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A COMPARATIVE ANALYSIS OF THE PROVISIONS OF LEGITIMACY AND PATERNITY UNDER THE CHILD'S RIGHT ACT AND ISLAMIC LAW IN NIGERIA

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INTRODUCTION

Children, by reason of their age, physical and mental immaturity constitutes one of the vulnerable groups in the society. They are dependants on parents/guardians who are adult for their necessaries of life. They need care, attention and guidance. They require as of right shelter feeding, clothing, education, religious upbringing as well as medical care for them to turn up well into the society as responsible citizens. The rights of the child are being neglected and abused by parents/guardians in so many ways such as inadequate provision of sexual abuse to mention but a few, which in turn affects the wellbeing of the child. Every child has the right to proper parental care and guidance irrespective of any contending issue on paternity.

It is pertinent to establish a point about the laws in issue, the context of each depends on its background. Thus law, has been defined by the new encyclopaedia Britannica as the discipline and profession concerned with the customs, practices and rules of conduct of a community that are recognised as binding.[1] It is therefore expected to find conflicting principles arising from provisions of the two laws emanating particularly from the fact of differences in customs, traditions and practices applying in diverse communities especially one with an established traditions, rules and practices as Islam.

Children found in disadvantaged position in the society raised a great deal of concern which led to accounted for their needs being the Geneva declaration of the rights of the child in 1924; universal declaration of Human Rights, the Declaration of the rights of the child adopted by the United Nation General Assembly on 20-11-59 and the adoption of its convention on 20-11-89.

Nigeria having signed the convention on the Rights of the child is making conscious efforts to domesticate it in all the states of the federation within their peculiarities in terms of culture and religion. Accordingly, the child's Right Act 2003 is applicable to the Federal Capital Territory having been passed into law and the federal government is exerting pressure on all the states of the federation to follow suit. Some few states such as Nassarawa, Plateau, Taraba, Ekiti, Enugu, Ogun, Anambra & Bayelsa have adopted and passed the Act into law with some few amendments to

[1] Encyclopedia Britannica 1994 Vol. VII, Micropeadia, U. S. A., 15th ed. P200

accommodate their cultural peculiarities whilo some other states are still in the process at different stages.

One aspect of the Child's Right Act that interestingly agitates our minds is Part VII relating to the method for determining the paternity or maternity of a child.

The Act prescribed the use of scientific test for doing so. This is in contrast to Islamic law under which marriage is the only recognised means of determining paternity of a child. Illicit relationship is unlawful and carries heavy penalty.

By and large it is important to inquire about the rationale of the Act in prescribing the use of scientific test to determine paternity or maternity. It is submitted that the reasons may not be far fetched; it is probably to ensure that each child have a secured parentage which carries with it other attendant responsibilities such as those envisaged under section 20 which provides for parental guidance with respect to the child. Section 52(2)(a), (3), (4) & (5) which vest court with the power to order parent to contribute to maintenance of a child. Section 68(5), (7), (8) & (9)(a) & (b) which gives the family court power to make order conferring parental responsibility on a father with or without his consent. This type of order is in particular relevant to children born outside marriage. In contrast, under Islamic law once there is no marriage between the parties the man can not assume or be given paternity of a child neither can the child be legitimate. Hence the issue of assuming responsibilities, rights and duties as enumerated above does not arise.

It is therefore the aim of this discourse to examine and review the provisions of part VII of the Act on determining paternity or maternity of a child in the light of Islamic Legal provision on the subject.

The fundamental issue to be examined and clarified is whether the provisions of part VII of the Child's Right Act is in agreement and reconcilable with the provisions of Islamic law or not. If it is not, whether it would be acceptable to the Muslims and on what terms, especially in some of the Northern states where they are predominantly Muslims; and considering that there are very clear and unambiguous provisions under Islamic law on the subject to which some of the provision of the Child's Right Act seems to be in conflict; thus creating the basis of controversy and resentment by the Muslims. In order to create more understanding on the divergence of principles we intend to examine these differences here below.

Legitimacy and Paternity

Definition:-

Legitimacy has been defined as the status of a person who is born within a lawful marriage or who acquires that status by later action of the parents, and that it is the legal kinship between a child and its parent or parents.[2]

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2 Garner B.A., 2004 Blacks Law Dictionary, 8th Ed. West Publishing Co., USA p. 920

Whereas, "Paternity", has been defined as the state or condition of being a father especially a biological one.[3]

Consequently, the antonym of legitimacy is illegitimacy. Illegitimacy is defined as the status of a person who is born outside a lawful marriage and who is not later legitimated by the parents.

On the other hand Legitimacy under Islamic law may be defined as the relationship of a child to its parents; it is restricted to the descent of a child from its father created through marriage only. Marriage is contracted for the purpose of legitimizing progenies, so that every child would have a secured identify and linkage. This therefore implies that paternity can only be secured through lawful marriage.

The issue of legitimacy and Paternity assumes an important dimension usually when there is dispute over same and especially when it arose outside wedlock.

Ordinarily, when a child is born to couple lawfully married, there is hardly any question over the legitimacy and paternity of the child. Where however, the parties are not married or there is a strong suspicion of unfaithfulness among the married couple dispute over paternity and denial of responsibility of the conception of the child sets in.

In such situation, the Child's Right Act on the one hand makes provisions on how the dispute is to be settled. On the other hand there are Islamic legal provisions on how such a dispute is to be resolve for the Muslims. It is clear from the above that under Islamic Law any child conceived outside wedlock is illegitimate and there is no mechanism whatsoever through which such a child would be legitimized.

Under the common law and statutes however, it is clear that an illegitimate child may be legitimized by the parents. This may be seen as the dividing line between Islamic Law, Statutes laws and Common Law positions.

Legitimacy and Paternity under the Child's Right Act.

The child's Right Act skilfully and consciously avoided making any compelling provision on legitimacy; it rather confined its provisions to determining paternity. This is probably because its sole aim is to secure a father for the child notwithstanding whether the child is legitimate or illegitimate. Other necessaries for the child's wellbeing are taken care of under some salient provisions of the Act which compel whoever turns out to be the father to shoulder some responsibilities.

Part VII of the Child's Right Act makes provision for the use of scientific test in determining the Paternity or maternity of a child. It provides thus:-

1 In any civil proceedings in which the paternity or maternity of a person falls to be determined by the Court hearing the

[3] Ibid. p. 116

proceedings, the Court may, on an application by a party to the proceedings, give a direction for:-

(a) the use of scientific tests, including blood tests and Deoxyribonucleic Acid tests to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking within a period to be specified in the direction, of blood or other samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons.

The Court may at any time revoke or vary a direction previously given by it under subsection (1) of this section.

Where

(a) an application is made for a direction under this section; and

(b) the person whose paternity or maternity is in issue is under the age of eighteen when the application is made, the application shall specify who is to carry out the tests.

In the case of a direction made on an application to which subsection (3) of this section applies, the Court

(a) shall specify that the person who is to carry out the test is the person specified in the application; or

(b) may where the Court considers that it would be inappropriate to specify the person referred to in paragraph (a) of this subsection, because specifying that person would be contrary to any provision of regulations made under section 65 of this Act or for any other reason decline to give the direction applied for.

The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under this section shall make, to the Court which gave the direction a report in which he shall state.

(a) the result of the tests.

(b) whether the party to whom the report relates is or is not indicated by the results as the father or mother of the person whose paternity or maternity as the case may be, is to be determined, and

(c) if the party is so indicated, the value, if any, of the results in determining whether that party is actually the father or mother of that person.

The report made under subsection (5) of this section shall be ---

(a) received by the Court as evidence in the proceedings of the matters stated in the report; and

(b) in the form prescribed by regulations made under section 65 of this Act.

Where a report has been made to the Court under subsection (5) of this section, any party to the proceedings may, with the leave of the Court, or shall, if the Court so directs, obtain from the person who made the report a written statement explaining or amplifying any statement made in the report, and that statement shall deemed for the purposes of this section, except subsection (5) (b) of this section, to form part of the report made to the Court.

Where a direction is given under this section in any proceedings, a party to the proceedings, shall not, unless the Court otherwise directs, be entitled to call as a witness....

(a) the person who carried out the tests taken for the purpose of giving effect to the direction; or

(b) any person who did any thing necessary for the purpose of enabling those tests to be carried out, unless within fourteen days after receiving a copy of the report that party serves notice on the other parties to the he Court may direct, of his intention to call that person, and where a person is called as a witness the party who called the person shall be entitled to cross-examine that person.

9. Where a direction is given under this section, the party on whose application the direction is given shall pay the cost of taking and testing blood or other samples for the purpose of giving effect to the direction, including any expenses reasonably incurred by any person---

(a) in taking any step required of the person for the purpose, and

(b) in making a report to the Court under this section, but the amount paid shall be treated as costs incurred by the party in the proceedings. [4]

The Act however, appears to be liberal on the provisions of section 63 administering scientific test since it subsequently makes submission to the te taking of sample voluntary, a putative parent may decide to withhold hi consent. In this respect the Act provides:-

1. Subject to the provisions of subsections (3) and (4) of this section, scientific sample which is required to be taken from any person for the purpose of giving effect to a direction under section 63 of this Act shall not be taken from that person except with his consent.

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

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

4. A scientific sample may be taken from a child who--------

[4] Section 63, Part VII Child's Right Act 2003

a. is suffering from mental disorder within the meaning of any relevant law in Nigeria, and

b. is incapable of understanding the nature and purpose of the scientific tests, if the person who has the care and control of the child consents and the medical practitioner in whose care he is has certified that the taking of the scientific sample from the child shall not be prejudicial to his proper care and treatment.

5. The provisions of this section are without prejudice to the provisions of section 66 of this Act.[5]

From the above it is clear that the so called free consent of the putative parent to submit to the test has been crippled by the combined effect of subsection (5) when read along side section 66. The combined interpretation gave the court a wide discretion of drawing an inference from the refusal of any of the disputing party to consent. The resultant effect of this provision may lead to the presumption of quilt by shifting the burden of proof to the non consenting party due to his/her refusal to consent. The court may hold him responsible for the pregnancy. The Act further added that:-

The Minister may by regulations make provisions as to the manner of giving effect to directions given under section 63 of this Act and, in particular, the regulations may.....

(a) provide that scientific samples shall not be taken except by such medical practitioners as may be appointed by the Minister.

(b) regulate the taking, identification and transporting of the scientific samples

(c) require the production, at the time when a scientific sample is to be taken of such evidences as to the identity of the person from whom it is to be taken, as may be prescribed by the regulations.

(d) require any person from whom a scientific sample is to be taken, or, in such cases as may be prescribed by the regulations, such other person as may be so prescribed, to

[5] Ibid Section 64

state in writing whether he or the person from whom the sample is to be taken, as the case may be, has during such period as may be specified in the regulations suffered from any such illness as may be so specified or received a transfusion of blood.

(e) provide that scientific tests shall not be carried out except by such persons, and at such places, as may be appointed by the Minister.

(f) prescribe the scientific tests to be carried out and the manner in which they are to be carried out.

(g) regulate the changes that may be made for the taking and testing of the scientific samples and for the making of a report to a Court under section 63 of this Act.

(h) make provision for securing that, so far as practicable the samples to be tested for the purpose of given effect to a direction under Section 63 of this Act are tested by the same person.

(i) prescribe the form of the report to be made to a Court under section 63 of this Act.[6]

The Act further provides:-

(1) Where the Court gives a direction under section 63 of this Act and a person fails to take any step required of him for the purpose of giving effect to the direction, the Court may draw such inferences, if any, from that facts as appear proper in the circumstances.

(2) Where, in any proceedings in which the paternity or maternity of a child falls to be determined by the Court hearing the proceedings, there is a presumption of law that the person is legitimate then if;

(a) a direction is given under section 63 of this Act in those proceedings, and

Ibid Section 65

(b) a party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction, the Court may adjourn the hearing from such period as it thinks fit to enable that party to take the step required.

(3) If at the end of the period referred to in subsection (2) of this section, the person fails without reasonable cause to take the step required, the Court may, without prejudice to subsection (1) of this section, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.

(4) Where a person named in a direction under section 63 of this Act fails to consent to the taking of scientific sample from himself or from a child named in the direction of whom he has the care and control, the person shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.[7]

In order to safeguard and ensure accuracy in the process of the test the Act provides punishment for impersonation in the following section.

If, for the purpose of providing scientific sample for a test required to give effect to a direction under section 63 of this Act, a person impersonates another, or proffers a child knowing that it is not the child named in the direction, that person commits an offence and is liable on conviction to a fine not exceeding ten thousand Naira or imprisonment for a term not exceeding one year or to both such fine and imprisonment.[8]

The combined effect of the provisions of sections 63 – 67 above is to facilitating the resolution of dispute over the paternity of a child. Scientific test which may to a greater degree provide an answer to who is the father or mother of the child in issue

7 Ibid Section 66
8 Ibid Section 67

through observing the biological characteristics of the child and the disputing parents. Whatever the result turn out to be is admissible in evidence.

Ordinarily the use of scientific test to determine paternity would be a panacea for a child in a community of people whose values needed guide to handle the upbringing of children born through adultery and extra marital relationship. Hence wishes to adopt rules to enable the acceptance a child born outside marriage. The provision of Part VII would readily apply to such category of people.

Whereas for the Muslims, Islamic law do not in any way approves or condone adultery or extra marital relationship hence it prescribed very stiff punishment for those involved in it. Moreover, under Islamic law disputes over paternity either arising among married couple or outside wedlock is a combination of civil and criminal processes.

Furthermore, under Islamic Law the only way of establishing/determining legitimacy is through marriage, notwithstanding any scientific test. If the pregnancy occurs as a result of extra marital relationship, the child cannot be a legitimate child of the purported father. The position remains the same even if the adulterous father owned up to his responsibility for the pregnancy. The parties both the adulterous father and mother are to be punished for their offence and the child and its responsibilities belong to the mother alone and in her absence it goes to her relations.

Similarly, Islamic Law has a settled rule for determining legitimacy between married or divorced couples. It is based on both minimum and maximum period of human gestation.

In the light of this background it is clear that the provisions of section 63 - 67 Child's Right Act is in conflict with the provisions of Islamic Law. Consequently, it is contrary to the Muslim's ideals.

Legitimacy and Paternity under Islamic Law

In contrast to the Child's Right Act and other legal systems legitimacy and paternity under Islamic law is unique and strict. This is because of its strict legal provisions against extra-marital affairs. It has been recogised by the Act that:- 1. one can have a child through illicit intercourse as a legitimate child by accepting and acknowledging his responsibility for the conception of the child; 2. A man can claim or accept paternity of a child that is known to have been delivered outside wedlock. 3. An adopted child can be legitimized with all the rights and privileges of a biological child. Islamic law on the other hand does not recognise any means of acquiring the status of legitimacy and its incidences but through a marriage contract. This position is made clearer below.

Establishment of legitimacy and paternity under Islamic law

a.) Through Marriage

Marriage is the legal basis for the status of a child's legitimacy and for all the rights flowing from a father.

The general principles of legitimacy under Islamic law dictate that a child is for the bed al-walad-lil firash, meaning any child born in marriage wedlock is presumed to be legitimate until the contrary is proved.

Legitimacy or paternity under Islamic Law does not admit of positive proof. This is because the connection of a child to its parents is secret; and once it is established, can not be revoked at will of the father neither would the child be allowed to deny its father. It is also fundamental that the father should be one perhaps that accounts for the prohibition of Polyandry in Islam. Thus any woman who misplaced her child's legitimacy would be denied the bliss of eternity. In this regard, the Holy Prophet is reported to have said:-

> *"A woman who misplaces a child's legitimacy by relating its descent to someone who is not responsible for its conception has committed a grave sin, alienated herself from Allah and will be denied the bliss of eternity*[9]

On the other hand a father who obscures his child's legitimacy by denying his responsibility for its conception has offended God and inflicted upon himself universal disgrace.[10] It is to ensure the child's right to legitimacy which also made the law to adopt an extreme measure on the principles of establishing a secured parental identity. Thus under Islamic Law, a child is presumed legitimate under the following circumstances:-

i. If born after six month of marriage by its parent until the contrary is proved.

ii. If born two years after divorce of its parents until the contrary is proved. But some jurists extend the period to four years. Provided in all cases, the mother remained unmarried since the termination of the marriage.

This in effect means if a husband and a wife cohabits and the wife gives birth six month thereafter, the child is regarded as the legitimate child of the husband. Similarly, if she gives birth two years after the dissolution of such marriage either by divorce or death and she remained unmarried, the child shall be the legitimate child of the former husband except upon cogent, concrete and convincing reasons ~~it is~~ proved otherwise.

[9] Abdal'Ati H. 1982 The Family Structure in Islam, Islamic Publication Bureau, Lagos, Nig. P. 190

[10] Ibid P. 190

On the other hand, any child born before six month of the marriage or after two years or four years respectively, since cessation of cohabitation, the child would be considered to be illegitimate. This is conclusive and irrebuttable presumption of law.

The jurists are however not unanimous on the time from when to start counting the month. Is it from the time of marriage or from the beginning of consummation?. According to the majority of them, it is to be counted from the date of consummation. But according to Hanafi Law it is to be counted from the time of marriage.[11] According to some of the jurists in that school intercourse is not a condition in the establishment of legitimacy even though they conceded that before this principle is upheld, it is absolutely necessary that the spouses must have met in an environment where intercourse could be presumed.[11]

By and large where it was established that the child was conceived outside wedlock, then the child's descent would derive from the mother only while the father, would be denied paternity as a punitive measure. Thus should a man impregnate a woman through illicit relation and then marries her, the child will not be legitimate child of the husband.

Looking at the moral decadence in the society of today however, it is questionable whether actually the denial of paternity would serve as a punitive measure against the adulterous father. This is because in most cases especially in the Hausa Muslims Community people view such happening as a taboo, thus a person that impregnate a woman always try to disassociate himself from responsibility. It is therefore observed that the denial of paternity would rather serve as a blessing in disguise to the adulterous father.

The status of legitimacy is of great importance to a child wellbeing that is why a husband is cautioned seriously against doubting or questioning the legitimacy of his wife's child born in wedlock within the stipulated minimum or maximum period of gestation. He is advised on the consequences of making any hasty decision in expressing his misgivings. However, should he accuse his wife of extra-marital affairs by denying the paternity of her child; this would lead to a course of mutual imprecation or double testimony to end the marriage with a special type of irrevocable talaq by lian.[12] After which the parties are separated completely and according to Maliki law, it create a permanent bar for remarriage between them.[13]

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[11] Imam F. H. Mansur, ND Fatwa-i-Kazee Khan Vol. 1, Book II, P. 130

[12] Holy Qur'an 24: 6 – 9 which provides – And for those who launch a charge against their spouses and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness for times (with an aoth) by God that they are solemnly telling the truth.

Where such happens, the child would be linked and identified by the mother's name. The father is excused by virtue of his oath. If he swears on a lie he will be punish by God either in this world or in the hereafter.

As observed earlier when paternity is denied to the adulterous father and the child is related to the mother, such is considered as penalty to the father for his misconduct. It is a punishment to the adulterous father because he may be in dare need to take the child. It is as well punishment or penalty to the mother to be saddled with the responsibility of a child without a father for allowing herself to be used without marriage. However, the mother is given the apparent and incontestable right of maternity and in spite of her misconduct her relationship to the child is neither to be severed nor questioned.

What might have accounted for this legal proposition may be the recognition of mother-child attachment, which can not be subject of any dispute. It may also be because of the child's various needs which normally it is only the mother that could satisfy them adequately or probably because of the unique relationship of mother to the child, which the Qur'an clearly characterised as thus:-

"And we have enjoined on man (to be good) to his parents, in travail upon travail did his mother bear him and in years twain was his weaning."[14]

In another verse the Qur'an provides:-

"In pain did his mother bear him, and in pain she give him birth; the carrying of the child to his weaning is a period of thirty months....."[15]

And the fifth (oath) (should be) that they solemnly invoke the curse of God on themselves if they tell a lie.

But it will avert the punishment from the wife, if she bears witness four times (with an oath) by God, that (her husband) is telling a lie.

And the fifth (oath) should be that she solemnly invokes the wrath of God an herself if (her accuser) is telling the truth.

[13] Abdal'Ati H. op. cit. P.191

[14] Holy Qur'an 31:14

[15] Ibid 46:15

Based on the foregoing discussion and authorities, where there exists between a man and a woman the relationship of husband and wife or such semblance as recognised by law, the children are either admittedly the lawful children of the man or capable of being made so by his acknowledgement. The semblance of lawful marriage for this purpose includes both void and voidable marriage, where it subsisted in bonafide ignorance of the bar, legitimacy here results from the absence of criminal intent on the part of the parents.[10]

It is clear that, to ascertain legitimacy through marriage, it is necessary to have recourse to the concept of minimum and maximum period of human gestation, it is as well clear that the period is determine based on the date of actual consummation or the date consummation ceased to take place and not on the duration of the marriage or divorce.

There is unanimity of opinion among the Sunnih schools that the minimum period of human gestation is six month. With regard to the maximum period however, the jurist differ in opinion. According to Hannafi, it is two years and according to Maliki, Shafi'i and Hambali it is 4 years while according to the Shi'ah law it is ten months. This shows that the status of legitimacy of a child as per the maximum period of gestation may vary depending on the schools. A child that would be considered legitimate under the Hannafi law would not be so considered under the Shia law and a child that may be consider legitimate under the Maliki, Shafi'i and Hambali laws would not be so considered under the Hannafi and Shia laws.

Admittedly, it is quite possible to have a dispute over paternity of a child arising from the minimum and maximum period of gestation particularly in cases of divorce and remarriage. For a example a woman may be divorced by her husband at her early stage of pregnancy and because of the tension and bad relation between her and the former husband may decided to contract a new marriage presumably after about three months of waiting and she delivers the child in the house of the second husband.

Where this is deliberately done, it will fall within the scope of what the Prophet condemns and described such a woman having alienated herself from Allah and would be denied bliss of eternity.[16] Thus where such happens it is the duty of the court to declare the subsequent marriage null and void and to award paternity of the child to the former husband. This is because second marriage was contracted during the period of Idda, since the Idda of a pregnant woman does not expire until she delivers her burden.[17] The following case is relevant on the issue.

[16] Abdal'ati H. op. cit. P. 190

[17] Holy Quran 65: 4 ".... For those who carry (life within their wombs) their period is until they deliver their burdens..."

MALARIMA KALLI MINTAR Vs ALH. BUKAR KORI[18]

The Plaintiff/Respondent, who was the husband of Damba- the second defendant, brought an action against the first defendant/appellant claiming the paternity of a child.

According to the Plaintiff, Damba, the mother of the child in dispute was married to him and that during the course of their marriage, Damba fell ill and a native medicine woman was called to examine her and she was found to be pregnant, and suffering from threatened abortion. The medicine woman administered some native medicine to her and the threatened abortion was contained.

Damba was however, later divorced by the plaintiff/respondent, and she married another man who was the appellant and in whose house she gave birth to a baby girl. But before the delivery her former husband (i.e. the Plaintiff), on learning that she had married, informed her father of her pregnancy for him.

After the delivery, Damba awarded the paternity of the child to her husband (i.e. the Appellant), whereupon the plaintiff/respondent instituted an action against the appellant and Damba claiming the paternity of the child and for the nullification of the marriage of both defendants on the ground that it was contracted during her iddah period. The plaintiff called four witnesses, two of whom were women who testified that Damba was pregnant before she left the Plaintiff's house.

The Upper Area Court granted the plaintiff all the relief's claimed, the appellant being dissatisfied appealed to the Sharia Court of Appeal; which dismissed his appeal. He further appealed to the Court of Appeal. In dismissing his appeal, the Court of Appeal held inter alia:-

> *That on proof of pregnancy and Child birth under Islamic Law, The testimony of two unimpeachable female witnesses is enough to provide the essential proof required to establish a case of childbirth or pregnancy that on determination of Parentage in Islamic Law the parentage of a child is determined on the principle that it follows the marital bed (Al-walad lil-fira'ah). Thus a child born within six months of a marriage and during the continuance of such marriage is said to be born in wedlock. That on the presumption of legitimacy under Maliki law, the maximum period within which a child born to a woman is presume to belong to a previous husband is five years. This presumption can be rebutted if the woman married another husband and the child is born after six months of such marriage. On legitimacy and gestation period under Maliki law, the minimum period of*

[18] 1989 Nigerian Weekly Law Reports Vol. 1, P. 718

gestation is six months, and therefore a child born within six months of marriage cannot be legitimate.[19]

From the above authority, it is abundantly clear that the minimum period of husband gestation is six month, and this has been agreed by all jurists. It thus means that:-

If a married woman bears a child less than six months after the marriage, its paternity is not attributed to the husband, since she was undoubtedly carrying the child before the marriage, unless the husband claims and declares it as his on condition that he does no state that it was the product of fornication.[20]

By and large legitimacy of a child may as well be presumed from the circumstances under which the marriage of its parents is presumed.

b.) Establishment of Legitimacy/Paternity by acknowledgement.

Hand in hand with the establishment of legitimacy through marriage is its establishment by acknowledgement. Under the Sunnih law it is only the father that has the right to establish the relationship of childhood to the exclusion of the mother or any other relations. This generally need not be express, it may as well be presumed by conduct of the father, such as his habitual and open treatment of the child as his legitimate child, provided there is no other established fact to the contrary.

Establishment of legitimacy by acknowledgement is only necessary in a situation where the fact of an alleged marriage is uncertain, but can not be used as a mechanism to legitimize a child that is known to be illegitimate. The principles of acknowledgement under Islamic Law therefore dictate that:-

"It must be made in such a way that the acknowledger mean to accept the other not only as his child but as his legitimate child. The ages of the parties must be such as to admit of the acknowledger being the father of the person acknowledged. The person acknowledged must not be the offspring of Zinna, that is, adultery, incest or fornication. The person acknowledged must not be known to be the child of another man. The acknowledgement must not have been repudiated by the person Acknowledged.[21]

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[19] Ibid PP. 719 720

[20] Qadri A. A. (1986) Islamic Jurisprudence in the modern world, Taj. Co. Gate, Delhi P. 403

[21] Vernes B. R. (1980) Muhammadan Law 5th Ed. P.204, also Mulle, Principles of Muhammadan Law 6th Ed. Section 344.

From the above examination, the following proposition may be deduced:-

1. That the paternity of the child must not already be certain or established on any other person. One example is a situation where a person takes a child from someone for upbringing either his relation or not and it is known to people that, that child is the child of another person, then the person that has taken the charge of his upbringing will not be heard to claim that child to be his. Likewise the acknowledgement is only necessary where the fact that the child belong to the person claiming him is uncertain e.g. A person travelled out of his locality for a very long time, settled somewhere got married and had children without the knowledge of his own people. By the time he return to them with children, it becomes necessary for him to acknowledge the paternity of the children to his own people. However, as pointed out earlier such acknowledgement need not be express; it is sufficient if it can be inferred from his conduct.
2. For the acknowledgement to be valid, it must be made by an adult and sane person whose age difference with the child would clearly admits their being father and child.
3. The acknowledgement must not be merely of paternity but of legitimate paternity. Thus if a person acknowledges a child to be his by Zinnah, the paternity would not be established.[22] Thus if a man commits zinnah with a woman and she becomes pregnant, the product of such pregnancy would not be the legitimate child of the man even if he happens to marry the woman and she deliver the pregnancy in his house.
   At this juncture, we are obliged to draw the attention of some muslims against the barbaric practice of romantic love in their courtship. After sometimes, they may decide to formally marry, often after the accident of conception. This practice is considered as normal, under the custom of some Nigerians, and it is generally accepted by them as a means of testing the fertility of the girl. In some cases however, it is resorted to, to avoid the possibility of the parents objecting to the choice of the spouse. It is submitted that most of the people that engaged in this practice are doing so due to their ignorance of the Islamic legal provision, relating to legitimacy of children.
4. That the child if capable of forming an opinion or if he reached the age of understanding must corroborate such assertion. However, children are warned against denying their fathers, any child that denies his real father

[22] Neil B. E. (1875) Digest of Muhammadan Law Part I, 2nd Ed. Pp. 414 – 415

would receive a serious punishment in the hereafter. The prophet is reported to have warned such a person in the following terms:-

> *"Whoso acknowledges a father other than his own while he knows, Paradise is unlawful for him"*[23]

In another tradition the prophet is reported to have said:-

> *"Turn not away from your fathers; whoso turns away from his father, He is indeed an infidel."*[24]

5. It is also imperative that the acknowledger should be one who could have lawfully been the husband of the mother. Thus where there exist any barrier at the time of the allege marriage, either in form of permanent or temporary prohibition and the parties are very much aware of this existence, then the child can not be a legitimate child. In RASHID AHMED Vs ANISA KHATUN[25] a husband divorced his wife by three talaq but continues to cohabit with her and treated her as his wife for 15 years thereafter. During this period five children were born, all of whom he treated as his legitimate children. It was held that the children were illegitimate.

Based on the preceding discussion, it is pertinent to point out that once the paternity is established through acknowledgement, it give rise to certain legal relationship such as the right of inheritance, presumption of marriage between the acknowledger and the mother of the child more especially at the time of conception of the child. Thus the effect of the acknowledgement is two fold. i.e. it can be taken advantage of by the child are well as by its mother. Moreover, the acknowledgement once made can not retracted.[26]

Establishment of paternity through evidence

Another means of establishing paternity under Islamic Law is through evidence; this may happen in a situation where the husband was away and in his absence the wife gave birth to a baby. He may have cause to doubt the delivery or the child. In such situation the wife may bring evidence to prove her assertion and for this purpose the evidence of two females is sufficient according to Maliki Law, one female according to Hannafi and Hanbali and four females according to Shafi'i law.

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[23] Al-Qaradawi Y. (1989) The Lawful & Prohibited In Islam p. 228
[24] Ibid P. 228
[25] A.I.R. (1932) P. C. 25 at p. 27
[26] Sayed Habibur V. Sayed Altaf Bom. L.R. Vol. 33 p. 636 P.C.

It should be noted that the evidence contemplated here is quite distinct from the evidence contemplated by the Child's Right Act whole idea is to prove paternity and establish legitimacy with or without marriage.

Conclusion

From the preceding discussion it is pertinent to conclude that Islamic law, in contrast to the Child's Right Act adopted a very strict attitude in establishing paternity and legitimate descent. It is clear that the status of paternity and legitimacy could only be established through marriage contract. Issues of acknowledgement and calling of evidence are only relevant in case of uncertainty, such as where the fact of an alleged marriage is unknown. It is also abundantly clear from the discussion that once, the status is certain the father has no right to disclaim the child.

In the same vein the law does not permit an individual to confer the status on someone that is known to be a child from an illicit relation.

The child's Right Act on the other hand focuses attention at resolving dispute over paternity or maternity outside wedlock by employing the means of scientific test. A method, that is clearly in conflict with the provisions of Islamic law particularly, as it is intended to secure for the child, a father with or without marriage.

It is observed therefore that for the Child's Right Act to be acceptable to the Muslims it must either be:-

a.) Subjected to the test of validity when it is to be applied to Muslims party, that means where there is a conflict between the provisions of the Child's Right Act and that of Islamic law, the provisions of Islamic law shall prevail. This may be achieved through a simple devise by making proviso at the end of each section that is found to be in conflict with Islamic law to state that where the parties are Muslims the provision of Islamic law shall apply. Or

b.) In the alternative, as a compromise, the Act may be allowed to remain as it is but with limited application to non Muslims and for the Muslims the provisions of Islamic law applies.