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# Child Rights and Protection in Nigeria: Exploring Nexus of Shari'ah, Common and Customary Law Provisions

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## Abstract

Nigeria recognizes protection of children's rights. In order to eradicate abuse and exploitation of these children, various laws are put in place to ensure their well-being. Despite ample legal provisions, Nigerian children are still suffering from abuse and neglect. Therefore, this paper examines the sources of legal rights and protection for these Nigerian children. It also analyses Child Rights Act as embodiment of the legislation relating to the protection of children's rights in Nigeria. The paper argues that protection of children's rights in Nigeria is a reflection of various laws, cultures and practices. The study is based on a qualitative research that draws from analysis of data taken from doctrinal research. The study finds that children's rights need to be adumbrated under the provision of the constitution for it to enjoy its deserved flavour. Therefore, when any of these rights is breached, recourse could be made to the Constitution.

## 1. Introduction

Children are generally considered as assets in all strata, including the Nigerian society. The rights of Nigerian children are protected through different sources. Plurality of these sources of law that protect the rights of Nigerian children is a reflection of operative law in the country.<sup>2</sup> However, some of these laws are general in nature, though they cater for the rights of all Nigerians, only a few specifically intended for the protection of children. The right and protection of children are basically derived from the available laws in Nigeria to wit: Sharia law, Common Law and Customary Law. Therefore, adherents of these different types of laws tend towards fulfilling their obligations on the right and protection of children based on their conviction on the law. But this is not to mean that these adherents carry out religious instructions on the right and protection of children to the letter. It is against this backdrop that this paper highlights and discusses the different sources of law in Nigeria on the right and protection. It offers opportunities which children benefit where their rights are adequately protected. It analyses the conceptual understanding of both the Nigerian and Shari'ah law on the right and protection of children.

## 2. Sources of Nigerian Law on Child Rights

The Nigerian legal system is generally pluralistic because it is developed from multiple resources that reflect the socio-legal history of the development of law in the country. The sources of Nigerian law basically include Shari'ah, received English law, customary law and legislation.<sup>3</sup>

### 2.1 Shari'ah as a Source of Law in Nigeria

The Islamic law applicable in Nigeria is dominantly influenced by the Maliki School.<sup>4</sup> Although the constitution does not refer to any school in particular, the Shari'ah Court of Appeal Laws of the

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<sup>2</sup> Merry Sally Engle 1998. "Legal Pluralism." *Law and Society Review*, pp. 869-896. See also Lukman Ayinla. 2006. "The Nigerian Living Law and its Reflection, the Sociological and Historical Perspective." *The University of Ilorin Law Journal* Vol.1 pp.40-59

<sup>3</sup> Akwara et al. 2010. "Law and Children's Protection: the Nexus for a Sustainable Development in Nigeria." *Canadian Social Science* Vol.6 No 2, pp.26-33.

<sup>4</sup> Abdulmumuni A. Oba. n.d. 'Religious and Customary Law in Nigeria'. [www.law.emory.edu/fileadmin/journal/ci/25/25.2/pdf](http://www.law.emory.edu/fileadmin/journal/ci/25/25.2/pdf). Accessed: 23rd May 2014. See also Philip Ositen & Albert Dekker. 2010. "Shari'ah and National Law in Nigeria." *Social Science Research Network*, pp. 25-62

states in northern Nigeria gave legal endorsement to the Maliki School.<sup>5</sup> The Court has decided that where there exist divergent opinions within the school, the majority opinion is applicable.<sup>6</sup> However, this does not preclude *Shari'ah* court from applying the opinions of any other school of Islamic law that is binding among non Nigerian parties.<sup>7</sup> The *Shari'ah* has the Qur'an and *Sunnah* as its primary sources, *Ijma* and *qiyas* as secondary sources and *istihsan*, *istihlah* and *musalah al-murisalah* and *adul* as subsidiary sources.

More importantly, the Constitution of the Federal Republic of Nigeria recognises *Shari'ah* as part of the sources of Nigerian law, although its scope is limited to the Islamic personal law. Even though the 1999 Constitution of the Federal Republic of Nigeria did not expressly provide for the application of Islamic law as a source of law,<sup>8</sup> it still recognises the establishment of the *Shari'ah* Court of Appeal.<sup>9</sup> It states that "there will be a *Shari'ah* Court of Appeal for every state that requires it."<sup>10</sup> This indirectly guarantees the establishment of the Islamic personal law under the 1999 Constitution. Nevertheless, not all of the 36 states in Nigeria have the Court. The *Shari'ah* Court of Appeal can only be found in states dominated by Muslims. For instance, in the northern states, the *Shari'ah* Court of Appeal is established due to the large number of Muslim population there. However, no *Shari'ah* Court of Appeal exists in the south-eastern states because these states are predominated by non-Muslims,<sup>11</sup> coupled with the fact that the Muslim minority in those region have not made any attempt to request for the establishment of a *Shari'ah* Court of Appeal. It is however surprising that in spite of large number of Muslims in the south-west Nigeria, there is no single state with the *Shari'ah* Court of Appeal and this could be partly due to hypocrisy on one hand and failure to clamour for it on the other hand.

It is worthy to note that the *Shari'ah* Court of Appeal is not given power to adjudicate on criminal matters in Nigeria and this has been a subject of debate for many years.<sup>12</sup> The 1999 Constitution did not categorically mention Islamic criminal law nor did it specifically state the application of Islamic law of crime. However, in 2001 Zamfara state of Nigeria promulgated Islamic law of crime which was followed by many of other states in northern Nigeria. This had led to the opposition from non-Muslims, NGOs and the Western world.<sup>13</sup> Their argument was that the adoption of Islamic criminal law was tantamount to adoption of state religion which is expressly prohibited by the 1999 CRFN (as amended). Their position and assertion are wrong because the

1999 CFRN (as amended) had guaranteed the right to religion for every citizen of Nigeria and by extension, the practice of Islamic criminal law.<sup>14</sup> Thus, Islamic law is the supreme law of the Muslims and they are urged to practise it.

### 2.1.1 Historical Background of Shari'ah Law in Nigeria

Historically, Islam entered Nigeria around the 11<sup>th</sup> century and spread across the country.<sup>15</sup> It came with its own distinctive legal system and by the 15<sup>th</sup> century, *Shari'ah* had spread to many parts of the former northern Nigerian including Kanem-Borno, Kano and Katsina.<sup>16</sup> The Fulani Jihad and the establishment of the Sokoto Caliphate in the 19<sup>th</sup> century further consolidated the influence of the *Shari'ah* legal system.<sup>17</sup> Similarly, upon the British colonization and amalgamation of Nigeria, the administration found *Shari'ah* as a well-established system of law.<sup>18</sup> When the colonialists came to West Africa, they found that *Shari'ah* was unequivocally and exclusively operating as the native law and custom and was more extensively followed and enforced in northern Nigeria.<sup>19</sup> It was also found that the people were resolved to maintain *Shari'ah* to its full extent.<sup>20</sup> Consequently, the *Shari'ah* legal system was allowed in the then northern region but only as native law and custom. Section 2 of the Native Court Ordinance<sup>21</sup> categorized *Shari'ah* as part of their native law and custom.<sup>22</sup> The Native Courts (Protectorate) Ordinance<sup>23</sup> equally empowered the native courts to administer the native law and customs prevailing in the areas of their jurisdiction.<sup>24</sup> Hence, the *Shari'ah* remained operative in northern Nigeria as a class of customary law until 1979 when the Nigerian Constitution appeared to recognize it as an independent system of law by allowing the establishment of *Shari'ah* courts. The trend was followed in the 1999 Constitution of the Federal Republic of Nigeria.<sup>25</sup> Similarly in 1992, the Supreme Court of Nigeria held in the case of *Alkamama*

<sup>14</sup> Suberu Rotimi. 2009. "Religion and Institution; Federalism and the Management of Conflicts over Sharia in Nigeria." *Journal of International Development*. Vol. 21, No. 4, pp. 547-560

<sup>15</sup> M. Owolabi Junaid, The Sharia Legal System in Nigeria: A Historical Survey in Nigerian Integrative Discourses, note 19, pp. 234-235.

<sup>16</sup> Hakeem Z. & Ahmaed Z. 2006. "19th Century Northern Nigeria." *Journal of Architectural and planning Research*. Vol. 4, pp. 250-262.

<sup>17</sup> Christelow Allan. 2002. "Islamic Law and Judicial Practice in Nigeria: An Historical Perspective." *Journal of Muslim Minority Affairs*. Vol. 22, no. 1 pp.185-204.

<sup>18</sup> J.N.D. Anderson. 1998. *Islamic Law in Africa*. Tamaza : Publishing Co. Ltd.p.87

<sup>19</sup> Laitin David. 1982. "The Sharia Debate and the Origins of Nigeria's Second Republic." *The Journal of Modern African Studies*. Vol. 20, No. 03, pp. 411-430.

<sup>20</sup> Joseph Shacht quoted in M.B. Uthman, Faculty of Law, Ahmadu Bello University, Zaria "Protecting the Rights of Accused Persons through the Implementation of the Sharia Procedural Guarantee in Northern

<sup>21</sup> 1914.

<sup>22</sup> Habu Galadima, 2003. "The Shadows of Sharia over Nigerian Federalism". *The Journal of Federalism*. Vol 3, No.33, p 126.

<sup>23</sup> Ajayi, F. A. 1960. "The Interaction of English Law with Customary Law in Western Nigeria" *International Journal of African Law*. Vol. 4, No 1, pp. 40-50.

<sup>24</sup> See section 315. 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 Muslim requested for a Federal Sharia Court of Appeal to cater for 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 upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law..." Gbenga Akingbein, "The Antonyms of Sharia and Human Rights: Nigeria's Perspective", in *International Law, Human Rights and Development*, note 17 p.392.

<sup>25</sup> The states are Niger; Bauchi; Borno; Gombe; Jigawa; Kaduna; Kano; Katsina; Kebbi; Sokoto and Yobe.

*r. Bello*<sup>26</sup> that it was a misnomer to categorise Islamic law as part of customary law because of the irreconcilable differences between both.

The above explanation was the state of affairs in Nigeria until 2002 when Zamfara State officially adopted the *Shari'ah* legal system and this was quickly followed by eleven other northern states.<sup>27</sup> The preamble to the Zamfara State legislation (as in most others) provided for the establishment of *Shari'ah* 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 *Shari'ah* law to curb the high rate of crime, moral decadence and anti-social behaviour increasingly on the rise in the state. However, the *Shari'ah* has not been fully implemented in Nigeria despite the fact that it forms part of Nigeria's legal system. It had been in operation before the advent of the colonialists who vehemently ousted the implementation of divine law from the nation and the remarkable ill effects still remain in the Nigerian legal system. The implementation of English common law gives many criminals and their lawyers the opportunity to fabricate and tailor their incredible evidence which is not possible under the *Shari'ah*.<sup>28</sup> Muslims in Nigeria have been agitating by looking forward to the full implementation of the *Shari'ah* but all their efforts are proved abortive. The *Shari'ah*, unlike customary law is written. Its principles are clearly defined and articulated. This system of law has worked with detail thoroughness and incisive precision.<sup>29</sup>

From the foregoing, it is crystal clear that the *Shari'ah* has faced serious opposition for its implementation. Hence, where this is the case, provisions relating to children's rights under the *Shari'ah* will ordinarily meet a brick wall regardless of benefits embedded in its implementation. The major concern of those who oppose to the implementation of children's rights under *Shari'ah* is that the protection is sourced from the *Quran and Sunnah* and they are worried because they want the principles of *Shari'ah* to prevail in any matter, let alone matters relating to the protection of children. Indeed, interactions with some of them reveal that they do appreciate those protections offered by *Shari'ah*. Nevertheless, once it is mentioned that these are *Shari'ah's* protection for children, they swiftly change their support.<sup>30</sup>

## 2.2 Received English Law as a Source of Law in Nigeria

English law was first implemented in the city of Badagry (in Lagos state of Nigeria) in 1884.<sup>31</sup> The law consists of ancient English customs and usage. It is the law received from the colonial masters who ruled the country before it gained its independence in 1960. English law is common law and it is found in colonial ordinance, Edicts and Bill.<sup>32</sup> Common law is also known as judge-made law because it was developed from the decisions of the Exchequer, and was followed in subsequent cases having similar facts.<sup>33</sup> Hence, judicial precedent is one of the major features of the common law courts.<sup>34</sup> The received English law includes common law, doctrine of equity and statutes of general application. The common law evolved and originated from the basic and general custom of

<sup>26</sup> [1998] 8 NWLR (pt 561), 173. See also Anderson J.N.D. 1998. *Islamic Law in Africa*. Tamaza : Publishing Co. Ltd.p.87

<sup>27</sup> *Shari'ah Courts (Administration of Justice and Certain Consequential Changes) Law No 5 of 1999*.

<sup>28</sup> Yusuf Jelili Amuda.2011. *Child Labour Under Nigerian Law: An Analytical Discourse of their Enforceability*. U.S.A.: Lambert.p.56.

<sup>29</sup> Abdulmuini A. Oba. n.d. 'Religious and customary law in Nigeria'.[www.law.emory.edu/fileadmin/journal/ei/25/25.2/pdf](http://www.law.emory.edu/fileadmin/journal/ei/25/25.2/pdf). accessed 23/5/2014.p.89. See also Woodman Gordon. 1996. "Legal Pluralism and the Search for Justice." *Journal of African Law*. Vol 40. No. 02 pp. 152-167.

<sup>30</sup> Interviews granted to the authors in Ilorin by some Christians elites on 22<sup>nd</sup> October, 2015.

<sup>31</sup> Akintunde Olusegun Obilade. 1981. "The Nigerian Legal System." *Journal of African Law*. Vol. 25 issue 1, pp 51-52.

<sup>32</sup> *Ibid*.

<sup>33</sup> Niki Tobo. 2007. *Sources of Nigerian Law*. Lagos : MIJ Publishers.p.140

<sup>34</sup> Obilade, A.O. 1979. *The Nigerian Legal System*.

England. It seems that the word 'law' acquired the application 'common' because its application cuts across the entire populace, distinct from local customs.<sup>35</sup> The doctrine of equity emanates as a result of the rigors in the application of the common law principles. Court of equity was presided over by clerics, which was why the court is otherwise called court of conscience. Equity stands for fair play and justice.<sup>36</sup> However, the statutes of general application are the laws enacted in England and were applicable in the whole enclave of England before 1900; these laws are implied to have been enacted in Nigeria.<sup>37</sup>

Similarly, the common law is the basic law of the United Kingdom that was developed by the common law courts. Thus, its distinctive characteristics which differentiate it from other laws such as the civil code of France which is not a comprehensive code, but rather a development of judges and principles discovered in previous cases.<sup>38</sup> Equity, on the other hand, is a product of the Chancery that came into being to mitigate the hardship in common law. Equity is generally designed on the principle of fairness that is based on certain maxims, for example, equity acts in *personam*, equity follows the law, delay defeats equity among others. In *Oil Field Supply Ltd v Johnson*,<sup>39</sup> the court held that the disagreement between the Chancery court and the Common Law courts became apparent and litigants are sometimes caught in between, yet the case was settled in favour of Equity.

Statutes of General Application that were in force in England on or before the 1<sup>st</sup> day of January 1900 constituted the part of English law that applies in Nigeria.<sup>40</sup> However, by virtue of Law of England (Applicable Law) of 1959, a Statute of General Application does not apply to the western region. There are two requirements before the Statute of General Application can be applied. Firstly, the Statute of General application must be applicable in the whole of the United Kingdom as it was decided by the former Federal Supreme court in the case of *Lawal v Ojo*,<sup>41</sup> and reaffirmed the decision in *Young v Abina*,<sup>42</sup> to the effect that the Statute of General Application must be applicable in United Kingdom. Secondly, the date of application should be 1<sup>st</sup> January, 1900. In *Young v Abina*,<sup>43</sup> the West African Court of Appeal held that it would still be applicable in Nigeria even if it had been repealed or amended in England after 1<sup>st</sup> January 1900. However, in *Lawal v Ejidike*, the Court of Appeal held that it would be ridiculous for Nigerian courts to continue to apply the law of England even if that law has ceased to be applied in England. Therefore, the Statute of General Application only applies in Nigeria if it remains valid and enforceable law in England on the date in question.<sup>44</sup>

### 2.3 Customary Law as a Source of Nigerian Law

Customary law in Nigeria is regarded as the law that is based on the custom of the people which contains family law that deals with children and their care before and after marriage. Customary law can be described simply as an amalgam of customs or habitual practices accepted by members of a particular community as having the force of law as a result of long established usage.<sup>45</sup> It depends on

<sup>35</sup> Niki Tobi. 2007. *Sources of Nigerian Law*. Lagos : MIJ Publishers. p.140

<sup>36</sup>Yadudu Auwalu 1992. "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria." *The Journal of Legal Pluralism and Unofficial Law*. Vol.24 No.32 pp.103-139.

<sup>37</sup> Okpanachi, E. 2011. "Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi States." *Emory International Law Review* p.897

<sup>38</sup> Park, A. E. W.1963. *Sources of Nigerian Law*. Lagos: African University Press.p.6.

<sup>39</sup> [1987] 2 NWLR 625.

<sup>40</sup> Judicature Act 1873, Section 25(1), (it is now Supreme Court Judicature (Consolidation) Act, 1925) Section 44.

<sup>41</sup> [1961] All NLR 245 per Breit J.

<sup>42</sup> [1940] WACA 180

<sup>43</sup> [1940] WACA 180

<sup>44</sup> Obilade, A.O. 1979. *The Nigerian Legal System*. Nigeria : Spectrum Law Publishing.p.11

<sup>45</sup> Owoyin v.Omotosho [1961] 2 SCNLR.57.

the acceptance of the custom of the community whose affairs are intended to be regulated.<sup>46</sup> It should be noted that the customary law of a particular community is different from the others. Therefore, there will be no room for the uniformity of customary law.<sup>47</sup>

Before the customary law is valid, there are certain characteristics that must be present. Firstly, the custom must be in existence at the time the issue in question is brought before the court as decided in the case of *Lemit v Bankole*.<sup>48</sup> Secondly, a custom must be a custom as well as law. The element of law in custom is important because in reality, it carries sanction in the event of breach.<sup>49</sup> Similarly, a custom must enjoy acceptability from the people before it enjoys recognition of the court. By its nature, customary law emanates from the practices of the people and it is not codified in a document form. It therefore follows that a custom is unwritten and flexible in nature.

Essentially, a custom is subjected to validity tests before it becomes applicable. It must not be repugnant to natural justice, equity and good conscience or incompatible with law.<sup>50</sup> It must not be contrary to public policy.<sup>51</sup> The problem however is the yardstick to measure whether a custom contravenes any validity test. There is no rule or guideline to determine the validity of the custom. The colonial administration simply introduces these tests to side-line or otherwise make inapplicable customs which they feel do not satisfy their tests. In the southern region, many customs were tagged repugnant to natural justice, equity and good conscience during the days of colonial administration.<sup>52</sup> After independence. Hence, for a custom to be applied in Nigeria, it must pass through the aforementioned validity tests. In *Mariyama v Sadikin Ejo*,<sup>53</sup> it was decided that a customary law of an appeal to the High Court, the decision was reversed on the grounds that the law was repugnant to natural justice and the child belongs to the natural father.

From the position of the customary law, one of the ways of protecting a child is by allowing a supposed biological father to take paternity of his child. This is why, in the eyes of the customary law, a child born within ten months after the father and mother have separated belongs to the father. Although the court in the case of *Mariyama v Sadikin Ejo*,<sup>54</sup> supra decided otherwise, medical expositions have shown that a gestation period could last up to ten months or more. This position is in line with the principle of *Shari'ah* that the gestation period of a woman could be extended to ten months. It is certain that the decision of the court in the above case which declared the custom as being repugnant to natural justice, equity and good conscience, is in incongruous with medical reality and the position of Islamic law. Therefore, the custom of allowing a divorced husband to take paternity of a child born by his former wife within ten months of divorce is to protect the paternity of the child which is considered a major right of the children. The English custom/common law failed to take this into consideration while handing-down its decision in the case of *Mariyama v Sadikin Ejo*.<sup>55</sup>

<sup>46</sup> *Emagbaya Eleko V Federal Republic of Nigeria*. [1931] AC. P.56.

<sup>47</sup> *Emagbaya A.P. & Bernard I. 2007. The Character of Customary Law: Legal, Historical and Philosophical Perspective*. U.S.A.

Thus, it has been asserted that the minimum period of pregnancy is six months and the frequent period of pregnancy is nine months. However, there are divergent opinions as to the maximum period of pregnancy. Evidence from modern medicine reveals that the maximum period of pregnancy is ten months but in rare and exceptional cases, this period may extend to eleven months (330 days). What is not certain is whether a placenta can provide the fetus with the ingredients of life for this period.<sup>56</sup>

### 2.3.1 The Sharia Nexus

Experts and specialist physicians who participated in the 11th session of the Islamic *Fiqh* Academy of the Muslim World League in Makkah opined that it is impossible for the pregnancy to continue more than one year (more than 365 days).<sup>57</sup> This is the opinion adopted by the laws of personal affairs in some Muslim countries.<sup>58</sup> In this direction, Najm 'Abdullāh 'Abdul Wāḥid opines that:

There is no doubt that the period of pregnancy naturally extends to nine months; that is forty weeks and medical statistics indicate that 60% of women give birth within this period, that 25% of women give birth within the forty-second week, that about 12% of women give birth within the forty-third week and that a low percentage of women (3%) give birth in the forty-fourth week, namely within a maximum period of ten months only.<sup>59</sup>

In the same token, Muḥammad 'Alī Al-Bār argues that:

The normal period of pregnancy is 280 days calculated from the start of the last period. As pregnancy usually takes place in about day 14 from the start of menstruation, the actual period of pregnancy is then  $280 - 14 = 266$  days. Therefore, advancement or delay of birth by two weeks from the calculated period is normal. The date of birth may also be delayed by one month even if the calculation is accurate.<sup>60</sup>

Based on the above premises, it could be deduced that the position taken in the case of *Mariyama v Sadikin Ejo*<sup>61</sup> was not correct because physicians as well as evidence from Qur'an have established that a gestation period could extend to more than nine months.<sup>62</sup>

## 2.4 Nigerian Legislation as a Source of Law in Nigeria

Legislation is also one of the sources of law in Nigeria. Following the exodus of the colonial administration, the idea of having written codes was left as one of the lasting legacies. Therefore, Nigerian state now regulates the conduct of its citizens through legislations, some of which were imported as statutes of general application through reception statutes. Consequent upon this, there

<sup>56</sup> Period of Pregnancy, Islamic Jurisprudence Academy Journal, p. 254, Issue No. 4, 2nd year, 1410 AH.  
<sup>57</sup> Ibid.

<sup>58</sup> The Fetus and Related Rulings in Islamic Jurisprudence, p. 151 and The Estate and Inheritance in Islam, Muhammad Mousā, p. 343.

<sup>59</sup> Najm 'Abdullāh 'Abdul Wāḥid, "Period of Pregnancy", *Islamic Jurisprudence Academy Journal*, p. 251, Issue No. 4, 2nd year, 1410 AH.

<sup>60</sup> Muḥammad 'Alī Al-Bār, *Human Creation between Medicine and the Qur'an*, p. 452.

<sup>61</sup> [1961] NRNL.R.81

<sup>62</sup> The maximum period of pregnancy according to physicians does not exceed one month after the expected date of delivery; otherwise, the fetus would die in the womb. They consider any time more than this as miscalculation. Dr. Najīb Mahfoudh, an obstetrician had argued that the complete period of pregnancy is ten lunar months, i.e. two hundred and eighty days, or nine Gregorian months and seven days calculated from the first day of the last menstruation period before pregnancy.

are certain Nigerian legislations that focus on the protection of the rights of children in the country.<sup>61</sup>

#### **2.4.1 Nigerian Legislations on Child Protection**

Nigerian children have been duly recognized by the government even before the enactment of CRA. There are some legislations made by the government for the purpose of ensuring that children are protected and also reformed. Some of these legislations are stated and discussed briefly below because they are relevant to the study.

##### **(a) Nigerian Constitution<sup>64</sup>**

Nigerian Constitution is one of Nigeria's legislations. It is an embodiment of the supreme law of the land. It also defines the fundamental principles or established precedents that govern the states.<sup>65</sup> Some provisions of the Constitution are also applicable to children, particularly Chapter II of the Constitution under the heading *Fundamental Objectives and Directive Principles*<sup>66</sup> while Chapter IV *Fundamental Rights*<sup>67</sup> is also applicable to the rights of children in Nigeria.

For the purpose of elucidation, Chapter II of the Constitution provides for the social objective and directives principles of state policy of the Nigerian states. The chapter highlights some of the benefits for Nigerian citizens, including children. The benefits include and not limited to free education, right to healthcare and others. It is disheartening that all the rights mentioned under this chapter are non-justiciable.<sup>68</sup> According to the Constitution, the power of court:

shall not except as otherwise provided by the 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 Directives Principles of State Policy set put in chapter II of this Constitution.<sup>69</sup>

It is important to say that the chapter is placed in the Constitution to show the responsibility of the state towards the subjects. The chapter also explains that the goal of the nation also serves as a reminder to the government of its responsibility and limited political controversy.<sup>70</sup> In *Fawehinmi v Abacha*,<sup>71</sup> the court emphasised that the provisions of Section 6(6) are non-justifiable because it was meant only to guide the government in its objectives. The Constitution also spells out the fundamental rights of its citizens including the children under Chapter IV. It specifically mentions that any person can sue and be sued for the violation of any of his rights by the government or private individuals.<sup>72</sup> It is therefore appropriate to say that a child is a juristic person who can benefit

<sup>61</sup> Mukoro A. 2009. "The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect." *International NGO Journal*, Vol.4 No 4 pp.167-172.

<sup>64</sup> Constitution of Federal Republic of Nigeria 1999.

<sup>65</sup> n.a. 25th May 2014. 'Nigeria Constitution App'. [www.pledge51.com/Nigeria-constitution-app/](http://www.pledge51.com/Nigeria-constitution-app/) p.1

<sup>66</sup> Sections 13-24 of the 1999 Constitution of Federal Republic of Nigeria.

<sup>67</sup> Sections 33-46 the 1999 Constitution of Federal Republic of Nigeria.

<sup>68</sup> Mukoro A. 2009. "The Interface between Customary Law and Local Government Legislation in Nigeria: A Retrospect and Prospect." *International NGO Journal*, Vol. 4 No 4 pp.167-172

<sup>69</sup> Section 6(6)(c) of the 1999 CFRN (as amended)

<sup>70</sup> Okpalaob, B.N. 2012. "Legal Judicial Enforcement Approaches Towards of Children Infected and Living with HIV/AIDS in Nigeria." *African Research Review*, Vol. 6 (1) Series No 24.p.90

<sup>71</sup> [1999] 1 L.R.

from this chapter and accordingly seeks redress in court, if any of his rights under this chapter is infringed. The rights under this chapter includes right to life,<sup>73</sup> dignity,<sup>74</sup> fair hearing<sup>75</sup> and others.

**(b) Children and Young Person Act 1943**

The Children and Young Persons Act (CYPA) was initially enacted in 1943. It has been amended subsequently through several legislations (i.e. Ordinance 44 of 1945, 27 of 1947 and 16 of 1950 as well as the laws of Nigeria 131 of 1954, 47 of 1955) and Order in Council 22 of 1946 intended as national law (Cap 32 Laws of the Federation, their adoption as regional laws and subsequently as state laws. As a result, the law was extended to the eastern and western of Nigeria in 1946 by Order-in-Council, No. 22 of 1946. The law was enacted for the northern Region in 1958 and constituted the Children and Young Persons Law, Cap 21 of the Law of Northern Nigeria (1963). Lagos state also adopted the law in the 1970 Children and Young Persons Law (Cap. 26 of the Laws of Lagos state).<sup>76</sup>

The CYPA remains one of the most important legislations in the country pertaining to the treatment of juvenile offenders. Subsequent discussion relies on the CYPA of 1958 as adopted in Lagos. The law was enacted to make provision for the welfare of young persons the treatment of young offenders and for the establishment of juvenile courts.<sup>77</sup> The law defines a young person as "a person under the age of fourteen years". However, as it is used in the legislation, it refers to both the child and young person that is a person who has not attained the age of 17.<sup>78</sup>

It is important to say that, although the CYPA was enacted to play a vital role in the welfare of children in Nigeria, the Act was concerned only with the criminalisation of a young person's acts. It touches only on issues relating to juvenile justice.<sup>79</sup> The Act does not therefore comply with the internationally recognised child rights requirements as contained in the United Nations' Convention on the Rights of the Child adopted in 1989<sup>80</sup> as well as the African Charter on the Rights and Welfare of the Child<sup>81</sup> adopted by the then Organisation of African Unity in 1990.<sup>82</sup> There was therefore a need to pass a new law that would adequately protect the rights of the children including their right to health. This is because the health of children will be deeply involved in the determination of the welfare of children as well as their treatment as young offenders. They may need adequate medical treatment, a very-clean environment, and the provision of healthy food to avoid contamination of diseases and endemic illnesses.

Furthermore, the CYPA has greatly dealt with the issue of handling young offenders. It provides for a child welfare model. In the whole process of a child's trial, the overriding intention shall be protection of the child's interest and acting in his interest, hence, juvenile trials should bear

<sup>73</sup> Section 33 of the 1999 CFRN (as amended)

<sup>74</sup> Section 34 of the 1999 CFRN (as amended)

<sup>75</sup> Section 36 of the 1999 CFRN (as amended)

<sup>76</sup> Report of the child in Nigeria. Report on the implementation of the Convention on the Right of the Child by Nigeria. 38<sup>th</sup> session- Geneve, January 2005.

<sup>77</sup> Atilola Olayinka. 2013. "Juvenile/youth Justice Management in Nigeria: Making a Case for Diversion Programmes." *Youth justice* Vol.13. No.1 pp. 3-16.

<sup>78</sup> Ogbuabor Chukwunweike A. & Edith O. Nwosu. 2014. "Impact of Nigeria's Child's Rights Act on Alternative Dispute Resolution and the Criminal Justice System." *European Journal of Social Sciences* Vol.42 No.4 pp.464-481.

<sup>79</sup> Alhaji Umar Alkali. 2015. Child Protection in the Northern States of Nigeria: A Need for a New Child Law. PhD Thesis. International Islamic University Malaysia. p.184.

<sup>80</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990

<sup>81</sup> OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November. 29, 1999.

<sup>82</sup> Representing Children Worldwide. Available at <http://www.law.yale.edu/rcw/jurisdictions/afw/nigeria/frontpage.htm>. Accessed on 22 January 2014.

minimum delay and should be handled by a professionally diverse panel where incarcerating punishment should be discouraged.<sup>81</sup> This has informed the reason for non-trial, conviction or sentence of young offenders. The process is often humane and mild, hence, probation, corrective orders for supervision by relatives, fines and damages are often the end product of cases against young offenders.<sup>84</sup>

Additionally, the United Nations' Minimum Standard Rules for the Administration of Criminal Justice could be said to have been localised under the CYPA because they both advocate that the general purpose of the juvenile justice system is not punishment but re-socialization of incarcerated juveniles.<sup>85</sup> The CYPA defines a juvenile to mean a person above the age of 14 years and under the age of 18 years.<sup>86</sup> Most juvenile offenders are children who have committed offences under laws which are applicable to adults. Children who are truant may be brought before the juvenile court in the exercise of its criminal jurisdiction under the CYPA.<sup>87</sup> The trial of juvenile offenders takes the form or approach that is different from that of adults. The trial consists of a single judge and a Magistrate Court which consists of a magistrate and two lay persons (which must include a woman) have jurisdiction over cases pertaining to juvenile offenders. The trial must be held in camera in order to protect the child from stigma and all other forms of acts that will be detrimental to his growth and development. Upon conviction, the law recognises four types of custodian institution of juvenile offenders<sup>88</sup> thus: remand homes, borstal homes, approved school and prisons or police cell. Unlike prison where adult criminals convicted of crimes are kept, these institutions will help in reforming the child and will not allow mingling of the convicted child with adult offenders.

The distinction between the CYPA and the CRA is that the CYPA is primarily concerned about issues of criminal justice that relate to a child while the CRA encapsulates both issues of the criminal justice system and that of the rights of the child. Similarly, the CRA was intended to reflect in a more comprehensive form all the laws relating to child protection in Nigeria and to produce it in a single document along the spirit of the CRC and the ACRWC, respectively.<sup>89</sup>

### **(c) Child Rights Act 2003 (CRA 2003)**

The Child Rights Act 2003 is the current law on the protection of children's rights in Nigeria. Before this comes into existence, it was clear that the legal framework for the protection of children's rights in Nigeria was weak and uncoordinated. The laws relating to children were neither specifically on children's right nor did they have adequate provisions regarding their rights.<sup>90</sup> Therefore, to show its commitment to the welfare of the children, Nigeria, like other nations ratified both the Convention on the Rights of the Child (CRC), which is the primary international instrument on the protection of the rights and welfare of children, and the African Charter on the Rights and Welfare of the Child

<sup>81</sup> Ibidapo-Obe, A. 2005. *A synthesis of African Law, Nigeria*. Concept Publication Limited. p.193

<sup>82</sup> Onyemachi Thomas Uche. 2010. "Children, Status and the Law in Nigeria." *African Research Review*. Vol 4. No.3, pp.45-56

<sup>83</sup> Article 10(3) of the International Covenant on Civil and Political Right (ICCPR) 1996 adopted 16<sup>th</sup> December 1966, entered into force on 3rd March 1976.

<sup>84</sup> Section 2 CYPA

<sup>85</sup> Oyero Olusola. 2011. "Information Sources and Awareness Level of Child Rights in Lagos State, Nigeria." *Communication Review*. Vol.5. No.1 p.118.

<sup>86</sup> Section 12 CYPA

(ACRWC). The Nigerian government ratified the CRC in 1991 and the ACRWC in 2000.<sup>91</sup> Both instruments were ratified without any reservations. However, the contents of both instruments did not have legal force in Nigeria until 2003 when the Nigerian National Assembly enacted the Child Rights Bill. The Bill was assented to and became an Act by the President on 31<sup>st</sup> July 2003.<sup>92</sup> The provisions of the CRA 2003 were largely influenced by both the CRC and the ACRWC.<sup>93</sup> The CRA 2003 then became the main legislation on child's rights and welfare in Nigeria, synchronising the different laws on child matters into one composite legislation that protects different forms of child's right.<sup>94</sup> The Act contains 278 sections, 24 parts and 11 schedules.

With the enactment of the CRA 2003, the welfare and responsibility of the government and institution become more defined. In addition, the Act makes provision for the enforcement of these rights by imposing strict penalties for abuse, creation of family court, and ironically brought Nigeria's child's rights law to a global standard.<sup>95</sup> Similarly, the rights of children under CRA can be classified into survival rights, development rights, participation rights and protection rights. Under the survival rights, children have the right to life, survival and development,<sup>96</sup> health and healthcare services<sup>97</sup>, dignity of the child and freedom from discrimination.<sup>98</sup>

In addition, under the development rights, they are entitled to leisure,<sup>99</sup> recreation, cultural activities,<sup>100</sup> freedom of thought, conscience and religion<sup>101</sup>, right to free and compulsory universal primary education,<sup>102</sup> right to parental care, protection and maintenance.<sup>103</sup> Similarly, under participation rights, they have the right to freedom of association and peaceful assembly,<sup>104</sup> freedom of expression, freedom of movement<sup>105</sup> and right to personal liberty. Under protection rights, there is right of the child to special protection<sup>106</sup> and the right of unborn child to protection<sup>107</sup> against harm or injury caused to him or her wilfully, recklessly, negligently, or through neglect before birth and contractual right<sup>108</sup> of a child enables him or her to enter into any contract except a contract for necessity entered into for repayment of money lent or payment of goods supplied to the child.<sup>109</sup>

<sup>91</sup> UNICEF. 2007. "Information Sheet: The Child's Rights Act". Available at

[http://www.unicef.org/wcaro/WCARO\\_Nigeria\\_Factsheets\\_CRA.pdf](http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf). Accessed on 20 September 2015.

<sup>92</sup> Ladan Tawfeeq. 2003. "The Nigerian Child Right's Act 2003: An Overview of Rationale, Structure and Content". *Nigerian Bar Journal*. Vol. 2 No. 2. p.220.

<sup>93</sup> Aleyu I. A. 2010. "Sharia and the Child Right's Act 2003: A Case of Incompatibility". In Aliyu I. A. *Alternative Dispute Resolution and Some Contemporary Issues*. Kaduna: M. O. Press and Publishers. p.451. See also Francis Akwara Azalahu. 2010. "Law and Children's Rights Protection: the Nexus for a Sustainable Development in Nigeria." *Canadian Social Science*. Vol 6. No.2 pp.26-33.

<sup>94</sup> Dankadai L. B. 2010. "The Legal Protection of Children against Exploitative Child Labour". *Bayero University Journal of Public Law*. Vol. 2 No. 1. p.111.

<sup>95</sup> Akwara Azalahu Francis 2010. "Law and Children's Rights Protection." *Canadian Social Science*. Vol.6.No 2.pp. 26- 33.

<sup>96</sup> Section 4 of CRA 2003.

<sup>97</sup> Section 13 of CRA 2003

<sup>98</sup> Sections 10 and 11 of CRA 2003.

<sup>99</sup> Section 12 of CRA 2003.

<sup>100</sup> Section 12(2) of CRA 2003.

<sup>101</sup> Section 7 of CRA 2003.

<sup>102</sup> Section 15 of CRA 2003.

<sup>103</sup> Section 14 of CR 2003.

<sup>104</sup> Section 6 of CRA 2003.

<sup>105</sup> Section 9 of CRA.2003.

<sup>106</sup> Section 16 of CRA 2003

<sup>107</sup> Section 17 of CRA 2003

<sup>108</sup> Section 18 of CRA.

<sup>109</sup> Section 18 of CRA.

## Conclusion

This paper discusses the sources of law regarding child's rights in Nigeria and found that this area of law shares the same sources as other areas of law in the country. Thus, *Shari'ah*, customary law, Received English law and Nigerian local legislation are all identified as the sources of child's rights law in Nigeria. Although each of these sub-systems of the Nigerian legal system has its peculiar approach to the protection of child's rights, this study focuses more and expatiates on the Nigerian legislation as the most important source of child rights law. It is found that the *Shari'ah* has been established as a firm system of law long before the advent of the colonialists. Although the colonialists recognized the effectiveness of the *Shari'ah* as a system of law and expressed intention to allow it to continue to operate, as soon as they established the colonial administration, they installed mechanisms that stultify the development of *Shari'ah* and in some cases the customary law. Most importantly, the colonial administration enacted laws that changed the status of the *Shari'ah* from an autonomous system of law to an appendage of customary law. Although the Supreme Court of Nigeria had partially refuted this position in 1992 in *Alkamawa v Bello supra*, the position changed totally with the enactment of the 1979 and 1999 Constitutions as well as the *Shari'ah* reform initiative of the Zamfara state government. It is found also that the *Shari'ah* expressly recognizes and mandates the recognition of children's rights. It is also found in this paper that the Nigerian legislation, especially the Constitution, CYPA and the CRA 2003, contain provisions that recognize the protection of children's rights.