NEW LEGISLATIVE APPROACH TOWARDS CHILD PROTECTION AND OTHER FAMILY LAW DEVELOPMENTS IN NIGERIA

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INTRODUCTION

Nigeria’s attempt to comply with the standards set by the United Nation’s Convention on the Rights of the Child finally culminated in the enactment of the Child Rights Act in the year 2003. This all encompassing legislation covered a wide range of issues including the legal age of marriage, maintenance, custody of children, property rights, education, fostering, adoption, sexual abuse, trafficking and other exploitation of children, child labour, child justice administration and so on. The Act, which may be said to have consolidated all aspects of children’s issues addressed many areas such as the marriageable age, establishment of family courts, and child justice system which had been neglected over the years.

It succeeded in portraying children not as the property of their parents or guardians but as individual human beings with full rights to legal protection. While de-emphasising the rights of parents or guardians over their children (contrary to the Nigerian culture) it elevates those of children thus debunking the social and cultural perspectives on children prevailing in many African societies.

Apart from the Child Rights Act, a few case law developments regarding the position of women in and outside marriage and their rights or absence of rights with respect to property also came up.

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1. Also the OAU Charter on the Rights and Welfare of the Child.
2. There were however the Children and Young Persons Laws operative in the different states of Nigeria under which Juvenile Courts are established to deal with issues relating to children. Every State has its own Law. It is to be noted that formation of statutory marriage and related matters is within the exclusive legislative competence of the Federal legislature and this includes fixing the age of marriage.
2.

It is intended to examine in this paper, some of the provisions of the new Child Rights Act, the extent to which the Act meets the standard set by the international covenants on children’s rights, the gradual changing attitude of government and the people towards treatment of children, the constitutional, logistic and other problems challenging the proper implementation of that Act and suggestions on the way forward.

Similarly the case law developments in Family Law will be featured as well as highlighting the implication of the new decisions. The paper will have two parts (a) Child Rights Act (b) Recent Case Law Development in Family Law.

A. CHILD RIGHTS ACT 2003

The paper, as has been indicated, will focus on only some provisions of the Child Rights Act and these are: (i) the legal age of marriage and betrothal, maintenance, education, family court, child justice system and administration.

I) Legal Age of Marriage

The Act regards the fixing of the legal age of marriage and betrothal as protection of the rights of a child.

The Act fixed the minimum age of marriage for both boys and girls at 18 years and for the first time, any marriage contracted before the child attains that age, is rendered null and void.\(^3\) Presently, the legal age of marriage in Nigeria is uncertain. The Nigerian Marriage Act\(^4\) merely provides that parental consent is necessary for the statutory marriage of a person under the age of 21 years. However if a marriage takes place without such consent, the marriage does not become

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4. 1914 Cap. 115, Laws of the Federation of Nigeria. It does not apply to customary or Islamic marriages. The Child Rights Act provision on age of marriage is meant to apply to all kinds of marriage.
null and void but remains valid.\textsuperscript{5} The Matrimonial Causes Act 1970\textsuperscript{6} does not help either. It only provides in section 3 that for a marriage to be valid under the Marriage Act, the child must be of marriageable age but specifies no particular age.

In this state of confusion arguments do spring up that the legal age of marriage in Nigeria can only be determined by reference to the English common law which set the age of 12 for girls and 14 for boys. This situation indeed promotes child marriage and its attendant evils.\textsuperscript{7}

Apart from marriage under the Marriage Act, many marriages are contracted under customary law. Customary law is usually unwritten and while its variety is multifarious, their common feature is that none of them has any particular minimum age of marriage. The vague concept of puberty seems to be the acceptable standard and under its guise a lot of child marriages take place. The right of a father to contract a marriage for his minor son or to give a daughter away in marriage at any age is entrenched in the customary law of some ethnic groups in Nigeria. This right has partly been blamed for the high incidence of child marriage and betrothal in the country. There is no lower age limit, for a child can be betrothed even at birth.\textsuperscript{8}

Bothered by this phenomenon, and in an attempt to curb the trend, the former Eastern Nigeria now comprising of nine states out of Nigeria’s thirty-six, as far back as 1956, passed a law, the Eastern Nigeria Age of Marriage Law\textsuperscript{9} which rendered null and void any marriage of a person or persons who are below the age of 16 years. The law also criminalized the causing,
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aiding, abetting and promoting of child marriage, by the imposition of both fine and imprisonment for the commission of that offence. Unfortunately that law has been honoured more in its breach than in its implementation.

In the predominantly Muslim North of Nigeria, child marriage is still rampant and shows little sign of abating. Young girls are still pulled out of school to marry men that are old enough to be their granddads. Some are still being killed or severely maimed for trying to run away from the homes of the old “husbands” they had been forced to marry. They are still being made to suffer both physical and psychological damage through early pregnancy and child birth. All these occur because of the wide acceptability of child marriage up in the North by the people who perpetrate it. Meanwhile antagonists of child marriage consisting mainly of non-governmental organizations are engaged in awareness and enlightenment programmes and campaigns aimed at curbing the practice.

On the government’s part, although the States cannot be forced to adopt age 18 which is prescribed for marriage under the Child Rights Act, the Act does provide a guide and standard for them to follow. The age set by the Child Rights Law of a State will apply to both customary and Islamic marriages under which most child marriages occur. It is therefore important for States to pass this Law which forbids parents or guardians or any other person to betroth a child under the age of 18 years to any person, and declares any such betrothal not only void\textsuperscript{10} but also a criminal offence.\textsuperscript{11} Consequently any person who marries a child, or to whom a child is betrothed or who

\begin{itemize}
  \item \textsuperscript{10} Section 22 (2) Child Rights Act.
  \item \textsuperscript{11} Section 23 (d).
\end{itemize}
promotes the marriage of a child or who betroths a child is liable on conviction to a fine of N500,000 or imprisonment for a term of five years or both fine and imprisonment.\textsuperscript{12}

Indeed a child for the purposes of the Act is a person below the age of 18 years and this age complies with the provisions of Article XXI(2) of the OAU Charter on the Rights and Welfare of the Child\textsuperscript{13} which states that child marriage and the betrothal of girls and boys shall be prohibited, and enjoins that effective action including legislation, should be taken by OAU States to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory. Presently in Nigeria there are no proper records of all customary law and Islamic Law marriages and divorces that take place because the records are simply not kept and moreover marriages are not invalidated by non-registration and divorces can be obtained extra-judicially. Similarly, only a negligible fraction of all births and deaths are registered and consequently the age of a child may not easily be ascertainable.

II) Education

Article 28(1) of the Convention on the Rights of the Child enjoins states parties to recognize the rights of the child to education by making primary education compulsory, available and free to all. They are to encourage the development of general and vocational education and ensuring their accessibility to every child and among other things, to take measures to encourage regular attendance at school and the reduction of drop-out rates.

Article XI (1) of the OAU Charter on the Rights and Welfare of the Child also states that every child shall have the right to education.
In Nigeria, education comes under the fundamental objectives and directive policies of Government and is not listed as one of the fundamental rights of the child or individual under Chapter IV of the Constitution. Therefore the ideals stated therein cannot be claimed through the judicial process. You cannot sue the Government or local government for failing to provide schools within reasonable access of a particular community or for failure to adequately equip or provide basic structures and learning materials for a school. Although it is the objective of government to make education free and compulsory at the primary level, and free at the secondary and tertiary levels, it does not confer an enforceable right on the citizens. This, inter alia, shows that the Constitution has not accorded education which has always been regarded as a powerful instrument of social change in the process of nation building the position of importance and priority which it deserves.

As a result of this attitude, education since the fiscal year of 1986 has been experiencing an unstable and highly fluctuating capital expenditure allocations. Inadequate funding is one of the greatest obstacles to achieving basic education for all Nigerian children. According to a UNICEF report, “educational infrastructure, deficient from inception, has deteriorated further in recent years due to lack of such basic items as books, equipment, vehicles, inadequate data, planning and management. In addition, teachers often go for months without pay as was the case in Anambra State in 2002 when primary and secondary school children in the state did not attend school for one whole year. The UNICEF report further stated that many classes were still held outdoors or in badly over-crowded, under-equipped classrooms and pointed out that the gap
between wealthy and poor areas have been widening. Similarly, the education landscape as in other areas of social services is littered with incomplete and run-down institutions and projects, broken down equipment and low morale. A greater proportion of children are still unable to read and write even after completing primary school. This situation, according to the report, appears to have been caused by the enormous pressure to expand the system without the provision of resources to pay for teachers, facilities and materials. This position is, to say the least, unacceptable, for the quality of education offered to the Nigerian children, must be high in order for it to achieve a meaningful purpose. The right to education means the right to quality education and nothing less.

The position now, with regard to the States which have not passed the Child Rights Law, is that parents or guardians have the right to determine the form of education their children should receive and can even decide whether or not to send them to school at all. In the absence of any law that makes education free and compulsory and with the high cost of education and economic decline in the country, education has further been entrenched as a privilege than as a right. Failure to cause a child to receive formal education is not an offence as parents and guardians are only morally and not legally bound to perform that role.

The Child Rights Act however is set to change all that, for it has introduced new laws that tend to enhance the child’s right to education. First, by virtue of that Act, every child now has the right to free, compulsory universal basic education which the government has undertaken to
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provide as a matter of duty. Second, the Act imposes on every parent or guardian the responsibility to ensure that his child or ward attends and completes his primary school education and junior secondary education. Third, every custodial parent or guardian of a child who has completed his basic education shall endeavour to support the child to senior secondary school except where the child is made to learn an appropriate trade.

The Act specifically provides that failure on the part of a parent or guardian to perform the duty of causing the child to complete his universal basic education, constitutes an offence for which a first conviction earns a reprimand and an order to undertake community service, while a second offence results in a fine of two thousand Naira or imprisonment for a term not exceeding one month, or both such fine and imprisonment. Any other subsequent conviction is punished by imposing a fine of five thousand Naira or imprisonment for a term not exceeding two months or both.

It is considered that the raising of the legal age of marriage for boys and girls to 18 years further buttresses the girl child’s rights to education as no child shall any longer be withdrawn from school for the purpose of marriage.

For the first time, legislative provision was made for a female child who becomes pregnant before completing her education to be allowed to continue with her education after giving birth, on
25. Section 15 (6) (b). The paltry amount of fine shows that it is the very poor that withdraw or do not send their children to school. For them this fine is too much.
26. Section 15 (6) (c).

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the basis of her individual ability. Consequently, the life of such a child will no longer be permanently ruined merely because of her moral mistake.

Although under the Act, the government has undertaken to provide free and compulsory basic education, past experience has shown that it had continuously paid lip service to that issue. There has not been any real free and compulsory education in the country for some decades – not even at any level. Where states governments have declared education free up to a certain level, authorities of state schools still impose illegal levies on parents which if not paid, will have the child sent out of school. This is an unsatisfactory state of affairs that must be checked. It is hoped that this kind of attitude displayed by government regarding the issue of free education will not spill over to the implementation of the Child Rights Act or Laws. The provision of the Act on education appears to be in conformity with the standards set by the Convention on the Rights of the Child and the other international covenants. All that is needed now is for the government to release sufficient funds into education and, barring mis-management and corruption, the goal of achieving a free and compulsory universal basic education for all Nigerian children will cease to be a mirage.

III) Maintenance

In statutory marriage, application for maintenance of a child will normally arise in proceedings for a matrimonial cause which, inter alia, includes divorce and judicial separation.
The Matrimonial Causes Act 1970 provides that both the mother and the father have equal responsibility to maintain the children of their marriage. Where however a parent or both parents fail to maintain the children, such children cannot enforce their right to maintenance in the absence of a proceeding for a matrimonial cause. If their parents’ conduct come within section 26 of the Children and Young Persons Law, the children may be taken away from them and be placed in a home or in the custody of some other fit person. On the other hand where a parent omits to provide the necessaries of life for his or her child under the age of 14 years thus resulting in injury to the child’s life and health, proceedings may be brought by the relevant authorities to punish and deprive the parent of his or her custodial rights.

Section 14 (2) of the Child Rights Act has further extended the child’s right by providing that the child’s right to maintenance by his parent or guardian can be enforced by the child in the Family court whether or not there is proceeding for a matrimonial cause. Orders for maintenance when made may not last beyond the child’s eighteenth birthday and when making financial orders under the Child Rights Act, the Court must also have regard, inter alia, to the income, earning capacity of the child and the parents, the child’s financial needs, physical and mental condition and education.

IV) Child Justice Administration

(a) Age of Criminal Responsibility

Article 40 (3)(a) of the Convention on the Rights of the Child and Article XVII (4) of the
32. There are no proper homes. The few existing ones are not only in bad condition but are manned by inexperienced staff that can offer little or nothing to the child.
33. See the CYPL. See also Head of Federal Military Government v. Warri Juvenile Court, Exparte Saka (1981) 3 L.R.N. 208.
34. The Family Court also has power to make an order for settlement of property for the benefit of the child.
35. See the First Schedule, Section 55(14), 3 (1) (b). Any child, whether the product of a customary or Islamic Marriage can claim maintenance under the new Law.

11.

OAU Charter on the Rights and Welfare of the child enjoins their respective member states to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

In Nigeria, Section 30 of the Criminal Code Act, 36 in conformity with the Convention on the Rights of the Child provides that a child under the age of seven years cannot be criminally responsible for any act or omission. Similarly the Penal Code 37 provides that “no act is an offence which is done by a child under seven years of age.

Under both provisions, not only is the child absolved absolutely from responsibility but such acts or omissions of his under scrutiny cannot constitute a crime at all for the purpose of there being an accessory, for example, a receiver of stolen goods where the act of “stealing was done by a child under this age. 38 The argument for this rule is that the child is presumed by law to lack the discretion to form the necessary “mens rea” and should therefore not be held accountable for his actions.

The second paragraph of Section 30 of the Criminal Code also provides that

A person under the age of twelve years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act


38. See Walters v. Lunt [1951] 2 All ER 645.

12. Section 50 (b) of the Penal Code also stipulates that:

“No act is an offence which is done –
(b) by a child above seven years who has not attained sufficient maturity of understanding to judge the nature and consequences of such act.”

39 The rule in the second paragraph of Section 30 of the Criminal Code seems to require the child who is above seven but under twelve not only to know that his act is forbidden by law, but also, that it is inherently wicked before he can be held to be criminally responsible for his act.

The Children and Young Persons Laws provide that children shall not be subjected to the normal processes of the criminal law. Their trial must take place in a juvenile court without members of the public being allowed to be present. Children below the age of 14 years shall also not be sentenced to a term of imprisonment. Even if the child is above 14 years, the juvenile court shall not hand down a sentence of imprisonment if he can be dealt with in any other suitable way. In the same vein, no juvenile below the age of seventeen years at the time he committed the offence shall be subjected to capital punishment.
However the provisions of the Children and Young Persons Law, protect only the young offender appearing before the juvenile courts and not before other courts.\textsuperscript{43} Usually the trial at the High Court would be for a more serious offence and therefore more likely to stigmatise the child. This is indeed when he needs greater protection.

\begin{itemize}
\item[39.] Cap 89.
\item[40.] Note that a male person under 12 years is presumed to be incapable of having carnal knowledge.
\item[41.] Section 11 (2). See also Section 14 of the C.Y.P.L. Cap 32.
\item[42.] Section 12 C.Y.P.L. Cap 32.
\item[43.] See Ayo Oyajobi, Women and Children Under Nigerian Law, Federal Ministry of Justice, p. 15.
\end{itemize}

13.

The Child Rights Act 2003 now deals extensively with child justice administration. It has specifically introduced a system that recognizes the vulnerability of children and the need to protect them from unnecessary stress. Thus every offence committed by a child, no matter how serious, and every other matter concerning the child shall be tried in the Family Court.

\textbf{(b) Family Court}

It provides that no child shall be subjected to the criminal process or to criminal sanctions and where a child commits an act that would have amounted to a criminal offence were he an adult, he shall be subjected only to the child justice system and processes set out in the Act.\textsuperscript{44} Hence in this regard there shall be established for each State of the Federation, a court to be known as the Family Court\textsuperscript{45} for the purposes of hearing and determining matters relating to children. The Court shall be at two levels-

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\item[(a)] as a Division of the High Court at the High Court Level; and
\item[(b)] as a Magistrate Court at the Magistrate Court Level.
\end{itemize}
The Court, subject to the provisions of the Act, has unlimited jurisdiction to hear and determine civil matters regarding the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim in respect of a child. It also has unlimited jurisdiction to hear and determine any criminal proceeding relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by a child against a child or against the interest of a child.

14.

The Court at the High Court Level has the power, inter alia, to deal with all offences punishable with death or terms of imprisonment for up to ten years or more and to hear appeals from the Court at the Magisterial level.

The members of the Court at the High Court level, includes a Judge and two assessors, one of whom has attributes of dealing with children and matters relating to children preferably in the area of child psychology education. At the Magistrate level, it shall consist of such number of Chief Magistrates and assessors who shall be officers not below the rank of senior Child Development Officer as shall enable the Court to effectively perform its functions under the Act.

Appeals shall lie to the Court of Appeal on any matter decided by the Court at the High Court level, as they will normally go from ordinary High Courts. Similarly appeals lie to the Court at the High Court level from the Court at the Magistrate level.
It is provided that in constituting a Court handling a matter concerning a child, consideration must be given to the circumstances and the needs of the child, particularly the age, sex, religion or other special characteristics of the child.\textsuperscript{53} Moreover a child has the right to be represented by a legal practitioner and is entitled to free legal aid in the hearing and determination of any matter concerning him in the Court.\textsuperscript{54}

No person except members and officers of the Court, the parties to the case, their lawyers, parents or guardians and other persons directly concerned in the case shall be allowed to attend the Court. Indeed members of the Press are expressly excluded.\textsuperscript{55}

\begin{itemize}
  \item[48.] Section 152 (4).
  \item[49.] Section 152 (1) (a) and (b).
  \item[50.] Section 153 (1) (a) and (b).
  \item[51.] Section 152 (5).
  \item[52.] Section 153 (5).
  \item[53.] Section 154 (3).
  \item[54.] Section 155.
  \item[55.] Section 156 (a-d) The records of a child offender shall be strictly confidential. See Section 205 (3).
\end{itemize}

The identity of the child is to be strictly guarded so that it is not allowed to publish the name, address, school, photograph or anything likely to lead to the identification of the child whose matter is before the Court.\textsuperscript{56} A contravention of this rule is an offence which attracts a fine of fifty thousand Naira or imprisonment for five years or to both such fine and imprisonment.\textsuperscript{57}

Respect for the child’s right to privacy at all stages of child justice administration in order to avoid harm being caused to him by undue publicity or by the process of labelling, is further reinforced by section 205 of the Act. Consequently no information that may lead to the identification of a child offender shall be published and the records of such a child must be kept strictly confidential.\textsuperscript{58} They must not be used in adult proceedings in subsequent cases involving the same child offender.\textsuperscript{59}
The fundamental rights of the child must be respected and therefore he must be presumed innocent and be notified of the charges against him.\textsuperscript{60} He has a right to remain silent and to have his parent or guardian present.\textsuperscript{61}

Stages in child justice administration include (a) investigation, and prosecution, (b) adjudication and follow-up dispositions.

When a child is apprehended, his parents or guardian shall immediately be notified or where it is not possible to notify immediately, it must be done within the shortest possible time after the apprehension of the child.\textsuperscript{62} The Court or police as the case may be, must without delay, consider the issue of release\textsuperscript{63} and in any contact between the police and the child, there must be respect for the legal status of the child and his interest and well-being must be promoted.\textsuperscript{64} Harm to the child must be avoided regarding his situation and the circumstances of the case.\textsuperscript{65}

For this purpose harm includes the use of harsh language, physical violence, exposure to the environment etc.\textsuperscript{66} The police often deal ruthlessly with offenders, including child offenders especially when they are in the older range.

The child shall not be detained pending trial except as a last resort and it must be for the shortest possible time.\textsuperscript{67} Wherever it is possible, detention should be replaced by alternative measures such as close supervision, care by, and placement with a family or in an educational
However while in detention the child should be given social, educational, vocational, psychological, medical and physical assistance that he may require having regard to his age, sex and personality.69

Where a child is ordered to be kept in police detention, obviously because of the seriousness of his act, the Court must ensure, if he has attained the age of fifteen years, that he is moved to a State Government accommodation, if space is not available in the secure accommodation and keeping him in any other authority’s accommodation will not sufficiently protect the public from harm.70

17.

A child offender shall be tried in the Court but the terms “Conviction” and “sentence” shall not be used in relation to him.71 If his act amounts to a criminal offence the parent or guardian must attend all stages of the proceeding. The Court may even make an order requiring them to attend.72

The child’s right to fair hearing and any other due process must be observed during trial.73 Indeed the procedure established by the child justice system under the Act requires that during trial, the child’s legal status must be respected, his best interest and well-being promoted and harm to him avoided.74 The proceedings must be conducted in an atmosphere conducive enough to enable the child participate and express himself fully.75 As much as possible, the Court shall
ensure that the child is not deprived of his personal liberty and it is only where he is found guilty of a serious offence involving violence against another person or of persistently committing other serious offences that the child may be personally restricted.\textsuperscript{76} Hence a balance is struck between the child’s interest and that of the public whose safety must also be protected. This apart however, the well-being of the child should be the guiding factor in the consideration of his case.

The child’s parents or guardians while in the Court are allowed to participate in the trial. They like the child, may question witnesses and make statements if they so wish.\textsuperscript{77}

If the child admits the offence or the Court is satisfied that the offence is proved, the Court, before deciding on how to deal with him, shall obtain information as to his general conduct, home surroundings, school record, medical history etc, to enable it make a decision as to how best to deal with the child.

A child who admits the commission of an offence may be remanded for the purpose of inquiry or observation. He will be remanded to a State Government accommodation\textsuperscript{78} and where necessary the Court will impose a security requirement, which means that the child in question will be placed and kept in secure accommodation.\textsuperscript{79} However a security requirement can only be imposed in respect of a child who has attained the age of 15 years and who is charged with or has been found to have committed a violent or sexual offence, or an offence for which an adult can be imprisoned for up to fourteen years or more. But such an order can only be imposed where the

\textsuperscript{71} Section 213 (2). See also e.g., Section 17 of the Children and Young Persons Law Cap. 25 Laws of Lagos State 1994. Every State has its own Law.

\textsuperscript{72} Section 216. See Section 9, Children and Young Persons Law.

\textsuperscript{73} Section 214 (1).

\textsuperscript{74} Section 214 (2).

\textsuperscript{75} Section 215 (1) (a).

\textsuperscript{76} Section 215 (1) (d) (i) (ii).

\textsuperscript{77} Section 216 (1) and (2).

\textsuperscript{78} Section 216 (1) and (2).
child has a recent history of absconding while remanded to a State Government accommodation and is charged with or has been found to have committed an offence punishable with imprisonment while he was so remanded, and the Court is of the opinion that only such an order would be adequate to protect the public from serious harm from the child. The State Government may, when it deems fit, apply to vary or revoke any condition or requirement imposed under the order. This will depend on the progress made with the child who is under detention.

The Court has power to order a parent or guardian to pay the fine, damages or compensation or costs awarded by it. It may also order them to give security for his good behaviour.

The Child Rights Act also provides that no child shall be ordered to be imprisoned or subjected to corporal punishment or to the death penalty.\textsuperscript{80} Death penalty shall also not be recorded against him. However the Nigerian Criminal Code\textsuperscript{81} provides that-

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“subject to the provisions of any other written law, the punishments which may be inflicted under this Code are death, imprisonment, caning, fine and forfeiture.”
\end{quote}

Section 18 then goes on to provide-

\begin{quote}
“Whenever a male person who, in the opinion of the court, has not attained seventeen years of age, has been found guilty of any offence, the court may, in its discretion, order him to be caned in addition to or in substitution for any other punishments to
This provision is clearly not in conformity with Section 221 (1) (b) of the Child Rights Act and as to which law will apply in place of the other, it appears that the Child Rights Act or Law will precede the Criminal Code being a latter law and both being state Laws.

One important thing that has been introduced by the Child Rights Act, is the requirement that every Judge, Magistrate and other judicial officers appointed to the Court shall be trained in sociology and behavioural sciences to ensure effective administration of the child justice system. They shall also receive, in-service training, refresher courses and other instructions necessary to maintain professional competence. The Act has also provided for the establishment of a Special Police Unit whose functions include the control and prevention of child offences, apprehension of child offenders and investigation of child offences. In cases of minor offences, the officers of the

82. The Penal Code generally allows caning and the recently gazetted Sharia Penal Codes applicable in the different Northern States also apply caning as a form of punishment.

Unit have the power to dispose of the case without resorting to a formal trial. Thus, other alternatives such as settlement, supervision, guidance, restitution and compensation of victims can be used for this purpose, and steps taken to encourage the parties involved in the case to settle the case informally. This will certainly reduce the burden and pressure that will likely be experienced by the Court as more cases arise. Finally, Section 160 provides that in proceedings whether civil or criminal, the evidence of a child may be given unsworn and Section 162 states that no other court except the Family Court shall exercise jurisdiction in any matter relating to children as are
specified in the Act. However, adults connected with the offence shall be tried at the ordinary courts.

V) **Children in Need of Care and Protection**

According to a recent study entitled: “Children on the Brink” published by UNICEF in 2004, there were 43 million orphans in Sub-Saharan Africa in 2003. In Nigeria, an assessment of orphans and vulnerable children conducted with UNICEF support in 2004, showed that there were about 7 million orphans. Among these, about 1.8 million were orphaned by HIV-AIDS. These children are definitely in need of care and protection which the Child Rights Act has provided for. Hence Section 50 provides that a child development officer, a police officer or any other person authorized by the Minister may bring a child before the Court if “he has reasonable grounds for believing that the child is an orphan or is deserted by his relatives………………” The Court may then commit the child to the care of any person whether a relative or not, who is willing to undertake the care of the child. Unfortunately the few orphanages that exist are not government funded and they are not enough to cope with the present emergency situation following the rapid increase in the population of orphans in the country. There however seems to be a reprieve for during this year’s celebration of the Day of the African Child, the President directed that “Orphans and Vulnerable Children Centres” be established in the six geo-political zones of the country as a way of tackling the increasing number of orphans. He announced that the funds are ready for the project to take off immediately.
While the establishment of such centres is a worthy cause, responsible well-to-do Nigerians are also urged to consider adopting these children into their families. To be brought up within a family unit is certainly better than growing up in a care home.

VI) Emergency Protection Orders

This constitutes a new approach to child protection in Nigeria. Section 42 authorises the Court to make an emergency protection order with respect to a child upon the application of a state government or other appropriate authority if it is satisfied that there is reasonable cause to believe that the child is suffering or is likely to suffer significant harm if he is not removed to an Emergency Protection Centre or other approved suitable accommodation or if he does not remain in the place in which he is then being accommodated. An emergency protection order can also be made if enquiries with respect to the welfare of the child are being frustrated by the unreasonable refusal of access to a person authorized to seek access or access to the child is required as a matter of urgency.

An order can last for 9 days and can only be extended once for a period of 7 days. While the order is in force, it gives the applicant parental responsibility towards the child and is allowed to take only actions that promote the child’s welfare.

While the emergency order is in force the Court can also direct that the child be medically examined or assessed as the case may be. This may arise where there is suspicion of abuse. The child however, depending on whether he has sufficient understanding to make an informed decision, may refuse to submit to medical or other examination that may enable the Court decide what to do in the situation. This recognizes a child’s limited independence.
Section 44 provides also that in case of an emergency a child may be taken into police protection by removing him to an Emergency Protection Centre or any other approved suitable accommodation. This may be necessary where a child is under the control of a robbery gang or some dubious characters. The Special Police Unit shall handle the situation and upon taking the child under their protection they must inform the State government. The child in all this, must be informed of the reasons for the step taken by the police if he appears capable of understanding.

An emergency protection order may be discharged upon the application to the Court by the child or his parent or a person who has parental responsibility to the child or the person with whom the child was living immediately before making the order.

VII) Child Rights Implementation Committee

The Child Rights Act makes provision for the establishment of committees to facilitate the implementation of the Child Rights Act. Hence the Committees are to operate at three different levels namely:

(a) National Child Rights Implementation Committee.\(^83\)

(b) State Child Rights Implementation Committee.\(^84\)

(c) Local Government Child Rights Implementation Committee.\(^85\)

The membership at every level is wide in terms of representation. All relevant bodies, parastatals, ministries, Courts and organizations are to be represented at the committee. Their functions are multifarious and include initiating actions that will ensure the observance and popularization of the rights and welfare of the child, among other things.
VIII) Institutional Treatment of Child Offenders

It is provided in the Child Rights Act that when a child is committed to an approved institution, he should be given care, protection and all necessary assistance with respect to his social, educational, vocational, psychological and medical needs. The intention of the Act is to ensure that the child who is so committed does not lose out or suffer any deprivation in terms of education and other development such as vocational or academic training and treatment. Furthermore it is aimed to assist the child to assume socially constructive and productive roles in the society. The emphasis seems to be more on reforming the child than punishing him which had been advocated for years before the Act. Under the Children and Young Persons Laws, child offenders were sent to Borstal Training Institution. There is only one such institution in the whole country which meant that children who needed to be sent to such places were often not sent for lack of the facilities. Borstal Institutions now seem to have given way to approved institutions by virtue of the Child Rights Act. That Act now requires every state government to provide approved institutions such as Children Centre, Residential Centre, Correctional Centre, where child offenders may be kept and rehabilitated.

86. Section 236.

There is also provision for non institutional treatment in which case the child is not committed to an institution but is assisted and monitored from where he resides. He may for
instance be required to render some community service while under this order. The aim is to rehabilitate and develop the child in a proper way.

IX) Supervision Order

Rather than commit a child as stated earlier, the Court may discharge the child and make a supervision order. The child may be required to enter into recognizance, with or without sureties, to be of good behaviour and to appear any time he is called up by the Court. For a period not exceeding, three years, the child will be under the supervision of a person named in the order, usually the supervision officer appointed by the Commissioner for that purpose.

The officer is expected to visit or receive reports from the child at intervals specified in the order and to ensure that the child observes the conditions of his recognizance. He should also make a report to the Court about the child’s behaviour and advise and assist the child generally.

There is also provision for post-release supervision of a child offender. To facilitate this, there shall be established in parts of the Federation or State, institutions to be known as approved children institutions. These are – (a) Children Attendance Centre (b) Children Centre (c) Children Residential Centre (d) Children Correctional Centre (e) Special Children Correctional Centre and any other institution that the Minister would wish to establish.

A Children Attendance Centre is meant to be a non-residential place at which children shall attend on such days as the Court may prescribe and a Children Centre is a place for the detention of children who are remanded in or committed to custody for trial or for the making of
a disposition order after trial or while awaiting adoption or fostering. A Children Residential Centre is a place in which child offenders may be detained and given regular school education and other training and instruction that may help to reform and re-socialise them. A Children Correctional Centre has the same function as Residential Centres while a Special Children Correction Centre will harbour “incorrigible” children that may likely have a bad influence on other inmates, detained in a Children Correctional Centre.

All officers appointed to all the approved institutions stated above must have a background or training in criminology, criminal justice, sociology, psychology, social psychology, guidance and counseling or social work.91

X) Constitutional Issues and Other Problems Affecting Implementation

It is the Constitution92 of the Federal Republic of Nigeria that empowers the National Assembly to make laws for the Federation of Nigeria. The National Assembly has the power to legislate exclusively on matters in the Exclusive List.93 It also has the power to legislate on matters in the Concurrent list. Any matter not contained in the Exclusive and Concurrent Lists is outside its legislative competence. Only the State Assemblies can legislate on such matters said to be in the Residuary List.94

The issue of Child Rights is not in the Exclusive List of the Constitution neither is it included in the Concurrent List. It therefore follows that the National Assembly which enacted

91. Section 252 (3).
the Child Rights Act lacked the competence to enact a Law that will be applicable to the whole country and consequently that Act is applicable only to the Federal Capital Territory of Abuja.

However the Act is relevant to the extent that it has set the standard or the model for the States to follow when enacting their own Child Rights Laws. So far, only five States, Anambra, Enugu, Imo, Ebonyi and Plateau have enacted Laws, similar in content and effect to the Child Rights Act. Some States are in the process of making their own Laws. The problem is that where a State refuses or fails to make this law nothing can be done about it since the matter is a state issue. Indeed, it is only pressure to comply, local and international, that may be used against such a State.

Another problem facing the success of this Law is the cost implication of its implementation. For example, the States have the responsibility to provide enough schools, equipment, books, and teachers in order to achieve the goal of making education truly free and compulsory. They also have the duty to provide the necessary government accommodation and other institution required for the proper working of the Act. There will also be the cost of training Judges, Magistrates, members of the Police Special Unit and officers of government approved institutions in the art of dealing with children, especially child offenders.

Putting up these structures, systems and infrastructures will involve enormous sums of money and therefore requires that the Federal Government releases adequate funds to the States for the purpose. Evidence of run down facilities and equipment that have been neglected over the years bear witness to the fact that Nigeria had never been famous for budgeting enough money for

95. Ondo State House of Assembly has just passed a Law, Ondo State Universal Education Law, 2005 which makes education up to junior secondary school level, free and compulsory.
education and other important projects, particularly those relating to children. It is therefore important to provide the funds now and to have the commitment and interest to execute the necessary projects in a systemized and co-ordinated manner. Attitudes are gradually changing however, for a noticeable interest in the welfare of children is growing steadily both within the government and among non-governmental organisations. The recent announcement by the President, giving directives for the establishment of “orphans and vulnerable children centres,” in the six geo-political zones in the country, the signing into law of the Child Rights Act itself after a long delay, and the gradual passing of the Law by State Assemblies, are examples. Similarly, a growing number of NGO’s is establishing homes or centres, (which must register with government), where abandoned babies and children, orphans, handicapped and destitute children are cared for and trained to become useful and responsible members of the society. In view of these, there is no doubt that Nigeria is beginning to feel the pressure from international bodies like UNICEF and ILO to live up to its responsibilities towards children and it is gradually responding.

Another perceived problem relates to the age of marriage for boys and girls, particularly for girls. The Child Rights Act set it at 18 years but it is still a fact that in Nigeria today, registration of birth is not taken seriously despite the Birth, Death, etc. (Compulsory Registration) Act 1992, so that many children born in the country, especially in the rural areas, have no birth records. This makes it difficult to prove with ease, the age of a person. The alternative way which may involve medical or scientific tests is not only expensive but time wasting. Moreover planning and budgeting becomes more difficult when the size or number of children is unknown.

Furthermore it appears that nothing can be done to any state which decides to set its age of marriage at 12 or 13 years in its Child Rights Law. The age set by the Law can only apply to
customary and Islamic marriages and not to statutory marriages. Here again, it is only the pressure to comply, that can be used against any State in that position. Regarding statutory marriage,\textsuperscript{96} there is also no specified age of marriage, and any age set by the Child Rights Law cannot apply to it. The common law ages of 12 and 14 years have been argued to be the ages of marriage for girls and boys respectively, under the statute. This shows the need to amend the Marriage Act by setting the age of marriage at 18 years.

XI) Suggestions Regarding the Child Rights Act

There can be no better way forward than to suggest that the following be done –

(a) Every State Legislature should enact the Child Rights Law following the model of the Child Rights Act 2003. It is an important first step which is evidence that the rights and welfare of children is being taken seriously.

(b) The Federal Government should set up a special fund for the implementation of the Child Rights Act and Laws, and disburse generously out of it to State Governments for the purpose of implementing the Act. In addition, the annual budget of States must reflect a genuine commitment towards enhancing the rights and welfare of children. Education should be a priority, with the construction of more schools and purchase of books and other educational tools. Refurbishment and rehabilitation of rundown structures, facilities and equipment must be undertaken. More teachers must be engaged and their salaries promptly paid when due, in order to raise their morale. Education should be made truly free and compulsory up to Junior Secondary Level. The establishment of Family Courts and other institutional centres for detaining, assisting and developing child offenders must

\textsuperscript{96} Formation of marriage, annulment or dissolution of marriage and all matrimonial causes are in the exclusive list of the Constitution. Islamic and customary law marriages are however not included.
not be delayed. Nigeria has just received a debt relief of about 18 billion dollars from the Paris Club and there is no doubt that this relief will enable the government to pursue capital projects as indicated above.

(c) The Constitution must be amended to make education for children up to a certain level, a fundamental right that can be enforced, if not reasonably provided. At present it comes under the fundamental objectives of the government.

(d) The Marriage Act which governs all statutory marriages throughout the country should be amended to specify age 18 years as the legal age of marriage in order to avoid the present uncertainty. If this is done, child marriage may be avoided.

On the whole the provisions of the Child Rights Act largely conform with the Convention on the Rights of the Child and the OAU Charter on the Rights and Welfare of the Child. It is provided in Section 1 that in every action concerning the child, his best interest shall be the primary consideration and by Section 10, that the child shall not be subjected to any form of discrimination because of his ethnic affiliation, place of origin, sex, religious or political opinion. Indeed more rights have been given to children and many things relating to the child’s right and welfare have been covered by the Act including the child’s right to be heard. What is remaining now is its successful implementation.

B DEVELOPMENTS IN FAMILY LAW

1) Property Rights and Inheritance by Women

In 1997 the Nigerian Court of Appeal in the case of Mojekwu v. Mojekwu\(^7\) made what was regarded as a landmark decision regarding women’s right to inheritance of property and made
pronouncements which were generally welcomed by women. The case involved a claim by the plaintiff whose father, Charles Nwofor Mojekwu died in 1963. Charles had an only brother, the plaintiff’s uncle, Okechukwu Mojekwu who died in 1944. The property in dispute was owned by Okechukwu who was married to two wives, Janet and Caroline. Janet had two daughters while Caroline had just a son, Patrick Adina. Patrick unfortunately died during the Nigerian civil war between 1967 and 1970 which meant that Okechukwu had no surviving male issue. The property, situate in Onitsha was held by Okechukwu during his lifetime under a “Kola tenancy land tenure system which obtains in Onitsha.

The plaintiff’s claim was that as the eldest surviving male in the Mojekwu family he inherited the property under the native law and custom of Nnewi known as “oli-ekpe”. By this custom, if a man dies leaving male issue, the property is inherited by that male child. If the deceased was not survived by a male issue, his brother will inherit his property. On the other hand if the male issue who survived the father dies leaving no male issue, his paternal uncle will inherit the property. Upon the death of such uncle, the uncle’s eldest son, if any, will inherit the property. Wives and daughters are excluded from any inheritance. This eldest surviving son is known as the “oli-ekpe”, that is, the person who inherits the property of his relation. The “oli-ekpe” inherits the land, the wives of the deceased and if the deceased had daughters, he will give them away in marriage when the time comes. Indeed he inherits the assets and liabilities of the deceased. The plaintiff’s assertion was that he was the oli-ekpe.

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98. The Nnewi custom of “oli-ekpe” upon which the plaintiff based his claim to the property in dispute was declared by the Court to be repugnant to natural justices, equity and good conscience.
The trial court dismissed his claim mainly on the basis that the inheritance law which applied to the property in question was the “lex situs” which is the Kola tenancy land tenure of Onitsha\(^\text{99}\) and not the personal law of the parties which is the oli-ekpe custom of Nnewi. The plaintiff appealed and the Court of Appeal also dismissed the case.

Niki Tobi J.C.A. adjudged the “Oli-ekpe” custom of Nnewi, repugnant to natural justice equity and good conscience. He said,

“Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilized sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the women folk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings – male and female are born into a free world, and are expected to participate freely, without any inhibition on grounds of sex, and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is anti-thesis to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs including the Nnewi “Oli-ekpe” custom relied upon by the Appellant are not consistent with our civilized world in which we live today……… I have no difficulty in holding that the “Oli-ekpe” custom of Nnewi, is repugnant to natural justice equity and good conscience.”

The plaintiff, dissatisfied with the judgment, appealed to the Supreme Court.\(^\text{100}\)

The Supreme Court while dismissing the appeal, however pronounced that it was wrong for the Court of Appeal to declare the “Oli-ekpe” custom repugnant to natural justice, equity and good conscience.

\(^{99}\) Under the Kola tenancy system the children of the deceased Kola tenant whether male or female, can inherit the property but under the oli-ekpe custom, females cannot inherit property.

Uwaifo JSC reading the lead judgment said that a binding judicial declaration or pronouncement must derive from relevant established principles of the rule of law…… and that the Court in every case should limit itself to issues joined by the parties on their pleadings because to go outside those pleadings was an aspect of a denial of fair hearing which might lead to a miscarriage of justice. He said that these principles apply in every situation where a Court is faced with a custom of a people and it conceives that such a custom may have some element of repugnancy. He made it clear that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with English law concept or some principle of individual right as understood in any other legal system. He said that before condemning a custom, the court must hear the parties\(^{101}\) and dispassionately consider the repugnancy principle.

The learned Justice of the Supreme Court rejected Niki Tobi JCA’s pronouncement on grounds stated below. He said-

“The in the present case, because of the circumstances in which it was done, I cannot see any justification for the Court below to pronounce that the Nnewi native custom of ‘Oli-ekpe’ was repugnant to natural justice, equity and good conscience. First, the issue that oli-ekpe in question was repugnant was not joined by the parties. Second the court below having felt strongly about its repugnancy, as can be seen from the emotive and highly homilised pronouncement, was obliged to draw the attention of the parties to it, raise it \textit{suo motu} and invite them to address the Court on the point. Third,

\(^{101}\) It is a wonder who else Uwaifo JSC expected the court to hear from. The plaintiff who relied on the custom had been heard. The girls who were the likely victims of the custom would certainly not acclaim it if given a free choice. Perhaps he meant members of the community.
the Court below itself had reached a conclusion that the applicable custom was that of the Kola tenancy of the lex situs. The pronouncement which was not necessary for deciding the suit can thus be assessed upon the scenario in which it was made. Fourth, the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi “Oli-ekpe custom. But the language used made the pronouncement so general and far-reaching that it seems to cavil about, and is capable of causing strong feelings against, all customs which fail to recognize a role for women. For instance, the custom and tradition of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice in their native communities. It would appear for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet’s nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.”

It is our view that this outburst by Uwaifo J.S.C. against the pronouncement of Niki Tobi regarding the “Oli-ekpe” custom is totally unwarranted. Why should Niki Tobi close his eyes and not comment on the custom which was indeed the basis of the plaintiff’s claim to the property in dispute. The plaintiff gave evidence and details of that custom and nobody controverted its existence. Niki Tobi, though admitting that the law applicable to that property was the lex situ, also went on to declare the “Oli-ekpe” custom repugnant to natural justice equity and good conscience.

Uwaifo’s expressed fears that Niki Tobi’s pronouncement would likely cause an uprising of women or result in increased bad feelings against men is unfounded. He seemed to be quarrelling with the strong language with which the custom was condemned when he said that even if the parties had joined issues he would still not have allowed the pronouncement to stand.
As far as he was concerned, that custom which clearly discriminates against women stands until perhaps, the so called hearing of the parties in a future case takes place. The other four Justices of the Supreme Court concurred to their learned brother’s conclusion.

By this judgment, the Supreme Court had indeed with a wave of the hand, killed the hopes of many women who believed they scored a victory after Niki Tobi’s judgment in the Court of Appeal\textsuperscript{102} and had awaited its confirmation by the Supreme Court. It is only hoped that in the future when another opportunity arises and the parties have addressed the court on the custom, the Supreme Court will in milder language condemn the “Oli-ekpe” custom.

Another case that arose is that of Anyaso v. Anyaso\textsuperscript{103} where the Court of Appeal when considering the quantum of maintenance award to be made to the wife in divorce proceedings took account of the husband’s manufacturing companies, his nine saloon cars and houses, the wife’s poor educational background and her non-employment, in coming to their decision. But earlier in 1971, two Supreme Court decisions, Olu-Ibukun v. Olu-Ibukun\textsuperscript{104} and Negbenebor v. Negbenebor, \textsuperscript{105} had held that a man’s house and money in his bank account are not income and should therefore not be considered. Admittedly while these are not income, there is no doubt, (as reflected in Anyaso’s case), that they constitute a party’s means or earning capacity and therefore should have been considered. “Means” and “earning capacity” should not narrowly be interpreted to mean only income.

We submit that the decision in Anyaso is more acceptable.

\textsuperscript{102} Even the Ministry of Women Affairs and other Women’s Organisations will also begin to court their losses as a result of the judgment and the demonstrated attitude of Uwaifo JSC.
\textsuperscript{103} (1998) 9 NWLR Part 564. p. 150.
104. (1971) 1 All Nig. Law Reports, 513.
105. (1971) 1 All Nig. Law Reports, 210.
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