

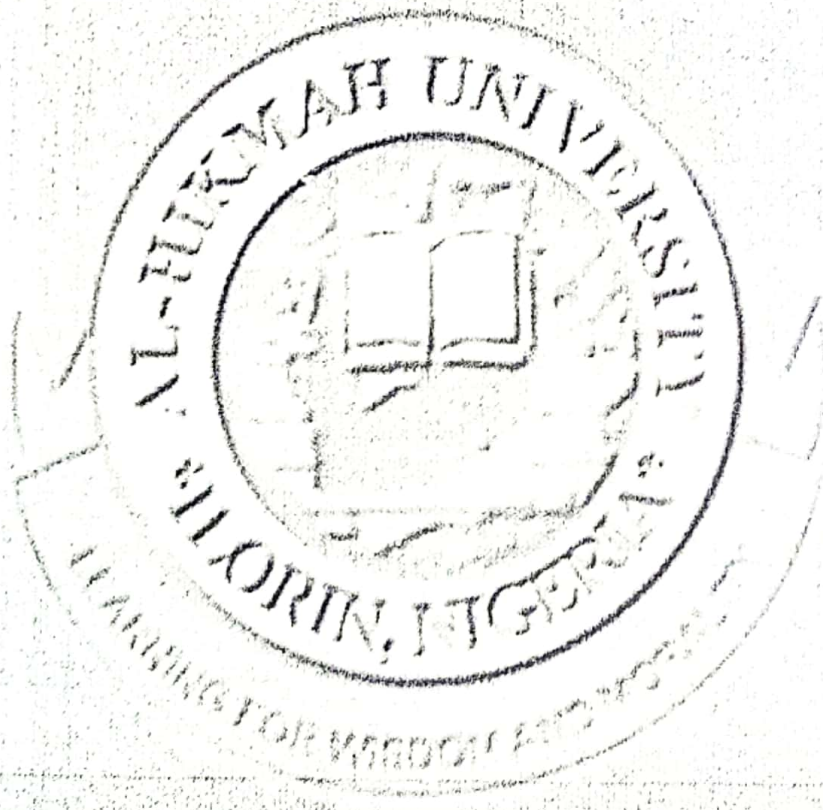


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CHILD RIGHTS IN NIGERIA: EXPLORING THE CONTENTIONS BETWEEN THE CHILD RIGHTS ACT 2003, CULTURAL PRACTICES AND ISLAMIC RULES

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Abstract

Despite having passed several laws, the attainment of the rights has been problematic in Nigeria. Nigeria has enacted a Child Rights Act 2003. However, the provisions of the Act, however, are still largely not implemented by the citizens who cite religious and cultural considerations as the basis of their relationships with the children. And they consider the ideas of child rights that are enshrined in the Child Rights Act as incongruous with cultural and religious rules. This paper examines and discusses the contentions between the cultural and religious practices in Nigeria and the Child Rights Act. The aim is to highlight the cultural and religious challenges to the attainment of the child rights in Nigeria. The paper employs the legal doctrinal and content analysis of relevant literature on child rights in Nigeria. It is found that each of the systems of law in Nigeria claim to protect child rights. The protection of child's right can be improved by harmonising the systems of law as well as reforming certain non-legal policies. The paper proposes some recommendations to this effect.

Keywords: Child Rights, Nigerian child, Child Rights Act 2003, Nigerian Culture

1. Introduction

Child welfare matters have recently being mainstreamed into the human rights discourse. This is because many societies often tend to consider children's welfare as secondary when they discuss issues of socio-economic infrastructures like education, health, nutrition, and housing among others.¹ Nigeria is one of such countries that take

¹ Okoye, 'Knowledge and Awareness of the Child's Rights Act Among Residents of a University Town in Enugu State, Nigeria'[2011] Theoretical issues in Child's Rights 1596

the rights of children for granted.² Although the federal legislature has enacted a Child Rights Act (CRA) since year 2003,³ little progress is recorded in terms of the rights of the children in the country. The provisions of the CRA have always been disregarded by Nigerians while they cite cultural and religious reasons to justify their actions.⁴

Children rights as contained under the CRA are considered as inalienable rights. However, there are many challenges that barricade the implementation of CRA and without tackling those challenges properly the Nigerian children will not benefit from the legislation. This paper highlights and examines some of the challenges that hinder the full implementation of CRA in Nigeria.

2. The Nigerian Child Rights Act 2003

Nigeria has committed to the protection of the welfare of the child. Many of the issues canvassed in the Convention on the Rights of Child (CRC) and the African Charter on the Rights and Welfare of Child (ACRWC) were covered by the Child Rights Act 2003 (CRA), which has been described as "a revolutionary piece of legislation aimed at protecting the child. The Act is so deeply rooted in achieving that aim that it even protects the unborn child."⁵

The Child Rights Act is a domestication of the CRC and ACRWC pursuant to the provision of the 1999 Constitution of the Federal Republic of Nigeria that for any international treaty entered into by the government of Nigeria to become binding, it must be enacted by the National Assembly.⁶ The CRA was domesticated and enacted

² Akwara S. A., 'Law and Children's Rights Protection: the Nexus for a Sustainable Development in Nigeria,' [2010] Canadian Social Science 33.

³ The Child Rights Act came into effect on the 31st July 2003. See Imam-Tamim, M.K., "The Rights of the Nigerian Child under Shariah and the Child Rights Act 2003" (2004) The Jurist 197-215. <https://unilorin.edu.ng/publications/imamt/The%20Rights%20of%20the%20Nigerian%20Child%20Under%20Shariah.pdf> accessed 23 August 2015.

⁴ Njoku G. and Oladiji S., "Calling on 15 States Left to Protect Their Children" *THIS DAY*, Nov 23, 2009. Available at <http://allafrica.com/stories/200911240582.html> accessed on 11 March 2015.

⁵ Olubor, J. O., 'The Legal Rights of the Vulnerable Groups vis-à-vis Customary Practices' (The Refresher Course for Judges and Kadis Workshop organized by The National Judicial Institute, Abuja from 23 - 27 March, 2009) p.8. available at <http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure%20THE%20LEGAL%20RIGHTS%20OF%20THE%20VULNERABLE%20GROUPS%20VIS%20A-VIS%20CUSTOMARY%20PRACTICES.pdf> accessed 19 June 2015.

⁶ Section 12(1) of 1999 Constitution of Nigeria and the case of *Abacha v Fawehinmi* [2000] 6 NWLR (PT. 660) 228, 229.

as a local legislation in Nigeria in year 2003. However, the Act could not be applied throughout the federation because matters relating to the children are contained under the concurrent legislative list.⁷ Therefore, the principles contained in the CRA need to be further re-enacted as state laws by the state legislatures before they could be enforced in the respective states. Majority of states⁸ have, however, promulgated their Child's Right Law⁹ while few others are yet to pass the law.¹⁰

3. Cultural Challenges

Many of the cultural practices among Nigerian ethnic tribes have contributed to the abuse of children. Some of the cultural abuses include early marriage, female genital mutilation, child labour, and denial of right of inheritance, to mention but a few.¹¹

a. Child Marriage

Child marriage refers to marriage of persons below the age of 18 years.¹² It is the practice in different parts of Nigeria but more in the Northern parts of Nigeria¹³ whereby young girls are given into marriage for various reasons, which include economic, maintenance of family name and maintenance of chastity. It has been found that one of the reasons that fuel the practice of child marriage is poverty.¹⁴ Many Nigerian societies, especially in the rural areas live below poverty line and one of the means of survival that is usually within the disposal of most

⁷ See Part II of the Second Legislative List of the 1999 Constitution. See also Ogunniran, I., 'The Child Rights Act Versus Shariah Law in Nigeria: Issues, and Challenges & Way Forward' [2010] Children's Legal Rights Journal, 62.

⁸ Although, it is not certain now how many states have passed their Child Rights Law, as at 2010, 24 states have passed the law. These include Abia, Akwalbom, Anambra, Benue, Cross River, Delta, Edo, Ekiti, Imo, Jigawa, Kwara, Kogi, Lagos, Nassarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, and Taraba. See Amalu, C., "Nigerian child and the Child Rights Act", *Vanguard*, 29 June 2010, <http://www.vanguardngr.com/2010/06/nigerian-child-and-the-child-rights-act/> accessed 23 August 2015.

⁹ Abdulraheem and Oladipo 'Trafficking in Women and Children: A hidden health and Social Problem in Nigeria' [2000] International Journal of Sociology and Anthropology 34, 39

¹⁰ Majority of the states that have not passed the Child Rights Law are from the northern Nigeria and include states like Adamawa, Bauchi, Borno, Enugu, Gombe, Kaduna, Kano, Katsina, Kebbi, Sokoto, Yobe and Zamfara States.

¹¹ Adedeji, L., "Cultural Practices Affecting Human Rights of Women in Nigeria", *The Lawyers' Chronicle*, <http://thelawverschronicle.com/cultural-practices-affecting-the-human-rights-of-women-in-nigeria/> accessed 9 March 2015.

¹² See the Inter-Africa Committee on Traditional Practices Affecting the health of woman and Children. Newsletter (December 2003).

¹³ This practice is predominant among Muslim parents.

¹⁴ Lachman, "Challenges facing Child Protection" (2002) Child Abuse and Neglect, 617.

parents is their child/children particularly girl children. Therefore, while many of the parents give their girl children out in marriage, others push their children into child prostitution, child labour among others.¹⁵

Although the CRA expressly prohibits child betrothal and child marriage,¹⁶ the practice is still widely rampant in Nigerian societies. The recent row in the Nigerian Senate over child marriage is illustrative of this issue.¹⁷ In 2009, the practice was reported in the city of Lagos where 2 young girls, 12 and 18 years respectively, were married off and taken to their husbands' houses even without them knowing they were already brides.¹⁸

In Nigeria, due to inconsistencies in legislation and the absence of any stipulation of a minimum age for marriage before the adoption of CRA 2003, child marriages continue to take place in many cases as means to preserve chastity. Section 18 of Marriage Act allows persons under the age of 21 to get married, provided that parental consent is given.¹⁹ It should be noted that the age of marriage is a highly controversial issue and varies from place to place. Whereas in the North West and North Central Nigeria, 14 years is the age of marriage, in the North Central the age of marriage is between 2nd and 3rd menstruation, while in the Southern States it varies from between 16 to 18 years.²⁰ This inconsistency has been a source of ineffective implementation of the law against child marriage.

Child marriage usually occurs before the girl is physically and physiologically ready to shoulder the responsibilities and bearing a child.²¹ It is established that pregnancies-related deaths are the leading cause of mortality in 15-19 years old girls.²² The consequence of child's marriage is attributed to immaturity of the brides who often experience domestic violence and less likely to act against this abuse. Girls who

¹⁵ Ibid. See also Sossou, M. and Yotub, J. A. "Abuse of children in West Africa: Implications for Social Work Education and Practice." (2008) Vol. 39 No. 7 British Journal of Social Work, 1218-1234 who in their study outlined various incidents of child marriage, child sexual abuse, child trafficking and neglect of disabled children in the African continent. They concluded that poverty and traditional cultural practices are the main causes of these phenomena.

¹⁶ Section 22(1) of Child's Rights Act 2003.

¹⁷ Adedeji, L., op. cit.

¹⁸ See Sunday Punch of March 1, 2009, p.3 cited by Olubor, J. O., op. cit.

¹⁹ Order 1, Rule 4 of the Matrimonial Causes Rules defines a child as a person under the age of 21.

²⁰ Second Periodic Report by Nigeria to the CRC, CRC/C/70/Add.24.17/09/2004.& 46.

²¹ See the Inter-Africa Committee on Traditional Practices Affecting the health of woman and Children. Newsletter (December 2003).

²² IPPF & UNFPA, *Ending Child Marriage: A Guide for Global Policy Action* (London: IPPF, 2006). 1.

marry early are also more likely to believe that a man is justified in beating his wife.²³ Child marriage harms the girl child's health as it often results in maternal mortality and morbidity due to early pregnancies. The consequences of child marriage are numerous and these include separation from family and friends, lack of freedom to interact with peers and participate in community activities and decreased opportunity from education.²⁴ Child marriage can also result in bonded labour or enslavement, commercial sexual exploitation and violence against the victim²⁵.

Child marriage has been prohibited by the CRA and it is categorized under the harmful traditional practices that adversely affect the health of Nigerian children. No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and of no effect whatsoever.²⁶ The Act further instructs the parents to desist from the act of contracting child marriage for the improvement of health of their children. No parent, guardian or any other person shall betroth a child to any person.²⁷ The Act imposes a fine to a person who engages in contracting his child out in marriage. A person who marries a child, to whom a child is betrothed; or who promote the marriage of a child; who betroths a child commits an offence and liable on conviction to a fine of N500, 000.00 (Five hundred thousand Naira) or imprisonment.

Nevertheless, customary position on the issue of child marriage differs and important parts of the population are still not aware of the negative effects child marriages can have on the girls. In most cases, it limits the opportunities for girls to accede to education, putting them in a disadvantaged position.²⁸ It is reported that 36 million Nigerian women and girls are not educated. It is also worrisome that early marriage can also be detrimental to girl's physical, mental and emotional health. This apart from the fact that it deprives girls from their right to have control over their body and reproductive health as it puts them in a position of complete dependence on their husbands.

Similarly, in Northern Nigeria, where the majority of girls face the prospect of early marriage, this has resulted over the years in a large number of cases of vesico-vaginal

²³ Walker, 'Early Marriage in Africa- Trends, Harmful Effect and Interventions' [2012] *Africa Journal of Reproductive Health* 56 at 86.

²⁴ New Wadsenago, 'Violation of women's Rights by Harmful Traditional practices' [2011] *Kamale-Raji Anthropologists* 121 at 129.

²⁵ Ibid.

²⁶ Section 21 of CRA.

²⁷ Section 22 (1) of CRA.

²⁸ Obiechina. G. O.. 'Violation of Child's Rights in Nigeria: Implications for Child's Health' [2014] *Academic Research International*, 175.

fistula, a condition caused by giving birth when the cervix is not well developed.²⁹ It occurs because the pelvic bones have had insufficient time to develop to cope with child-birth. Corrective operations often require the consent of the spouse, and more often than not the sufferers are abandoned or divorced by their husbands and ostracized by their communities.³⁰

Among the reason tendered by the advocates of the prohibition of child marriage prescribed under the CRA is that such child marriage are detrimental to health of the child such as causing Vestico Vaginal Fistula (VVF) disease.³¹ This view needs to be examined. There is no doubt that a young pregnant girl stands a high risk of contracting VVF during the labour of the child birth if her pelvic has not properly developed. This can possibly be avoided by proper medical attention such as aiding the birth by caesarean section or otherwise. That it is to say that a young pregnant girl can safely deliver her baby with skilled maternity care. This argument can also be supported by the facts that we have mothers and grandmothers who were married as early as age of twelve years and gave birth early and are still living in our midst and healthy without history of such disease. Adults are susceptible VVF too.³² The causes of VVF therefore go beyond child marriage or early marriage to include economic, social status and environment of those who contract the disease and the management of their pregnancy and their general health.

b. Female Circumcision

Female circumcision is another perceived cultural practice that leads to the abuse of women and children as widely practiced in Nigeria. This practice involves the "partial or total removal of the external female genital and/or injury to the female genital organs whether for any non-therapeutic or cultural reasons and is carried out for various cultural reasons such as maintenance of chastity and virginity before marriage, increasing sexual pleasure of the husbands, fidelity during marriage and intake of women into womanhood.³³ Female circumcision is also commonly referred to as Female Genital Mutilation (FGM).³⁴

²⁹ Nwonu, C. O. & Oyakhromen. I., 'Nigeria and Child Marriage: Legal issues, Complications, Implications, Prospects, and Solutions' [2014] Journal of Law, Policy and Globalization, 120 at 127.

³⁰ Oxfam, "Women and poverty in Nigeria" <http://www.oxfam.org.uk/what-we-do/resources> accessed 9 March 2015.

³¹ Uwais, M., "Children Bill not Anti-Islamic" <http://groups.google.com/group/altreligion.islam/msg/b/cata> assessed 17 January 2015.

³² Obiechina, G., 'Violation of Child's Rights in Nigeria: Implications for Child's Health. [2014] Academic Research International, 151 at 175.

³³ Aduba, N., *Some Customary Practices that affect the Enjoyment of Fundamental Rights of Women in Nigeria*. (New vistas, 2002) 204.

³⁴ Aduba, *ibid*.

FGM is still practiced in many parts of the country and among all religious groups. The age of mutilation varies from 3 months to 17 years. Any state interference into the practice of FGM is considered as violation of the right to privacy. It has been asserted that many girls face several health risks through this including HIV infection due to unhygienic methods that accompany the practice. According to the Female Circumcision (Prohibition) Law (2002) of Ekiti State 'No person shall circumcise or mutilate the genital organ of any female whether or not are consent is obtained.³⁵ The law further prescribes a fine of ten thousand naira or a term imprisonment not exceeding 2 years in the first instance and to imprisonment for a term not exceeding 3 years without an option of a fine for every subsequent conviction.³⁶ In the word of Adetifa, the practice of female circumcision may be carried out safely in the closet by the parents or guardian of the victim- female child either resident in the various towns, villages or even cities. It is axiomatic that law however potent cannot be applied to punish an uneducated violator or the unknown person.³⁷

c. Tattoos and Skin Marks

In Nigeria, ethnic groups such as the Hausa, Yoruba, Nupe, Kanuri, Jarawa in Plateau and Igala were known to have some of the most invasive scars.³⁸ However, the practice is slowly becoming extinct because of civilization and laws that forbid parents or anyone from marking a child's face.³⁹

The primary reason for the advent of tribal marks in Nigeria was the slave trade, although it became a fashion trend over time.⁴⁰ It merits mentioning that tribal marks have a long history in the African tradition, most important of which was the era when having a sense of identity was paramount to an individual. However, with civilization and the trend dwindling over time, individuals who wear such marks nowadays often become victims of ridicule among their peers.

³⁵ Section 2 of Female Circumcision (Prohibition) Law of Ekiti State.
³⁶ *ibid*, section 3.

³⁷ Adenifa, 'Female Genital Mutilation Practice: The Impotency of Law as an Antidote. A case Study of Ekiti State Female Circumcision (Prohibition) Law' [2010] UNADLJ, 98.

³⁸ Johnson, S., *The History of Yorubas from Earliest Times to the Beginning of the British Protectorate* (C.M.S 1921), 15.

³⁹ See for example, Osun State Child Rights Law.

⁴⁰ Ozongwu, M., "Tribal Marks – the 'African tattoo'", *African Identity*, 23 August 2012 <http://thisisafrica.me/tribal-marks-the-african-tattoo> accessed 22 August 2015;
Cullivan, L., "The meanings behind the marks: Scarification and the people of Wa" (1998) *African Diaspora* ISPs
<http://dh101.humanities.ucla.edu/DH101Fall12Lab5.archive/files/4e872e32b9fd18a1a8cc5d8e2efacc29.pdf> accessed 22 August 2015.

Tattoos and Skin Marks are categorized as part of harmful traditional practices that affect children in Nigeria. The CRA prohibits and makes it as an offence for any person who engages in this abusive act. No person shall tattoo or make a skin mark or cause any tattoo or skin mark to be made on a child.⁴¹ A person who tattoos or makes a skin mark on a child commits an offence under this Act and is liable on conviction to a fine not exceeding five thousand Naira or imprisonment for a term not exceeding one month or to both such fine and imprisonment.⁴²

In order to give effect to the CRA, some states in Nigerian have promulgated laws prohibiting tattoos and skin marks. For example, Osun state has banned giving of facial to children and whoever fails to observe the provision of this law risk fine of N5, 000 or imprisonment of one month or both.⁴³ It has been observed that Tattoos and Skin Marks responsible for Viral Hepatitis. According to the Nigerian Federal Ministry of Health, over 18 million Nigerians are carriers of this virus and it keeps spreading amongst the populace as a result of ignorance of its symptoms, treatment and prevention.⁴⁴ Enhancing the spread of this disease is the fact that most carriers are asymptomatic,⁴⁵ until several decades later. Meanwhile, during the period of asymptomatic, the liver is silently being damaged.⁴⁶ This disease is said to be 50-100 times more infectious than HIV cause circumcision, scarification for tattoos or tribal marks as well as skin and body piercing, therefore, it should get even more prominence.⁴⁷ Evidence from the first hepatitis sentinel survey conducted in Nigeria in 2013 shows that many healthy looking people carry the virus and do not know until screened. It also shows that cultural practices such as local circumcision, scarification (tribal marks), local cutting of the tonsils encourage its spread.⁴⁸

⁴¹ Section 24 (1) of CRA 2003.

⁴² Section 24(2) of CRA 2003.

⁴³ See section 24 of the Osun state Child Rights Law 2009. *

⁴⁴ Some 80 per cent of victims are unaware that they are carriers. See generally, Abiose, A. A., Circumcision, Tattooing, Fuel Spread of Hepatitis, <http://icimigeria.org/circumcision-tattooing-fuel-spread-of-hepatitis/> accessed 15 March 2015.

⁴⁵ That is, do not show symptoms character.

⁴⁶ This according to Professor Innocent Ujah, Director General of the Nigerian Institute of Medical Research, on the occasion of World Hepatitis Day, in Lagos, available at <http://icimigeria.org/circumcision-tattooing-fuel-spread-of-hepatitis/> accessed on 15/03/15.

⁴⁷ *ibid.*

⁴⁸ The research was conducted by Professors C.N. Obionu and B.S. C. Uzochukwu, in conjunction with the Nigerian Federal Ministry of Health. See generally Abiose, A. A., Circumcision, Tattooing, Fuel Spread of Hepatitis, <http://icimigeria.org/circumcision-tattooing-fuel-spread-of-hepatitis/> accessed 15 March 2015.

4. Incompatibility of some provisions of CRA with Shari'ah

There are some provisions of the CRA that contravene the principles embedded under *Maqasid al-Shariah* and such serve as challenge for the full implementation of it particularly the Muslims because it contradicts the position of *Shariah* on certain issues. Only the relevant to this study will be discussed.

a. Freedom of Religion

The Act provides that "every child has a right to freedom of thought, conscience and religion."⁴⁹ The implication of this section is that a Muslim child has a right to adopt any religion (other than Islam) of his choice. This is contrary to the cogent and preponderate view of Muslim Jurists to which a child is considered to be a Muslim. That is why if, at the age of ten, a child refuses to perform obligatory prayers, the parents are enjoined to beat him. This is in accordance with the hadith in which prophet Muhammad (pbuh) was reported to have said:

*Order your children to pray when they become seven years old, and spank them for it when they become ten years old.*⁵⁰

Moreover, Mu'adh bin Jabal (RA) reported that the prophet (pbuh) ordered him to do ten things in order to allow proper training and upbringing for his children and all children in general. The ninth and ten among them are:

*Do not refrain from using pressure (on your children) with view of treating them. Inculcate in them the fear of Allah.*⁵¹

In holding that, it is submitted that a Muslim child has no right what so ever like an Adult Muslim to adopt any religion other than Islam. This, because he or she is under the control of his/her parents by following the full step of his or her in religious matter especially by practicing the religion of Islam. This is view is in line with the holy Quran verse which says:

*Mankind, were but community, (i.e. on one religion), then they differ...*⁵²

The above verse indicates that to believe that Allah has partners, which characterizes all other religions except Islam, is an incidental development. Originally, human nature believed in the oneness of Allah. Therefore, freedom of religion as stated under the Act for the children is uncalled for and such should be disregarded. It

⁴⁹ Section 7 of CRA 2003

⁵⁰ Narrated by Abu Dawood and quoted in Trazi N., *The Child in Islam*. (U.S.A.: American Trust Publication, 1995.), 195.

⁵¹ Narrated by Abu Dawood and quoted in Trazi N., *The Child in Islam*. (U.S.A.: American Trust Publication, 1995). 195-196.

⁵² Al-Quran. al-Yunus 10: 19.

should be noted that the children are immature to determine the religion of their own. it is therefore compulsory to protect and safe guard this principle of *Maqasid al-Shariah* and allow the children to be under the control and directive of their Muslims parents to worship Allah alone.

Another verse says:

*So, set thou thy face truly to the religion upright, the nature in which Allah has made mankind...*⁵³

And in a Hadith, the Prophet S.A.W was reported to have said:

*No child is born except on the fitrah (of connectedness of Allah)... then his parents Judaize or Christianise or Magianise him.*⁵⁴

b. Discrimination

The Act provides that "A child shall not be subjected to any form of discrimination merely by reason of his belonging to a particular community or ethnic or by reason of his place of origin, sex, religion or political opinion."⁵⁵ If discrimination here means mere difference in any treatment, it is then contradicts *Quranic* principle of "agnatisation" in inheritance where a female child or full sister or consanguine sister get ½ share of that of male child or full of consanguine brother. Section 10(2) of the Act provides further that "No child shall be subjected to any disability or deprivation thereby by reason of the circumstances of his birth. The implication of this is that an illegitimate child is entitled to inherit his putative father although he is not lawfully married to the child's mother at the time of conceiving the child. This is contrary to the provision of *Shariah*.

Similarly, connected with the above provision of section 10 of CRA is section 17 of the Act, according to sub-sections (2) and (3) of the section an unborn child can only inherit its mother or father if they die "intestate" which means that if they bequeath their property the unborn child is not entitled to inherit them. This is obviously contrary to the *Shariah* rules because under the *Shariah*, child's right to inheritance is inalienable right by virtue of provision of *Quranic* verse which says:

God (thus) direct you as regards your children's inheritance: to the male, a portion equal for that to females:

⁵³ Al- Quran.Ar-Rum. 30:30.

⁵⁴ Narrated by Abu Hurayrah and reported by Imam Muslim in *Sahih Muslim*, Hadith 6425-6429, Nos.

<http://www.sahihmuslim.com/sps/smn/sahihmuslim.cfm?sen=dsnchaptersfull&BookID=33&ChapterID=1113> accessed 23 August 2015. The hadith was also reported by Imam Bukhari in *Sahih Bukhari* and Imam Malik in *Muwatta'*.

⁵⁵ Section 10 (1) of CRA 2003.

*if only daughters two or more, their share is two-third of the inheritance; if only one; her share is half...*⁵⁶

From the above verse, it is clear that that right to inheritance extends to an unborn child provided it was conceived before the death of the father and delivered alive after his death.

c. Adoption

The CRA comprehensively provide for adoption of children and related matters in one whole chapter.⁵⁷ In this regard, it is required that an application shall be made to the court in the prescribed manner. To qualify for an adoption order, the applicant must be a married couple where each of them has attained the age of twenty-five years and there is an order authorizing them jointly to adopt a child; or a married person if he has obtained the consent of the spouse. Consequent on an adoption order being made, it vests in the adopter all rights, duties, obligations and liabilities in respect of the future custody, maintenance, supervision and education of the child. In other words, adoption extinguishes any claim of the biological parents in its entirety.⁵⁸

On the other hand, legal adoption which confers on the child the name of the adopted father, the rights of inheritance, permissibility of mixing with non-Mahram members of the household is forbidden in Islam.⁵⁹ This assertion is based on the Quranic provisions thus, "... 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

⁵⁶ Al- Quran. An- Nisai (4):11.

⁵⁷ Chapter XII.

⁵⁸ Needless to say in this respect that the CRA merely encapsulates the adoption laws as codified in the laws of some states. And the general legal position is that adopted children possess inheritance rights. This view was canvassed by the respondent in the case of *Olaiya v Olaiya* (2002) 12 N.W.L.R. (pt. 782) p.652 at 670-671. 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 Olaiya. 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 Adopted Children Register established under the law. In effect, had this condition been complied with, the children would have benefited from the estate.

⁵⁹ Hussain, A., *The Islamic Law of Succession*, (Riyadh: Darussalam Publishers, 2005), 255.

God".⁶⁰ Adoption is prohibited under Islamic law because Islam attaches great importance to the protection of legitimacy and paternity; hence every child must be related to its own father and views it as unjust and illegal to ascribe his or her paternity to another.⁶¹ It is our 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 opting for adoption.

d. Custody

The Act mandates parents, guardians, institutions and authorities in whose care children are placed to make provision for the necessary guidance, education and training to enable the children live up to these responsibilities.⁶² Section 69 of the CRA states that family courts based on the application of either the father or mother may make an order as it deem necessary with respect to the custody of the child and right of access of either parents. However, the court must give consideration to the *welfare of the child and conduct of the parents and wishes of the both parents* (emphasis ours).⁶³ Prior to the enactment of the CRA, there were statutory provisions and judicial decisions guiding the courts on granting of custody especially in statutory marriages. For instance, section 71 of the Matrimonial Causes Act provides inter alia that with respect to custody and maintenance of children, the best interest of

⁶⁰ Al-Quran, Al-Ahzab (33):4-5.

⁶¹ IslamWeb English, "Islamic rules of adoption" Fatwa No. 84422 of 6 July 2002, <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&lang=E&Id=84422> accessed 23 August 2015. IslamWeb English, "Adoption in Islam" Fatwa No. 82371 of 13 November 2001, <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=82371> accessed 23 August 2015.

⁶² See Part VIII of the CRA 2003 especially section 68.

⁶³ Section 1 (a) (i) and (ii).

the child is the key consideration.⁶⁴ Thus, the interest of the child is of first importance in determining custody and will supersede that of the warring parents! The Nigerian Supreme Court, in *Williams v Williams*⁶⁵ emphasised 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...⁶⁶ Over the years, the courts have taken cognizance of character and conduct of the parties;⁶⁷ age and sex of the child;⁶⁹ welfare and economic factors;⁶⁸ emotional and psychological stability and some other factors as important indicators in determining welfare of the child. Hence, "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 seek for these decisions in interpreting similar provision stipulated in the CRA.

⁶⁴ In contrast, the best interest principle appear not be welcomed under customary law as this writer is only aware of one isolated case. In unreported case *Kasebiye 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 not refunded by her family belongs to the estranged husband. For instance, in Lagos Customary Courts, the practice is to award custody of a child above the age of seven years to the father even where he is not position to take adequate care of the child. See Owasanoye, B., "The Regulation of Child Custody and Access in Nigeria" (2005) 39 (2) Family Law Quarterly 470.

⁶⁵ (1987) 2 NWLR p.66. 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".
⁶⁶ Per Karibi Whyte JSC.

⁶⁷ *Okafor v Okafor* (1976) 6 CCHCJ 27, 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 *Kolawole v Kolawole* Unreported Suit No. HCL/45d/81 of July 1, 1982, High Court Ogun State of Nigeria. In that
⁶⁸ Conversely in *Damulak v Damulak* (2004) 8 NWLR pt 874. p.51, the appellant urged the court to grant him custody of Mohammed (one of the 2 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 child- 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.

Against this backdrop, custody of children will be awarded to either parent based on the above considerations.⁶⁹

This is radically different from the position under the sharia legal system. There are fixed custody rules where the parents are divorced or separated. The right to custody of children during the subsistence or termination of marriage is vested in the woman. The custody of a male child remains with the mother until he is matured and for the female child, until she gets married and the marriage is legally consummated.⁷⁰ In awarding custody of a child to a woman who complained that her husband denied her custody after divorce, the Prophet (peace be upon him) addressed the husband that, "her smell, her touch and her kiss to him (the child) is better than the best thing you might have".⁷¹ Where the mother loses the right to custody, there are specified people entitled to custody of the child.⁷²

It is submitted that under Islamic law, there is an entrenched and rigid formula guiding the grant of custody and not necessarily the best interest principle of the CRA. In other words, the utmost consideration in the award of custody may not be

- ⁶⁹ In *Oyelowo v Oyelowo* (1987) 2 NWLR 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. 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 that 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. See Owasanoye, op. cit.
- ⁷⁰ Conversely in *Dumulak v Dumalak* (2004) 8 NWLR pt 874, p.51, the appellant urged the court to grant him custody of Mohammed (one of the 2 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 child- 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.
- ⁷¹ It appears the best interest principle is also considered under customary law. In 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.
- ⁷² Keffi, S.U.D., "The Rights of Women to Terminate Marriage" (National Conference on the Rights of Women and Children under the Shari'ah organised by Centre for Islamic Legal Studies at Institute of Administration, Almadu Bello University Zaria between 16th and 17th June 2008), 95-97.

best in terms of care and adequate provisions but conditions laid down by the Islamic law, with little or no regard for the best interest of the child.⁷³

5. Lack of awareness.

Another challenge affecting the full implementation of CRA 2003 is lack of awareness. This is because some parents and the children in rural areas are not aware of the existence of the Act let alone its importance. Some of the activities of the government as regards children's health are not extended to the grass root. The social media such as Television, Radio and Newspapers are not adequately taking care of the story of children's health. It is not surprising that Micheal⁷⁴ observes that the school-going children are not aware their rights talk less of the illiterate children. Therefore, it may not be wrong to infer that this is due to inadequate publicity given to the CRA 2003 by relevant agencies including schools.

The awareness programme should include training, awareness raising and inspections in high-risk areas, such as agriculture and mining sectors. Federal and state governments should further work through the media, local communities and churches and mosques to sensitise parents on their responsibilities regarding their children. In addition, FMWA&SD works with the police, trying to shift the perception that domestic abuse is a private affair.

Traditional and religious leaders may also be involved to create awareness particularly if they are able to help shift attitudes regarding customary practices. For example, harmful forms of child labour need to be distinguished from child work. Evidence suggests that, in communities where traditional leaders speak out against child labour, people listen.⁷⁵ Traditional leaders could play similarly transformative roles in the fight against fosterage and early marriage. At the community level, faith-based organisations often have more social capital and accountability than governments. This puts them in a unique place in terms of being able to protect children. On the other hand, religious tradition is implicated in a range of practices that are harmful to children. Islamic schools often require that boys work on the street to earn money for the school.

⁷³ 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 father's 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.

⁷⁴ Ejiech, M. and Akinola, O., 'Children's Rights and Participation in School: Exploring the Awareness level and view of Nigerian Primary School Children' [2009] *Elementary Education online* 176 at 182.

⁷⁵ International Labour Organization International Programme on the Elimination of Child Labour (2005) *Evaluation Summaries: National Programme on the Elimination of Child Labour in Nigeria*. Geneva: ILO-IPEC.

6. Lack of effective implementation of the Act

Enhancing awareness and enforcement of existing child protection frameworks is a critical first step in promoting a child-sensitive transformative social protection agenda. A common complaint involved in child protection work is the incongruity between policy and legal frameworks and actual implementation. For example, the UBE Policy framework in Nigeria calls for penalties for the parents of chronic truants found on the streets, but there has apparently never been a single prosecution of parents who have breached the provision of the law. Similarly, while National Agency for the Prohibition of Traffic in Persons (NAPTIP) has made progress in reducing the incidence of child trafficking and has rescued hundreds of children from harmful forms of labour, to date there have been less than 20 trafficking prosecutions.⁷⁶

Inspection has also been largely ineffective, mostly because efforts have been unable to reach local level, and because inspection is often restricted to the formal business sector, where the level of child labour is relatively low. In the same vein, the current labour law specifies merely that children should not be engaged in work activities that are illegal or immoral, especially hazardous work.⁷⁷ While high-level policy indicates a commitment to preventing child domestic abuse, enforcement and public awareness leave much to be desired. This does not mean that small-scale efforts have not been initiated; the police and other law enforcement agencies have units to deal exclusively with violence against children and the Federal Ministry of Women's Affairs and Social Development (FMWA&SD) are making efforts towards provision of shelters for female victims of abuse, offering them basic medical care, counselling and access to legal assistance.

7. Way forwards to the challenges

i. National Advocacy on Civic and Cultural Reorientation

The government at all levels needs to do more in terms of orientation and advocacy to educate the citizens about the need to rethink some of the cultural and religious rules and practices that are harmful to the children. This is not intended to undermine the rules and values embedded in these systems of law but to revisit some of those rules and values with a view to making them operate in the best interest of the

⁷⁶ Jones, N., Presler-Marshall, E., Cooke, N. and Akinrimisi, B. *Promoting Synergies between Child Protection and Social Protection in Nigeria*, (London: Oversea Development Institute and UNICEF, 2012), 35.

⁷⁷ Education is acclaimed to be free in Nigeria; other costs associated with it often prove prohibitive for poor families, meaning children are still forced to work, either to attend school or to support the family full-time.

children. Cultural and Religious practices like female circumcision, child marriage, skin scarification, etc. which are not made under compulsory under any religion or culture should be discontinued. Some other practices like male circumcision among others that are considered very important in some cultures and religion like Islam should be allowed but their execution should be properly monitored by relevant institutions to ensure that they are not done in harmful manner. The government should also embark on a country-wide advocacy in order to improve the people's understanding of the issues that are contained in the CRA. The government should involve the traditional office holders more in the advocacy efforts. There should be a synergy of action between relevant government agencies like the National Orientation Agency and the National Institute for Cultural Orientation in order to make implementation of the provisions of the CRA more effective. As part of the advocacy, the school curricula (especially for basic and post basic schools) should be reformed to incorporate the teaching of child rights. This will enable the children who are the primary actors to have some level of understanding and awareness about their rights. Some will enlighten their parents about these rights. It will also enable the teachers to participate in the advocacy by enlightening parents on these issues. The latter is informed by the fact that parents always respect the teachers of their wards and are willing to accede to their warnings and admonitions regarding their wards.

ii. Recognition of socio-economic Rights

In order to make the advocacy more effective, the government should recognise the obligations contained in chapter II of the 1999 Constitution as part of the substantive rights of the citizens. Therefore, the provision of section 6 (6) (c) of the 1999 Constitution should be amended to allow the courts to have express power to adjudicate over matters contained in chapter II of the Constitution. This will enable the citizens to challenge the government to provide necessary socioeconomic facilities that will alleviate poverty, enhance standards of living and consequently make the protection of children's rights attainable. Pursuant to this, efforts should be intensified to ensure that the socioeconomic facilities such as free education and health facilities are adequately provided. This will make the parents send more children to school thereby prolonging the period within which the children especially the girls are lured into marriage. Access to free or affordable health facilities will also encourage the parents to patronise the hospitals or clinics more thereby enhancing the health conditions of the children and significantly reducing child mortality that has bedevilled the country.

iii. Proactive judicial practices

The judiciary should also be reformed so as to make the judges more proactive in their judicial functions. Some of the judges should be trained on child matters. This

will make them judicial experts on these issues. The continuing training will also make the judges to have a grasp of legal developments and enable them to be more proactive interpreting statutes especially provisions of chapter II of the Constitution in a way that will make government recognise the objectives and directives of state policies as socioeconomic rights of the citizens. Although the CRA establishes Family Courts, which has been replicated in some of the states that have passed their own Child Rights Laws, there is need to still train higher court judges on child related matters because any appeal from the Family Court will still pass through the high court up to the Supreme court.

iv. Restatement of customary law

One of the reasons it is difficult to align the position of the customary law with the provisions of the CRA is because there are different cultures and customary laws in

Nigeria. Although the customary laws may appear to be similar in some areas, they are different in many areas. Meanwhile, many of the harmful traditional practices are always justified by merely citing historical antecedents. This brings uncertainty as to whether those practices are actually laws or mere cultural practices. Many of the rules of customary law are kept in the minds of the elders and could be manipulated in some cases. It is therefore necessary for the government to embark on a restatement process in order to ascertain the true positions of many of the rules of customary law that are used to abuse the rights of the children. Contrary to popular belief, restatement does not alter the flexible nature of customary law as it is not a statute that requires rigid processes to amend. The restatement is only to record in a concrete form the rules and practices of a particular tribe in order to make them clearer for the people and the judges to apply.

v. Codification of Islamic law

The government should also make effort to codify the rules of Islamic personal law as contained in conformity with the rules of *shari'ah*. The need for codification of *shari'ah* is necessitated by the fact that some of the practices described as principles of *shari'ah* are actually customary practices. But since Islamic law as operated in Nigeria is also not written in any code, there is room for manipulation of the true Islamic law principles to suit customary purposes yet they will be disguised as *shari'ah* principles. For instance, protection of child rights is a highly placed issue under Islamic law but this is not given prominence because Islamic law is practised in the country in its orthodox form. There is, therefore, a need to codify the rules of Islamic law especially those relating to children's right so that the state who claim to operate *shari'ah* could also be held responsible for not adequately protecting the rights of the children. Codification of principles of Islamic law is not a strange

phenomenon in Islamic jurisprudence. Moreover, it has been practised by many Islamic countries and Muslim dominated societies. It is believed to be a form of *ijtihad* (legal reasoning), which is one of the sources of law under Islamic law.

8. Conclusion

Child's rights have not had long history of recognition. Children around the world suffered appalling abuses and exploitations from antiquity. Exploitation and authoritarianism characterized the societal attitude to children. Parents had absolute control over their children. They had unfettered rights over the child's person, property and earnings, based on the antiquated notion that children were their subjects. In Nigeria, despite the enactment of the CRA 2003, implementation of the rights of the children still faces lots of challenges such as harmful traditional practices and perceived incompatibility with *Shariah*. All these challenges hinder the full implementation of the CRA. The protection of the right of the children is also hindered by lack of adequate awareness among the citizens as well as the lack of political will to enforce the provisions of the CRA 2003. It is, however, believed that these challenges could be addressed by taking practical measures like government embarking on increased and intensive advocacy efforts to further enlighten the citizens especially the rural dwellers about the existence and values contained in the CRA 2003; recognising the socioeconomic rights of the citizens; retraining the judges to imbibe proactive judicial practices; restatement of customary law and codification of Islamic law.