

**AN APPRAISAL OF THE RIGHT OF THE CHILD TO
PATERNITY: PROTECTION AND PROGNOSIS**

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Abstract

Children are guaranteed several rights under different laws in Nigeria. The Nigerian Constitution 1999 has guaranteed every citizen rights which are inalienable. Children as humans are entitled to enjoy all the rights guaranteed by the constitution. The Child Rights Act 2003 is the most comprehensive law on child protection in Nigeria. Several states have domesticated the laws on rights of children. The Borno State Child Protection law 2022 is a good example. The right to legitimacy is not popular compared to other rights enjoyed by children. Unfortunately a threat to the right to legitimacy or paternity is a threat to several other rights like the right to dignity and protection from harm. The unilateral use of DNA by parents to determine the paternity of children born to them by their wives poses a serious threat to the right to paternity of children. While the Child Rights Act 2003 allows use of DNA and other scientific methods to determine paternity, it did not allow the unilateral use of the test. It is an abuse of the right of children to be subjected to DNA tests without their consent. However the Child Rights Act made it only a declaratory right. The paper therefore suggested stringent majors before the taking of samples for DNA test from children and equally provision of sanctions to laboratories that allow abuse of the right of children using their facilities.

Keywords: Children's Right, Paternity, DNA, Child's Rights Act

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1. Introduction

Children are the leaders of tomorrow and the protection of their rights is an investment for the good of every nation. Experts have identified three areas that relate to the protection of children otherwise referred to as three 'P's. These involve protection, provision and participation. Children must be protected from abuse and deprivations. They equally need to be provided with all that is required for them to become responsible members of the society such as education, health care and food. The right of children to participate in affairs related to them involves seeking for their consent in matters of health and dignity such as the use of DNA.

Deoxyribonucleic Acid (DNA) is a technology driven scientific method that can be used in determining the paternity of a child. In recent time, parents resort to the use of DNA to determine whether children to them by their wives actually belong to them. This paper intends to determine the legality or otherwise of this act having in mind its implication on the children. It is equally worthy of mention that must parents unilaterally conduct the DNA test without obtaining the order of a court of law or the consent of the child in question.

2. Meaning of a Child

A child has been defined as a human being who has not attained the age of majority.¹ It has equally been defined as the biological or psychological phase of life somewhere between infancy and adulthood.² The Child's Rights Act defines a child as a person who has not attained the age of 18 years.³ Section 2 of the Borno State Child Protection Law 2022 equally defines a child as a person below the age of 18 years. According to the 1959 UN Convention on the Rights of the Child, the term child represents every human being below the age

¹Salwan, S.L., and Narang, U., *Academic's Legal Dictionary* (India: Academics (India) Publishers, 2007) p69

²Kaime, T., *The African charter on the rights and welfare of the child-a socio-legal perspective*. (Cape Town: Pretoria University Law Press, 2009) p65

³Section 277 of the Child's Rights Act

of 18 years.⁴ The Convention prescribes the age of 18 years as the limit of childhood; however, this prescription is subject to any age prescribed by the child's country. Article 1 of the Convention recognises that the age of majority may be obtained earlier under the laws applicable to the child; the Article thus accommodates the concept of advancement of majority at an earlier age, by allowing for the minimum age to be set under different circumstances balancing the evolving capacities of the child with the states obligation to provide special protection. In other words, though the Child's Rights Convention has clearly defined a child, it has however made an allowance for disparities in the definition of the age.⁵ The African Charter on the Rights and Welfare the Child⁶ defines a child as a human being below the age of 18 years.⁷

Nigerian Constitution recognises the age of 18 as the age of voting.⁸ The Marriage Act on the other hand fixed the age of maturity at the age of 21 years.⁹ According to the Children and Young Person's Act¹⁰ "a "child" means a person under the age of fourteen years, while "young person" means a person who has attained the age of fourteen years and is under the age of seventeen years."¹¹ In a similar vein, the Immigration Act stipulates that any person below 16 years is a minor,¹² whereas the Matrimonial Causes Rules puts the age of majority at 21.¹³

⁴ Art. 1

⁵ Available at http://www.nspcc.org.uk/inform/research/questions/definition_of_a_child_wda59396.html.

⁶ Adopted in Addis Ababa, Ethiopia on July 1990 and entered into force on 29th November 1999.

⁷ Article 2

⁸ Section 29 of the 1999 Constitution which provides that "full age means 18 years and above..." section 2 of the Electoral act equally stipulates 18 years as the age of voting.

⁹ Section 48 of the Marriage Act cap C 218 Laws of the Federation of Nigeria 1990. See also section 18 of the Act

¹⁰ Enacted in Eastern, Western and Northern Regions of Nigeria

¹¹ Article 2 of the Children and Young Persons Act

¹² Section 37(1) of the Immigration Act 1963, CAP II LFN 2004

¹³ Order 1 Rule 4 of the Matrimonial Causes Act 1970, CAP M7, LFN 2004.



At Common law, the age of majority is fixed at 21. Therefore any person below the age of 21 years is deemed to be a child.¹⁴ In *Labinjo v Abake*¹⁵ it was echoed that in Nigeria the age of 21 is applicable as the age of majority as applicable in Common law. Similarly, in *Solo v State*¹⁶ the court defined a child as a person who has not attained the age of 14 years by virtue of section 2(1) of the Criminal Procedure law of Ogun State. Read opined that any one is a minor who is under 18 years of age.¹⁷ The Beijing Rule of the United Nations Standard Minimum Rules For the Administration of Juvenile Justice defined a child as young person who under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.¹⁸ Under Islamic law maturity is determined by wet dream for boys and menstrual cycle for females. Where these signs are not found then maturity is presumed by attainment of 18 years according to popular opinion of the Maliki School of Islamic jurisprudence.¹⁹

3. Laws on Rights of Children

There are a number of laws that are relevant whenever any discussion on child protection is to be made in Nigeria. Some of these laws are specifically meant to protect children and to serve as guide in the adjudication of justice concerning children. Since children are special category of people, special laws are made to ensure that extra protection is provided to them otherwise they will be abused due to their vulnerability. Some of the laws though not made specifically for the protection of children; For example, laws on trafficking in persons or force labour are very relevant when discussing legislations on child protection due to the obvious fact that children are the common

¹⁴ Sagay, I.E., *Nigerian Law of Contract* (Ibadan: Spectrum Books Limited, 1993) p475

¹⁵ (1924) 5 NLR 330 p328

¹⁶ (2005) 2 NWLR Part 937 p460. see also *Onyegbu V State* (1994) 1 NWLR Part 32

¹⁷ P.A., *Law of Contract* (London: HTL Publications, 1990) p60

¹⁸ G.A. res., 40/33, annex, 40 UN GAOR supp. (NO. 53) at 207, UN Doc A/40/53(1985)

¹⁹ Imam Ibn Ashur, see also Dasuqi, M.A., *Hashiyatu al-Dasuqi ala Sharhi al-Kabir*. vol. 3, (Beirut: Dar al-Fikr, nd), at 293 where 15 years was also stated as the popular view under the Maliki school.

victims of the trafficking in person and force labour. Some of the laws are of a general nature and children as human beings are entitled to protection under such laws.

3.1 Constitution of the Federal Republic of Nigeria 1999

The Nigerian Constitution is the supreme law and the source from which all other laws derive their validity. Though it might not deal exhaustively with the issue of child protection, it has however in various sections dealt with the issue of child protection either directly or by implication. The Constitution provides

“The state shall direct its policy towards ensuring that children, young persons and the aged are protected against any exploitation whatsoever and against any moral and material neglect.”²⁰

This section has categorically mentioned that children should be protected against exploitation and any form of moral and material neglect. Exploitation of children can take different forms and it is more or less circumstance based. Where a person employs a child in circumstance that is injurious to the child’s health and wellbeing, the employer could face the wrath of the law. The Nigerian Labour Act has specifically prohibited the employment of a person under the age of 16 years to work underground, on machine or any form of employment which is dangerous or immoral.²¹

Obviously, immorality to an African may substantially vary from the way an American or European looks at immorality. Due to the attachment of Africans to their culture and traditions and the lesser impact of modernization on their social relation, there seems to be more value for morality in Africa than in the Western world. Accordingly, the Constitutional prohibition of immorality connotes prohibition of any such activity that exposes children to sexual exploitation because that forms part of exposing children to immorality.²²

²⁰ S. 17(3)(f) 1999 CFRN (as amended).

²¹ S. 58 and 60 of the Labour Act CAP L 1, LFN 2004.

²² That has informed the struggle by the Nigerian Police to bring to justice any person that sexually exploits children. For example a Deeper Life Church Pastor Mr.



Chapter IV of the Constitution is exclusively devoted to protection of the fundamental human rights of all the citizens of Nigeria. The Constitution specifically mentioned that any person can sue or seek for redress in court for the violation of any of his rights by the government or a private individual.²³ A child as a person therefore falls under the ambit of the chapter and can therefore seek for redress for the violation of any of his rights mentioned in the chapter. The rights include the right to life,²⁴ dignity,²⁵ fair hearing,²⁶ etc. Section 34 of the Constitution has however directly dealt with the issue of child right protection because it prohibits slavery and forced labour in general. Due to their vulnerability, adults who albeit are supposed to protect children are found wanting in child protection. Children are the commonest victims of forced labour and sometimes trafficked out of the country.

It is a fact that children are the commonest victims of slavery and forced labour all over the world. A report released by the International Labour Organisation (ILO) on 23rd September, 2013, shows that progress was made between 2008 and 2012, when the global number fell from 215 to 168 million. More than half of the 168 million child labourers worldwide are involved in hazardous work. This work directly endangers their health, safety and moral development. The current number of children in hazardous work stands at 85 million, down from 171 million in 2000. Hazardous work is often treated as a proxy for the worst forms of child labour, since children in hazardous work account for the overwhelming majority of

Fidelis Eze of Abudu Orhionwan Local Government of Edo State was arrested by the Police for defiling a 2 years old girl but claimed was forgiven by the victim's father. The Edo state commissioner of Police Foluso Balogun decries the rising cases of defilement of minors he said "this is something that is disturbing, and we will not allow them go scot free." See *Leadership Newspaper*, 19 July, 2013, at 14.

²³ S. 42 of the 1999 CFRN (as amended).

²⁴ *Ibid.* s 33

²⁵ *Ibid.* s 34

²⁶ *Ibid.* s 36

those in the worst forms.²⁷ Nigerian children are equally victims of these and other forms of child abuse.

Human trafficking is the third largest crime in Nigeria after drug trafficking and financial fraud.²⁸ Internal human trafficking in Nigeria is often done with women and girls for domestic service and sexual exploitation.²⁹ Boys on the other hand are trafficked for forced labour, street vending, agriculture, mining, stone quarries and domestic services.³⁰ Several factors are responsible for the problem of human trafficking in Nigeria. A report by Carling (in a research on causes of human trafficking) states that “poverty, crime, corruption and violence have been part of a vicious circle adversely affecting the development of Nigerian society.”³¹

In addition to the constitutional prohibition on child slavery and labour, Nigeria promulgated legislation on anti-human trafficking termed “The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003”.³² An agency was established to counter human trafficking under the Act (i.e. National Agency for the Prohibition of Trafficking in Persons and other Related Matters (NAPTIP)) which has substantially succeeded in countering trafficking in children. In the North, the *Almajiris* are the commonest victims of exploitation and trafficking because they are forced to beg by their own teachers.³³ On the rights of fair hearing the Constitution states

²⁷ International Labour Organisation, available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_221568/lang--en/index.htm viewed on 27 September, 2014.

²⁸ Shatsari, R.S., “Criminal Prosecution of Human Traffickers in Nigeria: Progress and Challenges within the NAPTIP Kano Zone”, (2010), Vol. 2 No.1, BUJPL, at 44.

²⁹ *Ibid* at 46.

³⁰ Nigerian girls and boys are equally trafficked outside the borders of Nigeria to Europe and Middle Eastern countries for house work, sexual exploitation, working in restaurants and shops etc. Unfortunately, the effort being put in place to tame this trend has not yielded the required result.

³¹ Carling, J., Migration, Human Smuggling and Trafficking from Nigeria to Europe www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/ viewed on 2 September, 2014.

³² Amended in 2005.

³³ Matsari, R. S., The Trafficking of Women and Children in Nigeria An Analysis of the New Anti-Trafficking Legislation and its Application, available at



that a juvenile shall not be tried in public glare. This is to avoid stigmatization of the child.³⁴

Chapter II of the Constitution provides for the Social Objectives and Directive Principles of State Policy of the Nigerian state. Among other things, the chapter provides for free education to children, right to health care etc.³⁵ All the rights provided under the chapter are non-justiciable. According to the Constitution, the powers of the courts

“[S]hall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;”³⁶

It is meant to buttress the responsibility of the state towards its subject. It defines the goal of the nation; it serves as a reminder to the government of its responsibility and limiting political controversy.³⁷ In *Fawehinmi v Abacha*³⁸ the court reiterated that the provisions of the section are non-justiciable because it is meant only to guide the government in its objectives or strive towards achieving the objectives. However, in a landmark decision, the *Economic Community of West African States (ECOWAS) Court of Justice* held in *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission*³⁹ that the right to education in Nigeria is justiciable despite the express pronouncement by the Constitution that the provision concerning the

<http://www.ukm.my/juum/JUUM%202010/The%20Trafficking%20of%20Women%20and%20Children%20in%20Nigeria.pdf>. Viewed on 20 September, 2013.

³⁴ Section 36(4)(a) and (b) of the 1999 CFRN (as amended).

³⁵ Legal/judicial enforcement approaches toward these rights cannot be made in Nigeria.

³⁶ Section 6(6)(c) of the 1999 CFRN (as amended).

³⁷ Okpalaob, B.N., “Legal/Judicial Enforcement Approaches Towards of Children Infected and Living with HIV/AIDS in Nigeria”, (2012), Vol. 6(1) Series No. 24, *African Research Review*, at 190.

³⁸ S.C. 45/1997.

³⁹ Suit number ECW/CCJ/APP/0808.

right to education is non-justiciable. The decision was based on the fact that corruption and bad governance are the main reasons why the right to education cannot be achieved.

Similarly, the constitution provides for the right of the child to family life.⁴⁰ The right to a family is a right that is difficult to enjoy due to orphanage or poverty.⁴¹ This is African equivalent of the Euro-American social security or social insurance system. However, the traditional system should merely contemplate new devices of ensuring the advancement of the family rights of children in a contemporary setting.⁴²

3.2 Penal Code and Criminal Code

The Penal Code and Criminal Code are the two main laws that deal with crime and punishment in Nigeria. While the Penal Code is applicable in the states of Northern Nigeria, the Criminal Code is applicable in the Southern part of the country. Islamic law of crime was the main law applicable to the Northern region before the coming of the colonial masters.

The Penal Code and Criminal Code have much in common in terms of protection provided for children. They provided for certain defenses with the aim of ensuring that children do not suffer due to their vulnerability.⁴³ According to the Codes, a child under the age of seven is *doli incapax* which means incapable of committing a crime hence cannot be held responsible for any act or omission.⁴⁴ Similarly, a child between the ages of seven and 12 is presumed to be incapable

⁴⁰ S. 37 of the 1999 CFRN (as amended).

⁴¹ Ibidapo-Obe, A., *A Synthesis of African Law*, (Nigeria: Concept Publication Limited, 2005), at 192.

⁴² *Ibid.*

⁴³ Okonkwo, C.O., "The Child and Criminal Responsibility: The Nigerian Perspective" in *The Nigerian Child: Now and in the Future*, edited by Aminu, L.S. and Olikoshi, B., (Lagos: Federal Ministry of Health and Human Services and UNICEF, 1990), at 18.

⁴⁴ Section 50 Penal Code and Section 30 Criminal Code.



of bearing criminal responsibility except if it can be shown that he appreciates that his action is morally wrong.⁴⁵

Compared to other countries such as Malaysia which fixed 10 years as the age of criminal responsibility,⁴⁶ Britain from which Nigeria and Malaysia derived their legal system has made changes in its laws and has increased its age of criminal responsibility to 15 years.⁴⁷ In Sweden, the age of criminal responsibility is 18 years.⁴⁸ Under the shariah as applicable in Nigeria, criminal responsibility is not determined by age but by maturity hence a person who has attained maturity will be fully responsible for his acts and omissions. The basis is taken from the hadith, where the Prophet (PBUH) states that pen is lifted on the three, a child until he attains maturity, the sleeping until he wakes up and the insane until he regains his senses.⁴⁹

The courts in Nigeria have clearly mentioned that going by the provisions of the Criminal Procedure Law a person under the age of 18 years cannot be sanctioned to death.⁵⁰ The question however is whether the court looks at the age of the commission of the offence or the age at the time of conviction. In *R v Bangaza*⁵¹ the Supreme Court held that the relevant age of consideration is the date when the crime was committed and not the date of the conviction for the offence. That supposes that a child who commits an offence at the age of 15 and convicted to death at the age of 17 can be executed. In *Garba and Another v A.G Lagos State*⁵² the Lagos State Armed Robbery Tribunal reiterated the position of the Supreme Court by sentencing a 12 year under aged armed robber to death. On appeal to the High Court,

⁴⁵ Okagbue, I.E., "The Treatment of Juvenile Offenders and the Right of the Child" in *The Right of the Child in Nigeria*, edited by I. A. Obi, (Lagos: Nails, 1996), at 242.

⁴⁶ Section 82 of the Malaysian Penal Code Act 574.

⁴⁷ *Ibid*apo-Obe, n. 48, at 194.

⁴⁸ *Ibid*.

⁴⁹ Ibn Majah, *Sunan ibn Majah*, (Dar al-hadith: Al-Qahirah, nd), at 658.

⁵⁰ Section 368(3) Criminal Procedure Act (CPA) which applies in the south and section 270 and 272 Criminal Procedure code (CPC) which applies in the states of Northern Nigeria.

⁵¹ (1960) 5 FSC 1.

⁵² Suit M/568/91, judgment of 31 January, 1992, High Court of Lagos State, unreported.

Justice Lange applying a similar provision in the African Charter held that minors cannot be sentenced to death for any offence committed by them.

The Codes have prescribed protection for children even before their birth by prohibiting abortion. Under the codes, abortion is an offence punishable by law. According to the Criminal Code,

“Any person who, with intent to procure miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years.”⁵³

Similarly, the provisions of the Penal Code is in *pari materia* with that of the Criminal Code with respect to the punishment of 14 years prescribed for the offence except for the fact that under the Penal Code, the punishment does not change whether the woman herself or someone else is charged. Unfortunately, the Penal Code appears to lack provision for attempted abortion by anybody because the wordings of the law are clear to the effect that “whoever voluntarily causes a woman with child to miscarry...”⁵⁴

The criminalisation of abortion stems from the fact that a child is presumed to deserve the protection of the law even before his birth. Though abortion is not as bad as infanticide, yet the law looks at it from the perspective of the protection of the foetus and the fact that a botched abortion has health implication for the putative child.⁵⁵

Upon birth, the child is seen as a human being capable of being killed. Any person whose act or omission results in the death of the child will be charged with the offence of culpable homicide punishable with death under the codes.⁵⁶ According to the laws, where a mother killed her child as a result of post-natal stress, she is still guilty of infanticide and can be imprisoned for life upon conviction.⁵⁷ In order

⁵³ S. 228 CC.

⁵⁴ Section 232 PC.

⁵⁵ That affects the child in many ways which can lead to disability.

⁵⁶ Section 329 CC and Section 236 PC.

⁵⁷ Section 28 CC, Section 299 CPA and Section 322 PC.



to guard against abandonment, neglect and other similar child abuses, the codes state concealment of birth is an offence.⁵⁸ Where a child is abandoned, a lot of suffering and even death can occur as a result of that. The common reason for abandonment is unwanted pregnancy. Where a woman gets pregnant outside wedlock, societal stigma and economic hardship will seriously be a matter of concern for her because under the African setting it will be difficult for her to get a husband to marry and her child will be considered as an illegitimate child for the rest of his/her life. This is in addition to the economic burden for the woman will bear to feed, train and educate the child. The laws state that every parent, guardian or master is under an obligation to provide their children, wards and apprentices with the necessities of life like clothing, food, shelter or to protect them from cruelty.⁵⁹

With respect to sexual victimization, the codes have criminalised many acts that amount to abuse of children and adolescents. Indecent assault on boys and girls,⁶⁰ defilement of girls under 13 years,⁶¹ house holder permitting defilement,⁶² permitting persons under 16 years of age in brothels,⁶³ procurement of girls from thirteen to eighteen years,⁶⁴ abduction and rape.⁶⁵ With respect to rape, the law in Nigeria states that carnal knowledge with a girl under the age of 18 years is deemed to be statutory rape even if her consent is obtained. The law considers a girl of such age incapable of giving her consent. However, the Penal Code expressly mentioned that a person cannot be guilty of raping his wife.⁶⁶ The implication of this provision is to accommodate the Islamic principle which allows the marriage of a girl and indeed consummation of such marriage when the girl becomes matured enough for such relationship. In other words, the

⁵⁸ *Ibidapo-Obe*, n. 48, at 189.

⁵⁹ Section 238 PC

⁶⁰ *Ibid.* s 39 PC and 216 CC

⁶¹ *Ibid.* s 218 CC

⁶² *Ibid.* s 219 CC

⁶³ *Ibid.* s 222(5) CC

⁶⁴ *Ibid.* s 223 CC

⁶⁵ *Ibid.* s 223 CC

⁶⁶ *Ibid.* s 182 PC

Islamic yardstick for carnal relation with a girl is not her age but her suitability for carnal relation having regards to the implication of such relationship on her health and emotion.

3.3 Child Right Act 2003

The CRA is the most comprehensive legislation on child protection in Nigeria. It harmonises most laws on child protection in Nigeria and aims to provide in a single document laws on child protection and prescribes punishment for child trafficking, exploitation and abuse.⁶⁷ It contains 278 Sections, 24 parts and 11 schedules. The Child's Rights Act defines a child as a person who has not attained the age of 18 years.⁶⁸ This definition provided by the Act is actually not the same with the definition provided by some other laws in Nigeria. For example the Marriage Act fixed the age of maturity at the age of 21 years.⁶⁹ Similarly, the Matrimonial Causes Rules fixed the age of majority at 21.⁷⁰ According to the Children and Young Person's Act⁷¹ "a "child" means a person under the age of fourteen years, while "young person" means a person who has attained the age of fourteen years and is under the age of seventeen years."⁷² In a similar vein, the Immigration Act stipulates that any person below 16 years is a minor.⁷³ Though the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN as amended) did not define maturity, 18 years has been fixed by the Constitution to be the age of voting.

The Act started by stating that "the best interest of the child shall be of paramount consideration" in all actions relating to a child.⁷⁴ Unfortunately, it fell short of explaining what is meant by the term best interest. Hence it depends on what the judge perceives as best

⁶⁷ Dankadai, L.B., "The Legal Protection of Children Against Exploitative Child Labour", (2010), Vol. 2 No. 1, BUJPL, at 111.

⁶⁸ Section 277 of the Child's Rights Act

⁶⁹ Section 48 of the Marriage Act cap C 218 Laws of the Federation of Nigeria 1990. See also section 18 of the Act

⁷⁰ Order 1 Rule 4 of the Matrimonial Causes Act 1970, CAP M7, LFN 2004.

⁷¹ Enacted in Eastern, Western and Northern Regions of Nigeria

⁷² Article 2 of the Children and Young Persons Act

⁷³ Section 37(1) of the Immigration Act 1963, CAP II LFN 2004

⁷⁴ Section 1 CRA 2003.



interest having regards to the circumstances of a particular case. The Act provides for the right of the child to life, name, dignity, education, health etc. It equally prohibits child marriage, using child for any criminal activity, abduction and unlawful removal and transfer of a child from lawful custody; forced exploitative or hazardous child labour, recruitment of children into armed forces, hawking, begging for arms, prostitution, unlawful sexual relation etc.⁷⁵ The Act establishes family court which has unlimited jurisdiction to hear and determine any case (civil or criminal) in respect of any issue regarding a child. A child right implementation committee is to be established at the national, state and local government levels.⁷⁶

3.4 Children and Young Persons Law

For the states that have not passed the Child's Right Law, the Children and Young Persons Law (CYPL) is the main law that deals with the issue of children. The law mainly deals with the issues of juvenile justice. Though it does not reflect Islamic principles, it has been accepted by all the states of the federation. It is however one of the laws in Nigeria that was promulgated with the sole aim of specifically protecting children from physical and mental injury⁷⁷ and to equally restrict and prohibit exploitation of children or employing children before the age of 14 years.⁷⁸

The CYPL 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 trials, the overriding intention shall be protection of the child's interest and acting in his best interest; hence juvenile trials should bear minimum delay, it should be handled by a professionally diverse panel and incarcerating punishment should be discouraged.⁷⁹ That has informed the reason for non-trial, conviction or sentence of young offenders. The process is often humane and mild hence

⁷⁵ Sections 30-33 CRA 2003.

⁷⁶ Alkali, M.B., et al, "A Critique of the Provisions on Adoption Under the Child's Rights Act 2003 from Islamic Perspective", (2012), Vol. 2, No. 2, BUJPL at 50.

⁷⁷ Dankadai L.B., "The Legal Protection of Children Against Exploitative Labour in Nigeria", (2010), Vol. 2 No.1, BUJPL, at 110.

⁷⁸ Section 32 CYPL

⁷⁹ Ibidapo-Obe, n. 48, at 193.

probation, corrective orders for supervision by relatives, fines and damages are often the end product of cases against young offenders.⁸⁰ Upon conviction, the law recognises four types of custodian institution of juvenile offenders⁸¹ thus: remand homes;⁸² borstal centres;⁸³ approved schools;⁸⁴ and prisons or police cell.⁸⁵ 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 main difference between the CYPA and the CRA is that the CYPA is concerned about issues of criminal justice that relate to a child while the CRA encapsulates both issues of criminal justice system and that of rights of the child though it is more biased towards the issues of rights. 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.⁸⁶

3.5 Borno State Child Protection Law 2022

Borno state has passed the Borno state Child Protection Law 2022. All states of the federation except Bauchi have passed the law. The Borno state law is not in conflict with the culture and religion of the people of Borno. It has 206 sections and 20 parts. It is a huge success to have such a rich law passed in Borno. The following are some of the advantages of the law

- i. It is the most comprehensive legislation on children

⁸⁰ Ibid

⁸¹ Uche, O.T., "Children Status and the Nigerian Law", (2010), Vol. 4 (3a), An International Multi-Disciplinary Journal, Ethiopia, at 386.

⁸² Section 3(1)(a) of the Boastal Homes and Remand Centres Act stipulates that it is an institution for the detention of Juvenile offenders.

⁸³ It is a federal institution for the detention of convicted offenders between the ages of 16 and 21 years

⁸⁴ Care protection is provided in the special schools for the young offenders.

⁸⁵ Section 111(1) of the Children and Young Persons Act made provision for such detention of unruly child.

⁸⁶ Uwais, M., Rights of the Nigerian Child, available at http://www.ambafrance-ng.org/IMG/docx/Presentation_Maryam_Uwais.docx. viewed on 27 January, 2014.



- ii. It provided for a mother ministry which is the Ministry in charge of affairs of children in the state to monitor activities and programmes established under the law
- iii. Rights and responsibilities for children were provided by part II of the law
- iv. Provisions have been made for fosterage and adoption of children⁸⁷
- v. Palliatives are to be provided for by the state government to indigent parents⁸⁸
- vi. Registered children's homes are provided to accommodate children that are contact with the law⁸⁹
- vii. Care givers
- viii. Supervision
- ix. Research on matters related to children⁹⁰
- x. Child Rights Implementation committee⁹¹ which is saddled with the responsibility of observing and advising the government on the implementation and popularisation of the law. It is equally expected to come up with programs and activities towards strengthening the implementation of the law.

4. DNA and the Right to Paternity

The constitution provides for the right of the child to family life and paternity is a key instrument to enjoyment of this right.⁹² A child has the right to paternity and where his parents die instate, he is entitled to inherit his parents.⁹³ Any attempt to deny a child such a right is illegal and void. In our society, a denial of paternity affects a child's dignity in the society. The right to dignity is guaranteed to every citizen including a child under the 1999 constitution.⁹⁴ The Borno state CPL 2022 states 'Every child is entitled to respect for the dignity of his

⁸⁷ Parts IX and X of the law

⁸⁸ Sections 116 and 139

⁸⁹ Section 133

⁹⁰ Section 140

⁹¹ Part XX

⁹² Section 37 of the 1999 CFRN (as amended).

⁹³ Section 18(4) of the Borno State Child Protection Law 2022

⁹⁴ Part IV of the constitution.

persons, and accordingly, no child shall be:- (a). subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse;⁹⁵

In recent time, several cases of parents conducting DNA on their children to determine whether there are actually their biological children. These tests are often conducted without the consent of the children. There are issues of related to the issue of DNA these are the legality of conducting the test without the consent of child.

Section 63 of the Child Rights Act 2003 states

1) In any civil proceedings in which the paternity or maternity of a person falls to be determined by the Court hearing the proceedings, the Court may, on an application by a party to the proceedings, give a direction for (a) the use of scientific tests, including blood tests and Deoxyribonucleic Acid tests, to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person; and (h) for the taking, within a period to be specified in the direction, of blood or other' samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons.

This provision clearly allows the application of this power by a court of law. It is therefore not a unilateral decision of parents.

Similarly, the consent of the child is equally required before the sample can be taken.⁹⁶ The CRA 2003 states "Subject to the provisions of subsections (3) and (4) of this section, scientific sample which is required to be taken from any person for the purpose of giving effect to a direction under section 63 of this Act shall not be taken from that person except with his consent.

(2) The consent of a child who has attained the age of sixteen years to the taking from himself of a scientific sample shall be as effective as it would be if he had attained the age of majority and where a child has by a virtue of this subsection given an effective consent to the taking of scientific sample, it shall not be necessary to obtain any consent for it from any other person.

⁹⁵ Section 12

⁹⁶ Section 65



(3) A scientific sample may be taken from a child under the age of sixteen years, not being a child as is referred to in subsection (4) of this section, if the person who has the care and control of the child consents.

(4) A scientific sample may be taken from a child who (a) is suffering from mental disorder within the meaning of any relevant law in Nigeria; and (b) is incapable of understanding the nature and purpose of the scientific tests, if the person who has the care and control of the child consents and the medical practitioner in whose care he is has certified that the taking of the scientific sample from the child shall not be prejudicial to his proper care and treatment

The act of conducting DNA test without the consent of the child is therefore a breach of the provision of section 64 of the CRA. The Act has not provided for sanction for such breach.⁹⁷

In addition to the illegality associated with the unilateral test, this act will psychologically affect children because it shows that the father doubts the legitimacy of the child. Harm of all forms whether physical, emotional or sexual is totally prohibited. This practice will affect children in several forms and must therefore be stopped.

The Borno state Child Protection Law 2022 does not have provision for DNA test. Cases related to DNA test on children will therefore be based on the personal law of the child. With respect to Borno Islamic law applies to majority of its indigenes.

5. The Use of DNA under Islamic Law

Under Islamic law, a child can only be attached to his biological father/parents.⁹⁸ It is unlawful for any person to claim paternity of a

⁹⁷ Punishment of parents for wrong committed against their children may negatively affect the relationship between children and their parents. Similarly, where parents get imprisoned, the children of the family suffer the financial burden of absence of bread winner.

⁹⁸ Al Minawi, K.M., *The Child's Rights in Islam*, (Riyadh: Dar Al-Amal Publishing House, 2001), at 23

child belonging to another person.⁹⁹ It is equally unlawful for a parent to deny paternity to a child.¹⁰⁰ The Qur'an states "...and it is not lawful for them to conceal what Allah has created in their wombs,..."¹⁰¹ This is a warning by the Qur'an to mothers to ensure that children are attributed to their biological parents and any woman that does otherwise will face the wrath of Allah. In the case of *Atanke v Atanda*¹⁰² the Court of Appeal in Nigeria opined that paternity is a matter of right to every child under Islamic law and that the paternity of a child born by a divorced woman or widow during the *Iddah* period belongs to the husband for whom she kept the *Iddah*.¹⁰³

DNA test is allowed under Islamic law but that will not change the original position of Islamic law which says that a child belongs to the matrimonial bed. It can only be conducted with orders from the court to serve as corroborative evidence. Certain conditions must be observed which includes

- (a) it must be in compliance with a court order;
- (b) it must be done by professionals that are trained, trusted and matured;
- (c) there must be the need to do it;
- (d) it shall be done in at least two facilities belonging to the government that are genuine, secured and under supervision.¹⁰⁴

Under Islamic law, a father cannot use DNA as a means of denying paternity. The unilateral act of doing so is illegal and void. Even where he goes ahead to do that, it is of no effect. Under Islamic, a father can only deny paternity through *lian* (mutual imprecation).¹⁰⁵

6. Conclusion

⁹⁹ Ogwuche, A.S., *Compendium of Islamic Law* 1st ed., (Lagos: Maiyaki Chambers, 2006), at 61.

¹⁰⁰ Ahmad, Y.A., *Encyclopedia of Islamic Jurisprudence Concerning Muslim Women* Vol. 3, (Riyadh: DarrussalÉm, 2010), at 254.

¹⁰¹ Qur'an, *al-Baqarah*:228.

¹⁰² *Supra*

¹⁰³ [1990] 1 I.L.R. 94.

¹⁰⁴ Section 53(7) of the Sokoto state Child Protection Law 2021 reflected these Islamic law conditions.

¹⁰⁵ Qur'an 24:6-9



A child is guaranteed the right to paternity under several laws in Nigeria. This right is threatened by a disturbing trend of parents unilaterally undertaking DNA test on their children in order to determine the paternity of their children. While parents are entitled to the right of having children that are biologically theirs; children equally have the right to paternity, dignity and protection from harm. The use of DNA unilaterally to determine paternity is contrary to the 3 Ps principles of protection, provision and participation. Islamic law equally disapproves the use of DNA unilaterally. It will therefore be suggested that public enlightenment should be conducted against the unilateral use of DNA to determine paternity. Laws should be made to prevent medical facilities from conducting DNA examination without court orders and sanctions should be provided for any medical centre that breaches this requirement.

AJLEE (2023) Vol 4, Issue I