

**AN APPRAISAL OF THE RIGHT OF THE CHILD OFFENDER UNDER THE CUSTOMARY AND SHARIA LAW IN NIGERIA \***

**Abstract**

Juvenile justice is a track within the criminal justice administration which provides that the best interest of the child shall be protected at all times. This principle is hinged on the principle of first call which provides that in any matter that concerns the child, his protection shall be paramount. The study compares the position of the child under the Customary and Sharia law with the provisions of the law, particularly the Childs Right Act and discovers that children right to justice are violated. Consequently, our juvenile justice falls abysmally lower in standard than what is obtained in other jurisdictions. Accordingly, the work recommends for a paradigm shift with respect of children under the Sharia corpus juris and advocates that Sharia practicing states should borrow a leaf from the Egyptian Law.

**1.0 Introduction**

Basically, juvenile justice administration is an integral part of criminal justice administration whose sole aim is to protect children. It focuses on three categories of children, such as children that need protection, children in need of care and children in conflict with the law. However, for the purpose of this work, the study shall be restricted to the rights of children in conflict with the law. Hence, this work advocates that Customary and Sharia Court should uphold the principle of first call, which reiterates that in any matter that concerns the child, the best interest of the child shall be upheld, even where the child commits a serious offence like murder. He should not be punished like an adult but must be subjected to juvenile justice for proper treatment and integrated back into the society. Accordingly this study raises some cardinal questions, firstly whether, the rights of child offenders are adequately protected under the Sharia and Customary laws. Secondly, whether Sharia and Customary Court should adopt juvenile proceedings as practiced by other Sharia States like Egypt.

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## 2.0 Definition of Customary Law and Sharia Law

The Evidence Act<sup>1</sup> defines custom as rule which in particular district has from long usage, obtained the force of law<sup>2</sup>. For it to have the force of law; it must be approved by consent of those who follow it<sup>3</sup>. It is the practice of course of action of the people which by common adoption unvarying habit, has become compulsory and has acquired the force of law with respect to the place or subject matter to series of action, repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent. According to Tobi J.C.A. in *Ojisua v Aiyebelhi*<sup>4</sup>, Customary Law is law relating to the custom and tradition of a people. It affects the culture and ethos of the people<sup>5</sup>. This means that customary law is not a legislated law or law enacted by any parliament. It is relative in nature as it varies from tribe to tribe. In *Ogunlowo v Ogundare*<sup>6</sup> customary law is defined as a mirror of acceptable usage and cannot be decreed or legislated out of existence. According to Obaseki J.S.C Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is regulatory in that it controls the lives and transactions of the community subject to it. Accordingly, Customary Law import justice to the lives of all those subject to it<sup>7</sup>. While Sharia law is not law of any particular tribe and as such cannot be said to be the customary law of any particular ethnic group or tribe. According to Niki Tobi,

Writers and commentators have surprisingly not dealt with Islamic law as a source of Nigerian law. This reason is not far- fetched. There is the wrong, notion that Islamic law is customary law and therefore a

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<sup>1</sup> Evidence Act Cap 38, LFN 2011.

<sup>2</sup> *Omaye v Omag* (2008) 7 NWLR (pt. 1087) 477 at 507.

<sup>3</sup> *Ojisua v Iyebelhia* (2001) 11NWLR (pt. 723) 44.

<sup>4</sup> *Supra*

<sup>5</sup> 11 NWLR (pt. 723) 44 at 52.

<sup>6</sup> (1993) NWRL (pt. 307) 610 at 625.

<sup>7</sup> *Ibid.*

discussion of customary law includes Islamic law. It is not correct<sup>8</sup>.

The Supreme Court in *Alkamawa v Bello*<sup>9</sup> decided that “Islamic law is not the same as customary law as it does not belong to any particular tribe”. It is not also the law of any legislative house or parliament. It is believed to have religious and divine nature as it contains divine revelations received by prophet. Unlike the customary law, it is not flexible, it is written and rigid. The acceptability of Islamic law is a divine command by the Almighty Allah and its obedience is a must for all Muslim. Hence, disobedience to any aspect of the Islamic law is disobedient to the Almighty Allah. A person who disobeys the divine words of the Quran cannot call himself a Muslim. He is rather an unbeliever and is not regarded by the true Muslims. Hence, Sharia law is practiced by adherents of Islamic Law. This started with the revelation of the Holy Quran to mankind through Prophet Muhammed. At first, the revelation dealt with simple practical problems of everyday life. As time went on, however, it became comprehensive by providing fundamental directive and code of conduct for all Muslims in all sphere of their endeavor<sup>10</sup>.

The Sunnah of the prophet is next to Quran as another primary source of Islamic Law. Jurisprudentially, Sunnah represents the saying, doings and approval of the prophet in the course of his mission. Generally, the function of Sunnah is that, it either confirms the rules contained in the Quran or particularizes a general rule embodied in the Quran or provide guidance for issues not specifically provided for in the Quran<sup>11</sup>. The primary sources contain both spiritual and moral codes, which every Muslim must follow and prohibitions which every Muslim must avoid. The primary sources are strengthened by other sources referred to as secondary sources. Notable among the secondary sources include *Quiyas* (analogy) and *Ijima* (consensus).

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<sup>8</sup> *Niki Tobi v Kalio* (1914) 2 NLR 108; Re Adaderh (1951) 13 WACA 304.

<sup>9</sup> *Alkamawa v Bello* (1998) 8 NWLR (Pt. 561) 173 at 182.

<sup>10</sup> Y. Danladi, Socio-Economic Rights under Islamic Law, Kogi State University Law Journal, vol. 1, N0. 1 April 2007

<sup>11</sup> ID. Abdur, Sharia the Islamic Law (England: Delux Press, London, 1984) p. 64.

The secondary sources derive their authority from the primary sources. The primary sources provide a comprehensive framework as well as a code for regulating human activities in a manner beneficial to human kind both in this world and hereafter<sup>12</sup>. Hence, Sharia implementing states have enacted several laws for the smooth administration of the Sharia corpus juris. **Under Section 3 (1) of the Sharia Court Law** three grades of Sharia Court established in the state, namely Sharia higher and upper Sharia Courts<sup>13</sup>. Similarly, the Courts are vested with jurisdiction and powers to hear and determine both civil and criminal proceedings in Islamic Law<sup>14</sup>. Accordingly, it is worthy to note that all Muslims whether adult or children in such states are subject to the jurisdiction of these courts.

### **3.0 Legal Framework for Administration of Juvenile Justice**

#### **3.1 1999 Constitution (as amended)**

The Constitution as a grundnorm provides for the protection of the rights of the child and for the establishment of Family Court as a division of High Court specifically entrusted with the responsibilities for the enforcement of the rights of the child in Nigeria. The Court in *Fasakin Foods Nigeria v Shosanya* held that the Constitution is supreme, it is the organic or fundamental law and grundnorm of Nigeria<sup>15</sup>. Hence, it provides for the protection of the child in every sphere, such as right to life and development, right to dignity of human persons<sup>16</sup>, right to personal liberty, non-discrimination, freedom of expression, right to privacy and fair hearing<sup>17</sup>. Accordingly, Section 36 (6) (a) of the 1999 Constitution, provides that an accused (defendant) has a right to be informed in the language he understands and in detail of the nature of the offence with which he is accused or charged.

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<sup>12</sup> A Elias et al Elias Pocket Dictionary English Arabic (Cairo: Elias Modern (Press,) p. 31c.

<sup>13</sup> Sections 3 (1) of the Sharia Court Law 1999 of Zamfara State.

<sup>14</sup> Sharia Court's Law No.7, 2000 Jigawa State section 3 (1)

<sup>15</sup> (2002) 10 NWLR (pt. 672) P.166.

<sup>16</sup> 1999 Constitution Section 36 (6) (a)

<sup>17</sup> Ibid Section 36 (6) (b) of the 1999 Constitution Section

This must be done prior to trial either at the point of arrest or at the beginning of trial that is, during arraignment<sup>18</sup>. The Constitution also provides that the child shall be given sufficient time to prepare for his trial<sup>19</sup>. Also, it provides in Section 6 (6) (c) that every accused has the right to defend himself in person or be represented by counsel of his choice<sup>20</sup>.

### **3.2 Children and Young Persons Law ( CYPL)**

Under CYPL there are three categories of children who may become involved with the system of juvenile justice and these are children in conflict with the law, children in need of care and protection, and children beyond parental control. Children in need of care and protection are generally speaking, those who have been abandoned or left destitute by their parents. While children beyond parental control are brought to the attention of the authorities by their parents. . There is no legal definition of the group of children that are in conflict with the law but in many such cases the child is alleged to have engaged in minor criminal activity, usually directed at family members and neighbors, which has not been reported to the police<sup>21</sup>. When these children are brought before the court, their best interest are not protected because, they do not take active part in the proceedings.

3.3 Child's Right Act/ Child Rights Laws of Various States of the Federation. The Act prohibits the subjection of any child to criminal justice process and criminal sanctions<sup>22</sup>. They seek to apply the justice model to child justice administration in Nigeria, thereby guaranteeing respect or the legal status and the fundamental rights of the child<sup>23</sup>; including the right to the observance of privacy<sup>24</sup>, fair hearing, compliance with due process<sup>25</sup> presumption of innocence, the right to be notified of

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<sup>18</sup> *Awolowo v Sarki* (1966) 1 ANLR 178.

<sup>19</sup> *Arior v Elemo* (1983) SCNLR, *Okon v State* (1995) 2 SCNJ 174.

<sup>20</sup> 1999 Constitution Section 36 (6) (c)

<sup>21</sup> CYPL Cap 32 of Laws of Lagos State 2004.

<sup>22</sup> Child's Right Act 2005, Section 204.

<sup>23</sup> *Ibid* Section 210.

<sup>24</sup> *Ibid* Section 214 (1).

<sup>25</sup> *Ibid* Section 210 (a).

charges<sup>26</sup>, to remain silent<sup>27</sup>, the presence of a parent or guardian<sup>28</sup> and the right to legal representation and free legal aid<sup>29</sup> at all the stages of investigation<sup>30</sup>, adjudication<sup>31</sup> and disposition<sup>32</sup> of the case. These laws apply the welfare model that stipulates that every administration should be given to the best interest and well-being of the child<sup>33</sup>. The Act enjoins states parties to ensure that not only should the proceedings be conducive in the best interest of the child but should be conducted in a friendly atmosphere that will enable the child to participate fully and express himself freely. However, these lofty provisions remain a mirage to most children until separate courts are provided and best practices adopted. The judges are human beings and are already involved in normal court proceedings. Hence, for effective juvenile justice administration the court should be made to be child friendly, thus it should do away with some paraphernalia that do not make children participate fully in court administration such as, the dock, witness box, the lawyers wig and gown.

### **3.4 United Nations Convention on the Rights of the Child**

Generally, this Convention focuses on the best interest of the child, non-discrimination, participation, implementation of child's right which includes economic, social and cultural rights to the maximum extent of available resources, the rights to life, survival and development. On the principle of best interest of the child, the Convention enjoins everyone to consider the best interest of the child first in all matters. Apart from parents giving them maximum attention, in all matters that pertains to them, the government should also uphold these principles that promote

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<sup>26</sup> *Ibid* Section 210 (b)

<sup>27</sup> *Ibid* Section 219 (c)

<sup>28</sup> *Ibid* Section 210 (d)

<sup>29</sup> *Ibid* Section 210 (e) which provides that a Child has the Right to be Represented by a Legal Practitioner and a free legal aid in the hearing and determination of any matter concerning the Child in the Court and the Corresponding provisions or the Child Right Law of various States.

<sup>30</sup> *Ibid* Section 211 and 212, CRA,

<sup>31</sup> *Ibid* Sections 213-232

<sup>32</sup> *Ibid* Section 210

<sup>33</sup> *Ibid* Section 214 (2) (b) and 215 (1) (a)

the best interest of the child. Particularly Section 37 provides that state parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age, hence no child shall be deprived of his or her liberty unlawfully or arbitrarily<sup>34</sup>. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time<sup>35</sup>. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of their age. In particular every child deprived of liberty shall be separated from adults unless, it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits same in exceptional circumstance<sup>36</sup>. Furthermore, the Convention provides that every child deprived of his or her liberty shall have right to prompt access to legal services and other appropriate assistance as well as the right to challenge the legality of the deprivation of his liberty before a court or other competent independent and impartial authority and to a prompt decision on any such action.

However, despite laudable provisions of various legal framework, the rights of the child is still violated under our customary and Sharia law.

#### **4.0 The Rights of Children viz-aviz the Rights of the Child Offenders Under Sharia and Customary Law.**

##### **4.1 Trial Must Be Conducive and Conducted in the Best Interest of the Child**

The basic principle for the protection of the child as stipulated in the Child Right Act

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<sup>34</sup> United Nations Convention on the Rights of the Child, Adopted by the UN General Assembly on November 20 Section 37.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

is basically to uphold the best interest of the child in every sphere<sup>37</sup>. Thus, in all judicial or administrative proceeding affecting a child who is capable of communicating his or her own view an opportunity to be heard, either directly or through impartial representative as a party to the proceedings shall be given to him. However, under the Customary and Sharia law, these rights are not protected. This can be attributed to the aim of customary justice, whose purpose is to preserve the community's harmony and promote the safety of the group at the expense of the child. For example in sexual assault cases, when a girl child is assaulted instead of protecting the girl child, the family quickly arranges marriage between the offender and the victim without considering the opinion of the child. Accordingly, under the Ibo customary law, where a child commits murder or manslaughter instead of protecting the child, he is forced to go on exile and lives with the stigma forever<sup>38</sup>. Hence, this practice is at variance with the provisions of the Act and international standard which provide that state parties shall ensure that a child shall not be separated from his or her parents against their will, except when, competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child<sup>39</sup>. Further, the proceedings must be conducive and conducted in the best interest of the child and in an atmosphere of understanding, allowing the child to freely express himself. This means that the well-being of the child is the guiding factor in the consideration of his case and the court has the power to discontinue any proceedings at any time if circumstances arise which make discontinuation of the proceedings the best way to dispose of the case and must do so without delay<sup>40</sup>. Generally, the parents or guardian of a child offender must attend all stages of the proceedings and is entitled to participate in it. Where it is necessary, the court can make an order enforcing the appearance of a parent or guardian before it and if they fail to attend,

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<sup>37</sup> African Charter on the Rights of the Child ,Article iv

<sup>38</sup> Y. Colliou &K.H. Burhill, 'Customary Justice <https://www.tdhch/sites/default/dhtml> accessed on 18/5/2017.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* Section 215.

the court shall exclude them<sup>41</sup>. Such child and his parents or guardian must be made to understand in the language they speak the substance of the alleged offence and where the court decides that the case would be best disposed of by the imposition of a fine, the court shall order that it be paid by the parents or guardian instead of the child. However, this would not apply where the parents or guardian of the child cannot be found or has not condoned to the commission of the crime by neglecting to exercise due care of the child<sup>42</sup>. Further, under the juvenile justice proceeding children are shielded from the public and the records are not referred to in subsequent cases<sup>43</sup>. The proceeding is conducted privately and only the parents or guardian of the child and members of the court are allowed during the proceeding. Thus, the issue of stigmatization may never arise. However, with respect to customary and sharia law, the child does not suffer punishment alone but lives with the stigma of the offence forever. This practice contradicts the principle of juvenile justice which stipulates that the child should enjoy fair trial throughout proceedings. It is imperative to note that a fair trial is a trial which is fair in the light of the issues which have to be decided. This principle was well illustrated in the case of **W (Children)**<sup>44</sup> where the court averred that any proceeding that will harm the child should be discarded. Hence, a fair trial should promote the welfare of the child. **Section 36 (b) (c) of the 1999 Constitution which** provides that every person who is charged with a criminal offence shall be entitled to defend himself in person or by legal practitioner(s) of his own choice.

However, under our Customary and Sharia Law, the child is denied this right and cannot defend himself, thereby exposing him to harm. Apart from that, the child is not informed promptly in detail of the nature of the offence. Additionally, the presumption of innocence of the defendant person is not observed, even though, it is incorporated in the Constitution as one of the fundamental human rights of the Child. It is imperative to note that this right is described as the golden trait of the English

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<sup>41</sup> *Ibid* section 216.

<sup>42</sup> *Ibid* Section 217

<sup>43</sup> *Ibid* Section 205

<sup>44</sup> (2010) LPELR-17867 (UKSC).

law as entrenched in **Section 36 (5) of the Constitution** which provides that the defendant shall be presumed innocent until he is proved guilty. The essence of this provision is that the prosecution has the burden of establishing the guilt of the defendant person and until this is done, the defendant must be presumed innocent and to do otherwise would be tantamount to placing on the defendant the onus of establishing his innocence. Hence, due to immaturity of children they are punished unjustly because they do not establish their innocence. Thus, they are denied right to fair hearing. The Black's Law Dictionary defines “a fair hearing” as “a judicial or administrative hearing conducted in accordance with due process. In *Mohammed v Kano Native Authority*<sup>45</sup> a fair hearing was described as involving a fair trial, and a fair trial of a case as consisting of the whole hearing. Hence, every trial in breach of the Constitution is a nullity. Thus in the case of *Joseph v the State*<sup>46</sup>, the court held that compliance with the provision of the Constitution is mandatory and failure to so do will render the whole trial a nullity. Also in the case of *Okoye & Ors v COP & Ors*<sup>47</sup>, the Supreme Court held thus:

The evidence against the accused, including statements of witnesses for the prosecution, would be necessary for the preparation of his defence. So they are “facilities” within the meaning of the said section 36 (6) (b) .... It is in accord with the intention of the legislature to provide, a person charged with a criminal offence, with sufficient opportunity to prepare his defence and to prevent surprises being sprung on him at trial. This is fundamental as the accused person could be facing the loss of his life or personal liberty...

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<sup>45</sup> (Unreported) S C 417 Decide on December 31, 1968).

<sup>46</sup> (2013) LPELR- 22604 (SC)

<sup>47</sup> (2015) LPELR- 24675 (SC0).

Also in the case of *Akabogu v the State* the court averred thus, "... I am humbly of the strong opinion that any person charged whether summarily or by information to face criminal charges at the High Court is entitled as provided by the Constitution to details of the offence including the proofs of evidence by the police in order to facilitate his defence to the charge<sup>48</sup>. Accordingly, compliance with every aspect and principle of the law both procedurally and practically is imperative, so as to ensure that justice is attained and seen to be done at the end of the trial.

Under the Child Right Act, the court conducts the hearing in a conducive environment. Thus before deciding how to deal with a child the court obtains such information as to his general conduct, home surrounding, school record, and medical history as may enable it to deal with the case in the best interest of the child or young person for the purpose of obtaining such information for the best treatment of the child<sup>49</sup>. **Section 10** 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 group or by reason of his place of origin, sex, religion or political opinion<sup>50</sup>. While **Section 11** provides that every child is entitled to respect for the dignity of his person and accordingly no child shall be subjected to physical, mental or emotional injury abuse, neglect or maltreatment, including sexual abuse. No child shall be subjected to torture, inhuman or degrading treatment or punishment subjected to attacks, upon his honour or reputation or held in slavery or servitude, while in the care of a parent, legal guardian or school authority or any other person or authority having the care of the child.

## 4.2 The Age of a Child

The age of the child is a condition precedent for the purpose of administration of juvenile justice but conflict in age of criminal responsibility as provided by different

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<sup>48</sup> (2016) LPELR-40929 (CA). *Labode v. the State* (2009) 11 NWLR (PT 1152) 254 at *Adenyi v the Satate* (2001) 25 WRN 117 at 120

<sup>49</sup> Section 4 of Child's Right 2003

<sup>50</sup> Child's Right Act, see 10

legislation is a leeway for violation of the right of the child. Under the 1999 Constitution, the age of a child was not defined but rather it states that for the purpose of renouncing of citizenship that person must be at least eighteen years<sup>51</sup> while Child Right Act defines a child as a person under the age of eighteen. The Children and Young Person's Act defines a child and a young person as someone who under fourteen and seventeen years, while the United Nations Convention states that a child is a person under the law applicable to child majority is attained earlier. Hence, under the native law and custom there is no clear cut definition of the age of a child. In fact a boy remains an infant till he is initiated into “Mmuo” nor “Mmanwu” society. In other places infancy continues until the child is old enough to come under assessment for periodic money contributions levied for places or there is an annual proclamation by the ruling age grade or the Council of Elders to the effect that a given age grade is now of Age<sup>52</sup>. Also in the case of *Joseph Uwa v the State*<sup>53</sup>, the Supreme Court took into consideration the fact that when an Igbo villager says that he is 13 years old, it does not necessarily mean that he is 13 years old as one would expect. The court accepted the fact that some villages reckon their age by certain festivals and that the result may well be that an Ibo boy who says that he is 13 years may only be 12 years<sup>54</sup>. While the Sharia law pegs the age of the child at puberty. However, the English court gives solution to these variation by the combined effect of section 208 and 368 (3) of the criminal procedure law, which provides that where a court wants to ascertain the age of a child or person, the court may make due enquiry to the age of that person and for that purpose may take such evidence as may be forthcoming at the time, or at the time to which the enquiry may take such evidence that will reveal the true age of the child<sup>55</sup>. Thus in *Oladimeji v the State*, the court held that the age of the accused person is a question for court that there is no burden of proof of the issue on either the prosecution or the defence, so that the

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<sup>51</sup> 1999 Constitution

<sup>52</sup> Uba, NF, *Rights of the Child in Nigeria* (Owerri: Bon Publishers, 2002).

<sup>53</sup> (1965) All NLR 356.

<sup>54</sup> Uba, NF, *opcit*

<sup>55</sup> Criminal Procedure Act 1990, Section 208

age presumed or declared by the court as a result of its enquiry shall be deemed to be the true age of the person for the purpose of the CYPL<sup>56</sup>.

#### 4.3 Corporal Punishment under the Customary and Sharia

Corporal punishment is infliction of bodily pain to somebody by either whipping or striking him or branding or mutilating him. It is the act of thumping, spanking, striking, thrashing, branding or disfigurement or infliction of pain to the human body. It has been asserted that corporal punishment is distinguishable from pecuniary punishment or fine as the former is any kind of punishment inflicted on the body<sup>57</sup>. The Act provides for the protection of the child against corporal punishment because it violates the right to survival and development of the child. Thus no child shall be subjected to corporal punishment but should be protected even when the child commits a heinous crime. This is in tandem with the object of child justice which provides that in every dealing with the child that the best interest of the child should be upheld.

However, under the customary and Sharia justice system, children are victims of corporal punishment. For example under our customary law, children that are beyond parental control are punished severely beaten for violating minor codes of conduct. While those that commit serious offences like homicid are exiled to another town for many years depending on the tradition of the people. Apart from the punishment, the juvenile offenders suffer from stigma and they are often labelled the “thief” or the guilty which often affect their rights to survival and development.

Similarly, under the Sharia, offenders are treated according to the crimes or offences committed. Basically, under Sharia penal codes offences are divided into three group namely the “Hudud” and non “Hudud” offences, “Qisas” and non “Qisas” related

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<sup>56</sup> *Ibid*

<sup>57</sup> H.C. Black, *Black's Dictionary: 6th Edition* (St. {Paul Min, West Publishing, 1995) p. 339

offences and “Tazar” offences, while the punishments for the latter offences is not divinely or denied, hence, is fixed by the state. “Qisas” means punishment inflicted on the offenders as a “diyya” (compensation) for causing death or injuries to a person. However, for “Hudud” offences, punishment is divinely ordained. This presupposes that such punishments are not amenable in its application to adults and children. Hence, the Holy Prophet prohibited any mediation in carrying the punishment for hard offences. In a recognized Hadith, he said, do you intercede with me to violate one of the legal punishment of Allah? By “Allah” if Fatimah, the daughter of Muhammad committed theft, Muhammad would have her limb cut off<sup>58</sup>.

Hence, from the above injunction, one can easily deduce that the main fulcrum of the Child Right Act, other municipal laws and international treaties on the rights of the child is antithetical to the Islamic penal system. However, some Sharia implementing states appear to have responded differently concerning punishment for “hudud” child offenders. For instance in the Kaduna State criminal procedure code, no sentence of “hudud” or “qisas” shall be imposed on a person under the age of “takilif”. **Section 11 and Section 98 of the Sharia Penal Code** provides that when an accused person who has completed his seventeenth birthday but not eighteenth years of age is convicted by a court of any offence, the court may instead of passing the sentence prescribed under the code, subject the convict to “tazir” punishment<sup>59</sup>. Similarly in Zamfara State, where an accused that has completed his seventeenth birthday but not eighteenth, birthday, is convicted, the court may subject the accused confinement in a reformatory home for a period not exceeding one year or caning which may extend to twenty lashes or both. Paradoxically, these provision appear to be more of black letter laws judging from the cases already decided there under. For example in Zamfara State, a teenage girl Bariya Ibrahim Magazu was sentenced to 180 lashes for pre-marital sex in September, 2002<sup>60</sup>.

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<sup>58</sup> K. S. Mboho, A Comparative Analysis of Juvenile Justice System in the Northern and Southern Nigeria Journal of Law, Policy and Globalization <http://wwilsteorg> accessed on 3/10/2016.

<sup>59</sup> Sharia Penal Code of the (Amended) Law 2000 section 98.

<sup>60</sup> THISDAY Vo. 8 No 2695 of 8th September, 2002.

While in Kebbi State practicing Sharia Court ordered a fifteen years old Abubakar Aloyu's hand to be amputated for stealing. In another instance, a lower Sharia Court in Maska, Katsina State sentenced a fifteen years old to amputation for theft of a bull<sup>61</sup>. Similarly, a Sharia Court in Bauchi State, sentenced a fifteen year old for theft of a bull<sup>62</sup>, who claimed she had been raped by her step father to one hundred (100) lashes of the cane for premarital sex<sup>63</sup>. Apart from Nigeria, this practice is also prevalent in other Sharia practicing states like Iran. In fact Iran is known as the top executioner of juvenile offenders in the global ranking, having executed more child offenders than any other country in the world. For example in June 2009, Iran executed 33 child offenders and had at least 160 juveniles waiting on death row for different reasons such a homosexuality, apostasy, sex outside of marriage and involving in a street fight which led to murder<sup>64</sup>. This attitude toward delinquent children under sharia is violation of the rights of the child as provided by international, regional and national legislation on the rights of the child. In fact, it is cruel and inhuman to apply the death penalty even to adults let alone on children below the age of eighteen years.

Moreover because of children's immaturity vulnerability, impulsiveness and capacity for rehabilitation, they should never face such execution, no matter how severe the crime of which they have been convicted is because executing them will not solve juvenile delinquency, instead, the principle of maximizing the child offenders potential should be the focus. This attribute has attracted the attention of international community and they are really agitating for a change to ameliorate the plight of children under Sharia juvenile justice. In fact, Mary Robin son former UN High Commissioner for Human Rights emphasizes this aspect, by pointing out her concerns on the 1st of August 2002 about scheduled executions of two juveniles offenders and states interalia:

The overwhelming international consensus that the death penalty should not apply to juvenile offenders stems from the recognition that young person, who do not fully comprehend the consequences of their

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<sup>61</sup> Human Rights Violating under Sharia in Northern available at <http://www/hrw.org> accessed on 30/9/2016.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> M Lau, Islamic Law and the Afghar Legal System, <http://unpaniun/org/intradoc./group/publicodcuments/ApGotv/unpanu> accessed on 30/9/2016

actions should benefit from less severe sanctions than adults. More importantly, it reflects the firm beliefs that young persons are more susceptible to change and thus have a greater potential for rehabilitation than adult yet the sharia legal system has a strong focus on punishment<sup>65</sup>.

Apart from Sharia law Penal Code and the Criminal Procedure Code, the Criminal Code and Criminal Procedure Act and the Prisons Act and the Prisons Regulations all provide for corporal punishment. Hence, despite Nigeria signatory to international Convention like Convention on the Rights of the Child and political rights etcetera, child's rights are still violated with impunity. Apart from that, Sharia practicing states have refused to comply and implement Child Rights Act, which made copious provisions for the protection of child rights .It is submitted that Nigeria should take a leaf from other jurisdictions like Egypt and protect child offenders as stipulated in the law. Corporal punishment is therefore unlawful and unconstitutional .Hence applying section 1(3) of the Constitution of the Federal Republic of Nigeria 1999, consequently, all laws analyzed in this study as well as all other extant laws with provisions allowing corporal punishment must be declared inconsistent with the Constitution. Accordingly, it follows that no court in Nigeria has powers to sentence, convict to caning or whipping or any other form of corporal punishment. *In Stephen Ncube & Ors. v The State*<sup>66</sup>, the Zimbabwean Supreme Court was invited to interpret Section 15 (1) of that Constitution and the Court in declaring corporal punishment unconstitutional held it to be “*not only inherently brutal and cruel... It is relentless in its severity and contrary to the traditional humanity practiced by almost the whole of the civilized world being incompatible with the evolving standards of decency*<sup>67</sup>”.

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<sup>65</sup> Amnesty International.

<sup>66</sup> (1988) 2 S. AA 702.

<sup>67</sup> A similar decision was reached in the Botswanan case of *The State v. Anor* (1985) L.R. (Const) 699. See also *Ehonwa Op. cit* p. 205-206.

In England, corporal punishment came under severe criticism resulting to the setting up of the 1938 Department Committee known as the 'Cadogan Committee' which concluded that it “was not satisfied that corporal punishment has exceptionally effective influence as deterrent which is usually claimed for it by those who advocate its use as penalty for adult offenders”. In arriving at this decision, the 'Cadogan Committee' noted that corporal punishment was debasing and degrading to humanity as its singular aim was to humiliate the human person. Not done, the committee equally took a swipe at thrashing of juveniles and recommended the abolishing of corporal punishment altogether. These recommendations were implemented piece meal by the Criminal Justice Act of 1948<sup>68</sup> and the Criminal Justice Act of 1967<sup>69</sup>. In the United States of America, corporal punishment has equally been repealed and it is asserted that the last officially sanctioned flogging of a criminal offender in that country was on June 16th 1952 when a burglar, received 20 lashes<sup>70</sup>. The last statute on corporal punishment to be repealed in the United States was the Delaware Whipping Statute in 1973<sup>71</sup>. Nigeria should align herself with this practice in order to adequately protect the child.

## **5.0 Conclusion and Recommendation**

### **5.1 Conclusion**

The work reveals that Customary and Sharia Law do not uphold the rights of the child as provided by various legal frame work at the international, regional and national level. Hence, the rights of the child to justice is violated. Hence, they do not conduct their proceedings in the best interest of child, their personnel lack adequate training in child proceeding. Further, the courts do not ascertain the age of the child to give adequate training to the child. Consequently, the fundamental rights of the child is compromised in every sphere.

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<sup>68</sup> Section 2 repealed corporal punishment of adults.

<sup>69</sup> Section 65 repealed the use of corporal punishment on juveniles.

<sup>70</sup> Schmallegger op. cit. 483.

<sup>71</sup> Reid, S.T. Criminal Justice 8th Edition (Australia; Thompson, 2008) p. 247.

These rights include right to life , rights to dignity, rights to be protected from discrimination, rights to survival and development and rights to participation in child proceeding. Furthermore, the study observes that this challenge, can be traced to lack of juvenile courts in our Customary and Sharia Courts and recommends that Juvenile Courts should be extended to these courts for effective administration of juvenile justice in Nigeria.

## **5.2 Recommendation**

- (1) Constitutional Review: The Constitution should be reviewed in order to make the Family Court a Court of Record.
- (2) Legislative Oversight: Apart from making laws, which is the exclusive preserve of the legislators, legislators should monitor the implementation of the Constitution and Child's Right Act, to make sure that children are given fair trial in every court in Nigeria.
- (3) Legal Aid/Probono Services: The Government should encourage lawyers to give free legal services to child offenders.
- (4) Rehabilitation Services: The civil society should be involved in rehabilitation of juvenile offenders and should not be left to the government alone. The communities, the non-governmental organization and parents of the juveniles should be used as a veritable rehabilitation to enhance the juvenile justice system. Hence, they should be sensitized on the protection of the child for maximum efficiency.
- (5) Eradication of Obnoxious Laws: The Government should jettison every customary and Sharia law that impede the rights of the child.
- (6) Creation of Awareness: For there to be effective juvenile justice administration at the Customary and Sharia Court, awareness should be made from the grass root to those at the highest echelon of the society about the rights and the need to protect children, in juvenile proceedings.
- (7) Preventive Measures: the government should mount preventive measures such as creating poverty eradication programmes to curb delinquency among the

youths. For instance free education and vocational studies should be made accessible to children in order to divert them from delinquency.

- (8) Alternative Conflict Resolution: The customary and Sharia court should be encouraged to adopt alternative conflict resolution instead of giving the child corporal punishment.

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