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# GUARDIANSHIP OF CHILDREN IN ISLAMIC LAW AND THE CHILD'S RIGHTS ACT 2003: A COMPARATIVE ANALYSIS

By

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**Abstract**

As the saying goes "children are the leaders of tomorrow" and for their tomorrow to be bright and positive, they need to be properly guided. This can be achieved either by the biological parents or the guardians. Islamic law has provided detailed provisions for the guidance of such children in terms of their person and property. The Child's Rights Act also attempts to do so. This paper did a comparative analysis of the two laws, with the aim of determining which is better and which has jurisdictional powers. This was achieved utilising data obtained through the doctrinal method. It was observed, amongst others, that the Islamic law provision is more detailed and caters more for the interest of the child than the Child's Rights Act which is vague and lacks proper definitions. Based on the observations, it was recommended that the Act should be amended to provide proper definition of the terms 'guardian', 'guardian of a child', 'guardian of the estate of the child' to give a clear identification of the scope of their responsibilities and powers. Also, the sections that vested the family court with exclusive jurisdiction on matters of the child should be expunged as it conflicts with the provision of section 262 of the Constitution of the Federal Republic of Nigeria (CFRN).

## 1.1.1 Introduction

The guardianship of children is very important towards their physical mental, spiritual and psychological development. This could be done by th

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parents and in their absence, by others either appointed by the parents or by the courts. Islamic law has a detailed provision as to how this should be done. The Child's Rights Act 2003 (CRA) has also made provisions towards the guardianship of a child. Nigeria is a country consisting of different religious beliefs the Islamic faith being one of such and the Islamic law is recognized as a source of the Nigerian Legal System. Both laws seek to regulate the life of children. The question here is which of these provisions caters for the interest of the child better? And in the event of a child requiring a guardian, which of the laws will apply, in jurisdictions where the CRA has been domesticated? This paper therefore analyses the provisions of the two laws with the view of determining the best while highlighting the differences and similarities, if any. The scope of the paper is restricted to custodial and property guardianship.

### 1.1.2 Definition of a Child

In Islamic law, a child is a person from birth to puberty. Where the signs of puberty fail to manifest, the various schools of jurisprudence have identified age limit within which a person could be said to have attained puberty hence, becoming an adult. However, the jurists are not unanimous on the age hence; it ranges between 15yrs to 19yrs depending on the school of jurisprudence and the subject matter involved.[1]The jurists have categorised the development of a child into three: 0-7yrs (absence of understanding); 7-18yrs (Weak Understanding); and 18yrs and above (adulthood).[2] The powers of a guardian in relation to either guardianship of property or of the person are determined by this categorisation.

Article 1 of the UN Convention on the Rights of the Child (1989) defines children as all human beings under the age of 18 unless the relevant national laws recognise an earlier age of majority while the CRA defines a child as a person under the age of eighteen years.[3]

### 1.1.3 Classification of Guardians According to Both Laws

Guardians are classified into viz:

1. Natural Guardians. These are guardians where there is parental relationship between the guardians and the ward. In relation to custody of the child, the first right goes to the mother while in relation to property,

[1]i.e whether marriage, crime, tort or contract; IbnTahir (2009) al-Fiqh al-MalikywaAdillatuh, Muassasat al-Ma'arif, Beirut, V:7, p.109-110.
[2]Ibid
[3]S.277, Child's Rights Act 2003.

marriage, moral and religious education and maintenance, the first right according to Maliki school goes to the father.[4] However, under the CRA, both parents are regarded as guardians with same rights and responsibilities.[5]

2. Testamentary Guardian. This is the executor of the father appointed in his bequest. He is like the father and has the right to take precedence in marriage of the ward over other marriage guardians. The CRA only recognises this if the will is written and signed by the deceased or on his authority.[6]

3. Legal Guardian. This is the guardian appointed by the court of law.

4. Guardian appointed by deed. This is recognised by the CRA. It empowers the legal guardian to appoint another person as the guardian by deed.[7]

5. De facto Guardian. This is a mere custodian of the minor's person and property but has no legal right over either. He has only responsibilities towards the minor's person and property or both but no rights in respect thereof. They are usually relatives of the minor but without right to be the guardian under Islamic law. He is an officious intermeddler with the minor's property and has no status or position to alienate it without the court's permission. A sale by such a guardian of the minor's immovable property without the court's permission is void.[8]

## 1.4 Guardianship in Islamic Law

The term *wali* is derived from the root word *wala* which means to be near. Literally *wali* means helper, protector, friend, relative and caretaker. Technically, it stands for a person who is authorised, under the law to protect the person and property of someone who is unable to do so independently i.e. somebody who has *wilayah.*[9] Therefore, guardianship is defined as the right to control the movement and actions of a person who, owing to physical or mental defects, is unable to take

[4]Imam Ibn Ahmad. Al-Fasi (nd) SharhulMayyaratu Al-FasiAlaTuhfatulHukkam, Dar-Al-Fikr, V:1, p.269s
[5]Roy. A. (2010) *A Study of Guardianship of Person and Property Under the Muslim Law.* Available at https://papers.ssrn.com. p.2.

[6] Ibid
[7] Ibid
[8] Roy. A. (2010) *A Study of Guardianship of Person and Property Under the Muslim Law.* Available at https://papers.ssrn.com. p.2.
[9]Gurin. A. M., (2001), *An Introduction to Islamic Family Law.* Jodda Comm. Press Ltd. Zaria. p.64; Abd al-Ati. H. (1982). The Family Structure in Islam. Academy Press Ltd. Lagos. p.71; Sabiq S. (nd) Fiqh-ul-Sunnah. Al-Fath. Cairo. Vol.2 p.82.

care of himself and to manage his own affairs such as an infant, lunatic and an idiot.[10] Such right extends to the custody of the person and power to deal with the property of the ward and these rights may be vested in different individuals.[11]

Guardianship is solely for the benefit of the minor and cannot therefore be said to be the absolute right of any person, in the sense that the court will be bound to recognise it apart from the question of whether it will promote the welfare of the child or otherwise.[12] A guardian is a fiduciary and is subject to the high standard of care in exercising his powers.

## 1.4 Guardianship of Person for Custody

### 1.5.1 Concept of Custody (*hidanah*)

Custody is known as *hidanah* in Islamic law. *Hidanah* is derived from the word *hadean* which literally means'to embrace'or 'hug'.[13] In *shari'ah,* it means rising up or bringing up of a child.[14] In the Maliki School, *hidana* is defined as the taking care of a child with respect to his/her accommodation, provisions, feeding, clothing etc.[15] It is also defined as 'the caring for the infant during the period when it cannot do without the women related to it within the prohibited degrees who have lawful right to bring it up'.[16] It also refers to providing care and guardianship for a minor until he or she reaches the age of puberty.[17] In other words, *hidanah* could be defined as the act of nurturing a child by its relatives until it becomes physically and mentally fit to live outside the maternal embrace.

*Hidanah* relates to the sleeping arrangements, care of the child's feeding, clothing, beddings and personal hygiene. If the child has a father, then he shall bear the cost of all that has been discussed above and in addition, the child's education, vocation, marriage and even his circumcision. According to Imam Al-Fasi, the father bears the cost of everything. The mother only bears the

[10]Abd al-Ati, H, (1982). The Family Structure in Islam. Academy Press Ltd. Lagos. p.72
[11]AbdurRahim. M.A. (1911). The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools. Lahore p.344
[12] Ibid
[13]Hidanah (Custody) of Children. Retrieved from www.irfi.org/articles/articles-551-600/custody-of-children-in-shari.htm accessed on 13/12/2016
[14]ibid
[15]Jamal J. Ahmad Nasir. (2009) *The Status of Women Under Islamic Law and Modern Islamic Legislation.* Brill. Leiden Boston p.186
[16]Ibid
[17]Al-Jaza'iri A. B., (2001), *Minhaj Al-Muslim: A Book of Creed, Manners, Character, Acts of Worship and other Deeds.* Vol 2, Darussalam. p.391

responsibility of moral training (*tarbiyyah*) and accommodating the child at her place (*mabiit*).[18]The marriage ceremony (*zafaf*) should be for both father and mother, but the *Zahir* view is that since the right to keep custody extends to consummation (*dukhul*), it should be the right of the mother.[19]

### 1.5.2 Right to Custody of Children

There is a difference of opinion over whether *hidanah*is a right of the custodian (*hadin*) or the right of the child (*mahdun*). The preponderant (*mashhur*) opinion is the former which means the right can be relinquished by its possessor.[20] Therefore, by the *mashhur*, the right belongs to both parents during the subsistence of the marriage but after the termination of the marriage, whether by death or divorce, the right to custody of children is vested in the mother, first and foremost. This right shall not be denied to the mother unless she is found wanting or she waives the right even if she is a Christian, a Jew or a concubine.[21] This is based on the interpretation of a tradition of the Prophet where a man called Rafi'bn Sinan accepted Islam but his wife refused to accept it. The Prophet (SAW) then made the mother sit on one side and the father on the other while the son sat between the parents. The son inclined to the mother and the Prophet (SAW) then said: "Oh Allah gives him guidance". Then he inclined to the father and the father took him.'Based on this *hadith*, some scholars hold that merely being a disbeliever does not nullify the right of a mother to the custody of her child. Other scholars are however of the opinion that being a Muslim is a precondition for custody of a child.[22] The prophet (SAW) is reported to have said to a mother that reported to him the denial to her of her right to child custody: 'You have more right to him as long as you do not marry.'[23] This right does not, however, extend to a foster mother or foster grandmother.[24] The father, however,

[18] Imam Ibn Ahmad. Al Fasi. (nd) *SharhulMayaratu Al-FasiAlaTuhfatulHukkam*Vol. 1. Dar al-Fikr. p.269. as cited in Uthman M.B and Sulaiman, H Guardianship of children and their Property under Islamic law. A paper presented at the 18th Annual Judges' Conference organized by the Centre for Islamic Legal Studies, Institute of Administration, Ahmadu Bello Unniversity, Zaria in Collaboration with the National Judicial Institute (NJI) Abuja. Held at the Faculty of Law New theatre between 13th and 14th December, 2017. p.33

[19] Ibid.

[20] IbnJuzay. Qawanin al-fiqhiyyah. Dar al-Fikr. p. 195.

[21] Orire. A. (2007), Shari'a: A Misunderstood Legal System. Sankore Educational Publishers Ltd. Zaria. p. 81.

[22] Imam al- Shaukani, *Nayl Al-Autar*, Syria, Dar Al-Fikr. Vol.7.p.142 as qouted in Rafiq A. *Infra.*

[23] As quoted in Al-Jaza'iri A.B. Op.Cit. p.392. However, it could be said that the first view is more in line with the *Shari'a* because, if it were a precondition, the Prophet (SAW) would not have given the child the option in the first instance. He would have stated categorically that being a non-muslim she had no right to custody as it is in the case of inheritance. *Wallahua'alam.*

[24] See the case of Mal. Lawal v. Mal. AdamuYola (Kano) MCA/CV/19. (1960) (unreported) as cited in Orire. A. Op. Cit. p.83

is entitled to visit the child frequently, instruct him in polite accomplishments and send him to a teacher. The father has charge of all the child's business affairs and, in his absence, the executor.[25]

However, an interesting case has been recorded in the *Nail al Autar* which was brought before IbnTaimiya. In the case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. The mother asked the court to inquire from the child why he preferred the father. On the court's inquiry the child said, mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like. On hearing this court gave the custody to the mother.[26] This clearly shows that wishes of the minor while deciding his or her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal tradition.

On the duration of *hidanah*, there is no uniform opinion among the various schools of jurisprudence. The Hambali and Shafi'i schools do not distinguish between a boy and a girl. They hold that the duration of custody of a child will run from birth to seven years after which the child has the right to choose between either parents and the choice shall be respected.[27] According to Hanafi School, custody ends at the age of seven years for boys and nine years for girls.[28]The custody of a male child in the Maliki School is the mother's until he becomes adult. However, if after maturity it is discovered that he is a hermaphrodite, then his custody shall remain with the mother until his other real position is determined.[29] For the female child until she gets married and the marriage becomes legally consummated. This is when her right to *hidana* terminates.[30] This right is derived from a tradition of the Prophet (SAW) where it is reported on the authority of AmrIbnShu'aib, who reported on the authority of his grandfather, Abdullahi Ibn Amr that 'a woman had just been divorced by her husband by whom she had a son. She took the child in her arms and went to the Prophet (SAW) and said, visibly affected: 'Oh, Messenger of Allah; this child is my son, my womb is the vessel that contained him, my breasts are the vessels whence he

[25]Russel A.D. and Suhrawardy, A. A. *Manual of Law of Marriage from the Mukhtasar of Sidi Khalil* p.321.
[26] Imam Shaukani Op. Cit. p.142.
[27] Ibn. Qudamah, (1367AH). *Al-Mughni.* Vol. 7. Egypt. P.613-616 as quoted in Rafiq. A. (2014), 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)'. *International Journal of Humanities and Social sciences.* Vol.4, No. 5, March 2014. p.270.
[28] Ibn. Hamman, (1366H), Fath Al-Qadir. Vol.3. p. 316 as quoted in Rafiq. A. (2014), 'Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)'. *International Journal of Humanities and Social sciences.* Vol.4, No. 5, March 2014. p.269.
[29]Orire. A. Op. Cit. p 81.
[30]IbnJuzay. *Qawanin al-Fiqhiyyah.* Dar al-Fikr. p. 194;Gurin, A. M., (2001), *An Introduction to Islamic Family Law*, Jodda Comm. Press Ltd. Zaria. p.226. This is also the ratio in AlhajaTaibatuAduke v. Alhaji G.A . Mustapha App. No. KWS/SCA/10/85 (unreported).

fed, my garments form the cover in which I hold him wrapped up and yet his father divorced me and wants to separate me from my son.''To that, the Prophet (SAW) said: "The right to keep that child belongs to you until you marry again and have consummated the marriage."[31]

It is also reported that a similar decision was given in favour of a wife who *Sayyidina* Umar divorced, when he wanted to deprive her of the right to custody. After giving the custody to the wife, the Prophet (SAW) addressed *Sayyidina* Umar by saying to him: "her scent, her touch, her kiss to him (the child) is better than the best thing you might have."[32]*Sayyidina* Abu Bakr was also reported to have done the same when *Sayyidina* Umar attempted taking the child away from the grandmother and he added that "the hug and kisses of that old woman to the child is more important and valuable than whatever material wealth you can offer the child."[33]

All the schools have justifications for their positions however, the position of the Maliki School can be said to be more realistic especially in relation to the female child. The female child always needs the mother especially during the adolescent period. She needs the mother's guidance and understanding on a lot of issues which only a woman can understand and only a mother can empathize. Therefore, the position of leaving the female child with the mother up to marriage is more in the interest and welfare of the female child. By and large, the most important consideration should be the welfare of the child. Though we have seen in some of the earlier traditions that even in jurisdictions under Hanbali and Shafi'i law, the choice of the child were set aside as not in his welfare but this is subject to the discretion of the judge. As such, the position of the Maliki School should be preferred as it caters for the welfare of the two sexes without leaving it to the discretion of anybody; after all, such discretions could be abused.

### 1.5.3 Essential Conditions

For a mother to be given custody of her child or children she must fulfill certain conditions such as sanity (*aqlu*); intelligence; capacity to take charge of the child (*kafa'a*); trustworthiness (*amanah*); moral soundness; freedom from infectious diseases; safe environment for the child (*hirz*). It should be noted that the *hirz* here refers only to the female child that is physically capable of conjugal relations, even though it is required for all but it shall not be fatal unless in the

[31] As quoted in Hallaq, M. S.H., (2008), *Fiqh According to Qur'an and Sunnah. Translation of Al-Lubab Fee Fiqhus- SunnawalKitab.* Vol. 2. Darussalam. p.202. (The hadith is considered as Sahih).
[32] Ibid.
[33] Ibid

case of the *mutiqah* (the female capable of conjugal relations) i.e. if the girl is attractive and the conditions are risky, then *hirz* is necessary, otherwise it is only desirable[34]; prudence (*rushd*) etc.[35]The custodian must also be a religious person (*dayyinan*) and moreover, the *kafir* cannot be trusted with the *mahdun* based on several perspectives. And it is based on the text of *Muqarrab* that the later Malikis (*al-Muta'akhkhirun*) added a condition to the qualifications of the custodian, i.e. being religious in the case of the *muslimah*. As for the *kitabiyyah*, she shall keep custody as long as there is no fear that she shall cause them to drink wine or consume pork.[36] It should be noted that these conditions apply to all those entitled to custody of a child whether male or female.

Also, if the person granted custody is a eunuch, he must have a female who will take care of the child; the person must not travel away from the place of custody for a distance of more than 6 *burd* (72 miles) with intention of living there without the child or without the permission of the father if not for mere business.[37]

### 1.5.4 Lapse of Mother's Right

The mother's right to custody will lapse where:

1. She marries someone not related to the child within the prohibited degrees.[38] But the marriage must be legally consummated for it to end her right to custody.[39]
2. She resides during the subsistence of the marriage at a distance from the father's place of residence. This is because, the father has the right of guardianship i.e. supervision.[40]
3. She is leading an immoral life.[41]
4. She neglects to take proper care of the child.[42]

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[34] Imam ibn Ahmad. Al Fasi. Op.Cit. p.271. However, with the recent negative development of forceful sodomisation of the male children, it is submitted that this requirement should be compulsory for both genders.
[35] Russel A.D. and Suhrawardy, A. A. *Manual of Law of Marriage from the Mukhtasar of Sidi Khalil* p.323.
[36] Imam ibn Ahmad. Al Fasi. Op.Cit. p.273
[37] Orire. A. Op. Cit. p.87; Ibn. Juzay Op. Cit. p. 194.
[38] Gurin A.M. Op. Cit p.227
[39] Orire A. Op.Cit. p. 87
[40] Gurin. A.M. Op. Cit. p.228
[41] Ibid
[42] Ibid

5. With the exception of the Christian or Jewish mother, a Muslim woman who is entitled to custody may lose it if she apostates.[43]

6. Where she voluntarily waives the right whether for a consideration or not.[44]

7. Some harmful disease on the person of the custodian such as lunacy, leprosy, vitiligo, etc.[45]

However, the mother's right to custody will not lapse in the following situations:

1. where the child will not take to any other than the mother. Some jurists restrict this to a suckling child while others take it generally.[46]

2. Where the foster mother will not suckle the child except in the mother's house.[47]

3. Where the child has no other guardian except the mother or only one who is debarred from acting as being untrustworthy or incapable.[48]

4. Where the father is a slave and the mother is a free woman if the father is the next in line of custody.[49]

### 1.5.5 Hierarchy of Those Entitled to Custody

The *Shari'ah* gives preference to those who have the welfare of the child at heart. Therefore, women are preferred over men, and within the same gender, preference has been given to those who are closer to the child and therefore expected to be more compassionate and merciful. According to Ibn Rushd, women are entitled to custody by two reasons: by being blood relations of the child; and by their being within the prohibited degrees of the child. If they are blood relatives but not within the prohibited classes, such as she being a daughter of maternal aunt (*khalah*) or a daughter of a paternal aunt (*'amah*) she will not be entitled to custody; on the other hand, if she is within the prohibited degrees, but not a blood relative, such as foster mother or by marriage, she shall not be entitled to custody. However, in the case of men, Ibn. Rushd says they are entitled by mere being guardians (*bimujarradilwilayah*) such as prohibited blood relatives e.g. the grandfather, the brother, or son of the brother, or being a blood relation outside of

[43]Orire A. Op. Cit. p.87
[44]Russel A.D. and Suhrawardy, A. A. Op. Cit. p. 330
[45]IbnJuzay Op. Cit. p. 194
[46] Ibid p.327
[47] Ibid
[48] Ibid
[49] Ibid

the prohibited degrees such as the son of the paternal uncle or even outside the blood ties such as the freed slave (*maula*) or appointed administrator (*wasiy*) by the father or by the state.[50]

According to the *Mayyarah*, if there are males and females, all competing for custody, then the mother is the one to take priority, then her mother takes priority over all others.[51] It is also said that the father takes priority over the mother at the male child's loss of milk teeth (*ithgar*) and that the rest of the women take priority over the rest of the men. By the statement that 'the father takes priority...'it is meant, as related by IbnuHabib from Malik, that after the years of *ithgar,* the male child requires his father more as, at that stage, he requires training and knowledge and hence, the hierarchy is thus:

1. The first person is the mother[52].

   In the event of the mother losing the right, the following persons will be entitled to the child or children's custody in order of preference.

2. Maternal Grandmother how high so ever (hhs)[53].

   However, she will lose the right to *hidanah* where she lives together with her daughter or granddaughter. i.e. the child's mother when the mother's right has lapsed.[54] This extends to other female relatives entitled to *hidanah*. Each must be sole occupant to the exclusion of the one whose right has lapsed.

3. Maternal Aunt, whether consanguine or uterine.[55]

4. Mother's Paternal Aunt.[56]

5. Paternal Grandmother including the father's mother, his mother's mother and his father's mother the nearer excluding the remoter and those on the side of the mother's mother being more preferred to those on the side of the father's mother.[57]

6. Father.[58]

7. Paternal Grand Aunt.[59]

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[50] Imam Ibn. Ahmad Al-Fasi Op. Cit. p.270.
[51] Uthman, M. B. and Sulaiman H. Op. Cit. p37
[52] Gurin A.M. Op. Cit p.226 and various ahadith of the Prophet quoted earlier; IbnJuzay Op Cit. p.194.
[53] Russel A.D. and Suhrawardy, A. A. Op. cit. p. 321
[54] Russel A.D. and Suhrawardy, A. A. Op.Cit. p.321. this is the view attributed to Imam Malik by the *mashhur.*
[55] Ibid
[56] Ibid
[57] Ibid
[58] Orire A. Op.Cit. p. 83; Gurin A.M. Op. Cit p.227

8. Child's Sisters- germane, consanguine or uterine.[60]
9. Paternal Aunt.[61]
10. Trustee (*wasiyy*) appointed by the court who must have a female in his house who has no husband such as mother or aunt.[62]
11. Child's brother whether, uterine, consanguine or Germaine.[63]
12. Great Grandfather how high so ever.[64]
13. Son of the child's brother whether, uterine, consanguine or germane.[65]
14. Son of the Grandfather.[66]
15. *Maula* (i.e. person who freed the child) if any. If he dies, custody goes to the *maula's* relations. Full blood takes priority over others and the mother's side takes priority over the father's side.[67]

For the relatives, those equal in relationship will be preferred according to their respective reputation and compassionate disposition towards the child. Older are also preferred to younger ones.[68] However, where there are no relatives willing and able to look after the child, the mother who has become disqualified by marrying a stranger may be appointed by the court as the guardian of her minor child.[69]

Where the *hidanah* has lapsed owing to the mother marrying a non-relative of the father, it will not revert to her on her divorce nor on the husband's death nor even on the event of the marriage being annulled for invalidity according to the preponderant view.[70] Nor will it revert after she has waived it to the father or some other relative, unless the waiver was on justifiable grounds such as illness, or her milk ceasing or going on *hajj* etc.[71] A mother may reclaim custody in the event of the death of the grandmother where she is free from any disability such

[59] Ibid
[60] Ibid
[61] Ibid
[62] Orire A. Op.Cit. p. 85
[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid
[67] Orire. A. Op. Cit. p. 85
[68] Russel A.D. and Suhrawardy, A. A. Op. Cit. P. 323
[69] Gurin, A. M., Op. Cit. P.228
[70] Russel A.D. and Suhrawardy, A. A. Op. Cit. P. 330
[71] Ibid.

as that arising from a marriage, such as where she is divorced or widowed before the relative on whom the right would devolve knew of the lapse.[72]

The person having custody is entitled to receive the child's maintenance[73]for the purpose of the child but will not be entitled to anything for the custody. However, where she is poor and the child is wealthy, she may maintain herself out of them.[74] The reason being that, she receives on account of her poverty and not on account of *hidanah*.[75] However, her lack of entitlement to claim a fee relates only to a case where she has no other duty upon her except watching over the welfare of the child. Therefore, where she performs services such as cooking, washing his clothes, etc. she is entitled to payment from the father.[76] Hence, the maintenance of the child lies on the father or his executor and not the custodian where the custodian and the father are different while the custodial guardian is charged with the responsibility of ensuring the general wellbeing of the child under the supervision and guidance of the father.

## 1.6 Guardianship of Property

The guardianship of the property of the orphan is basically being guided by the verse in Stratum Nisa'i where The Almighty stated thus:

> Make trial of orphans until they reach the age of marriage if then you find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When you release their property to them, take witnesses in their presence: but all-sufficient is God in taking account.[77]

There are several categories of interdicted persons: the minor; the lunatic; the foolish; the slave; the woman; and the bankrupt. However, the scope of this paper is restricted to the minor.

A living child in the womb of its mother is a person in the contemplation of the law and is therefore possessed of inherent legal capacity though of a defective nature. Hence it is recognised as being capable of acquiring rights such as

[72] Ibid. p. 330-331
[73] Ibid.
[74] According to IbnuArfah.
[75] Ibid
[76] Imam Ibn. Ahman Al-Fasi Op. Cit. p.269.
[77] Ali. Y. A. (1983). The Holy Qur'an: Text, Translation and Commentary. Amana Corporation. Maryland. Chapter 4 Verse 6.p. 180.

inheritance, legacy etc. Such rights could lead to acquisition of property by the infant and, therefore, the need for a protector of such properties in the form of a guardian. The guardian is responsible for managing the child's property honestly and in his best interests.

The right of guardianship of a child's property belongs, in the first instance, to the father and on his death to his executor if he has appointed any[78]and on the latter's death, to his executor. In their absence, the guardianship of property belongs to the father's father and then his executor and, in their absence, the court.[79]

It is not lawful for the child to dispose of his property. However, if it is for a consideration (*'iwad*) then the transaction is suspended upon the pleasure of his guardian. If he pleases he may nullify the transaction, or if he pleases, he may ratify it and the other party shall have no say.[80] When the guardian nullifies a transaction of a child such as where he sells his property, the purchaser shall not be in a position to claim his purchase money except the transaction is of the sort that is wholly agreeable to the interests of the child and it is of necessity to such minor. It is only then that the *waliy* shall be compelled to remit the purchase price to the buyer.[81] However, if the child had made a disposition without consideration such as a donation (*hibah*) or manumission (*'itq*) the transaction is void (*mardud*).[82]

Whatever, the father disposes out of the wealth of his child; such a transaction is enforceable (*nafidhun*) in his capacity as his guardian except what he donates or gives out in charity. If he manumits his child's slave, the disposition is enforceable but he shall pay the value.[83] It is lawful for the guardian to purchase for his minor child something out of his own wealth, just as he may purchase something for himself out of the minor's wealth if that is in the interest of the minor child.[84]

All admissions against the interests of the minor which are within his powers as a guardian to ratify are lawful. However, admissions as to usurpation or trespass (*ghasb*) or other criminal actions are not admissible except in his position as a witness.[85]

[78]Abdurrahim. M. A. Op. Cit. p.345
[79] Ibid p.345
[80]IbnJuzay. Op. Cit. p. 274
[81] Ibid
[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid

When the minor attains adulthood, if he is a male, there are three scenarios, thus:[86]

1. Where his father is alive, he shall be discharged from his interdiction by his adulthood so long as he is not found to be a *safih* (spendthrift) and his father places no further interdiction on him.

2. Where his father is deceased and an executor supervises over him, he shall not be discharged by mere adulthood until he has attained *tarsheed*i.e prudence. If the *wasiy* had been appointed by the father, then he may deem him *rashidan* without making recourse to the court. However, if he was appointed by the court, then he has no option but to make recourse to the court in declaring his attainment of *rushd.* The court can declare him *rashid* with or without the *wasiy.*

3. Where he attains adulthood without a father and without a *wasiy* or any other restriction, he shall be assumed to be possessed of *rushd* except his feeblemindedness becomes manifest.

4. Where the minor is a female, the same categorisation applies except that the female minor whose father is still alive shall remain under his control and interdiction until she marries and her husband consummates the marriage and she remains so interdicted for a time after the consummation of her marriage. The jurists have differed over the length of such period between one year and seven years. Some have even held that her interdiction remains until her father declares her attainment of *rushd* or testifies to it. According to al-Shafi'i and Abu Hanifah, when she attains adulthood, she attains freedom from interdiction (*malakatamraha*).

   For the female who is under a *wasiy*, she shall not be relieved from her interdiction except by *tarsheed.* As for the one that is free from any restriction (*al-muhmalah*), it has been held that she shall possess her own rights when she attains puberty, and others have held until her marriage is consummated or she becomes *anis.*

## 1.7 The Child's Rights Act 2003

The right of children has been identified and recognised as basic and fundamental as far back as 1799 when Hannah Moore stated in her book that 'it follows according to the actual progression of human beings the next influx or irradiation which our enlighteners are pouring on us will illuminate the world with grave

[86] Ibid p.275

descents on the rights of the youths, the rights of children and the rights of babies.'[87] Her writing was actually in relation to the wave of articulation of the rights which became recognised under the American Declaration of Independence in 1777 and the French Declaration of Man & Citizen in 1789 respectively.[88] In 1922, EglantyneJebb pleaded through a memorandum which he addressed to the 'Save the Child International Union', an organisation based in Geneva asking for the creation of a code for children.[89] The union was finally formed in 1946 but it was merged with the International Union for Child Welfare (IUCW). This merger led to serious lobbying with the United Nations Economic & Social Council (ECOSOC) by pressing for its adoption as the Declaration of Geneva. While approving its adoption, ECOSOC posited that the child must be protected beyond and above all considerations of race, nationality or creed and also that the child must be cared for with due respect for the family as an entity.[90]

In 1959, the UN adopted the Declaration on the Rights of the Child (DRC), which affirmed the rights of children everywhere to receive adequate care from their parents and the community. Thus, the UNCRC was finally adopted in 1989.[91] This provided an enabling environment for the UN to make conceivable attempts to consolidate the International law on the basic rights of children to survival, education, improved health conditions and protection from all forms of abuse and exploitation. The rights enunciated in the African Charter on the Rights and Welfare of the Child, which was adopted by the Organisation of African Union (OAU) now African Union (AU) in 1990 complemented it.[92]

The UN Convention on the Right of The Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) were adopted by Nigeria in 1991 and 2000 respectively and domesticated in line with section 12(1) of Chapter II of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 and the Act came into force in 2003. However, 16years later, the Act is yet to be domesticated by some states of the federation mainly due to cultural and religious considerations. While some states have passed it into law *in toto*, some states have done so with some amendments[93] and some states are still in the process of domesticating it.[94]

[87] As quoted in Uche, O.T. (2010) Children, Status and the Law in Nigeria. *African Research Review* Vol. 4(3a):380 retrieved from www.ajol.info
[88] Ibid
[89] Ibid
[90] Ibid at 381.
[91] Ibid
[92] Ibid
[93] Example Jigawa State Child Rights Law
[94] The bill is presently before the Kaduna State House of Assembly.

## 1.8 Guardianship in Child's Rights Act

The Act attempted to provide a definition but ended up not. The section defined a guardian as 'a person who is ***the guardian of a child*** by virtue of the provision of this Act or a person lawfully appointed to be guardian of the child by deed or will or by an order of court of competent jurisdiction or by operation of law'.[95] It also defines 'guardian of a child' to mean 'a guardian (other than a guardian of the estate of a child) appointed in accordance with S85 (1) of the Act'.[96]

Juxtaposing these two purported definitions, it can be safely concluded that, guardianship in the CRA is restricted to the person of the child and not his estate. However, this may be in conflict with the provisions of S82 (1) which gives a guardian (with the exception of *guardian ad-litem*), parental responsibility for the child and by the definition of parental responsibility in S277 (a) of the Act, it encompasses all rights, duties, powers, responsibilities and authority which by law, a parent of a child has in relation to the child and his property.[97] By sub (b), it gives the guardian of the estate of a child rights, powers, and duties in relation to the child and his property. The question that begs for an answer here is: what is the difference between a "guardian of a child" and "guardian of the estate of a child"? In view of the fact that S82 (1) and S277 (a) and (b) have given them the same powers and responsibilities. Also, the CRA has failed to provide a definition of guardian of the estate of a child as distinct from the guardian of a child. To fill the lacuna of a sensible definition of a guardian, it is submitted that reading sections 277, 85(1) and 82(1) together, ***a guardian could be defined as any person, with the exception of the biological/adoptive parents of a child, in whom parental responsibility is vested by law.***

These contradictions notwithstanding, from the purported definition of the guardian, we can deduce that under the Act, a person (living or otherwise) can become a guardian through the following means: - by virtue of the provisions of the Act; by deed; by will; by an order of the court and by operation of law.

According to the Act, guardianship belongs to both and in the event of death of any of the parents; the surviving parent has guardianship (no matter the gender).[98] This is clearly different from the Islamic law position where guardianship belongs to the father or his executors and not the mother. Especially in view of the fact that under the CRA, the guardian has rights and powers over both the child and

[95] S277
[96] S85(1)
[97] 82(1)
[98] S83(1)

his property. The Act provides that the surviving parent can appoint a guardian for the child in the event of death and this can be anybody.[99]

The Act allows a family member or any appropriate authority (which by the definition section includes Non-Governmental Organisations (NGOs) to apply to be made a joint guardian with the parent and such a person may even be made the sole guardian of the child where the parents are considered unfit and the court may order the parents to pay the court appointed guardian.[100] By the provision of S128, a guardian, in the absence of a surviving parent, can consent to the adoption of the child. The Act does not recognise guardians appointed under a nuncupative will.[101]

## 1.9 Comparative Analysis

According to Maliki School, guardianship of property and maintenance belongs to the father and in his absence, the executor of his estate and in his absence, the grandfather of the child while guardianship of person (custodial) is the right of the mother unless she runs fowl of the law or waives such right. However, under the CRA, any of the parents can be a guardian jointly and severally and in certain situations, another person/authority can take over guardianship even in the presence of the parents. Some of the dangers related to this provision

In Islamic law, a guardian other than a father is appointed by the father through *wasiyyah* or in the absence of that, by a court of law. However, under the CRA, any of the parents, the court, or any appropriate authority (as defined by the Act) can appoint. Even a non-relative or the non-governmental organisations/welfare bodies appointed by the court as a guardian can appoint another as a guardian by deed.

Guardianship in Islamic law comprises of two perspectives: 'guardianship in relation to property (*wilayah*)' and 'guardianship in relation to person (*hidanah*)'. Each with distinct powers and responsibilities. The CRA attempted such categorisation by providing for the 'guardian of the child' and 'guardian of the estate of the child' but failed to show the difference, scope and the limitations. It simply, vested in both, parental responsibility.

A guardian in Islamic law, in relation to the custody of the child has the responsibility of caring for the child during the period when it cannot do without the women related to it within the prohibited degrees.[102] The person vested with

[99]S83(3) Child's Rights Act 2003
[100]S83(2)
[101]as provided in S84(4).
[102]Jamal J. A.N. Op. Cit. p186

custody of the child has to take care of the sleeping arrangement, feeding, clothing, beddings and personal hygiene while the person vested with *wilayah* shoulders the cost in addition to the child's education, vocation, marriage and even circumcision. According to Al-Fasi, the father bears the cost of everything while the mother only bears the responsibility of moral training and accommodating the child at her place (*mabiit*).[103] However, in relation to the CRA, it is not clear as to who a guardian is. Most certainly, not from the provision of S277 of the Act.

On the duration of guardianship. In Islamic law, where the guardianship relates to *hidanah*, the duration ranges from 7yrs to puberty for the male and marriage for the female, depending on the school of jurisprudence. In relation to property, there is no uniform opinion among the various schools of jurisprudence. However, in the CRA no such duration is provided. It is either left to the discretion of the court or the terms of the deed. This is the conclusion reached in view of the silence of the Act on the issue.

In Islamic law, the person vested with the guardianship of the person of the child is only entitled to payment of fees from the father (or any guardian) where she renders other services to the child apart from mere watching over the welfare of the child such as cooking, washing, etc. the CRA also entitles the guardian to receive payment from the parents of the child but it did not restrict it to certain situations.

It is worthy of note that the CFRN 1999 has vested the Shari'ah Court of Appeal with the jurisdiction for matters relating to guardianship and at the lower level, states with Shari'ah and Area Courts have vested such jurisdiction on such courts.[104] However, the CRA has vested exclusive jurisdiction on children matters on the family court and where absent, on the Magistrate and High Courts thereby ousting the jurisdiction of the shari'ah courts.[105] This is clearly in conflict with the provision of the constitution. Therefore, if this is maintained, in jurisdictions where the CRA has been domesticated, it will apply and not the Islamic law and hence, none of the sharia courts, whether lower or appeal, can entertain such matters

[103]Uthman M.B and Sulaiman,H Op. Cit. p.33

[104] Example, the Kaduna State Sharia Court Laws

[105]Ss 149-162 Child's Rights Act 2003

## 1.10 Conclusion

Children being the bedrock for the contribution of a society, there is the need for them to be properly nurtured and guided. It is clear that the two laws analysed, have attempted doing that. However, it is evident from the findings of this research that the CRA failed in providing a comprehensive document that will, effectively, protect the child. What it provided is extremely skeletal and vague which is evident even from the purported definitions. However, Islamic law provided very comprehensive provisions protecting and guiding the child. Whether in relation to his person or property. Hence, these Islamic law provisions should not be allowed to waste.

## 1.11 Observations and Recommendations

Some of the problems bedeviling the Act are: by vesting all forms of guardians with full parental responsibility which includes giving the child up for fosterage and adoption, it has inadvertently, jeopardised the welfare and future of such children as they may be potential preys for traffickers. Hence, the Act needs to be amended to exclude such 'persons' from those regarded as 'appropriate authorities. Also, Sections 149-162 are clearly in conflict with the provision of section 262 of the CFRN as such it should either be expunged or amended and given concurrent jurisdiction with customary/shari'ah courts where they exist. The Act should be amended to provide a proper definition of the terms 'guardian', 'guardian of a child' and 'guardian of the estate of the child' in order to give a clear identification of the scope of responsibilities and powers. It also needs to recognise and accept nuncupative wills where such are made by parents of the child as this will be more realistic considering our level of literacy and customary practices.