

AN OVERVIEW OF SOME PROVISIONS OF THE CHILD RIGHTS ACT 2003 AND ISLAMIC POSITION

By

Abdullahi Abba Aji Esq.*

Introduction

A child is defined as “ a person under the age of 18...”¹. The child being an endangered specie and from a vulnerable group deserves better understanding and special care and in this regard, the United Nations Convention on the Rights of the child 1989 in its preamble stated that,

*" recognizing that the child, for the full and harmonious development of his or her personality should grow up in a fairly environment, in an atmosphere of happiness, love and understanding".*²

Much as children are loved and valued in most cultures, the reality is that few regard children as full human beings who are holders of rights. History has shown at some point in time, that children have no legal personality and such could not be a bearer of rights as rights were entitlements that were enforceable in law by person known in law. In Roman law, a child was regarded as the property of the father. In pre-Islamic Arabia, a female child is regarded as, chattel worth destroying, hence she is killed in infancy least she brings shame to the father.³

LEGISLATIONS ON THE RIGHTS OF THE CHILD

Rights of the child have for several years become international and national concerns with the spurring of the recognition and formulation of laws, charters, conventions/instruments. The following are some of the legislations/instruments on the Rights of the child. The Leagues Children Charter of 1924 Geneva, Declaration On The Rights Of The Child, 1959 By The United Nations, The African Charter On The Rights And Welfare Of The Child 1990, European Convention For The Exercise Of Children's Right 1996 and the most recent in Nigeria, The Childs Right Act, 2003.

THE IMPORTANCE OF THE CHILD RIGHTS ACT 2003

Since children are considered to belong to the vulnerable groups, therefore, they need to be nurtured and assisted to develop into responsible and protective adults, who will take over the running of the affairs of the society as future leaders.

In this vein, it is essential to view the following areas as provided in the Child Rights Act and compare/analyse the Islamic position:

- a) Early marriage
- b) Guardianship
- c) Choice of Religion
- d) Choice of Profession
- e) The Courts on Children

*.LL.M., BL., MILR., Lecturer, Department of Public Law, Faculty of Law UNIMAID.

¹ S. 277 of Child Rights Act 2003

² United Nations Convention on the Rights of the Child 1989.

³ Sadiq M.M. Women in Islam (Prominent Printers New Delhi, India. 1988). See also Qur'an 16:58 – 59.

EARLY MARRIAGE The Child Rights Act provides that "No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void and of no effect whatsoever".⁴

In Sura Nisa'i verse 3, Allah (SWT) said, "Then marry such woman who seem good to you"⁵

In the Holy Qur'an Allah (SWT) said,
*"And one of his signs is that He created mates for you from among yourselves that you may find quite of mind in them and He put between you love and compassion."*⁶

The Prophet (SAW) is reported to have said, "It is necessary for you to marry, because marriage is the most powerful shield against allurements of sights and the protection of your private parts; if one of you cannot afford it, let him fast because fasting weakens the sexual impulse"⁷

The prophet also said, "Whoever dislikes my way of life is not of me"⁸. From the above Islamic injunctions, one could see why Islam insists on marriage. Without married life involving the care and education of children, human personality can never find its full development and the great traditions of religion, culture and civilization cannot be passed on to the future generation. If human individuality is a value of some importance, then it is not only necessary for every person to develop, his individuality to the fullest extent possible but also to transmit it for the future use of mankind by bringing into the world fresh individuals who will retain at least a part of this individual characteristics. The provisions of Childs Rights Act on the prohibition of marriage certainly cannot find a place in Islam. Section 21⁹ is captioned prohibition of marriage. It is only the body of the section that gave the stipulation of age.

In Islam, different schools of thought have agreed on the legal capacity of marriage i.e. marriageable age¹⁰. Hannafi School states that a person of full age can contract marriage as soon as he or she has attained the age of puberty¹¹.

The presumption is that puberty is attained at the age of 15 years¹². But evidence can certainly be produced to the effect that it is reached earlier than this. Minimum periods could appear to be 12 for male and 9 years for females¹³.

GUARDIANSHIP

Parents are the natural and legal guardians of children. When a parent or parents are unsuitable as guardians, the court has the power to appoint other persons as guardians and therefore are entrusted with their welfare management. S. 83(i) *"the parents of a child are supposing to be guardians of a child and in the event of the death of a parent, the surviving parent shall be the guardian of the child"*,

⁴ S.21 of the CRA 2003

⁵ Quran Sura Nisa: verse 3

⁶ Quran 30 verse 211

⁷ Sahih Bukhari " the correct Traditions of Al Bukhari" Vol.4 (Dar Al kotob Al ilmiyyah Beirut Lebanon, 2003) No. 50 56 pg. 361.

⁸ Ibid

⁹ S. 21 of the Child Rights Act 2003

¹⁰ Ibn Rushd, " Bidayat al mujtahid (the distinguished jurist primer vol.II Garner Publishers Reading UK 1996

¹¹¹ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 214.

¹² Ibid.

¹³ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 214.

S. 83(2) gives court the power to appoint a guardian. Under English law, guardianship entails upbringing and welfare of children and the management of their affairs including properties. Islam has the same view but is elaborative on the issue of guardianship of a child.

A Guardianship in Islam is called "wilayat." Rights to general movements and actions of a person who is a minor or insane or one who is incapable of taking care of himself, Almighty Allah said "prove orphans until they reach a marriageable age, and if ye perceive in them right management, then handover to them their property".

There are three types or guardianship:

- 1) Guardianship for marriage
- 2) Guardianship of the person of a minor for custody and education.
- 3) Guardianship or the property of the minor.

1. Guardianship in Marriage

The right to contract a marriage irrevocably on behalf of a minor of either sex belongs to the following classes of people in the order of priority.

- 1) Father
- 2) Father's father
- 3) Brother
- 4) Male paternal relatives
- 5) King, Amir or Ruler.¹⁴

Though the power of the father or grandfather is absolute in entering into contract of marriage for sons or daughters,¹⁵ still he is limited if he acts wickedly or if he acted heedlessly; the marriage is avoidable, though ordinarily, the contract is valid and binding. The right of the guardian continues till the minor attains the age of puberty in the Hannafi and Hambali schools, but in Maliki and Shafi' schools, the right of Ijbar in respect of the females continues in force until they are married and it is consequently emancipated from paternal control¹⁶. A marriage contracted by a minor possessed of understanding, is not however absolutely invalid, but its validity stands to be ratified by the guardian or the person standing loco parentis¹⁷.

Elaborately put the schools of thought views, on marriage or minor are as follows: Hannafi - The marriage of the minor boy or girl is lawful provided the guardian is one or the relations on the father's side (Asuba)¹⁸.

Maliki: According to this school, the marriage is valid, only if when the marriage guardian is the father.¹⁹

Shafi'i: Recognizes marriage of minor only when conducted by father or grandfather.²⁰

Hambali: His view is similar to that of Hannafi.

¹⁴ Sahih Bukhari "the correct Traditions of Al Bukhari" Vol.4 (Dar Al kotob Al ilmiyyah Beirut Lebanon, 2003) No. 50 56 pg. 361.

¹⁵ Ibn Rushd, "Bidayat al mujtahid (the distinguished jurist primer vol.II Garner Publishers Reading UK 1996

¹⁶ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 142.

¹⁷ Ibid.

¹⁸ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 142.

¹⁹ Ibid.

²⁰ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 142.

GUARDIANSHIP OF THE PERSON (CUSTODY) - HADANA

The person of a minor given for guardianship, in terms or priority devolves on the mother.²¹ This rights absolutely given to her and can only be taken away if she exhibits acts of misconduct e.g. way wardness.²²

According to jurists, custody of the child is in the following order or priority:

- 1) Mother ²³
- 2) Mother's mother
- 3) Fathers' mother
- 4) Full sister
- 5) The uterine sister
- 6) Consanguine sister
- 7) Daughter of the full sister
- 8) Daughter of paternal sister
- 9) Daughter of paternal aunt
- 10) The daughter of Consanguine sisters
- 11) Brothers daughters
- 12) The paternal aunts

In the event of lack of all the above mentioned people on the mothers side then the right of custody is given to the under listed people in order of priority.

- 1) Father
- 2) Nearest paternal grand father
- 3) Full brother
- 4) Consanguine brother or any other paternal relative within the prohibited degree.

However, in the absence of all the above, the right is extended to the court which will appoint a guardian for the child, particularly regarding his property.

²¹ Imam Ibn Hajar. Bulugh Al- maram, Dar Al Manarah Publishers 2003, P.426

²² Abdurahman .I. Doi “Shariah the Islamic Law” (London, Taha 1984) Page 214.

²³ Abdullahi Ibn umar (RA) narrated that a woman said “ O messenger of Allah this is my son, for him my worm was a vessel, My breast was like a water sink, and my lap was his bedding, yet his father divorced me and he wants to take him away from me”. The messenger of Allah said to her, “You have more right to keep him unless you get married”. Bulugh Al Maram.

TERMINATION OF CUSTODY

Custody of a child comes to an end for a male child at the age of 7 and for the female when she reaches puberty.²⁴

However, Maliki slightly differed when it is said that for a female child, until she is married off.

LOSS OF RIGHT OF CUSTODY

The females including the mother, loses the right of custody if any of the following occur:

- 1) If she is leading an immoral life e.g. prostitution.
- 2) If she neglects to proper care of the child.
- 3) If she marries, a person not related to the child within the prohibited degree e.g. stranger but right revives if the marriage is dissolved.
- 4) If she goes and reside during the subsistence of the marriage at a distance from the fathers place of residence.

GUARDIANSHIP OF PROPERTY

In the Holy Qur'an the Almighty Allah (SWT) strongly warned thus, "To orphans restore their property (when they reach their age) nor substitute (your) worthless things for (their) good ones. And eat not their substances (by mixing it up) with your own for this is indeed a great sin."²⁵

The above verse is comprehensive in meaning. It teaches us that a wealth is entrusted to only capable and trusted people. A wealth is a means of sustaining a life and deserves to be properly managed. Any wrong use may spoil its cultural and economic system and in the long run certainly its moral system.²⁶

The order of priority as to guardianship of a minors' property in Islam is as follows:²⁷

- 1) Father
- 2) Father's father
- 3) Executors

In the absence of the above, it devolves on the court to appoint guardian for the protection and preservation of the Childs property. The following factors have to be considered by the court, among others in appointing a guardian for a minor's property.

- 1) Welfare of the child: in this case, sometimes, the mother is considered in preference to paternal uncle of minor.
- 2) Wishes of the minor's fathers.
- 3) Have regard to age, sex and religion of the minor.
- 4) The character and capacity of the proposed guardian.
- 5) Nearness of kin to the minor.

TERMINATION OF PROPERTY GUARDIANSHIP OF MINOR

The guardianship of property of a minor ends when he or she reaches the age of majority i.e. puberty and judgment as provided by the Quranic provision quoted above.²⁸

²⁴ Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 214.

²⁵ Qur'an 4:127.

²⁶ Abdurahman .I. Doi " Shariah The Islamic Law" (London, Taha 1984) Page 214.

²⁷ Ibid

²⁸ Qur'an 4:5 – 6. Also see Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 213.

POWER OF GUARDIAN ON MINOR'S PROPERTY

Generally, a guardian could not dispose of the property of the child except under the following conditions:

- 1) Where he can obtain double the property of the minor.
- 2) Where there are debts of the deceased and no other means of paying them.
- 3) Where the minor has no other property and the sale is necessary for his maintenance.
- 4) Where the property is falling into decay.

CHILD'S RIGHT ACT AND COMMON LAW VIEW ON GUARDIANSHIP OF CHILD VIS A VIZ ISLAMIC LAW

The guardianship of a child mostly end up in court where contesting parties put forward their cases. The powers of the court as spelt out in section 7(1) Matrimonial Causes Act 1970 as including, custody, marriage, guardianship, welfare and advancement or education of children of marriage.²⁹

While Islamic law views the conduct of the mother in awarding custody, the common law view is not strongly opposed to the misconduct of a parent. In *Afonja vs. Afonja* (1971) 1 UILR 105, the court said "In our view, the learned judge was gravely in error by basing his decision on the question of custody of the child solely and entirely on his views as to the conduct of the wife."³⁰

CHOICE OF RELIGION

A child is considered a minor and requires guidance and certainly the best guidance is that provided by his parents. When he perfectly understands what he is doing, he is left to decide for himself. S.7 "Every child has a right to freedom of religion".³¹

In Islam, a child is not forced to observe religious duties until gradually when it is started with prayers at the age of seven. Allah has said there is no compulsion in religion, which is applicable to adults but as to the children, they are guided and admonished.³²

EDUCATION

S. 15. "Every child has the right to free, compulsory and universal basic education".³³ In *Dejonwo vs Dejonwo*.³⁴ The education of a child Abayomi

Dejonwo an only child of the parents was considered in custody issue. The father made arrangement up to his university level.

Certainly, in Islam, education receives a higher place where male and female are not segregated. "Seek/or knowledge even at Sinn (China) " the Prophet (SAW) has said.

Prof. Tabiu opined that, "in the North Education of girl child is greatly hampered by economic desires of parents, where girls are engaged in hawking wares instead of being in school".³⁵

²⁹ Ayo Atsenuwa – Human Rights of Vulnerable Groups: Paper presented at NBA annual conference 2005.

³⁰ (1971) 1 UILR P.105

³¹ S.7 CRA 2003

³² Abdurahman .I. Doi "Shariah the Islamic Law" (London, Taha 1984) Page 214.

³³ S. 15 CRA 2003

³⁴ (1983) 7 NWLR (pt. 306) 483

³⁵ Tabiu .M. " Women's Rights through shariah. A paper presented at the Annual General conference of the muslim lawyers Association of Nigeria, Gusau, Zamfara, 2006.

He is also of the view that a girl child is discriminated against where preference is given the male child. Thus, the Hausas have this adage on birth of a girl child "Ba ayi komai ba, mace ta haifi mace."³⁶

THE COURTS

The High Court, Shariah Court of Appeal, Customary Court of Appeal, Juvenile Courts, Area Courts, etc. have jurisdiction to try offenders regarding offences committed against children and or by children. S. 69 Childs Rights Act³⁷ and S. 12 - 28 of the Trafficking In persons (prohibition) Law Enforcement and Administration Act, 2003.³⁸ Have all provided for the protection of a child.

CONCLUSION

The Child Rights Act 2003 made provisions for welfare and custody of the child with a view to proper enhancement of his growth and development. The religion of Islam is all comprehensive and has in this vein, recognize that children are joys of life as well as sources of pride, seeds of vanity, fountains of distress and temptation but warns parents to be caution against over confidence, misdeed and false pride of children. Islam is strongly sensitive to the crucial dependence of the child on the parents.

The Islamic perspective on the rights of the child is broader than that of the Childs Rights Act and some provisions of the Act as pointed out earlier are not in consonance with the views of Islam hence deserve to be disregarded.

³⁶ Tabiu .M. " Women's Rights through shariah. A paper presented at the Annual General conference of the muslim lawyers Association of Nigeria, Gusau, Zamfara, 2006.

³⁷ S. 69 of the Child Right's Act 2003

³⁸ S. 12-28 of the trafficking in persons (prohibition) Law enforcement and Administration Act, 2003