

Comparative Study between Islamic Law and Child Rights Acts on the Right of Maintenance of a Child Born out of Wedlock.

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ABSTRACT

This comparative study was aim to analyze and compare the provisions of Islamic law and Child Rights Acts concerning the right of maintenance for a child born out of wedlock. The research explores the legal framework governing the financial support and responsibilities of parent towards children born outside the institution of marriage in both Islamic law and Child Rights Acts. The study begins by providing an overview of how Islam views children, who is a child Under Islamic law and under the Act, Legitimation, Maintenance of a child born out of wedlock in Islamic law and Child Rights Acts, highlighting the legal status and rights attributed to such children in each system. The study compares the two system, the sources of law in Islamic jurisprudence and the relevant provisions in Child Rights Acts to ascertain the specific obligation of parent towards the maintenance of children born out of wedlock. The study investigates any potential conflict or overlap between Islamic law and Child Rights Act, as well as the challenges faced in harmonizing these frameworks. Thus, this study combines both the secular and Islamic system of protecting the rights of the child. The analysis takes into account factors such as parental responsibilities, financial capacity, societal and cultural context and the determination of child support amount. Furthermore, the study evaluates the enforcement mechanisms available in both Islamic law and Child Rights Act to ensure compliance with the maintenance obligations. It also considers legal procedures, court interventions, and the role of government agencies in enforcing child maintenance rights. Finally, based on the comparative analysis, the research provides recommendations for potential areas of reform and identifies best practices that may enhance the protection of these children's right, such as harmonization between Islamic law and child right acts, awareness and education among others.

Keywords: Islamic law, Child Rights Acts, child born out of wedlock, Legitimation, illegitimate, maintenance, comparative study, legal frameworks, parental responsibilities, enforcement mechanisms, child support, best interests of the child.

INTRODUCTION

Children born out of wedlock represent a distinct category in society, often facing unique challenges in terms of legal recognition, social stigma, and access to various rights and protections. One crucial aspect of their well-being is the right to maintenance, which encompasses the financial support and responsibilities of parent towards their children. It has been nearly two decades since Nigeria passed into law the Child Rights Act of 2003 which contains lofty aspirations and stipulated beneficial provisions for the Nigerian child. The rights contained in the Child Rights Acts and the intention of care and protection for the Nigerian child by the Act is not distanced from that which is intended for children of other parts of the word. This is because the foundations for the Child Rights Act are Conventions applicable to many other countries both regionally and internationally. At the international level, the United Nations Convention on the Rights of the Child(CRC) which was adopted in 1989 formed the basis upon which the United Nations attempted to make a consolidation of the international law on the basic rights of the child. It is from the said convention that the

Nigerian federal legislators derived the many well-thought provisions of the Child Rights Act. At the regional level, the African Charter on the Rights and Welfare of the Child also played a vital role in the coming to life of the Child Rights Act. [3]

Part X establishes how a child becomes a ward of the court, that there may be payments required of a previous guardian for the “maintenance” of their child, and the rules regarding how a child may be released back into the custody of a guardian. [4]

This comparative study aims to explore and analyze the provisions of Islamic law and Child Rights Acts regarding the right of maintenance for children born out of wedlock, shedding light on the similarities, differences, and potential areas of convergence between these legal frameworks. The research will examine how Islamic law and Child Rights Act address the right of maintenance for children born out of wedlock, considering their respective principles, objectives, and approaches to child welfare. It will investigate the sources of law in Islamic jurisprudence and the specific provisions within Child Rights Act that pertain to the financial responsibilities of parent towards these children. The comparative analysis will delve into areas such as parental obligations, the determination of child support amounts, and the enforcement mechanisms available in both systems. By scrutinizing legal procedures, court interventions, and the role of government agencies, the study aims to identify the similarities and divergences in ensuring compliance with maintenance obligations. Furthermore, the research will explore the societal and cultural contexts in which these legal frameworks operate. It will examine the influence of social norms, customs, and prevailing attitude towards children born out of wedlock, as these factors can shape the interpretation and implementation of maintenance rights. This research seeks to enhance the understanding and protection of the rights of children born out of wedlock, promoting their well-being and ensuring their equitable access to support and maintenance. [5]

An Overview of the Child’s Rights Act 2003

The UN convention on the rights of the child[6] and African charter on the Rights and welfare of the child[7] require the State parties to take all appropriate measures including the enactment of the legislation, for the implementation of the rights of child recognized by these instruments. In compliance with this international obligation, the Nigerian government therefore, promulgated the child’s Rights Act 2003[8] into law in order to, among other objectives; protect the rights of children against all forms of discrimination and abuse of their human rights. The Act specifically spells out the basic rights and responsibilities of the Nigerian child and provides for a system of Child Justice administration and the care and supervision among other things. In other words, the Act incorporates all the rights and responsibilities of children and consolidates all laws relating to children into one piece of legislations as well as specify the duties and obligations of the government, parents, other authorities, persons, organizations and bodies in relation thereto. The necessity for the Act is evidently clear from the fact that all existing laws relating to children including the constitution of the Federal Republic of Nigeria, the various States Children and Young person’s laws, the Marriage Act, Matrimonial causes Act are not necessarily child’s rights and responsibilities specific and they are also uncoordinated. [9]

The Act is divided into 24 chapters, 11 schedules and contains 278 sections. It seeks to harmonize all laws including international conventions in relation to issues of children in Nigeria. But this research will focus mainly on part II and X.

Overview of Islamic Law

The shariah has been defined as a “way or road to follow” by the Muslims. The Muslims believed that all other laws have human origin but the shariah is fixed by the Almighty Allah through his messenger Muhammad (PBUH). Hence, shariah is all encompassing; a religion, way of life, society and the State. Muslims are enjoined to obey totally and absolutely the rules and regulations of the religion as depicted in

the Qur'an. This probably explains the passion of the Muslims to enforce the shariah *stricto sensu* without incorporating other ideals^[10] as shall be seen when discussing maintenance of an illegitimate child.

Who is a Child?

Article 1 of the UN Convention on the Rights of the Child and article 2 of the African Charter on the Rights and Welfare of the Child states that, "a child means every human being below the age of 18 years. ^[11] Attempts have been made to define child by various scholars, and in various books and statues. A child is also described as progeny, offspring of a parentage, unborn or recently born human being. ^[12] And under the Children and Young person's Law, a child is a person before attaining the age of 14 years, and a young person is the one between the age of 14 years and 18 years.^[13]

A Child under Islamic Law

Under Islamic Law the word "Child" is synonymous to the Arabic word "Al-walad". The word "Al- Walad is used to refer to a son or daughter. In ordinary usage however, it is employed in a wider sense to refer to an infant, a kid or young ones. The word "walad" is used in Q17:111 to mean a child. There are other words used in the Qur'an to mean child and children they include" Banun, Tiflu and Saby" are mostly used when referring to a child who is yet to attain age of understanding or maturity.^[14]

Illegitimate Child

An illegitimate child is one born outside of marriage. An illegitimate child can become recognized as legitimate through a process known as Legitimization.

Legitimation

A child born out of wedlock may be legitimated through subsequent marriage of the child's parent or by acknowledgement.^[15] Legitimization may occur through either of the following processes:

1. By subsequent Marriage: A child born out of wedlock would become legitimate if its parents eventually get married to each other. Section 3(1) of the Legitimacy Act 9 provides " where the parent of an illegitimate person marries or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is, at the date of the marriage, domiciled in Nigeria, render that person if living legitimate from the commencement of this Act or from the date of the marriage which ever last happens". A child who is not legitimate at birth can be made legitimate by virtue of the above provisions on the fulfilment of the following conditions only:
 - The parent of child must have been subsequently married to each other under the Act.
 - The Father of the illegitimate person must be domiciled in a state in Nigeria at the time of the marriage; and
 - The person to be legitimated (i.e., the illegitimate child) must be alive at the time of the marriage.

The legal effect of legitimation is that, it confers on a person who was born out of wedlock all the rights and obligations of a legitimate person.^[16]

2. Legitimation by Acknowledgment: This is a process of legitimization known only to Customary Law. A child becomes Legitimate when his father acknowledges paternity by acknowledging the child as his. However, acknowledgement would not make an illegitimate child legitimate if that illegitimate child was born out of wedlock during the subsistence of a valid statutory marriage in *Cole v. Akinyede* (1960)5 FSC 84. This is aimed at protecting the sanctity of marriage. Again, in spite of the provisions of section 42(2) of the Constitution of Federal Republic of Nigeria, 1999 (as amended),

there exist cultural and religious practices which continue to disable the constitutional provision in this regard and which continue to deprive and discriminate against persons including female children regardless of whether they were born within or out of wedlock. It is indisputable that in some parts of the states that make up Eastern Nigeria, persons alleged to be Osu (outcasts) are still being discriminated against in much the same way as persons regarded as illegitimate are. So too is the vexed issue of female children prohibited by customary practices from inheriting from their fathers. The fact that some of these customs have been declared by the courts to be repugnant to natural justice, equity and good conscience has not decimated their applicability in the areas where belief in them holds sway.

It has been observed that legitimation by Acknowledgment is well-recognized under Yoruba customary law and some other few customary laws in Nigeria. It is not very clear whether this principle is applicable in the customary systems in the Eastern and Northern States. [\[17\]](#)

It is interesting to note that despite the importance of this child's right to legitimacy, the CRA does not make provision on how to acquire the status of legitimacy. It however, provides that the court can make an order giving either of the parents, the parental responsibility of the child whose parents were not married at the time of the child's birth on the application of the parent of the child. The implication of this provision is that an illegitimate child who would not have been entitled to the rights accruing from the parent may enjoy these rights even from the natural father if he applied to take responsibility. It should be noted however that in *Okoli vs Okoli and Odjegba v. Odjegba* it has been held that a person is not to be deprived of any of his rights because of the circumstances of his birth as enshrined in Section 42(2) of the Constitution of the Federal Republic of Nigeria. [\[18\]](#)

Maintenance of a Child Born Outside Wedlock

It is the responsibility of every parent to provide financial security for their children, and this responsibility continues even till death, as a deceased parent is expected to make provision for their children while making their will. See section 2 of the Wills Law of Lagos, 2004

However, for one reason or the other, some parents have often failed in this solemn responsibility to make adequate financial provision for their children, and have been woeful derelict in this sacred and solemn responsibility, hence the need to resort to court or other Law enforcement agency for enforcement of the maintenance order by a child or his guardian.

The object of a maintenance order is to protect and safeguard the welfare and wellbeing of the children of the marriage or children born outside wedlock. It is to ensure that a child should have the necessary financial security and protection. Maintenance, sometimes is also referred to as child support in other clime, is generally seen as the amount of money which the court may grant a party to the marriage to take care of the basic need of that party.

Child maintenance is paid directly or indirectly by an obligor to an obligee for the care and support of children of a relationship that has been terminated or in some cases never existed. Often the obligor is a non-custodial parent. The obligee is typically a custodian parent, a guardian or the state. Order that a lump sum of weekly, monthly, yearly, or another periodic sum be paid – see *Hayes V Hayes* (2000) 3 NWLR (PT 648) 276 *Damulak V Damulak* (2004) 8 NWLR (PT 874) 155. Children born outside wedlock are usually on the wrung ladder of the society in terms of maintenance. They are usually faced with denial and in some cases outright abandonment by one or both of the parent. They are most often denied the necessary financial maintenance required by either of their parent. Section 14 (2) of the child right Act provide that every child has a right to maintenance by his parent or guardian, in accordance with extent of their means and the child has the right in appropriate circumstance to enforce this right in the family court.

Thus, any child who is deprived of such financial provision and the necessary maintenance is entitled to

apply to the welfare department of any state which will in turn apply to the family court, for an order of maintenance. In Lagos state, the criminal code Law of Lagos, makes it a crime for a parent or guardian to fail to provide for maintenance. By the combine provision of section 204 and 205 of the criminal code law of Lagos, which state that it is the duty of every person who as a head of family, or has charge of a child, being member of his household, to provide the necessities of Life for such child, and he is held to have caused any consequences which result to the life or health or of any person by reason of any omission to perform that duty.[\[19\]](#)

Thus, a child who is denied the necessary maintenance can make a formal report to the relevant Law agency to enforce his right. For instance, there are instances where single mother will be unable to get financial assistance from the father of her child, it is usually advisable that a single mother who has found herself in such quagmire should take full advantage of the aforementioned section and seek help at the gender section of the police command Ikeja, Lagos, for immediate prosecution.

By section 14 of the Act, a parent is under the obligation to provide maintenance for his child in accordance with the means of the parent. This right is enforceable in the family court. But what constitutes maintenance for the purpose of this Act has not been clearly defined. Clearly, what constitutes maintenance varies according to the various customs in Nigeria. The CRA however is in line with the provisions of the Convention of the Rights of Child (CRC) and the ACRWC (African Charter on the Right and welfare of Children) and therefore the latter treaties should guide its interpretation.[\[20\]](#)

Article 29(1) of the CRC entitles every Child to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development. Article 27(2) CRC and Article 20(1)(b) of the ACRWC imposes on the parents the responsibility to secure within their abilities and financial capacities, condition of living necessary for the child's development.[\[21\]](#)

Article 27(3) and 20(2) of the Charter further enjoin the state parties to render assistance and support Programme to parents in the performance of their duty of child rearing particularly with regards to nutrition, clothing and housing, health, education included. [\[22\]](#)

Legitimacy under Islamic Law

A child is regarded as legitimate and can claim the paternity of his Father, i.e., the husband of his/her mother if he/she is born in a lawful wedlock.[\[23\]](#) The Holy Prophet (PBUH) is reported to have said; the child is for the bed (lawful wedlock), and for the adulterer is stoning (punishment) and repentance. A child begotten outside wedlock cannot be attached to the man who had the illicit relationship with the child's mother, but such a man is liable to punishment for the illicit relationship (Zina). To determine if a child is begotten in a lawful wedlock i.e., is conceived 6 months from the date of solemnization of a valid marriage or consummation of the marriage between his/her parents.[\[24\]](#)

Parentage is exclusively established with the real father and mother of a child, and only if they beget the child in a lawful matrimony. Muslim Law is devoted to the notion that an illegitimate child is a child of nobody. In Hanafi law, parentage is established in every case by the mother.

They (Sunnis or the Hanafi's) adopt a view that an illegitimate child, for some purposes, such as for feeding and nourishment, belongs to the mother. For these purposes, the Hanafi Law confers some rights on the mother.[\[25\]](#)

Right to Maintenance of an Illegitimate Child

Tyabgi says 'Islamic law appears to impose no burden upon the natural father of the child' Islamic laws, it seems, does not confer any kind obligation of maintenance of illegitimate children on either parent, though the Hanafi's recognize the obligation to nurture a child till the age of seven.[\[26\]](#)

From the above, it is clear that Islamic law does not impute legitimacy to a child born out of wedlock. This issue has generated controversy in the contemporary world with many Western orientalist chastising the Islamic law position as unfriendly to children. Conceptually, it is important to recognize that there is a world of difference between legitimacy and recognition. While legitimacy deals with the ascription of Rights and obligations arising through duly constituted marriage with all the essentials and procedures for a valid marriage, recognition deals with personality of the human being. Undoubtedly, Islamic law has recognized the child born out of wedlock as a child deserving of all protection by all duty bearers including the state and its authorities and has all the legal capacity of Children of his age born within wedlock. Islamic law recognizes that the actions of his parents cannot be used to punish him. He was not a party nor was he an accomplice before, during or after the facts. He was guiltless and deserves to be recognized as such. He is entitled to all the guaranteed human rights under the law. He is merely illegitimate because he was conceived and delivered in disregard of the cherished legal norms and religious values. In Islamic law one of the objectives (maqasid) of the law is to preserve, respect and protect lineage, this can only be achieved through marriage. The whole idea of human identity is founded on marriage and the family.

JURISTIC OPINION ON ILLEGITIMATE CHILD IN ISLAMIC LAW

According to Mazhab Imam Malik the Child of adultery is not attributed to his father, but to his mother. Maliki allows a man to marry his daughter, sister and niece resulting from adultery because these women do not have a sharia lineage relationship with him.[\[27\]](#)

Mazhab Abu Hanifah, Ali Ibn Asim narrated that Abu Hanifa said “ if a man commits zina with a woman and she gets pregnant, the child will be his child”[\[28\]](#)

Mazhab Ahmad Bn Hambali, this school is no different from other schools which says that a child born out of wedlock only has a lineage to his mother and his mother’s family but does not have lineage with his father. This school shares the same opinion with Hanafi school which forbids children born out of wedlock and their fathers to marry. It is not even permissible for them to look and touch their adulterous children with lust.

Mazhab Shafi’i are of the opinion that a biological father cannot marry off his daughter begotten out of wedlock because the lineage of the daughter is with her mother and her mother’s family while the father has no right over his daughter. Children who are born out of wedlock are cut off from all rights related to their lineage such as inheritance, maintenance and guardianship. [\[29\]](#)

Ibn Qudamah said “The scholars unanimously agreed that if a child is born to one man’s wife and another man claims it is his child, the child is not to be attributed to the latter. The differences of opinion arises when a child is born outside wedlock”.

If the woman is not married, and she has a child as a result of zina and the zaani claims it is his child, should the child be attributed to him or not? The majority of scholars are of the view that the child should not be attributed to him.[\[30\]](#)

According to Shaykh Al-Islam Ibn Taymiyah (May Allah have mercy on him) that the child should be attributed to him.

According to Al-Hasan, Ibn Sireen, Urwah Al-Nakha’I Ishaq and Sulaymaan Ibn Yassar that the child should be attributed to him.[\[31\]](#)

CONCLUSION

In Islamic law, the right of maintenance for a child born out of wedlock is recognized, and the responsibility

falls primarily on the biological father. However, the child's right to maintenance may be limited compared to a child born within a valid marriage. The extent and implementation of this right may vary across different interpretations and jurisdictions within Islamic law. The Child Rights Act (2003) emphasizes the protection and welfare of children, irrespective of their legitimacy. It recognizes the right of a child born out of wedlock to maintenance and provides for their welfare, including financial support from both parents.

RECOMMENDATIONS

1. **Harmonization:** It is recommended to work towards harmonizing the principles and provisions of Islamic law and the Child Rights Act to ensure the comprehensive protection of the rights of children born out of wedlock. This can be achieved through dialogue and collaboration between relevant stakeholders, including legal experts, religious scholars, and child rights advocates.
2. **Best Interests of the Child:** Regardless of the legal framework, it is crucial to prioritize the best interests of the child when determining maintenance rights. This includes considering factors such as the child's age, health, education, and overall well-being. The focus should be on ensuring the child receives adequate support and care from both parents, regardless of their marital status.
3. **Awareness and Education:** Enhancing awareness and education among parents, communities, and legal practitioners about the rights and responsibilities concerning maintenance for children born out of wedlock is essential. This can help in reducing disputes, ensuring compliance with legal obligations, and fostering a supportive environment for the child's upbringing.
4. **Legal Enforcement:** Strengthening mechanisms for legal enforcement of maintenance rights is crucial. This includes establishing effective procedures for resolving disputes and ensuring compliance with court orders or agreements related to child maintenance. Adequate support should be provided to individuals, especially mothers, seeking maintenance for their children.

FOOT NOTES

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[3] Juwairiyah Bint Badamasiu Protection of the Rights of the Child in Northern Nigeria, Ahmadu Bello University Press ltd (2015) p 1

[4] Part X Child's Rights Act (2003)

[5] Chamanlawfirm.com retrieved on 20/4/2023

[6] Article 4

[7] Article 1

[8] The House of Representative and the Senate passed the Bill into law and the Act came into force after the assent of the President to the Bill on 31st July, 2003. See Ladan Tawfiq the Nigerian Child's Rights Act; 2003: An overview of Rationale Structure and Content; Nigerian Bar journal, (2004, vol.2 no. 2 p 220)

[9] Juwairiyah Bint Badamasiu. Protection of the Rights of the Child in Northern Nigeria, (ABU press ltd 2015) p

[10] <https://ir.unilag.edu.ng/bitsreams> retrieved on 19/05/2023

[11] *ibid*

[12] [ibid](#)

[13] [ibid](#)

[14] [ibid](#)

[15] Juwairiyah Bnt Badamasiu Protection of the Rights of the Child in Northern Nigeria, Ahmadu Bello University Press limited Zaria (2015) p 39

[16] [ibid](#)

[17] [Op cit](#)

[18] <https://independent.ng/right-of-children-to-maintenance-under-the-law>

[19] [ibid](#)

[20] [ibid](#)

[21] [Article 29 CRC](#)

[22] [Article 27 CRC](#)

[23] [Zadul ma 'ad](#)

[24] [ibid](#)

[25] <https:// Blog.ipleaders.in/illegitimate-children-muslim-law>

[26] [ibid](#)

[27] Uswatun Hasanah Sampuju et 'al, The Lineage of Children out of wedlock to Islamic Law(ICIIS), 2022. P.174

[28] Jamiu Ridwanullah Kayode, Succession Right of the Child born out of wedlock: An appraisal of the Nigerian Law on Legitimization and the Islamic Law. (2021) IJRES Vol.1

[29] [ibid](#)

[30] Nur Shadiq S, The Status and Rights of an illegitimate child according to Mazhab Asy-Shafi'I perspective on the Development of Islamic Family Law in Indonesia. Jurnal Ilmia Al-Syri'ah(2019)vol.17 No 2

[31] [ibid](#)