications of child marriages upon young girls, the female children should have unlimited and unhindered access to education. Apart from delaying the age of marriage, such girls will be empowered financially to care for their children, resulting in preserving a generation from poverty. In this respect, it is noteworthy that some northern states already have laws prohibiting the withdrawal of girls from school for purposes of early marriage.226 Despite the Quranic backing for child marriages, it has been outlawed in Egypt; hence, it is possible to do the same in Nigeria, especially when the caveat as to the period of copulation generally is not followed.227

Curiously, the Jigawa State Child Rights Law affirms emphatically that its provision on adoption shall not apply to Muslims.228 In essence, non-Muslims in the State may benefit from adoption. In the Borno State provisions, adoption is allowed without any restriction.229 It is this author's opinion that this signifies a step ahead; since the provision is available, willing Muslims may avail themselves of its dispensation.

As stated earlier in this article, under Islamic law, the right to custody is preserved exclusively for the mother unless she loses the right in specifically stipulated instances.230 However, it is the separated husband that bears the financial responsibility for the child.231 Already, the Jigawa provision states in regards to custody rights that “the court must have regard to the personal law of the child.”232 In other words, the provision is subject to Islamic personal law. Even though the Borno Bill lacks such a restrictive position, time will indicate whether the Sharia-implementing states' model will adopt this particular provision. Presently, the position appears to favor the Islamic model, as there is a judicial pronouncement as earlier expatiated in this paper that the child’s “best interest” in relation to custody is as
formulated by Islamic law. Be that as it may, both the provisions under the CRA and Islamic law are welcome, provided that the father actually takes up the financial responsibility of the child under Islamic law.

Undoubtedly, Sharia Courts have become a permanent feature in the Sharia-implementing states as we have shown above. However, it must be pointed out that some provisions in the Jigawa and Borno Child Laws encapsulate some of the CRA provisions. For example, some provisions require the judge to sit with an assessor who is learned in child psychology, require increased training for judges, and outline due process rights for children. It is this author's view that despite the entrenchment of Sharia Courts, these provisions should be consciously activated, as well as serve as a model for other Sharia-implementing states when adopting the CRA.

As noted above, some aspects of the Sharia penal system may indeed protect children. For instance, in the Kaduna State Criminal Procedure Code, sentences of huudud or qisas shall not be imposed on children, but they can be subjected to tazir punishment. Such punishment includes a fine, a reprimand, compensation, a warning, restitution, and caning. Although this is subject to the discretion of the presiding Magistrate, this author prefers the adoption of Section Eleven of the Kaduna Children and Young Persons Law, which provides for the imposition of a fine, damages or costs, or ordering of parents/guardian to give security for good behavior. These laudable principles are also provided for under the CRA; confinement to a reformatory or caning must be clearly outlawed. Regarding the age of criminal responsibility, it is this author's opinion that sincerity of purpose is the solution. The Jigawa State Child Rights Law defines a "child" as any person below eighteen except under Section Fifteen, which addresses child marriages. But the proposed bill of Borno State provides that a "child" is a person below the age of eighteen years old, hence this is a blanket provision that can apply to all the sections. Other states should follow the latter model because it will remove the ambiguity as to the age of the child and criminal responsibility.

On the issue of flogging, it is this author's opinion that continuous dialogue among the advocates of CRA, Islamic jurist's and scholars may provide for mutual understanding in this respect. Since Islam recognizes children as joys of life, as well as sources of pride and strength, those individuals staunchly committed to Sharia principles may soon realize the philosophy of CRA and that flogging children in the circumstances enumerated above is inhuman.

In general, campaigns for compliance with universal human rights standards usually begin with local organizations and groups. But a positive strategy is strongly recommended, to wit: garnering support for implementation of the CRA by extolling its progressive contributions is likely to be more successful rather than merely condemning Sharia law. In addition, human rights advocates can organize human rights discourse with contributions from Islamic jurists and scholars. Apart from imbuing their discussion with Islamic legitimacy, they may soon find some platform for pro-CRA Islamic Scholars.

Be that as it may, this author asserts that in Nigeria, more than anywhere else in the world, the possibility of Islamic law accommodating the progressive principles of the CRA rests squarely on the political will of the leaders in the various states. One only hopes the leaders will, at this crucial time in Nigerian history, take up this challenge.

Endnotes

* Department of Public Law, Faculty of Law, University of Lagos, Nigeria.
1 The League of Nations, in order to protect and provide welfare services to children orphaned and displaced by World War I, adopted the Declaration of the Rights of the Child in 1924. It declared that "men and women of all nations," recognize that mankind owed the child the best it has to give, accept it as their duty to give a child "means for normal development;" "feed and nurse him;" "give him relief in times of distress" amongst others. A second, more detailed, Declaration on the Rights of the Child was adopted in 1959. The General Assembly proclaimed that to the end that a child may have a happy childhood, enjoy it for his own good, and the good of the society which the rights and freedoms herein set forth, and that parents and national Governments should recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with about ten stated principles. But these were mere declarations and not legally binding on member states. Albeit indirectly, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Cultural and Social Rights (ICESCR) were adopted in 1966. Both confer rights on 'every human being,' which, by implication, include children. See Geneva Declaration of the Rights of the Child of 1924, League of Nations O.J. Spec. Supp. 21, 43 (Sept. 26, 1924); G.A. Res. 1386 (XIV), U.N. GAOR, Supp. No. 16, U.N. Doc. A/4354 (1959); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereafter ICCPR].
See TREVOR BUCK, INTERNATIONAL CHILD LAW 12–13 (Cavendish) (2005).


4 Id.


6 Id.


8 AKIN OYEBODE, INTERNATIONAL LAW AND POLITICS: AN AFRICAN PERSPECTIVE 175 (Bolabay, 2003).


10 OYEBODE, supra note 8.


12 1999 CONSTITUTION, § 12(2).

13 1999 CONSTITUTION, § 12(3) (1999). In Nigeria, there are three types of legislative lists. The National Assembly has the exclusive jurisdiction on items on the Exclusive Legislative List. Both the National Assembly and states’ Houses of Assembly have jurisdictions on items on the Concurrent Legislative Lists. Items that are not included on both Lists automatically belong to the Residual Lists which are for only the states’ Houses of Assembly.

14 Id.

15 CRC, supra note 2, art. 2–16.


18 Id.

19 Id.

20 Federal Capital Territory (FCT) is Abuja, which is the capital of Nigeria. Basically, the Constitution vests the power of re-enacting treaties into laws in the National Assembly (NA). In this instance, the NA was aware it would not get the ratification of a majority of all Houses of Assembly in the Federation as stipulated by the Constitution because of opposition by the northern states. The only way was to come under Sec. 299(a) of the same Constitution, whereby it can make laws for FCT. The NA adopted the CRA as a federal law for FCT. States are now adopting the CRA as state laws.


22 1999 CONSTITUTION, supra note 11, at § 2, 4.


25 Id.

26 There are thirty–six states in Nigeria, but presently, twenty–two states have adopted the CRA. These are: Abia, Anambra, Bayelsa, Ebonyi, Ekiti, Imo, Edo, Delta, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Oyo, Osun, Plateau, Rivers, Benue, Akwa Ibom, Cross Rivers, Taraba. Only four northern states such as Jigawa, Kwara, Nassarawa, and Taraba have adopted the CRA. In fact, many of the states that are yet to adopt are from the North. Significantly, it is only Jigawa out of the Sharia–implementing states that has adopted the CRA. Interview with Sharon Oladiji, Project Officer Child Protection and Participation Section, UNICEF, U.N. House Central District, Abuja.

27 See infra Section III, Divergence of CRA and Sharia Law.

28 See Interview with Sharon Oladiji, supra note 26.


32 See infra Section III, Divergence of CRA and Sharia Law.
Nigeria: Law and Justice System in Northern Nigeria: Descriptive Study, Human Rights in Islamic States, 12 CHILDREN'S LEGAL RIGHTS JOURNAL addition to such other alia: Constitution replicated this provision and provide inter alia: "the Sharia Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law." Id. 35 Fabamise, supra note 34, at 375.

35 The states are Niger; Bauchi; Borno; Gombe; Jigawa; Kaduna; Kano; Katsina; Kebbi; Sokoto and Yobe. Id.

36 Sharia Courts (Administration of Justice and Certain Consequential Changes) Law No. 5 of 1999. Id.

37 Mohammed Tabli said, Islam maintains that "humans are not created for solitariness and impervious individuality. They are created for community, relationship and dialogue. Thus, the Muslim is not the autonomous individual of West philosophy but 'one who submits' completely to God." Artz, supra note 33, at 206.


39 Id.

40 Id.

41 Id.

42 Id.

43 Id. at 236.

44 Id.

45 Id.

46 Fabamise, supra note 34, at 380.

47 Id.


50 See CONSTITUTION § 315 (1963) (Fed. Rep. Nigeria). The existing laws were the penal code and Sharia civil law. However, at the Constitutional Drafting Committee stage to usher in a democratic rule in 1978, the Muslims requested for a Federal Sharia Court of Appeal to cater to matters of Islamic personal law. This was granted with modifications and incorporated in the 1979 Constitution. The 1999 Constitution replicated this provision and provide inter alia: “the Sharia Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred
Rights and Rules Concerning Children in Islam,

father against her wish. She complained to the Prophet her consent. "Hassana bint Khaddar was married a virgin’s consent should be sought and her silence is responsibility.

father will be acting in what he believes to be the best interest of his ward and in the fulfillment of his religious responsibility. (b) is given in marriage, with the females in the North marrying on an average of about five years earlier than those in the South. In the Northwest, the median age of female marriage is 14.6 years and in the Northeast; it was slightly higher at 15.0. The conclusion was that the problem of early marriage is by far more serious in the Northern part of the country. See Children’s and Women’s Rights.

The number of such cases in the country is estimated to be between 80,000 and 150,000 with about seventy percent in the northern part of the country. The incidence of VVF is estimated at two per 1,000 deliveries. The harmful traditional practices study has reported that eighty to ninety percent of wives with VVF are divorced deliveries. The harmful traditional practices study has reported that eighty to ninety percent of wives with VVF are divorced...
towards children. See A.A. Adeyemi, Dean, Faculty of Law, University of Lagos Law Teachers Conference (May 2004).

101 Children’s Rights Act, supra note 100, at § 22(1).

102 Id. at § 22(2).

103 Id. The current exchange rate is N156 to $1USD.

104 Children’s Rights Act, supra note 100, at § 15(1).

105 Id. at § 2(1).

106 Id. at § 15(3).

107 Id. at § 2(1).

108 N156/$1, this approximates $32 USD.

109 Children’s Rights Act, supra note 100, at § 17.

110 Id. at § 21. It has been argued that the definition of a child under the CRC as “every human being below the age of eighteen years, unless, under the law applicable majority is attained earlier” is more purposeful, realistic and flexible within the context of Nigerian people, especially the Muslims, than the blanket provision of eighteen years under the CRA. It is the author’s opinion that the preference for this definition is that under it, the age of marriage will still not be specific as depicted in the Borno State Bill.

111 Quran 65:4; HILALI & KHAN, supra note 61, at 766.

112 Children’s Rights Act, supra note 100, at § 23.

113 Id. at ch. XII.

114 Id. at § 126.

115 Id. at § 129.


117 Needless to say in this respect that the CRA merely encapsulates the adoption laws as codified in the laws of some states. The general legal position is that adopted children possess inheritance rights. This view was canvassed by the respondent in the case of Olaitya v. Olaitya, 12 N.W.L.R. 652, 670–71. Upon the death of the husband, the respondent claimed that though there was no biological child of the marriage, they adopted two children, Emmanuel and Sarah Olaitya. According to the Nigerian Court of Appeal, proof of adoption is essential in the devolution of property on the intestacy. Since the respondent was unable to tender any documentary evidence establishing the adoption or any acceptable evidence to that effect, the children could not be beneficiaries to the intestate estate. The reasoning here is quite plausible as it is re- emphasizing that all the adoption processes must be followed. The Court actually stated that the best evidence of the adoption is the Adopted Children Register established under the law. In effect, had this condition been complied with, the children would have benefited from the estate.


119 Quran 33:4–5; HILALI & KHAN, supra note 61, at 559, 567.


121 Children’s Rights Act, supra note 100, at § 69.

122 Id. at § 1(a)(i & ii).

123 NWOGUGU, supra note 116, at 251–57.

124 Matrimonial Causes Act, Cap. 220, § 71 (1990) (Nigeria); the best interest principle appears not to be welcomed under customary law as this writer is only aware of one isolated case. In the unreported case Kasebyie v Adeyemi, (Appeal No JD/229/60 (unreported) Jos High Court, September 1964, the trial court awarded custody of a child to the father. On appeal to the Jos High Court, the court acknowledged that the decision of the lower court was in accordance with customary law, but custody was awarded to the mother on the basis of the best interest principle. It has been said that the dowry system has tremendously influenced the traditional approach to custody under customary law. Where couples are separated, any child delivered by a wife whose dowry is not refunded by her family, belongs to the estranged husband. See Bolaji Owasanoye, The Regulation of Child Custody and Access in Nigeria, 39 Fam. L.Q. 405, 420 (2005) (For instance, in Lagos Customary Courts, the practice is to award custody of a child above the age of seven years old to the father even when he is not in a position to take adequate care of the child).

125 Owasanoye, supra note 124, at 420. (Williams v. Williams, [1987] 2 N.W.L.R. 66 (Nig.) (According to the Court, “Consideration such as the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities such as educational, religious, or opportunities for proper upbringing are matters which may affect [the] determination of custody. What the courts deal with is the lives of human beings and [it]ought not to be regulated by rigid formulae.”). See Owasanoye, supra note 124, at 413.

126 See Owasanoye, supra note 124, at 413–16 (Okafor v. Okafor, [1976] 6 C.C.H.C.J. 27 (Nig.), “the court refused to grant custody of the child to a mother who had not seen the child physically for almost six years, other than through photographs.” Similarly in Kolawale v. Kolawale Unreported Suit No. HCL/45d/81 of July 1, 1982, High Court Ogun State of Nig., “the court refused to grant custody to a mother who had tried to kill the child.”).

127 See Owasanoye, supra note 124 at 413–16 (In Oyelowo v Oyelowo [1987] 2 N.W.L.R. 239, both parents applied for the custody of their two male children, aged nine and ten years respectively. “The children had lived with the mother for two years after the separation of their parents.” The trial judge held that as male children, their rightful and natural home is with the father. This was supported by the Court of Appeal where in the context of the Nigerian culture, “boys
rightly belonged to the man’s family.” This is highly discriminatory and a negative feature of the patrilineal nature of the Nigerian society).

129 Contra Damulak v. Damulak [2004] 8 N.W.L.R. 51, the appellant urged the court to grant him custody of Mohammed (one of the two kids of the marriage). He maintained that he would take care of him because he is financially sound to look after the two kids. The Court of Appeal in dismissing the appeal held that since that is the only evidential account of the arrangement put together for the well-being of the Mohammed, it is not sufficient to grant custody to him. Therefore, the courts will consider a combination of factors all in the best interest of the child.

130 It appears the best interest principle is also considered under customary law. In an unreported case, Kasebiye v. Adeyemi, the trial court awarded custody of a child to the father. On appeal to the Jos High Court, the court acknowledged that the decision of the lower court was in accordance with customary law, but custody was awarded to the mother on the basis of the best interest principle.

131 Sheikh U.D. Keffi, NATIONAL CONFERENCE ON THE RIGHTS OF WOMEN AND CHILDREN UNDER THE SHARIA, Centre for Islamic Studies, Institute of Administration, Ahmadu Bello University Zaria 95 (2008).

132 Id.

133 Id. at 96.

134 Id.

135 Id. at 97. (She may lose the right if she is insane or impaired by reason of health or old age. The following will be entitled to custody in this order: mother’s mother, maternal aunt, mother’s maternal aunt, the father’s mother, the father, the paternal aunt, the child’s sister, the executor of the father’s bequest, anyone appointed by the judge, the child’s full paternal uncle, the child’s consanguine paternal uncle, and the child father’s father. It has been opined that Islamic law accords priority for custody of children to female and maternal female relatives to male and paternal ones due to the affectionate and sympathetic love of the former). See generally Justice Abdul-Malik Bappa Mahmud, Protection of Women and Children in Islamic Law, 6 WOMEN AND CHILDREN UNDER NIGERIAN L. 51, 51–58.


137 Children’s Rights Act, supra note 100, at § 68 and HUSSAIN, supra note 118, at 251.

138 Children’s Rights Act, supra note 100, at § 68.

139 Id. at § 68(a)(i) & (ii)–(b); 1999 CONSTITUTION, supra note 9, § 42(2) (provides that “no citizen of shall be subjected to disability or derivation merely by reason of the circumstances of his birth.” This has been interpreted as removing any disability attached to illegitimacy, but in reality, such children may not be able to be claimed from the father unless he acknowledges their paternity). See JADESOLA O. AKANDE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1979, 39 (1982) (According to Akande, the Drafting Committee of the 1979 Constitution “specifically stated that no citizen of Nigeria shall be subject to discrimination by virtue of the fact ‘that he was born out of wedlock.’” There was objection by some members of the Committee and the Constituent Assembly that it is repugnant to morality).

140 HUSSAIN, supra note 118, at 251.

141 Ibrahim N Sada, Rights of Women and Children: A Comparative Analysis Between the Free Western Societies and Islamic Law, National Conference on the Rights of Women and Children under the Sharia Centre for Islamic Studies, Institute of Administration, Ahmadu Bello University Zaria, 229 (2008).


144 Shari’a Courts in Jigawa State, No. 7 (2000); Shari’a Courts in Zamafara State No. 5 (1999).

145 See Shari’a Courts Law in Jigawa State, No. 7 (2000), § 3(1); see also Shari’a Courts in Zamafara State No. 5 (1999).


147 Shari’a Court of Appeal (Amendment) Law No. 6, 2000, Zamfara State and Shari’a Court of Appeal (Amendment) Law No 13, 2001, Kaduna State.


149 Children’s Rights Act, supra note 100, at §§ 149, 150(1)(a & b).

150 BLACK’S LAW DICTIONARY supra note 137, at 1537 (8th ed. 2004).

151 Children’s Rights Act, supra note 100, at § 162.

152 Id. § 141.

153 Id. § 142(1)–43(8) specifically provides that Sharia courts shall have the power to deal with custody of children in which jurisdiction is vested by law. Sharia courts have been incorporated into the state Child Rights Law with specific jurisdiction on custody issues.

154 Id. at § 142(1) & (9) Jigawa; § 150 Borno State.


156 Id. at §§ 8(i), 10(i) (“The Council shall comprise not less than 17 members appointed by the Governor and who shall be knowledgeable in Islamic law and jurisprudence and are distinguished scholars in the study of Quran, Hadith and Sunnah of the Prophet, Ijmah, Qiyas and other sources of Islamic law, and generally have considerable experience in these fields.”).

Vol. 30 • No. 1 • Spring 2010
Children’s Legal Rights Journal

78

[157] Id. at § 8(ii)(a)-(b).

[158] Id. at § 7(a)–(j) (These are the Holy Quran, the Hadith and Sunnah of Prophet Muhammed (SAW), Ijmah, Qiyaqyas, Masalahat Mursala, Istishan, Istishab, Al-urf, Mashabul-Sahabi, and Shar’u Man Kablana).

[159] Children’s Rights Act, supra note 100, at § 152–53.

[160] Id. at § 161.


[164] See infra note 186.


[167] RUUD PETERS, ISLAMIC CRIMINAL LAW IN NIGERIA 1 (Spectrum Books Limited 2003) (Historically, the Islamic criminal law consists of four Sunni schools of jurisprudence. “These are the Maliki, the Hanafi, the Shafi’i and the Hanbali schools.” In northern Nigeria, the prevailing school is the Maliki legal doctrine).


[169] Peters, supra note 167. (These are theft (sariqah); alcohol drinking (shurbul–khamar); false accusation of adultery or fornication (Qahdi); assault, robbery (hirabah); adultery or fornication (Zina); murder (jimayat); apostacy (riddah); rebellion (baghyy) and sodomy (liwati)); See Chapter VIII Sharia Penal Code Law, (2005) Zamfara State.

[170] CRC, supra note 2, Art. 40(1).


[175] Children’s Rights Act, supra note 100, at § 215(1)(b).


[177] Id. at Cap. 9, § 168.

[178] Id. at Cap. 10, § 240.

[179] Id. at Cap.1, § 58.

[180] See id. at Cap.1 § 57.


[184] Id. at § 98.


[188] Id.


[190] Tertsakian, supra note 187, at 57. (The conviction was quashed on appeal on the ground that he was a minor. He was sentenced to flogging and sent to remand home for one year to learn vocational skill).

[191] Id. at 58.

[192] Id. at 61–62.


[194] Id.


This provision, if adopted, is innovative because under the Criminal and Penal Codes applicable in Southern and Northern Nigeria respectively, Section 30 and 50 state that a child under seven years is not criminally responsible for his acts or omissions. Also, a child above seven, but under twelve years is not criminally responsible unless it can be shown that at the time he was doing the act or making the omission he knew he ought not to do the act or make the omission. This writer asserts that the age of criminal responsibility should be raised to fourteen in Nigeria and the present distinction jettisoned in accord with the present realities pertaining to education and exposure of children.

hudud and qisas by a child below the age of taklif. See also Kebbi State Penal Code (Amendment) Law, (2000), § 72 (Nigeria).


198 Children’s Rights Act, supra note 100, at § 209(1)(a).

199 Id. at 223.


201 E.E.O. Alemika, & I.C. Chukwuma, Juvenile Justice Administration in Nigeria: Philosophy and Practice, Centre for Law Enforcement Education, Lagos, Nigeria (2001). The states covered were Abia, Adamawa, Bauchi, Benue, Delta, Ebonyi, Edo, Enugu, Imo, Kaduna Kano, Lagos, Ogun, Plateau and Rivers. See also CHINWE R. NWANNA & NAOMI E. N. AKPAN, RESEARCH FINDINGS OF JUVENILE ADMINISTRATION IN NIGERIA, Constitutional Rights Project (CRP) in Partnership with Penal Reform International (PRI) and the European Union (EU) (2003). Two states were covered in each zone: Kaduna and Kano in North West Zone; Borno and Adamawa in North East Zone; Plateau and Capital Territory in North Central Zone. Others were Lagos and Oyo in South West Zone; Enugu and Imo in South East Zone and Cross Rivers and Rivers in South–South Zone.

202 Alemika & Chukwuma, supra note 201, at 61.

203 PETERS, supra note 168, at 3.

204 Iyabode Ogunniran, Right to Bail in Capital Offences: An Appraisal 8 UNiben L.J. 105, 105–22 (2005). The issue of discretionary justice seems unending in Nigeria. For example, the Nigerian Law Reform Commission recently organized a workshop on reform of rape and other sexual offences. One of the propositions was an amendment of the penal provision on rape. It maintained that because the language is couched in general terms, judges sentenced convicted rapist to minimum terms of imprisonment. Nigerian Law Reform Commission, Workshop Papers on Reform of Law Relating to Rape and other Sexual Offences (2008).

205 Children’s Rights Act, supra note 100, at § 221(b); CRC, supra note 2, § 37(a); (provides that “[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. . .”). In the same vein, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) stipulate that juveniles should not be subjected to corporal punishment. Rule 17.3.


207 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Art. 1, June 26, 1987. Art. 1 defines torture to include “. . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed. . .”).

208 Tertsakian, supra note 187, at 58.

209 See supra notes 186–192.

210 Tertsakian, supra note 187, at 59.


212 Id.

213 Id.

214 Children’s Rights Act, supra note 100, at § 206(1). However in Borno State corporal punishment has been outlawed. See § 221(1) (b).


217 Id.


219 Eliagwu & Galadima, supra note 48, at 137.

220 Id.

221 Id.

222 Id.

223 Id.

224 Junaid, supra note 39, at 243.

225 Id. at 244.

226 See Literature Review of Unicef Protection 94 (quoting Cross River State Girl Child Marriage and Female Circumcision Prohibition Law 2000; Niger and Bauchi States have laws prohibiting the withdrawal of girls from school for purposes of early marriage; Sokoto State has a scheme whereby young married girls who dropped out of school can return to their education).

227 See Promoting Women’s Rights, supra note 89, at 10.


230 See supra notes 132–133.

231 Id.

232 Jigawa Child Rights Law No 5, (2007), § 60(1).

233 Obi, supra note 136, at § 40–41.

234 191, 195 Jigawa Child Rights Law No 5, (2007);


236 PETERS, supra note 169, at 3.

238 2006 Proposed Bill, supra note 30, at § 273.
239 See supra notes 186–187.
240 RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW 183–84 (2005).
241 Id.