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### **List of abbreviations**

ACHPR- African Charter on Human and Peoples' Rights

ACRWC- African Charter on the Rights and Welfare of the Child

AHRLJ- African Human Rights Law Journal

BBC- British Broadcasting Corporation

CC-Criminal Code

CEDAW- Convention on the Elimination of Discrimination against Women

CFRN- Constitution of the Federal Republic of Nigeria

EA- Evidence Act

ED(S)- Editor/Editors

FIDA- International Federation of Female Lawyers

FGM- Female genital mutilation

GIOPINI- General Inequalities in Persons Initiative

HIV/AIDS- Human immunodeficiency virus/Acquired immune deficiency syndrome

HRC- Human Rights Council

ICCPR- International Covenant on Civil and Political Rights

ICESR- International Covenant on Social and Economic Rights

IJSELL – International Journal on Studies in English and Literature

KAHRN- Kano Human Rights Network

MA- Marriage Act

MCA- Matrimonial Causes Act

NAPTIP- National Agency for the Prohibition of Trafficking in Persons

Non-Governmental Organisation

NMLR-Nigerian Monthly Law Report

NWLR- Nigerian Weekly Law Report

PC-Penal Code

RVF- Recto vaginal fistula

SC- Supreme Court

UDHR- Universal Declaration of Human Rights

UNFPA- United Nations Population Fund

UNICEF-United Nations International Children's Emergency Fund

UK- United Kingdom

UN- United Nations

UNCRC- United Nations Convention on the Rights of the Child

VVF- vesico vagina fistula

WHO-World Health Organization

WILDAF- Women in Law and Development in Africa

# CHAPTER ONE

## Introduction

### 1.1 Background

Global human rights provisions, reiterated in regional human rights documents, prohibit early, forced and child marriages.<sup>1</sup> Where child marriage is not expressly addressed by some of these provisions, it may be subsumed under all the forms of sexual abuse, discrimination and practices that are harmful to children<sup>2</sup> which states are obliged to eliminate, amongst others by promulgating domestic laws.<sup>3</sup> It is trite that recent law development in many jurisdictions in Africa and beyond point to attempts to eradicate child marriage through law.<sup>4</sup> Global provisions for the protection of the girl child therefore hold the promise of the elimination of child marriage in Nigeria.<sup>5</sup>

Child marriage and sexual abuse are not unrelated since the definition of sexual abuse includes any form of forced, non-consensual sexual intimacy or intercourse between an adult and a much younger person.<sup>6</sup> In the case of child marriage the much younger person is the girl who is often younger than 18 years.<sup>7</sup>

In terms of consent to the marriage union and the sexual intercourse which is ancillary to marriage, age and consent are key concepts. They are also

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<sup>1</sup> Art 16(2) CEDAW, Art 21(2) African Charter on the Rights and Welfare of the Child, although CEDAW does not specify a minimum age, the African charter on the Rights and Welfare of the child does.

<sup>2</sup> Art 21(1), African Charter on the Rights and Welfare of the Child, Art 19(1), 34(a) Convention on the Rights of the Child CRC.

<sup>3</sup> Art 21(2) African charter on the Rights and Welfare of the Child provides "...and effective action including legislation shall be taken to specify the minimum age of marriage to be 18 years...." is an example.

<sup>4</sup> UK Forced Marriage Civil Protection Act 2007, Kenya Marriage Act 2014 are examples.

<sup>5</sup> A Onuora-Oguno & O Adeniyi 'Sexual abuse and child marriage: Promise and pathos of international human rights treaties in safeguarding the rights of the girl child in Nigeria' (2015)<sup>16</sup> *Child Abuse Research: A South African Journal* 84.

<sup>6</sup> L Richter et al (eds) *Sexual abuse of Young children in Southern Africa* (2004) 3.

<sup>7</sup> F Okonofua 'Prevention of child marriage and teenage pregnancy in Africa: Need for more research and innovation' (2013)<sup>17</sup> *African journal of Reproductive health* 9.



fundamental to the term “child marriage” in which case sexual intercourse with the girl bride is “forced” and “non-consensual” and ultimately constitutes sexual abuse.<sup>8</sup> The increased occurrence of teenage pregnancies, early child bearing, sexually transmitted diseases, HIV/AIDS, maternal mortality and the particularly severe health condition vesico vaginal fistula (VVF) in areas where child marriage is prevalent,<sup>9</sup> are all evidence of the early sexual intercourse and sexual abuse that take place within the institution of child marriage.<sup>10</sup>

Notwithstanding these terrible repercussions and despite international and regional prohibitions and domestic laws, the practice of child marriage persists.<sup>11</sup> It is firmly embedded in a rigid conception of the attainment of adulthood in various cultures and societies, and is justified on the basis of arguments of a cultural and religious nature.<sup>12</sup>

Followers of the Islamic faith who support child marriage generally argue that Islamic marriages cannot adhere to the marriageable age prescribed by global standards because the same prescription does not exist in their religion.<sup>13</sup> They argue that in Islam readiness for marriage is not linked to chronological age but to the attainment of maturity or puberty.<sup>14</sup> There are however a few Islamic activists who hold that child marriage is not an Islamic injunction as generally claimed,<sup>15</sup> stating that it is a practice but not

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<sup>8</sup> D Shaw ‘Access to sexual and reproductive health for young people: Bridging the disconnect between human rights and reality’ (2009)106 *International journal of obstetrics and gynecologists* 132.

<sup>9</sup> A S. Erulkar & M Bello *The Experience of Married Adolescent Girls in Northern Nigeria* (2007) 1,2,9-11, it was revealed that most adolescent pregnancies in Northern Nigeria take place within marriage.

<sup>10</sup> As above.

<sup>11</sup> *The effects of traditional and religious practices of child marriage on Africa’s socio economic development: A review of Research, Reports and Toolkits from Africa* (2015) 3. AS Erulkar & M Bello, (n 9 above)16.

<sup>12</sup> Erulkar & Bello (n 9 above) 5-6.

<sup>13</sup> ‘Bill banning child marriage fails in Pakistan after it’s deemed ‘un-Islamic’ I Tharoor The Washington Post 15 January 2016 <http://truthandgrace.com/muslimmarriage.htm> (accessed 5 November 2016)

<sup>14</sup> T Khabir ‘The Role of Islam in Childhood Marriage Case Study: Nigeria’ (2008)3 being a paper presented at the 17th Annual Convention of the Global Awareness Society International, May 2008, San Francisco, CA, USA. NNNB Shah *Marriage and divorce under Islamic law* (2001) 6.

<sup>15</sup> ‘Does The Quran Really Permit Child Marriage?’ Muslim Reformation, 18 March 2014 <https://quranalyzeit.wordpress.com/2014/03/18/cii-vs-islam-does-the-quran-really-permit-child-marriage/> (accessed 5 November 2016).

a law in Islam.<sup>16</sup> Furthermore, they argue that there are opportunities for Islam to review its practices in the interest of the protection of vulnerable people and the development of society,<sup>17</sup> and that marriageable age can be determined using sound judgement.<sup>18</sup>

The reference to Islamic law is very relevant to this discourse because it is proffered as an argument for the continuation and retention of the practice of child marriage, particularly in Northern Nigeria where Islam is the predominant religion.<sup>19</sup> More importantly however, supporters of child marriage not only call on the relativism of Islam but are able to defend their position on the basis of certain secular laws and even the Constitution of Nigeria.<sup>20</sup>

In reality, Nigeria is not ruled by Islamic law, or any other religious law for that matter,<sup>21</sup> although Islamic law does form part of the legal system and sources of law in the country.<sup>22</sup> This situation is not peculiar to Nigeria but is found in many plural legal systems where the practice of child marriage, with its inevitable non-consensual sexual intercourse and attending repercussions, has resisted many legal efforts to eradicate it.<sup>23</sup> The lack of enforcement of existing laws and the persistence of the practice in Nigeria

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<sup>16</sup> 'Nowhere Does Islam Excuse Child Brides' Arzu Kanya Uranli The Huffington Post 18 June 2014 [http://www.huffingtonpost.com/arzu-kaya-uranli/nowhere-does-islam-excuse\\_b\\_5176425.html](http://www.huffingtonpost.com/arzu-kaya-uranli/nowhere-does-islam-excuse_b_5176425.html), (accessed 5/11/2016 by Arzu Kanya Uranli).

<sup>17</sup> D Olowu 'Children's rights, International human rights and the promise of Islamic legal Theory' (2008) *Law, Democracy and Development* 63. M Uwais, The Compatibility of the Child Rights Act with Islamic Legal Principles, 14 April 2009 <http://www.iwei-ng.org> [accessed 3 February 2014].

<sup>18</sup> n 15 above.

<sup>19</sup> Erulkar & Bello, (n 9 above) 5-6. 'The Practice of Child Marriage in Nigeria' Udoka Okafor The Huffington Post 12 June 2014 [huffingtonpost.com/udoka-okafor/the-practice-of-child-mar\\_b\\_5133881.html](http://huffingtonpost.com/udoka-okafor/the-practice-of-child-mar_b_5133881.html) (accessed 5 November 2016).

<sup>20</sup> TS Braimah 'Child marriage in Northern: Section 61 Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 481, 485. Particularly S29(4), Item 61, Part 1, Second Schedule of the CFRN 1999. KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions against realisation of Education Rights' (2015) 5. 7 *US-China Education Review B*, 464.

<sup>21</sup> S10 Constitution of the Federal Republic of Nigeria 1999 provides that the Country is a secular state, this statement has however brought up many argument and has been the cause of several legal and grammatical debates as to the meaning and extent of its secularity while there has been no definite legal interpretation to the provision to put the matter at rest, this is akin to the status of child marriage in Nigeria.

<sup>22</sup> S244, S260-262, S275-277 Constitution of the Federal Republic of Nigeria 1999. JO Asein, Nigerian Legal System (2005) 5

<sup>23</sup> S Tomkinson 'Childhood to womanhood- child brides and the inefficiency of the Indian State' (2009) 2, being a report under the program of democracy and children's rights in India and the UK: Law, Policy and outcomes, United Kingdom, India Education and Research Initiative.

are evidence of non-prioritisation and lack of political will on the part of government.<sup>24</sup>

Forty five percent of Hausa-Fulani girls are married off by the age of fifteen,<sup>25</sup> and marriage for girls twelve years or even younger is not unknown.<sup>26</sup> The fact that far more teenage pregnancies occur within marriage than outside marriage in Northern Nigeria is also indicative of the predominance of child marriages in that part of the country<sup>27</sup> and other health repercussions are also rampant in the area.<sup>28</sup> Child marriage continues to pose a danger to the lives of girls<sup>29</sup> and inhibit the development of the region and Nigerian society as a whole.<sup>30</sup>

While law is by definition a rule of human conduct,<sup>31</sup> a set of regulatory orders, instruction or rule, it is also an instrument for social engineering and change.<sup>32</sup> As a country, Nigeria has been known to use legislation to correct or prevent many social ills. One example is the recently promulgated

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<sup>24</sup> Fayokun (n 20 above) 469. 'Marrying too young-End child marriage' 2012.

<sup>25</sup> Erulkar & Bello (n 9 above) 5-6. According to The Times, Northern Nigeria has one of the highest rates of child marriage in the world (The Times 28 Nov. 2008). The Nigeria Demographic and Health Survey 2008 reported the median age of marriage for 15 to 19 year olds in the northeast to be 15.9 and in the northwest to be 15.7, Nigerian Demographic and Health Survey, Nigeria Nov. 2009, 94).United Nations population fund, 'Early marriage in Nigeria' <http://nigeria.unfpa.org/nigerianchild.html> (accessed 10 August 2015). 'Nigeria' Nigeria Demographic and Health Survey 2003. E Elizabeth 'Child marriage an undying culture?' The Tide News Online 28 December 2009 <http://www.thetidenewsonline.com/2009/12/28/child-marriage-an-undying-culture> (accessed 10 August 2013). 'The facts of gender inequality and violence against women and girls' Advocates for youth 2013 [www.advocateforyouth.org](http://www.advocateforyouth.org). Although it is argued that there is the prescription that the husbands do not engage in sex with them until they are matured, this is not often the case, yet again the issue of age does not occur but maturity, such that once the girl starts her first menstrual period, she is old enough to engage in sexual intercourse with the husband though her body is not physically ready for it or even for pregnancy or child bearing which follows as a result of this.

<sup>26</sup> 'Early marriage: child spouses' Innocenti Digest No 7 March 2001 4. 'Forced marriage Girls not brides'TheTimes28Nov2012

[www.ohchr.org/.../Issues/.../ForcedMarriage/.../GirlsNotBridesNigeria.doc](http://www.ohchr.org/.../Issues/.../ForcedMarriage/.../GirlsNotBridesNigeria.doc) (accessed 17 October 2015). This is because marriage in the North is most times dependent on the age of attainment of puberty, most girls even experience their first menstruation in their husband's home after experiencing sexual intercourse as would be revealed in Chapter Three of this Thesis.

<sup>27</sup>Erulkar & Bello, (n 9 above) 4, 5. AA Agbaje & AO Agbaje 'Early marriage, child spouses: What roles for counselling psychology' (2013) 2 *Asian Journal of Social Science and Humanities* 51.

<sup>28</sup>Erulkar & Bello, (n 9 above)9,11. Around 12 million girls between the ages of 13-14 years are already married in the Northern part of Nigeria and this is the reason why the rate of VVF is high in the part of the country. GIOPINI (General Inequalities in Persons Initiative) a kano based initiative. 'Nigeria: Early marriage adds to socioeconomic woes' [www.irinnews.org/report/81667/nigeria-early-marriage-adds-to-socioeconomic-woes-ngos-say](http://www.irinnews.org/report/81667/nigeria-early-marriage-adds-to-socioeconomic-woes-ngos-say) (accessed 20 July 2015).

<sup>29</sup> Okonofua (n7 above) 9-13, 9.

<sup>30</sup> Fayokun (n 20 above) 461, 468-469. Millennium reports 'vital statistics on the girl child' [www.savethechildren.org](http://www.savethechildren.org).

<sup>31</sup> Asein (n 22 above) 9

<sup>32</sup> O Soyaju *Rudiments of Nigerian law* (2005) 1-2.

Lagos State Properties Protection Law of 2016 which prohibits the notorious practice of property and land hijacking that is rampant in the country.<sup>33</sup> In Kano, Governor Ganduje also signed the Kano Contributory Health Care Agency Bill of 2016 into law.<sup>34</sup> Not to mention the fact that Nigeria promulgated a law prohibiting same sex marriages.<sup>35</sup>

In light of the current administration's public admission that child marriage is a problem and its declared intention to eliminate the practice, the solutions proposed by this thesis, especially the recommended draft of a specific Child marriage prohibition legislation which provides a minimum marriageable age and criminalises the practice is of particular relevance.<sup>36</sup>

The thesis explores child marriage in Nigeria in terms of the provisions of law on marriage, family law, human rights, international law, constitutional law, jurisprudence and criminal law, particularly with respect to the issues of age and consent as they relate to capacity and consent to marriage and sexual intercourse. It is ironic that although forced, non-consensual sexual intercourse is usually associated with criminal liability, it is the inevitable experience of the girl child in a child marriage.<sup>37</sup> The marital relationship, which is considered to be private, has moved out of the sphere of private law into public law as a result of the criminal connotations raised in recent times.<sup>38</sup>

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<sup>33</sup> 'Ambode outlaws land grabbing in Lagos' All News 15 August 2016 <http://www.lagosstate.gov.ng/2016/08/15/ambode-outlaws-land-grabbing-in-lagos/> (accessed 5 November 2016).

<sup>34</sup> 'Ganduje signs Kano Contributory Health Care Agency Bill' Metro News Online 20 August 2016 (accessed 27 November 2016).

<sup>35</sup> The Anti Same Sex Marriage Act 2015.

<sup>36</sup> 'Buhari wants an end to child marriage exploitation' Elanza News 2 May 2016 <http://www.elanzanews.com/buhari-wants-an-end-to-child-marriage-exploitation/> (accessed 28 May 2016) the president of the Country directed the Ministry of Women Affairs and Social Development to engage with other ministry parastatals and offices to work out worthy programmes including plans and feasible actions that would help in handling and eradicating violence and abuse against children including child marriage. The president's wife earlier had announced that she would support any legislation that would bring an end to child marriage in the Country. Stella Dimoko Korkus 'Aisha Buhari Seeks Legislation against Child Marriage in Nigeria' 13 May 2015 <http://www.stelladimokokorkus.com/2015/05/aisha-buhari-seeks-legislation-against.html> (accessed 22 March 2016).

<sup>37</sup> S357, 358 The Nigerian Criminal Code. This is Rape

<sup>38</sup> 'Nigerian child bride poisons older husband' BBC News 10 April 2014 <http://www.bbc.com/news/world-africa-26978872> (accessed 16 January 2017) where it was reported that a girl child in the northern Kano state who was recently married to a man of 35 years old, confessed she had poisoned the husband to escape the week old marriage.

While having or attempting to have sexual intercourse with an underage person (thirteen years or younger) constitutes defilement or unlawful carnal knowledge under Nigeria's criminal law<sup>39</sup>, the lack of criminal provisions in terms of consent to sexual intercourse within marriage could be said to support the practice. This is an issue which warrants investigation.<sup>40</sup>

One of the assumptions of this thesis is that solutions to the child marriage issue lie amongst others in the application of global and regional human rights provisions for the protection of the girl child; provisions which may also exist in domestic law. A detailed review of the applicable laws in Nigeria, both substantive and procedural, is therefore necessary over and above the development of new laws to eradicate the practice.

Nigeria has a threefold or tripartite legal system made up of English common law, customary laws and Islamic law. In addition, there is a systemic dichotomy between the regions of Northern and Southern Nigeria.<sup>41</sup> In the South, the recognition of people's customs is such that customary law and its associated courts apply. In the North, the religion of the people, and therefore Islamic law and Sharia courts, apply alongside Area Courts<sup>42</sup> in some places. In addition, there is a variously applied jurisprudential system to adjudicate on the various types of law endorsed by the Constitution.<sup>43</sup>

The Constitution of Nigeria includes provisions on the fundamental human rights<sup>44</sup> to dignity<sup>45</sup> of the person and freedom against discrimination<sup>46</sup> as well as provisions on the fundamental objectives and directive principles of

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<sup>39</sup> S218, S221 and S223 Criminal Code of Nigeria.

<sup>40</sup> S282(2) Penal Code of Nigeria and S6 Interpretation Section Criminal Code of Nigeria, excludes sexual intercourse between husband and wife or married couple as unlawful carnal knowledge.

<sup>41</sup> Asein (n 22 above) 5

<sup>42</sup> These Area courts can be the equivalent of the Customary Courts of the South as different from the Islamic Religious Courts. Seri Solebo, a magistrate of family court in Lagos is of the opinion that it is a dichotomy of system between the North and the South as while customary courts exist in the South, East and West, in the North, it is Islamic courts that exist.

<sup>43</sup> S6, S17, S230-284 Constitution of the Federal Republic of Nigeria 1999, Common law, Customary and Islamic religious law are recognised and applicable in the country's legal system. Soyeju (n32 above) 42-82.

<sup>44</sup> Following the provisions of the United Nations declaration of Human rights, since when most countries imbibed the practice of having a section on human rights in their constitutions.

<sup>45</sup> S34 Constitution of the Federal Republic of Nigeria 1999

<sup>46</sup> S42 Constitution of the Federal Republic of Nigeria 1999, which can also mean the right to equality of all persons irrespective of sex, gender, age or whatever.

state policy.<sup>47</sup> The Constitution also provides for the treatment and application of international treaties in the country<sup>48</sup> and the supremacy of the Constitution above all other laws and legislation, and prescribes the legislative processes of the country as a federal republic.<sup>49</sup>

Nigeria's Criminal and Penal Codes can be said to emanate from the religious and cultural diversity of the Nigerian people.<sup>50</sup> Both codes include provisions that criminalise rape and defilement<sup>51</sup> and offer protection for the girl child against sexual abuse; provisions which could be taken as amounting to the prohibition of child marriage.<sup>52</sup>

Nigeria practices a dual system of federalism which involves federal and state governments in legislative matters on the exclusive and concurrent lists, and a jurisprudential system aligned with this.<sup>53</sup> A legal system of this nature promises robust protection for all members of society, which raises the question of why child marriage continues to thrive in Nigeria.<sup>54</sup>

There are multiple and conflicting legal provisions in the country, particularly with regard to the age of childhood,<sup>55</sup> and the admission in some legislation that child marriage exists. This raises questions about the condonation of the practice.<sup>56</sup> Customary laws and Islamic law which do not necessarily reject the practice of child marriage, also form part of Nigeria's legal system.<sup>57</sup>

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<sup>47</sup> S13-21 Constitution of the Federal Republic of Nigeria 1999 contains the social, educational and economic objectives.

<sup>48</sup> S12 Constitution of the Federal Republic of Nigeria 1999.

<sup>49</sup> S1 and S4 Constitution of the Federal Republic of Nigeria 1999

<sup>50</sup> The Penal code is applicable in the North only while the Criminal Code is applicable in other parts of the Country. IT Sampson 'Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State-Religion Relations and its Implications for National Security' (2014) 3 *Oxford Journal of Law and Religion* 319-320

<sup>51</sup> S357, S218 Nigerian Criminal Code, S282, S283 Nigerian Penal Code. The non-consensual sexual intercourse with a person, to proof this non consent and penetration is required in evidence.

<sup>52</sup> Statutory rape and defilement refers to unlawful sexual intercourse with under aged girls or carnal knowledge or statutory rape, in the criminal laws of Nigeria.

<sup>53</sup> S4, second schedule, Part 1, Part 11, S6, also S17, for local government see S7 fourth schedule, Constitution of the Federal Republic of Nigeria 1999

<sup>54</sup> ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' (2015) 15 *African Human rights law journal* 421.

<sup>55</sup> Fayokun (n 20 above) 464-465

<sup>56</sup> Fifth Schedule, Part 1 of the Code of Conduct for Public Officers General which provides the recognition of the officers married children who are under 18 years.

<sup>57</sup> Fayokun (n 20 above) 464

Further challenges are the legal provisions which inhibit the direct application of ratified international and regional treaties,<sup>58</sup> the explicit decriminalisation of sexual intercourse with a girl child as long as it is within marriage,<sup>59</sup> and the complexity of the federal system, particularly in terms of the legislative jurisdiction of federal and state Houses of Assembly.<sup>60</sup>

It is clear that ambiguity, vagueness, lacunae, contradictions and conflicting legal provisions combine to create a subtle atmosphere in which child marriage can thrive.<sup>61</sup>

The researcher is of the opinion that the gravity of the situation calls firstly for a child marriage prohibition Act as a best interest principle without which the girl child continues to be deprived of adequate protection against the practice by Nigerian law.<sup>62</sup> Existing laws also require reform in light of the number of conflicting and contradictory provisions.<sup>63</sup>

Although Nigeria has ratified international treaties<sup>64</sup> which prohibit the practice of child marriage, it has not as yet promulgated an Act specifically prohibiting child marriage. The Child Rights Act, as domestic legislation, does prohibit child marriage but it is still not law in some Nigerian states. One of the criticisms levelled against the Child Rights Act has been on the question of marriageable age.<sup>65</sup> Meanwhile, other laws protecting the girl child have been rendered ineffectual by conflicting provisions.<sup>66</sup> The

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<sup>58</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>59</sup> S282(2) Penal Code "Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty." and S6 Criminal Code.

<sup>60</sup> Item 61, Part 1, Second schedule, CFRN 1999

<sup>61</sup> Fayokun (n 20 above) 464-465.

<sup>62</sup> Braimah (n 20 above) 487

<sup>63</sup> Fayokun (n 20 above) 469

<sup>64</sup> UN Convention on the rights of the child, CEDAW Convention on the elimination of discrimination against women, regional ones like the African charter on the rights and welfare of the child, The African charter on human and Peoples rights on women which prohibit child marriage specifically or as a cultural harmful practice.

<sup>65</sup> 'Opinion: Ese Oruru: Good Reason To Domesticate, Ratify And Implement The Child Right Act By States' The Will Nigeria March 4 2016 <http://thewillnigeria.com/news/opinion-ese-oruru-good-reason-to-domesticate-ratify-and-implement-the-child-right-act-by-states/> (accessed 5 November 2016)

<sup>66</sup> NM Nour 'Health Consequences of child marriage in Africa' (2006) 12 *Emerging Infectious Diseases* 1645.

combined result is that, through the failure of government, the girl child in Nigeria is not adequately protected against child marriage.<sup>67</sup>

The thesis also has relevance in terms of child marriage as it presents in conflicting international and domestic laws, in conflicts between law, culture and religion, and in constitutionality and the state's responsibility to protect the rights of citizens. The thesis also looks at emerging international trends in dealing with the issue of child marriage. South Africa, Malawi, Kenya, India, the United Kingdom and an attempt made in the United States are briefly examined.<sup>68</sup>

In essence, the thesis argues that where laws do exist<sup>69</sup>, they are rife with inherent defects in the form of explicit gender discrimination<sup>70</sup>, vagueness, lack of clarity, lacunae and inconsistencies.<sup>71</sup> In addition, there are cases where provisions expressly acknowledge the practice of child marriage in the first place, such as the provision which states that "...the officers unmarried children who are under 18 years".<sup>72</sup>

*Yakubu v Paiko*<sup>73</sup> is one major case which illustrates the conflicts inherent in Nigeria's dual jurisprudential system as well as Islamic support for child marriage in the country. In 2010 this unreported case on forced marriage

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<sup>67</sup> Art 16 and 21(2) African Charter on the Rights and Welfare of the Child.

<sup>68</sup> The Constitution of the Republic of South Africa on application of international treaties, Kenya Marriage Act, India Child Marriage Prohibition Act 2006, UK Scotland Forced Marriage Act 2011.

<sup>69</sup> CJ Onyejekwe 'Nigeria – the dominance of rape' (2008) 10 *Journal of International Women Studies* 51-53 where she claims that provisions on rape are outdated and not adequately enforced in the criminal justice system, neither does the constitution expressly prohibit rape.

<sup>70</sup> Child marriage is steeped in discrimination of the girl child and although not as a support for child marriage, a large proportion of Nigerian laws are actually discriminatory against women, this runs through the thesis as part of the research. The Nigerian constitution even on provisions of fundamental human rights is worded in the male gender form, using he throughout, it is not clear whether this is to mean that these provisions do not extend to women as it provides that or that it is just the normalcy of its gendered male society or an extension of the patriarchal societal undertone, see S33(1) Constitution of the Federal Republic of Nigeria 1999: Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

<sup>71</sup> Fayokun (n 20 above) 463-464

<sup>72</sup> Fifth Schedule, Part 1 of the Code of Conduct for Public Officers General. S29 (4) (b) Constitution of the Federal Republic of Nigeria 1999.

<sup>73</sup> CA/K/80s/85 (unreported) also 1985, 1 Sharia Law Report, the father's right to compel giving the daughter away in marriage without her consent was upheld as Islamic practice following the Ijbar principle, although the Court of Appeal invalidated the Islamic principle.



was dismissed by a high court in the North on the basis of lack of jurisdiction.<sup>74</sup>

The thesis applies feminist theory to explain why child marriage is prevalent in Nigeria and to argue for a change in the perception of the value of the girl child and for legal reform. Through rights theory, the thesis exposes child marriage as an infringement of the rights of the girl child and a failure on the part of the Nigerian government to meet its obligations under ratified treaties, also incorporating the argument of relativism.

The theory of rights includes the issue of sovereignty and for this reason monism and dualism are studied as they relate to the domestication and application of ratified international and regional treaties. In terms of sociolegal theory, the topics of legal pluralism and federalism cannot be omitted from this discourse as theories of government under sovereignty or function of law. Since one of the objectives of the thesis is to examine how the law can be applied to eradicate child marriage, it also includes a discussion of sociolegal theory for the purpose of a better understanding of the purpose and importance of law.

The thesis improves on previous studies by proposing a draft bill for the prohibition of child marriage in Nigeria and listing specific laws that must be reviewed.<sup>75</sup> While authors such as Fayokun, Braimah and Oyakhiromen have recommended the promulgation and amendment of laws to eradicate the practice,<sup>76</sup> this thesis specifically recommends that laws with respect to marriageable age be harmonised through the adoption of a reasonable minimum age that is in the best interest of the child. In addition, a revision

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<sup>74</sup>BBC News, 22Oct, 2010, Nigerian Court rejects Forced Marriage case at <http://www.bbc.co.uk/news/world-africa-11607532>. The court held that the forced marriage did not infringe the girl's human rights and that it was the sharia court that was proper to handle the matter.

<sup>75</sup> Provided in the Appendix to this thesis. Formulated from the combination of some jurisdictions having similar problems to wit India, Europe and Malawi, where laws have been promulgated to deal with the problem, having considered the impacts, challenges and the similar areas of congruent or difference with the Nigerian situation.

<sup>76</sup> Fayokun (n20 above) 469 calls for law reform. Braimah (n 20 above) 487-488, calls for legislation on marriageable age in addition to law reform, inclusive of a specific child marriage prohibition Act but does not provide a draft. CO Nwonu & I Oyakhiromen 'Nigeria and Child Marriage: Legal Issues, Complications, Implications, Prospects and Solutions' (2014) 29 *Journal of Law, Policy and Globalization* 124. 'Does Nigeria have marriageable age?' Punch10 March 2016 <http://punchng.com/does-nigeria-have-marriageable-age/> (accessed 15 July 2016).

of sections of the 1999 Constitution of Nigeria which could impact on the implementation of the proposed bill, such as S29, item 61, Part 1, Second Schedule, is proposed.<sup>77</sup>

The thesis further recommends the addition to the Constitution of a provision similar to S39 of the 1996 Constitution of the Republic of South Africa,<sup>78</sup> the reform of laws such as the Marriage Act and the deletion or revision of S6 of the Criminal Code and S282 (2) of the Penal Code.<sup>79</sup>

The rationale behind the argument for a dedicated prohibitory Act is the need for a legal reference that can also be used for scapegoating.

The thesis also proposes that a sociolegal approach be used to advocate for the eradication of child marriage, in particular by religious leaders, parents and children themselves. Lastly, through an exploratory methodology, it suggests how culture can be leveraged to eradicate the practice.

The thesis makes a concrete legal contribution in the form of a draft Bill to prohibit child marriage in Nigeria, while a contribution to knowledge is made through the comparative analysis of recent law development and wide-ranging discussion of various aspects of the law.

## **1.2 Problem statement**

Child marriage impacts on the lives of individual girls, the girl child as a social category and the development of Nigerian society. It is a form of sexual abuse that persists despite applicable domestic laws and ratified human rights instruments.

## **1.3 Thesis statement**

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<sup>77</sup> 'Early Marriage: Legal Instruments and the Nigerian Protest' O Ilechukwu <http://www.skyrocketnews.com/early-marriage-legal-instruments-and-the-nigerian-protest-by-obinna-ilechukwu-2/> (accessed 7 July 2015).

<sup>78</sup> S39(1)(b) In interpreting the bill of rights, courts must consider international law, (2) when interpreting any legislation and developing the common law or customary law, courts must promote the spirit and objects of the bill of rights. In the Nigerian case, Islamic laws as a legal system should be subject to the bill of rights and international law provisions.

<sup>79</sup> The proposed child marriage prohibition Act is provided in the Appendix to this Thesis in Chapter seven, as well as proposed amendments of the faulty laws while a justification for the Proposed Act is provided in Chapter 6.

The thesis argues that while child marriage is a social problem, the persistence of the practice in Nigeria despite international prohibitions is the result of lack of implementation and enforcement of existing laws due to inherent conflicts and contradictions. Conflicting provisions have rendered laws prohibiting the practice ineffectual and resulted in inadequate protection for the girl child against child marriage in Nigeria.<sup>80</sup>

The thesis further argues that this situation amounts to and contributes to the failure of the state to meet its obligations in terms of the prohibition of child marriage and the protection of the girl child, and therefore holds the Nigerian government responsible for the continued practice of child marriage in the country.<sup>81</sup>

#### **1.4 Research objectives**

The specific objectives of the thesis are to:

- a. Examine the nature, repercussions and legality of child marriage by investigating the reasons for its practice and the scope of the legal response in Nigeria.
- b. Consider the position of the legal systems of constituent states on the application of international and regional human rights instruments that protect the girl child against child marriage.
- c. Evaluate the role of the federal government of Nigeria in dealing with the practice of child marriage in light of its signing and ratification of international treaties and regional charters on the protection of the girl child.
- d. Analyse the conflicts in Nigeria's tripartite legal system that arise from the differential responses of competing customary, Sharia and constitutional provisions on the practice or prohibition of child marriage.

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<sup>80</sup>Nour (n 66 above)1645.

<sup>81</sup> n 23 above

- e. Propose a law making model that explicitly prohibits the practice of child marriage in Nigeria by prescribing punishment and addressing related issues.
- f. Contribute to educating the public, given that ignorance can hinder the realisation of human rights and the implementation and enforcement of human rights provisions.

### **1.5 Research questions**

Following on from these objectives, the thesis attempts to answer the question of how the law can be harnessed as an instrument for protecting the girl child in Nigeria against child marriage, in particular by implementing the internationally accepted minimum marriageable age as a standard.

In order to do so however, it is first necessary to establish the following:

- a. Is the girl child in Nigeria adequately protected against the practice of child marriage?
- b. If not, how do the country's existing legal system, laws and legislation contribute to the continuation of the practice?
- c. How has the state responded to the continuation of the practice and met its obligations in terms of global and regional human rights provisions that prohibit the practice?

To answer the primary research questions given above, the thesis investigates the following:

- a. What is the current legal position on child marriage in Nigeria?
- b. Is there a constitutional or domestic legal framework for protecting the girl child against child marriage in Nigeria, and if so, is it adequate?
- c. Do global and regional provisions have any impact on the protection of the girl child against child marriage or on related laws in Nigeria, and if not, could they do so?

- d. What legal challenges and obstacles hinder the eradication of the practice of child marriage in Nigeria?
- e. What is the feasibility of achieving the eradication of child marriage in Nigeria?

## **1.6 Research Methodology**

The study takes the form of desktop research involving a multi-disciplinary, sociolegal and comparative analysis of the law. It employs a feminist, sociolegal and rights based approach to the study of child marriage in Nigeria. It is descriptive and exploratory in proposing that the law be applied to addressing the problem of child marriage. Applying the law to deal with the issue is an approach which has previously been discouraged, primarily because of the danger of cultural or religious bias. In this regard, the thesis pays particular attention to the application of international provisions on recent development in law on the minimum marriageable age and the definition of child marriage and sexual abuse in the attempt to eradicate the practice.

The thesis includes a descriptive and analytical study of the Nigerian legal system and substantive and procedural provisions on marriage and sexual relations, including the provisions, comments and recommendations of international and regional human rights instruments on marriage and sexual abuse. In addition, case studies and case law within Nigeria and other relevant jurisdictions are analysed and compared for the purpose of identifying emerging trends in the eradication of child marriage which could be adopted in Nigeria.

The work of non-governmental organisations (NGOs) aimed at protecting the girl child is considered, particularly in the area of child marriage and family law in Nigeria, including dialogue and in-depth interviews with NGO personnel and relevant stakeholders where possible. These organisations include but are not limited to the Isa Wali Empowerment Initiative (IWEI) in

Kano and the International Federation of Women Lawyers (FIDA) which deal with cases of child marriage, particularly in Northern Nigeria. In the course of the study, the researcher benefitted enormously from informal discussions with a number of key staff members at NGOs on the issue of child marriage in Nigeria.

### **1.7 Limitations**

The study focuses on the Constitution, substantive and procedural laws and legal system in Nigeria, and those aspects of international and regional human rights instruments that are pertinent to the protection of the girl child in Nigeria against child marriage and sexual abuse.

The study is limited to the impact of child marriage on the girl child from the sexual abuse that occurs within the institution of child marriage in Nigeria. It focuses in particular on the impact of conflicting laws arising from the country's legal pluralism (i.e. the recognition of differing civil, customary and religious laws) on the girl child in Nigeria, and related legal problems and challenges.

### **1.8 Literature review**

Authors who have written about the interplay of customs, religion and law over the years have largely focused on issues relating to women and discriminatory laws, in particular the application of customary and religious laws which are more prominent in the sphere of private law, as well as on the topics of family law, marriage, custody of children and inheritance.

This thesis differs by providing a review of the Nigerian legal system and laws on marriage and sexual abuse, and particularly the abuse of the girl child within the institution of child marriage, international provisions for the protection of the girl child, and a review of the legal responses of states.

The paper concurs with some views posited in the literature and disagrees with others and gives arguments to justify its position. The available literature has been studied in terms of five aspects which are fundamental

to the thesis statement and around which the thesis revolves. These are the reasons for the ongoing practice of child marriage in Nigeria; the existence of international and regional human rights provisions protecting the girl child from the practice; the response of the Nigerian government as a sovereign state in terms of its obligations; the contribution of existing domestic law to the continuation of child marriage; and how the same law can be harnessed as an instrument to bring about the desired change.

Amoah<sup>82</sup> is of the opinion that sexual abuse of the girl child constitutes a demonstration of discrimination against her and that the issue is a structural one, meaning that the law is to blame for its occurrence. Amoah states that “the way in which the girl-child experiences the world is traditionally negative, as it is characterized by disadvantage, marginalization and discrimination of the girl-child, vis-à-vis other members of her society.” Amoah’s view is that the inadequate protection of the girl child stems from the failure to address her intersecting identities.”<sup>83</sup>

Amoah is not alone in this line of thought. Nnadi<sup>84</sup> is also of the view that sexual abuse is an endemic problem in Nigeria and persists because the state has failed to deal with discrimination against women or the entrenched culture of impunity for the violation of human rights. According to Nnadi, “in Nigeria the Penal Code of Nigeria which is applicable in the predominantly Muslim northern parts of Nigeria also validates wife beating in Section 55(1) which permits a husband to chastise his wife”.<sup>85</sup>

This is one example of how the experiences of women, while rooted in cultural history, have become part of some laws and thereby acceptable to society.<sup>86</sup> Although both Amoah and Nnadi hold the law responsible for the discrimination against the girl child which is the basis of the sexual abuse and violence she experiences, neither author deals specifically with child

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<sup>82</sup>J Amoah ‘The world on her shoulders- The Rights of the girl child in the context of culture and identity’ (2007)4 *Essex Human Rights Review* 1-23.

<sup>83</sup> Amoah (n 82 above) 1.

<sup>84</sup> I Nnadi ‘An insight into violence against women as human rights violation in Nigeria: A critique’ (2012) 5 *Journal of politics and law* 48-47, 49

<sup>85</sup> Nnadi (n 84 above)50

<sup>86</sup> As above

marriage or links their argument exclusively to legal pluralism and conflicting laws.<sup>87</sup>

Bunting<sup>88</sup> is of the opinion that the practice of child marriage, particularly in Northern Nigeria, is a matter of relativism. According to her, “Muslim governments assert relativist challenges to the application of international human rights. Delegates from diverse countries such as Morocco, Sudan, Malaysia, and Iran defend themselves from criticism on the basis of cultural integrity or cultural sovereignty.”<sup>89</sup>

Bunting also expresses the view that the legal norms applied in Northern Nigeria reinforce the notion that puberty is a girl's threshold to womanhood and therefore marriage.<sup>90</sup> As shall be shown in this thesis, governments often take this position when negotiating, or refusing to negotiate, on the substance of international women's rights. This is because the people in many countries where child marriage is practiced believe that their religion permits or supports marriage at puberty without specifying an age.<sup>91</sup>

According to Bunting, religious leaders in Northern Nigeria hold that it is a father's Islamic duty to marry out his daughters before puberty in order to ensure that no shame is brought upon their homes.<sup>92</sup> Girls are often married at the age of thirteen or fourteen, some even as young as nine or ten, with repercussions that include the termination of their formal education and vulnerability to rape and vesico-vaginal fistulae (VVF).<sup>93</sup>

Although Bunting's research includes a comparison of international and domestic laws, she does not propose the use of Nigerian or any other law as a model to prohibit child marriage.<sup>94</sup>

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<sup>87</sup> Amoah (n82 above) Nnadi (n 84 above).

<sup>88</sup> Unpublished: A Bunting 'Particularity of Rights, Diversity of Contexts: Women, International Human Rights and the Case of Early Marriage' unpublished SJD Thesis, University of Toronto, 1999 18.

<sup>89</sup> Bunting (n88 above) 18, 57

<sup>90</sup> Bunting (n 88 above) 100

<sup>91</sup> Erulkar & Bello (n 9 above) 11.

<sup>92</sup> Bunting (n 88 above) 100

<sup>93</sup> As above

<sup>94</sup> Bunting (n 88 above) 101.



Uwais<sup>95</sup> disagrees with the view that Islam is the reason for the practice of child marriage, arguing that the practice is not law in Islam and that Islam provides for the protection of the rights of vulnerable members of society who in many cases are women and children.<sup>96</sup> She also holds that by accommodating these rights, Islam allows for the modification or reform of its provisions. She blames the law and society for the ongoing practice of child marriage.<sup>97</sup>

In her discussion of the case of a girl bride who poisoned her husband in order to stop the sexual assault she suffered every night since her wedding, Uwais says, “If a minimum age for marriage had been incorporated into our laws and implemented effectively thereafter, Wasila’s father would not have had the legitimate authority to compel her into such an unwanted union, with the attendant consequences.”<sup>98</sup>

Dejo Olowu is of the same opinion as Uwais, stating that Islamic law contains extensive provisions that reinforce global advocacy for the promotion and protection of the status, rights and welfare of children.<sup>99</sup>

Braimah<sup>100</sup> also holds that Nigerian law is to blame for creating an atmosphere that is conducive to the continued practice of child marriage. According to Braimah, the rights of the girl child with respect to marriage are not adequately protected due to the provisions of Part 1 Section 61 of the 1999 Constitution of the Federal Republic of Nigeria.<sup>101</sup>

This researcher is in agreement with the feminist school of thought in this regard but goes further to argue that this is because the legal system and

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<sup>95</sup> Maryam Uwais ‘Senator Yerima and Constitutional Review’ Partnership for Justice (PJN) 23 July 2013 <http://pinigeria.org/our-stories-blog/senator-verima-and-constitutional-review-by-maryam-uwais.pjn/> (accessed 16 January 2017).

<sup>96</sup> As above

<sup>97</sup> As above. M Uwais ‘The Rights of the Nigerian Child’ being a presentation at the French Embassy, 9<sup>th</sup> December 2013.

<sup>98</sup> M Uwais ‘Child Marriage, as Violence Against the Girl Child, The Forum on Women, Religion, Violence and Power’ The Carter Center March 18 2015 <http://forumonwomenblog.cartercenter.org/2015/03/18/child-marriage-as-violence-against-the-girl-child/> (accessed 6 November 2016. n 17 above).

<sup>99</sup> Olowu (n 17 above) 62-85.

<sup>100</sup> Braimah (n 20 above) 476

<sup>101</sup> As above

laws appear to institutionalise patriarchy.<sup>102</sup> The thesis seeks to demonstrate that in the multiplicity of laws within the legal system, both substantive and procedural, conflicts of law are inevitable and problematic for decisions on which law to apply to whom and how.

Nour argues that existing laws do not adequately protect the girl child because they are ineffectual.<sup>103</sup> The researcher concurs with Nour's position that the laws prohibiting child marriage are rendered ineffectual by lack of enforcement,<sup>104</sup> arguing further that the state is guilty of inadequate legal and judicial responses in this regard. The fact that perpetrators are not prosecuted and the failure to interpret the meaning of confusing legal provisions that leads to a dearth of decided cases are evidence of the state's failure to meet its responsibilities in protecting the girl child.<sup>105</sup>

Nigeria's legal system and legal provisions are often blamed by government as standing in the way of the domestication of ratified international and regional treaties. The thesis proposes that the legal system be changed and laws reformed since the Nigerian government is obliged by international human rights declarations to protect the rights of its citizens. Culture, religion and even domestic laws cannot be used as excuses for infringing on the rights of any individual or for government's failure to fulfil its lawful duties.<sup>106</sup>

In discussing the issue of legal pluralism with respect to Islamic law, An Naim prefers the term normative pluralism to legal pluralism.<sup>107</sup> Natan Lerner agrees on the issue of normative orderings,<sup>108</sup> while Imam, also

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<sup>102</sup>F Banda Project on a mechanism to address laws that discriminate against women, office of the high commission for human rights-women's rights and gender unit (2008)21 [http://www.ohchr.org/Documents/Publications/laws\\_that\\_discriminate\\_against\\_women.pdf](http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf), (accessed 22 November 2016).

<sup>103</sup> Nour (n 66 above) 1647

<sup>104</sup> As above

<sup>105</sup> Banda(n 102 above)57-59

<sup>106</sup> Fayokun (n 20 above)466

<sup>107</sup> A An-Naim 'Religious norms and family law: Is it legal or Normative pluralism?' (2011) 25 *Emory International Law Review* 786.

<sup>108</sup> Natan Lerner 'Group rights and legal pluralism' (2011) 25 *Emory International Law review* 830.

agreeing with An-Naim, holds that religious laws, and Sharia in particular, can be interpreted as being in line with development and legal reform.<sup>109</sup>

The researcher concurs that religious tenets are more often described as norms than laws and, as opposed to state laws, are regarded as instructions or ordinances by adherents of the faith. She does not however agree with the use of the term normative pluralism because this implies also taking regular laws as norms (since they exist naturally), which they in fact are not. The researcher further maintains that even religious norms cease to be mere norms when they are recognised by state laws, as happens in Nigeria. They then become law and are actually viewed as such.<sup>110</sup>

This opinion is shared by Oba who states that religious practices or dictates, and particularly Sharia, are not merely practices like other customary norms, but law, and when codified become statutory laws as has happened in Northern Nigeria.<sup>111</sup> Even before the institutionalisation of religious state laws in Nigeria, Sharia law, as Islamic law, was part of the country's legal system and has operated as such since before the advent of colonialism and post independence.<sup>112</sup>

Authors are divided on the issue of government responsibility. Some argue that the state has failed in its duty to ensure the implementation of United Nations and regional human rights provisions for the protection of the girl child against abuse<sup>113</sup> and child marriage in particular, given that the ongoing practice of child marriage in Nigeria is not only related to issues of

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<sup>109</sup> A Imam 'Women, Muslim Laws and Human Rights in Nigeria' July 7 2011 <https://www.wilsoncenter.org/publication/women-muslim-laws-and-human-rights-nigeria#sthash.rxz6nbYP.dpuf> (accessed 11 November 2016).

<sup>110</sup> Islamic as well as customary law are recognised in the Nigerian Constitution and the existence of established courts with personnel paid by the government proves this. S260, S261, S275-284 of the Constitution of the Federal Republic of Nigeria 1999.

<sup>111</sup> AA Oba 'Religious and Customary laws in Nigeria (2011) 25 *Emory International Laws review* 894-895. Also S Solebo- a chief magistrate of the family court in Lagos opined that there are 4 schools of Islam and for Islam to be institutionalised in Nigeria the government must adopt one which has not been done, although many writers believe it is the Maliki school that is practiced in Nigeria, but this must also be considered in the light of S10 of the constitution on prohibition of religious state.

<sup>112</sup> Oba (n 111 above) 882. Whether normative or law, Nigeria practices a plural legal system which allows the recognition of the three civil, customary and religious laws to be applied simultaneously alongside each other and the federalism in its legislative system too is plural in nature.

<sup>113</sup> Nnadi (n 84 above) 55. She believes the CEDAW has not been domesticated and this is one of the reasons why violence against women continue unabated.

religion<sup>114</sup> or culture but also the permissiveness of the law. Olatubosun<sup>115</sup> and Uwais<sup>116</sup> have supported this view.

According to Ofuani, it is the responsibility of sovereign states to protect their citizens from crimes such as rape and should they fail to do so, the responsibility reverts to the international community.<sup>117</sup> According to Viljoen, the state-centered nature of international human rights has been one of its major challenges. In his view, international human rights law is trapped in the paradox of the state as both primary protector and violator of human rights.<sup>118</sup>

Viljoen also maintains that states are the primary duty bearers and that the domestic implementation of international human rights law has been the real test in the realisation of the human rights of citizens.<sup>119</sup> It is in the context of the realisation or enforcement of human rights that the theory of sovereignty is raised in this thesis.

In linking sovereignty to the realisation of human rights, Ofuani notes that the basic international legal status of a state is such that within its territorial jurisdiction it is not subject to the governmental, executive, legislative or judicial jurisdiction of a foreign state or to any foreign law other

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<sup>114</sup> The argument even internationally from Islamic leaders is that Islam does not provide a specific minimum age for marriage but puberty, that it would be against Islam to fix one especially since Mohammed the founder and prophet of Islam set the precedence and Muslims are to abide by his teachings and lifestyle, although the Muslim women Musawah have variously contradicted this, see Musawah, A Report to be written pursuant to HRI Resolution/HRC/RES/23/23 on child, early and forced marriage, 13 Dec 2013, by Musawah, global movement for equality and justice in the Muslim family.

<sup>115</sup> A Olatubosun 'Addressing The Phenomenon of Child Marriage in Nigeria' (2001) 9:2 *Ifè Psychology IA: An International Journal* 159. It is not an issue of culture and religion alone but also of law, while customary and religious law seem to permit it, the other legal system is not clear about its stance on the issue of age in marriage so there is no specific legal provision that prohibits child marriage in Nigeria by age standard.

<sup>116</sup> M Uwais 'Child Marriage as Violence Against the Girl Child' The Forum on Women, Religion, Violence and Power The Carter Center March 18 2015 <http://forumonwomenblog.cartercenter.org/2015/03/18/child-marriage-as-violence-against-the-girl-child/> (accessed 6 November 2016).

<sup>117</sup> Unpublished: SO Ofuani 'Redefining state sovereignty: The complexities of humanitarian intervention and the responsibility to protect' Unpublished Master's Thesis, school for advanced legal studies, Faculty of law, University of Cape Town, 2009 43.

<sup>118</sup> F Viljoen 'Contemporary challenges to international human rights law and the role of human rights educators' (2011) 44 *De Jure (Pretoria)* 217.

<sup>119</sup> F Viljoen *International Human Rights Law in Africa* (2012) 4, 9.

than public international law.<sup>120</sup> Along similar lines, the thesis discusses legal pluralism and federalism as theories under the theory of sovereignty.

Admittedly, the domestication of ratified international human rights instruments in Nigeria has partly been problematic due to loopholes in the law which have allowed politics to play out and due to the interpretation of the provision in the Constitution of Nigeria on the domestication of international treaties.<sup>121</sup>

The country's plural legal system coupled with its complex federalism, particularly with respect to legislative making powers, contributes to the ongoing practice of child marriage in Northern Nigeria, especially when it comes to implementing the rights enshrined in treaties ratified by the Nigerian government.<sup>122</sup>

It has been noted above that Braimah maintains that the rights of the girl child in terms of marriage are not adequately protected due to the provisions of Part 1 Section 61 of the 1999 Constitution of Nigeria.<sup>123</sup> On the basis of this section, certain of Nigeria's northern states have not accepted the Child Rights Act and/or have drafted their own Child Rights Act which recognises the attainment of puberty as the age for marriage rather than the 18 years stipulated in the Child Rights Act.<sup>124</sup>

In this regard, the judiciary, as interpreter of the law and legal norms to protect citizens,<sup>125</sup> plays a huge role since even the most fundamental sources of Islam can be interpreted as supporting the protection of the girl child and holding states responsible for doing so.<sup>126</sup>

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<sup>120</sup> Ofuani (n 117 above)6

<sup>121</sup> S12 Constitution of the Federal Republic of Nigeria, this has permitted the non-domestication of Cedaw and other important laws that would have helped against child marriage. Also item 61, part 1, second schedule Constitution of the Federal Republic of Nigeria 1999.

<sup>122</sup> Braimah(n20 above)479

<sup>123</sup> As above

<sup>124</sup> Braimah(n 18 above)486

<sup>125</sup> M Ladan 'Women rights, access to and administration of justice under the sharia in Nigeria' in J Ezeilo, M Ladan & A Akiyode (eds) *Sharia implementation in Nigeria, issues and challenges on women's rights and access to justice* (2003) xxvii, 21,23,42.

<sup>126</sup> Olowu (n 17 above)63.

A great deal depends on a country's legal system and laws if the human rights of its citizens are to be protected. The answer lies in the Constitution itself as the supreme law, particularly the analysis of its legislative provisions and most importantly its interpretation. In this regard, the researcher concurs with Braimah on the need for a revision of the Nigerian Constitution to support the eradication of child marriage.<sup>127</sup>

The Constitution is clearly ripe for reform,<sup>128</sup> but this thesis argues further for not only a general reconstruction of the legal system but the promulgation of a law prohibiting child marriage which specifies a marriageable age that is in the best interest of the child.<sup>129</sup> It further recommends a revision of certain other laws such as the Criminal and Penal Codes in accordance with international standards, a reform of the Marriage Act and the Matrimonial Causes Act on marriageable age and the prohibition of child marriage, and the harmonisation of laws so that the girl child in Nigeria is legally protected against the practice.<sup>130</sup> It also recommends a Gender or Child Unit in all government offices with a commission dedicated to dealing with child marriage issues.

### **1.8.1 Knowledge gap and contribution**

There are a number of gaps which this thesis seeks to fill.

Studies on sexual abuse of the girl child in Nigeria have focused on the abuse of street children<sup>131</sup>, abuse while hawking<sup>132</sup>, and abuse in schools<sup>133</sup>

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<sup>127</sup> Braimah (n 20 above)488

<sup>128</sup> I Imam & MAA Mustapha 'The unending crisis on the status of sharia in Nigerian constitution: The past, present and future of sharia in focus' <https://unilorin.edu.ng/publications/SHARIAH%20IN%20NIGERIA%20IMAM%20AND%20MARIAM.htm> (accessed 11 November 2016).

<sup>129</sup> A draft Bill is provided in the Appendix of this thesis as one of the contribution of this thesis. The different authors in Nigeria that recommend legislation did not provide a model draft, this thesis does this.

<sup>130</sup> Musawah, A report pursuant to HRI Resolution A/HRC/RES/24/23 on Child, early and forced marriages, 13<sup>th</sup> December, 2013, by Musawah, Global movement for equality and justice in the Muslim family, Islamic justifications for child marriage are not tenable and are debatable, many Muslims have been debating it and many Muslim countries have reformed their laws to ban the practice.

<sup>131</sup> P Ebigo 'Street children the core of neglect' (1996) 26 *Africa Insight* 245

<sup>132</sup> JI Ikechukwu GO Udigwe et al 'Sexual abuse among juvenile female street hawkers in Anambra' (2008) 12 *African journal of reproductive health* 111-119

<sup>133</sup> IC Anochie & EE Ikpeeme 'Prevalence of sexual activity and outcome among female secondary school students in Port Harcourt Nigeria' (2001) 5 *African journal of reproductive health* 63-67

and the neighbourhood but not within the institution of child marriage.<sup>134</sup> In addition, researchers on child marriage have focused on specific applications of the law such as human rights and health or the impact of law on the education and development of the girl child, but without the holistic approach to aspects of law or conflict of laws provided in this thesis. While Braimah and Fayokun discuss child marriage from the perspective of conflict of laws, Braimah focuses on conflicting legislative jurisdiction<sup>135</sup> and Fayokun on the legal system.<sup>136</sup> This thesis involves a broader study of conflict of law as it affects child marriage.

Furthermore, while other researchers have recommended that legislation be implemented to prohibit child marriage, none have put forward a drafted child marriage prohibition Act.<sup>137</sup>

The thesis looks at child marriage in relation to a number of aspects of the law - constitutional law, human rights, international law, family law, marriage, criminal law, jurisprudence, and law and religion – and makes a timely appearance in light of the persistence of child marriage in Nigeria.

A contribution is also made to the ongoing discourse on constitutional and general law reform in the country,<sup>138</sup> looking at child marriage in Nigeria from the perspective of recent law development in other jurisdictions in Africa and beyond, and making recommendations.

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<sup>134</sup> Ikechukwu et al (n 132 above)64

<sup>135</sup> Braimah (n 20 above)488

<sup>136</sup> Fayokun (n 20 above)469

<sup>137</sup> Braimah (n 20 above), 474.

<sup>138</sup> Bunting (n 88 above)100 This is the recognized gap in this area, various researches have counselled against using law to eradicate the problem fearing that it would give room for its perpetration in secret and close it up totally from eradication. Essentially the fear is criminalizing the practice but this thesis finds it necessary based on the various unfruitful attempts and thus recommends an attempt at law, which it seeks as a last resort. Although Braimah recommended a child marriage prohibition act, it did not provide a proposed draft of such Act.

## **1.9 Chapter outline**

Chapter 1: This chapter introduces the thesis. It outlines the basis, extent, content and structure of the study, provides background to the research, describes the research problem and thesis statements, and lists the aims, objectives, research questions, methodology and limitations of the study. It also contains a detailed literature review, identifies the knowledge gap and the contribution of the study, and presents the chapter outline.

Chapter 2: This chapter consists of eight sections, the first of which is the introduction. This is followed by a discussion of the feminist theory, rights theory and the sociolegal theory of jurisprudence under which an overview of legal pluralism is discussed. Following a theoretical synthesis and application of the theories covered, a postulation is made. In addition, for the purposes of background information, the chapter includes a section on Nigeria, with particular reference to childhood and the child in the context of Nigerian culture and religion. This is followed by a summary and conclusion.

Chapter 3: The chapter covers major conceivable issues relating to child marriage. The Chapter covers eleven sections. The introduction is followed by the second section on sexual abuse in context. The third section discusses the girl child. The fourth section discusses the institution of marriage. The fifth section covers a range of the general perspectives on child marriage including unions similar to child marriage in some other jurisdictions. The sixth section discusses the legal aspects of child marriage. The seventh section discusses child marriage in Nigeria: prevalence and causes. The eighth section discusses a case study of child marriage and the sexual experience of the girl brides in Nigeria. The ninth section deals with the effects of child marriage. The tenth section deals with sociological solutions to child marriage, this includes a section on utilising customary law and practice to discourage the practice while the last section is the summary and conclusion.



Chapter 4: The chapter contains 19 sections. The first section discusses the Nigerian legal system generally. The second section discusses English law in Nigeria. The third section discusses customary law in Nigeria. The fourth section discusses Islamic law in Nigeria. The fifth section discusses judicial precedence in Nigeria. All these sections are discussed alongside their provisions on marriage and their connection to child marriage. The sixth section discusses judicial institutions and the police. The seventh section discusses the constitution of Nigeria and analyses its contents as compared to other jurisdictions on fundamental human rights and the issues of culture and religion. The eighth section discusses judicial precedence. The ninth section discusses the protection of the girl child against child marriage under the Nigerian constitution specifically. The tenth section discusses the protection under the marriage and the Matrimonial Causes Act. The eleventh section discusses the protection under the Child Rights Act. The twelfth section discusses the protection under the Criminal provisions of the criminal and penal codes. The thirteenth section discusses the protection under the NAPTIP (National Agency for the Prohibition of Trafficking of Persons). The fourteenth section deals with the provisions of the Prohibition of Violence against persons Act. The fifteenth sections deals with policies that are related to the issue of child marriage in Nigeria. The sixteenth section deals with other institutions apart from the court and Police which provide protection for citizens. The seventeenth section discusses the evaluation of the legal protection against child marriage in Nigeria. The last section is the summary and conclusion.

Chapter 5: The chapter explains international and regional treaties with provisions on child marriage, sexual abuse and harmful traditional practices. This chapter covers eight sections. The first section is on the responsibilities of states with respect to international human rights. The second section is on the related multilateral treaties. The third section is on discussion of the implementation of treaties by member states and the fourth section is on challenges of treaties related to women and children. The fifth section discusses the emerging trends in state obligations under

international law to protect the girl child against child marriage. The sixth section discusses the domestication and applicability of treaties in Nigeria. The seventh section is a discussion of the country's implementation of international law for the protection of the girl child. The eighth aspect discusses an assessment of the fulfilment of Nigeria's obligations under international human rights instruments. The chapter then concludes with a summary.

Chapter 6: This chapter contains an analysis of the challenges and legal obstacles to the implementation of existing protective provisions in Nigeria, in particular the conflicts within the country's legal system and laws or legislation. This chapter discusses eight aspects. The first section examines the conflict of law on the issue of age of childhood in Nigeria as it relates to child marriage and the inevitable attending sexual abuse. The second section looks specifically at the conflict between the three main aspects within the country's plural legal system. This is followed by the third section which is a discussion of the conflict within each of the English, customary and Islamic systems of law and the implications thereof on the issue of child marriage. The fourth section deals with the conflict within each law or piece of legislation. This is followed by a discussion of other legal challenges including the problems of vagueness, lacunae and issues of interpretation as the fifth section. The sixth section analyses the effect of these conflicts and challenges. The seventh section explores what Nigeria can learn from other jurisdictions on the issue of conflicts of law. Lastly, the eighth section discusses the possible legal solutions and the chapter ends with a conclusion.

Chapter 7: This chapter concludes the thesis with recommendations. A proposed draft bill on the prohibition of child marriage in Nigeria is attached as an appendix. Constitutional reform and amendments to other key problematic and/or conflicting legislation noted in the course of the study are proposed. A recommendation is also made for the establishment of an independent Child and Gender Commission which includes a commission dedicated to child marriage issues.

## **CHAPTER TWO**

### **Theoretical framework**

#### **2.1 Introduction**

This chapter consists of eight sections. The introduction section is followed by a discussion of feminist theory. The third section is the rights theory under which the issues of universalism, relativism and state sovereignty are discussed. Under the issue of state sovereignty, monism and dualism is discussed. The fourth section is the sociolegal theory of jurisprudence under which an overview of legal pluralism and federalism is discussed. The fifth section discusses a theoretical synthesis and application of the theories covered. The sixth section is a short postulation from the theories. In addition, for the purposes of background, the chapter includes a seventh section on Nigeria, with particular reference to childhood and the child in the context of Nigerian culture and religion. The chapter ends with a summary and conclusion

This thesis views child marriage issue from the feminist perspective, the rights theory and the sociolegal jurisprudential theory. Universalism and relativism as well as sovereignty, monism and dualism are linked to the rights theory and covered in that discussion, while legal pluralism and federalism are discussed in the section on the sociolegal jurisprudential theory.

#### **2.2 Feminist theory**

Theories offer competing explanations about how things work and how and why people interact as they do, they prompt people to ask new questions

and to see power dynamics and relationships which would otherwise have been missed or misread.<sup>1</sup>

Researchers have developed theories on child marriage, many about the origin and persistence of the practice.<sup>2</sup> Mganga discussed the issue of child marriage as centred around the theory of gender and power.<sup>3</sup> Many of the theories focus on the causes and effect of child marriage and some discuss the age of marriage and empowerment of the girls and women. In explaining the causes of child marriage, the dominant issue most often discussed is on patriarchy, the perception of women and children in societies.<sup>4</sup>

These issues are connected to feminism, which is believed will make visible other impacts of child marriage on sexuality, and livelihood beyond health and education.<sup>5</sup> Mganga analyses practices and norms in societies as socially constructed pattern of behaviour of roles that are learnt, enacted and organised and where women and children occupy the disadvantaged positions.<sup>6</sup> This is summarised as feminist theory in this thesis.

Feminist theory is centred on the stories and cases of women in society and posits that the various abuses experienced by women are the result of the discrimination that plays out in the patriarchal structure of societies.<sup>7</sup> It claims that these abuses are the result of male dominance<sup>8</sup> and that this dominance has become so structured in society that even the law itself discriminates against women.<sup>9</sup>

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<sup>1</sup> W Frisby, P Maguire & C Reid 'The "F" word has everything to do with it: How feminist theories inform action research' (2009) 7 *Action Research* 16

<sup>2</sup> C Bicchieri, T Jiang & JW Lindemans 'A social norms perspective on child marriage: The general framework' being a Unicef draft from the behavioural Ethics lab, University of Pennsylvania, 05/15/2014 2.

<sup>3</sup> VM Mganga 'Young married girls: Silenced in marriage, invisible in policy and practice' being a research paper for the degree of masters in Arts, International Institute of Social Studies, Graduate School of Development Studies, The Hague, The Netherlands, 2009 7-10.

<sup>4</sup> 'Early marriage: Child spouses' Innocenti Digest No.7 - March 2001 2

<sup>5</sup> ME Greene 'Ending child marriage in a generation: what research is needed' (2014) 1,7

<sup>6</sup> Mganga (n 3 above) 10

<sup>7</sup> SM Okin 'Feminism, women's human rights and cultural differences' (1998) 13 *Hypatia* 35. This sets the atmosphere and regulates behavior in many societies in marriages, homes and families.

<sup>8</sup> A Ojilire & GC Chuan 'Learning from the Indian Judiciary: New Directions for Securing Nigerian Women's Right to Dignity' (2015) 31 *Asian Women* 86, 98. PE Okeke 'Reconfiguring tradition: Women's rights and social status in contemporary Nigeria' (2000) 47 *Africa Today* 50

<sup>9</sup> C Dalton 'Where we stand: Observations on the situation of Feminist Legal Thoughts' (1987) 3 *Berkeley Journal of Gender, Law and Justice*, 2.

Law in this sense being legal provisions as contained in the regulations established to guide and create order in society.<sup>10</sup> It is problematic when these provisions are discriminatory against a sector of society, which is the case with Nigerian law relating to child marriage.<sup>11</sup> The feminist approach has the “aim of illuminating the life context and experiences of women,<sup>12</sup> guided by their frame of reference, experience and language<sup>13</sup> and then attempting to effect a change through its perspectives.”<sup>14</sup>

Feminism is the movement which seeks the eradication of all forms of discrimination against women, and to this end embraces various theoretical approaches including the liberal, Marxist, radical and socialist.<sup>15</sup>

The liberal feminist focuses on social change through the reconstruction of legislation and regulation of practices, particularly in terms of employment, holding that the inequality in society that is evident in the treatment of women stems from the denial of equal rights.<sup>16</sup> The radical feminist argues for a complete transformation of the perceptions, thoughts and ideas in society which underlie how women are treated, in particular as second class citizens compared to their male counterparts.<sup>17</sup> Marxist feminist theory is largely about class and status, its argument being that women should be treated equally in all social institutions, including marriage.<sup>18</sup>

On the other hand, social feminism holds that the oppression of women is rooted in their work or their role in the family which has negatively affected their economic independence and status in society.<sup>19</sup> In this sense, the

<sup>10</sup> O Soyeju *Rudiments of Nigerian law* (2005)2

<sup>11</sup> KO Fayokun ‘Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights’ (2015) 5 *US-China Education Review B* 463-465

<sup>12</sup> PA Cain ‘Feminist jurisprudence: Grounding the theories’ (1988) 4 *Beckley Women’s LJ* 191.

<sup>13</sup> Pamela Scully ‘Feminist thinking’ (2010) *African gender history and transitional justice* 31-32. [www.ajol.info/index.php/ajer/article/viewfile/52171/40797](http://www.ajol.info/index.php/ajer/article/viewfile/52171/40797)

<sup>14</sup> Dalton (n 9 above)2. Frisby (n 1 above) feminist research prompt people to ask new questions and to see power dynamics and relationships that may otherwise be missed or misread. As a result, they have an important role to play in any action research.

<sup>15</sup> ‘Feminist movements and ideologies’ Wikipedia [https://en.wikipedia.org/wiki/Feminist\\_movements\\_and\\_ideologies](https://en.wikipedia.org/wiki/Feminist_movements_and_ideologies) (accessed 29 November 2016).

<sup>16</sup> As (n15 above)

<sup>17</sup> As above. Cain (n12 above)31-32.

<sup>18</sup> ‘What is Marxist feminism?’, Reference <https://www.reference.com/world-view/marxist-feminism-afa84658e7ff7d1> (accessed 7 November 2016).

<sup>19</sup> Aver T Theophilus ‘Gender Violence and Criminal Justice system in Nigeria’ 1 [aceser.net/journals/download.php?aid=19&action=download](http://aceser.net/journals/download.php?aid=19&action=download) (accessed 29 November 2016).

social feminist argues that the social roles of womanhood and motherhood that are attached to women are the determining factor in their current status in every society.<sup>20</sup>

Of these feminist theories, this thesis applies the radical and liberal approaches that for child marriage to stop in Nigeria, laws inclusive of mind-set about women must change.

Liberal feminism highlights understanding the lack of equality in societies between men and women and the role of the law in maintaining this inequality, and demands substantive justice.<sup>21</sup> It describes the practical day-to-day life experiences of women from their perspective, not that of men, and calls for the reform of those laws and politics relating to equality in societies which affect women as citizens.<sup>22</sup>

The liberal feminist argument is not intrinsically about women and men being equal, since it acknowledges the difference between men and women, even in their makeup, but it seeks equity and equality in the treatment of all human beings in male-dominated societies.<sup>23</sup> The radical feminist slant in the thesis can be seen in the postulation that for things to change on child marriage, the gender roles and gender discrimination inherent in cultural contexts as well as all patriarchal institutions and their supporting perceptions must be eradicated.<sup>24</sup>

Bunting, an internationally renowned feminist who has written on child marriage<sup>25</sup>, used the situation of women in Northern Nigeria to illustrate the discrimination against women particularly on the basis of culture and religion which she maintains is linked to early marriages.

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<sup>20</sup> A Atsenuwa *Constitutionalism and legal feminism: Stepping stones or impediment on the long road to Freedom for Nigerian women* (2011) 18

<sup>21</sup> What is liberal feminism?, Reference at <https://www.reference.com/world-view/liberal-feminism-4a7ffe51e979e64>, accessed on 7/11/2016.

<sup>22</sup> 'Liberal feminism' Wikipedia [https://en.wikipedia.org/wiki/Liberal\\_feminism](https://en.wikipedia.org/wiki/Liberal_feminism) (accessed 7 November 2016).

<sup>23</sup> Atsenuwa (n 20 above) 18

<sup>24</sup> G Mikel 'African feminism: Towards a new politics of representation' (1995) 21 *Feminist studies Inc.* 406. African feminism toward new politics of representation <http://knowleak.com/african-feminism-toward-new-politics-of-representation> (accessed 29 November 2016).

<sup>25</sup> Unpublished: A Bunting 'Particularity of Rights, Diversity of context: Women's International human rights and the case of Early marriage' unpublished JSD Thesis, University of Toronto, 1999 8-9. The thesis was on early marriage in Northern Nigeria.

While writing on the issue of sexual intercourse within marriage, Mochetti cites the male right to sex as the major reason for the sexual exploitation which is entrenched in the practice of child marriage.<sup>26</sup> I argue like Moschetti that conjugal rights in child marriage are upheld by the state, are further reinforced by the institutions of law and religion and are often prioritised even when they result in the sexual violation of the girl brides.

Feminists argue that patriarchy allows for child marriage<sup>27</sup> and have criticised the cultural, traditional and religious norms that characterise the politics of societies and, in the case of Nigeria in particular, are embedded within the legal system.<sup>28</sup> For instance, Oyigbenu,<sup>29</sup> acceding to the traditional perception of the girl child agreed that “the girl child in these societies has had her destiny sealed from birth by traditions and cultures on account of her biological sex,” as her destiny and fulfilment in life may be limited by practices argued as immune to the law on the grounds of tradition and culture. In Oyigbenu’s view, the cornerstone of this issue is patriarchy.

Bamgbose<sup>30</sup> maintains that discrimination of females has been built into Nigerian law and this has buttressed and promoted the continuation of practices such as child marriage in Nigerian society. Teafi<sup>31</sup> conceding on the issue of age and sex as negatively affecting the girl child, is of the view that the law often deals inadequately with the abuse of the girl child since the law itself has succeeded in fragmenting the identity of the girl child into that of a child and a woman so that the two are not considered together.

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<sup>26</sup> Unpublished: CO Mochetti Conjugal Wrongs don’t make Rights: International feminist activism, child marriage and sexual relativism, unpublished PhD thesis, University of Melbourne, 2005 7, 13. Challenging sexual exploitation is difficult because of the social acceptance of men’s rights of sexual access to men and girls.

<sup>27</sup> ‘Patriarchy allows child marriage and female genital mutilation to flourish’ The Guardian 24 July 2014 <https://www.theguardian.com/global-development/poverty-matters/2014/jul/24/patriarchy-child-marriage-female-genital-mutilation-fgm-feminism> (accessed 15 July 2016).

<sup>28</sup> Fayokun (n 11 above) 465.

<sup>29</sup> A Oyigbenu ‘Girl Child Education and Nigeria’s Developmental Agenda: A literary perspective’ (2010) 4 *African Research Review* 419.

<sup>30</sup> O Bamgbose ‘Legal and cultural approaches to sexual matters in Africa: the cry of the adolescent girl’ (2015) 10 *University of Miami International and Comparative Law Review* 127, 138.

<sup>31</sup> Nura Taefi ‘The synthesis of age and gender: Intersectionality, International human rights law and marginalisation of the girl child in M Freeman (ed) *Children’s Rights: progress and perspectives, essays from international journal of children’s rights* (2011) 128.

This contributes to making the girl child invisible in society and her protection consequently not being prioritised.

Ezeilo<sup>32</sup> agrees that discrimination is the main reason why women experience so much abuse and that this discrimination has been formalised in the law.

Feminism is not without its shortcomings,<sup>33</sup> one of which is a universal view of the experience of women which is not in fact the same everywhere, but it has been useful in drawing attention to the voice of women.<sup>34</sup> It speaks to the particular abuses and challenges that women encounter, and can also be useful in highlighting the plight of children, particularly the girl child.<sup>35</sup>

Feminism has successfully linked the challenges of women to society's patriarchal perceptions, tracing it to the dawn of civilization<sup>36</sup> and finding it entrenched in the foundations of legal provisions.<sup>37</sup> The discussion of African feminism below is based on the different experiences and responses of women in different timeframes and spaces.

### **2.2.1 African feminism**

Since feminism is about the plight of women as expressed by women, its postulations are influenced by which woman or set of women is under scrutiny. A discourse on child marriage in Nigeria as an African country

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<sup>32</sup> J Ezeilo 'Feminism and Islamic Fundamentalism: Some Perspectives from Nigeria and beyond' (2006) 32 *Signs: Journal of Women in Culture and Society* 42.

<sup>33</sup> Frisby et al. (n 1 above) 16.

<sup>34</sup> P Mcfadden 'Contemporary African Feminism: Conceptual Challenges and Transformational Prospects' Osisa July 8 2011 <http://www.osisa.org/buwa/womens-rights/regional/contemporary-african-feminism-conceptual-challenges-and-transformational>.

<sup>35</sup> YS Alkan 'Feminist Legal methods: Theoretical assumption, advantages and potential problems' (2012) 9 *Ankara Law Review* 160-163.

<sup>36</sup> IS Emakhu 'The Nature And Prevalence Of Violence Against Women In Nigeria' 1st Annual International Interdisciplinary Conference, AIIC 2013, 24-26 April, Azores, Portugal, 775. All these place demands on women and have been formalized in some provisions of the laws of Nigeria.

<sup>37</sup> A Sultana 'Patriarchy and Women's Subordination: A Theoretical Analysis' (2010-2011) 4 *The Arts Faculty Journal* 8-10.



must of necessity refer to African feminism as the theoretical strand that is purely about the voice and experience of the African woman.<sup>38</sup>

According to Oyekan, feminism is based on the concept of group action by women with regard to their welfare in terms of social, cultural, economic, religious and political provisions that are indigenous and familiar to most of them.<sup>39</sup> African feminist philosophy is thus feminist philosophy that belongs to or is indigenous to African women and expresses feminist ideas on and for African women.<sup>40</sup>

African feminism does not restrict itself to the rights of women living in Africa but embraces the experiences and responses of African women living in the Diaspora or on other continents.<sup>41</sup> It is contended that a culture practiced in Africa is carried by its people to wherever they migrate.<sup>42</sup> Child marriage for example is practiced by indigenous people everywhere, including Northern Nigerians whether living in Nigeria or abroad.<sup>43</sup> This is illustrated by the fact that the prevalence of child and forced marriages in migrant communities in the United Kingdom recently led to that country promulgating a law criminalising the practice.<sup>44</sup>

Gaie argues that African feminism is distinct from that of the western women and to compare them will result in moral confusion.<sup>45</sup> There are women the world over but their circumstances and situations vary, and the

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<sup>38</sup> AO Oyekan 'African Feminism: Some Critical Considerations' (2014)15) *Philosophia* 2. Unarguably, there is the western and the African feminism, the western feminism is first feminism discussed in this chapter, there is also a western feminism in African feminism that discusses the approach of the been to African woman who thinks or perceives feminism in line with the western woman.

<sup>39</sup> Oyekan (n 38 above)2-3.

<sup>40</sup> J Ahikire 'African feminism in context: Reflections on the legitimization battles, victories and reversals' 19 *Feminist Africa* 8-10 [http://agi.ac.za/sites/agi.ac.za/files/features\\_-\\_african\\_feminism\\_in\\_the\\_21st\\_century\\_-\\_a\\_reflection\\_on\\_ugandagos\\_victories\\_battles\\_and\\_reversals.pdf](http://agi.ac.za/sites/agi.ac.za/files/features_-_african_feminism_in_the_21st_century_-_a_reflection_on_ugandagos_victories_battles_and_reversals.pdf) (accessed 7 November 2016).

<sup>41</sup> 'African Feminism Driven by African Women' *Feminism* 20 January 2010 <http://www.ngopulse.org/article/african-feminism-driven-african-women> (accessed 7 November 2016).

<sup>42</sup> 'The US has a forced child marriage problem too' *PRI* 29 December 2015 <http://www.pri.org/stories/2015-12-29/us-has-forced-child-marriage-problem-too> (accessed 3 December 2016). 'Forced Marriage in Immigrant Communities in the United States' 2011 National Survey Results Tahirih Justice Center <https://preventforcedmarriage.org/wp-content/uploads/2014/07/REPORT-Tahirih-Survey-on-Forced-Marriage-in-Immigrant-Communities-in-the-United-States-September-201151.pdf> (accessed 3 December 2016).

<sup>43</sup> Mohammed v Knott.

<sup>44</sup> UK Anti-social Behaviour, Crime and Policing Act 2014

<sup>45</sup> JBR Gaie 'African Feminist Philosophy: The Creation of a moral Confusion?'(2013) 9 *European Scientific Journal* 203.

African woman in particular must be heard in terms of her background, society and environment.<sup>46</sup>

The African feminist approach encompasses the politics and responses relating to gender equity in the home, family and society, and is based on the argument that what is generally referred to as feminism has its roots in the African continent although it might not always have been termed feminism.<sup>47</sup>

Early historical records and even the oral tradition of grandmothers' stories reveal that African women have long attempted to fight against patriarchy especially polygamy.<sup>48</sup> One story in Nigerian folklore tells of a group of women who, on hearing a lie that the men had met to decide on the adoption of polygamy, gathered in the village square chanting that they would not permit the perpetration of such a wrong and discriminatory injustice and that only one man-one woman marriages should be allowed.<sup>49</sup>

As opposition to patriarchy, feminism is not foreign to Africa although the term itself may have been imported. Casely-Hayford argues that there have been woman feminists in Africa as far back as African history records, with contemporary feminists including the likes of Leymah Gbowee, Joyce Banda, Simphiwe Dana and Chimamanda Ngozi Adichie.<sup>50</sup>

African feminism is a theory rooted in a sociology, which can have a legal angle which advocates for and contributes to the emancipation of women in a predominantly patriarchal world.<sup>51</sup> It is also distinctly African in

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<sup>46</sup> Oyekan (n 38 above)1. Gaie (n45 above)221

<sup>47</sup> Mama Amina 'Feminism: Africa and African Diaspora New Dictionary of the History of Ideas 2005 Encyclopedia.com. 26 May 2016 <http://www.encyclopedia.com> (accessed 26 May 2016).

<sup>48</sup> Some Yoruba proverbs relate with this. For example Orisa jen pe meji obirin kosi- this means, no woman ever prays God to add another wife to her in her husband's house.

<sup>49</sup> JF Odunjo *Alawiye Yoruba* (1980) 40. The woman who spread this story was the mother of a young boy who had attended the men's meeting with his father and having been pressurized by his mother to tell her the details of the meeting which he was not to reveal to a woman had framed that story for her. M Ba *So Long a Letter* (1981) Aissatou's story.

<sup>50</sup> A Casely-Hayford 'A brief history of African feminism' <http://www.msafropolitan.com/2013/07/a-brief-history-of-african-feminism.html> (accessed 26 May 2016) she gives a list of women, Charlotte Maxeke 1981 of the Bantu Women's League in South Africa and Huda Sharaawi who in 1923 established the Egyptian Feminist Union., women like the Mau-Mau rebel, Wambui Otieno, the freedom-fighters Lilian Ngoyi, Albertina Sisulu, Margaret Ekpo and Funmilayo Anikulapo-Kuti among many others who fought against colonialism as well as patriarchy (often through protest)

<sup>51</sup> Sultana (n37 above) 8-9

addressing the needs and desires of African women without subscribing to the common western perception of these women as powerless and helpless.<sup>52</sup>

The experience of African women living in villages dominated by patriarchy or discrimination will obviously differ from that of women living in urban areas. Although their responses could also be expected to be different, some similarities have been observed.<sup>53</sup> While African women in villages may not have formed social or political groups, they have nonetheless mobilised against the practices that subjugate them. Some have run away from oppressive marriages or supported their girls in fleeing impending forced marriages, female genital mutilation and even tribal facial marks.<sup>54</sup> Such responses can at best be described as feminist activism.<sup>55</sup>

It can be argued that there is a place for African feminism in light of the extent to which the discriminatory practices encountered by western women differ from those of African women. Since Western women hardly face polygamy, genital mutilation or tribal marking, they would not know how to respond to such practices within their cultural context.

For example, the equal pay for equal work struggle may be fundamental to western feminism, it has less relevance for women in developing countries are not even able to get a job due to their being deprived of an education by virtue of being female. It can therefore be argued that western style

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<sup>52</sup> 'African feminism driven by African women SANGONeT <http://www.ngopulse.org/article/african-feminism-driven-african-women> (accessed 26 May 2016)

<sup>53</sup> K Eke 'Responses to Patriarchy in African Women's Poetry' (2013) 41 *Matatu* 3-18

<sup>54</sup> The researcher has heard of women she knows personally who ran away with their babies to avoid having them cut with tribal marks, and some who were not bold enough to stand against the practice even though they didn't like it or want it. Some young girls have attempted escape from forced marriages, some even getting injured in the process, some even killed, yet the stories did not deter others from making such attempts too when it happened to them.

<sup>55</sup>R Goredema 'African feminism: the African woman's struggle for identity' <http://awdflibrary.org/bitstream/handle/123456789/424/the%20African%20woman's%20struggle%20for%20identity.pdf?sequence=1> (accessed 7 November 2016)

feminism is not well suited to the peculiarities of the African woman's experience.<sup>56</sup>

There are offices to which the single African woman cannot aspire and situation in which she will not be able to intervene, no matter what her educational qualifications, achievements or even position.<sup>57</sup>

Child marriage is not an issue of race, culture or even religion; although traditional attitudes in combination with strongly held religious beliefs can play a role. Before being eradicated through developmental progress, child marriage also took place in the developed western world at one time. There are recorded cases in Biblical times, ancient Greece and Rome and medieval European society. The view was that, in terms of the value of women and girl children, child marriage was expedient because it allowed for a longer child bearing period, particularly in Royal families where heirs were important.<sup>58</sup>

The practice has however been a significantly inhibiting factor in the development of women, and most particularly African women. While this means that western feminism alone at this level may not be an adequate theoretical approach to the issue,<sup>59</sup> the practice can however be seen as a global problem affecting women as a vulnerable group for which a solution needs to be sought.<sup>60</sup>

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<sup>56</sup> E Patrick 'Competence Égale, Chance Égale' ("Equal Ability, Equal Opportunity") Problems encountered when attempting to change the status of women in West Africa' (2000) *African Studies* 1-2 being SAIS Studies On Senegal Johns Hopkins University, Washington, DC 20036.

<sup>57</sup> VK Dixon 'Western Feminism in a Global Perspective' (2011)3 *Inquiries* 1 <http://www.inquiriesjournal.com/articles/395/western-feminism-in-a-global-perspective> (accessed 7 November 2016).

<sup>58</sup> Egypt: Ancient Egypt marriages' <http://www.touregypt.net/historicalessays/lifeinEgypt8.htm#ixzz4HzzDbwXx> (accessed 21 August 2016). It was said that lifespan was short those days and that made child marriage a necessity.

<sup>59</sup> E Crowley 'Third World Women and the Inadequacies of Western Feminism' Global Research March 8 2014 <http://www.globalresearch.ca/third-world-women-and-the-inadequacies-of-western-feminism/5372515> (accessed 7 November 2016).

<sup>60</sup> Hleziphi Nyanungo 'Female Husbands without Male Wives: Women, culture and marriage in Africa' January 10th 2014 <http://www.osisa.org/buwa/regional/female-husbands-without-male-wives-women-culture-and-marriage-africa> (accessed 30 May 2016).

Post-independence feminism in Africa has focused on the responsibilities of government, as evidenced by demands for legal and policy reforms.<sup>61</sup> Feminism in Africa has lobbied for a number of female causes including reproductive rights, affordable health care and improved working conditions for women. The fact that it is shaped by African contexts and experiences<sup>62</sup> is a strength but also a weakness in that it is affected by unfavourable cultural and political practices. The overzealous misapplication of western thought can also give rise to much confusion.<sup>63</sup>

Islamic individuals in Nigeria that can be called feminists such as Maryam Uwais and Hussaina Ibrahim,<sup>64</sup> global movements such as the Musawah and more local movements such as the one spearheaded by the current first lady of Nigeria can all be described as working for reform in the area of child marriage in Nigeria.<sup>65</sup>

Although fraught with many misinterpretations, misconceptions and confusion,<sup>66</sup> the combination of feminism and African feminism can be a force to be reckoned with against the patriarchal dominance and beliefs that must be eradicated so that women can live better lives and societal developed is possible. The structures that need to be brought down include the religious tenets that are proffered as arguments for child marriage in Nigeria and the laws that support them.<sup>67</sup> In the light of these facts, feminism is a necessary approach.

This thesis is based on the assumption that the practice of child marriage in Nigeria continues because of patriarchy, the sexual experiences of the girl child within the institution flows from the perception of male sexual rights and as a sign of their superiority over women and finds support for its

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<sup>61</sup> L Wetheridge & L Antonowicz 'Child Marriage in West Africa and Cameroon: A Desk Review' (2014) 22-23.

<sup>62</sup> (n 52 above).

<sup>63</sup> As above

<sup>64</sup> Mariam is a Muslim female lawyer and activist, Hussaina Ibrahim is a female lawyer who works on cases on child marriage in the North of Nigeria, she is involved with FIDA.

<sup>65</sup> M Lar 'Buhari's wife seeks to stop child marriage in Nigeria' 12 May 2015 Nigeria Village Square <http://nigeriavillagesquare.com/forum/threads/buharis-wife-seeks-to-stop-child-marriage-in-nigeria.89032/> (accessed 7 November 2016).

<sup>66</sup> Gaie (n 45 above)203

<sup>67</sup> Tawanda Sachikonye 'African Feminism Driven by African Women' 20 January 2010 <http://www.ngopulse.org/article/african-feminism-driven-african-women> (accessed 30 May 2016).

continued perpetration in the legal system and laws of the Country.<sup>68</sup> The thesis views that except there is a reform of laws and change of perception of women, the trend will continue. It is, however, a combination of the liberal and radical feminist approach, the liberal of political and legal reform and the radical of a total overhaul or change of perception and patriarchal structure.<sup>69</sup>

This thesis is a research that views child marriage as continuing in Nigeria because of a combination of factors. First because of patriarchy, but also sees it as a matter of the practice not being acknowledged as a rights issue or infringement.<sup>70</sup> The rights theory will therefore be investigated.

### **2.3 Rights theory**

Rights can be defined as just deserts, entitlements or privileges to be enjoyed by persons but are also seen as constituting immunity from certain treatment or circumstances.<sup>71</sup> Human rights are understood as being the rights which belong to any and every individual as a consequence of their being human.<sup>72</sup>

Rights offer the individual protection of life, dignity, liberty and expression, and demand action or restraint on the part of others.<sup>73</sup> The human rights of women and girl children are an inalienable, integral and indivisible part of

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<sup>68</sup> Moschetti (n 26 above)13. The criminal provisions in Nigeria will be researched to proof this assertion.

<sup>69</sup> (n60 above)

<sup>70</sup> Frisby (n1 above) 13–29.

<sup>71</sup> The International bill on human rights, particularly the preamble at <http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf> (accessed 21 January 2017). V Odala 'The Spectrum For Child Justice In The International Human Rights Framework: From "Reclaiming The Delinquent Child " To Restorative Justice' (2012) *Am.U. Intl Law Review* 545

<sup>72</sup> M Piechowiak 'What are human rights? The concept of human rights and their extra-legal justification' in R Hanski & M Suski (eds) *An introduction to international protection of human rights* (1999)5. TSN Sastry *Human rights of the vulnerable and disadvantaged groups* (2012)7 where rights was defined as a justified claim that individuals and groups can make upon others or societies, especially vulnerable persons against the government.

<sup>73</sup> Fundamental human rights, Chapter 4 Constitution of the Federal Republic of Nigeria 1999, Bill of Rights, Constitution of the Republic of South of Africa all which follows the United Nations Declaration on Human Rights.

all human rights, and the eradication of all forms of discrimination on the grounds of gender is a primary goal of the international community.<sup>74</sup>

Rawls understands rights theory as an extension of social contract theory which is about the availability of equal liberty and opportunity for everyone. He holds that any inequalities in the distribution of liberties and opportunities must be to the benefit of the least privileged while not disadvantaging anyone else.<sup>75</sup>

Rawls's understanding of rights or freedom, which he refers to as liberty, involves justice as well as equality,<sup>76</sup> and only certain basic liberties are protected as the rights of individuals, namely freedom of thought, freedom of conscience, the right to bodily integrity, liberty of association, and the rule of law. These are all expected to be equal.<sup>77</sup>

Rawls's theory of rights touches on equality and the position of people in society, as well as their awareness of their liberties and opportunities. In the context of child marriage in Nigeria, it can be argued that to exist means having the right to non-discrimination, which also means being entitled to equality in the Nigerian Constitution.<sup>78</sup> The view of Rawls is that if society denies any person equal treatment, coercion must be used. In other words, if society refuses to bring an undesirable practice to an end, government may be forced to prohibit it through specific and explicit laws.<sup>79</sup>

The rights based approach emphasises state accountability and the need for the promulgation of legislation or legislative reform in measuring progress and accountability.<sup>80</sup>

The focus of rights theory on individual rights as opposed to the cultural or religious conceptions of group rights is seen by some as problematic.<sup>81</sup> This

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<sup>74</sup> S Goonesekere & R De Silva-De Alwis *Women's and Children's Rights in a human rights based approach to development* (2005) 1.

<sup>75</sup> J Rawls 'The law of the peoples' (1993) 20 *Critical Inquiry* 38.

<sup>76</sup> Rawls (n 75 above)38

<sup>77</sup> Rawls (n 75 above)38

<sup>78</sup> S42 Constitution of the Federal Republic of Nigeria 1999

<sup>79</sup> Rawls (n 75 above) 38.

<sup>80</sup> Goonesekere & De Silva-De Alwis (n 74 above) 1-2.

<sup>81</sup> C Pateman *Individualism in Human Rights-The Sexual Contract* (1987)1,19. Some writers have argued against using a rights approach to criticize child marriage because it might make it difficult to

feature of the theory is however often overemphasised and the criticisms not entirely correct since individual rights are at times recognised in participation with others.<sup>82</sup>

The emphasis on the responsibility and accountability of duty bearers towards citizens as the holders of rights is an important contribution of rights theory to this thesis in terms of the Nigerian government's responsibility towards the girl child and particularly the discrimination and inequality experienced within child marriages.<sup>83</sup>

Child marriage infringes on the rights of the girl child, it is contrary to constitutional provisions on human rights<sup>84</sup>, and allows for sexual abuse and other harmful discriminatory practices which are prohibited by global and regional treaties.<sup>85</sup> By virtue of their ratification of such treaties, state governments accept the obligation to eradicate prohibited practices in protection of vulnerable people.<sup>86</sup>

Child marriage is also a manifestation of the gender based discrimination resulting from the patriarchal structures in societies and reflects the extent of unequal treatment of individuals despite the existence of laws.<sup>87</sup> Interestingly, rights theory is the basis of most feminist arguments, as can be seen particularly in how radical feminism calls attention to the distance

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be accepted by many people especially the cultural relativist but generally child marriage has been widely accepted as an infringement of the rights of people especially those of the girl child.

<sup>82</sup> Article 1: Everyone has the right, individually and in association with others.... Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Adopted by General Assembly resolution 53/144 of 9 December 1998, United Nations Human Rights Office of the High Commissioner, OHCHR, at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>

<sup>83</sup> Chapter IV of the Constitution of Federal Republic of Nigeria is dedicated to fundamental human rights.

<sup>84</sup> Rights to dignity, non discrimination, equality, right to health, life, education and other connected rights.

<sup>85</sup> UN CRC, ACRWC, CEDAW and others

<sup>86</sup> The Constitution of countries provide rights of individuals and sexual abuse is against these rights, to wit right to dignity, life. Health, equality which is the right against discrimination, Chapter 4, S33-44 on fundamental Human Rights in the Constitution of the Federal Republic of Nigeria, 1999, also instruments like Convention on the elimination of all discrimination against women, Child Rights Convention, African Charter on the Rights and Welfare of Children, Protocol to the African Charter on Human and People's Rights on the Women's Rights.

<sup>87</sup> Unpublished: EE Otiocha International human rights: The protection of the rights of women and female children in Africa: Theory and practice unpublished SJD thesis, Golden Gate University school of Law, 2009 51-52



between elegantly worded laws and the reality of women's lives especially in plural legal systems.<sup>88</sup>

The rights based approach is also employed in this thesis when examining the rights of the girl child in terms of the Nigerian Constitution. Bunting explains that the rights discourse is invoked by feminist theories in order to amplify rights claims and legitimatise the stories of women by employing the language of the law.<sup>89</sup>

Rights theory comes up against cultural theory in situations such as child marriage. While child marriage infringes on the girl child's rights to life, dignity, equality, and sexual and reproductive health, culture and religion are always raised in defence of the practice and in most cases are the reason why governments turn a blind eye.<sup>90</sup>

Lama<sup>91</sup> argues that the rich diversity of culture and religion should strengthen the function of human rights because individuality and diversity are fundamental principles which bind the human family and no diversity and tradition can or should justify the violation of human rights.

In terms of patriarchy, discrimination, law and other similar terms relevant in the issue of child marriage, a common discourse under rights theory is that of universalism versus cultural or religious relativism, as discussed in the next section of the thesis. This warrants attention in a study of child marriage in Nigeria since the religious justification of the practice that is so often put forward is essentially a matter of relativism versus universal provisions on minimum marriageable age.<sup>92</sup>

### **2.3.1 Universalism versus cultural relativism**

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<sup>88</sup> GW Mugwanya 'Human rights in Africa: Enhancing human rights through the African Regional human rights systems' (2001) 1 *African Human Rights Law Journal* 268. EE Otiocha (n 87 above)44.

<sup>89</sup> Bunting(n 25 above) 6,9,16.

<sup>90</sup> EM Zechenter 'In the name of culture: Cultural relativism and the abuse of the individual'(1997) 53 *Journal of Anthropology research* 319-320.

<sup>91</sup> D Lama 'Human rights and universal responsibility' paper delivered at the Non-governmental organization, The United Nations World conference on Human Rights, Vienna, Austria, 15<sup>th</sup> June 1993 <http://fpmt.org/teachers/hhdl/speeches/human-rights-and-universal-responsibility/>(accessed 10 November 2016).

<sup>92</sup> Fayokun (n 11 above) 461-463.

The majority of arguments against child marriage have focused on the issue of the infringement on the rights of the child bride on cultural and religious grounds. The pertinent arguments are centred on the origin, nature, justification of human rights and how they should be respected<sup>93</sup> which are the crux of the universalism<sup>94</sup> versus relativism discourse.<sup>95</sup>

These arguments sometimes touch on the issue of individual rights versus group rights, particularly in the areas of culture, custom and religion. As pointed out by Rawls<sup>96</sup> and Raz,<sup>97</sup> this is because not only do religious and customary institutions often try to regulate the lives of their members but sometimes it may be difficult to define right, a fact which may jeopardise its discourse and defeat its purpose.<sup>98</sup>

According to Raz, a rights holder can be any entity with sufficient interest to warrant calling for protection, and the rights of corporations and groups are all rights in the same sense.<sup>99</sup> In line with this, Rawls called for comprehensive secular and religious doctrines to be set aside or at least given a circumscribed role in the political conception of justice which he called reasonable pluralism.<sup>100</sup>

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<sup>93</sup> Otiocha (n87 above) 56. The disagreement as to what is human rights, why should it be respected, what are the contents of human rights and contentions as to the methodological approach are issues within this framework.

<sup>94</sup> Otiocha (n87 above) 56. Universalism of human rights proffers that human rights are the entitlement of all human, based on their humanity.

<sup>95</sup> Zechenter (n90 above) 322. Relativism believes that since culture is relative, human rights cannot be applied universally the same way but vary from culture to culture, it is the belief that there cannot be one set of universal values and norms on which human rights are based.

<sup>96</sup> Rawls (n 75 above) 38

<sup>97</sup> J Raz 'Rights and individual wellbeing' (1992) 5 *Ratio Juris* 127-142, 128

<sup>98</sup> As above. J Raz 'On the nature of Rights' *Mind* (1984) XCIII (370)195. Raz also discussed variously on political institutions as they relate to the issue of rights. He also discussed the nature of rights and the possibility of holding individuals to be under a duty as opposed to the sole responsibility of states on the issue of rights. According to him equality could be argued as a universal entitlement. J Raz *The morality of freedom* (1986) 1-3, 165-173, 217. The contribution of Raz to the issue of norms and rules is particularly of interest to this thesis in the discourse of child marriage where it is argued that regulation is necessary to eradicate it. J Raz *Practical reason and norms* (1999)9-11 where Raz talks about norms and rules in the introduction to his discourse.

<sup>99</sup> Raz (n 97 above) 127.

<sup>100</sup> Rawls (n 75 above)38. He opined that every society must understand how it is related to other societies. Rawls believes that decisions made by sovereign entities retain substantial force, he puts forward a limited view of human rights as urgent rights, agreements on this short list of rights limits the autonomy of states by specifying when conditions are appropriate for international intervention. It is the rights of citizens and inhabitants of states that take priority.

The dispute between Universalists and relativists has been on since the inception of Universal Declaration of Human Rights.<sup>101</sup> In the view of the universalist, human rights are the general and innate entitlement of every human being to freedom, dignity and equality which manifests in all world cultures albeit in different forms and with different understandings.<sup>102</sup> The relativist argument is contrary to this.

According to Hassman, rights can be seen as emanating from settlements or communities as such pre existent culture of human rights is a condition for the enjoyment of rights.<sup>103</sup>

One of the greatest challenges to the universal understanding of human rights has come from view of Asian countries that norms are incompatible with human rights, particularly in cases of traditions involving women that are prescribed by culture and religion.<sup>104</sup> Countries in this category argue that human rights are controversial with their culture or beliefs. Relativists in support of this, argue that Asian and developing countries did not participate in the formulation of universal human rights documents.<sup>105</sup>

Perrin however maintains that non-western states did contribute to the development of the human rights declaration, perhaps not officially but nonetheless making recommendations.<sup>106</sup> He argues that although the inception of human rights is traceable to the west, human rights in

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<sup>101</sup> Bunting (n25 above)1. Relativists contended that the UNDHR did not consider other cultures, the contentions have been on the origin, contribution and application of human rights to the extent that it originated from the west and that other people have no conception of it. J Donnelly 'Human Rights and Human Dignity: An analytical critique of Nonwestern Conception of Human rights' (1982) 76 *The American Political Science Review* 303.

<sup>102</sup> Human rights from the international expert consultation to address harmful practice against children, 13<sup>th</sup> -15<sup>th</sup> June, 2012. Although several authors had opined that human rights did not exist in pre colonial Africa. C Ake 'The African context of human rights' (1987) 34 *Africa today* 83. J Donnelly 'Human rights and human dignity: An analytical critique of nonwestern conception of human rights' (1982) 76 *The American Political Science Review* 303.

<sup>103</sup> Rhoda E. Howard Hassmann Social Change and Human Right, 12 at [https://legacy.wlu.ca/documents/50528/gibney\\_sage\\_dr7\\_SuBMITTED\\_feb\\_22\\_2012.pdf](https://legacy.wlu.ca/documents/50528/gibney_sage_dr7_SuBMITTED_feb_22_2012.pdf) (accessed 10 November 2016).

<sup>104</sup> U Niaz 'Violence against women in South Asian Countries' (2003) 6 *Archives of Women's mental Health* 173-184. The subjugation of women is therefore the behavior of man everywhere so also is the struggle for human dignity.

<sup>105</sup> C Good 'Human Rights and Relativism' (2010) 19 *Macalester Journal of Philosophy* 28-30, 32.

<sup>106</sup> AK Perrin Human rights and cultural relativism, the historical development and building a universal consensus (2005) 5-18. Even Nigeria as a colonised country participated in the development through its colonial masters, this is why immediately after its independent it became part of the commonwealth countries and ever since has been actively involved in issues of human rights in Africa and beyond. S Tharoor 'Are human rights universal?' (2000) XVI *World Policy Journal* 1-6.

themselves are not exclusively western but common to all individuals. He argues that as proof of its universality the Vienna Convention on the Law of Treaties makes provision for fundamental rights and freedom as a duty of states regardless of their political, economic and cultural systems.<sup>107</sup>

It is the Universalist' view that since the human rights contained in international and regional treaties are universal, these agreements constitute a collective common imperative that overrides any cultural or religious dictates. They have been universally negotiated and accommodate in their codes all rights due to individuals by virtue of their humanity.<sup>108</sup>

Donnelly, again, argues that human rights are too important to be rejected or accepted on the basis of their origins or source, whether that be western, Asian or African.<sup>109</sup> Brown<sup>110</sup> argues that the so-called west is just a construct not an actual place and asserts that there can be as many west as people want to be, none of which can claim authenticity as being west.

However, the argument of the relativists has been about more than source or origin. It has been about values, beliefs, principles and even law, of perceptions and how things are viewed, and of the constructs of each society which they believe should be respected.<sup>111</sup>

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<sup>107</sup> Perrin (n 104 above)5-18. UN General Assembly, Vienna Declaration and Program of Action 12 July 1993.

<sup>108</sup> M Freeman 'The problem of secularism in human rights theory' (2004) 26 *Human rights quarterly* 375. Donnelly claims that the key norms in international human rights document are principles widely accepted as authoritative by the international community. J Donnelly *Universal human rights in theory and practice* (2003)158. J Donnelly 'The relative universality of human rights' (2007) *Human Rights Quarterly* 283.

<sup>109</sup> J Donnelly(n 108 above)286, 290-291, although according to Donnelly, the idea of internationalizing came from the west.

<sup>110</sup> C Brown 'Universal human rights: A critique' (1997) 1:2, *The international journal of Human Rights* 41-65, 55. The truth is while the west may be said to be the initiator of the formal documents especially of socio economic rights this is not to say nonwestern states had no concept or manifestation of the practice of human rights or that their culture and politics lacked the manifestation of human rights but what we have now is not the ontological one that existed and is innate in man everywhere from the inception of time irrespective of where and civilization. M Goodale, *Toward a Critical Anthropology of Human Rights* (2006) 47 *Current Anthropology* 487-488.

<sup>111</sup> The argument between universalism and relativist have been based on, what are human rights and why should they be respected, the disagreements about contents and the methodological approach of it. Every culture has a good reason behind it, child marriage, culturally was not for economical purpose, it was a belief in the interest of the child in Traditional Africa, an unwritten code of expectation, it is the father's responsibility to ensure the future of his daughter by settling her in a good marriage/home. UU Eweluka 'The girl child, African states and International human rights law-

The opposing views do agree on the dignity of the human being.<sup>112</sup> Moreover, citing culture as an excuse for upholding or continuing inhuman practices has gone beyond the point of the source of human rights, since the wide acceptance and ratification of human rights attest to their universalism.<sup>113</sup> In the context of this thesis, Nigeria ratified all relevant conventions with no reservations and therefore cannot now argue on the grounds of religion or culture.<sup>114</sup>

Age, a major factor in child marriage is a universal fact of life, and although the cultures may vary in their definitions of the attainment of adulthood,<sup>115</sup> this is not enough to justify the use of culture to defend the perpetration of practices that are harmful to the individual.<sup>116</sup> According to Tharoor, the argument against child marriage is not one of culture but one of dignity.<sup>117</sup>

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Towards a new framework for action' in O Nnaemeka and JN Ezeilo, *Engendering Human rights: Cultural and Socio-Economic Realities in Africa* (2005). Moschetti (n26 above) 24, this same unwritten code prescribes that sexual intercourse is the entitlement of the man and duty of the wife. Like issues of age and childhood, Childhood for example is a relative concept constructed differently by various cultures, relativists argue that it is not a natural phenomenon and cannot be properly understood as such, immaturity of children is a biological factor but the understanding of maturity and childhood is a cultural one. The termination of childhood from the African view is different from the western perception which is chronological, for the former, it is by attainment of adult responsibility. In Zaire it begins at birth and continues until the attainment of economic independent and fully participation in adult work, in Nigeria, for boys it is acquiring independent, for girls it is entry into motherhood, signaled by puberty and rited by marriage, while Universalists maintain that a minimum age be fixed to accommodate uniform proper growth and development of children in all societies. Afua Twum-Danso 'A Cultural bridge, Not an imposition: Legitimizing children's rights in the eyes of local communities' (2008) 1 *The Journal of the history of childhood and youth* 391-413, 401.

<sup>112</sup> Good (n103 above)33.

<sup>113</sup> Fox DJ 'Women Human Rights in Africa: Beyond the debate over the Universality or relativity of Human Rights' (1998) 2 *African Studies Quarterly* 3, 4. Most international and regional human rights documents have been ratified even without reservations. The CRC and the CEDAW which in the case of Nigeria were ratified without reservations hence they are bound by it and not justified to raise any cultural or religious excuse. Twum- Danso (n 111 above)401.

<sup>114</sup> E Durojaye 'Woman, but not human': widowhood practices and human rights violations in Nigeria' (2013) 27(2): *International Journal of Law, Policy and the Family* 176, 179. Even on the marriageable age in the Child Rights Act which is now an issue of contention was not contended or reserved either wholly or in part or even on the issue of age as some countries did, although even now some of those countries have revoked their reservations and now have marriageable ages in their laws to deal with child and early marriage.

<sup>115</sup> Twum- Danso (n111 above) 401. The issue of age is universal and cultural, in the reasoning of the relativist, a girl attains maturity when the society perceives her as an adult when she attains puberty, or starts to menstruate, and this is right because then biological if she has sex she can get pregnant, hence reasoning to give her away in marriage then may not be totally wrong but the perception of harm occurring to her because her body is not fully ready needs to be understood. Marriage and sex are also universal and at the same time cultural. Unpublished: VR Mafhala Child marriage practice: a cultural gross violation of human rights of girls in a free South Africa unpublished M phil thesis, University of Pretoria, 2015 10.

<sup>116</sup> Durojaye (n 112 above)179.

<sup>117</sup> Tharoor (n 106 above)1-6. It is not an issue of religion, or region whether Asian or Western or African. Even developed countries at a time practiced child marriage, in fact till date in Europe they are finding ways of dealing with it as immigrants practice it, see The Commentator at

Griffiths and Holtzman, in their analysis of Rawls on equality, state that there is no equality if a certain religion or culture, on the basis of beliefs, subjects its girl children to child or early marriages which deprive them of access to education and other privileges while these girls are ignorant of their choices or the availability of such.<sup>118</sup> Even within the same religion and society, some classes of people are more privileged and have more access to certain things than others. This is inequality, and it is the responsibility of government to apply the coercion of law to improve the situation of the victimised sector.<sup>119</sup>

Gagoomal is of the opinion that coercion is everywhere and argues that nothing qualifies as full and free. This is also true of the prescriptions regarding marriage contained in international instruments, and in terms of the principles of the margin of appreciation, states can decide for themselves on the limits or extent of what is full and free.<sup>120</sup> Bunting agrees but cautions that governments must take care not to apply the margin of appreciation to discriminate against a particular sector of society.<sup>121</sup>

The situation in Nigeria with regard to child marriage is a case in point, where even under international law, the government of each state law can resort to the right to margin of appreciation when deciding on marriageable age. While the argument may be tenable, one has to consider whether it is not to the detriment of the girl child in the Nigeria's muslim North as compared to her counterparts in other parts of the country.<sup>122</sup>

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[www.thecommentator.com/article/521/why\\_the\\_uk\\_must\\_criminalise\\_forced\\_marriage](http://www.thecommentator.com/article/521/why_the_uk_must_criminalise_forced_marriage), accessed on 25/3/2015, but the practice is no longer seen as European culture, because of development which culture as adapted to. It is because of its existence and argued cultural reasons that The UK Forced Marriage (Civil Protection) Act 2007 was promulgated.

<sup>118</sup> D Griffiths & R Holtzman, *Evaluating Rawls: Equality in the family* (2012) 44-50. The Honors Program Senior Capstone Project

<sup>119</sup> R R. Dobbs 'Application of a justice as fairness perspective to laws banning same sex marriage' (2004) 2 Special Issue: LGBT *California Journal of Health Promotion* 19.

<sup>120</sup> PJ Gagoomal 'A margin of appreciation for marriage of appreciation: Reconciling South Asian adult arranged marriages with the matrimonial consent requirement in international human rights law' (2009) 97 *The Georgetown Law Journal* 605.

<sup>121</sup> Bunting (n 25 above) 7-9.

<sup>122</sup> Fayokun(n 11 above) 461-463

In the case of *Hertzberg v Finland*,<sup>123</sup> the court allowed the application of the margin of appreciation to hold that there was no infringement of the rights of a group of gay individuals. In *Lovelace v Canada*<sup>124</sup> deference was not allowed the government in its attempt to legitimise the discriminatory treatment of historically disadvantaged group.<sup>125</sup>

Notwithstanding the potential for discrimination, it is reasonable that a certain level of discretion be granted to national authorities in the execution of their international obligations.<sup>126</sup> Even Islam is not opposed to this in the interest of the public good, allowing for and recommending the adoption of the internationally accepted marriageable age of eighteen years by state government in Islamic countries.<sup>127</sup>

The majority of international human rights instrument have not been rigid on the issue of marriageable age, recommending a minimum age without prescribing a specific one.<sup>128</sup> In applying the margin of appreciation therefore states can determine and fix a minimum age that is in the best interest of the child, although the issue of full and free consent has not been negotiated.<sup>129</sup> Legal pluralistic societies already have a foundation for the application of this principle and Nigeria is one of such societies.<sup>130</sup>

The best interest principle is important in considering the issue of age and the girl child in child marriages. The question that arises is that of whose interest is being protected in such unions? From the standpoint of

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<sup>123</sup> communications No 61/1979 adopted 2 April 1982(fifteenth session) in selected decision under the optional protocol, Vol 1.

<sup>124</sup> Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977

<sup>125</sup> Bunting(n 25 above)61-62. She believes Hertzberg case shows a dangerous use of the margin of appreciation principle which was not applied in Lovelace case.

<sup>126</sup> Y Shany, Toward a general margin of appreciation doctrine in international law (2006) Vol 16 No 5, *The European Journal of International Law EJIL*, 908-914.

<sup>127</sup> M Uwais 'The Compatibility of the Child Rights Act with Islamic Legal Principles 19 February 2013 [iwei-ng.org/wp-content/upload/2014/10/The-compatibility-of-the-Child-Rights-Act-within-islamic-legal-principle.pdf](http://iwei-ng.org/wp-content/upload/2014/10/The-compatibility-of-the-Child-Rights-Act-within-islamic-legal-principle.pdf). This is called Maslaha the Doctrine of public interest or that of encouraging good and preventing harm (hisbah) in Islam.

<sup>128</sup> Bunting (n25 above)7, 13.

<sup>129</sup>Art 6 (b) Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa provides 18 as the minimum marriageable age for women but the cedaw did not but in 16 (1) (b) provides for full and free consent and in Art 16 (2) The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

<sup>130</sup> Shany (n 124 above)913.

relativism, it is the values of society or family that is protected and most certainly not the girl child who is sexually violated, injured and harmed for life physically, emotionally and economically!<sup>131</sup>

It would appear that even the society does not benefit from the practice, given that most societies today where the practice is common are backward in their development, Northern Nigeria being one example.<sup>132</sup> Prescribing a minimum age for marriage will undoubtedly contribute to control or regulations to prevent the various negative repercussions of child marriage.<sup>133</sup>

Irrespective of the margin of appreciation, this thesis situates the protection of the girl child in Nigeria against child marriage in the relevant ratified international and regional instruments and the enforcement of these in which it becomes the responsibility of government to stipulate a minimum marriageable age on the basis of the best interest principle.<sup>134</sup>

Bunting relates child marriage in Nigeria with religious relativism, she opines that there is a need for dialogue and a meeting of minds on the adoption of minimum standards for the protection of the girl child and in the interest of the development of society. This will be best channelled through or initiated by representatives from Islamic communities on the values at issue for them.<sup>135</sup> Moschetti relates child marriage with what she calls sexual relativism.<sup>136</sup>

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<sup>131</sup> TS Ramis 'Child marriage in whose best interest?' Nov 11 2013 [www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/](http://www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/) (accessed 11 November 2015).

<sup>132</sup> J Parsons et al. 'Economic impact of child marriage: A review of literature' (2015) 13 *The review of faith and International Affairs* 14-18. A Ukwoma, *Child marriage in Nigeria: The health hazards and sociolegal implications (X-Raying the human rights and development issues in girl-child early marriage)* (2014) 174. MS Abdul 'The dangers of child marriage in Nigeria (2010) 14 *Multidisciplinary journal of Research Development* 110.

<sup>133</sup> Maryam Uwais 'Child marriage as violence against the girl child' Feb 16 2015. Maryam Uwais 'Senator Yerima and Constitutional Review' July 20, 2013.

<sup>134</sup> International and regional human rights instruments have provided this assumable by recommending marriageable age but not specifying one in Art 16 (2) CEDAW and even in the UN Convention on the Rights of the Child where the 18 years of childhood is subject to whether according to the law applicable to the child majority is attained earlier- Art 1, so it is possible it may be 16 years.

<sup>135</sup> Bunting (n25 above)9

<sup>136</sup> Moschetti (n26 above)14



This thesis also inhabits the space between the dichotomous poles of relativism and universalism within the rights discourse. I take a pick of the combination of the two and argue that child marriage in Nigeria is an issue of sexual religious relativism which law has aggravated and which general law, not just human rights discourse will correct.

Feminists such as Imam<sup>137</sup> and academics on culture, human rights and religion such as Uwais,<sup>138</sup> Ladan<sup>139</sup> and An Naim,<sup>140</sup> and even a group of educated Islamic women are already examining Islamic laws in order to propose reforms which align them with universal human rights.<sup>141</sup> Some of these activists are not opposed to the imposition of a marriageable age as a means of curtailing child marriage in Nigeria<sup>142</sup> or even legislation to eradicate the practice.

### **2.3.2 The theory of state sovereignty as it relates to the rights theory**

Asides the theories of universalism and cultural relativism, the sovereignty of states dominates in the discourse on law and human rights. The focus here is on the response or commitment of states to agreed human rights and how this affects their sovereignty and their responsibility toward their citizens and the international communities to which they belong.<sup>143</sup> This is inclusive of the response of the international community to the infringement

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<sup>137</sup>Ayesha Imam et al 'Women's rights in Muslim laws: A resource document' 2005 <http://www.baobabwomen.org/womensrightinmuslimlaws.doc> who believes in working from the inside especially of Islam on creating a better understanding and interpretation of the scripture and books in favour of women.

<sup>138</sup> M Uwais 'The cry of the Nigerian Child' 9 December 2013 French Embassy.

<sup>139</sup> MT Ladan League of Democratic women (Leads-Nigeria) *A handbook of sharia implementation in Northern Nigeria: Women and children's rights focus* (2005) 81-83. MT Ladan, *Introduction to Jurisprudence, classical and Islamic* (2006) 416.

<sup>140</sup> An Naim has written several papers and articles on this issue and related ones. AA An-Naim, 'Religious Norms and Family Law: Is it legal or Normative Pluralism' (2011) *Emory International Law Review* 785-809.

<sup>141</sup> Women in Islam, Musawah, etc. are working on these. Musawah ('equality' in Arabic) is a global movement for equality and justice in the Muslim family. Musawah is pluralistic and inclusive, bringing together NGOs, activists, scholars, legal practitioners, policy makers and grassroots women and men from around the world. The movement is led by Muslim women who seek to publicly reclaim Islam's spirit of justice for all. The movement employ a holistic framework that integrates Islamic teachings, universal human rights, national constitutional guarantees of equality, and the lived realities of women and men. See About Musawah at <http://www.musawah.org/about-musawah>, accessed on 5 December 2016.

<sup>142</sup> M Uwais (n 133 above) M Uwais (n 138 above).

<sup>143</sup> Donnelly (n 106 above) 160. The legal realities of sovereignty may limit legitimate action on behalf the human rights of foreigners to means short of intervention.

of human rights that occurs within sovereign states subsequent to the ratification of treaties.

A state is a permanent population, a defined territory, a government with the capacity to enter into relations with other states.<sup>144</sup> Sovereignty however is difficult to define. It is about jurisdiction, in international law, it is the most extensive form of jurisdiction denoting full and unchallengeable power over a particular territory and its persons.<sup>145</sup>

Sovereignty is the idea of the complex combination of authority and control in the governance of a state.<sup>146</sup> It constitutes one of the most powerful principles in international law denoting independence from foreign power and in a sense mostly connected to law making.<sup>147</sup> In the sense of its connection with international law, once a treaty has been signed, each sovereign state is responsible for actualising its contents for their respective citizens.<sup>148</sup>

As a body of rules which regulate the conduct of members of the international community, international law inevitably has a role to play in shaping the lives of people within states particularly through its provisions on human rights and its influence on the fulfilment by states of their obligations.<sup>149</sup> But sovereignty connotes that although bound by international law which results from treaties, it will not tolerate any other law creating agent above its own.<sup>150</sup>

In the words of Oyeboode, “Practically speaking what the international protection of human rights implies is that it enables an aggrieved national to make demands on his state of nationality far beyond what the domestic law

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<sup>144</sup>Art 1 of the Montevideo Convention on the Rights and Duties of States 1933. See also Monte video convention of 1933 on the rights and duties of states and a restatement in the Vienna convention on the law of treaties of 1969.

<sup>145</sup> MP Ferreira-Synman ‘The evolution of state sovereignty: A historical overview’ (2008)2*Fundamina* 1

<sup>146</sup> WP Nagan & AM Hadad ‘Sovereignty in theory and practice’ (2011-2012) 13 *San Diego Intl law Journal* 435.

<sup>147</sup> Ferreira-Synman(n 145 above)5

<sup>148</sup> Nagan et al. (n 146 above)1,

<sup>149</sup>A Oyeboode *International law and politics: An African Perspective* (2003)2. Every state is competent to enter into treaties regarding matters that fall within its sovereignty.

<sup>150</sup> Ferreira-Synman (n 145 above)6

provides based on international prescriptions of minimum standard”.<sup>151</sup> Nigeria as a sovereign state has its law making process even with regards to ratified treaties.<sup>152</sup>

In the line of this thought, state sovereignty implies the responsibility of the individual state to enact laws and perform whatever functions are necessary to ensure that internationally agreed rights can be accessed by any individual for whom they are intended without undue intervention by the international community.<sup>153</sup>

What is important in terms of this thesis is that universal human rights are universal because they belong to humans everywhere despite the fact that states have often used the argument of cultural relativity to place reservations on instruments that would otherwise have protected women and children from the sexual abuse that takes place within child marriage.<sup>154</sup> The thesis argues that the state of Nigeria is obliged by its ratification of treaties to respect and promote the rights of the girl child by eradicating child marriage through legal enactment and reform.<sup>155</sup>

The question is the extent to which states are still entitled to sovereignty despite agreements on international human rights, particularly in terms of existing internal laws, how they are to conform to the provisions of the international standards in question and can the citizens within their national domains enforce the rights in their domestic courts? These are relevant considerations because states may uphold or fight for their sovereignty by resisting compliance with international standards.

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<sup>151</sup> Oyeboade (n 147 above)

<sup>152</sup> BI Oluwatoyin ‘Treaty making and its application under Nigerian law: The journey so far’ (2014) 31 *International Journal of Business and management Invention* 8.

<sup>153</sup> ‘The responsibility to protect’ (2011) international development research center. J Donnelly, State sovereignty and human rights at <http://mysite.du.edu/~jdonnell/papers/hrsov%20v4a.htm> (accessed 5 December 2016). A Abashidze The relationship between international law and municipal law: significance of monism and dualism concepts.

<sup>154</sup> Abuses like child marriage, which based on age argued to be a cultural issue some states have either refused to sign, signed reservations and some have refused to fulfil their responsibilities after signing. However, it is the responsibility of states to protect against, prevent, prosecute, punish and provide redress for acts of violence against women. K Stefiszyn and BK Kombo, Due diligence and State responsibility to eliminate violence against women, African Region (2014) (IHRI)

<sup>155</sup> TS Braimah ‘Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage’ (2014) 14 *African Human Rights Law Journal* 474-488

Oppong<sup>156</sup> is of the view that the accession or ratification and application of international norms infringes on state sovereignty. Oyeboode<sup>157</sup> on the other hand posits that while the normative process of international law is sustained by the relinquishment of some sovereignty through a state's acceptance of the rules of international customs or treaties, this does not in itself take away any sovereignty but in fact constitutes auto-sovereignty.

The question of sovereignty becomes real if the implementing bodies and organs of a treaty are required to intervene in the realisation of the rights of citizens of a ratifying state on the basis of reports that the state is not meeting its obligations in terms of the treaty agreement.<sup>158</sup>

This thesis presupposes that by signing, ratifying and even implementing international human rights treaties whether through legislation or not, a state does not necessarily lose its sovereignty but only demonstrates its membership of a unified international body that is resolute about the recognition of the rights of the individuals and the seriousness of the commitment of the state or sovereign to realising or enforcing such rights.

Hence, it is the responsibility of individual government to actualise through its laws and agencies the protection of the girl child against child marriage as a form of sexual abuse and a harmful cultural practice as prescribed by international human rights agreements ratified by it, as it applies to the Nigerian state too.<sup>159</sup>

International human rights treaties usually prescribe the procedures for compliance with its provisions which form part of the duties of state

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<sup>156</sup> RF Oppong 'Re -Imagining International law: An examination of recent trends in the reception of International law into National legal systems in Africa' (2006)30 *Fordham International Law Journal* 300.

<sup>157</sup> Oyeboode (n 147 above).

<sup>158</sup> Unpublished: SO Ofuani Redefining state sovereignty: The complexities of humanitarian intervention and the responsibility to protect unpublished Master's thesis, University of Cape town, 2009 2.

<sup>159</sup> CN Okeke 'International law in the Nigerian Legal system' (1997) 27 *california western. Int'l Law Journal* 311. CN Okeke 'The use of international law in the domestic courts of Ghana and Nigeria' (2015) 32 *Arizona Journal of International & Comparative Law* 377. SA Shaapera 'Theories of the State: Perspectives on the Nigerian Variant' (2012) 8 *European Scientific Journal* 14-15.

government.<sup>160</sup> However, the way in which sovereignty is practised in a country may impact on the practicability of law making which in turn affects the implementation of international human rights and the enjoyment of those rights by individual citizens.<sup>161</sup>

Similarly, sovereignty can play a role in the link between international and national state laws, as can legal pluralism or federalism within a country influence the transference of international rights to its citizens.<sup>162</sup> This can be said to be the situation in Nigeria which, amongst others, this thesis seeks to analyse.

### **2.3.3 Monism and dualism**

The exact relationship between international and domestic laws and their application can be explained and understood by means of the theories of monism<sup>163</sup> and dualism.<sup>164</sup>

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<sup>160</sup> Many international human rights provisions provide that states make provisions for the feasibility of these rights in their countries through laws, legislation or other means. This has to be internal and will obviously fall under the regular or normal duties of organs of the government, like the legislature or the judiciary. EG Mountis 'Cultural relativism: Reevaluating gender rights in a multi-cultural context' (1996) 15 *Dick J. Int'l* 114-115

<sup>161</sup> Oppong (154 above) 298

<sup>162</sup> Oppong (154 above) 298-299. The federal system makes possible the autonomy of different sovereign entities. PS Berman 'Federalism and International law through the lens of Legal Pluralism' (2008) 73 *Missouri Law Review* 1150, federalism like legal pluralism seeks to maintain unity while preserving diversity. VC Iwuoha 'Federal state relations in Nigeria' in EA Obi and RN Nwankwo (eds) *Dynamics of Intergovernmental relations in Nigeria and comparative perspective* (2013) 6-7. Nigeria practices federalism, this often causes a conflict or dual duty between the Federal and the state in legislative powers. The North of Nigeria is predominantly Islamic and have their religion guiding almost every aspect of the people's lives and recognized by the laws of the land, even their own criminal law is guided by the Penal Code which is Islamic while the other parts of the country are regulated by the Criminal Code, they would reasonably make Islamic laws, while that of the other parts will be secular or a mix of secular and customary.

<sup>163</sup> Oppong (n 154 above) 297-299. This is the theory of oneness of legal systems, the domestic and the international. It is the belief that both systems are one, they are both laws, governing over human and applying to them everywhere without demarcation as to one over states and the other over individuals M Dixon Text book on International law (2000) 82-85. DJ Harris *Cases and materials on International law* (1997) 66. There is no need for transforming of international law in Domestic law before it can be applied, rather it is directly applicable because the two systems are the same. This determines whether individuals can raise or claim the rights as enforceable rights in their courts and whether the courts can rely on it in coming to a decision even if it does not form part of the domestic laws of the country. This is usually provided in the domestic laws of each state as in the Constitution of Nigeria in S12 Constitution of the Federal Republic of Nigeria 1999.

<sup>164</sup> Oppong (n154 above) 297-299. The theory that international law and domestic law are different and thus international law must first be transformed before it can be applied in the domestic sphere which is the practice of Nigeria as provided in S12 CRN 1999. Unpublished: M Ndayikengurukiye 'The International law as a source of law in the Burundian judicial system' unpublished master's thesis,

It is imperative to understand and appreciate that the interpretation and use of international law is most often dependent on the domestic courts,<sup>165</sup> and that as much as monism and dualism are not inherently conclusive, they are nonetheless important.<sup>166</sup>

According to Ndayikengurukiye, proponents of dualism argue that international and national law are two distinct systems that operate in separate spheres and are therefore each supreme in themselves.<sup>167</sup> There is generally no possibility of conflict since domestic laws preside over domestic issues and international law over international issues. Should a conflict arise however, the provisions of national law will prevail by virtue of it having sovereignty over the acceptance or accommodation of international law within its territory.<sup>168</sup>

Egede<sup>169</sup> and Uzoukwu<sup>170</sup> concur with other scholars on the application of international treaties within states. They maintain that in practice, clashes between international and domestic laws are inevitable and the resolution always depends on the decision of the judiciary as to which will prevail.<sup>171</sup> This position clearly highlights the responsibility, purposes and legal expectations of the judiciary<sup>172</sup> and is dealt with extensively in chapter five.

In the practical sense, there is no competition between the international and national law.<sup>173</sup> They in fact complement each other and neither is superior

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human rights and democratization of the University of Pretoria, 2005, 16. While national law deals with rights and obligations of individuals within states international law deals with relationship between states. A conflict is therefore possible between the two, and dualist states are inclined to give municipal law privacy over international law. Unpublished: CD Longohn 'Implementation and Application of treaties in Nigeria' unpublished LLM Thesis, Nigerian Institute of Advanced Legal Studies, 2010.

<sup>165</sup> Unpublished: LI Uzoukwu 'Constitutionalism human rights and the judiciary in Nigeria' unpublished LLD Thesis of the University of South Africa, 2010 198-200.

<sup>166</sup> Uzoukwu (n 165 above)198-200. A Abashidze, The relationship between international law and municipal law: Significance of monism and dualism concepts.

<sup>167</sup> M Ndayikengurukiye(n 164 above)7-16.

<sup>168</sup> As above 16.

<sup>169</sup> E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African law* 249-284.

<sup>170</sup> Uzoukwu (n 165 above)199.

<sup>171</sup> Egede (n 169 above)250. Uzoukwu(n 165 above)198-200

<sup>172</sup>M Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *The European Journal of International Law* 910-911.

<sup>173</sup> V Morina et al. 'The relationship between international law and national law in the case of Kosovo: A constitutional perspective' (2011) 9 *International journal of constitutional law* 280

to or replaces the other. In real terms, states have the power to determine the form, reception and application of international norms.<sup>174</sup>

Like other African Commonwealth states such as Ghana,<sup>175</sup> Nigeria by its constitutional provision operates a dualist system whereby ratified international law is not automatically applicable until domesticated, in other words unless promulgated as law in the country.<sup>176</sup> Since Nigeria is a federal state, domesticated international laws are Acts of the National Assembly and as such supercede the laws of constituent states, but not the Constitution.<sup>177</sup> The same situation is found in Germany which is also a federal state and where such laws are an integral part of federal laws, safeguarding rights for the citizens in the federal territory.<sup>178</sup>

This is not to say that the judiciary in Nigeria has not made efforts to apply international law in the pursuit of justice, as evidenced in *Abacha v Fawehinmi*,<sup>179</sup> and even when the relevant provisions have not yet been domesticated as in the case of *Mojekwe v Mojekwe*.<sup>180</sup> However more could be done in terms of the domestication of laws by legislators and application by the judiciary.

This thesis is based on the assumption that the dualist system of domesticating international human rights adopted by Nigeria makes the application of international human rights a complex task in the country, and indirectly impacts on the protection of the girl child in terms of laws prohibiting child marriage and/or specifying a minimum marriageable age.<sup>181</sup>

The situation would have been different if international human rights applied immediately or automatically and citizens enjoyed the benefits of

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<sup>174</sup> As above

<sup>175</sup> AKP Kludze 'Constitutional rights and their relationship with international human rights in Ghana' (2008) 41 *Israeli Law Review* 677-702.

<sup>176</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>177</sup> S4 Constitution of Federal Republic of Nigeria 1999

<sup>178</sup> Art 25 of the basic law of Germany

<sup>179</sup>(2000) 6 NWLR Pt 660, (2001) AHRLR, 172 (Nig SC 2000)

<sup>180</sup> 1997 7 NWLR Pt 512, 283.

<sup>181</sup> S12 Constitution of Federal Republic of Nigeria 1999, provides that no treaty between the country shall be applicable unless it has first been domesticated as part of the laws of the country, the meaning, ambits and confines of these were elucidated in the case of *Abacha v Fawehinmi*.

ratification without the need for further legislation. The process of domestication is further complicated by Nigeria's legal pluralism and federalist legislative system which allocates some matters to the exclusive jurisdiction of constituent state Houses of Assembly, especially on the issue of marriage.<sup>182</sup>

This is an important point for the thesis in that it has affected the application of domesticated international and regional human rights instruments prohibiting child marriage, particularly by the Northern Nigerian states,<sup>183</sup> and has implications for the possibility of international intervention in Nigeria as a sovereign state. Even more important, however, is the relevance of this topic to the law making responsibility of the Nigerian government in fulfilling its obligations under ratified treaties, which in the context of the thesis concerns legislation to eradicate child marriage as prescribed by relevant international and regional treaties.<sup>184</sup>

This takes the discourse into the jurisprudential side of the thesis and sociolegal theory.

## **2.4 Sociolegal theory**

This thesis essentially adopts an interdisciplinary and multidisciplinary approach to the analysis of the law and legal phenomena, and the relationship between these terminologies and the society.<sup>185</sup> It considers law in the context of broader social and political theories and looks at whether and how the law is promulgated, implemented, enforced, and the exercise of discretion.<sup>186</sup> This deals with the nature and purpose of law, in this case the nature of the Nigerian legal system, and federalism as relates to legislation

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<sup>182</sup> Item 61, Part 1, Second schedule, CFRN 1999.

<sup>183</sup> Braimah(n 153 above)485-487.

<sup>184</sup> As above

<sup>185</sup> B Banaka & M Traverse 'Theory and Method in Socio-Legal Research' <http://ssrn.com/abstract=1511112>, available at [https://www.researchgate.net/publication/228262192\\_Theory\\_and\\_Method\\_in\\_Socio-Legal\\_Research](https://www.researchgate.net/publication/228262192_Theory_and_Method_in_Socio-Legal_Research) (accessed 8 November 2016).

<sup>186</sup> As above



and laws on the protection of the girl child particularly on the issue of child marriage shall be the context of the research.<sup>187</sup>

In the sociolegal approach, the analysis of law is directly linked to the analysis of the social situation in which the law applies, and should be conducted from that perspective by examining the role played by the law in creating, maintaining and/or altering that situation.<sup>188</sup> It has been argued that the legal structure, by virtue of its nature and the social functions it serves, requires a different form of analysis than do other social institutions.<sup>189</sup>

Exploring the relationship of law with broader social and political forces, both international and domestic, affords a perspective on ideology, culture, identity and social life which is necessary to understand a particular social problem.<sup>190</sup> Sociolegal theory is centred on the understanding that law and society are mutually constitutive. The law is not an external force to which society is subjected, but a dynamic set of codes, practices, categories and deliberations that are shaped by broader social, political and economic logics, contexts and relations.<sup>191</sup>

There is no universally accepted definition of law, with various theories suggesting different definitions, but it is generally accepted that there are different facets to law.<sup>192</sup> Austin's theory is that law is the command of the sovereign,<sup>193</sup> while Oliver Wendell Holmes is a proponent of the realistic theory of law as being the prophecy of what the courts will do.<sup>194</sup> In this

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<sup>187</sup> This is discussed in detail in the relevant chapter but mentioned here as a theoretical approach intended to be employed in the thesis.

<sup>188</sup> DN Schiff 'Socio legal theory: Social structure and the Law' (1976) 39 *The modern law review* 287.

<sup>189</sup> As above.

<sup>190</sup> As above.

<sup>191</sup> Social legal studies <http://www.griffith.edu.au/criminology-law/socio-legal-research-center>, (accessed 22 February 2016)

<sup>192</sup> Soyeju (n 10 above)1.

<sup>193</sup> 'The Command Theory of Law: A Brief Summary and Hart's Objections' May 5 2008 Jurisprudence and the philosophy of law, <http://legaltheoryandjurisprudence.blogspot.co.za/2008/05/command-theory-of-law-brief-summary-and.html> (accessed 7 November 2016).

<sup>194</sup> PS Pereira &DM Beltran (eds) of OW Holmes The common law (2011) 5. *University of Toronto Law School Typographical Society*

case, the law is a collection of decisions rather than a body of rules, which aligns with the view of case law as a source of law.<sup>195</sup>

According to the historical theory,<sup>196</sup> law is a reflection of the spirit of the people who develop it. This theory looks at law as it is and accepts as law that which is based on the traditions, customs and culture of a particular people or community.<sup>197</sup> Again, the substance of the law at any given time nearly corresponds with what is then understood to be convenient.<sup>198</sup>

Karl Marx, on the other hand, developed a theory based on economic consideration as the reason for law, maintaining that law is created in society because of the desire of certain people to control the means of production or economic resources.<sup>199</sup>

The discourse on what law is or is not, what it ought to be, how to determine its validity and how it connects to human rights in society is what constitutes the argument between the natural law and the positive law schools of thought.<sup>200</sup> The arguments around these schools are the prelude to the sociolegal theory which forms the crux of this thesis and are therefore discussed below.

Legal positivism holds that law is what legislators provide as rules to guide and direct the people and the sanctions associated with disobedience.<sup>201</sup> In this case, law is not about morals; it is the law as it is not as it ought to be as posited by the theory of natural law.<sup>202</sup>

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<sup>195</sup> As above 5

<sup>196</sup> Soyeju (n 10 above) 4. The historical law school is as propounded by Von Savigny.

<sup>197</sup> Soyeju (n 10 above) 4

<sup>198</sup> Pereira & Beltran (n 194 above) 5

<sup>199</sup> Soyeju (n 10 above) 5. Legal Marxism, Wikipedia, at [https://en.wikipedia.org/wiki/Legal\\_Marxism](https://en.wikipedia.org/wiki/Legal_Marxism), (accessed 7 November 2016)

<sup>200</sup> B Cirimele 'Natural law theory v Positive law theory' (2012) 1 [https://www.academia.edu/1876870/Natural\\_Law\\_Theory\\_VS\\_Positive\\_Law\\_Theory](https://www.academia.edu/1876870/Natural_Law_Theory_VS_Positive_Law_Theory). These two schools have the early proponents and the contemporary proponents. 'JURISPRUDENCE: Natural Law vs Legal Positivism' 6 April 2012 <https://walubengoden.wordpress.com/2012/04/06/jurisprudence-natural-law-vs-legal-positivism/> (accessed 6 December 2016).

<sup>201</sup> "What is an example of positive law?" <https://www.reference.com/government-politics/example-positive-law-a9f163e249d086c4> (accessed 7 November 2016).

<sup>202</sup> Unpublished: U Emelonye 'Proportionality and best interest: Calibrating the twin pillars of child justice in Nigeria' unpublished doctoral thesis, University of Helsinki, Finland, 2014 31-36.

Hart, Hans Kelsen and Joseph Raz were proponents of the positive law school of thought according to which the law consists of commands and legislations of authority and that decisions must be made purely on the basis of predetermined rules with no appeal to social policy or rational argument.<sup>203</sup>

Legal positivists agree with natural law theory that the origins of law or rule lie in the concept of right and wrong, in other words, morality. They postulate that while this was the basis of most codified law, as people and societies developed, law has gone beyond the moral or the codification of authority.<sup>204</sup> Law has become a necessary instrument for ongoing change in society and the attitudes of the people.<sup>205</sup>

This leads to the sociolegal theory. The sociolegal research analyses law in terms of its practical administration, role or functional side.<sup>206</sup> Sociolegal theory developed after historic law theory and views law as a social phenomenon that exists because of people, functions as an organised changing system and embodies fundamental values within its substantive rules or provisions.<sup>207</sup>

Roscoe Pound is credited with introducing sociolegal theory through his famous statement that law is an instrument or mechanism for social engineering.<sup>208</sup> Although a more practical school than the positivist, it sees law through the eyes of its function as rules of conduct imposed by the authority of the state or other agencies empowered to do so and enforced by the courts or other means of recognised law enforcement for a purpose.<sup>209</sup>

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<sup>203</sup> 'Positive Law: Thomas Hobbes, Jeremy Bentham, John Austin' Sabinet African journals <http://schoolworkhelper.net/positive-law-thomas-hobbes-jeremy-bentham-john-austin/> (accessed 7 November 2016). Although Finnis argues that positive law is not a single track authority where orders originate from government as the sole source.

<sup>204</sup> Soyeju (n 10 above)3

<sup>205</sup> P Bahar 'Revitalizing judiciary-Enhancing access to the poor' in A Singh & NA Zahid (eds) *Strengthening governance through access to justice* (2009) 73.

<sup>206</sup> Schiff (n 185 above)289.

<sup>207</sup> W Schluchter 'The Sociology of Law as an Empirical Theory of Validity' (2002) 19 *European Sociological Review* 538-549.

<sup>208</sup> Soyeju (n 10 above) 5

<sup>209</sup> LJ McNaman 'Social Engineering: The Legal Philosophy of Roscoe Pound' (2013) 33 *St. John's Law Review* 1-48. Schiff (n 185 above)305.

The sociolegal approach dictates that the making, interpretation and application of law must take social factors into account and three interests must be recognised in order to achieve the desired result, namely individual, public and social interests.<sup>210</sup> It propounds that the limits of the enjoyment of legal protection must be ascertained and secured for each of these parties and their competing interests balanced.<sup>211</sup>

The role of law in regulating human society is invaluable and the sociolegal concept of law can be helpful in achieving justice in uncertain cases, particularly when the issues relate to the fulfilment of state obligations.<sup>212</sup> It also contributes to legislative and judicial development, all which relates to the efficacy of law.<sup>213</sup>

Sociolegal theory is particularly relevant to this thesis as it looks at the societal problem of child marriage in Nigeria as stemming from the pluralegal system and conflicting legislations and by looking at the role of law in society as an instrument of social change calls for the promulgation of a specific child marriage prohibiting Act. This is to change perception and attitude regarding the girl child on the issue of child marriage in the Nigerian society.<sup>214</sup> The thesis analyses several legislations in Nigeria civil and criminal and checks the impact of the various forms of legislation on the practice of child marriage as well as the legal response to its persistence as justification for the recommendation of a dedicated Act.

#### **2.4.1 Legal pluralism**

Relevant to the sociolegal perspective of law is a discussion of the nature of law, which involves a discourse on the legal systems and institutions within

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<sup>210</sup> E Nalbandian 'Sociological Jurisprudence: Roscoe Pound's Discussion On Legal Interests And Jural Postulates' (2011) 5 *Mizan Law Review* 141-145. Schiff (n 185 above) 310. The sociological jurisprudence proposes that the purpose of law is to secure the conditions of social life, that is, the advancement of development to further human dignity

<sup>211</sup>As above

<sup>212</sup> Nalbandian (n 210 above) 141-145.

<sup>213</sup>GO Akinrinmade 'Prospects and Challenges of Sociological conception of law: The Nigerian experience' (2013) 5 *OIDA International Journal of Sustainable Development* 82-84.

<sup>214</sup> The regulations that exist on marriage are international and domestic, for the domestic in Nigeria, depending on its sources, which may be statutory-the Marriage and the Matrimonial Causes Act, the customary marriage and the Islamic marriage and as for rules governing sexual intercourse, they are found within these marriage provisions or the Criminal and the Penal Codes.

society. Plural legal orders exist in every part of the world.<sup>215</sup> Legal pluralism is a term that refers amongst others to the existence of multiple systems of law within a culturally diverse society.<sup>216</sup> Legal pluralism is a judicial system in which different types of law, civil, religious and customary, apply equally and simultaneously to different citizens or within a particular state, or one in which a dispute or matter may be governed by multiple norms or laws that coexist within a particular jurisdiction or country.<sup>217</sup>

Pluralism is relevant to this study because violence against women and children is a pervasive social issue, and is often linked to customary and religious values which coexist with other recognised law or another legal system, as in the case of Nigeria.<sup>218</sup>

Societies with plural legal systems are common in many parts of the world.<sup>219</sup> The system allows for the recognition and practice of different laws and the domination of the authority of customary, religious and statutory laws alongside each other.<sup>220</sup> The coexistence of these laws is more visible in the area of family law on the issues of marriage, divorce and custody.<sup>221</sup>

In Nigeria, child marriage is a long term cultural practice which is more predominant in the North where, it is argued, it has the support of Islam, the prevailing religion in the area.<sup>222</sup> The practice is argued not to be in

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<sup>215</sup> M Stefanova & N Menzies 'Human Rights as Legal pluralism Book Review' (2010) 60 *Journal of legal pluralism and unofficial law* 181

<sup>216</sup> IO Agbede *Themes on conflict of laws* (2001) 6-8

<sup>217</sup> *When legal worlds overlap, human rights, state and non-state law*, (2009) 2. Where the state legal order is plural in nature, all legal, formal, recognized and practiced together, it is visible in situations where family or personal law issues are group matters governed by different laws for different religious/ethnic communities whereas most matters are governed by general law or concurrent jurisdiction. Marriage and family cases may be heard by different laws providing for different practices and outcomes.

<sup>218</sup> UN Secretary General's study on violence against children cited in Violating children's rights: Harmful practices based on tradition culture religion or superstition- A report from the International NGO Council on Violence against Children 2012.

<sup>219</sup> M Ndulo 'African customary laws, customs and women's rights' (2011) 18 *Indiana journal of Global legal studies* 87.

<sup>220</sup> Ndulo (n 219 above) 87

<sup>221</sup> (n213 above) 2.

<sup>222</sup> Women's Rights Watch, 18 Oct 2012, There is high incidence of forced marriage in Nigeria which is predominant in the North and linked with the culture and religion, it is not common in the south or among the yorubas. The daily trust of Oct 2 2012, also reports that thousands of young girls in Nigeria are forced into early marriage every year and the practice is increasing. Jamba Abdul Mummuni a 13-year-old child bride's case against her relative guardian who gave her in marriage to an elderly man is still in court, Rekia was forced into marriage at 15 to a 40-year-old man and it is argued that it is an Islamic provision Quran suratul Talaq verse 4 and the case study, State of Human

contravention of the civil laws of the country or an infringement of human rights because people have the right to practice their religion<sup>223</sup>, civil laws and its institutions recognise the practice of their religion and its values by adherents.<sup>224</sup> This is the plight of the girl child as she is caught in the web of culture, religion and the law in a plural legal society. <sup>225</sup>

This thesis posits that child marriage is permissible in Nigeria due to the recognition of customary and religious laws as applicable alongside English laws in the country. It is therefore structured in the law and effecting a change requires not only the harmonisation of laws but legal reform.

Legal pluralism is associated with a number of legal and social complexities. Under common law, one of these is conflicts around issues such as the choice of law, choice of jurisdiction and recognition of foreign laws or judgements which is further complicated by the effect of federalism on the acceptance of international law.<sup>226</sup> All of these challenges are clearly issues in the case of child marriage in Nigeria.<sup>227</sup>

Since legal pluralism involves the practice of law in a context of formal or state laws combined with customary practices or norms and religious laws, it is associated with feminist arguments because the different laws that are recognised and implemented include those which allow the discrimination of women which then form part of the law of the authority in Nigeria.<sup>228</sup>

The interpretation in the context of secular society where Muslims argue for the upholding of their religious values and practices, even if they are contrary to state laws, is subjected to scrutiny in this thesis. However, the focus is particularly on Muslims in Northern Nigeria who maintain that secular laws in Nigeria give credence to their religious practice with regard

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rights in Northern Nigeria, abridged version by Kano Human Rights Network (KAHRN) and Bauchi Human Rights Network (BAHRN) A publication of Global Rights. The more recent case of a child bride (14 years old) to a 35-year-old man, who poisoned her husband and two of his friends a week after her wedding to him is notable. Punch April 11, 2014, by BBC, Nigeria child bride poisons older husband

<sup>223</sup> S38 CFRN 1999

<sup>224</sup> Fayokun (n 11 above) 461

<sup>225</sup> Ndulo (n 219 above) 89

<sup>226</sup> Agbede (n212 above) 2-4.

<sup>227</sup> Fayokun (n 11 above)464-467

<sup>228</sup> Fayokun (n 11 above)461.

to child marriage even when the practice contradict some other legislative provisions.<sup>229</sup>

An Naim is a notable scholar on legal pluralism with the emphasis on Islamic law as a legal system within the general law of society.<sup>230</sup> In his view, both legal orders can co-exist, the general law being acknowledged as supreme and other laws subject to it especially with regard to issues which the law has given it jurisdiction.<sup>231</sup> The difficulty here is the evident tension between of some religious and customary provisions with those of human rights and the general secular law of states everywhere.<sup>232</sup>

Dejo Olowu does not agree that Islamic laws cannot coexist with secular laws and believes that Islamic laws can support international human rights.<sup>233</sup> Uwais also holds that it is possible for human rights and particularly those of children to be protected in and under Islamic laws, arguing in particular that prescriptions on marriageable age can be accepted by Islam since the religion can adapt to changes and development in societies.<sup>234</sup>

Imam<sup>235</sup> is of the view that the legal reform of Islam is possible. While it is religious leaders who interpret Islamic law and give it the status of divinity, she believes that Islamic law can be restructured to make it compatible with the norms of modern day international human rights, particularly on the treatment of women and children.

This thesis concurs with learned authors on the need for the reform or reconstruction of the legal system of Nigeria. It is contended that when the plural legal system was established the need to accommodate three coexisting legal systems was justifiable, but the argument may no longer be

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<sup>229</sup> Braimah(153 above) 474-488

<sup>230</sup>A An-Naim 'Religious norms and family law: Is it legal or normative pluralism?' (2011) 25 *Emory international law review*,789.

<sup>231</sup> As above

<sup>232</sup> An-Naim( n 230 above)786.

<sup>233</sup> D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) *Law, Democracy and Development* 63.

<sup>234</sup> M Uwais 'The Compatibility of the Child Rights Act with Islamic Legal Principles' 2013.

<sup>235</sup> AM Imam 'Women, Muslim Laws and Human Rights in Nigeria' July 7 2011 Wilson Center <https://www.wilsoncenter.org/publication/women-muslim-laws-and-human-rights-nigeria> (accessed 7 December 2016).

tenable. What is needed now is a system of laws which is based on equality, the rule of law, constitutionality and accountability of rulers and the ruled (particularly rulers), and in which the protection of vulnerable groups is paramount.<sup>236</sup>

Plural legal systems may appear accessible, fair, non-discriminatory and reflect a country's historic and legal development but in reality, it may allow for the justification of harmful practices on the basis of religion and culture based on sources of law that may compromise the realisation of human rights.<sup>237</sup> This is the situation of the practice of child marriage in Nigeria which this thesis seeks to buttress.

The thesis emphasises that law can play an important role in dealing with the conflicts of interest, and the coexistence of social and individual interests which exists in this plural legal situation on child marriage.<sup>238</sup> Since both of these interests have equal priority, it should be the purpose of the law to eradicate inequalities and protect the entire community rather than a few individuals. This can be achieved through legislation and harmonisation hence the recommendation of this thesis that the sociolegal approach be adopted.<sup>239</sup>

This is the link to social engineering which is based on the theory that laws are created to shape society and regulate people's behaviour. As an approach that attempts to control human conduct with the assistance of law,<sup>240</sup> it is explored in this thesis. Law as a vehicle of social change<sup>241</sup> can be brought to bear on the menace of child marriage as it affects the girl child and society through the promulgation of a law to bring about change.

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<sup>236</sup> Ndulo (215 above) 97.

<sup>237</sup> J Sarich et al. 'Forced marriage, slavery and plural legal systems: An African perspective' (2016) 38 *Human rights Quarterly* 450-476. *Protection of children from harmful practices in plural legal systems: with a special emphasis on Africa* (2012) 17.

<sup>238</sup> Shubham Kumar 'What is social engineering?' <http://blog.ipleaders.in/what-is-social-engineering/> (accessed 22 February 2016).

<sup>239</sup> E Nalbandian 'Sociological Jurisprudence: Roscoe Pound's discussion on legal interests and Jural postulates' (2011) 5 *Mizan Law Review* 141-142.

<sup>240</sup> Kumar (n 238 above).

<sup>241</sup> Roscoe Pound *An introduction to the philosophy of Law* (1999) 18. He defined law as a mechanism of social engineering. Writers also call it the functional school, MDA Freeman, *Introduction to Jurisprudence*, 2001, 659-678.



Asides the nature or characteristics of the legal system of Nigeria, another nature which characterises the government is federalism. In this thesis, the relevance is on the aspect of legislation as it impacts on the issue of child marriage in the country. As this is a perspective from which this thesis is viewed and which runs through the germane argument of the issue of the legal protection of the girl child against child marriage in Nigeria, it shall be discussed as an approach.

### **2.4.2 Federalism**

It would be an omission to conclude the theoretical section of the thesis without exploring the issue of federalism as an aspect of law, particularly as it impacts on the issue of child marriage in Nigeria.<sup>242</sup> Although strictly speaking a matter of government structure, Nigeria's federalism constitutes another aspect of legal pluralism<sup>243</sup> which can be described as legislative pluralism. This is a situation in which the central or federal government and that of regions or states lead to a dual legislative source and conflict between multiplicity of laws.<sup>244</sup>

An advantage of federalism is that it provides for an abundant variety of legislation and harmonised foreign policy within the state,<sup>245</sup> but the potential for conflict both within the various legislations and between federal and state Houses of Assembly is a disadvantage. It can be said that, like legal pluralism, the legislative federalism has been more of a restrictive factor in the enjoyment of ratified human rights by individual Nigerian

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<sup>242</sup> This shall be seen in the relevant chapter in this thesis.

<sup>243</sup> S2(2) Constitution of the Federal Republic of Nigeria 1999, Nigeria shall be a federation consisting of states and a Federal Capital Territory. the central or federal house of Assembly has jurisdiction to legislate on some issues exclusively, in other cases concurrently with the states house of Assembly while some legislations are within the jurisdiction of the state houses of Assembly has the jurisdiction to legislate on some issues, exclusively, The Exclusive list is found in Item 61, Part 1, Constitution of the Federal Republic of Nigeria 1999.

<sup>244</sup> Agbede (n 212 above) 3-5. S2,3 and 4 CFRN 1999, the Nigerian state is a federal one with capital in Abuja and other 36 states, by S4, legislative powers are shared by the Federal and other States houses of Assembly in order of Exclusive and Conclusive lists with the local government having powers to make bye laws.

<sup>245</sup> Unpublished: CC Njoku 'The role of federalism in mitigating ethnic conflicts in plural societies: Nigeria and Malaysia in comparative perspective' unpublished doctoral thesis, University of Malaysia, 2015 40-43.

citizens, particularly in terms of the practice of child marriage.<sup>246</sup> This is because the children whose lives are controlled by cultural and religious practices which feature more in the areas of personal or family law<sup>247</sup> and the issue of religious marriage fall under state legislative jurisdiction in Nigeria.<sup>248</sup>

In the North of Nigeria, Islam is religion, practice and law,<sup>249</sup> and the fact that its provisions control legislation, social practices and even the application of legal provisions and human rights in that region is undisputed. As an example, the primary problem in the issue of marriageable age as prescribed by international human rights provisions and the domesticated Child Rights Act in Nigeria is its incompatibility with Islamic provisions.<sup>250</sup>

In theory as well as in real and practical terms however, the federal government has the ultimate responsibility to ensure that human rights are respected in the country,<sup>251</sup> and while the federal versus state dilemma does exist in Nigeria, regional or even domestic state laws cannot be invoked to justify the non-implementation of international human rights.<sup>252</sup> It is in this context that Braimah and Fayokun blame the government of Nigeria for the denial of women's rights and the protection of the girl child against child marriage in Nigeria.<sup>253</sup>

Since in Nigeria, this particular problem on child marriage and national versus state legislation is related to the understanding of sovereignty in

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<sup>246</sup> Braimah (n 153 above) 485

<sup>247</sup> Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children at <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> (accessed 21 January 2017). (n 213 above)2. IT Sampson 'Religion and the Nigerian State: Situating the de facto and de jure frontiers of state-religion relations and its implication for National security' (2014) *Oxford Journal of Law and Religion* 312.

<sup>248</sup> Item 61, second schedule on exclusive list in the Constitution of the Federal Republic of Nigeria, 1999. By the Nigerian Constitution each state has the power to make laws on the issue of marriage which for the North is Islamic law type, in actual fact by its provision the central government is ousted from legislating on such state jurisdiction matters.

<sup>249</sup> JA Yakubu *The Dialectics of the Sharia Imbroglia in Nigeria* (2003) 3, although the provisions of the Constitution still applies as it does in the other part or states of the Country.

<sup>250</sup> Braimah (n 153 above) 485.

<sup>251</sup> I Zarifis 'Rights of Religious minorities in Nigeria' (2002) 10 *Human rights Brief* 22

<sup>252</sup> Vienna Law of International Treaties. Zarifis as above

<sup>253</sup> Braimah(n 153 above) 474-488. Fayokun (n11 above)460-470.

terms of the application of international human rights treaties<sup>254</sup>, it touches on the issue of the relationship between international and domestic law. Oyeboode,<sup>255</sup> in the attempt to describe this relationship, explains that it is a mutual one and that international law is dependent on the domestic Constitution and legislation to thrive.

International law is a source of law in Nigeria but its application is not automatic<sup>256</sup> and even after it has been domesticated, the nature of the country's legislative federalism can still pose challenges to the realisation of the entrenched rights.<sup>257</sup> This has relevance for this thesis because the majority of the laws which prohibit child marriage and sexual abuse of the girl child are found in international human rights instruments but their accessibility for citizens is an internal or domestic state issue.<sup>258</sup>

The domestication of international human rights as a legislative issue is affected by the peculiar legislative jurisdiction that exists between the federal and state legislatures in Nigeria. This is a salient feature of the issue of child marriage in Nigeria which calls for reform.<sup>259</sup>

Nigeria's federalism also affects the issue of jurisdiction on the involvement of the courts or access to justice in the enforcement of the rights of the girl child on the issue of child marriage.<sup>260</sup> This is in connection with the existence of federal and states courts and their jurisdictions on the enforcement of fundamental human rights of citizens or the relevant judicial procedure.

In light of the above, the solution to the problem of child marriage in Nigeria can be seen to lie in the application of the law to, in the reform and or

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<sup>254</sup> Braimah (n 153 above)475. The particular problem has to do with marriageable age in some international human rights treaties, its domestication is the contentious issue.

<sup>255</sup> Oyeboode (n 147 above)2.

<sup>256</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>257</sup> Item 61 Part 1, second schedule as expounded in Braimah(n 153 above)

<sup>258</sup> This procedure depending on the practice of particular state may be monism or dualism, like in the case of Nigeria which requires that they must first be domesticated based on the fact that international and domestic law are different orders, this theory of dualism is the one strong obstacle to the enforcement of human rights treaties in Nigeria especially the CEDAW and CRC.

<sup>259</sup> Braimah (n 153 above)475.

<sup>260</sup> The constitution makes provision for federal and states high courts separately, each with its own jurisdiction or sphere of influence. This however may create conflict.

harmonisation of the existing provisions in a bid to control human behaviour. This is the connection to the sociolegal theory under which head this federalism theory is discussed.

Eliminating the conflict between laws which allows for the perpetration of child marriage through legal harmonisation and reform will clarify the stance of child marriage in Nigeria and assist in the elimination of the practice.<sup>261</sup>

## **2.5 Theoretical synthesis and application**

The thesis utilises an integrated combination of theories. Feminist theory, rights theory and sociolegal theory are the principal ones, with additional aspects addressed appropriately under these headings. African feminism is dealt with as part of feminist theory, while the discourse on universalism versus cultural or religious relativism, sovereignty, monism and dualism are integrated in the discussion on rights theory, and legal pluralism and federalism in that on sociolegal theory. This is not because these aspects are compartmentalised as such in reality but purely with a view to obtaining a better understanding of trends in the thinking on the issue of child marriage in Nigeria within the context of the thesis.

The feminist assumption that the girl child is subjected to sexual abuse and child marriage as a result of the patriarchal system in society which promotes male domination and assigns women the role of second class citizens is essentially about the issue of power whereby men assert their superiority and authority over women.<sup>262</sup>

The radical feminist proposes that the ideologies, mind-set and perceptions of women need to change if they are to attain equal status while the liberal feminist goes further by linking this problem to law, stating that the perception of women is structured in society and can be found in legal

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<sup>261</sup> L J Mcmanaman 'Social Engineering: The Legal Philosophy of Roscoe Pound' (2013) 33 *St. John's Law Review* 8. U Naiz 'Violence against women in South Asian Countries' (2003) 6 *Archives of women's mental health* 173, the co-existence of different laws permit this.

<sup>262</sup> Bunting(n 25 above)9

provisions.<sup>263</sup> This link to the law ushers in the issue of rights and thereby rights theory.

Since society's discrimination against women and girls is often excused on the basis of cultural and religious norms, the rights theory discourse necessarily includes the issue of universalism versus cultural relativism. Child marriage is a matter involving age, gender, marriage<sup>264</sup> and sex which are all global human issues but subject to different cultural perceptions. Along with the girl child in terms of the definition of children and childhood, these are matters of rights, culture and religion and their associated social, legal and cultural constructs.<sup>265</sup>

In some societies, these are private personal issues within the family and controlled or regulated by culture and religion. In such cases, particularly in African society, they are dealt with in terms of group interests rather than those of the individuals involved. This is in contrast to the culture in developed countries where they are the private issue of the individual or couple alone.<sup>266</sup>

In communities regulated by religious groups, there is often resistance to intervention by the state. This is particularly the case in Islamic communities where Islamic law has the status of divine law which regulates

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<sup>263</sup> PE Okeke 'Reconfiguring Tradition: Women's rights and social status in contemporary Nigeria' (2000) 47 *Africa Today* 51

<sup>264</sup> EI Nwogugu *Family Law in Nigeria* (1974) lxxviii, 23-25. Marriage is a universal institution recognized and respected all over the world, it is a social institution governed by the social and religious norms of society.

<sup>265</sup> A Atsenuwa Constitutionalism and legal feminism: Stepping stones or impediments on the long road to freedom for Nigerian women? 2011, 7. All laws in Nigeria customary, Islamic and English meet or converge in one document, the Nigerian Constitution which is the supreme law and recognises these other laws in its provisions. This is the Nigerian legal pluralism, whose major problem however outweighs its advantage of multiplicity of diverse laws, as it makes room for different contradictory and conflicting provisions of what the law on a particular issue is at the end of the day. From Ratification to implementation: A state capacity needs assessment on domestication, implementation and monitoring of the African Unions protocol to the African charter on human and people's rights in Africa on the rights of women, July 2009.

<sup>266</sup> Child, Early and forced marriage: A multi Country study of Women living under Muslim laws, 2014 being a submission to the United Nations office of the High Commission. In some societies, like in the North of Nigeria, the girl child is a female who only has to be married off and serve her husband by satisfying his sexual needs and bearing children. The dictates of culture and religion views that the girl child is of age when she shows signs of maturity or puberty, that is she can be seen to be ready for child bearing and taking care of the home when society views her as ready and not by a particular age or law, it is also the fathers responsibility to settle her in marriage, not her choice, universally however, it is an issue of personal choice and consent which requires personal capacity. B Abegunde 'Gender Inequalities: Nigerian and International perspectives' (2014) *British Journal of Arts and Social Sciences* 167-170

every aspect of life in the community and which cannot be changed, modified, subdued or brought under the control of secular laws,<sup>267</sup> although some Muslim scholars argue that once Islamic law is acknowledged by secular law, it loses its divine status.<sup>268</sup>

This dilemma can be seen very clearly in the context of child marriage in Nigeria, with Muslims being adamant that the state has no right to intervene in any way in Islamic marriages, and particularly on its legislation.<sup>269</sup> Conflict of law becomes a challenge however when the same adherents turn to the provisions of secular laws and legislation to support their argument, an argument which still denies the human rights of the girl child and affects the development of society.<sup>270</sup>

In articulating this, Spinner agrees with Rawls's contention that while religious people seek to impose their way of life on others, there has to be justice, equality and stability spearheaded by government to ensure that individual interests are not sacrificed at the altar of group interest. This necessitates widespread agreement on the principles of justice which in turn can intrude considerably on the terrain of conservative religions.<sup>271</sup>

A rights based approach is useful because the language of human rights allows legitimate claims to be articulated with moral authority. It also promotes engagement with the responsibility of the state by defining the entitlements of right holders and the duties of the state.<sup>272</sup>

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<sup>267</sup> K Abou El Fadl 'Islam and the Challenge of Democracy' Boston Review <http://bostonreview.net/archives/BR28.2/abou.html> (accessed 8 November 2016. See also the same article (2005) 1 *Journal of scholarly perspectives* 3.

<sup>268</sup> As above.

<sup>269</sup> Like item 61, part I 1999 CFRN

<sup>270</sup> Braimah(n 153 above) 474-488

<sup>271</sup> Jeff Spinner 'Liberalism and Religion: Against Congruence' (2008) 9:2 *Theoretical inquiries in law* 553. He believes that wider agreement is unattainable and that the better route to stability is through extensive agreement on decision making procedure. Since Rawls believe that religion is a complete way of life as it informs people about how to live their lives, in his believe like Islam for example in the case of child marriage in Nigeria, try to impose their moral code on others or the state (in a way, the Nigerian law may already be so, in the instances of their argument in support of child marriage, the problem is how religious people can retain their comprehensive views while agreeing to a shared political conception of justice, so no one religion is able to impose its doctrine on others.

<sup>272</sup> S Goonesekere 'A Rights- based approach to realizing Gender equality' in cooperation with the UN Division for the advancement of women. Other approaches lack this unique characteristic.

Since this is about giving effect to the ratification of international treaties, it raises the issue of the domestication of ratified treaties in Nigeria.<sup>273</sup> This is irrespective of the fact that child marriage is argued to be a religious practice in Nigeria and that its abolition would amount to disregard for Islamic values, an infringement on the right to religious freedom and a contravention of the legislative jurisdiction of the federal government of Nigeria.<sup>274</sup> These allegations engage the issues of relativism, sovereignty, domestic laws and legal systems, including the particular case of Nigeria's federal system.

International human rights have provided not only for the protection of the girl child based on the best interest principle, particularly in terms of her capacity (age) when it comes to marriage, but also the protection of her right to non-discrimination (referred to as equality by Rawls),<sup>275</sup> dignity (in terms of her consent to the marriage and sexual intercourse) and development. The principle of the margin of appreciation could also be reviewed to see how it can be applied in the Nigerian context.

Even without categorically insisting on eighteen as the minimum marriageable age, the unacceptability of giving eleven, thirteen or fifteen-year-old girls out in marriage is glaringly obvious. The conjugal and parental responsibilities and expectations associated with sexual intercourse, child bearing and child rearing is beyond the capability of girls at such a tender age.<sup>276</sup> Rawls sees the need for a point of convergence between individuals, groups and the state to resolve the issue of equality versus responsibility.<sup>277</sup>

Given that child marriage is a social problem and that the research looks into the role of law in its persistence, particularly through the conflict of laws, the sociolegal approach of considering the law in relation to other

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<sup>273</sup> S12 Constitution of the Federal Republic Nigeria 1999

<sup>274</sup> The Right to freedom of Religion and Assembly, also item 61 Part I CFRN 1999.

<sup>275</sup> Rawls(n 75 above) 38

<sup>276</sup> 'Child marriage, Child protection from violence, exploitation and abuse' August 29 2016 UNICEF [http://www.unicef.org/protection/57929\\_58008.html](http://www.unicef.org/protection/57929_58008.html) (accessed 8 November 2016). 'Early marriage, Child spouses' Innocenti Digest No 7 2001 Unicef Florence Italy.

<sup>277</sup> Spinner (n 266 above)553

factors in society is a necessary and important one.<sup>278</sup> Sociolegal theory sees international law as written law as opposed to law in action, in other words its implementation at local levels.

Focusing on Nigeria, the thesis examines the ways in which countries have addressed the issue child marriage by using international law as a model and instrument for social change.<sup>279</sup> This is the fundamental approach of the sociolegal school of thought which seeks to assess the functioning of the law in the society since it sees law as a mechanism for social engineering.<sup>280</sup>

This thesis holds that by and large states are primarily responsible for securing the rights of those under their jurisdiction in line with international law through its domestic laws and efforts of the judiciary. However, it also takes a subtly comparative approach by examining the situation in other states and how they respond to international law. Overall, the thesis makes use of feminist theory and rights theory through a sociolegal comparative, analytical, descriptive and exploratory methodology to explore how laws can be used to abolish child marriage in Nigeria in a bid to protect the girl child.

## **2.6. Postulation**

In light of the foregoing discussion, and particularly the earmarking of law as a tool of social engineering, a workable theory or approach which this thesis proposes to dealing with the scourge of child marriage in Nigeria is one of specificity and clarification. It is both necessary and meaningful for specific legislation explicitly prohibiting child marriage to be promulgated and existing provisions on related issues to be clarified if the law is to be effective in protecting the girl child.

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<sup>278</sup> McManaman(n 256) 8

<sup>279</sup> Countries like India, Malawi, Zambia, Kenya and UK and some part of the US

<sup>280</sup> LW Potts 'Law as a tool of social engineering: The case of the Republic of South Africa'(1982)5 *B.C. Int'l & Comp LR* 2. SA Gochhayat 'Social Engineering by Roscoe Pound: Issues in Legal and Political Philosophy' (2010) 1. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1742165&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742165&download=yes) (accessed 21 January 2017). M Salter & J Mason *Writing law dissertations- An introduction and guide to the conduct of legal research* (2007)1-5



This will necessarily entail harmonisation of laws and legal reform. This thesis concludes that it is of utmost importance that all provisions on related issues in Nigeria be clarified and where necessary reformed to allow the law to perform its functions in terms of protecting the girl child.

In order to ensure a good understanding of how rights, culture and religion play out in Nigeria, some background information about the country is necessary.

## **2.7. Nigeria**

Nigeria is a West African country located between Benin and Cameroon on the Gulf of Guinea on Africa's west coast. The state capital used to be Lagos, close to the sea and one of the busiest cities in Africa, but has since been moved to Abuja, a city in the heart of the country.<sup>281</sup> The population of the Country is largely rural with 63% of the population living in rural areas, at present 45% of the country's population is younger than fifteen years.<sup>282</sup>

With over 167 million people, Nigeria is the most populous nation in Africa and consists of 37 states.<sup>283</sup> The official language is English, an inheritance of British colonialism, but a pidgin variant of the language, otherwise known as broken English, is commonly spoken informally while the widely spoken indigenous languages are Hausa, Yoruba and Ibo.<sup>284</sup>

A map illustrates how the country is divided into the three sectors of North, East and West. The North is home to the Hausa and Fulani people, while the Yoruba are indigenous to the West and the Igbos and the Calabar/Efik to the East.<sup>285</sup> Nigeria is a country of over 250 diverse ethnic groups, including the Hausa, Fulani, Yoruba, Igbo, Ijaw, Kanuri, Ibibio, Tiv and Nupe, who

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<sup>281</sup> Nigeria Country Profile, UNICEF website, see also S2 CFRN 1999

<sup>282</sup> Child survival in Nigeria: Situation, response and Prospects, key issues, 2012

<sup>283</sup> Nigerian population commission 2011. S3 Constitution of the Federal Republic of Nigeria 1999.

<sup>284</sup> Nigeria Country profile, UNICEF website, although each of these tribes have several ethnic groups within them that are different, distinct and have their own language too like the Ibira, the Efik, the Ibibio, Ondo, Ekiti, Egba, Benin, Edo etc.

<sup>285</sup> IT Sampson 'Religion and the Nigerian State: Situating the de facto and de jure Frontiers of State-Religion Relations and its Implications for National Security' (2014)3 *Oxford Journal of Law and Religion* 311-312

speak many different languages and dialects and contribute to the diversity of tribal cultures and religious affiliations in Nigeria.<sup>286</sup>

Every tribe and ethnic group has deeply rooted cultural beliefs and attitudes, irrespective of whether or not these are related to the religion they practice.<sup>287</sup>

Nigeria is a religiously pluralistic state where the citizens practice a number of religions as a fundamental human right,<sup>288</sup> although constitutionally, it is a secular country.<sup>289</sup> The three major religions are Islam, Christianity and traditional religion, with Islam and Christianity playing an important role in the development of millions of Nigerians. The practice of these religions seems to follow ethnic or geographic lines which implies a tribal basis.<sup>290</sup>

The Hausa are predominantly Muslim followers of Islam and the Igbos predominantly Christian, while there is a mix of the two religions among the Yoruba.<sup>291</sup> Regardless of their chosen or recognised religions, the three tribes still also practice their traditional religions to the extent that the combination sometimes makes it difficult to determine whether a practice is Islamic, Christian or traditional.<sup>292</sup>

Nigeria has a hierarchical social structure with clearly defined roles for men women and children, and religion is clearly dominant in shaping community values. This is central to how Nigerians identify themselves,<sup>293</sup> as evident from the fact that social life traditionally revolves around ceremonies and

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<sup>286</sup> As above

<sup>287</sup> 'Child survival in Nigeria: situation, response and prospects. Key issues' 2002- Policy projects/ Nigeria- Usaid publication. Inadvertently albeit unconscious these attitudes and beliefs result in practices harmful to the survival of children and women, most of these practices are gender related.

<sup>288</sup> S38 (1) Constitution of the Federal Republic of Nigeria 1999

<sup>289</sup> S10 Constitution of the Federal Republic of Nigeria 1999

<sup>290</sup> AA Okebukola 'Synopsis of Religion and Child abuse: The Nigerian experience' (2012) 3 *Mediterranean journal of social science* 147.

<sup>291</sup> Yushau Sodiq 'Can Muslims and Christians live together peacefully in Nigeria' (2009) 99 *The Muslim World* 646

<sup>292</sup> As above

<sup>293</sup> MC Green Religion 'family law and recognition of identity in Nigeria' (2011) 25 *Emory International law Review* 947

public performances. Even dress, a strong cultural facet of the people, is largely influenced by religious affiliation, particularly in the North.<sup>294</sup>

Nigerian society is a religious one as is evident from the astounding development of religiosity over the past twenty years in terms of the time, resources and effort devoted to religious practices.<sup>295</sup>

Religion in the country appears to be tribal or even geographical, with Islam being predominant in the northern region and Christianity among the Igbos in the south east, while in the south west the Yoruba practice both Islam and Christianity.<sup>296</sup> In fact in this part of the country almost every family has relatives who are members of one of these religions.<sup>297</sup>

More Nigerians are adherents of Islam and Christianity than of traditional African religion, and the two religions compete for political leadership and status, as evidenced by the observance of religions festivals as public holidays, recognition of prayer days, and government calls to prayer in public programmes.<sup>298</sup> Working hours in the North are structured around the fact that Friday is the Muslim day of prayer, although Yoruba states in the south also recognise the day of prayer in the same way.<sup>299</sup>

Nigeria's legal system is believed to have had a religious foundation since the invasion of the British.<sup>300</sup> With English common law representing Christianity, Islamic law representing Islam and native laws representing traditional religion, these three systems continue to operate side by side and are all recognised by the Constitution.<sup>301</sup>

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<sup>294</sup> Dresses and social etiquette Abuja City.com at [http://www.abujacity.com/abuja\\_and\\_beyond/dress-and-social-etiquette.html](http://www.abujacity.com/abuja_and_beyond/dress-and-social-etiquette.html), accessed on 21 January 2017. Religion and Culture in Nigeria, 2012, Embassy of Nigeria Russia, cued from the internet

<sup>295</sup> Sampson(n 280 above) 311. Ibrahim and Toure Ethno religious conflict in Northern Nigeria, 2003, the Nordic Africa Institute.

<sup>296</sup> As above

<sup>297</sup> 'Religion and Culture in Nigeria' 2012 Embassy of Nigeria Russia

<sup>298</sup> Eyene Okpanachi 'Ethno religious identity and conflict in Northern Nigeria' 2012 at [www.cetri.be](http://www.cetri.be)

<sup>299</sup> As above. Each political party choses its leaders or candidates based on their religions, for example if the presidential candidate is a Muslim then the vice or running mate will be a Christian and vice versa.

<sup>300</sup> As above

<sup>301</sup> Sodiq (n 291 above) 646.

Nigeria is a federal country where different laws and circumstances apply in different states,<sup>302</sup> and because of the diversity of beliefs and particularly the competition between Islam and Christianity which has spread into the political and legal sphere, longstanding religious and ethnic tensions are pervasive.<sup>303</sup>

The foregoing is all evidence that Nigeria is a multi-ethnic, multicultural, multi-religious and multi-legal society in which the various religious practices and norms are recognised by the law.<sup>304</sup> The link to this is the fact that Nigeria is a hierarchical society where age and position garner respect<sup>305</sup> can be said to be a cultural feature which is not alien to any of the religions practiced and is proof of the intimate relationship between religion and the formation of human social groups.<sup>306</sup>

Regrettably, one would not be mistaken in concluding that the country is also a deeply divided state in which major political, social and even legal issues are vigorously and sometimes violently contested along the lines of complex ethnic, religious and regional divisions.<sup>307</sup> The current situation in terms of child marriage is one of such example.<sup>308</sup>

Cultural practices are undeniable progressive yet culture is sometimes cited as grounds for various forms of abuse against women and children.<sup>309</sup> The same can be said of religion, particularly the religiosity of Nigerians, where the link between religion and certain motivational values, both moral and legal, coupled with the significant impact of religion on cultural beliefs and

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<sup>302</sup> S2 CFRN 1999

<sup>303</sup> Musa Usman Abubakar 'Criminal Law and the rights of the child in Northern Nigeria' 2012 Legal studies research paper

<sup>304</sup> As above

<sup>305</sup> 'Nigerian society and culture' Embassy of the Federal Republic of Nigeria Bucharest Romania <http://nigerian-embassy.ro/about-nigeria/culture/> (accessed 21 January 2017).

<sup>306</sup> Kwintessential website

<sup>307</sup> Eyene Okponachi, *Ethno religious identity and Conflict in Northern Nigeria*, 2012, [www.cetri.be](http://www.cetri.be). It is clear that culture and religion are closely knit and in Nigeria interwoven, interlinked and with a deep influence on the political and social structure of the society.

<sup>308</sup> Braimah(n 153 above) 475

<sup>309</sup> Yvonne Rafferty 'International dimensions of discrimination and violence against girls: A human rights perspective' (2013) 14 *journal of international women's studies* 3.

practices, means that almost everything good or bad has its basis in religion.<sup>310</sup>

In light of the fact that religion is a source of cultural rules and order, the primary force organising the world view, values and decisions that drive culture and are critical for its future,<sup>311</sup> and in Nigeria a form of law in itself, it warrants analysis, particularly in terms of its role to this day in the practice of child marriage in Nigeria's North.<sup>312</sup>

While it is known that religious norms impose patriarchal regimes that disadvantage or discriminate against women, the manifestation of violence against women, although a global issue, is also shaped by the values and circumstances in particular countries, some of which have been entrenched in the secular laws of states.<sup>313</sup>

This thesis focusing on the Nigerian context follows this line of thought, in the perception and treatment of the girl child and particularly in terms of conceptions of childhood and age and their role in the continued practice of child marriage.

## **2.8 Summary and conclusion**

Applying liberal feminist and radical feminist theory, the thesis approaches the problem of child marriage in Nigeria as a situation brought about by the patriarchal perception of women and girls in society which has been structured into law and argues for a change through re-imagining mind-set and perception of women and girls through specific legislation and reform of law, amongst others.

Rights theory is applied in the thesis to position child marriage as an infringement of the rights of the girl child through sexual abuse. The

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<sup>310</sup> N Tarakeshwar et al 'Religion an overlooked dimension in cross cultural psychology' (2003) *journal of cross cultural psychology*, 377, 379

<sup>311</sup> As above. P Hefner 'The spiritual task of religion in culture: An evolutionary perspective' (1998) 33 *Journal of religion and science* 535

<sup>312</sup> Although it is the laws of Nigeria that is the focus in this thesis

<sup>313</sup> Clifford Geertz 'Religion as a cultural system in *The interpretation of cultures: Selected Essays*' 1993 89.

practice being argued or defended as cultural/ religious relativism. This practice is specifically coined out as sexual relativism as it displays the dominating cultural belief and law of men's sexual rights in homes and marriages.

Being a rights issue, it holds the Nigerian government accountable for the fulfilment of its obligation to protect the rights of the girl child under the provisions of ratified international and regional human rights treaties. The issue of accountability raises the connection of sovereignty and the theory of dualism and monism in the application of international human rights in the domestic terrains of member states.

The foregoing are matters or issues of law. Hence, this lays the foundation for the sociolegal approach which focuses on the nature of law and its function as a social engineering mechanism for the protection of the girl child in Nigeria. It therefore looks at the Nigerian pluralegal system and federalism as a characterizing nature and function of law on the issue of child marriage.

This theory argues that the law, and by extrapolation human rights, is binding, not by virtue of its source or origin, whether divine or moral, domestic or international, or its form, whether codified or not, but because it relates to human beings irrespective of sex, gender, age or race. The thesis however argues that it is expedient for the law to have a reference framework that renders it accessible as well as supportive of the development and advancement of society, and as such relevant for its purposes.

This thesis is based on the assumption that the legal system of Nigeria provides a conducive atmosphere for the practice of child marriage because its laws are not sufficiently protective of the girl child. The reason for this is the discriminatory nature of certain of the country's legal provisions due to their foundation in the patriarchal system that dominates the plural legal systems of customary, Islamic and statutory laws in the country as recognised by the Constitution.

Nigerian law also contains confusing and conflicting provisions which make its stance on child marriage unclear, particularly in terms of marriageable age and sexual intercourse, issues which have already been determined by the culture and religion adhered to by a large proportion of the Nigerian population. The thesis takes a sociolegal approach by examining the role of the law in the continued practice of child marriage in Nigeria plays in the problem, and by proposing a theory of specificity and clarification as an instrument for the same law to resolve the issue.

## **CHAPTER THREE**

### **Child marriage in context**

#### **3.1 Introduction**

The Chapter covers eleven sections. The first section is the introduction; the second section is on sexual abuse in context. The third section discusses the girl child. The fourth section discusses the institution of marriage. The fifth section covers a range of the general perspectives on child marriage including unions similar to child marriage in some other jurisdictions. The sixth section discusses the legal aspects of child marriage. The seventh section discusses child marriage in Nigeria: prevalence and causes. The eighth section discusses a case study of child marriage and the sexual experience of the girl brides in Nigeria. The ninth section deals with the effects of child marriage. The tenth section deals with sociological solutions to child marriage, this includes a section on utilising customary law to discourage the practice while the last section is the summary and conclusion.

The purpose of this chapter is to discuss child marriage by analysing what it means and the issues and concepts that surround it, particularly from the perspective of sexual abuse which is the focus of the research. It attempts a thorough discourse on child marriage as a background to the research and concludes with a sociological attempt to eradicate it before the discourse of legal issues and legal attempts at its eradication in the last chapters of the thesis.

#### **3.2 Sexual abuse in context**

The African Charter on the Rights and Welfare of the Child (ACRWC) mentions harmful cultural practices or discriminatory customs involving sex



and expressly refers to child marriage as a prohibited practice.<sup>1</sup> The charter makes provision for the protection of children against sexual abuse.<sup>2</sup> The United Nations Declaration on the Elimination of Violence against Women defines the sexual abuse of female children, marital rape and other traditional practices harmful to women as violence.<sup>3</sup>

Abuse is the improper use or treatment of an entity, often for unfairly or improperly gained benefit, and takes many forms including physical and verbal maltreatment, injury, assault, violation, rape, unjust practices, crimes and various other form of aggression.<sup>4</sup> Abuse is an intentionally cruel or violent act of ill treatment that can cause harm or have damaging effects on the safety, wellbeing or dignity of a person.<sup>5</sup>

In the case of a child, it includes treatment that can harm the child's development in any way.<sup>6</sup> It is any action by another person that causes significant harm to a child.<sup>7</sup> According to Okebukola, child abuse describes all sorts of injustice, abnormality and inhuman treatment given to the young feeble ones by the adult generation and may be intentional or unintentional.<sup>8</sup> When such harm involves contact with the sexual organs, it is sexual abuse

Sexual abuse has been defined as any form of forced or coerced sexual relations between an adult and a child.<sup>9</sup> It includes having sexual

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<sup>1</sup> Art 21(1) and (2) African Charter on the Rights and Welfare of the Child

<sup>2</sup> Art 16(1) African charter on the rights and welfare of the child.

<sup>3</sup> Art 2 United Nations Declaration of Elimination of Violence against women 1993, in Art 144 Declaration on the elimination of violence against women (UN, 1994) Gender based violence are acts which result or likely to result in physical, sexual or psychological harm or suffering of women including its threat, coercion or arbitrary deprivation of liberty occurring in public or private life, this obviously will include child marriage.

<sup>4</sup> Statutory definitions of neglect, child sexual abuse and child sexual exploitation, and guidance on harmful sexual behaviours NSPCC Research in practice Action for children, accessed on 21 January 2017. 'Abuse' Wikipedia <https://en.wikipedia.org/wiki/Abuse> (accessed 9 November 2016).

<sup>5</sup> 'What is abuse' The law dictionary <http://thelawdictionary.org/abuse/> (accessed 10 December 2016).

<sup>6</sup>As above

<sup>7</sup> 'What is child abuse' Child abuse and neglect <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/> (accessed 9 December 2016).

<sup>8</sup> AOA Okebukola 'Synopsis of Religion and Child abuse: The Nigerian experience' (2012) 3(15) *Mediterranean journal of social science* 147-148.

<sup>9</sup> C Rudd 'Case studies of child sexual abuse in Zimbabwe' in L Richter, A Daves and CH-Smith(ed) *Sexual abuse of young children in Southern Africa* (2004) 400-401.

intercourse with a girl under 16 years with her consent.<sup>10</sup> Sexual abuse is argued a natural consequence of women's second class status in society.<sup>11</sup> It has diverse harmful effects on the child and is pervasive in a number of societies, including those in sub-Saharan Africa.<sup>12</sup>

Abuse can be a form of violence. According to the Convention on the Rights of the Child (CRC), the term violence refers to all forms of physical or mental harm, injury, neglect, negligence, maltreatment or exploitation which includes sexual abuse.<sup>13</sup> When inflicted on a child such violence or abuse is can properly be described as child abuse and where it involves sex, it can be called sexual abuse.<sup>14</sup>

This thesis however is more concerned with the sexual abuse of the girl child as it occurs in child marriage. Sexual abuse occurs when a child is forced, coerced or persuaded to take part in sexual activities.<sup>15</sup> This is obviously the case in child marriage as the girl child who submits to sex can hardly be said to be engaging in consensual sex.<sup>16</sup> In the sense that child marriage involves the engagement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, it is a form of sexual abuse.<sup>17</sup>

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<sup>10</sup> NG Muridzo & E Malianga 'child sexual abuse in Zimbabwe: Prevention strategies for social workers' (2015) 5(2) *African Journal of Social Work* 45.

<sup>11</sup> E Chikwiri & EM Lemmer 'Gender-based Violence in Primary Schools in the Harare and Marondera Districts of Zimbabwe' (2014) 5 (1) *J Sociology Soc Anth*, 96

<sup>12</sup> G Kanguade & T Banda 'Sexual Health and Rights of Adolescents: A Dialogue with Sub-Saharan Africa' in C Ngwenya & E Durojaiye (eds), *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 252.

<sup>13</sup> Article 19 Convention on the Rights of the Child, see also Art 1(j) Protocol to the African Charter on Human and Peoples rights on the Rights of Women in Africa defines violence as all acts perpetrated against women which cause them physical, sexual psychological and economic harm, including threats to take such acts or impose restriction on or deprivation of fundamental freedoms in public or private life in peace and during situation of armed conflict, this seems to describe the experience of child marriage by the girl child.

<sup>14</sup> Rudd (n 9 above) 400-401

<sup>15</sup> 'What is child abuse' Child abuse and neglect <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/> (accessed 9 November 2016)

<sup>16</sup> J Birech 'Child Marriage: A Cultural Health Phenomenon' (2013) 3 *International journal of Humanities and Social Science* 97, 99-100

<sup>17</sup> 'Child sexual abuse in Guidelines for Medico-Legal care for victims of sexual violence' WHO [http://www.who.int/violence\\_injury\\_prevention/resources/publications/en/guidelines\\_chap7.pdf](http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf), (accessed 11 December 2016).

Furthermore, the fact that the sexual act happens within marriage may not help her feel less violated.<sup>18</sup> In this thesis, child marriage is also considered to be abuse because it harms the girl child and according to Okebukola, it is meted on the girl child by adults in the community.<sup>19</sup> A cursory look at a number of definitions that exist on sexual abuse and child marriage does not put the culturally based good intentions of parents or guardians in the African context in a very good light.<sup>20</sup> This is largely because the decision for child marriage is made by the parents for the child since children by virtue of their age are not capable of such decisions and are subject to parental authority on such and other sexuality issues.<sup>21</sup>

Child marriage is a particular practice that exposes the girl child to the sexual act which can cause her harm.<sup>22</sup> For this reason, the sexual act in child marriage constitutes the most persistent form of sanctioned sexual abuse<sup>23</sup> despite not necessarily being seen as such in the communities where it is practiced. Hence the engagement of child marriage as a harmful practice to be eliminated in the ACRWC and other conventions.<sup>24</sup>

Pre-puberty marriages were quite common in developed countries too, for example, in royal families,<sup>25</sup> it has ceased from being a norm because of development. It is not considered unnatural for girls in marriage unions to

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<sup>18</sup> A Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case of child rights legislation and early marriage in Nigeria and Ethiopia' in C Ngwenya and E Durojaiye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 284.

<sup>19</sup> Okebukola (n 8 above) 147-148

<sup>20</sup> Birech (n 16 above) 97-98

<sup>21</sup> As above

<sup>22</sup> Birech (n 16 above) 97, 99-100. Okebukola (n 8 above) 148-149

<sup>23</sup> M Uwais 'The rights of the Nigerian Child 9 December 2013 French Embassy [www.ambafrance-ng.org/IMG/docx/presentation-Maryam-Uwais.docx?](http://www.ambafrance-ng.org/IMG/docx/presentation-Maryam-Uwais.docx?) (accessed 9 August 2015).

<sup>24</sup> Art 2 Protocol to the African Charter on Human and Peoples Rights on the rights of women in Africa, Convention on the Elimination of all Forms of Discrimination against Women. Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children on CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Art.5(a)), adopted by General Assembly resolution 34/180 of 18 December 1979, at <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> (accessed 9 November 2016).

<sup>25</sup> 'Culture of child marriage in medieval Europe' <http://muslimvilla.smfforfree.com/index.php?topic=1695.0;wap2> (accessed 11 December 2016). <http://www.touregypt.net/historicalessays/lifeinEgypt8.htm#ixzz4HzxDbwXx>, accessed 21/8/2016. 'Discover the truth' 9 September 2013 <https://discover-the-truth.com/2013/09/09/age-of-consent-in-european-american-history/> (accessed 21 August 2016). 'Noble Women in Middle Ages' <http://www.lordsandladies.org/noble-women-in-the-middle-ages.htm> (accessed 9 November 2016).

engage in sex since it was an expectation of marriage.<sup>26</sup> Neither was consideration given to possible harmful consequences although many did suffer harm through birthing complications.<sup>27</sup> Involvement in sexual intercourse with a child however in this age and outside marriage would amount to sexual abuse.<sup>28</sup>

Sexual abuse affects the health and development of its victims and constitutes an infringement of their rights.<sup>29</sup> It is the responsibility of state organs to prevent this infringement and failure to do so amounts to structural abuse and neglect.<sup>30</sup> This is because sexual abuse is a breach of the rights of individuals that are recognised internationally and provided for in human rights instruments that are signed and ratified by states.<sup>31</sup> Unfortunately, incompatibility with local culture and/or religions and patriarchal systems generally interfere with the required enforcement.<sup>32</sup>

In the majority of cases of sexual abuse the victim is the girl although in reality child marriage may involve two children, it is most usually between a girl child and an adult male.<sup>33</sup> Child marriage in Nigeria, is the celebrated union between a girl child and a grown male adult,<sup>34</sup> it is a fact that it involves sexual intercourse between the couple.<sup>35</sup> This is sexual abuse in the

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<sup>26</sup> Birech (n 16 above) 98

<sup>27</sup> S Bryson 'Childbirth in Medieval and Tudor Times' The Tudor Society <https://www.tudorsociety.com/childbirth-in-medieval-and-tudor-times-by-sarah-bryson/> (accessed 9 November 2016). U Hogberg et al 'Maternal deaths in medieval Sweden: An osteological and life table analysis' (1987) 19 *J. biosoc. sci.* 495-503 at 495.

<sup>28</sup> Muridzo & Malianga (n 10 above) 45

<sup>29</sup> 'How is children's health a human rights issue?' <https://www.hhrguide.org/2014/03/16/how-is-childrens-health-a-human-rights-issue/> (accessed 11 December 2016).

<sup>30</sup> L Richter et al 'Confronting the problem' in L Richter et al (eds) *Sexual Abuse of Young Children in Southern Africa* (2004) 1,3, 7.

<sup>31</sup> Most instruments on the protection of children and women provide prohibitions of sexual abuse, UN Convention on the Rights of the Child CRC, Convention on the Elimination of Discrimination against Women (CEDAW), African Charter on the Rights and Welfare of the Child and other relevant ones.

<sup>32</sup> A Armstrong 'Consent and Compensation: The Sexual Abuse of Girls in Zimbabwe' in W Ncube (ed) *Law, Culture and Tradition in Eastern and Southern Africa* (1998) 129. Under customary law rape is also wrong but the understanding of consent is problematic.

<sup>33</sup> ME Green et al *Engaging Men and Boys to Address the Practice of Child Marriage* (2015) 1-3. Washington, DC: GreeneWorks at [content/uploads/sites/2/2015/04/Engaging-Men-and-Boys-to-End-the-Practice-of-Child-Marriage1.pdf](https://content/uploads/sites/2/2015/04/Engaging-Men-and-Boys-to-End-the-Practice-of-Child-Marriage1.pdf) (accessed 11 December 2016).

<sup>34</sup> TS Braimah 'Child marriage in Northern Nigeria: Section 61 of part 1 of the 1999 constitution and the protection of children against child marriage' (2014) 14 *AHRLJ* 475. Erulkar & Bello *The experience of married adolescent girls in Northern Nigeria*, (2007) 7-9

<sup>35</sup> ES Erulkar & M Bello (n 34 above) 4-5.

sense of this thesis. It is in these terms that child marriage is linked to discrimination in this thesis.

The issues of who the girl child is and how child marriage affects her as an issue of discrimination is necessary to be discussed.

### **3.3 The girl child**

The Protocol to the African Charter on Human and Peoples' Rights defines the girl child as a person who is recognised as female.<sup>36</sup> According to the CRC, the girl child will be a female eighteen years or younger.<sup>37</sup> She is a developing female still in the stage of childhood (girlhood).<sup>38</sup> The girl-child is seen as a young female person who would eventually grow into a woman and marry.<sup>39</sup>

Offorma<sup>40</sup> defines the girl child as a biological female offspring aged between birth and eighteen years who is entirely under the care of an adult parent, guardian or older sibling and in that period of time when she is still developing into an adult. The term girl actually has to do with the issue of being female and period of time or rather the period of childhood and the attainment of adulthood.<sup>41</sup> All these which may differ according to societies and as formalized in law.<sup>42</sup>

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<sup>36</sup> Art 1(k) women means persons of female gender, including girls, although the word girl is not defined

<sup>37</sup> Art 1 CRC.

<sup>38</sup>V Morrow *Understanding Children and Childhood* (2011) 4. To her a child is a son or a daughter. Longman Dictionary of Contemporary English 2008 Pearson Longman [www.yourdictionary.com](http://www.yourdictionary.com) (accessed 20 November 2014) also can be referred to as a female child.

<sup>39</sup> Unpublished: FD Djouguela 'The right to education for the girl child and problems facing adolescent girls in the pursuit of their right to education: A focus on South Africa' unpublished master's Thesis, University of Pretoria, 2012 4-5.

<sup>40</sup>GC Offorma 'Girl Child Education in Africa' (2009) being a Keynote address presented at the conference of the federation of the University women of Africa held in Lagos Nigeria on 16-19 July 2009 <http://www.ifuw.org/fuwa/docs/Girl-child-education-Africa-part2.pdf>. Here, she is not yet a full grown adult, although with the features, biologically, at 18 years, she is not yet full grown, neither will the fulfilment of the expectations of an adult like marriage and motherhood makes her one.

<sup>41</sup> A Oyigbenu 'Girl-Child Education and Nigeria's Development Agenda: a Literary Perspective' (2010) 4(2) *African Research Review* 420. Here she is a female unmarried girl, defined by anatomical and physiological characteristics which differentiate her from her male counterpart. MK Edogiawerei 'The crown and respect of the Esan woman: A philosophical examination' in GU Ukagba et al (eds) *The Kpim of feminism: Issues and women in a changing world* (2010) 164.

<sup>42</sup> A B- Boaten 'Changes in the Concept of childhood: Implication on children in Ghana' (2010) 3(10) *Journal of International social research* 105.

While customary law links the attainment of adulthood to the attainment of adult responsibilities<sup>43</sup> as Islam recognises puberty as the attainment of adulthood for the girl child<sup>44</sup>, international and regional treaties in human rights approach the attainment of adulthood from the perspective of chronological age.<sup>45</sup>

While a child has been defined above as any person under the age of eighteen years.<sup>46</sup> According to Kaime, coming to this conclusion is not as simple or basic as recognizing who among a group of people is a child or not.<sup>47</sup> In his view, in basic terms childhood may be seen as the biological or psychological phase of life between infancy and adulthood or a social institution, an actively negotiated set of social relationships within which the early years of human life are constituted.<sup>48</sup> Moreover, in Nigeria these variances have been embodied in formal laws or legal provisions<sup>49</sup> for the obvious reason of their peculiar importance to society.<sup>50</sup>

While children are seen as assets and perceived as a gift from God in almost every society, it is also by virtue of their being children that they are vulnerable and exposed to all manner of assaults.<sup>51</sup> This is particularly so

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<sup>43</sup> T Kaime *The African Charter on the Rights and Welfare of the Child A socio-legal perspective* (2009) 68. AF Akwara et al. 'Law and Children's Rights Protection: the Nexus for a Sustainable Development in Nigeria' (2010) 6(2) *Canadian Social Science* 28.

<sup>44</sup> NNNB Shah *Marriage and divorce under Islamic law* (2001)6.

<sup>45</sup> 18 years Art 1 UN CRC. Art 2 African Charter on the rights and Welfare of the Child

<sup>46</sup> Art 2 of the African Charter on the Rights and Welfare of Children.

<sup>47</sup> Kaime (n 43 above) 65.

<sup>48</sup> As above

<sup>49</sup> Akwara et al (n 43 above) 28. At common law, it was 14 for boys and 12 for girls, see the case of *Howard v Howard* (1954) 69 ER 344. In Nigeria, for Yoruba land it was 14 for girls and 17 for boys, Itshekiri 16 for girls and 20 for boys, lowest in the North, Contextually maturity in this sense will mean physical, mental and otherwise. In Nigeria it is 18 years, although different laws in the country set different ages for the different legislations or purposes. The age for Immigrations Act for a citizen may be different from that for contract purposes in the Children and Young Peoples Act. Although the Child Rights Act fixed under 18 for the limit of childhood.

<sup>50</sup> As above. The construct of age is unavoidably necessary for labour, productivity and government policies and program planning.

<sup>51</sup> TU Onyemachi 'Children, status and the Law in Nigeria' (2010) 4 *African Research Review* 378. These abuses could be physical, mental and even sexual, most of these unintended as they are cultural perceptions or beliefs of what is right and necessary. Some assaults are not perceived as such, some of them are traditional practices which are customary with particular societies although they cause harm to the individual child and may actually affect the development of the particular society or community. Some of them are also perceived as religious injunctions which must be followed and which have divine or spiritual reward. Examples of these are female genital mutilations and even child marriage.

for the girl child.<sup>52</sup> Because she is a child, many decisions are made for her and on her behalf, even if they are to her detriment,<sup>53</sup> but her case is also unique in terms of how she is perceived in society, not only in Nigeria but on almost every continent.<sup>54</sup>

Since time immemorial, the influence of tradition and religion on social context has had a hand in the perception of the girl child and woman throughout her lifetime.<sup>55</sup> Against the backdrop of the dictates of patriarchy, it is Oyigbenu's view that the girl child is doomed to an eternity of oppression and destruction,<sup>56</sup> with her plight being even more horrific than one could imagine, including preferential treatment of male siblings and relegation to domestic chores at the expense of education, not to mention possible infanticide and child marriage.<sup>57</sup>

One area in which the girl child is disadvantaged is child marriage.<sup>58</sup> Women, or more correctly girls, were usually married by the age of twelve, sometimes even younger, and were expected to start child bearing immediately.<sup>59</sup> As a result, many girls died in childbirth or due to having too many children without reprieve.<sup>60</sup> Child or early marriage as a cultural practice in many societies has changed with time and development.<sup>61</sup>

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<sup>52</sup>T Alabi et al. 'The girl child: A sociological view of the problems of Education in Nigeria (2014) 10 *European scientific Journal* 393. She is in the greater percentage as victim of sexual abuse. UA Ojedokun & EN Atoi 'Baby Factory Syndicates: An emerging child adoption racket in Nigeria' (2016) 19 *African journal for the psychological study of social issues* 47-48.

<sup>53</sup> Kaime (n 43 above)66. 'A profile of child marriages in Africa' 2013 UNICEF Brochure <https://data.unicef.org/topic/child-protection/child-marriage/>

<sup>54</sup> Alabi et al, (n 52 above)393-394. AA Aderinto 'The status of the girl child in South Western Nigeria' (1999) 3 *Journal of social science* 97-99. Djouguela (n 39 above) 4-5.

<sup>55</sup> As above. Okebukola (n 8 above) 148-149

<sup>56</sup> Oyigbenu (n 41 above) 418-419.

<sup>57</sup>As above. Alabi (n 52 above) 393. E Villarino 'The plight of the girl child' Devex 16 Oct 2013 <https://www.devex.com/news/the-plight-of-the-girl-child-82106> (accessed 9 November 2016)

<sup>58</sup> As above.

<sup>59</sup> Birech (n 16 above) 100. Alabi (n 52 above) 394. Campaign to end child marriage in Africa The Effects of Traditional and Religious Practices of Child Marriage on Africa's Socio-Economic Development A Review of Research, Reports And Toolkits from Africa (2015) 21, African Union [http://pages.au.int/sites/default/files/5465\\_CCMC\\_Africa\\_report.pdf](http://pages.au.int/sites/default/files/5465_CCMC_Africa_report.pdf) (accessed 13 December 2016).

<sup>60</sup>K Mason 'Ancient Roman Women: A Look at Their Lives' <http://www.moyak.com/papers/roman-women.html> (accessed 21 August 2018).

<sup>61</sup> 'Child marriage' Wikipedia [https://en.wikipedia.org/wiki/Child\\_marriage](https://en.wikipedia.org/wiki/Child_marriage) (accessed 13 December 2016). K Mason 'Ancient Roman Women: A Look at Their Lives' <http://www.moyak.com/papers/roman-women.html> (accessed 21 August 2018).

While child marriage was a matter of culture in earlier times, it soon became linked to religion.<sup>62</sup> As a concept, religion has come to occupy centre stage in both the consciousness and academic discourse of man. It contributes to the maintenance of order in society by creating conditions for the integration of the individual into society and establishes and maintains the conditions for cohesion and wellbeing introduced by cultural tradition.<sup>63</sup>

A large proportion of the cultural and patriarchal practices of male dominance in traditional Africa were religious practices believed to be for the protection of women and children, and family traditions including those surrounding childhood were inextricably linked to religious practices and beliefs.<sup>64</sup>

Initiation rites and onset of maturity or puberty do not signify the attainment of adulthood.<sup>65</sup> Marriage does not turn a girl into a woman as culture and Islamic religion proffer.<sup>66</sup> The girl child falls into the category of children and forceful entry into adulthood for her through child marriage causes her harm. It is a form of sexual abuse as the sexual intercourse is non-consensual and its unpalatable attending effects.<sup>67</sup>

The population of the girl child in Nigeria and her status in the society, coupled with its relevance for future development of the country, makes this study a relevant one. Research reveals that children under the age of fifteen make up approximately 45% of the Nigerian population, and children up to 18 years, count for approximately 60%.<sup>68</sup> There is an estimated 60 million children in Nigeria, where 62% of the 11 million children who are not in

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<sup>62</sup> "AU and the moral crusade against child marriage" The New Times 9 Dec 2015 <http://www.newtimes.co.rw/section/article/2015-12-09/195133/> (accessed 9 November 2016).

<sup>63</sup> Okebukola (n 8 above) 147,

<sup>64</sup> Boateng (n 42 above) 105.

<sup>65</sup> 'THEMATIC REPORT: Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage' (2015) ECPAT

<sup>66</sup> As above, 2-3

<sup>67</sup> As above, 5, 6, 22.

<sup>68</sup> 'Nigeria population' <http://countrymeters.info/en/Nigeria> (accessed 13 December 2016).



school are girls and 35% of girls who drop out of school begin child bearing immediately.<sup>69</sup>

The girl child forms the subject of this thesis as the victim of the practice of child marriage and the sexual intercourse which happens subsequently. This is the individual whose human rights are infringed by acts of violation that are accepted and defended as cultural and religious practice in many communities, amongst others in the North of Nigeria.<sup>70</sup>

The thesis argues that cultural and religious discriminatory perceptions and conceptions of the girl child structured within Nigeria's plural legal system help defend the perpetration of various harmful practices meted on the girl child. This include among others, the practice of child marriage. In this context, therefore the institution of marriage shall be discussed.

### **3.4 The institution of marriage**

Marriage is the legal union between a couple as husband and wife.<sup>71</sup> In contemporary cultures, the definition of participants in the act of marriage can be the subject of even legal debate. Marriage can be seen as taking place between humans of the same sex<sup>72</sup>, humans of opposite sexes,<sup>73</sup> a human

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<sup>69</sup> As above. Unicef Nigeria [www.unicef.org](http://www.unicef.org) (accessed 21 January 2014) 'Children of Nigeria' Save the children [www.savethechildren.org](http://www.savethechildren.org) NGO Periodic report for Nigeria, ANPPCAN Child Rights Mortality Center.

<sup>70</sup> 'AU and the moral crusade against child marriage' The New Times 9 December 2015 <http://www.newtimes.co.rw/section/article/2015-12-09/195133/> (accessed 9 November 2016).

<sup>71</sup> EI Nwogugu *Family law in Nigeria* (2001) lxxxiii. This seems to be a definition that prevents conflict as the word marriage has been difficult to define especially in the recent times of the argument of international human rights and the individuals and the fact that marriage is a cultural and social construct and of global interest. It was defined as the legal union between a man and a woman but he was quick to explain that this has been complicated by the existence of same sex marriage and such like. He opined that traditionally this was true, marriage was between a man and a woman but not so today, quoting *Hyde v Hyde* (1861- 1873) All ER Rep 175 as the voluntary union for life of one man and one woman to the exclusion of all others, can be said to have defined a monogamous type of marriage and not the institution of marriage itself. Even in the legal arguments of same sex marriages, it is a consideration that one of them acts the wife and the other the husband, there is at least the perception that a couple is made of a husband and a wife. In common law, marriage was the union of a man and a woman to the exclusion of all others voluntarily entered for life. S5 Marriage Act 1961.

<sup>72</sup> As above. N Otakpor 'A Woman who is a husband and father: An essay in customary law' (2008) 2(2) *Review of Nigeria law and Practice* 63-64. It had also existed culturally in Yoruba land, Sudan among the Zulu and Sotho of South Africa, Kikuyu and Nandi of East Africa and is a controversial issue in the US where some states have given it legal recognition. Man to man or woman to woman marriage also called same sex marriage is now legal, though not in all countries, like Nigeria. Although it was recognized as a form of customary marriage, in Igbo land Nigeria, although it was not in the sense of marriage as in the same sex marriage of today.

and an inanimate object<sup>74</sup>, a human and an animal<sup>75</sup> and even a human and himself or herself.<sup>76</sup> However, the existence and recognition of these various forms of matrimony, even in the cultural context, have not spared the institution of marriage the scrutiny of law whether nationally or internationally.<sup>77</sup>

Although internationally recognised, same sex marriage has not been legally accepted in Nigeria.<sup>78</sup> Despite arguments in cases such as *Meribe v Igwe*<sup>79</sup> that it has been a cultural practice in the country, in *Helina v Iyere*,<sup>80</sup> it was accepted by the lower court but rejected by the higher court on basis of the repugnancy clause. The same happened in the case of *Okonkwo v Okagbue*.<sup>81</sup>

The above mentioned cases differed from present day same sex marriages, however, primarily in there being no evidence proving any personal sexual relations or involvement.<sup>82</sup> The human rights argument notwithstanding, the

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<sup>73</sup> As above. The traditionally recognized marriage between a man and a woman, in law the statutory marriage or monogamous marriage. Although monogamy is argued as not being indigenous African practice.

<sup>74</sup> K Landin, 15 of the world's weirdest marriages, I now pronounce you-----what?!, [thefw.com/weirdest-marriage-of-the-world-photos-video/](http://thefw.com/weirdest-marriage-of-the-world-photos-video/) (accessed 7 March 2015). There it was reported that in 1979, Erica Riita Berliner-Mauer married the Berlin wall, which she claimed she had fallen in love with as a child, a man marries his doll, another man married his pillow and a woman married a clay pot.

<sup>75</sup> 'A woman marries a dog in a romantic wedding ceremony after marriage to a man didn't work out' The Mirror 10 March 2014 at [www.mirror.co.uk/news/weird-news/woman-marries-dog-romantic-wedding-3225948](http://www.mirror.co.uk/news/weird-news/woman-marries-dog-romantic-wedding-3225948) (accessed 7 March 2015). Sometimes this is a religious issue like the case of the girl that celebrated a wedding with a dog in order to ward off evil in June 2003, September 2014, in India a young lady marries a dog in a religious rite to ward off evil see

<sup>76</sup> 'Man marries himself' Sharon Krum 'The Man who married himself' The Guardian [www.guardian.com/world/2006/may/13/gayrights.features](http://www.guardian.com/world/2006/may/13/gayrights.features). Jennifer Hoes a woman married herself in 2003, in 2010, in Taiwan, Chen Wei Yih married herself, The Telegraph 22 October 2010 [www.telegraph.co.uk/news/worldnews/Taiwan-asia/taiwan/woman-to-marry-herself.8080685/html](http://www.telegraph.co.uk/news/worldnews/Taiwan-asia/taiwan/woman-to-marry-herself.8080685/html) (accessed 7 March 2015)

<sup>77</sup> The Marriage Act and the Matrimonial Causes Act and several international and regional instruments exist to oversee the marriage institution.

<sup>78</sup> The Anti Same Sex Marriage Bill was passed in May 2013 in Nigeria

<sup>79</sup> 1976, 3 SC 23, though subject to the repugnancy rule

<sup>80</sup> High Court of Bendel State, Ubiaja Judicial Division, Suit No/U 24A/79 Unreported,

<sup>81</sup> 1994 9NWLR 301

<sup>82</sup> Otakpor (n 72 above) 71. KC Nwoko 'Female Husbands in Igbo land: Southeast Nigeria' (2012) 5 *The Journal of Pan African Studies* 69, 74. AM Osiki & KC Nwoko 'The Institution of Female-Husband in Ilorin and Its Environs Up to the Early Colonial Period' (2014) 1 *African Studies* 28-29. A typology of same sex marriage had also existed culturally in Yoruba land, in the Sudan, among the Zulu and Sotho of South Africa, Kikuyu and Nandi of East Africa and is a controversial issue in the US where some states have given its factual existence legal recognition. In south Africa Fourie & Another v Minister of Home Affairs & Others 2005(3) SA 429(SCA), 2005(3) BCLR241(SCA) [Fourie (csa)] where the difference between regular and irregular marriages were distinguished and the court held that the courts were responsible to correct the common law's deficiencies where appropriate and this was not a choice but an obligation.

issue of same sex marriage has been the cause of much rancour and legal debate in the international world in recent times<sup>83</sup> and it is still legally prohibited in Nigeria.<sup>84</sup>

Marriage is a social institution found everywhere in the world<sup>85</sup> and is not unexpectedly an area of interest for almost all authorities in every state and religious or traditional community, nationally and internationally, because of the importance of family in every society.<sup>86</sup> This explains the existence of different forms of marriage, namely religious, traditional and statutory marriages.<sup>87</sup>

Marriage exists in various forms and types, the common ones in Nigeria being statutory, religious and customary. Although these various types or marriage shall be discussed in the course of this research,<sup>88</sup> it is with child marriage that this thesis is concerned.

### **3.5 Perspective on child marriage**

Common conceptions of the marriage union may be associated with an adult man and woman, but since time immemorial there have been marriages of young people in many cultures.<sup>89</sup> In medieval societies, child betrothal and marriage was the norm.<sup>90</sup> Girls married at an early age, even as young as

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<sup>83</sup> On June 2013, the US Supreme court issued a ruling that gives same sex couple who hold a legal marriage in their state the same federal benefit as married straight couples, overturning the Defense of Marriage Act (DOMA) that forbade the federal government from recognizing same sex marriage as legal, Got questions.org home [www.gotquestions.org/definition-of-marriage.html](http://www.gotquestions.org/definition-of-marriage.html) (accessed 5 March 2014).

<sup>84</sup> Anti Same Sex Marriage Act 2013

<sup>85</sup> Nwogugu (n 71 above)lxxviii.

<sup>86</sup> When Legal worlds overlap, Human Rights, State and Non-State Law (2009) International Council on Human Rights Policy, Switzerland.

<sup>87</sup> Nwogugu(n 71 above)lxxviii - lxxxiv.

<sup>88</sup> Chapter 4 of this thesis discusses the three major marriage types in Nigeria.

<sup>89</sup> Nwogugu (n 71 above) 18-19. 'Arranged marriage' Medieval Times <http://www.medievaltimes.com/teachers-students/materials/medieval-era/marriage.html> (accessed 13 December 2016). 'Arranged marriage' New World Encyclopedia [http://www.newworldencyclopedia.org/entry/Arranged\\_marriage](http://www.newworldencyclopedia.org/entry/Arranged_marriage) (accessed 9 November 2016).

<sup>90</sup> 'Medieval marriage and childbirth' August 29 2007 Women of history <http://womenofhistory.blogspot.co.za/2007/08/medieval-marriage-childbirth.html> (accessed 13 December 2016).

seven to twelve years.<sup>91</sup> Until 2008, some Christian affiliated organisations engaged in child marriages in the United States.<sup>92</sup>

In traditional African societies, even in Nigeria, babies have been betrothed, sometimes from the womb, and young girls have been given in marriage to much older men as gifts or symbols of alliances and peace.<sup>93</sup> Although such unions have not been termed child marriages, they undoubtedly are,<sup>94</sup> and were arranged without any thought about possible harm or injury to the bride.<sup>95</sup> The high rate of maternal mortality in traditional African societies was not attributed to child or early marriage.<sup>96</sup> Rather it was attributed to lack of proper medical care, or more commonly witchcraft or spiritual attack, since contemporary medical care was not known and local herbs and traditional or spiritual healers were used instead.<sup>97</sup>

Child marriage has been recognised as harmful, criminal and infringement of human rights by Social development, legislation or the wider dissemination of information through provisions which prohibit the practice.<sup>98</sup> It has been known more euphemistically as early marriage, arranged marriage or even forced marriage but the common factor is that at

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<sup>91</sup> <http://www.touregypt.net/historicalessays/lifeinEgypt8.htm#ixzz4HzxDbwXx>, accessed 21/8/2016.

<sup>92</sup> As above. Here the Fundamentalist Church of Jesus Christ of Latter Day Saints, the Yearning For Zion Ranch and some individual pastors including church leader Warren Jeffs was convicted of being an accomplice to statutory rape of a minor due to arranging a marriage between a 14-year-old girl and a 19-year-old man. A Karam 'Faith-Inspired Initiatives to Tackle the Social Determinants of Child Marriage' (2015) 13(3) *The Review of Faith & International Affairs* 62

<sup>93</sup> Nwogugu (n 71 above) 18-19

<sup>94</sup> Gaffney-Rhys 'The development of the law relating to forced marriage: Does the law reflect the interest of the victim?' (2014) 16 (4) *Crime prevention and community safety*, 269.

<sup>95</sup> Nwogugu (n 71 above) 19. IN George, DE Ukpogon, EE Umah 'Cultural Diversity of Marriage Sustainability in Nigeria: Strengths and Challenges' (2014) 2 *Sociology and Anthropology* 9-10.

<sup>96</sup> J Chiwuzie et al 'Traditional Belief Systems and Maternal Mortality in a Semi-Urban Community in Southern Nigeria' (2001) 5 (1) *African Journal of Reproductive Health* 75-82. OT Asu et al 'African Cultural Practices and Health Implications for Nigeria Rural Development' (2013) 2(1) *International Review of Management and Business Research* 177

<sup>97</sup> 'Maternal deaths blamed on witchcraft' 3 January 2013 The Media Project <http://themediaproject.org/article/mistreated-corpses-reveal-controversy-over-death-during-childbirth-nakinti-nofur?page=full> (accessed 14 December 2015). MK Mason 'Ancient Roman Women: A Look at Their Lives' <http://www.moyak.com/papers/roman-women.html> (accessed 21 August 2016). E Fottrell et al 'The epidemiology of 'bewitchment' as a lay-reported cause of death in rural South Africa' (2012) 6(8) *Journal of Epidemiology and Community Health* 704-709. 'How is Ghana Dealing with Maternal Mortality?' 23 April 2011 Ghana Web <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/How-is-Ghana-Dealing-with-Maternal-Mortality-207385> (accessed 14 December 2016). No qualitative research or report exists to give details or veracity of this occurrence but it was not uncommon even in now developed countries that girls who married early had many children, many girls died at child birth or from bearing too many children in medieval societies.

<sup>98</sup> Global and regional human rights provisions which prohibit it

least one spouse in the union is so young as to raise the question of how capable they were of giving informed consent to the marriage.<sup>99</sup>

Child marriage<sup>100</sup> is a union in which one of the spouses, usually the wife, is younger than eighteen years.<sup>101</sup> Okonofua<sup>102</sup> defines child marriage as marriage before a person reaches eighteen years which is the universally prescribed minimum age for marriage. Child marriage is also referred to as early marriage because it takes place early in life before the girl is mature enough, physically and otherwise, to deal with the attendant responsibilities.<sup>103</sup> At the same time, the term is used interchangeably with forced marriage because of the lack of consent which is involved.<sup>104</sup>

Although Sommerset<sup>105</sup> differentiates between early and child marriage based on the particular society, she maintains that in Niger early marriage is marriage involving a spouse not older than thirteen years. Nour<sup>106</sup> on the other hand is of the opinion that the term early marriage is too vague since it does not necessarily connote child marriage because early is a relative concept. This is the issue of relativism in child marriage but generally international standards prescribe that any marriage entered into when one of the spouses is younger than eighteen years can properly and legally be deemed a child marriage.<sup>107</sup>

In most patriarchal societies where marriage is believed to be for the purposes of procreation, the sexual intercourse which is an essential part of

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<sup>99</sup> A Sabbe et al. 'Forced marriage: an analysis of legislation and political measures in Europe' (2014) 62(1) *Crime, Law and Social Change* 171.

<sup>100</sup> The researcher is aware of the other forms of marriage which involve young persons like early and forced marriage which are often times used simultaneously with Child marriage, forced marriage connotes the intended/ conscious use of force on one of the spouse, early marriage connotes being young but not necessarily under age and probably without force while child marriage will connote being under the expected age of marriage and the use of coercion or force. Nawal M Nour 'Health consequences of child marriage in Africa' (2006) 12(11) *Emerging Infectious Diseases* 1644.

<sup>101</sup> Art 1 and Art 2 Convention on the rights of the Child and the African Charter on the Rights and Welfare of the Child, since a child is a person under 18 years. M Uwais 'The Rights of the Nigerian Child' 2013 a paper delivered at the French embassy on 9<sup>th</sup> Dec, 2013.

<sup>102</sup> F Okonofua 'Prevention of child marriage and teenage pregnancy in Africa: Need for more research and innovation' (2013) 17 *African journal of reproductive health* 9

<sup>103</sup> As above. J-Ann Walker 'Early marriage in Africa- Trends, harmful effects and interventions' (2012) 16(2) *African Journal of Reproductive health* 231

<sup>104</sup> Sabbe et al. (n 98 above).

<sup>105</sup> Carron Somersset 'Early marriage: Whose right to choose?' Forum on the rights of women and girls 2000, UNICEF.

<sup>106</sup> Nour (n 100 above) 1644-1645.

<sup>107</sup> Walker (n 102 above) 231-232.

marriage,<sup>108</sup> follows immediately after the wedding. This also applies to child marriages, despite the age of the bride and the fact that she is still a minor and lacks any understanding of the act or the implications.<sup>109</sup> It follows that she is therefore not capable of giving consent to intercourse with the result that it is invariably forced, introducing the aspect of sexual abuse into the union.<sup>110</sup>

Practitioners of child marriage in countries such as Nigeria claim that the practice is Islamic although it also exists to a greater or lesser extent as a cultural practice in certain areas.<sup>111</sup> Even Muslims however argue that child marriage is recognised by the laws of the land, citing that it is supported not only by customary or religious laws but even the Constitution, through the recognition of customary and religious laws, and other legislation or legal provisions which do not criminalise the sexual abuse that occurs within the social institution.<sup>112</sup>

Although the perpetration of child marriage in Nigeria does not mean it is legal, the government is still tolerating the practice.<sup>113</sup> This may explain why the practice has been the subject of many arguments, articles and research

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<sup>108</sup> Walker (n 102 above) 234. P Kyalo 'A Reflection on the African Traditional Values of Marriage and Sexuality' (2012) 1(2) *International Journal of Academic Research in Progressive Education and Development* 212. U C Isiugo- Abanihe 'Nuptiality patterns, sexual activity and fertility in Nigeria' 1994, DHS Working papers, No 16, 1, Macro International Inc.

<sup>109</sup> Walker (n 102 above) 231. Carron Sommerset (n 105 above) this brings in the connotation of marital rape as forceful non consensual intercourse which ordinarily is a crime but within marriage it is not and therefore not prosecuted, sexual intercourse with a minor is also defilement or statutory rape but the context of marriage shields the husband in child marriage and sometimes finds a hiding place in the law. See S6 Criminal Code of Nigeria, which is always traumatic for the girl child sometimes with health consequence or even death and child bearing that follows almost immediately results in vesico vagina fistula VVF a disease common in the North of Nigeria than any other region in the country and linked to the prevalence of child marriage and early motherhood.

<sup>110</sup> Walker (n 102 above) 234. 'Child sexual abuse' [www.rationalwiki.org/wiki/child-sexual-abuse](http://www.rationalwiki.org/wiki/child-sexual-abuse) (accessed 21 July 2014).

<sup>111</sup> KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions against Realisation of Education Rights' (2015) 5 US-China Education Review B 460-470.

<sup>112</sup> As above. This is why it is said to be a causation of legal pluralism. The Nigerian Constitution cannot be said to permit child marriage but it is unclear about the legal age for attainment of adulthood for its children and the criteria for such. See S29(4) (b). Some other laws in the country are also unclear on this. In Bangladesh, forced intercourse of a husband with his wife if she is over 13 is not rape according to the criminal provisions, but a 13-year-old is obviously a child since she is not yet 18, the same is the case in Nigeria, in fact no matter her age as long as she is married to the man, intercourse with her by the man is not defilement, statutory rape or any crime at all. See S6 Criminal Code of Nigeria Human rights from the international expert consultation to address harmful practices against children, 13<sup>th</sup>-15<sup>th</sup> June, 2012, Addis Ababa, Ethiopia. In the North of Nigeria, legal pluralism exists but Islamic law is prevalent and it is argued from that it is Islamic, also from its prevalence in most Islamic Countries like Saudi Arabia etc

<sup>113</sup> Braimah (n 34 above) 475.

studies without any definite solution.<sup>114</sup> Nonetheless it is a flagrant abuse of the human rights of the girl child as provided in international and regional human rights instruments,<sup>115</sup> and a failure on the part of the Nigerian government to meet its obligations under the said instruments.<sup>116</sup>

In this thesis child marriage is seen as a union which exists in reality within the marriage institution although its legality may be another issue for consideration.

### **3.5.1 Understanding child marriage from within**

Supporters of child marriage defend it as a valuable cultural and/or religious practice that should not be abolished.<sup>117</sup> Some societies, through ignorance or stubbornness, resist social change and laws prohibiting child marriage because of their convictions about its value.<sup>118</sup> Arguments also abound on the reasons for the introduction and continuation of child marriage and why it should not be eradicated in Nigeria, most particularly in the context of its value and religious meaning for a certain group of the people.<sup>119</sup>

Child marriage has been common practice throughout history for a variety of reasons such as escaping poverty and insecurity or for political or financial gain.<sup>120</sup> The fact that it was the norm is not unrelated to the accepted age of attainment of adulthood, since the term minor was said to

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<sup>114</sup> ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' (2015) 15 *African Human Rights Law Journal* 421-432. Braimah (n 34 above)481-487.

<sup>115</sup> Several international human rights expressly prohibit child marriage and enjoin state governments to make provisions to ensure its prevention and the protection of the girl child from it and other endangering practices. These instruments exist on international and regional levels. This thesis is concerned with the international and African regional level. Among these instruments are the Convention on the Rights of the Child, the Convention on the Elimination of all Discrimination against Women, the Convention on Consent to Marry, minimum age of marriage and registration of marriage 1962, the African Charter on human rights on women's rights, the African Charter on the Rights and Welfare of Children.

<sup>116</sup> Braimah (n 34 above) 487. E Durojaye 'Substantive Equality and Maternal Mortality in Nigeria' (2012) 65 *Journal of Legal Pluralism and Unofficial law* 104.

<sup>117</sup> Fayokun (n 111 above) 461-462. Unpublished: A Bunting "Particularity of Rights, Diversity of Contexts: Women, International Human Rights and the Case of Early Marriage" unpublished Doctor of Juridical Science thesis, University of Toronto, 1999 9

<sup>118</sup> As above.

<sup>119</sup> As above.

<sup>120</sup> Child Marriage - Rationale, Historical Views, And Consequences World Atlas <http://www.worldatlas.com/articles/child-marriage-rationale-historical-views-and-consequences.html> (accessed 15 December 2016)

refer to a girl of under twelve years and a day.<sup>121</sup> A twelve and a half year old girl was already considered an adult in all respects.<sup>122</sup>

One argument for the legalisation of child marriage is that it already exists as a de facto cultural practice.<sup>123</sup> Others contend that it has the same religious value for Muslims as does Sharia and should therefore be allowed, particularly in light of the protection of freedom of religion.<sup>124</sup> Claims in defence of the practice that, the men do not actually have sex with their young brides until they are of age,<sup>125</sup> are refuted by the number of recorded deaths of young brides. Examples are the Yemen bride who died as a result of sexual exhaustion, vaginal lacerations and internal bleeding on her wedding night<sup>126</sup> and the horror stories of the labour experiences of some Nigerian child brides.<sup>127</sup>

Another argument is that early marriage is a better option for the girl child than being sent into domestic service in order to financially support poverty stricken parents,<sup>128</sup> while others submit that some little girls are already having sex and getting pregnant and would not mind getting married anyway since it will prevent their children from being bastards and at least given them the option of choosing which older man they want to marry.<sup>129</sup>

Quite apart from the fact that the claimed postponement of sexual intercourse by the husbands in child marriages has been proven to be

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<sup>121</sup> As above

<sup>122</sup> 'Child marriage' Wikipedia [https://en.wikipedia.org/wiki/Child\\_marriage](https://en.wikipedia.org/wiki/Child_marriage) (accessed 9 November 2016).

<sup>123</sup> S Menz 'Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community' (2016) 104 *California law Review* 514-515.

<sup>124</sup> S38 Constitution of the Federal Republic of Nigeria 1999

<sup>125</sup> JAC Brown 'Misquoting Muhammed: The challenge and choices of interpreting the prophet's legacy' Oneworld Publications (2014) 142-143.

<sup>126</sup> M Jamjoon & H Almasmari 'Yemen minister on child marriage: Enough is enough' edition.cnn.com/2013/09/15/world/meast/yemen-child-bride/ (accessed 26 February 2016). 'Yemen child bride dies on wedding night' [www.theguardian.com/global-development/2013/sept11/yemen-child-bride-dies-wedding](http://www.theguardian.com/global-development/2013/sept11/yemen-child-bride-dies-wedding) (accessed 26 February 2016).

<sup>127</sup> 'Nigeria's child brides: I thought being in labour would never end' 2 September 2013 women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/ (accessed 26 February 2016)

<sup>128</sup> N Akbar 'Child marriage: Case study and Analysis' <http://www.asafeworldforwomen.org/1131-asia/afghanistan/1957-child-marriage.html> (accessed 9 November 2016).

<sup>129</sup> S Al-Zawqari 'Don't use traditional arguments to justify young marriages' 3 October 2013 [www.yementimes.com/en/1716/report/2949/dont-use-traditional-arguments-to-justify-young-marriages.html](http://www.yementimes.com/en/1716/report/2949/dont-use-traditional-arguments-to-justify-young-marriages.html) (accessed 26 February 2016).



false<sup>130</sup>, the reasoning that girl children have the capacity to make decisions about early marriage and sexual intercourse is utterly insupportable.<sup>131</sup> Nonetheless, it is important to understand the issue of child marriage from all perspectives including those of the perpetrators, parents, society and government in addition to that of the girl child.

Perpetrating parents defend child marriage as being in the best interest of the girls, allowing them to maintain their virtue and protecting them from rape and sexual assault or defilement by boys as they mature.<sup>132</sup> Some see it as a means of settling their daughters in the homes of people who can be trusted to care for them financially, but this does raise the question of whether the economic gain associated with child marriage is to the benefit of the girl or her parents and family.<sup>133</sup> On some continents parents marry off their girl children in order to finance the weddings of their brothers or to pay for the education of other children.<sup>134</sup>

This argument has also been raised in Nigeria, with some authors contending that child marriage is linked to poverty,<sup>135</sup> a view that is supported by the observable predominance of the practice in the poorer classes and the enormous bride prices paid by grooms to the parents of child brides.<sup>136</sup> Be that as it may, child marriage is also simply what some people understand as marriage.<sup>137</sup> To them, child marriage is not wrong or

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<sup>130</sup> Brown (n 125 above) 142-143. Bunting (n 117 above) 175 the husbands don't wait. JS Crouse 'Child Brides and Too-Early Sexual Activity' 14 September 2013 American thinker [http://www.americanthinker.com/articles/2013/09/recently\\_the\\_world\\_read\\_with\\_horror\\_about\\_the\\_death\\_of\\_a\\_yemeni\\_8-year-old\\_child\\_bride\\_who\\_died\\_of\\_i.html](http://www.americanthinker.com/articles/2013/09/recently_the_world_read_with_horror_about_the_death_of_a_yemeni_8-year-old_child_bride_who_died_of_i.html) (accessed 15 December 2016).

<sup>131</sup> M Jamjoun & H Almasmari 'Yemen minister on child marriage: Enough is enough' edition.cnn.com/2013/09/15/world/meast/Yemen-child-bride/ (accessed 26 February 2016).

<sup>132</sup> TS Ramis 'Whose best interest' 'Child marriage in whose best interest?' 11 November 2013 [www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/](http://www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/) (accessed 10 October 2015). C Thorn '10 Countries Still Allowing Child Marriage, 04.10.14 [www.therichest.com/rich-list/most-shocking/10-countries-where-child-marriage-still-flourishes/](http://www.therichest.com/rich-list/most-shocking/10-countries-where-child-marriage-still-flourishes/) (accessed 9 November 2016).

<sup>133</sup> As above

<sup>134</sup> J Parsons et al. 'Economic impacts of child marriage: A review of literature' (2015) 13 *The review of faith and international affairs*, 12-13. C Thorn (as above).

<sup>135</sup> Braimah (n 34 above) 483

<sup>136</sup> As above

<sup>137</sup> Fayokun (n111 above) 461-462

they are not aware of any law prohibiting it, so they are only doing what they know.<sup>138</sup>

Again, a justification has been that, motivated by both societal and family imperatives, girls are sometimes settled in families that have been verified to be free of infectious or shameful diseases such as leprosy and insanity in order to uphold the family virtue and honour and maintain good family relations.<sup>139</sup>

Studies in Nigeria have disproved the claim that some girls are already having sexual relations<sup>140</sup> or are married off because they are pregnant.<sup>141</sup> According to studies, many of the girls are neither ready for marriage nor interested in it, and certainly not capable of understanding what they are supposedly consenting to do.<sup>142</sup> What is more, they are not in a legal position or empowered to oppose or challenge their parents' decisions.<sup>143</sup> Due to their age, teaching and environment, some girls know no better and accept that things are as they should be.<sup>144</sup>

None of the arguments mentioned above, including those relating to meeting financial needs and making provision for the potential sexual urges of young

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<sup>138</sup> 'Nigeria's child brides: I thought being in labour would never end, sept 2, 2013, at [women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/](http://women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/) (accessed 26 February 2016).

<sup>139</sup> Thorn (n 132 above).

<sup>140</sup> Bunting (n 117 above) 176, 269-286 For all the girls in the case study, the sexual relations with their husbands was the sexual debut for the girls. So also it is in most of the cases used in the case study in the latter part of this chapter. S Al-Zawqari 'Don't use traditional arguments to justify young marriages' 3 October 2013 [www.yementimes.com/en/1716/report/2949/dont-use-traditional-arguments-to-justify-young-marriages.html](http://www.yementimes.com/en/1716/report/2949/dont-use-traditional-arguments-to-justify-young-marriages.html) (accessed 26 February 2016).

<sup>141</sup> M Sibanda *Married too soon: Child marriage in Zimbabwe* (2011) 9-10.

<sup>142</sup> Bunting (n 117 above) 170. GP Koocher & P Keith-Spiegel *Children, Ethics, and the Law: Professional Issues and Cases* (1990) 5-8. The five key elements in making fully informed decision include information, understanding, competency, voluntariness, and decision-making. Ability is about reasoning, information refers to access to all data which might reasonably be expected to influence a person's willingness to participate. Information includes only what is offered or made available to the person. Competency includes the capacity to understand, the ability to weigh potential outcomes, and also the foresight to anticipate the future consequences of the decision. Voluntariness is the freedom to choose to participate or to refuse. Decision-making ability refers to the ability to render a reasoned choice and express it clearly. All of these are often lacking in child marriages, at least from the girl child.

<sup>143</sup> As above.

<sup>144</sup> Nigeria's child brides: I thought being in labour would never end, sept 2, 2013, at [women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/](http://women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/) (accessed 26 February 2016).

people, are sufficient justification of child marriage as a practice that is in the best interest of the girl child.<sup>145</sup>

As a cultural and religious issue, child marriage cuts across regions, cultures and religions.<sup>146</sup> To Muslims it is a religious observance and a measure of value, particularly in terms of ensuring the premarital chastity of the girl child.<sup>147</sup> However, the practice is also related to socio-economic factors and the various arguments in its favour call for an interrogation of the cultural and religious basis it is claimed to have.<sup>148</sup>

### **3.5.2 Child marriage: cultural, religious, both or neither**

Child marriage is truly a global problem that cuts across countries, cultures, religions and ethnicities.<sup>149</sup> Child brides can be found in every region in the world, from the Middle East to Latin America, South Asia to Europe.<sup>150</sup>

Girls who start to menstruate are no longer seen as children but as mature women by some communities, with marriage being the obvious next step to give them the status of wives and mothers.<sup>151</sup> Child marriage however is tantamount to child abuse in the eyes of the international community while “abuse” is not a relative of any race or creed.<sup>152</sup>

Child marriage is also not officially endorsed by or a religious obligation in any religion in the world, although people often use religion and tradition to justify certain practices. Many culture practice it, different religions of Islam

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<sup>145</sup> Bunting (n 117 above) 194-203. Thorn(n 132 above).

<sup>146</sup> Sibanda (n 141 above) 7-9.

<sup>147</sup> Bunting (n 117 above) 9, 187-194.

<sup>148</sup> T Kabir ‘The Role of Islam in Childhood Marriage Case Study: Nigeria’ being a paper presented at the 17th Annual Convention of the Global Awareness Society International, May 2008, San Francisco, CA, USA at [http://organizations.bloomu.edu/gasi/pdf\\_documents/2008\\_Proceedings\\_pdfs/Khabir.pdf](http://organizations.bloomu.edu/gasi/pdf_documents/2008_Proceedings_pdfs/Khabir.pdf) (accessed 16 December 2016). Nigeria’s child brides: I thought being in labour would never end, sept 2, 2013, at [women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/](http://women.mg.co.za/nigerias-child-brides-i-thought-being-in-labour-would-never-end/) accessed 26/2/2016.

<sup>149</sup> Sibanda (n 141 above).

<sup>150</sup> Sibanda (n 141 above)2-3 <http://www.girlsnotbrides.org/where-does-it-happen/> (accessed 24 May 2016)

<sup>151</sup> As above <http://www.girlsnotbrides.org/why-does-it-happen/>

<sup>152</sup>Arzu Kaya Uranli ‘Nowhere Does Islam Excuse Child Brides’ June 18 2014 [http://www.huffingtonpost.com/arzu-kaya-uranli/nowhere-does-islam-excuse\\_b\\_5176425.html](http://www.huffingtonpost.com/arzu-kaya-uranli/nowhere-does-islam-excuse_b_5176425.html) (accessed 24 May 2016).

Christianity and even Hindu are also affiliated to it.<sup>153</sup> However, child marriages occur across the world and it is necessary to examine all the various cultural and religious arguments for and against the practice.

Culture refers to the shared patterns of behaviors and interactions, cognitive constructs and understanding acquired through socialisation. It can be seen as the development of a group identity fostered by social patterns which are unique to the group.<sup>154</sup> Culture is also defined as the characteristics and knowledge of a particular group of people, expressed in everything from language, religion, cuisine and social habits to music and arts.<sup>155</sup> These shared patterns identify the members of a cultural group while simultaneously distinguishing them from members of other groups.<sup>156</sup>

The essence of a culture does not lie in its artifacts, tools or other tangible objects but how they are perceived, interpreted and used by the members of the group.<sup>157</sup> It lies in the values, symbols, interpretations, and perspectives that distinguish one people from another in modern societies rather than the material objects and other tangible aspects of society.<sup>158</sup>

Culture is made up of learned and shared human patterns or models for daily living which pervade all aspects of human social interaction. It is mankind's primary adaptive mechanism. Another view is that culture is the collective mental programming which distinguishes the members of one category of people from another.<sup>159</sup>

culture denotes a people's store of knowledge, beliefs, arts, morals, laws and customs, in essence it means everything that humans acquire by

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<sup>153</sup> Sibanda (n 117 above) 2-3. 'Is Child Marriage a Muslim Problem?' 6 May 2012 Loonwatch.com at <http://www.loonwatch.com/2012/05/is-child-marriage-a-muslim-problem/> (accessed 16 December 2016).

<sup>154</sup> 'What is culture' The Center for Advance Research on Language Acquisition 'What is Culture? Definition of Culture' February 19 2015 <http://www.livescience.com/21478-what-is-culture-definition-of-culture.html#sthash.1tOGAmQN.dpuf> (accessed 24 May 2016).

<sup>155</sup> EB Tylor 'Primitive Culture' 1871 in What is Culture? [http://anthro.palomer.edu/culture/culture\\_1.htm](http://anthro.palomer.edu/culture/culture_1.htm) (accessed 24 May 2016).

<sup>156</sup> "What is culture" Center for advanced research on language acquisition (CARLA), University of Minnesota <http://carla.umn.edu/culture/definitions.html> (accessed 24 May 2016)

<sup>157</sup> As above

<sup>158</sup> As above.

<sup>159</sup> "What is culture" at <http://carla.umn.edu/culture/definitions.html> (accessed 24 May 2016).

virtue of being members of society.<sup>160</sup> It should be noted that through this and other definitions of culture, religion can be seen to be closely connected to and sometimes include religion.<sup>161</sup>

Although it has a certain logic and structure, culture is constantly being changed by human actors and therefore never achieves total coherence.<sup>162</sup> As an example, in the case of *Shilubana & Others v Nwamitwa & Others*,<sup>163</sup> Van der Westhuizen highlighted the freedom of a community to change its customary laws in response to emerging social problems. In *MEC for Education, KwaZulu-Natal & Others v Pillay*,<sup>164</sup> O'Regan said that culture serves to give meaning to the lives of individuals, thereby helping to achieve the overall goals of human dignity and the "unity and solidarity amongst all who live in our diverse society".<sup>165</sup>

In *Bhe & Others v Magistrate Khayelitsha & Others*,<sup>166</sup> where the Constitutional Court of South Africa held that it will only give effect to a "living" version of customary law, one that "has evolved and developed to meet the changing needs of the community" is in support of the fact that culture changes.

However, the process of acculturation which is ongoing in all societies at all times presents a problem.<sup>167</sup> This may also be the case with cultural and religious practices and particularly that of child marriage. Just like religion, culture is used to defend unexplainable practices people decide to engage in

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<sup>160</sup> J Amoah & T Bennett 'The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?' (2008) 8 *African Human Rights Law Journal* 368

<sup>161</sup> As above

<sup>162</sup> "Overview" [http://anthro.palomar.edu/change/change\\_1.htm](http://anthro.palomar.edu/change/change_1.htm) (accessed 16 December 2016).

<sup>163</sup> 2007 (5) SA 620 (CC); 2007 (9) BCLR 919 (CC) para. 54.

<sup>164</sup> 2008 (1) SA 474 (CC); 2008 2 BCLR 99 (CC).

<sup>165</sup> As above

<sup>166</sup> 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) paras. 44, 81 and 153.

<sup>167</sup> LJ Schwartz et al. 'Rethinking the Concept of Acculturation Implications for Theory and Research' (2010) 65 (4) *American Psychologist* 237

without question.<sup>168</sup> While some people argue that child marriage is cultural, some people say it is religious.<sup>169</sup>

In this way it is argued that child marriage as a traditional practice in Nigeria, was practiced in Northern Nigeria before the advent of Islam.<sup>170</sup> The practice did not start with the Holy Prophet, so cannot be claimed to be Islamic.<sup>171</sup> It was the norm in Arabia where the marriage of girls as young as nine or ten years was defended on the basis of the short average lifespan.<sup>172</sup> This means child marriage might as well be a culture rather than religion but first having explained culture, there is the need to explain religion too and put the two words in perspective.

The English word "religion" is derived from the Middle English "religioun" which came from the Old French "religion."<sup>173</sup> It may have originally derived from the Latin "religio" which has meanings such as good faith and ritual, or from the Latin "religâre" which means to tie fast or bind together.<sup>174</sup> Religion is a collection of cultural systems, belief systems, and worldviews that relate humanity to spirituality and, sometimes, to moral values.<sup>175</sup>

Religion does include beliefs and practices<sup>176</sup> and in this sense, is also culture. The fact is that "...no single definition will suffice to encompass the

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<sup>168</sup> 'When ukuthwala is stealing a child' 30 September 2013 The Mercury <http://www.iol.co.za/mercury/when-ukuthwala-is-stealing-a-child-1584682> (accessed 26 May 2016).

<sup>169</sup> I Nnadi 'Early Marriage: A Gender-Based Violence and A Violation of Women's Human Rights in Nigeria' (2014) 7 *Journal of Politics and Law* 35-36

<sup>170</sup> Braimah (n 34 above) 475. 'The practice of child marriage in Nigeria' 12 April 2014 The Huffington Post [http://www.huffingtonpost.com/udoka-okafor/the-practice-of-child-mar\\_b\\_5133881.html](http://www.huffingtonpost.com/udoka-okafor/the-practice-of-child-mar_b_5133881.html) (accessed 17 December 2016).

<sup>171</sup> 'Why Prophet Muhammed married Aisha when she was only 9' 11 April 2011 Islam world's greatest religion! <https://islamgreatreligion.wordpress.com/2011/04/11/why-prophet-muhammad-married-aisha-when-she-was-only-9/> (accessed 16 December 2016) an argument which even some Islamic scholars have canvassed.

<sup>172</sup> As above

<sup>173</sup> Philosophy of religion' [http://www.qcc.cuny.edu/SocialSciences/ppecorino/PHIL\\_of\\_RELIGION\\_TEXT/CHAPTER\\_10\\_DEFINITON/Requirements\\_of\\_a\\_Definition.htm](http://www.qcc.cuny.edu/SocialSciences/ppecorino/PHIL_of_RELIGION_TEXT/CHAPTER_10_DEFINITON/Requirements_of_a_Definition.htm) (accessed 16 December 2016).

<sup>174</sup> As above

<sup>175</sup> "Religion and belief" Council of Europe at <http://www.coe.int/en/web/compass/religion-and-belief> (accessed 16 December 2016). Belief is a state of the mind when we consider something true even though we are not 100% sure or able to prove it. Everybody has beliefs about life and the world they experience. Mutually supportive beliefs may form belief systems, which may be religious, philosophical or ideological. Religions are belief systems that relate humanity to spirituality.

<sup>176</sup> As above

varied sets of traditions, practices, and ideas which constitute different religions."<sup>177</sup>

Religion is also a system of social coherence based on a common group of beliefs or attitudes concerning an object, person, unseen being or system of thought considered to be supernatural, sacred, divine or the highest truth, and the moral codes, practices, values, institutions, traditions and rituals associated with such a belief or system of thought."<sup>178</sup>

A big part of the difficulty in defining religion is that it is not easily understood.<sup>179</sup> Neither is the correct use or misuse of the word very clear or certain. Religion itself is as old as the human race. Being a set of beliefs, it has become culture and vice versa.<sup>180</sup> It may or may not be innate in human beings, but the evidence of its inevitability is overwhelming.<sup>181</sup>

The problem is that many societies do not draw a clear line between their culture and what scholars would call religion. A difference exists between what belongs to a culture's religion alone and what is part of the wider culture itself.<sup>182</sup> Religion defines how the community members interpret their role in the universe, with this teaching based on the local culture, so different religions rise out of different cultures. Similarly when members of one religion convert members of a foreign culture often the resulting religion in that area is affected by the host culture.<sup>183</sup>

Culture defines the social forces within a community involving its conventions for behavior, ranging from food preparation techniques, to forms of entertainment that keep the community together like music or dancing, to dating rituals, and so on.<sup>184</sup>

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<sup>177</sup> As above

<sup>178</sup> 'Definitions of the word religion' Religious tolerance.org [http://www.religioustolerance.org/rel\\_defn1.htm](http://www.religioustolerance.org/rel_defn1.htm) (accessed 16 December 2016).

<sup>179</sup> As above

<sup>180</sup> "Culture and religion" <http://www.cultureandreligion.com/> (accessed 16 December 2016)

<sup>181</sup> Thomas A. Idinopulos 'What is religion' Sabinet African journals, Cross current <http://www.crosscurrents.org/whatisreligion.htm> (accessed 1 May 2015).

<sup>182</sup> A James 'Difference between culture and religion' 01/05/2015 <http://www.differencebtw.com/difference-between-culture-and-religion/> (accessed 13 August 2016).

<sup>183</sup> "Culture and religion" <http://www.cultureandreligion.com/> (accessed 16 December 2016)

<sup>184</sup> As above

Traditionally, religious belief has been a key part of culture.<sup>185</sup> It was a major part of people's lives, practices and even politics as it is in many societies today.<sup>186</sup> This is true of the Nigerian society. It can thus be said that culture engenders religion and religion in turn influences culture, although this may be analogous to saying that religion is to culture what wheels are to an automobile.<sup>187</sup>

Culture can exist outside of religion. A religion may color a local culture but religion can also transcend culture. Culture is a way of life while religion is a belief system.<sup>188</sup> The main difference between culture and religion is that culture is based on the shared values of human being and is essentially manmade while religion is wholly associated with God or the Creator and most of the world's religions claim that their source is God.<sup>189</sup>

Other differences between culture and religion can also be noted, such as that culture is a process of evolution and exists in practical form in the behavior and habits of a community while religion is a process of revelation and exists in written form such as holy or sacred books.<sup>190</sup> Two different religions often share the same culture. For example, although some of the habits of American Christians and Muslims are the same.<sup>191</sup> However, one religion may not consist of different cultures. Another difference is that culture changes with the passage of time but it is not possible to rewrite the fundamental structure of a religion.<sup>192</sup>

The practice of child marriage is not limited to any one region, culture or religion.<sup>193</sup> It is accepted as a harmless tradition in many cultures despite the fact that it often "amounts to socially licensed sexual abuse and

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<sup>185</sup> 'What is Religion? Is It the part of Culture?' Quora <https://www.quora.com/What-is-Religion-Is-It-the-part-of-Culture> (accessed 17 December 2016)

<sup>186</sup> 'Religion and politics' Internet Encyclopedia of politics <http://www.iep.utm.edu/rel-poli/> (accessed 17 December 2016).

<sup>187</sup> "Difference between culture and religion", 01/05/2015, <http://www.differencebtw.com/difference-between-culture-and-religion/> (accessed 13 August 2016).

<sup>188</sup> As above.

<sup>189</sup> As above.

<sup>190</sup> As above

<sup>191</sup> As above

<sup>192</sup> As above.

<sup>193</sup> 'Targeting Girls in the Name of Tradition: Child Marriage' 15 July 2010 US Department of State <http://www.state.gov/s/gwi/rls/rem/2010/144989.htm> (accessed 17 December 2016).



exploitation of a child which really is steeped in cultural and religious acceptance”.<sup>194</sup>

Research shows that the fundamentalism that is pervasive in the Middle East and North Africa has created a fertile environment for the sexual exploitation of young girls through practices that include child marriage.<sup>195</sup> Child marriage does however predate Islam and it can therefore be argued that it is not an Islamic practice but a practice acquired by Islam.<sup>196</sup>

Some respected Islamic leaders have supported child marriage on the basis of the provisions of the Quran and Hadith. Grand Mufti of Saudi Arabia Sheikh Abdul Aziz Al-Sheikh is claimed to have said “Our mothers and before them our grandmothers married when they were barely 12, good upbringing makes a girl ready to perform all marital duties at that age. A nine-year-old girl has the same sexual capacities like a woman of twenty and over”.<sup>197</sup>

Sheikh Mohamed Ibn Abderrahmane Al-Maghraoui also reportedly said that “Getting married at an early age is something that is confirmed by the book of Allah, the Sunnah of his Prophet (Sallallahu Alaihi wa Sallam), the consensus of the scholars and the actions of the companions, and the Muslims who came after them.

There are many hadith which confirm that marriage at an early age was widespread among the companions and no one denied its permissibility. Getting married at an early age was not peculiar to the Prophet (Sallallahu Alaihi wa Sallam) as some people think, but it was general for him and for his Ummah.”<sup>198</sup>

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<sup>194</sup> Child Marriage in the Middle East and North Africa being a white paper, 2013, A publication of The Koons Family Institute on International Law & Policy, an initiative of the, International centre for missing and exploited children.

<sup>195</sup> As above

<sup>196</sup> As above. Koran 30:21.

<sup>197</sup> Why Prophet Muhammad Married Aisha When She Was Only 9? Islam world’s greatest religion 11 April 2011 <https://islamgreatreligion.wordpress.com/2011/04/11/why-prophet-muhammad-married-aisha-when-she-was-only-9/>, accessed on 22 January 2017.

<sup>198</sup> As above

According to the retired Canadian Muslim leader Dr David Liepert, the story of Aisha's marriage to the Prophet may be true but there is controversy even around her age at that time.<sup>199</sup> He claims that Islamic scriptures warn against consummation until after puberty. This follows the teaching and practice of the Prophet on which there is no disagreement.<sup>200</sup>

Some Muslim scholars in Nigeria are of the opinion that child marriage is Islamic.<sup>201</sup> Senator Yerima married a girl child<sup>202</sup> and the Emir of Katsina even did so in the midst of the controversy around child marriage in the country.<sup>203</sup> Prof Ishaq Akintola is quoted as having said that Islam prescribes no age barrier for marriage and that child marriage is an Islamic principle which should not be criticised.<sup>204</sup>

On the other hand, there are Muslims who argue that the practice is not Islamic, saying that fundamentalists have advocated for the practice of child marriage in their own interests based on the Prophet Muhammad's marriage to Aisha when she was six years old.<sup>205</sup> Sulaiman also disagrees that child marriage is Islamic, maintaining that such claims are probably based on the fact that Islam does not prescribe a specific age for marriage, only puberty, but that this is insufficient proof of its being Islamic.<sup>206</sup> He also argues that

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<sup>199</sup> Dr David Liepert 'Rejecting the myth of sanctioned child marriage in Islam' 25 May 2011 [www.huffingtonpost.com/dr-david-liepert/islamic-pedophilia-b-814332.html](http://www.huffingtonpost.com/dr-david-liepert/islamic-pedophilia-b-814332.html) (accessed 24 August 2016). Popular Muslim leaders have married girl children under the interpretation of the Hadith but this Dr said it is misinterpretation and that the Quran does not support it.

<sup>200</sup> As above

<sup>201</sup> 'Muslim professor says marriage has no age limit and Muslims need not be ashamed about sex with children' Eagle Rising March 2016 [www.eaglerising.com/31224/muslim-professor-says-marriage-has-no-age-barrier-and-muslim-need-not-be-ashamed-about-sex-with-children/](http://www.eaglerising.com/31224/muslim-professor-says-marriage-has-no-age-barrier-and-muslim-need-not-be-ashamed-about-sex-with-children/) (accessed 24 August 2016).

<sup>202</sup> 'Nigerian Senator marries girl of 13' Africa 18 May 2010 [http://www.aljazeera.com/news/africa/2010/05/2010518858453672.html?utm=from\\_old\\_mobile](http://www.aljazeera.com/news/africa/2010/05/2010518858453672.html?utm=from_old_mobile) (accessed 9 November 2016).

<sup>203</sup> 'Emir of Katsina's marriage to 14-year-old Habiba' – Reno Vanguard 15 October 2016 [vanguardngr.com/2016/10/emir-katsinas-marriage-14-year-old-habiba-reno/](http://vanguardngr.com/2016/10/emir-katsinas-marriage-14-year-old-habiba-reno/) (accessed 9 November 2016). The Emir is 65 years old.

<sup>204</sup> As in n 201 above

<sup>205</sup> 'Child marriage is about culture not Islam' 11 March 2016 Vanguard [www.vanguardngr.com/2016/03/ese-child-marriage-is-about-culture-not-islam/](http://www.vanguardngr.com/2016/03/ese-child-marriage-is-about-culture-not-islam/) (accessed 9 November 2016).

<sup>206</sup> KO Sulaiman 'Islamic response to the raging controversy of child marriage in Nigeria' (2016) *Ahfad Journal* 1

the fact that it has been practiced for more than a hundred years does not make it proper, right or law in the present dispensation.<sup>207</sup>

The opposing views of academics in Nigeria are evidence of the dissent around the practice of child marriage even in Muslim communities or schools of thought. It is currently argued that Islamic provisions do not support the marriage of a girl whose consent to the marriage has not been obtained.<sup>208</sup> However, Islam alone cannot explain why child brides are found as far afield as India, Pakistan, Turkey and Sub-Saharan Africa.<sup>209</sup>

It could be argued that child marriage is a Christian practice since it is practiced by African Christians in Zimbabwe.<sup>210</sup> In India, on the other hand, both Muslim and Hindu girls marry at the age of ten or younger. In some Egyptian rural areas it is the customary for Muslim and Orthodox Christian parents to marry their girls at younger than fifteen, and the same applies to girls in desert areas such as the Arab Peninsula.<sup>211</sup> In contrast, the norm in most urban areas in the Muslim world and among Muslim minority groups in Western societies is for girls is to get married after the age of twenty and after completing their higher education.<sup>212</sup>

The argument that child marriage is a religious practice is an obvious misinterpretation and misuse of religion by men to excuse or accommodate their will or desires.<sup>213</sup> In the same vein, justifying it on the basis of culture indicates a desire on the part of some people to control the lives of others by offering explanations of things they do not understand and are unwilling to admit they do not.<sup>214</sup>

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<sup>207</sup> As above

<sup>208</sup> 'Child marriage not a religious or cultural issue' <http://www.thestar.com.my/news/nation/2013/10/06/child-marriages-not-a-religious-or-cultural-issue/> (accessed 24 May 2016). The Effects of Traditional and Religious Practices of Child Marriage on Africa's Socio-Economic Development, A Review of Research, Reports and Toolkits from Africa, Campaign to End Child Marriage in Africa, Oct 2015, <http://pages.au.int/cecm> (accessed 24 May 2016).

<sup>209</sup> As in n193 above.

<sup>210</sup> Sibanda (n 117 above) 2-3.

<sup>211</sup> 'Distinguishing culture from religion concerning marriage' November 25 2015 [http://www.islamawareness.net/Marriage/Child/cm\\_fatwa\\_002.html](http://www.islamawareness.net/Marriage/Child/cm_fatwa_002.html) (accessed 24 May 2016)

<sup>212</sup> As above

<sup>213</sup> Sulaiman (n 206 above)

<sup>214</sup> As above.

Whether or not the Prophet had a child bride, there is consensus that he did not introduce the practice of child marriage. Given that it is something he is said to have done hundreds of years ago, one could question whether it should still be practiced today.<sup>215</sup> Child marriage may have been common practice in those days but modern developments have exposed both its social implications and its repercussions for the health of the girl child. These are more than adequate grounds to call for the abolition of the practice wherever it is perpetrated and for whatever reason, including in Nigeria.<sup>216</sup>

It is also noteworthy that the argument of child marriage has progressed beyond being cultural or religious to its legal accommodation which is the focus of this thesis. In line with this, its connection with child sexual abuse as a crime and human rights infringement needs to be investigated.

### **3.5.3 Establishing child marriage as sexual abuse**

Child marriage can take various forms but fundamentally, it connotes the existence of a child and the institution of marriage.<sup>217</sup> The relevant question here is therefore what constitutes a child and a marriage, particularly in terms of sexual intercourse. Reference to a child implies a certain conception of age and thereby a certain general level of understanding and maturity.<sup>218</sup>

A major role of the institution of marriage in human society is the establishment of families through procreation, made possible through the couple's engagement in sexual intercourse.<sup>219</sup> Although there are marriages in which sexual intercourse between the couple or having children naturally is not possible, alternative ways of having children have come about through medical, scientific or technological developments.<sup>220</sup> Whatever the means,

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<sup>215</sup> As above.

<sup>216</sup> The latter part of this Chapter discusses the effects of child marriage.

<sup>217</sup> Nour (n 100 above) 1644-1649. From the combination of the two words-child and marriage.

<sup>218</sup> As above

<sup>219</sup> Kyalo (n 108 above) 212

<sup>220</sup> For example, cloning which for human is being experimented, although it has been established for animals. E Young 'First cloned baby "born on 26 December" Daily News 27 December 2002

child bearing for the purpose of continuing the human race has remained a major reason for marrying and this is no different in the case of child marriage.<sup>221</sup>

This essentially means that even couples in child marriage unions necessarily engage in sexual intercourse in order to fulfil the obligation of procreation.<sup>222</sup> Sexual intercourse however does not take place with the consent of the child bride because by virtue of her age she is not capable of giving consent, understanding the impact or repercussions of the act or experiencing it as anything more than an act of force on the part of her husband or family.<sup>223</sup> Proof that sexual intercourse has taken place is that most brides, as young as they are, conceive almost immediately after their weddings.<sup>224</sup>

When telling their stories, most girls in child marriages describe their first sexual experience as forceful, non-consensual and traumatic.<sup>225</sup> Forced sexual activity by an adult with a child is nothing short of sexual abuse.<sup>226</sup> It is an act for which the physiology and anatomy of the girl child is not yet prepared or properly developed. Such sexual intercourse has been responsible for the high rate of vesico vaginal fistula in Northern Nigeria where the practice is predominant.<sup>227</sup>

Although the term sexual abuse is not found in the Nigerian legal system, criminal provisions refer to defilement or statutory rape or unlawful carnal knowledge.<sup>228</sup> Sexual intercourse with a woman without her consent is rape

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<https://www.newscientist.com/article/dn3217-first-cloned-baby-born-on-26-december/> (accessed 9 November 2016).

<sup>221</sup> Child Brides and Too-Early Sexual Activity 14 September 2013, American Thinker [http://www.americanthinker.com/articles/2013/09/recently\\_the\\_world\\_read\\_with\\_horror\\_about\\_the\\_death\\_of\\_a\\_yemeni\\_8-year-old\\_child\\_bride\\_who\\_died\\_of\\_i.html](http://www.americanthinker.com/articles/2013/09/recently_the_world_read_with_horror_about_the_death_of_a_yemeni_8-year-old_child_bride_who_died_of_i.html) (accessed 17 December 2016). Bunting(n 117 above)175.

<sup>222</sup> As above. See also [www.unicef.org/protection/57929-58008.html](http://www.unicef.org/protection/57929-58008.html) (accessed 21 July 2015).

<sup>223</sup> A Atsenuwa, (n 18 above) 284.

<sup>224</sup> [www.unicef.org/statistics/](http://www.unicef.org/statistics/) (accessed 21 July 2015)

<sup>225</sup> Bunting(n 117 above) 167-174

<sup>226</sup> As above, 176. Child marriage subjects a child to a lifetime of rape and other forms of sexual abuse see [www.ikwro.org.uk/2013/1v/child-marriage-abuse/](http://www.ikwro.org.uk/2013/1v/child-marriage-abuse/) (accessed 27 July 2015). Also child marriage results in sexual abuse [www.washingtonpost.com/opinions/child-marriage-results-early-for-girl-child-brides/2012/10/12/286eaf8c-/](http://www.washingtonpost.com/opinions/child-marriage-results-early-for-girl-child-brides/2012/10/12/286eaf8c-/) (accessed 27 July 2015).

<sup>227</sup> Bunting (n 117 above) 167-174. AF Osunyikanmi 'Reflections on education and Girl child marriage in Nigeria' (2014) 1 *International Journal of Sociological Sciences* 2.

<sup>228</sup> S218, S221, S222 of the Nigerian Criminal Code.

which means that sexual intercourse with a girl child without her consent is a criminal offence and falls under the definition of child sexual abuse in most jurisdictions.<sup>229</sup> According to the Convention on the Rights of the Child, states are required to take all necessary steps to protect the child from violence, injury or abuse<sup>230</sup> and to prevent the inducement or coercion of the child to engage in any unlawful sexual activity.<sup>231</sup>

It is in light of this that child marriage can be said to be a form of sexual abuse as it is associated with lack of capacity and lack of consent, by reason of age, to both the marriage itself and the sexual intercourse that is automatically expected to attach to it.<sup>232</sup>

The problem here is the construct of age as it relates to who is a child and to capacity to consent to marriage and sexual intercourse.<sup>233</sup> This is an issue because coercion or force, which implies the absence of consent, is a major factor in rape or sexual abuse culpability under state laws, and a child cannot be seen as having the capacity to give consent. Despite this, in customary and Islamic practice a girl is considered to be ready for marriage when she reaches puberty which could be at the age of nine or ten.<sup>234</sup> Then categorised as mature and no longer a child, she is reasonably said to be capable of consenting to marriage and sexual intercourse.<sup>235</sup>

In Nigeria, although eighteen years is taken to be full age, any woman who is married is also deemed to be of full age<sup>236</sup> and therefore can be argued capable of giving consent to sex. The issue of capacity is what needs to be

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<sup>229</sup> A Armstrong 'Consent and Compensation: The Sexual Abuse of Girls in Zimbabwe' in W Ncube (ed) *Law, Culture and Tradition in Eastern and Southern Africa* 1998 14. 'Sexual assault' Wikipedia [https://en.wikipedia.org/wiki/Sexual\\_assault](https://en.wikipedia.org/wiki/Sexual_assault) (accessed 17 December 2016).

<sup>230</sup> Art 19

<sup>231</sup> Art 34

<sup>232</sup> Nour (n 100 above) 1644. Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia' in C Ngwenya & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014)284.

<sup>233</sup> As above.

<sup>234</sup> Braimah (n34 above) 477. EI Alemika & SK Kigbu 'Translating The Legal Framework On The Rights Of Child (The Child Rights Act 2003) Into Effective Practice Through Human Rights Education In Nigeria' being a paper at the 6th International Human Rights Conference, 17-19 December, 2015 <http://www.ihrec2015.org/sites/default/files/panel%2010%20Alemika%20-%20paper.pdf> (accessed 1 May 2016).

<sup>235</sup> As above

<sup>236</sup> S29 (4)(b)

understood as the factor in child marriage which identifies the marriage and the consequent sexual intercourse as sexual abuse.

### **3.5.4 The issue of capacity in child marriage**

The United Nations Declaration on Human Rights recognises the right of men and women of full age to marry.<sup>237</sup> “Individuals shall have the right to the respect of their dignity inherent in a human being and to the recognition of their legal status.”<sup>238</sup> Capacity has to do with legal standing, recognition or competence to perform some act.<sup>239</sup>

Marital capacity requires the attainment of cognitive ability and psychosocial maturity along with other abilities associated with late adolescence at which point the individual can take reasonable decisions without interference or supervision.<sup>240</sup> Erulkar defines adolescence as the period of rapid physical, psychological and cognitive change in an individual or person, at which time the person still only transitioning into adulthood and is therefore not ready for adult activities such as sex or getting married. In this sense, adolescence can be said to be a period within the childhood phase.<sup>241</sup>

A primary qualification for marriage is the capability of both parties to be aware of what they are doing and to consciously consent to it.<sup>242</sup> While

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<sup>237</sup> Art 16 (1) UNDHR, this full age attainment is 18 years, see also Art 16 (a) Convention on the elimination of all discrimination against women CEDAW: The right of men and women to get married not boys and girls or men and girls, while Art 11 African Charter on the Rights and Welfare of the Child specifically prohibits child marriage.

<sup>238</sup> Art 5 African Charter on Human and People’s Rights,

<sup>239</sup> VE Hamilton ‘The age of marital capacity: Reconciling civil recognition of adolescent marriage’ (2012) *Boston University Law Review* 1851-1855. Although lack of capacity cannot be established merely by reference to age or appearance Lack of it is the lack of fundamental ability to be accountable for one’s actions that nullifies the element of intent when intent is essential to the action thereby relieving a person of responsibility for it. It is what a human being can do within a framework of legal system. T Jamabo ‘A Discourse of the developmental effects of child marriage’ (2012) 2 *African Journal of social sciences* 141-142.

<sup>240</sup> As above

<sup>241</sup> A Erulkar ‘Early marriage, marital relations and intimate partner violence in Ethiopia’ (2013) 39 (1) *International Perspectives on Sexual and Reproductive Health*, 7, 9-10. In defining adolescent age grouping, he cited Dixon Mueller on standards relating to consent who said researchers should use a particular age grouping which is 10-11 and 12-14 for early adolescents, 15-17 for middle adolescents and 18-19 for late adolescents and prescribed that early adolescents are too early for marriage.

<sup>242</sup> HF Goodrich ‘Foreign marriages and the conflict of laws’ (1922) 21 *Michigan law review*, 744. Marriage is a relationship of status, not an ordinary contract, it is a consensual transaction. T Baty ‘Capacity and form of marriage in the conflict of laws (1917) 26 *The Yale Law Journal* 444. Capacity means legal ability. That is why marriage laws provide that minors cannot get married also people

international standards prescribe a minimum age for marriage,<sup>243</sup> local customs and traditions do not always agree.<sup>244</sup> There is agreement on the requirement of capacity but the understanding of when this capacity is attained is the problem.<sup>245</sup>

As the ability to understand and give conscious consent, capacity is an important factor in every marriage, and it is very doubtful that it exists in the case of child marriage, since the child can invariably be assumed to be below the age of eighteen and not ready for marriage.<sup>246</sup> A number of the issues around child marriage are therefore related to the age factor.

Apart from the inability to give informed consent to marriage or to sexual intercourse and its attending consequences, it can be assumed that a child is incapable of being a good parent since she is not even mature enough to take care of herself and her own affairs, let alone someone who is dependent her decisions, care and maintenance.<sup>247</sup> These are among the reasons why the United Nations, the African Union and other international and regional bodies actively discourage the practice of child marriage.<sup>248</sup>

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who are mentally unstable, because legally they are seen as not able to comprehend marriage and its import.

<sup>243</sup> Art 16 (1) United Nations Declaration of Human Rights, provides that men and women of full age can get married, the full age is 18 years, see Art 21 African Charter on the Rights and Welfare of the Child.

<sup>244</sup> The disagreement is on the issue of age not on capacity, but age does affect capacity. International law has fixed 18 years but cultural relativism continues to argue this, many cultures have various ages for attainment of adulthood and hence capacity to enter into marriage relationship, this age is by attainment of maturity and not a specific age reference. In the cultural context a girl attains adulthood at maturity or puberty and all the while she has been learning to take care of the home but she is not ready to take up this full responsibility until her body is ready for childbearing which happens in their belief when she attains puberty, even medically speaking at this age when a girl has sexual intercourse she can become pregnant, irrespective of whether her body is fully ready for it or not. Alemika & Kigbu (n 234 above).

<sup>245</sup> NNNB Shah *Marriage and divorce under Islamic law* (2001) 6. Islam believes that a child has matured and hence capable of marital responsibility when she attains puberty at the onset of her menstrual cycle. The fact that they agree on maturity is a proof of the understanding of the importance of capacity, although the existence of child betrothals negates this concurrence yet there is the difference between betrothal and marriage which cannot be denied, in betrothal the marriage has not been formalized or legalized and the issue of consummation does not arise.

<sup>246</sup> MJ Miller 'Stop Forced Child Marriage: A Comparative Global Law Analysis' (2015) 9(11) *International Journal of Social, Behavioural, Educational, Economic, Business and Industrial Engineering*, 3818. C Bicchieri, T Jiary, JW Lindemans, A social norms perspective on child marriage: The General Framework, Draft 05/15/2014

<sup>247</sup> The tribulations of child-bearing children, 11 December 2009, IRIN <http://www.irinnews.org/report/87396/afghanistan-tribulations-child-bearing-children> (accessed 17 December 2016). S Mollborn 'Children Having Children' (2011) 10 *Berkeley Calif* 35.

<sup>248</sup> As above.



Capacity to understand and give consent to marriage and its attending consequences is most often lacking in the union of child marriage.<sup>249</sup> The lack of consensus on what constitutes childhood and at what age maturity is attained is glaringly obvious when it comes to the practice of child marriage in Nigeria, particularly with respect to the issues of capacity and consent.<sup>250</sup>

### 3.5.5 The issue of consent

Art 2 Convention on consent to marry, minimum age of marriage and registration of marriage provides that “Marriage shall be with the free and full consent of the intending spouses.”<sup>251</sup> While this makes it clear that consent is a prerequisite for marriage, it also implies the capacity to give consent which in turn brings in the issue of age.

Consent means a concurrence of wills.<sup>252</sup> Consent is an act of reason and deliberation which follows capacity to understand, comprehend and make informed choice.<sup>253</sup> Consent means that a person agrees by choice and has the freedom and capacity to make such a choice.<sup>254</sup> The issue of consent is not unrelated to that of the age since the capacity to make informed and independent decisions comes with age.<sup>255</sup>

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<sup>249</sup> As above

<sup>250</sup> Fayokun (n 111 above) 460-461.

<sup>251</sup> Art 2 Convention on Consent to marriage, minimum age for marriage and registration of marriage, see also Art 6(a) Protocol to the African Charter on human and people rights on the rights of women in Africa Under common law, consenting mind was a prerequisite for entering a contract of marriage, see Prinsloo’s Curators Bonis v Crafford & Prinsloo 1905T5669, in SALRC Report on sexual offences 203 par3.5 quoted in South African Law Commission Discussion Paper 105, Project 122, Assisted decision making : Adults with impaired decision making capacity, 2004.

<sup>252</sup> ‘What is consent’ The law Dictionary Blacks law dictionary on line <http://thelawdictionary.org/consent/> (accessed 17 December 2016).

<sup>253</sup> As above. S273(1) Criminal code of Canada also the provisions of the criminal code of Nigeria on requirement of consent for sexual intercourse and also the age for consent to sexual intercourse.

<sup>254</sup> S23 The sexual offences Bill 2012 of Nigeria.

<sup>255</sup> Baty (n 242 above) 444. Consent are matters of capacity not of form, *Simonin v Mallac* 1860 2 Sw & Tr 62. General comment No 28, Art 23 and 24, General comment 19 (1990) state should set the minimum age to ensure women capacity to make informed and unforced decision. O Bamgbose ‘Legal and cultural approaches to sexual matters in Africa: The cry of the adolescent girl’ (2015) 10 *Miami Int’l and Comp. L Rev* 127. The age at which an individual no longer requires the parental permission to get married because she is held capable of voluntary agreeing to marriage and all it connotes or stand for, including sexual intercourse, child bearing etc. By reason of age a child cannot make

Consent is an essential factor in the validation of marriage. Its importance, as underscored by the description of marriage as a contractual agreement, is such that non-consent is condemned and a minimum age for marriage is recommended.<sup>256</sup> The ability to give consent is unavoidably linked to age and is particularly relevant to the issue of marriage.<sup>257</sup>

It is in the sense of the ability to give informed consent to marriage that the capacity of a spouse in the case of child marriage is also linked to sexual intercourse and is therefore required in legal provisions. Most countries and legal jurisdictions make provision in their criminal law for consent as a prerequisite for sexual intercourse even outside marriage. Rape is an example of non-consensual intercourse with a person.<sup>258</sup>

In child marriage, the reality is that at least one of the two persons contracting the marriage probably does not or is unable to give informed consent to the marriage.<sup>259</sup> This is often the child bride by virtue of her being a minor and therefore not having the capacity to understand or give consent on a variety of issues such as career choice or important life decisions such as marriage.<sup>260</sup>

For consent to be legally valid, a person must be able to understand, appreciate and evaluate a situation and make concrete decisions on that basis and in the absence of any threat, fear, coercion or fraud.<sup>261</sup> In light of

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decisions as to whether she can or is ready for sexual intercourse, contraceptives, child spacing etc which are considerations in marriage and decisions of matured minds.

<sup>256</sup> Convention on the Elimination of all discrimination against women CEDAW, The Convention to marry, minimum age for marriage and the registration of marriage

<sup>257</sup> Fayokun (n 111 above) 463. Age of consent is the age at which a person no longer requires parental permission to get married as she is capable of voluntary agreeing to sexual intercourse otherwise may lead to criminal charges of statutory rape/assault, as sexual intercourse forms part of the marriage parcel. In Northern Nigeria, the age of consent for sex is 13 years, although the age of consent for marriage is actually 18 years, see also 2009 Human Rights Report: Nigerian state.gov.2010-03-11.

<sup>258</sup> NR Kamyongolo & B Malunga *The treatment of consent in sexual assault law in Malawi* (2011)3

<sup>259</sup> Fayokun (n 111 above) 463. 'Early marriage Child spouses' Innocenti Digest 2001.

<sup>260</sup> A child is not capable of giving valid Consent to marriage. C Thomas 'Forced and early marriage: A focus on central and eastern Europe and former Soviet Union countries with selected laws from other countries' 2009 being an expert paper. Bicchiery, T Jiany, JW Lindemans A social norms perspective on child marriage: The general Framework, Draft 05/15/2014.

<sup>261</sup> Koocher & Keith-Spiegel (n 142 above) 5-8. *Singh v Singh* 1971, 2 ALLER 828, limited duress to threat of fear caused by immediate danger to life, limb liberty, because of this restriction, the case was decided as not sufficient, in the Australian case of *In the marriage of S*, it was held that even more subtle form of duress than in *Hirani* can vitiate consent, it should be broad enough to cover nonviolent but controlling parental coercion. *Hirani v Hirani* 1983 4 FLR 232, the marriage of a 19

this it is reasonable to conclude that any form of union or marriage involving a person who cannot reason for themselves or cannot weigh and evaluate the issues and make decisions on that basis cannot be considered to include consent.<sup>262</sup> This is clearly the case in the marriage of an underage child.

Consent is not only a requirement for marriage, it is also a requirement for lawful sexual intercourse,<sup>263</sup> which explains why the sexual intercourse that takes place within child marriage is regarded as forced and nonconsensual and therefore sexual abuse of the girl child.<sup>264</sup>

### **3.5.6 Forced intercourse within child marriage**

Forced sexual intercourse is a criminal offence and a form of violence prohibited by human rights instruments.<sup>265</sup> In the case of child marriage it has to do with the nonconsensual consummation of the union and inevitable recurring sexual intercourse.<sup>266</sup> It also involves criminal liability since a child cannot be said to be able to consent to sex.<sup>267</sup>

As previously noted, consent has to do with capacity which brings in the issue of age, and particularly the age of consent in terms of legally

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year old was annulled as the pressure was such as to destroy the reality of consent and overshadow the will of the individual. N Dostrovsky et al. 'Annotated Bibliography on comparative and International Law relating to Forced Marriage research report' (2007) Department of Justice, Canada <http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/mar/chap10.html> (accessed 17 December 2016).

<sup>262</sup> O Adedokun et al. 'Child marriage and maternal health risks among young mothers in Gombe, Adamawa State Nigeria: Implication for mortality, entitlement and freedoms' paper presented at the 6<sup>th</sup> African Population Conference, 5-9<sup>th</sup> Dec 2011 at Ouagadougou, Burkina Faso. Emasu Alice was of the opinion that girls and women can bring legal action based on lack of consent to nullify forced marriages, 'Uganda: Use the law to bar a forced marriage' 2 August 2005 ALL Africa News [allafrica.com/stories/200508020038.html](http://allafrica.com/stories/200508020038.html) (accessed 18 March 2015).

<sup>263</sup> It is the willing state of mind to proceed with an act. R v Day 1841 9 c&p 722, non-consent means without resistance R v Fletcher 1859 Bell cc 63 and R v Camplin 1845 1 Den 89. Absence of consent in sexual intercourse between a man and a woman has criminal connotations and constitutes a crime called rape, where it between a man and a child it is statutory rape or defilement in Nigeria, although within a marriage it is not a crime.

<sup>264</sup> Atsenuwa (n 18 above) 284

<sup>265</sup> Art 19(1) Convention on the Rights of the Child, Art 16, Art 21, Art 27 African Charter on the Rights and Welfare of the Child and specifically prohibits child marriage because of the harm it causes on sexual exploitation which includes the coercion or inducement to engage in sexual activity.

<sup>266</sup> Atsenuwa (n 18 above) 284 See also [www.endvawnow.org/en/articles/614-definitions-of-forced-and-child-marriage-html](http://www.endvawnow.org/en/articles/614-definitions-of-forced-and-child-marriage-html), accessed on 21/7/2015.

<sup>267</sup> In some jurisdictions like in South Africa, a man cannot have sex with a child below 12-16 even if he or she consents to it, it is a criminal act. S15 and S16 Criminal law (sexual offences and related matters) Amendment Act 32 of 2007. In Nigeria unlawful carnal knowledge with a girl without her consent is a crime under the criminal code but not when she has attained puberty and she is the man's wife.

consenting to and engaging in sex.<sup>268</sup> Consent is a willingness to proceed with an act and involves being informed about the consequences of doing so.<sup>269</sup> Forced nonconsensual intercourse constitutes rape and when it occurs within marriage, it is marital rape<sup>270</sup> although it is not recognised as such by even the civil laws in many jurisdictions, particularly in patriarchal societies.<sup>271</sup>

While rape was prohibited and punishable in traditional African and Islamic societies, marital rape was not because a man could not be said to rape his own wife even if she was forced to engage in intercourse. Like the issues of capacity and consent, forced intercourse is a feature of child marriage.<sup>272</sup> It constitutes a particular act of violence against women and girls which is prohibited by international human rights<sup>273</sup> as a violation of human dignity and a denial of equality for women.<sup>274</sup>

Sexual intercourse within child marriage is said to be forced because the girl child is not mature enough to consent to the intercourse, cannot be said to understand fully the repercussions and has probably not reached the age of

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<sup>268</sup> S23 Sexual offences Bill 2012, consent means a person consents if he or she agrees by choice and has the freedom and capacity to make that choice, particularly without resort to parents and will not amount to crime, this age of sexual consent varies from one jurisdiction to another, sometimes it is even lower than the legal age for marriage in some societies.

<sup>269</sup> I Nnadi 'Does absence of informed consent constitute a violation of human rights' (2014) *African Journal of Law and Criminology* 71. R V Day 40 (1841)9 C&P 722

<sup>270</sup> Rape is non consensual forceful intercourse or penetration of the female by the male which constitutes a criminal offence. Sabbe et al. 'Determinants of child and forced marriage in Morocco: Stakeholders perspectives on health policies and human rights' (2013) 13 *BMC International health and human rights* 2-3. For a child it would amount to statutory rape or defilement but not considered as rape or criminal in marriages in so many places because the wife is taken to have consented to sexual intercourse at the time of contracting the marriage, this is the case in Malawi. Kamyongolo & Malunga ( n258 above) 12. Even in the Nigerian law S6 Criminal code excludes sexual intercourse with a wife from marital rape and even the Penal code of excludes sex with a wife even if she is a child from rape and defilement.

<sup>271</sup> Common law does not recognize marital rape, the belief is that the woman gave consent to the marriage and this extends to sexual intercourse between her and her husband for all times and purpose which she cannot unilaterally revoke, R V Roberts Criminal Law Reports 188. EO Ekhatior 'Women and the Law in Nigeria: A Reappraisal' (2015) 16 *Journal of International Women's Studies*, 287-288. R V Mwasomola 4 ALR(mal)572 a wife cannot refuse her husband, also Roger Moffat v Grace Moffat civil case no 10 of 2007, the court held the action amounted to sexual abuse but did not pronounce it marital rape even though she was not willing and did not consent to it.

<sup>272</sup> M Quattara et al. 'Forced marriage, Forced Sex: The Perils of Childhood for girls' (1998) 6 *Gender and Development*, 27. as sex is a major component of marriage in the society, and in the patriarchal society, marriage is understood as constituting consent to sex. Sofia Khan, Fact Sheet, Accountability for child marriage, key UN recommendation to governments in South Africa on reproductive health and sexual violence, 2013, center for reproductive rights, Ford Foundation

<sup>273</sup> ART 2 UN Declaration of Human rights

<sup>274</sup> Art 1(j) Protocol to the African charter on human and people's rights on the rights of women in Africa

consent under the laws of the country.<sup>275</sup> This is notwithstanding the fact that by virtue of her attaining puberty, she is no longer a child and can therefore consent to sex under customary and Islamic law.<sup>276</sup>

Child marriage in its entirety can be regarded as a relationship or union of force in that the consent to marriage is forced and intercourse is forced upon the girl child which amounts to sexual abuse with its attending repercussions.<sup>277</sup> The fact that virtually everything about the marriage is forced on the girl child and occurs without her valid consent is an infringement of her basic human rights and also implies criminal culpability.

In many countries where child marriage occurs, whether forced or not, sexual intercourse with the child bride does not fall under rape, defilement or any other crime in the criminal code.<sup>278</sup> In Bangladesh, forced intercourse with the wife if she is older than thirteen years of age is not considered rape.<sup>279</sup> The same applies in Nigeria where carnal knowledge within the institution of marriage is excluded from the criminal and penal codes.<sup>280</sup> Current Nigerian laws relating to sexual intercourse, and particularly unlawful carnal knowledge interpreted as sexual intercourse with a girl younger than thirteen or sixteen, are flawed.<sup>281</sup>

### **3.6 Unions similar to child marriage in other jurisdiction**

Child and forced marriages are a global issue, occurring in India, Yemen, Bangladesh, Pakistan, Australia, Canada and the United Kingdom and being

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<sup>275</sup> Fayokun (n 111 above)461-463

<sup>276</sup> As above. Age of consent for sexual intercourse varies from one society to the other, but almost always it is below the age of 18 which is the minimum marriage age.

<sup>277</sup> Art1(g) and (j) Protocol to the African charter on human and people's rights on the rights of women in Africa. This aspect connotes denial of freedom of her person, movement and decisions in important issues that affects her health and life, reproduction etc.

<sup>278</sup> 'Violence prevention the evidence, changing cultural and social norms that support violence' 2009 WHO.

<sup>279</sup> As above. The same is the case in Nigeria, sexual intercourse of a man with his underage bride does not amount to rape hence outside the province of criminal law

<sup>280</sup> S6 Criminal Code, S282 Penal Code.

<sup>281</sup> S218 and S221 Criminal Code of Nigeria. CJ Onyejekwe 'Nigeria: The dominance of rape' (2008) 10 *Journal of international women's studies* 50-54. OA Olatunji 'Penetration, corroboration and non consent: Examining the Nigerian law of rape and addressing its shortcomings' (2012) *University of Ilorin Law Journal* 5.

particularly prevalent in Sub-Saharan Africa.<sup>282</sup> In Southern Africa, child marriage is also reported in South Africa, Malawi, Zimbabwe and Zambia.<sup>283</sup> In the analysis of child marriage with a view to finding solutions to the problem, Greene<sup>284</sup> compiled a list of marriages or relationships that are connected with child marriage, including abductions, so-called shotgun weddings and early marriages.<sup>285</sup>

Some forced types of marriage are cultural or traditionally recognised in many parts of the world and particularly Africa. The Ukuthwala in South Africa<sup>286</sup> and kumpibira in Malawi<sup>287</sup> are similar to the child marriage found in Nigeria, although there are some differences as well.

### 3.6.1 Ukuthwala in South Africa

The word “ukuthwala” means to carry and refers to a culturally legitimised form of abduction prevalent in the rural areas of Eastern Cape and Kwa-Zulu Natal.<sup>288</sup> It involves the kidnapping of a young girl by a man and his friends or peers with the intention of compelling the girl or her family to endorse marriage negotiations.<sup>289</sup>

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<sup>282</sup> S Jain & K Kurz *New Insights in Preventing Child marriage: A Global analysis of factors and programs* (2007) 6.

<sup>283</sup> As above

<sup>284</sup> ME Greene *Ending child marriage in a generation what research is needed* (2014)3.

<sup>285</sup> As above.

<sup>286</sup> E Thornberry ‘Validity of “ukuthwala” depends on definition of custom’, 15 July 2013, Custom contested views and voices [customcontested.co.za/ukwuthwala/](http://customcontested.co.za/ukwuthwala/) (accessed 18 March 2015). The practice of abducting young girls and forcing them into marriage, traditionally with their parents’ consent or to get parents to consent to the marriage or agree on lobola, traditionally it did not include sexual relations or violence so did not amount to criminal abduction as it is now. See the Jesile case. Its validity depends on the definition of custom. ‘Ukwuthwala’ Department of Justice and Development RSA [www.justice-gov.za/brochure/ukuthwala/ukuthwala.html](http://www.justice-gov.za/brochure/ukuthwala/ukuthwala.html) on 18/3/2015. South Africa has proposed a law to criminalize forced marriage, see proposal to outlaw ukuthwala, prosecute parents forcing girls to wed. 3 September 2014 [www.citypress.co.za/news/proposal\\_outlaw\\_ukuthwala\\_prosecute\\_parents\\_forcing\\_girls\\_wed/](http://www.citypress.co.za/news/proposal_outlaw_ukuthwala_prosecute_parents_forcing_girls_wed/) (accessed 18 March 2015).

<sup>287</sup> Forced marriage in Malawi is actually attributed to poverty than any other cause although cultural factors of preserving chastity or more particularly the perception and view of women promotes child marriage for many. Also just like in Nigeria, it is linked to the issue of perception of childhood in particular societies, particularly the attainment of adulthood or rather puberty. It has however been subject to contestations as to its legality and a particular case has been nullified. ‘Malawi court nullifies teen marriage in Nsanje’ september 24 2013 bnl Times [timesmediamw.com/Malawi-court-nullifies-teen-marriage-in-nsanje/](http://timesmediamw.com/Malawi-court-nullifies-teen-marriage-in-nsanje/) (accessed 23 March 2015) where the marriage of a 13-year-old was nullified by a magistrate court.

<sup>288</sup> Thornberry (n 286 above)

<sup>289</sup> ‘Ukuthwala’ [http://www.justice.gov.za/docs/articles/2009\\_ukuthwala-kidnapping-girls.html](http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html) (accessed 6 January 2015).

The kidnapped girls were traditionally of marriageable age but the practice did not involve rape or even consensual sexual intercourse with the girl until all conditions for marriage had been met.<sup>290</sup> In the past, it was also common for the man to be required to pay the girl's father or guardian compensation as punishment for the abduction.<sup>291</sup> Today ukuthwala is increasingly associated with rape and the forced marriage of minors with grown men.<sup>292</sup> The practice is a form of sexual abuse and a violation of human rights.<sup>293</sup>

In the case of *Nvumeleni Jezile v The State*,<sup>294</sup> the appellant was found guilty of criminal charges on appeal although he pleaded innocent on the basis of ukuthwala. The court held that ukuthwala is not a defense in the case of rape, human trafficking and assault with the intent to do grievous bodily harm.

As a widespread phenomenon, early marriage is a symptom of and contributes to gender inequality.<sup>295</sup> According to the Children's Act of 2005<sup>296</sup> the age of majority in South Africa is eighteen years and a person younger than eighteen cannot marry age without the consent of their parents. However, since underage marriage can take place as long as the parents give their consent, child marriage is not strictly speaking prohibited.<sup>297</sup> On the other hand, S12 of the Act states that "every child has the right not to be subjected to detrimental social, cultural and religious practices"<sup>298</sup> and should not be coerced or forced into marriage. According to this section of the act, child marriage and forced marriage is forbidden

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<sup>290</sup> As above. H Choma 'ukuthwala custom in south africa: A constitutional test' (2011) 8 *US China law Review* 875-876.

<sup>291</sup> As above. P Martin & B Mbambo 'An exploratory study on the interplay between African customary law and practices and children's protection rights in South Africa' (2011) 12, being A study commissioned by Save the Children Sweden Southern Africa Regional Office, Save the Children.

<sup>292</sup> N Ntlokwana 'Submissions to the SA Law Commission on Ukuthwala Custom' Center for Constitutional Rights 4-5

<sup>293</sup> South African Integrated Programme of Action, Addressing Violence Against Women and Children, (2013-2018), 2014, Department of Social Development, Republic of South Africa [www.dsd.gov.za](http://www.dsd.gov.za) (accessed 21 December 2015).

<sup>294</sup> (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

<sup>295</sup> MJ Maluleke 'Culture, Tradition, Custom, law and Gender Equality' (2012) 15 *PER/PEL* 3

<sup>296</sup> S1 defines any person under 18 as a child, S17 a person attains majority upon reaching 18 years.

<sup>297</sup> S26 Marriage Act 25 of 1961, amended by the Children's Act, no person under 18 may marry without consent.

<sup>298</sup> S12 (1) Children's Act 38 of 2005

irrespective of age.<sup>299</sup> In the same vein, the sexual exploitation of children by parents or relatives is prohibited,<sup>300</sup> as is trafficking in persons.<sup>301</sup> All of these forbidden acts or behaviors can be seen in the practice of ukuthwala.<sup>302</sup>

The Sexual Offences Amendment Act of 2007 prohibits sex with a minor without their consent after abduction, which happens in the present day ukuthwala, as it constitutes rape.<sup>303</sup> A victim of this practice may apply for a restraining order against any person including family members<sup>304</sup> under the Domestic Violence Act of 1998. Under this Act, ukuthwala can be seen as a form of sexual abuse.<sup>305</sup> Ukuthwala is also prohibited under many international human rights instruments and other laws.<sup>306</sup>

Unlike child marriage practices in Nigeria, ukuthwala is not linked to religion but is argued a customary or cultural practice.<sup>307</sup> It is also not acknowledged as conclusive as child marriage in itself but as a preliminary to marriage negotiations.<sup>308</sup> However, it is criticised as forced marriage and even human trafficking, particularly if lobola is paid and the bride does not give consent.<sup>309</sup> Although these factors distinguish ukuthwala from the practice of child marriage in Nigeria which is an actual celebrated form of marriage, it also persists despite the fact that South Africa is a signatory to

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<sup>299</sup> S12 (2) (a) and (b)

<sup>300</sup> S15 & S17 Sexual Offences Act

<sup>301</sup> S17 Sexual Offences Act. Department of Justice and Constitutional Development 'Ukuthwala: Lets protect our children' (2009) [http://www.justice.gov.za/docs/articles/2009\\_ukuthwala-kidnapping-girls.html](http://www.justice.gov.za/docs/articles/2009_ukuthwala-kidnapping-girls.html).

<sup>302</sup> Maluleke (n 295 above)8

<sup>303</sup> S15 Criminal Law (Sexual Offences) Amendment Act of 2007. Sex without consent with any person irrespective of the age is rape, sex with 12 years under is rape as it is assumed that a child of that age is legally incapable of consent and sex with under 16 years old constitute statutory rape.

<sup>304</sup> S1 defines domestic violence as including sexual abuse.

<sup>305</sup> As above

<sup>306</sup> CRC, Cedaw, African charter on human and peoples right protocol on women right in Africa SADC protocol on Gender and Development, The Constitution on best interest of the child, Recognition of Customary Marriages Act also provides for consent of both parties and 18 years age, Transkei Penal Code forbids the abduction of children under 18 years, S8 Equality Act

<sup>307</sup> L Mwambene & J S-Nielsen 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 8-11.

<sup>308</sup> As above

<sup>309</sup> *Jezile v S and Others* (WCC) (unreported case no 127/2014, 23-3-2015)



global treaties which prohibit harmful cultural practices and has a strong national legal framework for the protection of women and children.<sup>310</sup>

### 3.6.2 Kumpibira in Malawi

Malawi is another Southern African country where the incidence of early and child marriage and the associated sexual abuse and maternal mortality rate is high.<sup>311</sup> The fact that HIV/AIDS is more widespread among women than men, particularly between the ages of fifteen and forty nine, has also been linked to the prevalence of child and early marriage in the country.<sup>312</sup> The Malawian government recently took legal steps to stop the menace by raising the legal age from fifteen to eighteen years and is monitoring the impact of the amendment.<sup>313</sup>

The Constitution of Malawi provides for the passing of legislation to end practices that perpetuate gender abuse and violence.<sup>314</sup> It also guarantees gender equality and non-discrimination but gender disparities continue to manifest in traditional practices that encourage acts of gender violence<sup>315</sup> and sexual abuse, such as child marriage.<sup>316</sup>

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<sup>310</sup> Ntlokwana (n 292 above) 4-5.

<sup>311</sup> World Health Organization Child marriages: 39000 every day at <http://www.who.int/mediacentre/news/releases/2013/childmarriages/20130307/en> (accessed 7 December 2013).

<sup>312</sup> "Malawi government 2012 Global Aids Response Progress Report: Malawi Country Report for 2010 and 2011". "I've never experienced happiness" 'child marriage in Malawi' 2014, Human rights Watch.

<sup>313</sup> 'Malawi officially bans child marriage' 15 April 2015 <http://www.news24.com/Africa/News/Malawi-officially-bans-child-marriages-20150415> (accessed 1 April 2016) 'Ending child marriage in Malawi: A roadmap to sustainable change' 19 April 2015 <http://www.huffingtonpost.com/let-girls-lead/ending-child-marriage-in-b-6700130.html> (accessed 1 April 2016). The case of Malawi is terrible, the author of this article says Malawian girls are commonly locked in a room for seven days and taught how to please men sexually, complete with an exit exam where they must prove their skills with an older man. Girls in parts of the country customarily enter marriage when they are kidnapped, raped and forced to marry their assailant; some of them are as young as 9 years old. "Hyenas," men who are secretly employed by community elders, "cleanse" girls when they reach adolescence by having sex with them to rid them of their "sexual dust." Not coincidentally, for every one man who contracts HIV in Malawi, at least five women and girls become infected.

<sup>314</sup> S24(2) Republic of Malawi Constitution

<sup>315</sup> 'Cultural practices and their impact on the enjoyment of human rights, particularly the Rights of Women and Children in Malawi' (2005) 7 Malawi Human Rights Commission at <http://www.medcol.mw/commhealth/publications/cultural-practices-report.pdf> (accessed 16 November 2013)

<sup>316</sup> 'The situation of women in Malawi' 2009 Women and Law in Southern Africa Research and Educational Trust

As in Northern Nigeria, child marriage in Malawi is common as soon as girls reach puberty which may be as early as twelve years or even younger. Since sexual intercourse takes place immediately, twelve, thirteen or fourteen year mothers or legitimately pregnant girls are not unknown.<sup>317</sup> Child marriage involves coercion on the part of the girl's family and the matrimonial sexual intercourse can be expected to be forced and nonconsensual.<sup>318</sup>

Malawian girls are sent to a traditional school where they are taught about the art of sexual intercourse, losing their virginity on time and how to satisfy men.<sup>319</sup> They are also discouraged from using condoms or other contraceptives.<sup>320</sup> This clearly illustrates the value of girls as objects of pleasure for men and particularly their husbands.<sup>321</sup>

A common form of forced and early marriage in Malawi is kumpibira or kutomera, the practice of giving girls to older men as a form of debt repayment.<sup>322</sup> There is also the practice of nhlazi, in which a wife gives a young relative to her husband as a reward for being good to the wife's family. The consent of the girl is not relevant as the decision is made by the senior members of her family.<sup>323</sup> Child marriage in Malawi is however

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<sup>317</sup> Teistworth 'Ending child marriage in Malawi: A roadmap to sustainable change' Huffington Post 19 April 2015 [http://www.huffingtonpost.com/let-girls-lead/ending-child-marriage-in-\\_b\\_6700130.html](http://www.huffingtonpost.com/let-girls-lead/ending-child-marriage-in-_b_6700130.html) (accessed 1 April 2016).

<sup>318</sup> 'Are there benefits to child marriage?' [www.debate.org/opinions/are-there-benefits-to-child-marriage](http://www.debate.org/opinions/are-there-benefits-to-child-marriage) (accessed 3 January 2015)

<sup>319</sup> 'Teenage girls in south Malawi reject sexual cleansing' The Guardian September 18 2014 [www.theguardian.com/global-development/-professionals-network/2014/sep/18/end-child-marriage-malawi-girls](http://www.theguardian.com/global-development/-professionals-network/2014/sep/18/end-child-marriage-malawi-girls) (accessed 6 January 2016). 'A rite of passage that pushes girls into sex' CNN Feb 4 2014 [www.edition.cnn.com/2014/02/04/health/Malawi-girls-initiation/](http://www.edition.cnn.com/2014/02/04/health/Malawi-girls-initiation/) (accessed 6 January 2016). There is no school like this in Nigeria, although there is the fattening room where girls in preparation for marriage are fed and fattened in Cross River State but not in the North.

<sup>320</sup> As above.

<sup>321</sup> As above

<sup>322</sup> Womb betrothal and acceptance of marriage offers for baby girls. Here as a cultural practice people seek the assistance of birth attendants to know the sex of a baby, if it is a girl, she is pledged to another family before birth, an older man may also offer marriage to a young girl through her parents and upon reaching puberty, the girl is sent to live with the man as his wife. M Mwale 'Factors generally perpetrating the spread of HIV/AIDS in Malawi and other high prevalence Countries in sub-Saharan Africa' (2010) <http://researchcooperative.org/profiles/blogs/factors-generally-perpetrating> (accessed 23 February 2014).

<sup>323</sup> Kamyongolo & Malunga (n 258 above)15. This is the influence of patriarchy and evidences the value placed on the girl child as member of the family and in society, although she is considered fit to marry by the attainment of puberty, she is not deemed important to make such choices or give consent on such issues.

different from Nigeria in that it involves both girls and boys<sup>324</sup> but in Nigeria, it is a practice mainly against the girl child.

Similarly to the situation in Northern Nigeria, Muslims in Malawi's rural areas relate child marriage to their beliefs.<sup>325</sup> Research shows that the practice predominates in Mangochi where Islam is prevalent.<sup>326</sup> However, it must be mentioned that despite this, religion is rarely used as a justification for the practice in Malawi as in Nigeria.<sup>327</sup>

Like South Africa and Nigeria, Malawi is party to almost all international conventions, protocols and conventions on the protection of the child.<sup>328</sup> The country's constitution rules that the state is to discourage marriages where either person is younger than fifteen years.<sup>329</sup> This however means that child marriage is not expressly prohibited. The constitution does also protect women against violence, sexual abuse and harassment.<sup>330</sup>

Malawi's Child Care, Protection and Justice Act of 2010 provides a broader policy and legal framework for the protection of children. According to the Act, parents are responsible for protecting the child against neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards.<sup>331</sup> It also prohibits any social or cultural practice that is harmful to the health or general development of the child,<sup>332</sup> and forced marriage is expressly forbidden <sup>333</sup> and punishable by ten years in prison according to S82.

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<sup>324</sup> 'Cultural practices and their impact on the enjoyment of human rights, particularly the Rights of Women and Children in Malawi' (2005) 7 Malawi Human Rights Commission <http://www.medcol.mw/commhealth/publications/cultural-practices-report.pdf> (accessed 16 November 2013).

<sup>325</sup> Fayokun (n 111 above) 461- 462. J Donnelly 'Malawi's Muslim communities embrace family planning' 26 June 2011 <http://www.globalpost.com/dispatch/news/health/110622/malawi%E2%80%99s-muslim-communities-embrace-family-planning> (accessed 25 January 2015).

<sup>326</sup> As above

<sup>327</sup> As above. Fayokun (n 111 above) 461-462.

<sup>328</sup> 'Protecting children in Malawi: A report on the major findings of the mapping and assessment of the National Child Protection System' UNICEF 2012 <http://www.unmalawi.org/pdf/2012%20Malawi%20Child%20Protection%20System%20Mapping%20and%20Assessment%20Report.pdf> (accessed 21 February 2014).

<sup>329</sup> S22(8) Constitution of Malawi

<sup>330</sup> S24 (2) Constitution of Malawi

<sup>331</sup> S3(a) The Child Protection and Justice Act of Malawi 2010

<sup>332</sup> S80 The Child Protection and Justice Act of Malawi 2010

There is a strong institutional framework for the protection of children in Malawi, such as the national Ministry of Gender, Children and Community Development and almost 140 offices at district level to follow up on child protection cases, inspect and supervise child care institutions, and liaise with the justice sector and communities through community child protection workers.<sup>334</sup>

Despite this, child marriage persists in Malawi although there have been commendable movements in the direction of its eradication recently.<sup>335</sup>

There is the same confusion around the issues of age and consent as in Nigeria, but Malawi's Penal Code does not differentiate between sexual intercourse with a married child and an unmarried one.<sup>336</sup> While this means that anyone who consummates a marriage with a girl child is guilty of a criminal offence, the reality is that enforcement is a problem and husbands are not prosecuted or punished for sexual offences.<sup>337</sup> It is argued that one of the reasons for this problem is because the Penal Code does not define consent when it comes to sexual assault which represents an area of lacuna in the law.<sup>338</sup> One would expect that since the Constitution of Malawi already protects children from any form of abuse and exploitation,<sup>339</sup> such acts would be uncommon in the country.

As in Nigeria, although legal measures exist for the protection of women and girls from discriminatory practices, there is a view that the legal system itself is discriminatory. The apparent confusion over the age of childhood and legal marriageable age is often an obstacle to the protection of girl children from early marriage.<sup>340</sup>

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<sup>333</sup> S81 The Child Protection and Justice Act of Malawi 2010

<sup>334</sup> Protection of children in Malawi UNICEF.

<sup>335</sup> 'Malawi: New Marriage Law Can Change Lives' April 7 2015 <https://www.hrw.org/news/2015/04/17/malawi-new-marriage-law-can-change-lives> (accessed 9 November 2016).

<sup>336</sup> S160B (1) Penal Code Amendment Act, Any person who engages or indulges in sexual activity with a child shall be guilty of an offence and liable to imprisonment for fourteen years.

<sup>337</sup> Kamyongolo & Malunga (n 258 above) 13

<sup>338</sup> As above

<sup>339</sup> S20 Constitution of Malawi

<sup>340</sup> 'The situation of women in Malawi' 2009 Women and law in Southern Africa research and educational trust <http://wlsamw.wordpress.com/situation-of-women/>

Child marriage was recently outlawed in Malawi when a court nullified over 300 such marriages and sent the child spouses back to school.<sup>341</sup> There was a similar development in Zimbabwe where the highest court declared child marriage unconstitutional.<sup>342</sup> On the other hand, in the United States about 468 children were removed from the Yearning For Zion Ranch where it was suspected they were being subjected to forced marriages and sexually abuse, but the Supreme Court ordered that they be returned to their families.<sup>343</sup> These are legal or judicial lessons for Nigeria to emulate in the attempt to eradicate child marriage within its jurisdiction.

### **3.7 The legal aspect of child marriage**

The practice of child marriage is a contravention of multiple human right provisions.<sup>344</sup> Child marriage has been summed up as a threat to the human rights and well-being of children, including the infringement of the rights to dignity, equality, education, health, protection, development and liberty, as well as being an abrogation of a girl's right to freedom from torture, cruel, inhuman and degrading treatment and sexual exploitation.<sup>345</sup>

In Nigeria, child marriage can be argued to be an infringement of fundamental human rights contained within the Nigerian Constitution,<sup>346</sup> in particular the dignity of the girl child.<sup>347</sup> This is because the practice is essentially a form of modern day slavery and therefore is an infringement of the right to dignity.<sup>348</sup> It is also an infringement on the girl child's right to

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<sup>341</sup> 'Malawi bans child marriage but the work is just beginning' 20 February 2015 International women's health coalition <https://iwhc.org/2015/02/malawi-bans-child-marriage-work-just-beginning/> (accessed 17 December 2016).

<sup>342</sup> 'Breaking: Zimbabwe outlaws child marriages' News Day 16 January 2016 <https://www.newsday.co.zw/2016/01/20/breaking-zimbabwe-outlaws-child-marriages/> (accessed 17 December 2016)

<sup>343</sup> <http://www.touregypt.net/historicalessays/lifeinEgypt8.htm#ixzz4HzxDBwXx> (accessed 21 August 2016).

<sup>344</sup> International human rights instruments prohibit child marriage in several of its conventions and treaties, Cedaw, CRC, Africa Charter on the rights and Welfare of the child and other relevant ones.

<sup>345</sup> Parliamentary seminar on combating early and forced marriage, March 3-4, 2014 in Ghana, wiLDAF Ghana.

<sup>346</sup> Chapter 4 of the Constitution of the Federal Republic of Nigeria 1999 is dedicated to fundamental human rights.

<sup>347</sup> S34 Constitution of the Federal Republic of Nigeria 1999.

<sup>348</sup> S34 CFRN 1999. Right to dignity of the person.

equality by discriminating between the girl and boy child.<sup>349</sup> It restricts her freedom of movement<sup>350</sup> and infringes on her health and reproductive rights and her right to education and development.<sup>351</sup>

Child marriage is the most prevalent human rights violation dealt with in societies today<sup>352</sup> and as such is an issue of global concern.<sup>353</sup> It is widely recognised as a violation of children's rights and a direct form of discrimination against the girl child.<sup>354</sup>

Child marriage is a social phenomenon with legal and moral connotations. The practice is sanctioned by customary and Islamic law in Nigeria while simultaneously contravening statutory and international human rights provisions.<sup>355</sup> It is a customary practice in some regions, a religious practice in others, and both in yet others.<sup>356</sup> All in all, the practice of child marriage falls within the discourse of legal systems.<sup>357</sup>

As a legal issue, child marriage can be approached on two levels. Firstly, there is the legal pluralism that exists in certain territories such as Nigeria.<sup>358</sup> Secondly, there is the coexistence of international and domestic law within a territory. Both levels are discussed in this thesis.<sup>359</sup>

From another perspective, one that is not considered by perpetrators, child marriage can be said to be immoral. Any normal judgement should tell a

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<sup>349</sup> Right to freedom discrimination, S42 CFRN 1999

<sup>350</sup> Right to freedom of movement, S41 CFRN 1999

<sup>351</sup> A Bunting 'Forced marriage in conflict situations: Researching and prosecuting old harms and new crimes' (2012) 1 *Canadian journal of human rights* 168-169. Atsenuwa(n 18 above)279-280

<sup>352</sup> UN Special Rapporteur on violence against women following her visit to Bangladesh in 2013, cited from Sofia Khan, Accountability for child marriage, key UN Recommendation to governments in South Asia on reproductive health and sexual violence, Fact sheet, 2013, center for reproductive rights, Ford Foundation.

<sup>353</sup> 'Who speaks for me? Ending Child marriage' 2011, Population Reference Bureau.

<sup>354</sup> Sibanda (n117 above)1-3

<sup>355</sup> Fayokun (n 111 above) 462-463.

<sup>356</sup> It is an area of conflict in the provision of Item 61, Second schedule CFRN 1999 provides that the National Assembly has no power to legislate on marriage issues under Islamic and customary laws including the related matrimonial issues. 'Former Nigerian Governor allows under age marriage loophole into constitution' world watch monitor July 23 2013 <https://www.worldwatchmonitor.org/2013/07/2619643/> (accessed 18 December 2016). In Mozambique, it is not a religious but customary practice, while in Nigeria it tends more towards a religious than a customary practice although it is a feature of both cultural and religious practice and this is where the issue of plural legal societies comes in.

<sup>357</sup> Braimah (n 34 above) 476-479

<sup>358</sup> As above

<sup>359</sup> These are discussed in chapters 4 and 5 of this these and the problems with them discussed in chapter 6

reasonable person that it is wrong to marry or have sexual intercourse with a child, although the question is whose judgement is applicable - that of society, the perpetrator, the local community or the international community.<sup>360</sup> This would be in the area of morality and the law.

It is also a fact that the forced and nonconsensual penetration of young brides in the consummation of marriage and fulfillment of marital expectations is a criminal act of defilement or statutory rape,<sup>361</sup> although the culprits are not prosecuted due to the social acceptability of child marriages.<sup>362</sup> At the same time child marriage has to do with the internal state responsibility to protect internationally recognised human rights and is linked to the functions of legislators and judiciary, issues of peace and development, and the impact of community development.<sup>363</sup>

There are various legal categories into which the sexual intercourse that takes place in child marriage can be placed. As forced intercourse with a person, it is rape.<sup>364</sup> As forced and nonconsensual sexual intercourse with an underage person, it is statutory rape, and as forced intercourse with an underage girl, it qualifies as defilement.<sup>365</sup> In addition, it can be called sexual assault or abuse which does not necessarily involve penetration but is forced and nonconsensual and violates the body and person of the victim.<sup>366</sup>

The argument around who decides whether child marriage is right or wrong is essentially a matter of relativism versus universalism. However, such a

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<sup>360</sup> In the Nigerian criminal code section where defilement appears, it is entitled offence against morality. Chapter 21 Nigerian Criminal Code Act.

<sup>361</sup> S218 Criminal Code

<sup>362</sup> Being forceful, nonconsensual sexual intercourse equivalent to rape although not legally categorized, prosecuted and punished as such.

<sup>363</sup> 'Former Nigerian Governor allows under age marriage loophole into constitution' World watch Monitor July 23 2013 <https://www.worldwatchmonitor.org/2013/07/2619643/> (accessed 18 December 2016). Human rights activists fear lack of protection for young girls, as a senator who did it publicly in Nigeria was not accosted or prosecuted for it. Also the application of international treaties in Nigeria by the courts.

<sup>364</sup> S357 CC

<sup>365</sup> S218 CC

<sup>366</sup> These are all criminal offences in the Nigerian law, for statutory rape there is no marriage between the girl and the culprit, even if it is consistent for a period of time, marriage is a strong distinguishing factor in this context from child marriage. S351, S352 on sexual assault of female, S357 on abduction, S358 on rape, S360 on indecent assault, S218, S221 on defilement, all in the Criminal Code Act.

decision, even a decision on the legality or illegality of the practice, cannot be based on a judgement. It can only be reached by weighing up the effects on the individual, the public, society and development.<sup>367</sup> This leads to the practice as an issue of constitutionalism. What does the constitution say and what law trumps in the country on the issue of child marriage.<sup>368</sup>

The relativist argument has made it doubtful that child marriage will be acknowledged as a rights issue in Nigeria. This can be seen in the various challenges experienced in the enforcement of human rights treaties in the northern parts of the country.<sup>369</sup> Again, being an issue of marriage, child marriage falls under family law. This particular side of it also makes it fall within the jurisdiction of personal law of religion or customary law, the state and international law.<sup>370</sup>

On another hand, child marriage can be viewed from the jurisprudential perspective of law. Approaching the problem from a legal and jurisprudential point of view which is not strictly related to human rights, but the purpose or function of law or what law really is may prove to be more productive.<sup>371</sup>

### **3.8 Child marriage in Nigeria: Prevalence and causes**

Child marriage is classified as a harmful cultural and religious practice<sup>372</sup> and a practice which reflects the social discrimination against the girl in traditional societies. In Nigeria, child marriage is still the norm and a longstanding practice which is recognised as part of Nigerian culture both within and outside the country.<sup>373</sup> It is more prevalent in the Islamic northern part of the country and particularly in the villages.<sup>374</sup> Child brides can be as young as nine years depending on the onset of puberty.<sup>375</sup>

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<sup>367</sup> Nwauche (n 114 above) 423-424

<sup>368</sup> Nwauche (n 114 above) 424

<sup>369</sup> As above

<sup>370</sup> When legal worlds overlap: Human rights, State and Non-State Law (2009) v, viii, International Council on Human rights Policy

<sup>371</sup> JO Asein *The Nigerian legal system* (2005)9-14.

<sup>372</sup> Art 21(2) African Charter on the Rights and Welfare of the Child.

<sup>373</sup> Mohammed v Knott [1969] 1 QB1, In that case child marriage was recognized as the practice of the people of Northern Nigeria.

<sup>374</sup> Fayokun (n 111 above)461-462

<sup>375</sup> As above, 460-461. PM Adebuseye 'Hidden: A Profile of married Adolescents in Northern Nigeria' (2006) 7, Action Health Incorporated.



According to statistics, in the North West the percentage of child marriage is 33%, in the North East 14.3%, in the North Central 11.2%, in the South 8.6%, in the South East 5.8 and it is 5.4% in the South West.<sup>376</sup>

Several authors have speculated on the causes of child marriage wherever it occurs<sup>377</sup> and the practice has been linked to factors such as patriarchy, discrimination against the female gender, culture, religion, political will and poverty.<sup>378</sup> Nour<sup>379</sup> is of the opinion that the primary motivating force is poverty, citing the examples of Korea, Taiwan and Thailand where there has been a considerable reduction in the prevalence of child marriage as poverty decreased.

Okonofua<sup>380</sup> also sees the practice as a poverty issue but with cultural and religious connotations, stating that “Evidence is increasingly accumulating to suggest that child marriage is not just a religious or cultural practice but is driven largely by poverty.....”

Howard-Hassman<sup>381</sup> attributes child marriage to religion, and particularly Islam, while Olatubosun prefers to see it as both a cultural and religious phenomenon.<sup>382</sup> Oguniran, Akangbe and Owasonoye also attribute child

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<sup>376</sup> As above. Records from [www.unfpa.org/child-marriage](http://www.unfpa.org/child-marriage), [www.refworld.org/docid/50b406202.html](http://www.refworld.org/docid/50b406202.html), see also feminist Newswire on July 14, 2014 at <https://feminist.org/blog/index.php/2014/07/14/study-shows-high-rate-of-child-marriage-and-maternal-death-across-nigeria> (accessed 29 February 2016).

<sup>377</sup> Although it is a universal problem, it is particularly an issue of concern in Southern Asia and sub Saharan Africa; it is noticeably common in developing countries and particularly in Nigeria MA Akangbe ‘Nigeria and the girl child bride: Culture, Constitution and Religion’ Aug 6 2013, [www.africaontheblog.com](http://www.africaontheblog.com). NM Nour ‘Child marriage: A silent health and human rights issue’ (2009) 2(1) *Reviews in Obstetrics and Gynecology* 51. It is found also in Latin America and the Caribbean, it is a major problem in India, Bangladesh even as young as 7 years in Ethiopia.

<sup>378</sup> Gender inequality is a causative factor of child marriage in patriarchal societies where the female is seen and perceived as lower to the male because of her gender or sex. Parliamentary seminar on combating early and forced marriage, March 3-4 2014, wiLDAF Ghana. H Ijaiya ‘Human rights: Gender discrimination against female children in Nigeria’ (2006) 1 *University of Ilorin Law Journal* 90. CO Nwosu and I Oyakhiromen ‘Nigeria and Child marriage: Legal issues, complications, prospects and solutions’ (2014) 29 *Journal of law, Policy and Globalization* 120.

<sup>379</sup> Nour (n 100 above) 1646.

<sup>380</sup> F Okonofua ‘Prevention of child marriage and teenage pregnancy in Africa: Need for more research and Innovation’ (2013) 17 *African Journal of Reproductive Health* 9.

<sup>381</sup> RE Howard Hassman ‘the flogging of Bariya Magazu: Nigeria, politics, Canadian pressures and women and children’s rights’ 2004 3 *Journal of human rights* 10.

<sup>382</sup> A Olatubosun ‘Addressing the Phenomenon of child marriage in Nigeria’ (2001) 9 *Ife psychologyA*, 159.

marriage to cultural and religious beliefs as evidenced by the prevalence of the practice in Northern Nigeria.<sup>383</sup>

Bamgbose<sup>384</sup> sees it more as a traditional cultural practice than a religious one with the exception of Northern Nigeria where religious beliefs also play a role. She contends that “.....there are many problems within our culture that adolescent girls have to contend with and in most part of Hausa land, child marriage is a rule rather than the exception”.<sup>385</sup>

None of these perspectives are wrong since there is undoubtedly a connection between religion and culture in that religious norms impose patriarchal regimes that discriminate against women and establish structures that determine gender roles which are in turn perceived as culture.<sup>386</sup>

While poverty is both a cause and effect of child marriage in many societies,<sup>387</sup> there is more argument and debate about the interlinked role of culture and religion than poverty. However, it is also the case that where culture discriminates against women, they are prevented from contributing to the economy of the family and society which in turn promotes poverty.<sup>388</sup>

The role of culture and religion in the social problem of child marriage may well be related to their perceptions of the age of childhood and the attainment of adulthood.<sup>389</sup> From both the cultural and religious

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<sup>383</sup> Iyabode Oguniran ‘Child bride and Child sex: Combating child marriages in Nigeria’ (2011) 2, 88, 94-95. To Oguniran, it is religious and particularly Islam. MA Akangbe ‘Nigeria and the child bride: culture, constitution and religion’ Aug 6 2013 [www.africaontheblog.com](http://www.africaontheblog.com). F Ajumobi ‘Nigeria and the ills of child marriage Vanguard 25 2014. B Owasanoye ‘Killer Bride has no Protection under the Law’ Vanguard 25 May 2014 [www.vanguardngr.com/2014/05/killer-bride-child-protection-law-prof-wasanoye/#stash.pD151kxy.dpuf](http://www.vanguardngr.com/2014/05/killer-bride-child-protection-law-prof-wasanoye/#stash.pD151kxy.dpuf) (accessed 7 November 2016)

<sup>384</sup> O Bamgbose ‘Legal & Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl’ (2015) 10 U. *Miami Int’l & Comp L. Rev.* 131.

<sup>385</sup> As above

<sup>386</sup> Clifford Geertz *Religion as a cultural system in the interpretation of cultures* (1993) 90. Some practices were cultural which religion imbibed, at the same time culture itself derive its origin from religion. AS Mohl ‘Religious Fundamentalism and its impact on the female gender’ (2009) 36 *The Journal of Psychohistory*, originally presented at the 31<sup>st</sup> annual Convention at Fordham University at Lincoln Center.

<sup>387</sup> GV Kyari & J Ayodele ‘The Socio-Economic Effect of Early Marriage in North Western Nigeria (2014) 5 *Mediterranean Journal of Social Sciences* 583.

<sup>388</sup> As above

<sup>389</sup> A Boakye- Boateng ‘Changes in the Concept of childhood: Implication on children in Ghana’ (2009) 3/10 *The Journal of International social research* 104-105. T Kaime *The African Charter on the Rights and Welfare of the Child: A sociological perspective* (2009) 70-78.

perspective, a girl child is considered ready for marriage when she attains puberty, since puberty is understood as being associated with the capability to take on adult responsibilities, particularly that of child bearing.<sup>390</sup> Adopting puberty as a standard for marriageable age can be problematic because it is a developmental stage rather than a specific event.<sup>391</sup>

Neither Islam nor customary law prescribe a specific age for marriage, rather taking the attainment of puberty as marriageable age for the girl child which, it is argued, promotes the practice of child marriage.<sup>392</sup>

Bunting argues that although child marriage is a common problem in Islamic countries, it also occurs in non-Islamic communities,<sup>393</sup> which supports the suggestion that it could be a cultural as well as a religious issue.<sup>394</sup> Notwithstanding the precedent of the Prophet and arguments that girl children should be married off early to prevent their bringing shame on their families through pregnancies outside wedlock, the most tenable point connecting child marriage with Islam is the fact that Islam does not prescribe a specific age for marriage, only puberty or maturity.<sup>395</sup>

Uwais argues that child marriage is neither a law nor a requirement of Islam. It is a practice that is not obligatory or mandatory and is not like the five pillars of Islam.<sup>396</sup> Other Muslim scholars and Musawah, the group of Muslim women who oppose fight child marriage contend that the practice is

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<sup>390</sup> Kaime as above 75-76

<sup>391</sup> T Smith & L Brownlees 'Age assessment practices: a literature review & annotated bibliography' (2011) 5-7, A discussion paper, UNICEF New York.

<sup>392</sup> 'Iranian Child Brides Get Younger - And More Numerous' Front Page <http://www.frontpagemag.com/2012/frankcrimi/Iranian-child-brides-get-younger-and-more-numerous> (last visited September 15, 2013) (statement of Mohammad Ali Isfenani) ("We must regard nine as being the appropriate age for a girl to have reached puberty and qualified to get married. To do otherwise would be to contradict and challenge Islamic Sharia law").

<sup>393</sup> Bunting (n 117 above) 187-194. It is not just a problem of developing countries either, it happens in Mississippi, and Massachusetts [www.care.org/UN-work/womens-empowerment/child-marriage/top-5-things-you-didnt-know-about-child-marriage](http://www.care.org/UN-work/womens-empowerment/child-marriage/top-5-things-you-didnt-know-about-child-marriage) (accessed 22 July 2015). It is a prevalent problem in India where it is not associated with Islam.

<sup>394</sup> As above

<sup>395</sup> Shah (45 above)6.

<sup>396</sup> M Uwais 'Senator Yerima and Constitutional Review' July 22 2013 (accessed 8 September 2015) M Uwais 'The Compatibility of the child rights act with Islamic Legal Principles' (accessed 23 November 2013). Also Seri Solebo, a magistrate of the family court in Lagos is of the same opinion on this, from an interview with her on this thesis in December, 2015.

only claimed to be Islamic by men who want to use religion to disguise their personal lust.<sup>397</sup>

Although there is the argument that the Quran and Prophet Muhammad do not expressly prescribe child marriage, the Maliki law may not prohibit it.<sup>398</sup> Muslim scholars cite the child marriage of the Prophet himself to highlight it as an Islamic law and practice.<sup>399</sup> It is also a common claim that Islamic law was created on the basis of the deeds of the Prophet,<sup>400</sup> and the Quran does indeed exhort adherents to follow the Prophet's example.<sup>401</sup>

Child marriage is related to the perception of women, childhood and age in many customs and religion,<sup>402</sup> particularly the customary and Islamic directives on marriageable age.<sup>403</sup> As such there are variations in the practice, with it being a purely customary tradition in some communities and a religious one in others.<sup>404</sup>

The two defining aspects of capacity (or age) and consent must be discussed when linking child marriage to cultural norms, Islamic law and even statutory or English law. It is possible for the girl to give her consent to early marriage despite it not being her idea, but Islam specifically allows a father to consent to marriage on behalf of his daughter or ward.<sup>405</sup>

Child marriage is a typical example of a situation where culture, religion and the law intersect.<sup>406</sup> In many countries, and particularly those with plural

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<sup>397</sup> Musawah Statement to OHCHR on Child, Early and Forced Marriage, 2 May 2014, Musawah at <http://www.musawah.org/musawah-to-OHCHR-child-marriage> (accessed 18 December 2016).

<sup>398</sup> Bunting (n 117 above) 16-168.

<sup>399</sup> Aisha was a child bride whom the Prophet married after the death of Khadija his first wife.

<sup>400</sup> T Khabir 'The role of Islam in childhood marriage case study: Nigeria' (2008) 2, being a paper presented at the 17<sup>th</sup> annual convention of Global Awareness Society International, San Francisco, CA, USA.

<sup>401</sup> Quran, Surat Azhab B3:21, "Ye have indeed in the Apostle of God, a beautiful pattern of conduct for any one whose hope is in God and the final day and who engages much in the practice of God".

<sup>402</sup> Kyari & Ayodele (n 385 above) 582.

<sup>403</sup> Shah (n 45 above) 6. This is the same as marriageable age, the age at which an individual especially a girl can be said to be right or rather ripe and fit for marriage. Customary rules in Nigeria even have prescribed age for children but Islam does not prescribe any, rather it provides puberty, which is not specific and is quite vague, puberty is even a process, a girl could start her period but this does not mean she has attained puberty; unfortunately, this is the measuring standard in Islam.

<sup>404</sup> "I've never experienced happiness, child marriage in Malawi" 2014 Human rights watch. In South Africa, Ukwuthwala is a cultural practice while in Malawi although more of a cultural practice it is predominant among the Muslims like in Nigeria and some other Islamic countries.

<sup>405</sup> Shah (n 45 above) 6. This is called Ijbar and a practice of the Maliki Islamic School.

<sup>406</sup> Kyari & Ayodele (n 385 above) 582.

legal systems such as Nigeria, it is prohibited by state law but permitted by customary and Islamic laws which are simultaneously recognised by the laws of the country.<sup>407</sup>

In recent times, child marriage has highlighted the plight of the Nigerian child, particularly the girl child and her protection under the law and culpability for crimes despite her age.<sup>408</sup>

### **3.9 Case study of child marriages in Nigeria and the sexual experiences of the girl brides.**

This research takes a feminist approach in studying child marriage cases particularly in Nigeria and attempting to capture the sexual experiences of the child brides and the effect on their lives.<sup>409</sup>

Although child marriage has always been and still is practiced in Nigeria, the practice drew global attention in 2010 when Senator Sani Ahmed Yerima showcased his wedding to a thirteen year old girl.<sup>410</sup> The bride's sexual experience did not make the headlines of any newspaper but the event raised a storm of arguments about the practice, its religious support and even the legal permissiveness of the Nigerian legal system and constitutional provisions and laws in this regard.<sup>411</sup>

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<sup>407</sup> Fayokun (n 111 above)463-465. Canada: Immigration and Refugee board of Canada "Nigeria: Forced marriage among Yoruba, Igbo and Hausa Fulani, prevalence, consequences for a woman or minor who refuses to participate in the marriage, availability of state protection" (Feb 2006) 3 March 2006, NGA101044E <http://www.refworld.org/docid/45f1478a11.html> (accessed 30th January 2015) it has died down in the western part no longer a practice in Yoruba land but still much prevalent in the Muslim North argued as a religious practice which law cannot take away.

<sup>408</sup> So many child brides have been frustrated and abused to commit crimes in order to escape the situation and have become children in conflict with the law, one bride burnt her husband to death and after five years in 2012, she was convicted and on death row, another poisoned her husband and two of his friends and they died in 2014, she is awaiting trial, [www.theguardian.com/development-professionals-network/2011/mar/11/the-tragedy-of-nigeria-child-brides](http://www.theguardian.com/development-professionals-network/2011/mar/11/the-tragedy-of-nigeria-child-brides) (accessed 23 March 2015).

<sup>409</sup> PA Cain 'Feminist jurisprudence: Grounding the theories' (1988) 4 *Beckley Women's LJ* 191.

<sup>410</sup> M Habib 'Solving the problem of child marriage' 18 September 2013 <http://www.gatestoneinstitute.org/3981/childmarriage> (accessed 22 July 2015). Although the senator denied that the girl was 13 years but the fact remains that she was not yet 16 or even the recommended 18 years but was according to Islamic requirement matured having attained puberty.

<sup>411</sup> Carol Ajei 'Overcoming challenges of senator Yerima's child marriage (2)' Daily Independent of Oct 2, 2012, being a publication of a paper at the International Bar Association (IBA) Annual Conference, Dublin, Ireland. M Uwais 'Senator Yerima and Constitutional review' July 22 2013 [www.vanguardngr.com/2013/07/senator-yerima-and-constitutional-review-by-mariam-uwais/](http://www.vanguardngr.com/2013/07/senator-yerima-and-constitutional-review-by-mariam-uwais/) (accessed on 5 February 2016).

These case studies illustrate the trauma experienced by child brides through the unwanted and continued sexual intercourse in their marriages..<sup>412</sup>

A fourteen year old reported that when she experienced intense pain with bleeding, her aunt gave her medicine but cautioned that if she stopped having intercourse, the wound would not heal.<sup>413</sup> The girl went on to say that her husband was stubborn and was always coming for her although she didn't want to have sex and was always crying.<sup>414</sup>

Aisha got married at the age of nine. She did not understand what happened on her wedding night. She could only say that her husband did something to her from behind and that she woke up in the hospital.<sup>415</sup> Thirteen year old Halima has a fistula from the prolonged labour resulting from her teenage pregnancy.<sup>416</sup>

Wasila Umar was twelve years old when she got married. She tells that the trauma she experienced through forced sexual intercourse pushed her to seek escape by giving her husband such a terrible stomach ache that he would leave her alone.<sup>417</sup> She poisoned him with rat poison which led to the deaths of her husband and three friends who ate with him<sup>418</sup> The story of Wasila's murder of her husband sent shock waves round the world and highlighted not only the issue of child marriage but also conflicts in the law and the issue of criminal justice for children in Nigeria. She took action to stop what she experienced as sexual abuse at that tender age.<sup>419</sup> Her lawyer

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<sup>412</sup> [www.unicef.org/protection/57929-58008.html](http://www.unicef.org/protection/57929-58008.html) (accessed 22 July 2015).

<sup>413</sup> 'Suffer the little children: Recent Nigerian Legislation raised the scepter of child marriage' July 13 2013 <https://juicyecumenica.com/2013/09/31/suffer-the-little-children-recent-nigeria-legislation-raises-the-scepter-of-child-marriage/> (accessed 22 July 2015).

<sup>414</sup> As above

<sup>415</sup> 'Nigeria child brides: I thought being in labour would never end' [www.theguardian.com/global-development/2017/sep/02/nigeria-child-brides-religion](http://www.theguardian.com/global-development/2017/sep/02/nigeria-child-brides-religion) (accessed 22 July 2015)

<sup>416</sup> As above

<sup>417</sup> M Uwais 'Child marriage as violence against the girl child posted March 18, 2015 <http://forumonwomen.wordpress.com/2015/03/18/child-marriage-as-violence-against-the-girl-child/> (accessed 9 August 2015). Her intention was not to kill but to give him stomach pain so he would not be able to have intercourse with her, but she got more than this when his friends joined him and they all died.

<sup>418</sup> As above

<sup>419</sup> 'Muslim child bride poisons husband' [www.abigmerge.com/tag/child-bride](http://www.abigmerge.com/tag/child-bride) (accessed 5 February 2016).

reported that she had told him her husband tied her to the bed and raped her on their wedding night.<sup>420</sup>

Further case studies appear in Bunting's thesis on child marriage in Nigeria.<sup>421</sup> Salamata married at the age of twelve and engaged in sexual intercourse even before the onset of menstruation. She experienced intercourse as forced and unwanted. Rabi Hamisa Karaye, who married at the age of eleven, also did not willingly participate in sexual intercourse. She was married and it was her duty towards her husband.<sup>422</sup> Sexual intercourse was also forced on thirteen year old Abu when she married.<sup>423</sup>

Married at fifteen, Rabi Mande's experience of forced and nonconsensual sexual intercourse was so bad that her legs had to be tied to the bed. The sexual act was also forced and nonconsensual for Ai who was married at the age of eleven.<sup>424</sup> Zainabu Malla Ibrahim had no knowledge of sex at all before being married when she was twelve and could not therefore give her consent to the act.<sup>425</sup>

The trauma and pain of sexual intercourse experienced by child brides is not peculiar to Nigeria.<sup>426</sup> In Yemen, eight year old Rawa who was married to a forty year old man died of internal bleeding after sexual intercourse on the night of her wedding.<sup>427</sup>

The horrors of sexual intercourse do not end however end with the act as pregnancy quickly ensues, subjecting the girls to both the burden of pregnancy and the agony of child birth for which they are not physiologically and anatomically prepared, and making them vulnerable to maternal death, vesico vaginal fistula and related repercussions of intercourse.<sup>428</sup>

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<sup>420</sup> As above

<sup>421</sup> Bunting (n 117 above) 269-286

<sup>422</sup> As above

<sup>423</sup> As above

<sup>424</sup> As above

<sup>425</sup> As above.

<sup>426</sup> Atsenuwa ( n 18 above) 289, .

<sup>427</sup> M Habib 'Solving the problem of child marriage' 18<sup>th</sup> September 2013 <http://www.gatestoneinstitute.org/3981/childmarriage> (accessed 21 July 2015).

<sup>428</sup> Atsenuwa (n 18 above) 291.

### 3.10 Effects of child marriage

Article 21 African Charter on the Rights and Welfare of the child mentions child marriage as a harmful custom and practice that constitutes a risk or danger to the child.<sup>429</sup> Even more appropriately, it is categorised as a form of violence, maltreatment, modern day slavery and exploitation.<sup>430</sup> There is indeed a thin line between child brides and slaves.<sup>431</sup>

Child marriage affects the girl child personally.<sup>432</sup> The sexual intercourse hurts and harms her physically, physiologically, psychologically and mentally.<sup>433</sup> One of the effects linked to child marriage in Northern Nigeria is vesico vaginal fistula which is the result of child marriage and early engagement in sex with underdeveloped girls.<sup>434</sup> Nour counsels that the health implications of marriage for the girl child are numerous and overwhelming.<sup>435</sup>

Vesico vaginal fistula (VVF) is a hole caused by the tearing of the tissue between the vagina and the bladder during prolonged labor leading to the constant leaking of urine into the vagina. Rectovaginal fistula (RVF) is the tear from the rectum into the vagina leading to stool leakage.<sup>436</sup> Additional medical issues associated with child marriage are the dangers of underage labour that lead to stillbirths and maternal death. Complications in pregnancy and childbirth are the leading cause of death in girls between the

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<sup>429</sup> Art 21 (1) (a) and 2 of the African charter on the Rights and Welfare of the Child,

<sup>430</sup> Art 19(1) Convention on the Rights of the Child

<sup>431</sup> "Nigerian school girls kidnapping cast light on child trafficking", National Geographic Magazine, 15 May 2014, here the kidnappers boasted of selling the girls out as wives to Islamic militants. They will have to perform household tasks inclusive of satisfying the sexual demands of their husbands and families in law.

<sup>432</sup> Atsenuwa (n 18 above) 292

<sup>433</sup> As above. 'The Impact of Early Marriage: Domestic Violence and Sexuality, Nation against Early Marriage' <http://www.breakthrough.tv/earlymarriage/2013/08/impact-early-marriage-domestic-violence-sexuality/> (accessed 9 November 2016).

<sup>434</sup> Bunting (n 117) 269-286.

<sup>435</sup> Nour (n 100 above) 1644,

<sup>436</sup> MA Ijaiya et al. 'Vesico vaginal fistula: A Review of Nigerian Experience (2011) 29(5) *West African Journal of Med* 293-298. The various medical needs and help available in the North for fistula patients and fistula cases <https://www.fistulafoundation.org/countries-we-help-nigeria/> (accessed 29 February 2016). I Sunday- Adeoye et al. 'A Review of the Management of Vesico-vaginal Fistula with Co-existing Bladder Calculi in South-East Nigeria' (2016) 6:5 *Gynecology & Obstetrics (Sunnyvale)* 1-2. AA Kullima et al. 'Vesico vagina fistula: A shift in epidemiology in Northern Nigeria' (2009) 8 *Ebonyi medical Journal* <http://dx.doi.org/10.43.4/ebomed.v8i1.52633> (accessed 29 February)2016.



ages of fifteen and nineteen.<sup>437</sup> These are all repercussions of child marriage that affect the girl child and in turn society.<sup>438</sup>

In Africa, the increased risk of contracting sexually transmitted diseases, cervical cancer and malaria, as well as maternal death in childbirth, obstetric fistulas, premature birth and the death of neonates, infants and children are linked to younger age in women.<sup>439</sup> In Kenya, Zambia and Uganda, research has found that the greater risk and incidence of HIV among married girls is due to their being physiologically more vulnerable to HIV infection because the vagina is not yet well lined with protective cells and the cervix is more easily eroded, allowing permeation by the virus. Hymenal, vaginal and cervical lacerations increase the transmission rate of the virus.<sup>440</sup>

Maternal mortality is also higher in African countries where Eclampsia, postpartum haemorrhage, HIV infection, malaria and obstructed labour all play a role in the deaths that occur.<sup>441</sup>

Labour is said to be obstructed when a girl's pelvis is too small to deliver the coming baby. When the baby's head passes into the vagina but the shoulders cannot pass through the mother's pelvic bones, a caesarean section is needed to save the baby.<sup>442</sup> In the absence of this intervention, the mother is fortunate if she does not succumb to sepsis or haemorrhage. If she does survive, the tissue and bones of the baby will eventually soften and the remains pass through the vagina.<sup>443</sup> This is a common occurrence in developing or under developed countries where child marriage is rife and

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<sup>437</sup> Kyari & Ayodele (n 385 above) 582

<sup>438</sup> 'Child marriage: practice, consequences and remedy' Vanguard 26 June 26 2013 [www.vanguardngr.com/2015/06/chilc-marriage-practice-consequences-and-remedy/](http://www.vanguardngr.com/2015/06/chilc-marriage-practice-consequences-and-remedy/) (accessed 29 February 2016).

<sup>439</sup> Nour (n 100 above) 1644-1646

<sup>440</sup> As above

<sup>441</sup> KG Santhya 'Early marriage and sexual and reproductive health vulnerabilities of young women: a synthesis of recent evidence from developing countries' (2011) 23(5) *Curr Opin Obstet Gynecol* 335-336.

<sup>442</sup> As above

<sup>443</sup> As above

medical facilities are lacking or denied for religious reasons amongst others.<sup>444</sup>

There is a connection between maternal and child mortality, that is death of mother and/or death of the baby during or shortly after birth, and the high incidence of both in Sub-Saharan Africa is again connected to the prevalence of child or early marriages.<sup>445</sup> Maternal death has also been linked to early marriage in developing countries such as India as opposed to developed countries such as the United Kingdom and the United States.<sup>446</sup> According to the World Health Organization (WHO), child marriage must be stopped in order to reduce the incidence of maternal death due to complications in pregnancy and childbirth in developed countries.<sup>447</sup>

Child marriage also affects the girl child not only psychologically but socially. She is forcefully, unduly and prematurely detached from her peers and family and hindered in her education, both of which are related to a broader definition of social and mental health.<sup>448</sup> In all these ways, child marriage clearly poses a danger not only to the girl child's health and life but also to public health.<sup>449</sup> Nigeria has the highest maternal mortality rate in Africa and one of the world's highest rates of fistula, particularly in Northern Nigeria.<sup>450</sup>

Child marriage has an unquantifiable impact on society as the girl child's most immediate environment and can therefore be said to have a social effect.<sup>451</sup> Depriving the girl child of education contributes to illiteracy in

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<sup>444</sup> As above.

<sup>445</sup> Trends in maternal mortality: 1990-2015, (2015) ix. WHO, still highest in Nigeria and India

<sup>446</sup> As above.

<sup>447</sup> 'Child marriages: 39 000 every day' WHO [http://www.who.int/mediacentre/news/releases/2013/child\\_marriage\\_20130307/en/](http://www.who.int/mediacentre/news/releases/2013/child_marriage_20130307/en/) (accessed 24 August 2016)

<sup>448</sup> 'Child marriage a threat to health' 20 December 2012 World Health Organisation Europe <http://www.euro.who.int/en/health-topics/health-determinants/social-determinants/news/news/2012/12/child-marriage-a-threat-to-health> (accessed 9 November 2016). S Ahmed et al 'Psychological Impact Evaluation Of Early Marriage' (2013) 1 *International journal of endorsing health science research*

<sup>449</sup> Sunday-Adeoye (n 435 above) 1-2. Kullima et al (n 435 above)

<sup>450</sup> 'Early Marriage' 'Till Death do us Part': Understanding the Sexual and Reproductive Health Risks of Early Marriage International women's health program", <http://iwhp.sogc.org/index.php?page=early-marriage> (accessed 24 August 2016)

<sup>451</sup> 'Nigeria; Early marriage adds to socio economic woes NGOs say' Kano 26, Nov 2008, IRIN 2014. CI Okereke et al. 'Education, an antidote to early marriage for the girl child' (2013) 3 *Journal of*

society, turns the girl into an economic liability rather than an asset and hampers her ability to make a real contribution as a woman and mother.<sup>452</sup>

Overall, the practice of child marriage has an adverse impact on the social and economic life and development of the girl child's generation, the state and global society.<sup>453</sup> Depriving girls of an education by forcing them into early marriages deprives the country of the economic strength of the girls and also deprives the girls of the opportunity of being developed mothers of tomorrow who will raise respectable and enlightened citizens.<sup>454</sup> Areas in which child marriage is practiced are also noticeably prone to underdevelopment and poverty.<sup>455</sup>

### **3.11 Sociolegal solutions to the problem of child marriage**

The eradication of child marriage will only be possible through both legal and sociolegal measures that involve legislation, law reform and law enforcement in combination with enlightenment, education and community engagement to transform mindsets and perceptions, particularly on gender inequality.<sup>456</sup> This chapter focuses on sociolegal solutions while legal aspects are dealt with in chapters six and seven. The argument in this section is that even law needs to be accessed for the sociological methods to be put in place and used effectively

Dialogue with communities and stakeholders can be an instrument for highlighting the negative effects of child marriage for the girl child and the

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*education and social research* 75-76. GT Lemmon & LS Harake 'Child brides, Global consequences: How to end child marriage' (2014) Council of foreign relations. Criminal capabilities out of frustration, In April 2014, a 14 years old girl bride poisoned her week old husband, prostitution is said to be high in the north because girls run away from their abusive relationship or marriage or homes to escape forced marriage, without education or skill and having to survive, they engage in prostitution, teenage pregnancy, early motherhood and maternal mortality, some married girls are divorced by their husbands and have nothing to live on but their battered bodies also engage in prostitution, Girls ages 15 to 24 are twice more likely to be infected with HIV are all visible effects of child marriage in the North of Nigeria.

<sup>452</sup> Kyari & J Ayodele (n 385 above) 583

<sup>453</sup> As above. Apart from the fact that she cannot and is unable to contribute to her society, in Nigeria, the bulk of the money or fund that could be used to develop leaders' personnel for a better tomorrow are spent on the cure of VVF, which is said to be a result of child marriage in that part of the country.

<sup>454</sup> As above

<sup>455</sup> As above

<sup>456</sup> L Anderson "Fight to end child marriage must be scaled up-experts" 11 March 2015 [news.trust.org/item/20150311035544-35pf/?/source=spotlight](https://news.trust.org/item/20150311035544-35pf/?/source=spotlight).

dangers it poses to the community and society at large.<sup>457</sup> Greater understanding may help people see the practice in a new light and support efforts to abolish it.<sup>458</sup>

Poverty eradication is a major factor in the attempt to eradicate child marriage since it is clearly a defining characteristic of communities where the practice prevails.<sup>459</sup> Eradicating or reducing poverty will help reduce the occurrence of child marriage, particularly in areas such as Northern Nigeria where poverty levels are high and community development is hindered by the practice of child marriage.<sup>460</sup>

Advocacy for the abolition of child marriage is another mechanism that can be used but it needs to be culturally appropriate and acceptable.<sup>461</sup> In the case of Muslim Northern Nigeria Muslim, religious leaders need to spearhead advocacy for the abolition of the practice.<sup>462</sup> The Muslim female lawyer Maryam Uwais is currently working to help Muslims better understand the position of Islam on child marriage and the need for an end to the practice.<sup>463</sup> Community groups and NGOs as well as customary leaders can join and support such campaigns.<sup>464</sup>

Traditional and more contemporary forms of enlightenment can be employed to bring an end to the practice of child marriage.<sup>465</sup> Traditional and religious

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<sup>457</sup> Bunting (n 117 above) 101

<sup>458</sup> As above

<sup>459</sup> "Ending child marriage, A guide for global policy action", (2006) 15, 28. International Planned Parenthood Federation and the Forum on Marriage and the Rights of Women and Girls at <http://www.unfpa.org/sites/default/files/pub-pdf/endchildmarriage.pdf> (accessed 19 December 2016).

<sup>460</sup> As above.

<sup>461</sup> 'Ending child brides: Advocate for more women as community leaders' The Zimbabwean 14 November 2016 <http://thezimbabwean.co/2016/11/ending-child-brides-advocate-women-com> (accessed 19 December 2016).

<sup>462</sup> Partnering with religious communities for children (2012) 3. Lemmon & ElHarake(n 451 above)16-17. This is in practice in India.

<sup>463</sup> M Uwais 'Senator Yerima and Constitutional review' July 22, 2013, the honorable minister also insisted the international human rights provision are not exclusively western they are found in Islamic principles too. The Compatibility of the child rights act with Islamic legal principles, 14th April, 2009. Maryam is a minister of the Federal Republic of Nigeria and the founder Isa Wali Empowerment Initiative

<sup>464</sup> CONFERENCE REPORT South Asia Parliamentarians' Meeting on Child Marriage "Accelerating our Collective Efforts to End Child Marriage" 6, 22-23 March 2016, Kathmandu, Nepal at <https://www.afppd.org/Resources/23-conference-report-sa-parliamentarians-meeting-on-child-marriage.pdf> (accessed 19 November 2016).

<sup>465</sup> IE Nwosu 'Mobilizing People's Support for Development: An Analysis of Public Enlightenment Campaigns in Africa' (1986) 1 *Africa media Review* 53, 60

leaders can be involved in public awareness campaigns and town criers can be used in rural areas along with other traditional forms of communication such as storytelling.<sup>466</sup> The involvement of grandmothers in the movement to end female genital mutilation in Senegal is an example of this.<sup>467</sup>

Community members working to eradicate or substitute harmful practices can be engaged with to change the child marriage culture.<sup>468</sup> The Tostan group in Senegal successfully engaged with men and individual and neighboring communities on the matter of female genital mutilation.<sup>469</sup>

As a critical component of the drive to end child marriage, education needs to include awareness programmes as well as laws on compulsory education that will keep girls in school longer and reduce the incidence of early marriage.<sup>470</sup> Support programmes or incentives can be introduced to encourage parents who marry their daughters off early for reasons of poverty to keep their girls in school longer.<sup>471</sup> Programmes such as these exist in Egypt<sup>472</sup> and have been initiated in Northern Nigeria.<sup>473</sup>

However, while the program and related policies in the North have seemingly provided girls with educational opportunities and led to a minimal increase

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<sup>466</sup> Partnering with religious communities for children (n 461 above) 3. L Mitchell, C Eke 'Alternatives to female genital mutilation in Western Africa' <http://web.stanford.edu/group/womenscourage/FGM/chibuzolilyFGMpaper.html> (accessed 15 November 2015).

<sup>467</sup> AS Musoko et al. *Girls & Grandmothers Hand-in-Hand, Dialogue for Community Change* (2012) The Grandmother Project, Italy.

<sup>468</sup> Lemmon & ElHarake (n 451 above) 13-15.

<sup>469</sup> Mitchell & Eke (n 466 above) 'An alternative to female genital mutilation that prevents girls suffering' 6 February 2014 The Guardian <https://www.theguardian.com/commentisfree/2014/feb/06/alternative-to-circumcision-prevents-girls-suffering-kenya> (accessed 19 December 2016).

<sup>470</sup> Lemmon & ElHarake (n 451 above) 9, 12-13.

<sup>471</sup> As above

<sup>472</sup> As above. Patrick Crump 'Delaying early marriage in Egypt, the case of Ishraq' (2013) the Wilson Center, being a program implemented by save the children, Population Council, National Council of Youth, 2001-present, Save the children. Ishraq called it a new life trajectory, empowerment package and community engagement, this program affords the opportunity to enroll in school part time.

<sup>473</sup> 'Education for pregnant girls and young mothers' 10 November 2015 Health and Education Advice & Resource Team (HEART) <http://www.heart-resources.org/2015/11/education-for-pregnant-girls-and-young-mothers/> (accessed 19 December 2016). Educational program for pregnant, married girls and teenage mothers have been introduced in the North of Nigeria.

in the number of girls enrolled in school, they have not had an impact on the elimination of the practice of child marriage in the region.<sup>474</sup>

Lastly, the law can be employed alongside these sociological methods. Not only in legislation but also in establishing and legalising the methods and approaches highlighted. In the process of law making, consultation is an important step which should not be overlooked. This not only sensitises the people but takes their views into account on the issues that are up for legislation. This also is a formal legislative requirement which involves a sociological process.

### **3.11.1 Child marriage eradication through cultural practices and/or cultural principles**

This section of the chapter is a necessary addition because various attempts at eradicating child marriage particularly in Nigeria has often times faced opposition especially on the issue of using law. Hence, it is needful that apart from the sociological methods discussed in the preceding sub head, if it is possible, methods of eradicating the practice should engage the application of culture or cultural principles. This is what this section attempts to do.

The inappropriateness of child marriage can be highlighted by reexamining the original context and character of marriage in Africa.<sup>475</sup> The concept of marriage originally meant the union of a man and a woman.<sup>476</sup> Although history is rife with recorded incidents of girls being promised in marriage or betrothed even from the womb,<sup>477</sup> these were later social developments

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<sup>474</sup> 'Ending child marriage Progress and prospects' (2014) 7. In the researchers' opinion it has even gingered the case of child marriage, because this means the girls can be married and still attend school.

<sup>475</sup> "African marriage" at <http://www.africanmarriage.info/> (accessed 19 December 2016). The most important ceremony in African culture Marriage is a privilege afforded by communities for the purpose of continuing mankind race.

<sup>476</sup> As above. Man and woman who meet the criteria. This connotes an understanding of maturity and understanding from time immemorial, not between children or a child and an adult.

<sup>477</sup> Nwogugu (n 71 above) 18-19

based on solidifying friendships and strengthening community alliances or to deal with some special emergency.<sup>478</sup>

Originally, a man and a woman would see and accept each other, after which a marriage would be arranged by the families.<sup>479</sup> Since children do not and cannot marry in this sense of the word, child marriage can be said to be a deviation and a later development related to issues such as best interest or friendship.<sup>480</sup>

Child marriage can also be viewed in light of the problem that in indigenous African societies chronological age was calculated on the basis of events and counts of the moon. Since the only measure of marriageable age for girls was the attainment of puberty or womanhood, the question is whether one can still speak of child marriage if a girl was given out in marriage at that time.<sup>481</sup> It can be said that people married early and young in traditional African society but one cannot strictly speaking take this as meaning child marriage.<sup>482</sup>

It can also be argued that child marriage is not original to African culture, as it is a recorded part of English history, particularly that of royal families, and has even been reported until recently in developed countries.<sup>483</sup> In addition, if one considers the argument that child marriage is an Islamic practice, Islam is not an originally African culture, customary law or

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<sup>478</sup> 'Education can break the bonds of child marriage' 18 November 2016 World education Blog <https://gemreportunesco.wordpress.com/2015/11/18/education-can-break-the-bonds-of-child-marriage/> (accessed 19 December 2016).

<sup>479</sup> After checks and verifications of issues beneficial to the couple, family and society, for example checking whether there were no cases of insanity, leprosy or other genetically transferable infections that could mar the family line in either family of the intended couple.

<sup>480</sup> M Hunter 'Courting desire?: love and intimacy in late 19th and early 20th century kwazulu-natal' (2005) <http://quod.lib.umich.edu/p/passages/4761530.0010.016/--courting-desire-love-and-intimacy-in-late-19th-and-early?rgn=main;view=fulltext> (accessed 19 December 2016). D Ekane 'Traditional African Family Patterns' 2013 [su.diva-portal.org/smah/git/diva2.602444/FULLTEXT01.pdf](http://su.diva-portal.org/smah/git/diva2.602444/FULLTEXT01.pdf) (accessed 19 November 2015). Even in the context of marriage at that time, it was a union of families not of the couple alone.

<sup>481</sup> El Nwogugu (n 71 above)19.

<sup>482</sup> M Garenne 'Age at marriage and modernization in sub Saharan Africa' (2004) 9(2) *SAJDem* 59-79.

<sup>483</sup> "Child marriage: An issue whose time has come" [www.nospank.net/boysandgirls.htm](http://www.nospank.net/boysandgirls.htm) (accessed 10 October 2015). It happens in North Carolina, Alabama, South Carolina age 12, Kansas, New Hampshire age 13. Tom Johnson is Special project coordinator of parents and Teachers against violence in education

indigenous religion but was imported to the Continent.<sup>484</sup> It is therefore postulated that rediscovering the original African concept of marriage as a union of an adult man and woman can help put an end to child marriage as a deviation from the norm.

While several legal attempts have been made by states to enforce compliance with international human rights standards on minimum marriageable age, many conservative countries have resisted this on the grounds that it constitutes an imposition of western standards to eradicate their valued culture.<sup>485</sup> Objecting countries need to be convinced that the rationale behind prescribing a minimum marriageable age is to protect the best interest of the girl child and is not an intrinsically western idea.

The best interest principle is part of customary law and is in fact what motivated the practice of child marriage in the first instance.<sup>486</sup> One way of employing culture to bring about change in terms of child marriage is to recognise the practice, understand the reasoning behind it (which includes the best interest principle) and place it in the context of human rights provisions.

It is argued that the purpose of child marriage was not only to preserve the chastity of the girl and the family honor but even more importantly to settle the girl child in a home where she would be taken care of, particularly when her parents were old or deceased.<sup>487</sup> The practice can therefore be said to be in the best interest of the girl child particularly in terms of protecting her

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<sup>484</sup> 'Islam in Nigeria' Harvard Divinity School <http://rlp.hds.harvard.edu/faq/islam-nigeria> (accessed 19 December 2016). Wikipedia, 13/06/2014 Through trade by the Arab and Berbers, the Almoravids and itinerant Islamic scholars, spreading through Africa, via North Africa, following the trade route, probably around the 1<sup>st</sup> Century. A prominent Muslim in Nigeria Abdul Adelabu said it came to sub-Saharan Africa and Nigeria around this time,

<sup>485</sup> Bunting (n 117 above) Countries like Sudan, Turkey, Syria, Saudi, Yemen although most of them have amended their laws to accommodate a marriage age but at first they signed reservations to the international provisions on minimum marriageable age.

<sup>486</sup> 'Child marriage in whose best interest?' FMT Mews 11 December 2016 <http://www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/> (accessed 19 December 2016).

<sup>487</sup> 'Ending child marriage: Insights from Desmond Tutu and Mary Robinson' 2 June 2012 The World Post [www.huffingtonpost.com/marriane-schnall/desmond-tutu-and-mary-rob-b-1254218.htm](http://www.huffingtonpost.com/marriane-schnall/desmond-tutu-and-mary-rob-b-1254218.htm) (accessed 10 October 2015). Desmond said parent do it because they believe it is in the best interest of their children but it hurts them and that poverty is also a factor.



against sexual assault and rape.<sup>488</sup> There are of course questions about whether the best interests of the girl child are really protected by child marriage considering the many health repercussions and the issue of bride price<sup>489</sup> associated with the practice.<sup>490</sup>

Now it needs to be applied to end the practice.<sup>491</sup> Another argument is that in African culture the negatives of child marriage are not as horrendous as they are made out to be, particularly if the well-meaning reasons behind it are researched and understood.<sup>492</sup>

African parents also love their young ones, have their best interests at heart and want to protect them, particularly their girl children. This was the main reason for the introduction of child marriage without taking the negative effects which enlightenment has now revealed into account.<sup>493</sup> Previously, child marriage was not the only cause of maternal and child mortality.<sup>494</sup> For example, there were taboos such as the one prohibiting pregnant women from eating well. Child marriage may have been a contributing factor but many girls married early or young and there is no qualitative research evidence to link the practice to maternal mortality at that stage.<sup>495</sup>

The fact that the best interest principle forms part of international human right principles does not mean it originated there.<sup>496</sup> Many African values, belief systems and practices show that African parents are passionate about

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<sup>488</sup> Fayokun (n 117 above)461

<sup>489</sup> Bride price or dowry is the money which parents of the bride collect or receive from the groom as payment for their daughter's hand in marriage.

<sup>490</sup> TS Ramis, Child marriage in whose best interest?, Nov 11, 2013, at [www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/](http://www.freemalaysiatoday.com/category/opinion/2013/11/11/child-marriage-in-whose-best-interests/), accessed on 10/10/2015.

<sup>491</sup> M Uwais 'The compatibility of the child rights Act with Islamic law principles'

<sup>492</sup> 'Are there benefits of child marriage' Debate.org <http://www.debate.org/opinions/are-there-benefits-to-child-marriage> (accessed 19 December 2016).

<sup>493</sup> 'Ending child marriage. Insights from Desmond Tutu and Mary Robinson' [www.huffingtonpost.com/marriane-schnall/desmond-tutu-and-mary-rob-b-1254218.htm](http://www.huffingtonpost.com/marriane-schnall/desmond-tutu-and-mary-rob-b-1254218.htm) (accessed 10 October 2015).

<sup>494</sup> Nour (n 100 above)53

<sup>495</sup> Garenne (n 481 above) 59

<sup>496</sup> Even human rights can be found in Islamic principles too, see M Uwais, The compatibility of the child rights Act with Islamic legal principles.

the welfare and best interests of their children<sup>497</sup> and the harm caused by any practice is not intentional.

The acceptance of a minimum marriageable age is a necessity in the best interest of the girl child. Regional provisions in this regard are proof that it is a universal principle which existed before the codification of international human rights standards.<sup>498</sup>

One way of employing culture to change the practice of child marriage is therefore to apply the best interest principle as a culture that existed long before the emergence of international and regional human rights declarations in order to argue that the child marriage is not in the best interest of the girl child.<sup>499</sup>

Child marriage can also be defined as an aberration in traditional Africa by understanding and applying the concept of taboo.<sup>500</sup> The repugnancy doctrine<sup>501</sup> can be applied to highlight child marriage as an exception to the rule rather than the norm, and thereby taboo.

In African tradition, it is taboo for an adult man to undress before a child, even more so when the child is of the opposite sex, as naturally happens in the case of child marriage.<sup>502</sup> According to the repugnancy doctrine, customs and practices that are unnatural and in opposition to natural justice and principles of equity should be declared as such and not be practiced or enforced by law.<sup>503</sup>

In this sense then the repugnancy doctrine is a form of the taboo principle in traditional African society which can be revived to support the eradication

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<sup>497</sup> 'Archbishop Tutu fights against child marriage in Ethiopia' 7 June 2011 [www.bbc.com/new/world-africa-13677955](http://www.bbc.com/new/world-africa-13677955) (accessed 10 October 2015).

<sup>498</sup> Martin & Mbambo (n 291 above) 16

<sup>499</sup> M Uwais, The compatibility of the child rights act with Islamic legal principles

<sup>500</sup> Forbidden, banned, must not be done, not accepted as socially correct, activity that people should avoid because it is considered offensive or embarrassing, Longman Contemporary English, Pearson, Longman.

<sup>501</sup> Soyaju (n 10 above)24. A principle of English law introduced to colonial states to override barbaric customs.

<sup>502</sup> 'Adolescents what is sexual assault Laurel house [http://laurelhouse.org.au/?page\\_id=8](http://laurelhouse.org.au/?page_id=8) (accessed 19 December 2016). Exposure to nudity is sexual abuse. When should parents stop changing clothes in front of children? Parenting beta at <http://parenting.stackexchange.com/questions/21617/when-should-parents-stop-changing-clothes-in-front-of-children> (accessed 19 December 2016).

<sup>503</sup> See the case of *Edet v Essien* 1932 11 NLR 47.

of child marriage since the practice can reasonably be said to be unnatural, unequitable and discriminatory against the girl child.<sup>504</sup>

The value of women in African society is also something that can be rediscovered.<sup>505</sup> Women and particularly mothers have always been a cherished and important part of all African cultures, not only protected by the men but having their own group identity and contributing to society.<sup>506</sup> In this light, the discrimination, lack of choice and lack of value of the girl child associated with child marriage can be said to be contrary to traditional African culture<sup>507</sup> as exemplified in the Igbo community and illustrated by the economic contributions made by women in precolonial Nigeria.<sup>508</sup>

This can be linked to the principle of dignity in African culture and tradition, and the fact that women were revered as mothers, accorded a place in society and included in decision-making.<sup>509</sup> Through rediscovering this value and practice, child marriage emerges as a custom that is contrary to the recognition and revered role of women in traditional Africa and a case can be made for its abolition.

Another aspect for rediscovery is the role and function of traditional leaders in African society.<sup>510</sup> These leaders had the function of settling disputes and administering justice in their societies, as seen in Eastern Nigeria and even the Yoruba community in the south west,<sup>511</sup> and till today they are the custodians of custom and in charge of the customary courts. Traditional

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<sup>504</sup> Sexual intercourse with a child cannot be said to be natural, even if it is argued that whose sense of reasoning justifies this, it is just obvious that sex with a child is not socially permitted anywhere. Again that is why even where child marriage is practiced it is when the child has attained maturity in the perception of the society.

<sup>505</sup> 'The role of women in African tradition' 18 October 2009 Blojlu's Blog <https://blojlu.wordpress.com/2009/10/18/the-role-of-women-in-african-tradition/> (accessed 19 December 2016).

<sup>506</sup> As above. AC Diala 'A revisionist viewpoint of African customary law and Human Rights in the context of South Africa's multicultural Constitution' being a lecture at the University of the Western Cape, 30<sup>th</sup> Sept -1<sup>st</sup> Oct, 2013.

<sup>507</sup> As above. Argued as a fall out of formal laws from the European patriarchal community, although existed in precolonial Africa, it was not pronounced. It was in the then England that women were kept at home to raise and rear children and the practice of house wife developed, it was not African practice.

<sup>508</sup> As above.

<sup>509</sup> Musoko et al. (n 466 above) 90.

<sup>510</sup> P Martin and B Mbambo (n 291 above) 16, 90

<sup>511</sup> K Werner 'Rediscovering Indigenous peacebuilding techniques; The way to lasting peace' (2010) 3 *Africa Peace and Conflict Journal* 60.

leaders can be given the responsibility of correcting negative aspects of culture based on their knowledge of original culture.<sup>512</sup> They can also contribute in the form of advocacy, living their own prescripts, reforming culture for society as respected leaders, and censuring undesirable behavior and practices.<sup>513</sup>

The fact that customary laws are not documented can be leveraged in the interest of social development. Since there are no written rules to say that girls should be married off when still children, it could be argued that the socially accepted norm should be jettisoned in order to support development. This principle was considered in the case of *Shilubana v Nwamitwa*.<sup>514</sup> Research also shows that there is no customarily specified marriageable age and that the rationale behind child marriage is to settle a girl who has reached puberty and is therefore reasonably believed to be ready for motherhood and marriage with a husband before she loses her value as a wife through being violated.<sup>515</sup>

As previously mentioned, traditional societies could only rely on repeat events or moon phases to calculate age, hence the use of puberty as measure a girl's readiness for marriage but times have changed and chronological age can now be accurately recorded and counted.<sup>516</sup> Cultural practices are also amenable to development, and difficulties in ascertaining age are no longer a tenable excuse for the marriage of underage girls.<sup>517</sup> Society should move on and on the basis of the same best interest principle now adopt a reasonable minimum marriageable age.

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<sup>512</sup> Musoko et al. (n466 above) 90.

<sup>513</sup> Diale (n above)

<sup>514</sup> (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)

<sup>515</sup> A girls right to say no-working to end child marriage and keep girls in school(2013) 26-18, Plan Ltd UK.

<sup>516</sup> 'Establishing a minimum age of marriage' UN WOMEN <http://www.endvawnow.org/en/articles/616-establishing-a-minimum-age-for-marriage.html> (accessed 19 December 2016).

<sup>517</sup> Process of change [http://anthro.palomar.edu/change/change\\_2.htm](http://anthro.palomar.edu/change/change_2.htm) (accessed 19 December 2016). 'Traditions old and new Worldwatch Institute' <http://blogs.worldwatch.org/transformingcultures/contents/traditions/> (accessed 20 December 2016). 'Harmful traditions must change' Graca Machel Trust [http://www.gracamacheltrust.org/new/index.php?option=com\\_content&view=article&id=12&catid=9&Itemid=155](http://www.gracamacheltrust.org/new/index.php?option=com_content&view=article&id=12&catid=9&Itemid=155) (accessed 20 December 2016) 'Why tradition is a poor excuse or unethical practices' 13 February 2014 <http://www.onegreenplanet.org/animalsandnature/why-tradition-is-a-poor-excuse-for-unethical-practices/> (accessed 20 December 2016).

In terms of customary practice as an instrument for change, original customs which are not harmful or which have benefitted from modern advances can be adapted to contribute to the eradication of child marriage. There are examples of places where positive customary practices have been adapted on the basis of modern advances.<sup>518</sup> For example, medical procedures can now replace traditional male circumcision rites, and even female circumcision if necessary, in order to save lives.<sup>519</sup> Customary practices can also be regulated, as is now happening with the rite of passage of boys in South Africa.

Nwambene and Sloth-Neilsen are of the opinion that there should be benign accommodation of the positive aspects of culture, and that South African law should recognise those forms of ukuthwala which require the consent of the “bride”.<sup>520</sup>

Ibhawoh states that “It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or reintegrated with national legislation to promote human rights....”<sup>521</sup> Notwithstanding constitutional rights however, this thesis is of the view that any custom which is obviously and clearly discriminatory, does not qualify for salvaging or retention and should be eliminated.

In the case of *Christian Education of South Africa v Minister of Education*,<sup>522</sup> the Constitutional Court of South Africa held that the rights of members of communities who associate on the basis of language, culture and religion cannot be used to defend practices which contravene the Bill of Rights.<sup>523</sup>

Where possible, the principle of substitution can be applied to some customary practices. A practice can also be substituted with one that is not

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<sup>518</sup> As above

<sup>519</sup> Musoko et al.(n 466 above)60

<sup>520</sup> Mwambene & Sloth-Nielsen (n 307 above)22,

<sup>521</sup> B Ibhawoh ‘Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state’ (2000) 22 *Human Rights Quarterly* 838 839.

<sup>522</sup> 2000 4 SA 757 (SCA) 711, para 26.

<sup>523</sup> As above. T Maseko ‘The constitutionality of the state’s intervention with the practice of male traditional circumcision in South Africa’ (2008).

harmful, such as has happened with female genital mutilation in Senegal through the Tostan practice.<sup>524</sup>

In societies where the practice is valued, child marriage can be substituted by something such as a marriage that is delayed until the girl is of age and can consent to the marriage or revoke it.<sup>525</sup> A similar provision already exists in Islam in that a girl can divorce her husband when she comes of age.<sup>526</sup>

By applying by-laws, customary law can be used to prohibit child marriage. Traditional leaders themselves prohibit harmful customary practices through the government office in charge of customary by-laws. In Nigeria there are local government offices which deal with local government functions such as by-laws.<sup>527</sup>

Through law making, legislators can reform and bring customary law into alignment with constitutional principles, particularly those relating to human rights and the statutory laws of the land. In the case of *Bhe and Others v Magistrate Khayelitsha and Others* case.<sup>528</sup> The judiciary can also interpret legal provisions on the basis of principles that are found in customary laws and do not contravene international human rights provisions.<sup>529</sup>

It is possible to harmonize customary and or Islamic law with human rights.<sup>530</sup> Firstly, international provisions are not in opposition to the culture or religion of particular individual or societies.<sup>531</sup> This can be seen in the provisions for the recognition of culture in some documents like the International Covenant on Cultural Economic and Social Rights. It can also be deduced from provisions on the definition of child in the UN Charter on the Rights of Children.<sup>532</sup> Most of the African regional instruments reflect

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<sup>524</sup> As n 469 above.

<sup>525</sup> As above

<sup>526</sup> Shah (n 45 above) 7

<sup>527</sup> S7 Constitution of the Federal Republic of Nigeria 1999

<sup>528</sup> 2005 (1) BCLR 1 (CC)

<sup>529</sup> As above

<sup>530</sup> D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' 2008) 12 Law, *Democracy and Development* 79-80.

<sup>531</sup> Nwabene & Nielsen(n 307 above)11

<sup>532</sup> Definition of a child, Art 1 CRC

the understanding of the acknowledgement of the culture of the people within the continent.<sup>533</sup>

It is thus clearly possible to harmonise African customary law with international standards prohibiting harmful customary practices.<sup>534</sup> This is because it can be deduced that it is the intention of both to protect children from sexual abuse and exploitation.<sup>535</sup>

### **3.12 Summary and conclusion**

The issues and arguments surrounding child marriage have been identified and analysed, in particular marriage itself, sexual abuse, the girl child, and the age factor in terms of capacity and consent to sexual intercourse. In interrogating child marriage as a form of sexual abuse, case studies of the sexual experiences of child brides in Nigeria were used to illustrate the role and repercussions of capacity, consent, force and harm. The causes, meaning, underpinning principles, effects and legal implications of child marriage have been analysed, including cultural and religious perspectives, and various sociological ways of supporting the eradication of the practice explored.

Linked as it is to procreation, marriage is an important part of every society and has significance for individuals, families and communities, particularly in African traditional society. Child marriage is a nonconsensual union in the sense that the child spouse lacks the capacity to consent to the marriage and to the sexual intercourse the follows. The sexual act which occurs within child marriage can be argued as being criminal. It is so because it is an act of sexual abuse except for the fact that the social acceptance of the practice or institution does not perceive the act as such which makes the culprits go free.

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<sup>533</sup> As above

<sup>534</sup> Olowu (n 530 above) 79-80

<sup>535</sup> AC Diala 'A revisionist viewpoint of African customary law and Human Rights in the context of South Africa's multicultural Constitution' being a lecture at the University of the Western Cape, 30th Sept -1st Oct, 2013.

Child marriage is the union between a much older man and a girl child who is not matured physiologically or psychologically enough to understand or give consent to the marriage. It is brought about by poverty, patriarchy and religion and kept alive by the applicable laws recognized by society which either prohibit it or simply by not having clear provisions on it. It is argued as religious and or cultural in several places but proof of research does not agree on all fours with these arguments. Being a form of sexual abuse it contravenes the provision of human rights of the child, her right to health to life, to dignity and to nondiscrimination and as a form of forceful intercourse it is a criminal act of statutory rape or defilement. Hence it is a legal issue on several areas: human rights, criminal law, international law, jurisprudence, family law, constitutional law as well as encircling areas of health, sociology, religion, politics and government.

The effects of child marriage are pain and trauma experienced in fulfilling the wife responsibility for the girl child, which in itself is against morals and the open celebration of it against public morals and decency or has brought about issues against public morals. Other effects include girl child illiteracy, teenage and early pregnancy, VVF, maternal mortality and morbidity, HIV/AIDS which are all public health issues and general underdevelopment. All these are common features in the areas of its predominance in Northern Nigeria where it also be said to affect the defense and security of other people and society at large.

In this wise, it presents symptoms on the individual girl bride, the group or class of girl children, the children they bear, the family, the society and the Country. In the long run it impacts on the global world at large and thus necessitates governmental intervention through legislation and engagement of other social interventions.

The problem of child marriage can be solved by applying some legal or sociological methods. The sociological aspect of advocacy, dialogue, poverty eradication, education, empowerment for girls and women, special innovative programs to encourage girl education and motivations for parents



among others are some of the methods. Attempt to eradicate ignorance on the issue especially on the negative effects and clarity on the arguments of its cultural and religious affiliations through the help of traditional and religious leaders can bring about the desired change. Non Governmental Organisations can also assist with programs as they have been doing.

It is also possible to attempt the eradication of child marriage through an explorative, innovative method of applying cultural practices and or cultural principles. The principles of best practice, rediscovery, substitution, prohibition, modification, adoption, adaptation, development alongside with the attempt of Bye Laws as promulgation from the customary leaders are suggested for the intended change.

These explorative measures would require the provision of formal or substantive laws to give them effect or legality which is the link of this thesis with the aspect of using culture to attempt the eradication of child marriage.

## **CHAPTER FOUR**

### **Domestic laws for the protection of the girl child against child marriage in Nigeria**

#### **4.1 Introduction**

The chapter contains 19 sections. The first section discusses the Nigerian legal system generally. The second section discusses English law in Nigeria. The third section discusses customary law in Nigeria. The fourth section discusses Islamic law in Nigeria. The fifth section discusses judicial precedence in Nigeria. All these sections are discussed alongside their provisions on marriage and their connection to child marriage.

The sixth section discusses judicial institutions and the police. The seventh section discusses the constitution of Nigeria and analyses its contents as compared to other jurisdictions on fundamental human rights and the issues of culture and religion. The eighth section discusses legislation in Nigeria. The ninth section discusses the protection of the girl child against child marriage under the Nigerian constitution specifically.

The tenth section discusses the protection under the marriage and the Matrimonial Causes Act. The eleventh section discusses the protection under the Child Rights Act. The twelfth section discusses the protection under the Criminal provisions of the criminal and penal codes. The thirteenth section discusses the protection under the NAPTIP (National Agency for the Prohibition of Trafficking of Persons).

The fourteenth section deals with the provisions of the Prohibition of Violence against persons Act. The fifteenth sections deals with policies that are related to the issue of child marriage in Nigeria. The sixteenth section deals with other institutions apart from the court and Police which provide protection for citizens. The seventeenth section discusses the evaluation of

the legal protection against child marriage in Nigeria. The last section is the summary and conclusion.

## 4.2 The Nigerian legal system

A legal system is a legal order or operational set of legal institutions, procedures and rules through which a nation's law is expressed.<sup>1</sup> It is the established organisation of the laws of a country that comprises its laws, provisions, practices, procedures, institutions and generally every aspect relating to matters of the law in the country.<sup>2</sup>

Olong<sup>3</sup> defines a legal system as the law of any country considered from the perspective of the unity of the norms that constitute it and their demarcation into major and minor groups, each with its own stable and unique character and all forming an integrated whole.

The Nigerian legal system classified under the common law system is plural in nature.<sup>4</sup> Onokah<sup>5</sup> defines pluralism as the state of being plural, a condition whereby a political, cultural or social system comprises a multiplicity of autonomous but interdependent groups. He cites Nigeria as

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<sup>1</sup> SM Mitchell & EJ Powell *Domestic law goes global: Legal traditions and international courts* (2011)20 The term "legal system" refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction. W Tetley *Mixed jurisdictions : common law vs civil law (codified and uncoded)* at <http://www.cisg.law.pace.edu/cisg/biblio/tetley.html> (accessed 22 January 2017). A Bajpai, *Legislative Reform in support of Children's Rights* (2012) 9-10, final curriculum framework, UNICEF, New York <https://old.unicef.es/sites/www.unicef.es/files/recursos/legislative-reform-in-support-of-children-rights.pdf> (accessed 22 January 2017).

<sup>2</sup> As above. CN Okeke 'International law in the Nigerian legal system' (1997) 27 *cal.w. Int'l LJ* 312. There are various definitions for a legal system, it can be defined as an operative set of legal institutions procedures and rules which refers to the nature and content of the law generally, the structure and methods whereby it is legislated upon, adjudicated upon and administered within a given jurisdiction or in another sense it is the manner in which law is administered It is a system or body of laws for interpreting and enforcing the laws, it is also the mechanism or procedure for creating, interpreting and enforcing laws in a given jurisdiction which also elaborates the rights and responsibilities in a variety of ways.

<sup>3</sup> AM Olong *The Nigerian Legal System* (2007)1-2

<sup>4</sup> JO Asein *Introduction to Nigerian legal system* (2005)3-5. Pluralism is a major feature of African legal systems, as to source and practice. Pluralism is a system or form that derives from the principle of legal administration which holds that different law coexist in a particular state, although all laws are recognized by the state, some are norms and rites practiced by non-state actors including religious and customary institutions but are accepted as law by their recognition by the state either through normative recognition of the substantive provisions of customary or religious law as law or and through the recognition of their institutions in which the actions of Customary institutions are considered enforceable. An example of this is the entrenchment of the establishment of customary and religious courts in a country's constitution and the position allocated them in the judicial hierarchy as in the case of Nigeria.

<sup>5</sup> MC Onokah *Family law* (2012) 3.

an example of a situation where members of diverse ethnic, religious or social groups autonomously participate in a common society in promoting their traditional cultural or special interests.<sup>6</sup>

According to Oba,<sup>7</sup> Nigeria is pluralistic in terms of ethnicity, religion and laws as a result of the multifarious legal traditions and cultures that are associated with customary, Islamic and English law. This diversity of legal traditions could be seen as a result of the country's federal system, whereby legislative power is shared between the federal and state governments, and the differences between federal and state laws and the laws of the various individual states.<sup>8</sup> The country's legal pluralism may also be linked to the country's political history and the regionalism from which its laws originate.<sup>9</sup>

The influence of British law is also very evident in Nigeria's legal pluralism due to the fact that the country was formerly a British colony.<sup>10</sup> English common law applies side by side with customary and Islamic law, particularly in the area of personal family law and the related issues of marriage, custody, maintenance and adoption.<sup>11</sup>

Legal pluralism can also be seen in the existence of different court systems catering for different issues in the legal system.<sup>12</sup> However, although the Nigerian legal system does comprise different court levels, they do not deal with different legal issues.<sup>13</sup> The court systems that exist are the statutory or English courts, the customary courts and the Islamic courts, while the court levels are the higher and lower courts, otherwise known as the federal and the state courts on the basis of the country's federal system of

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<sup>6</sup> As above.

<sup>7</sup> AA Oba Religious and customary laws in Nigeria (2011) *Emory International Law Review* 881-882.

<sup>8</sup> As above

<sup>9</sup> As above.

<sup>10</sup> O Soyeju *Rudiments of Nigerian law* (2005) 14-15

<sup>11</sup> EI Nwogugu *Family law in Nigeria* (2001) lxxx. Onokah (n 5 above) 28. Onokah however sees this as duality rather than plurality because the customary and Islamic laws are contra distinct to the statutory laws on marriage and family issues.

<sup>12</sup> IO Agbede *Legal pluralism* (1991) 8.

<sup>13</sup> Soyeju (n 10 above) 44

government.<sup>14</sup> The federal courts, as per the Constitution of Nigeria, are the Supreme Court, the Court of Appeal and the federal High Courts.<sup>15</sup>

With marriage being the universal institution that it is, family law and marriage-related issues undoubtedly comprise a common area of interest for the state, the diverse religious and social bodies as well as the international community.<sup>16</sup> This is very evident from the variety of legal provisions of institutions and the establishment of disparate court systems which each have jurisdiction over a particular type of marriage.<sup>17</sup>

The legal pluralism in Nigeria is also evident in the legislative jurisdiction of the country's federal system<sup>18</sup> as explained by the second part of Oba's<sup>19</sup> definition of legal pluralism and by Onokah on family law and marriage-related matters.<sup>20</sup> According to Mbaya *et al*, law making in Nigeria can be done by the National Assembly or the States Assembly or can take the form of promulgation of by-laws by local government.<sup>21</sup> The Constitution decrees that laws with respect to customary and Islamic marriages fall under the

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<sup>14</sup> Asein (n 4 above) 7

<sup>15</sup> Constitution of the Federal Republic of Nigeria 1999. S230-235 for the Supreme Court, S237-248 for the Court of Appeal S249-254 for the Federal High Courts.

<sup>16</sup> When legal worlds overlap: Human rights, state and non-state law (2009) 46.

<sup>17</sup> As above. Nwogugu (n 11 above)lxxviii. Issues of marriage are normally categorized as personal, private and domestic, which is why individual personal law is allowed to govern the aspect of family law in many societies; this personal law could be religious or customary.

<sup>18</sup> IO Agbede *Themes on conflict of laws* (2001) 4.

<sup>19</sup> Oba (n 7 above) 883. In this aspect legal pluralism arising from the country's federal system whereby legislative power is shared between the federal and the state which has resulted in differences between federal and state laws as well as difference among individual states laws resulting in conflict of laws in the country as a whole. See S1 CFRN 1999, S4 CFRN 1999, S47 and S90 CFRN 1999, Second Schedule, Part 1 and Part 11, CFRN 1999.

<sup>20</sup> Onokah (n 5 above) 13.

<sup>21</sup> PY Mbaya et al. 'The process of law making in a presidential system of government: The Nigerian experience' (2013) 9 *Asian Social Science* 107. E Okon & A Essien *Law making Processes in Nigeria at the National and State Houses of Assembly* (2005) 20. This is true in the case of Nigeria, prior to the advent of colonialism when traditional rulers/Islamic rulers ruled over the people, they made laws or rather law was what was generally accepted by the people This is customary law, different from cultural practices by its sanctions which attend contraventions, it was in the form of ostracism This was different in the case of sharia laws. While customary law was unwritten, Islamic law was based on the Quran and the teachings and acts of the Prophet which were written and formed the Islamic or sharia laws With the coming of colonialism, English common laws brought with it statutes and case law, the end of colonialism and attainment of independence set the scene for the beginning of personal statutory laws that is Nigerian legislation, because prior to colonialism customary laws applied but it had no formal provision neither did it exist on any documentary form but in the heart and practices of the people.

legislative jurisdiction of the states, while legislative jurisdiction on statutory marriages is the responsibility of the federal House of Assembly.<sup>22</sup>

Overall, the formal sources of Nigerian law can be said to lie in where the laws are found, where governing legislation originates, the ways in which laws are made or come into being and in the written materials from which we obtain our knowledge of what the law is.<sup>23</sup>

The sources of Nigerian law are linked to the different orders which constitute the legal system, to wit English law, customary law and Islamic law,<sup>24</sup> and where legal provisions or rules are found, which is in the Constitution, statutory books of the federal and state legal systems and, in case law with judicial precedents, textbooks and law reports.<sup>25</sup> In addition, the domesticated provisions of ratified international law treaties can be seen as a source of law in Nigeria.<sup>26</sup>

With particular reference to child marriage in Nigeria, this chapter looks specifically at the legal provisions on marriage in statutory, customary and Islamic law in Nigeria, criminal provisions with respect to forced and nonconsensual intercourse, constitutional human rights provisions, access to justice in the case of infringed human rights, and the court system.

### **4.3 English law in Nigeria**

English law is generally made up of common laws, laws of equity and statutes of general application.<sup>27</sup>

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<sup>22</sup> Item 61, part 1, Second schedule, CFRN 1999.

<sup>23</sup> Soyeju (n 10 above) 13.

<sup>24</sup> Asein (n 4 above)4.

<sup>25</sup> As above. Soyeju(n 10 above)14.

<sup>26</sup> As above. Although when domesticated they become part of the domestic law as decided in the case of *Abacha v Fawehinmi* [2001] 51 W.R.N. 29

<sup>27</sup> Soyeju (n 10 above) 17-21. Common law is the legal tradition which evolved in England from the 11th century having its principles appear for the most part in reported judgments usually of the higher courts. Common law is based on unwritten English practices and customs, judicially acted upon as developed by the king bench of England, the court of common pleas, and the Court of Exchequer in the medieval period and translated into law. It was actually the decisions of common pleas, made by the judges on the dispute settlement common to all England that became precedents, hence common law and is also called case law. As for Equity, although different from common law, its history is traced to it, common law of the kings court were operated by a writ system but only claims that fell within the very few standard forms were taken, this rigidity left so many claimants without remedy, this brought about the evolvement of equity as cases without redress thru the common pleas

According to Asein,<sup>28</sup> the original meaning of common law was non-local law applicable to the entire country. It could also refer to laws created through custom or judicial precedent, i.e. case law as opposed to statutory law. Although common law and equity law are administered together they remain two different systems of rules. This is the situation in Nigeria where one of the common maxims of equity is *ubi jus ibi remedium*.<sup>29</sup>

Oba is of the opinion that through colonialism common law was established as the fundamental law in Nigeria superceding the numerous indigenous customary laws in the country including Islamic law.<sup>30</sup> This was done by means of the repugnancy clause which subjected customary laws to the test of compatibility with English standards on the basis of natural law, equity and good conscience.<sup>31</sup>

Some of the statutes and subsidiary legislation passed while Nigeria was still under British rule were repealed when the country obtained independence in 1960, while others are still in force.<sup>32</sup> At first the receiving legislation had

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were petitioned to the King whose senior legal officer and cleric called the Kings conscience (the lord chancellor) dealt with the matters on his behalf. By the end of the 14th century, petitions were addressed directly to the chancellor, hence the development of the two separate courts but because the system became costly by virtue of the Judicature Act of 1873, the court system was rationalized so that common law and equitable remedies could be awarded by the same court and where there was conflict the rules of equity prevailed. Statutes of general application: A statute is an Act of parliament, statutes are those laws passed by parliament, alongside common law and rule of equity law passed by British parliament were received into Nigeria with a date specification. Probably this was to have some rules in operation before the protectorate starts to pass her own which would have been reasonable anyway but some of them are still in force today, although some of them have been re-enacted as laws especially in the western region. See also Agbade (n 18 above)8-12. By Ordinance No 3 of 1863, the British imperialists established the English courts in Lagos colony, to execute the laws and custom. These English courts were given general jurisdiction to execute the (1) common laws of England (2) doctrines of equity as applicable in England (3) Statutes of general application as at 1<sup>st</sup> of July 1874 later varied to 1<sup>st</sup> January 1900 (4) local enactment (5) customary laws that were repugnant to natural law, equity and good conscience or incompatible with the law for the time in force.

<sup>28</sup> Asein (n 4 above)20, 102-104.

<sup>29</sup> Asein (n4 above) 104-107. This Latin maxim of equity means where there is wrong there is remedy. It stems from the fact that the law is there for the correction or remedy of wrongs and that it is equitable to provide remedies where there are wrongs.

<sup>30</sup> AA Oba 'Lawyers, Legal education and the sharia courts in Nigeria' (2004) 49 *Journal of legal pluralism*, 117. Oba (n 7 above) 887.

<sup>31</sup> As above.

<sup>32</sup>Asein (n 4 above) 107. British statutes operative in Nigeria fall into 2 groups, the ones that were made to apply directly to Nigeria by the order of the British government and those received into the Country by local legislation. In explaining this some legislations were necessary for effective administration in the colony and as running laws since the colony had unwritten customary laws, after independent via the independent Act of 1960 abolished the colonial laws validity Act of 1865 and provided that no Act of the United Kingdom passed on or before 1<sup>st</sup> Oct 1960 shall extend or be deemed to extend to Nigeria and also conferred powers on the Nigerian legislature to repeal and amend any act of UK parliament extending to the country. The other set of those statutes received into Nigeria by local legislation within the country e.g. The Interpretative Act No 61 of 1970, S45

problems of interpretation, first on the issue of the date and secondly because the interpretative act did not provide the meaning of general application of the statutes.<sup>33</sup>

A large number of English statutes have been pronounced generally applicable and are still in force in Nigeria<sup>34</sup> as far as local circumstances allow. An English statute is only held to be not applicable if its subject is not relevant in Nigeria,<sup>35</sup> not if its application is difficult or inconvenient.<sup>36</sup>

The Marriage Act and the Matrimonial Causes Act contain the provisions of English law on marriage in Nigeria. They include regulations with respect to capacity but not necessarily age. The required capacity in this case has to do with status and affinity in the sense of being single or widowed and there being no blood relationship between the intending spouses.<sup>37</sup> The two Acts also contain provisions relating to consent, specifically that both parties must consent to the marriage and that this consent must be voluntary.<sup>38</sup> In the case of either of the spouses being under the age of twenty one, the consent of the parents or guardian is required.<sup>39</sup>

Onokah is of the opinion that the interpretation of this provision and the fact that there is no common minimum prescribed marriageable age constitute a flaw in the two Acts and are evidence that they are predisposed

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which provided that Common laws, doctrines of Equity and Statutes of General Application in force in England on the 1<sup>st</sup> of Jan 1900, shall be in force in Lagos in so far as they relate to any matter within the exclusive legislative competence of the federal legislature shall be in force elsewhere in the federation.

<sup>33</sup> On the issue of the date, it is certain that it must have been in force in England as at 1<sup>st</sup> of Jan 1900 whether it has been subsequently repealed after that date or not by another English statute was decided in the case of *Young v Abina* 1940 6 WACA 180 and on the issue of general application which has burdened the courts, *Osbourne CJ in Att Gen v John Holt & Co* (1910) 2 NLR. In determining this put up 2 tests of by what courts is the statute applied in England and to what classes of community in England does it apply? In answering this, a statute will be of general application if on Jan 1 1900, the Act of Parliament was applied by all civil and criminal courts and to all members of the community.

<sup>34</sup> Examples are The Fraudulent Conveyance Act as decided in *Braithwaite v Folarin* 1938 4 WACA 76, The Conveyance Act 1886 in *Sanusi v Daniel* 1956 1 FSC 93, The Wills Act 1837 in *Thomas v De Souza* 1929 9 NLR 81, The Infant Relief Act 1874 in *Labinjo V Abike* 1912 5 NLR 81 and some others.

<sup>35</sup> *CF. Jex v McKinney* 1889 14 App Case 77

<sup>36</sup> *Lawal v Younan* 1961 NLR 245

<sup>37</sup> S11, S18 Marriage Act, also S3(a)(b) and (e) Matrimonial Causes Act 1970, the Matrimonial Causes Act provides for the invalidation of marriage where either of the party is not of marriageable age

<sup>38</sup> S3(1) (d) Matrimonial Causes Act

<sup>39</sup> S3 MCA 1970



to child marriage.<sup>40</sup> While in their defence it is argued that that they are English law and can therefore not be interpreted as supporting child marriage, this is in reality an example of the type of legislative conflict which allows for the continued perpetration of child marriage.<sup>41</sup>

#### **4.3.1 Statutory law and statutory marriage in Nigeria**

The provisions of enactment or legislations form statutory or written laws in Nigeria, for example the Constitution, the Evidence Act and the Criminal and Penal Codes as well as policies.<sup>42</sup> Some of these, such as the Marriage Act and the Matrimonial Causes Act, relate specifically to marriage, some like the Criminal and Penal Codes provide regulations on sexual relations<sup>43</sup> and yet others are provisions on procedural rules of court such as rules of admissibility of evidence.<sup>44</sup>

Marriage is one of the issues in Nigeria to which English laws apply through the Marriage Act and the Matrimonial Causes Act which regulate English type marriage and its related issues.<sup>45</sup> The important elements to highlight in these provisions are those of capacity and consent in terms of age and voluntary marriage.

The Marriage Act does not specify a marriageable age<sup>46</sup> and according to Nwogugu<sup>47</sup> this means that recourse must be made to the common law of England which stipulates the age of puberty, being fourteen years for boys and twelve for girls.<sup>48</sup> Although no marriageable age is prescribed, age plays

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<sup>40</sup> Onokah (n 5 above) 124.

<sup>41</sup> As above

<sup>42</sup> JO Obasohan 'Sources of law in Nigeria' in CC Ohuruogu & OT Umahi (eds) *Nigerian legal methods* (2013)103-104.

<sup>43</sup> The Criminal and Penal Codes are provisions on criminal liabilities and offences generally and include the criminal liabilities for sexual relations within the society.

<sup>44</sup> The Evidence Act.

<sup>45</sup> Onokah (n 5 above) 13, 115.

<sup>46</sup> As above 124. But provides that anyone who marries or assist anyone to marry a minor under 21years, shall be liable to 2 years' imprisonment. See S49.

<sup>47</sup> Nwogugu (n 11 above) 4

<sup>48</sup> As above. Also Harrod v Harrod 1854 1K&J4 69 ER 344

a very important role in terms of capacity to marry, in that a marriage in which either of the spouses is not of marriageable age is null and void.<sup>49</sup>

Not only is consent important, it must be voluntary, real and given without fraud or duress.<sup>50</sup> Although parental consent is required if one or both parties are under twenty one years of age, if it is not obtained, the marriage is not declared invalid.<sup>51</sup> The marriage must however be solemnized in a licensed place of worship by a recognised minister of religion<sup>52</sup> or in a marriage registry by a registrar of marriage.<sup>53</sup>

Statutory marriage recognises rights and duties of parties to a marriage, both jointly and severally.<sup>54</sup> One of these rights which creates a duty for the other has to do with sexual intercourse.<sup>55</sup> A marriage which is not consummated may be dissolved.<sup>56</sup>

Issues relating to a statutory marriage can be initiated or resolved at the High Court which has the original jurisdiction in this regard, while appeals go to the Court of Appeal.<sup>57</sup>

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<sup>49</sup> S3 (1) (d) (e) Matrimonial Causes Act 1970

<sup>50</sup> S3 (1) (d) (i) Matrimonial Causes Act 1970. *Mbonu v Mbonu* 1976 FNLr 57 where the petitioner claimed she was induced by fraud and duress to consent was held not enough to rebut the presumption that she consented willingly and voluntarily to the marriage.

<sup>51</sup> S33 (3) Marriage Act. S3 (1) Matrimonial Causes Act 1970 No 18 now LFN 1990 Cap 220 mentions marriageable age without a specific age. One thing is clear about statutory marriage, that is, it prohibits forced marriage as consent is a major requirement for it although consent can be two sides consent of the spouses and that of the parents. Unlike customary marriage, statutory marriage does not mandate parental consent except where one or both spouses are minors, but it mandates consent of the spouses.

<sup>52</sup> S21 Marriage Act. After due procedure of delivery of a certificate by the registrar of marriage or a license authorizing the marriage. As a result of law enlightenment, a lot of churches in Nigeria are now aware of these provisions as opposed to their earlier practice whereby each independent church issues its own church wedding certificate to the couple, a situation of conflict which creates a problem situation whenever the validity of the marriage comes up.

<sup>53</sup> As above. The Marriage Act provides stipulations as to the procedure place and time for this too.

<sup>54</sup> Onokah (n 5 above) 135-142. Legal recognition of duties and responsibilities of couples to each other both privately and in public, there are different laws for this, for example law of Contract or torts on the liabilities of spouses and even the law of evidence on whether spouses can testify for and against each other.

<sup>55</sup> EOC Obidimma & AE Obidimma 'Spousal rape in Nigeria: An aberration' (2015) 13 *International journal of African and Asian studies* 172. MA Umar et al. 'Legislating marital rape in Nigeria: Issues in Islamic and customary law marriages' (2016) 2 *Journal of Asian and African Social Science and Humanities* 49-50.

<sup>56</sup> S15 (1), (2) (a) Matrimonial Causes Act 1970 Cap 220, LFN 1990 where it is proved that the respondent has wilfully and persistently refused to consummate the marriage.

<sup>57</sup> S15 (1) MCA. MO Izunwa 'Divorce in Nigerian statutory and customary marriages: a comparative critique of grounds, procedures and reliefs attaching thereto' (2015) 3 *Peak Journal of Social Sciences and Humanities* 79. Primarily, statutory marriage is the English type marriage and requires the English type formal adjudication to determine its issues.

#### 4.4 Customary law in Nigeria

Customary law, defined in different ways by different authors, is also recognised within the Nigerian legal system.<sup>58</sup> According to Oba,<sup>59</sup> customary law is a combination of customs or habitual practices that are accepted by the members of a particular community as having the force of law by virtue of long usage.<sup>60</sup>

In *Oyewumi v Ogunesan*,<sup>61</sup> the Supreme Court affirmed customary law as being the organic and living law of the indigenous people of Nigeria regulating their lives and those of others. Being largely unwritten, it is not static but progressive in nature, and is regulatory in that it controls the lives of its subjects and transactions governed by it. It mirrors the culture of the people.<sup>62</sup>

As noted by Nwauche,<sup>63</sup> it is the assent of the people or community that grants customary law acceptability and enforceability despite its being unwritten. In *Buraimo v Gbamgboye*,<sup>64</sup> the court held that, since it is unwritten, the existence of customary law must be proved by knowledgeable

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<sup>58</sup> Soyaju (n 10 above) 14. This is also evidenced by the establishment of customary courts and power of legislation by its authorities in the Nigerian Constitution particularly on the issue of marriage.

<sup>59</sup> Oba (n 7 above) 886.

<sup>60</sup> As above. These are the laws of the indigenous locals in the country. It is a body of unwritten laws that are kept on by observances and practices. Being the code of law of indigenous communities before the onset of colonialism, it is the starting point of legal history even for Nigeria. Because there are numerous tribes and ethnic groups each with its own indigenous customs, and practices, although with similar nature and characteristics, customary law in Nigeria varies from place to place, neither is it fixed or uniform, this fact underlies its uniqueness as law. This however brings the connotation of the difference between practice and law. Because it is basically seen in practice there is the difficulty of the ability to distinguish between it and custom or practices. At the onset of colonialism in Nigeria, the colonial masters introduced their law which was applicable to British citizens and the foreign nationals subject to them while customarily law applied to the natives of Nigeria. English law was first introduced to the colony through Lagos first in 1863 and then to the whole country in 1900. Customary law then could be applied by customary court as well as the English courts. This is also the difference between customarily law and Islamic law. S16 Evidence Act.

<sup>61</sup> 1990 3 NWLR 182

<sup>62</sup> As above

<sup>63</sup> ES Nwauche 'Civil Questions Involving Customary Law as the Basis of Appellate Jurisdiction in Nigeria' (2015) 11 *Acta Universitatis Danubius Juridica* 40-41.

<sup>64</sup> 1940 15 NLR 139

witnesses and the frequency with which it arises in court must be such that it merits judicial notice.

Customary courts by default have knowledge of customary laws but this is also required for the other courts in terms of acknowledging and taking judicial notice of their existence.<sup>65</sup> However, in order to be judicially enforceable, a customary law also has to pass the repugnancy test of natural justice, equity and good conscience.<sup>66</sup>

The cases of *Mojekwe v Mojekwe*<sup>67</sup> and *Mojekwu v. Ejikeme*,<sup>68</sup> in which courts reached different decisions on the same points of customary law, illustrate the uncertainties involved, even in the repugnancy test.<sup>69</sup> Kiye<sup>70</sup> argues that the repugnancy doctrine already limited the application of customary law by imposing a foreign culture on the then British colony. He cautions that the judiciary should appeal to the Constitution and conduct a sociolegal analysis before striking out any customary law. He also calls for an interpretative approach to the law that will ensure the survival of customary law.<sup>71</sup>

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<sup>65</sup> Asein (n 4 above) 120.

<sup>66</sup> Asein (n 4 above) 129. Two distinct issues evolve from the validity and enforceability, to be valid it must be proved to exist as a matter of fact and by judicial notice and then to be enforceable it must pass the repugnancy test. Despite the repugnancy test which is criticized for attempts to stagnate customary law, the laws still apply, notwithstanding the inconsistencies because the repugnancy test is subjective. These discrepancies have been noticed in some cases that appeared before the courts in their attempt to apply the repugnancy doctrine.

<sup>67</sup> [1997] 7 NWLR 283. The Nigerian court refused to enforce or recognize an existing *oli-ekpe* custom which permitted the nephew of a deceased to inherit the deceased property against his surviving female child/children where he had no surviving male child, for being repugnant to natural justice, equity and good conscience.

<sup>68</sup> (2000) 5 NWLR (pt. 657) 402 where it was testified thus: "The *Nrachi* Ceremony is done to enable a daughter bear children in her father's compound in order that the children if males will represent the father of the mother. Such children if males, will inherit the mother's father's property." Thus *Nrachi* may be seen as the customary equitable intervention to cure the mischief in *Oli-ekpe*, yet it is still repugnant to natural justice, equity and good conscience.

<sup>69</sup> RA Onuoha 'Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue' (2008) 10 *The International Journal of Not-for-Profit Law* <http://www.icnl.org/research/journal/vol10iss2/art 4.htm> (accessed 27 December 2016). Customary law continues to apply in the country despite the challenges of modernity which has been numerous and more glaring in the aspect of its discriminatory treatments of women and children and in some ways that may not stand the English test of repugnancy. Yet being part of the constitutionally recognized law, it cannot be easily discarded. Although this category of people would seem to fare better and be treated better under the received law than customary law, hence there has been justified agitation for a gender equal interpretation of customary law.

<sup>70</sup> ME Kiye 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' (2015) Vol 15 *African studies Quarterly* 85

<sup>71</sup> Kiye (n 70 above) 98.

#### 4.4.1 Customary marriage in Nigeria

Customary marriage refers to a marriage performed according to the customs of the people and is essentially the union of a man and a woman for the duration of their lives that involves a wider association between two families or set of families.<sup>72</sup> It is recognised by the law as valid, perfect and complete.<sup>73</sup> As in the case of statutory marriage however, for a customary marriage to be deemed valid, it must meet certain requirements in terms of consent<sup>74</sup>, capacity<sup>75</sup>, bride price and giving away.<sup>76</sup>

Generally, no marriageable age is prescribed for customary marriage other than that the couple, and particularly the bride, must have reached puberty.<sup>77</sup> In Nigeria, customary marriageable age varies from tribe to tribe and in some states it is written into law.<sup>78</sup> Some of the Northern Nigerian states which have provisions on marriageable age are Biu where it is fourteen years, Idoma where it is twelve years and Borgu where it is thirteen years. In Tiv, the requirement is the attainment of puberty.<sup>79</sup> The provisions

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<sup>72</sup> Onokah (n 5 above) 69. Or a man and two or more women as polygamy is recognized and accepted in customary marriage as opposed to the monogamous union of statutory marriage. This is a major difference between statutory and customary marriage, the involvement of families.

<sup>73</sup> Nwogugu (n 11 above) lxxxv

<sup>74</sup> Onokah (n 5 above) 83. Consent was twofold, first was that of the parents of the couple and second that of the couples themselves, on parental consent it could be that of the family or the direct parents, and the consent of the bride's parents was always very important. *Savage v MacFoy* parental consent received judicial recognition. In *Obasi & Ors v Obasi* 1979 ISLR the court held that the non-participation of the girl's mother in the customary marriage did not invalidate the marriage, in the case of *re Sapara* 1911 Renners Gold Coast Reports, 605, the emphasis was on family consent.

<sup>75</sup> Onokah (n 5 above) 74-78. Capacity is not just about age but acceptability for marriage, age was immaterial under customary law hence child marriage was permitted, age was the attainment of puberty which could be reached variously by individuals depending on the physical development of the young person. What was actually important was the ability to have children, this system set a flexible minimum age, where the issue of underage was raised the proposed marriage would normally be postponed, the actual age was immaterial. In *Savage v Macfoy* 1909, Renners's Gold Coast Report, capacity was an issue of nationality not age.

<sup>76</sup> Nwogugu (n 11 above) 51-58

<sup>77</sup> Nwogugu (n 11 above) 43.

<sup>78</sup> Nwogugu (n 11 above) 44. This came by legislation with the coming of colonial government, erstwhile there were no written laws, and for some places alone particularly where child marriages existed in great number then, 16 in the east, see Eastern States age of marriage Law 1956 cap 6 laws of Eastern Nigeria 1963, no marriage age is prescribed in Yoruba land in any legislation, as long as the parties are matured.

<sup>79</sup> Native Authority (Declaration of Biu Native marriage laws and custom) Order 1964 S1(a), Native Authority (Declaration of Idoma Native marriage law and custom) Order 1959 S2 (1) (a). Native Authority (Declaration of Tiv Native marriage law and custom) Order 1955 S2(a). Native Authority (Declaration of Borgu Native marriage law and custom) Order 1961 S2(1) (a). These were the laws on marriageable age until the Child Rights Act in States that have adopted it.

of these laws tend not to be respected however despite their contravention being punishable in some cases.<sup>80</sup>

In traditional societies marriage was a family affair and families were involved in the search for a suitable spouse, particularly a suitable bride for a son, as well as negotiations and wedding arrangements.<sup>81</sup> Child betrothals were common and the consent of the children was not relevant, with the consent the girl's parents outweighing that of the girl herself, even when she was of age.<sup>82</sup> The advent of English law changed this practice however.<sup>83</sup> Consent however refers to where the parties are adults and can reasonably be seen to have the capability to give consent.

Even in Northern Nigeria where the marriageable age is low, consent is still a requirement under customary law.<sup>84</sup> Parental consent is very important and sometimes mandatory, especially the consent of the father of the bride.<sup>85</sup> The courts acceded to the requirement for parental consent in *Okpanum v Okpanum*.<sup>86</sup> Some states such as Lagos and certain mid-western states have laws that waive the requirement for parental consent if the bride is older than eighteen, particularly in cases where the parents adamantly refuse to give their consent.<sup>87</sup>

The bride price or dowry is an important part of a traditional marriage, as is its solemnisation or celebration which often involves traditional forms of prayer. The breaking of kola, libation and handing over of the bride to the groom and his family may also be important parts of the ritual.<sup>88</sup> In *Omoayo*

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<sup>80</sup> 'Does Nigeria have marriageable age?' 10 March 2016 Punch <http://punchng.com/does-nigeria-have-marriageable-age/> (accessed 27 December 2016).

<sup>81</sup> EE Maccoby *The two sexes: Growing up apart, coming together* (2003) 193. Mostly the family of the groom, even the father of the bride sometimes had no say especially if there were elderly people in his family whose duty it was to take it up. Although in *Osamwoyin v Osamwoyin* 1973 NMLR 26 consent of the parties was held necessary for a valid marriage under customary law.

<sup>82</sup> Onokah (n 5 above)88

<sup>83</sup> S3 (1) (d) (i) MCA 1970

<sup>84</sup> S1 (b) Biu Declaration, S2 (1) (b) Idoma Declaration, S2(b) Tiv Declaration and S2 (i) (b) Borgu Declaration. Unpublished: AM Gurin 'Comparative study of matrimonial law of Northern Nigeria with Emphasis on Islamic law' unpublished PhD thesis, Ahmadu Bello University, Zaria, 1991 173.

<sup>85</sup> Onokah (n 5 above) 84-85

<sup>86</sup> 1972 ECSLR 561

<sup>87</sup> Onokah (n 5 above) 87.

<sup>88</sup> Nwogugu (n 11 above)58

*v Badejo*,<sup>89</sup> the court held that for the marriage to be valid, the bride had to be formally handed over to the groom in the presence of the two families and witnesses, and accepted and taken away by the groom under Yoruba native law and custom.

Consummation of the marriage is essential for a marriage to be considered properly concluded and valid. Traditionally all the guests and the groom's family would be on standby to wait for the newlyweds to emerge from their bedroom with the outcome of the consummation.<sup>90</sup> Sexual intercourse to satisfy the desires of the husband is very important and<sup>91</sup>, even though he may be guilty of indecent assault, marital rape is not a consideration since the woman will not have been heard to say no or refuse.<sup>92</sup> Rape outside marriage is however frowned at.

Sexual intercourse is perceived as being largely for the purposes of procreation and as an entitlement in marriage as long as the customary requirements have been fulfilled.<sup>93</sup> Lack of consent does not imply rape or unlawful carnal knowledge.<sup>94</sup>

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<sup>89</sup> 1985 NCMLR

<sup>90</sup> 'Wedding tradition' Turkish culture Portal <http://www.turkishculture.org/lifestyles/ceremonies-536.htm> (accessed 27 December 2016). On the wedding night, a blood stained cloth was usually evidence of the maleness of the man and the chastity of the bride. This is usually followed by another celebration including gifts to the family of the bride where she was "met at home", "intact", "made a woman" by the husband that is she was a virgin until that night. Being customary, the rights of the husband usually superseded that of the wife especially in sexual matters. Customarily polygamous marriage was permitted in the first place to allow the woman space to wean the child without the husband's disturbance for sex because a second woman would be available to satisfy him sexually at this "break time" and when she was having her monthly period. All these symbolize the male right to sexuality as opposed to any right that is given or attributed to the woman.

<sup>91</sup> CO Moschetti *Conjugal wrongs don't make rights: International feminist activism, child marriage and sexual relativism* (2005)7

<sup>92</sup> S360 CC and in *Alawusa v Odusote* 1941 7 WACA 140

<sup>93</sup> P Kyali 'A Reflection on the African Traditional Values of Marriage and Sexuality' (2012) 1 *International Journal of Academic Research in Progressive Education and Development* 214

<sup>94</sup> EM Baloyi 'An African view of women as sexual objects as a concern for gender equality: A critical study' (2010) 31 *Verbum et Ecclesia*. Unlawful carnal knowledge is sexual non-consensual intercourse with an under aged girl is an offence- S221 CC but according S6 CC, as long as there is a marriage, intercourse with her by the husband does not constitute unlawful carnal knowledge. Lack of specific marriageable age in customary law permits the perpetration of child marriage where the girl especially may be under the age of 18 and the ceremony of marriage irrespective of her age and ability to consent or understand the implications entitles the husband to consummate the marriage or customarily reap the fruits of his entitlement in sexual intercourse which under the law is not an offence

All customary courts in Nigeria have original jurisdiction over matrimonial issues between persons married under customary law,<sup>95</sup> while the magisterial and high courts have appellate and supervisory jurisdiction with respect to customary marriage.<sup>96</sup> The high courts can revoke a judgement of the customary court and use any of the orders of certiorari, mandamus or prohibition against any customary court process.<sup>97</sup>

#### **4.5 Islamic law in Nigeria**

The religion of Islam was founded by the Prophet Muhammad (SAW) in Saudi Arabia in the 7<sup>th</sup> Century.<sup>98</sup> Around 647 AD, it expanded into North Africa and was the primary religion of the Hausa/Fulani in Nigeria<sup>99</sup> by the early 9<sup>th</sup> Century.<sup>100</sup> It was spread by Arab and Berber traders, the Almoravids, and itinerant Islamic scholars, following the trade route and becoming part of the history of the Kanem-Bornu Empire in pre-colonial West Africa.<sup>101</sup>

Islamic law, the religious law of the Muslims, otherwise known as Sharia,<sup>102</sup> is one of the world's greatest legal systems.<sup>103</sup> Partly written and partly unwritten, it is accepted by Muslims as universal, eternal and immutable.<sup>104</sup> There are two sources of Islamic law, the primary source being the Quran

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<sup>95</sup> S18 Customary Court Edict 1966 with the exception of East central states.

<sup>96</sup> See S18, 19, 29 High Court Laws of Lagos State for supervisory jurisdiction of High Courts.

<sup>97</sup> Soyeju (n 10 above) 65-66.

<sup>98</sup> 'The birth of Islam in Arabia' Historical atlas of the Mediterranean <http://explorethemed.com/mohammed.asp?c=1> (accessed 28 December 2016). Unpublished: RPD Miamingi 'Constructing a conception of childhood in Africa: A sociologic perspective' unpublished LLD thesis, University of Pretoria, 2014 25.

<sup>99</sup> 'Islam in Nigeria' Africa study Center Leiden <http://www.ascleiden.nl/content/webdossiers/islam-nigeria> (accessed 28 December 2016). History has it that it was the intermarriage of Arabs and the Berbers with local northern Nigerians that produced the Hausa/Fulani.

<sup>100</sup> Although there are claims that it was earlier probably around the 1<sup>st</sup> century, A prominent Muslim in Nigeria Abdul Adelabu said it came to sub-Saharan Africa and Nigeria around this time, Wikipedia, 13/06/2014

<sup>101</sup> Gurin (n 84 above) 20. This is one of the empires in history in the area which is now known as Nigeria.

<sup>102</sup> 'Understanding Islamic law' The Islamic supreme council of America <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/52-understanding-islamic-law.html> (accessed 28 December 2016). Sharia literarily means "the way to the watery place", as a law it is often described as a way of life, claimed to be a complete legal system of its own, governing every area of life like the general law and regulating the relationship between God and man and between man and man.

<sup>103</sup> 'The judicial system in Islam' Discover Islam <http://www.ediscoverislam.com/islamic-law-and-legal-systems/judicial-ruling-justice-rights-in-islam> (accessed 28 December 2016).

<sup>104</sup> IKE Oraegbunam 'Islamic Criminal Law and Constitutionalism in Nigeria: Any Lessons from Turkey?' (2015) 33 *Journal of law Policy and Globalisation* 33



and the hadith,<sup>105</sup> and the secondary source comprising the Ijma and the Qiyas, where the Ijma is the consensus and the Qiyas the analogy.<sup>106</sup>

There are two broad schools or divisions in Islamic law, the Sunni and the Shia, which differ in their attitude towards and acceptance of the secondary sources of Islam.<sup>107</sup> The Maliki School found in Nigeria falls under the Sunni division.<sup>108</sup> Although both the Sunni and the Shia are based on the same teachings of the Prophet, interpretations of his teachings and practices vary depending on the school and the founding teachers.<sup>109</sup>

As a law among the indigenous people of Nigeria before colonialism<sup>110</sup>, Islamic law applied as law of the indigenes of Northern Nigeria<sup>111</sup> and was therefore considered to form part of customary law.<sup>112</sup> With the advent of the British, it was actually classified as customary law.<sup>113</sup> In recent times, it has been argued that Islamic law is not customary but religious law (Sharia) and as such should be distinguished as separate type of law.<sup>114</sup>

The impact of colonialism on Islamic law has not been seen by all scholars as positive. Oba is of the opinion that the intention of the colonialists was to diminish Islamic law to the point of nonexistence, and it is true that they

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<sup>105</sup> The Quran is believed to be divine revelation while the hadith includes the utterances and actions of the holy prophet whose words and actions are claimed to be precedents. - Quran surat AZhab 33:21

<sup>106</sup> 'Islamic secondary sources' Quran message <http://quransmessage.com/articles/hadith%20FM2.htm>, (accessed 28 December 2016)

<sup>107</sup> 'Schools of thought in Islam' 24 January 2012 Middle East Institute <http://www.mei.edu/content/schools-thought-islam> (accessed 28 December 2016). 'What are the major similarities and differences in the different sects of Islam?' 10 June 2013 Interfaith leadership council of Metropolitan Detroit <https://detroitinterfaithcouncil.com/2013/06/10/what-are-the-major-similarities-and-differences-in-the-different-sects-of-islam/> (accessed 28 December 2016).

<sup>108</sup> Oba (n 7 above) 886. 'Maliki Law: The Predominant Muslim Law in Nigeria' Gamji <http://www.gamji.com/article4000/news4601.htm> (accessed 28 December 2016).

<sup>109</sup> 'What are the major similarities and differences in the different sects of Islam?' 10 June 2013 Interfaith leadership council of Metropolitan Detroit <https://detroitinterfaithcouncil.com/2013/06/10/what-are-the-major-similarities-and-differences-in-the-different-sects-of-islam/> (accessed 28 December 2016).

<sup>110</sup> AH Yadudu 'Colonization and the transformation of Islamic law in Nigeria' (1992) *journal of legal pluralism* 110-111. Islam was fully established as state law in the North by the arrival of the British on the shores of Nigeria practiced for only the Muslims but accommodated the local customs of the non-Muslims and probably this is why they both intermingled such that many times Islamic law and practice could not be easily differentiated from the culture of the environment it met on ground.

<sup>111</sup> As above.

<sup>112</sup> S2 Native Court Ordinance 1914. In the Northern Nigeria Native Court Law. 1956 section 2

<sup>113</sup> Yadudu (n 110 above) 109

<sup>114</sup> JA Yakubu 'Colonialism, customary and post-colonial state in Africa: The case of Nigeria' (2005) 30(4) *Africa Development* 219. The Alkalis or Islamic law judges had been enforcing the Maliki code. *Yinusa v Adesubokan Bello* 1968 NMLR 97

succeeded in changing its form and limiting its application.<sup>115</sup> Abikan concurs with Oba in this regard.<sup>116</sup> In pre-colonial times, Islamic law applied to the entire system of law in Nigeria but is now limited to the realm of personal law.<sup>117</sup>

It is Gurin's view that upon independence the Nigerian government should have reconstituted the law in order to return it to its former glory before the colonial reign.<sup>118</sup> However, the reconstruction of any legal system involves constitutional issues which cannot be dealt with hastily, and in the case of Nigeria, the Constitution is particularly rigid.<sup>119</sup> The legality of the present-day practice of Islamic law in Nigeria is also a controversial issue mired in vagueness and ongoing legal debate, despite the fact that even before independence the Nigerian Constitution recognised its existence and practice as part of the country's laws.<sup>120</sup>

As a communal institution, Sharia law consists of rules that regulate the lives of adherents of Islam, including and particularly on the aspect of marriage<sup>121</sup> which is important to Muslims as a foundation for the dissemination and promotion of Islamic beliefs and teachings.<sup>122</sup> For instance, Islam preaches against premarital sex, pregnancy outside wedlock and general promiscuity, and provides for death by stoning of persons convicted of these charges under its law.<sup>123</sup>

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<sup>115</sup>Oba (n7 above)892.

<sup>116</sup> Al Abikan 'The Application of Islamic Law In Civil Causes In Nigerian Courts' (2002) 6 *Journal of International and Comparative Law* 88-115.

<sup>117</sup> As above.

<sup>118</sup> Gurin (n 84 above) 173

<sup>119</sup> Soyaju (n 10 above)261.

<sup>120</sup> S10, S262(2), S42(1), S40 and S38, Constitution of the Federal Republic Nigeria 1999. These provisions are subject to various interpretations. GN Okeke 'Ambivalence of the 1999 Nigerian Constitution in matters relating to secularism: A Case for a Constitutional Review' (2013) 2 *International Journal of Humanities & Social Sciences* 67.

<sup>121</sup> Gurin (n84 above)170

<sup>122</sup> 'Importance of marriage from Islamic point of view' Islam Guidance [http://www.sibtayn.com/en/index.php?option=com\\_content&view=article&id=5192:importance-of-marriage-from-islamic-point-of-view&Itemid=1325](http://www.sibtayn.com/en/index.php?option=com_content&view=article&id=5192:importance-of-marriage-from-islamic-point-of-view&Itemid=1325) (accessed 10 November 2016).

<sup>123</sup> H Ibrahim & PN Lyman *Reflections of the new Sharia law in Nigeria* (2004)8 The case of Hauwa Ibrahim who was impregnated outside marriage and sentenced to death by stoning, a case in Northern Nigeria and the application of Sharia law which drew international community's attention is a case study on this.

The prohibition of premarital sex and conception outside wedlock is argued as being one of the major reasons for early marriage among Muslims.<sup>124</sup> Islam opposes cohabitation without marriage and is vehemently against sin with severe punishments despite internationally recognised individual human rights in this regard.<sup>125</sup>

Islamic law is the basis for the practice and recognition of Islamic marriage in Nigeria hence the link to its discourse in this thesis particularly as relates to its conception on age and consent to the marriage union which births the issue of child marriage in Nigeria.<sup>126</sup>

#### **4.5.1 Islamic marriage in Nigeria**

In Islam marriage is a religious duty, a moral safeguard and a social commitment.<sup>127</sup> Age is not irrelevant<sup>128</sup> but no specific age is prescribed other than the attainment of puberty or maturity.<sup>129</sup> At puberty, a girl is considered to be an adult and mature enough for marriage as she is assumed to be ready for childbearing.<sup>130</sup> Although Ijaiya is of the view that fifteen years is the generally accepted marriageable age, marriage of girls younger than this is not uncommon among Muslims.<sup>131</sup>

Consent is a requirement for marriage. While the parties must freely consent, parental consent is most important, particularly that of the father

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<sup>124</sup> S Eltantawi 'Between strict constructionist and protecting young girls in contemporary Northern Nigeria: The case of child marriage' in F Banda & LF Joffe (eds) *Womens rights and religious laws Domestic and International perspectives* (2016) 91.

<sup>125</sup> Ibrahim & Lyman(n 123 above) 8

<sup>126</sup> Eltantawi (n 124 above) 98

<sup>127</sup> NNNB Shah *Marriage and divorce under Islamic law* (2001) 1.

<sup>128</sup> Marriageable age is mentioned but not specified or minimum age is not prescribed so there is reference to age of marriage, Surah an-Nisa 4:6- Make trial of Orphans until they reach age of maturity: if then you find sound judgement in them, release their property to them, although this equated with the age of puberty i.e. when the girl starts to menstruate.

<sup>129</sup> Shah (n 127 above)6

<sup>130</sup> As above. In Northern Nigeria, where Islam is prevalent, it varies again across regions, in the north, age of marriage is between the second and third menstruation, in the north west and north central it is 14 years. This is decided by when the girl starts her period, At least this is the interpretation given to the Quran provision on age of marriage, such that the onset of period for a girl is maturity. Because of this, early marriage is predicted as religious in the North. Quran 65:4, M Taqi-ud-Al-Hilali & M. Mushin Khan, *Interpretation of the meaning of the Noble Quran in English Language* 2006.

<sup>131</sup> H Ijaiya 'Human rights: Gender discrimination against female children in Nigeria' (2006) 4 *Indian journal of human rights and justice* 6-7.

or guardian of the bride if she is a minor.<sup>132</sup> This is a teaching of the Maliki school of Islamic thought<sup>133</sup> which is recognised and practiced in Nigeria,<sup>134</sup> and the fact that it recognises that a minor may get married with the consent of her parents is cited as evidence that Islam permits child marriage.<sup>135</sup> This ijbar has however constantly been at the heart of different judicial decisions, even in Sharia courts. Shah argues that child marriage is not Islamic neither is it a requirement in Islam.<sup>136</sup>

In *Mairo Baba Nasidi vs Alhaji*,<sup>137</sup> the uncle of a fourteen year old girl had applied the ijbar and married her to a seventy year old man, tying her up to force her into the marriage when she refused. The girl and her mother took the matter to court where the marriage was upheld but the Sharia court of Kano found that the uncle was in the wrong. In *Alhaji Isa Bida vs Baiwa, daughter of Alh Isa Bida*,<sup>138</sup> a girl complained that her father refused to let her marry the man of her choice despite the fact that he had told her to bring the man she loved. The court held that the father had transferred the power of ijbar when he told the girl to bring the man of her choice and was therefore bound to allow the marriage.<sup>139</sup>

Consent is also relevant to the issue of sexual intercourse which is very important in Islamic marriage as the duty of the wife and the right of the husband.<sup>140</sup> A wife is expected not to refuse her husband's advances or deny him sexual satisfaction and doing so with no reasonable or justifiable excuse is deemed rebellion and grounds rescinding her right to maintenance.<sup>141</sup>

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<sup>132</sup>Shah (n127 above)19-20.

<sup>133</sup> As above. This is called Ijbar. The Islamic law school of Maliki actually provides for a father to consent on behalf of his underage daughter. *Promoting women's rights through sharia in northern Nigeria, centre for Islamic legal studies Zaria* (2005)10 there is a ruling of imam Malik that a father may compel his previously unmarried daughter to marry a man he chooses for her, although he loses this right if he allows the girl to make a choice from among her suitors.

<sup>134</sup> Oba (n7 above)886.

<sup>135</sup> Shah (n 127 above)19-20

<sup>136</sup> Shah (n127 above )12

<sup>137</sup> Unreported upper Area court, Kano, Sharia law report centre for Islamic legal studies vol 1 38

<sup>138</sup> Case N0 SCA/NWS/CV/47/70 Sharia law Report, vol 1, 85.

<sup>139</sup> As above

<sup>140</sup> HB Yusuf *Sexuality and the Marriage Institution in Islam: An Appraisal* (2005) 3.

<sup>141</sup> Gurin (n 84 above) 133-136

This means that her husband's sexual satisfaction is the marital and religious duty of every bride in Islam.<sup>142</sup> As in customary law, consent to marriage automatically means general consent to sexual intercourse without the need for it to be requested every time sex is demanded by the husband.<sup>143</sup>

The argument here is that Islamic law is believed to provide for the protection of children, including the child bride since it states that the consent of the spouses is mandatory if the marriage is to be considered valid.<sup>144</sup> In the Maliki school, a parent, and specifically the father, can consent on behalf of a minor but she has the right to rescind this consent when she comes of age. In this way her protection is guaranteed.<sup>145</sup>

However, although minors are not permitted to marry since they cannot give consent, it is argued that Islam requires capacity for a marriage to be valid,<sup>146</sup> with capacity being linked to the attainment of puberty which is held by some Muslims to be at the age of fifteen.<sup>147</sup> Despite these inconsistencies with respect to age, capacity and consent, it is believed that even present-day Islamic provisions in Nigeria protect the rights of children and are aligned with the provisions of international human rights.<sup>148</sup>

#### **4.6 Judicial precedence**

Judicial precedence is a source of law in Nigeria and is therefore discussed here as part of the country's legal system. Judicial precedent consists of law as found in judicial decisions.<sup>149</sup> Bello explains that a precedent can be

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<sup>142</sup> Gurin (n84 above)310

<sup>143</sup> As above

<sup>144</sup> Shah (n127 above) 14

<sup>145</sup> Gurin (n84 above)224. Although it does not prevent child marriage occurrence but at least provides an opportunity for her to opt out of it when she becomes an adult.

<sup>146</sup> Shah (n 127 above) 11-12.

<sup>147</sup> As above.

<sup>148</sup> D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 12 *Law Democracy and development* 66-69. M Uwais 'The rights of the Nigerian child' [www.ambafrance-ng.org/IMG/docx/presentation\\_maryam\\_Uwais.docx](http://www.ambafrance-ng.org/IMG/docx/presentation_maryam_Uwais.docx) (accessed 7 October 2014).

<sup>149</sup>Asein (n4 above) 73.

binding, declaratory, original and persuasive.<sup>150</sup> A binding precedent is one which must be followed by the court, a declaratory precedent is merely the application of an existing legal rule, an original precedent is one which creates or applies a new rule and a persuasive precedent is one which is not binding on a court but which should receive respect and careful consideration in deciding on a matter.<sup>151</sup>

Judicial precedent refers to the making of law by a court through the recognition and application of new rules in the process of administering justice.<sup>152</sup> Although there is general consensus that judicial precedents constitute a source of law, opinions differ on whether judges can create law or not. Steinman<sup>153</sup> is of the opinion that in interpreting law the judiciary also makes law. Bedi on the other hand holds that judges do not create law, they only interpret it, arguing that judges are officers of the judicial arm of government not the legislative one and that their constitutional function is to interpret laws, not make them.<sup>154</sup>

This is a longstanding controversy although logically, since judges, as the voice of the judicial arm of government, decide on the interpretation of law in the process of giving judgement, can be said to determine what the law is.<sup>155</sup> While not usurping the role of the legislature, the judiciary makes law by creating precedents, and this is necessary for the achievement of certainty in law as well as justice.<sup>156</sup> One can therefore conclude that it is

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<sup>150</sup> A Bello 'Binding precedent and sharia/ Islamic law in Nigeria: An Attempt at a civil-criminal distinction' (2009) *Islamic law and the law of the muslim world* Paper No 09-67 1 [http://ssrn.com/abstract=\[1397737\]\(accessed 17 November 2016\).](http://ssrn.com/abstract=[1397737](accessed 17 November 2016).)

<sup>151</sup> As above

<sup>152</sup> As above. V Fon & F Parisi 'Judicial precedents in civil law systems: A dynamic analysis' (2006) 26 *International Review of Law and Economics* 520.

<sup>153</sup> AN Steinman 'A constitution for judicial law making' (2004) 65 *University of Pittsburgh law review* 545, 547. He also cited Justice Oliver Holmes that "I recognize without hesitation that judges do and must legislate" in 547

<sup>154</sup> SRS Bedi *The development of human rights law by the judges of the International court of justice* (2007) 35.

<sup>155</sup> Justice Kenny 'Constitutional Role of the Judge: Statutory Interpretation' 15 March 2013 Federal Court of Australia <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20130315> (accessed 10 November 2016).

<sup>156</sup> Asein (n 4 above) 73. 'The role of judges- making law or not?' 15 May 2012 wordpress <https://gcalers.wordpress.com/2012/05/15/the-role-of-judges-making-law-or-not/> (accessed 10 November 2016).

incorrect to say that judges do not make law or to restrict their duties and functions to legal interpretation alone.<sup>157</sup>

While there is case law on marriage issues particularly on dissolution of marriages and especially on statutory marriages with some on customary marriages, there is dearth of decided cases on the issue of child marriage in Nigeria.<sup>158</sup> It is necessary to discuss here, the issue of jurisdiction and judicial institutions as it relates to marriage in Nigeria.

#### **4.7 Judicial institutions in Nigeria**

In the federation of Nigeria, judicial powers are vested in the courts<sup>159</sup> which are organised in a hierarchy.<sup>160</sup> Courts are classified as superior and inferior courts, courts of record and non-record, superior and subordinate courts and courts of coordinate jurisdiction.<sup>161</sup> Although the courts can also be categorised as federal or state courts, the country's judiciary consists of only one judicial hierarchy.<sup>162</sup>

##### **4.7.1 The superior courts**

The superior courts are courts with unlimited jurisdiction in terms of subject matter and the monetary value of cases.<sup>163</sup> As per S6(5) of the Nigerian Constitution, these start with the Supreme Court, the Federal Court of Appeal and the Federal High Court which is located in Abuja but also has divisions in each of the thirty six states. Each state or Federal

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<sup>157</sup> As above. It is a fact that the administration of justice involves the interpretation of existing laws relevant to the issue at hand before court, which each judge or court has the discretion to determine according to its understanding of the applicable laws to come to a decision that would affect the rights or status of the parties, where such decisions forms the basis for determining future cases with similar facts, the decision becomes a precedent, a rule or law as it may, it may therefore be concluded that judges in fulfilling their law interpretative functions, in coming to decisions, rules or new laws are created in the process, thus judges in their interpretation of existing laws can make new rules.

<sup>158</sup> 'Statutory law and child marriage in Nigeria' <http://www.okeyeni.com/2012/03/law-journal-006-statutory-law-and-child.html> (accessed 28 December 2016).

<sup>159</sup> S6(1) Constitution of the Federal Republic of Nigeria 1999.

<sup>160</sup> S6(5) Constitution of the Federal Republic of Nigeria 1999.

<sup>161</sup> Soyeju (n 10 above) 44-46

<sup>162</sup> Asein(n 4 above) 172.

<sup>163</sup> Soyeju (n 10 above) 44

Capital Territory (FCT) also has its own High Court, Sharia Court of Appeal, and Customary Court of Appeal.<sup>164</sup>

The Supreme Court is the apex of the judiciary in Nigeria.<sup>165</sup> It has no divisions or branches and has original jurisdiction on all matters between the federation and a state or between states as well as appellate jurisdiction from the Court of Appeal.<sup>166</sup> In *Governor of Kaduna v The President*,<sup>167</sup> the original jurisdiction of the Supreme Court was held to extend to individuals in their capacity as representative of a state, such as the Executive Governor of a state versus the President or vice versa.<sup>168</sup> In *Odojin v Olabanji*,<sup>169</sup> the Supreme Court was also held to have supervisory jurisdiction over inferior courts.<sup>170</sup>

Judicial precedence is not a feature of Islamic law, hence Supreme Court decisions have been criticised in the writings of some Islamic scholars,<sup>171</sup> examples being the cases of *Ndaguna Shaaba v Nda Mohammed*,<sup>172</sup> *Isiaka Lawal Ajia v Alhaja Adijat Oloduowo & Others*<sup>173</sup> and *Alh Issa Alabi v Alh Salihu Kareem*.<sup>174</sup>

The question of law regarding the issue of child marriage on the Child Rights Act and the non-complying Northern states may be a matter for the Supreme Court between the federal government and such erring state(s) but no such matter has not been brought before it. This omission as expected action by the government is one of the reasons why the government is faulted for the continuous perpetration of child marriage in Nigeria.

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<sup>164</sup> S6(5)(a)-(j) Constitution of the Federal Republic of Nigeria 1999.

<sup>165</sup> S235

<sup>166</sup> S232 Constitution of the Federal Republic of Nigeria 1999

<sup>167</sup> 1981 2 NCLR 786, the Lagos High Court held that all matters involving the exercise of executive powers, any dispute between a state chief executive and the president can only be adjudicated by the supreme court in its original jurisdiction.

<sup>168</sup> As above.

<sup>169</sup> (1990) 3 NWLR (Pt435)126

<sup>170</sup> As above

<sup>171</sup> Bello(n 150 above)1

<sup>172</sup> 2000 Kwara state sharia court of Appeal report 81 at 86

<sup>173</sup> 2001 Kwara state sharia court of Appeal report 100 at 102

<sup>174</sup> 2002 Kwara state sharia of appeal report 54 at 59



The Court of Appeal<sup>175</sup> is the next court in hierarchy. It has appellate jurisdiction on all matters from the state and federal high courts and the Sharia and customary courts of appeal. Its decisions are binding on lower courts but like the Supreme Court can choose which of its own conflicting decisions to apply in a case.<sup>176</sup>

The Court of Appeal exclusively hears and determines the issues of validity or constitutionality of elections to the office of president or vice president of the country, their term of office and its vacancies.<sup>177</sup> It is also the exclusive jurisdiction of the Court of Appeal to hear appeals from the Federal High Court, State High Courts, the Sharia Courts and other courts prescribed by the constitution.<sup>178</sup>

As a court of appellate jurisdiction, the Nigerian Court of Appeal may have little to do with the issue of child marriage. This is except in so far as it is a matter of human rights or otherwise it comes before it on appeal from a lower court. No such case has however been recorded in the country.

The state high courts<sup>179</sup> and federal high court<sup>180</sup> are courts of coordinate jurisdiction which differ only in the matters assigned to them by the Constitution and the court rules binding their operations. State high courts have jurisdiction on all criminal or civil matters, and the decisions of a high court are not binding on any other high court since they are of coordinate jurisdiction.<sup>181</sup> The Federal High Court has exclusive jurisdiction over federal matters as assigned by the Constitution and the rules of the court.<sup>182</sup> S251 of the Constitution also allows for the extension of the Federal High Court jurisdiction where applicable.<sup>183</sup>

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<sup>175</sup> S237 Constitution of the Federal Republic of Nigeria 1999

<sup>176</sup> In much the same way as the supreme court, particularly when the decision was reached per incuriam, and if it cannot stand the decision of the Supreme Court.

<sup>177</sup> S289 Constitution of the Federal Republic of Nigeria 1999

<sup>178</sup> S240 Constitution of the Federal Republic of Nigeria 1999

<sup>179</sup> S6(5) S270 Constitution of the Federal Republic of Nigeria 1999

<sup>180</sup> S249 Constitution of the Federal Republic of Nigeria 1999

<sup>181</sup> Matters of issues of existence and extent of legal rights, power, obligations, duties, liability etc.

<sup>182</sup> S251 Constitution of the Federal Republic of Nigeria 1999. John Adebileye & Anor v National Electric Power Authority & Anor (1998) 12 NWLR (Pt577)

<sup>183</sup> S251(q) and (s) provides that the federal high court has exclusive jurisdiction in civil causes and matters, (q) subject to the provisions of this constitution, the operation and interpretation of this constitution, in so far as it affects the federal government or any of its agencies: (s) such other

The concurrent jurisdiction of state high courts and the Federal High Court has been the source of debate and legal argument in many cases, and has specific relevance in this thesis to marriage and particularly child marriage as a fundamental human rights issues relating to the protection of the girl child.<sup>184</sup> It is however, argued that this is a largely immaterial contention brought about by the failure to distinguish between the status of the litigating parties and the subject of the litigation, since the law is clear on its provisions for the exclusive jurisdiction of the Federal High Court.<sup>185</sup> This was upheld in the case of *Inegbedun v Selo Ojemen*.<sup>186</sup>

It has been established that where both the federal and state high courts exist in a state, they have equal jurisdiction on issues of fundamental human rights,<sup>187</sup> as held in *Alhaji Shehu Abdul Gafar v Government of Kwara State & 2 Ors*<sup>188</sup> and *Umaru Abba Tukur v Government of Gongola State*.<sup>189</sup>

While there is no dispute about statutory marriage issues falling under the jurisdiction of the high courts as courts of first instance or original jurisdiction, child marriage as a fundamental human rights issue can raise the long debate about the concurrent jurisdiction of state high courts and the Federal High Court.<sup>190</sup> In this regard, a federal high court in Northern Nigeria refused a case on forced marriage holding that it did not constitute a human rights violation and that since it was an Islamic marriage, the Federal High Court did not have jurisdiction over the matter.<sup>191</sup> Dada was of

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jurisdiction criminal or civil and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly

<sup>184</sup> A Sanni 'Fundamental Rights Enforcement Procedure Rules 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *African Human Rights Law Journal* 517. JA Dada 'Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal' (2013) 10 *Journal of Law, Policy and Globalization* 5

<sup>185</sup> S251 Constitution of the Federal Republic of Nigeria 1999

<sup>186</sup> (2002) 12 NWLR (Pt 887) 415

<sup>187</sup> S46 (1) Constitution of the Federal Republic of Nigeria 1999. Fundamental Rights (Enforcement Procedure) Rules, Order 2, rule 2(2) and rule 2(3)

<sup>188</sup> (2007) CHR1.

<sup>189</sup> (1989) 4 NWLR (PT 117) 517

<sup>190</sup> E Essien 'The jurisdiction of state High Courts in Nigeria' (2000) 44 *Journal of African Law* 264-271.

<sup>191</sup> 'Nigeria court rejects forced marriage case' BBC News 22 Oct 2010 <http://www.bbc.com/news/world-africa-11607532> (accessed 11 March 2016).

the opinion that even magistrate courts should be allowed jurisdiction over human right issues.<sup>192</sup>

While constitutional courts have jurisdiction over issues of violations of the constitution in countries such as South Africa<sup>193</sup>, Zambia<sup>194</sup> and even Zimbabwe, in Nigeria there is no constitutional or other specific court to deal with such issues other than the federal and state high courts which have concurrent jurisdiction on fundamental human rights.<sup>195</sup> The Constitutional Court of Zimbabwe recently made a declaration prohibiting child marriage in the country on the basis of the provisions of the Marriage Act which holds the practice to be unconstitutional.<sup>196</sup>

The High Court also has appellate and supervisory jurisdiction over certain lower courts such as the Magistrate Court or district courts and the Upper Area Court on issues that do not involve Islamic personal law.<sup>197</sup> This supervisory jurisdiction could be exercised through the order of mandamus, prohibition, certiorari, quo-warranto and habeas corpus.<sup>198</sup>

The order of mandamus requires an inferior court or person to do what is specified in the order,<sup>199</sup> while prohibition stops an inferior court from continuing or proceeding with a case which is outside its jurisdiction.<sup>200</sup> Certiorari is used to remove any proceeding from an inferior court which has exceeded its jurisdiction and take it to the high court.<sup>201</sup> Quo-warranto is issued to stop a person from acting in an office in which he is not entitled to

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<sup>192</sup> Dada (n 184 above)15

<sup>193</sup> S167 Constitution of the Republic of South Africa

<sup>194</sup> Art 157 Constitution of Zambia 2016

<sup>195</sup> S46(1) Constitution of the Federal Republic of Nigeria 1999. Dada(n 184 above) 5. Fundamental human rights are provided in the Nigerian constitution, hence are constitutional issues but constitutional issues are much wider than fundamental human rights issue.

<sup>196</sup> Mudzuru & Anor v the minister of justice legal parliamentary affairs ccz 12-15

<sup>197</sup> For example S28 High Court Laws of Lagos State.

<sup>198</sup> Okeahialam v Nwamara (2003) 12 NWLR pt. 835, S18, 19, 20 High Court Laws of Lagos State.

<sup>199</sup> S18 High court law of Lagos state. Banjo & Others v Abeokuta Urban District Council 1965 NMLR 295

<sup>200</sup> S19 High court law of Lagos state. Perenanah v President Customary Court. 1987, 2 QLRN 266 and Williams v Dawodu 1988, 4 NWLR 189.

<sup>201</sup> Awe v General Manager Osun state water corporation 2001 32 WRN 53(CA)

act,<sup>202</sup> and habeas corpus is an instrument for testing the validity of a person's imprisonment or detention.<sup>203</sup>

Aside from this general supervisory control over inferior courts, there is the referral of questions of law to the jurisdiction of superior courts.<sup>204</sup> This is provided for in S295 of the Constitution in terms of the referral of any question on the interpretation or application of the Constitution. S295(1) is of particular importance as it provides for the referral of questions of law or interpretation of the Constitution to the federal or state high courts.<sup>205</sup>

This seems to imply that questions of law or interpretation of the Constitution relating to cases of child marriage can be referred to the high court in the jurisdiction where the issue arises from determination.<sup>206</sup> If this is the case, such court cannot deny its jurisdiction but must either execute its duties or refer the case to another superior court.

Questions of law on child marriage are largely about the interpretation of conflicting provisions in the Constitution or other legislation. While the federal and state high courts appear to have the necessary jurisdiction in this regard, no case on child marriage has yet been brought on referral for determination of such issues, neither has any been referred to a superior court.<sup>207</sup>

From the provisions of law on the jurisdiction of the federal and state high courts on human rights issue in Nigeria, it can be argued that both courts

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<sup>202</sup> S20 High court laws of Lagos state

<sup>203</sup> Soyeju (n 10 above) 65-67

<sup>204</sup> As above

<sup>205</sup> S295(1) Constitution of the Federal Republic of Nigeria 1999. Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, the Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or a High Court having jurisdiction in that part of Nigeria-----

<sup>206</sup> This might mean that these two courts-the federal and states high courts acts as the constitutional courts in the instance of the Nigerian state.

<sup>207</sup> Statutory law and child marriage in Nigeria 12 March 2012 <http://www.okeyeni.com/2012/03/law-journal-006-statutory-law-and-child.html> (accessed 28 December 2016). Wasila's case was one on murder not on child marriage. The case of Yerima which was supposed to appear before the Federal high court Abuja does not seem to have borne any fruit, obviously by reason of conflict of jurisdiction and legal provision. 'Nigerian court to hear child-bride case' 4 June 2010 IOL Africa <http://www.iol.co.za/news/africa/nigerian-court-to-hear-child-bride-case-486234> (accessed 10 November 2016).

may handle a case of child marriage brought under the violation of fundamental human rights.<sup>208</sup>

Established to handle cases involving Islamic personal law,<sup>209</sup> the Sharia Court of Appeal is a court of special but coordinate jurisdiction with the relevant High Court and Customary Court of Appeal<sup>210</sup> By virtue of S262(1) of the Constitution, this court has jurisdiction over marriages concluded in accordance with Islamic law, including the validity or dissolution of such unions and any matters relating to family relationships, as well as Islamic law relevant to a Muslim infant.<sup>211</sup> The Constitution thus already limits the jurisdiction of this court in terms of both subject matter and parties to the action.<sup>212</sup>

It is in terms of this provision that the Sharia Court of Appeal has particular relevance to the issue of child marriage where the marriage is an Islamic one and the girl is a Muslim child. An example that comes to mind is the abduction of Ese Oruru for marriage between August 2015 and February 2016 by one Muslim Yinusa.<sup>213</sup> Ese was reportedly converted to Muslim by virtue of the marriage. The case was brought before the Emir and the Sharia Court of the state, but it was determined that it was not a matter of Islamic marriage since the parents had not given consent and that it should be treated as a criminal case of abduction.<sup>214</sup> Where the girl's age and

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<sup>208</sup> 'Nigerian court rejects forced marriage case' 22 October 2010 <http://www.bbc.com/news/world-africa-11607532> (accessed 17 March 2013). Although it is said that it is the sharia court that has jurisdiction over matters contracted under Islamic law, these are areas of conflict of law which was brought up when a federal high court in the north refused jurisdiction on a case of forced marriage and said it was not one under fundamental human rights and that being an Islamic marriage, the sharia court was legally empowered to adjudicate over the matter. This conflict will be discussed properly in chapter 6 of this thesis.

<sup>209</sup> S 262 Constitution of the Federal Republic of Nigeria 1999.

<sup>210</sup> S6, 260 and 275 CFRN 1999.

<sup>211</sup> S262 (1) Constitution of the Federal Republic of Nigeria 1999

<sup>212</sup> Soyaju (n 10 above)69

<sup>213</sup> 'Ese Oruru Kidnap: Shocking revelation about the forced marriage revealed' 03/11/2016 Nigeria News today & Breaking news | Read on NAIJ.COM. Since then many similar cases have unfolded in the North. 'Beyond Ese Oruru: Naming And Shaming The Kidnap-And-Convert Villains' 7 March 2016 Sahara Reporters <http://saharareporters.com/2016/03/07/beyond-ese-oruru-naming-and-shaming-kidnap-and-convert-villains-moses-e-ochonu> (accessed 29 December 2016).

<sup>214</sup> As above

nonconsensual intercourse are involved, the case will constitute defilement amongst other charges of abduction.<sup>215</sup>

The Customary Court of Appeal has coordinate jurisdiction with the Sharia Court of Appeal, but on questions and issues of customary law.<sup>216</sup>

#### **4.7.2 The inferior courts**

Inferior courts are sometimes called courts of limited jurisdiction.<sup>217</sup> They include the Magistrate or Districts Courts, Upper Area Courts, Customary Courts, Juvenile Courts and Coroners Courts.<sup>218</sup> The Magistrate Court has jurisdiction over both civil and criminal matters, limited however with respect to the subject matter and monetary value of cases and the maximum fine or term of imprisonment it can impose in criminal matters. It is usually subject to the supervisory jurisdiction of superior courts.<sup>219</sup>

Below the Magistrate Courts are the Customary Courts <sup>220</sup> (otherwise known as Area or Native Courts) and the Sharia Courts<sup>221</sup> which have jurisdiction on Islamic civil family and personal matters. Since 2000, some Northern Sharia states have introduced new Sharia laws also giving criminal jurisdiction to the Sharia Courts.<sup>222</sup>

Districts Courts, which are only found in Northern Nigeria, have similar jurisdiction to that of the Magistrate Court but only deal with civil matters.<sup>223</sup> Customary Courts have jurisdiction on matters of Customary law in the country's southern states, although the enabling law or edict may

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<sup>215</sup> As above. By virtue of the fact that she was not a Muslim and no lawful marriage contracted both under the Act and Islamic law, I argue that it was not an issue for an Islamic or sharia court, it was a criminal case of abduction. These arguments may form the content of conflict of law in chapter 6 of this thesis, illicit sex and unlawful canal knowledge among others.

<sup>216</sup> S267 and for states customary courts see S282

<sup>217</sup> Soyaju (n 10 above) 45

<sup>218</sup> As above

<sup>219</sup> As above.

<sup>220</sup> S282 Constitution of the Federal Republic of Nigeria 1999

<sup>221</sup> S277. There also exists the Sharia court of Appeal.

<sup>222</sup> H Ibrahim & PN Lyman *Reflections on the New Shari'a Law in Nigeria* (2004) 3.

<sup>223</sup> Soyaju (n 10 above) 75

grant it criminal jurisdiction as well.<sup>224</sup> All issues relating to marriages contracted under Customary law, to the validity and dissolution of the marriage and other related issues are within the jurisdiction of the Customary Court.<sup>225</sup>

Area Courts deal with matters involving Islamic personal or customary law. They also only exist in some parts of Northern Nigeria and are divided into grades.<sup>226</sup>

As a matter of marriage, child marriage borders on family law in the area of personal and private law, although rarely brought by the girls concerned as civil cases.<sup>227</sup> However, child marriage also borders on the issue of human rights<sup>228</sup> and the interpretation of certain of the current constitutional provisions in Nigeria.

Cases involving rape, defilement, unlawful carnal knowledge, forced intercourse and assault of minors are criminal cases which inadvertently arise in the context of child marriage and may obviously be linked to the issue of jurisdiction carried out by judicial institutions.<sup>229</sup> All these are issues for discourse in this thesis.

#### **4.7.3 The police**

The police force is not a judicial institution like the court but it a criminal administrative institution and is the first port of call on criminal matters.<sup>230</sup> Unlike the courts, there is no prescribed procedure or process for accessing

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<sup>224</sup> Customary courts law of Lagos state, cap33 of 1973, section 16 & schedule 2, Part II

<sup>225</sup> Onokah (n 5 above)173.

<sup>226</sup> Soyaju (n 10 above)75.

<sup>227</sup> Nwogugu (n 11 above) lxxxv

<sup>228</sup> 'Ending child marriage: Meeting the Global development goals promise to girls' 2015 Human rights Watch <https://www.hrw.org/world-report/2016/ending-child-marriage> (accessed 29 December 2016).

<sup>229</sup> 'Nigerian court to hear child-bride case' 4 June 2010, IOL Africa <http://www.iol.co.za/news/africa/nigerian-court-to-hear-child-bride-case-486234>(accessed 10 November 2016)

<sup>230</sup> C Nwagbara 'Administrative Law as the Bedrock of Administrative Agencies and Procedure in Nigeria' (2016) 4 *International Journal of Business & Law Research* 12

the police.<sup>231</sup> Cases of rape, sexual assault and abuse can be reported to the police for the charging of the culprit.<sup>232</sup>

The problem with taking child marriage complaints to the police, while similar to the difficulty of accessing the courts due to restrictions of law, is related to the key issues of stereotyping and societal preconceptions.<sup>233</sup> You will hardly find a child reporting a matter to the police despite the fact that there is no law against their doing so, due to the pressure to avoid becoming victims of stereotyping and social censure. The same restrictions may apply in terms of children accessing the courts, including the principle of locus standi.<sup>234</sup>

Another point is jurisdiction of the issue. Family issues are domestic or civil matters, while the police handle criminal matters and are in the habit of refusing to interfere in domestic family issues.<sup>235</sup>

#### **4.8 The Constitution**

The Constitution is the fundamental and supreme law of the land.<sup>236</sup> As a legal paper, it is the document which contains the rules and regulations as well as the norms and ethics according to which a particular country is to be administered.<sup>237</sup> Different countries have different constitutions and these can be written or unwritten, federal or unitary and rigid or flexible depending on the peculiarities of the state.<sup>238</sup> The Nigerian Constitution is a

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<sup>231</sup>N Adegoke 'The Nigerian police and the challenges of security in Nigeria' (2014) 3 *Review of Public Administration and Management* 22. T Akuul 'The role of the Nigerian police force in maintaining peace and security in Nigeria' (2011) 3 *Journal of Social Science and Public Policy* 16

<sup>232</sup> 'Child sexual abuse: The burden of a slow judicial system in Nigeria, 12 March 2015, 9jafeminista <https://9jafeminista.wordpress.com/2015/03/12/child-sexual-abuse-the-burden-of-a-slow-judicial-system-in-nigeria/> (accessed 29 December 2016).

<sup>233</sup> As above.

<sup>234</sup> As above. GN Okeke 'Re-examining the role of locus standi in the Nigerian Legal system' (2013) 6 *Journal of Politics and Law* 211.

<sup>235</sup> 'Canada: Immigration and Refugee Board of Canada Nigeria: Domestic violence, including Lagos State; legislation, recourse, state protection and services available to victims (2011-October 2014)' 10 November 2014 <http://www.refworld.org/docid/548168e14.html> (accessed 29 December 2016). 'Child brides facing death sentences a decade after child marriage prohibited' 11 March 2015 The Guardian <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides> (accessed 10/11/2016). The matter was for murder not child marriage although child marriage was the reason for the murder.

<sup>236</sup> SI of Constitution of the Federal Republic of Nigeria 1999.

<sup>237</sup> Soyaju (n 10 above) 258

<sup>238</sup> As above.



written one and is rigid in that the procedure for amending it cumbersome.<sup>239</sup>

It is also a federal constitution,<sup>240</sup> in which case power is divided between the central government and states such that they are equal and independent.<sup>241</sup> The organs of government are the executive, the legislative and the judicial. Under the federal Nigerian Constitution, there are three categories of legislative power, namely the exclusive list, the concurrent list and the residual list.<sup>242</sup> The exclusive list is a list of items that fall under the legislation of the federal government, both the federal and state governments are responsible for the items on the concurrent list, and those on the residual list are dealt with only by the states.<sup>243</sup>

The Nigerian Constitution that is currently in force is that of 1999 but it has a long history which even pre-dates independence.<sup>244</sup> It is naturally a critical

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<sup>239</sup> S9(2) Constitution of the Federal Republic of Nigeria 1999 provides that an act of the national assembly for the alteration of the constitution shall not be passed in either house of the national assembly unless the proposal is supported by the votes of not less than 2/3 majority of all the members of that house and approved by the resolution of the houses of assembly of not less than 2/3 of all states, if the proposed amendment has to do with fundamental rights, the proposal must be approved by the votes of not less than 4/5 majority of all members of each house and also approved by resolution of the Houses of Assembly of not less than 2/3 of all the states- S9(3) CFRN 1999. In fact, the argument as to what constitutes 2/3 majority has been upmost in all constitutional amendment bodies set up in Nigeria and the difficulty in reaching the amendment for the Nigerian constitution for decades.

<sup>240</sup> Soyaju (n 10 above) 266.

<sup>241</sup> S2(2) Constitution of the Federal Republic of Nigeria 1999 provides Nigeria shall be a federation consisting of states and a federal capital territory.

<sup>242</sup> Soyaju (n 10 above) 278

<sup>243</sup> S4 of the Constitution of the Federal Republic of Nigeria 1999 contains the division of legislative powers between the central federal government of Nigeria and the constituting states that is between the federal house of Assembly and that of the state's houses of Assembly.

<sup>244</sup> Soyaju (n 10 above) 271-274. In 1900, the southern province of Nigeria was amalgamated while the northern territory was declared a protectorate of British colony, the entire country and this was when Nigeria as a geographical entity was created. The first constitution was introduced in 1922, the Clifford Constitution, named after Sir Hugh Clifford which introduced legislative and elective principle, for the first time but this was only applicable to the south, the north continued to be governed by a governor general through proclamations and Nigerians were not included in the executive list. It was followed by the Richards 1946 constitution which is said to have come because of the criticisms of the Clifford's constitution not being representative enough. It was an improvement on his predecessor, it included greater participation for the indigenes, it introduced a national legislative council based on appointment and selection with jurisdiction all over Nigeria. This constitution created regional council for three regions, house of assembly and house of chiefs for the west and North though the house of chief played advisory role, it was scrapped because of stiff opposition from critics and replaced by the Macpherson constitution of 1951. The Macpherson constitution guaranteed more Nigerian participation and was closer to the people. It established a federal house of rep and set a public service commission. The regional government was given authority to legislate on local matters while the federal house can legislate both for the region and the central government. This constitution cemented the idea of federalism with its component regions; it was followed by the federal constitution of 1954. The federal constitution or Littleton constitution of 1954 removed Lagos as part of the western region, made it the federal territory, established federal

document to consider when looking at the issue of child marriage in Nigeria,<sup>245</sup> since it formalises both the country's legal pluralism, setting out the applicability of Statutory, Customary and Islamic law and the associated institutions and jurisdictions,<sup>246</sup> and its acceptance of international law in terms of international and regional instruments on human rights to which Nigeria is a signatory.<sup>247</sup>

The constitutional provision on fundamental human rights speaks to the issue of child marriage.<sup>248</sup> Although it is true there is no express right to marry or establish a family, the Constitution does guarantee and protect the right of citizens to privacy, including in their homes and to their properties.<sup>249</sup> While this may be seen as the guaranteed absence of unnecessary interference in the affairs of a family or the personal life of an individual citizen, it is the closest the Constitution comes to recognising the right to marry and have a family life, which is a right provided for in international human rights instruments.<sup>250</sup>

The Nigerian constitution provides the right to life,<sup>251</sup> the right to dignity,<sup>252</sup> right to freedom from discrimination,<sup>253</sup> the right to personal liberty or protection against unlawful imprisonment,<sup>254</sup> right to freedom of association,<sup>255</sup> freedom of movement,<sup>256</sup> and the right to information.<sup>257</sup>

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government for Nigeria and officially legalized the regional formation of east, west and north at the same time it created the federal and the concurrent list of federal and regional government responsibility which resulted in strong constitutional and regional government and also separate federal and regional civil and judicial public service. This constitution replaced the centralized form of federal system with much power on the region; it also institutionalized an unbalanced federation which has continued till date.

<sup>245</sup> TS Braimah 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *AHRLJ* 474. KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights' (2015) 5 *US-China Education Review B* 460-470

<sup>246</sup> S6(5) Constitution of Federal Republic of Nigeria 1999

<sup>247</sup> S12 Constitution of Federal Republic of Nigeria 1999

<sup>248</sup> Chapter IV S33-44 Constitution Federal Republic of Nigeria 1999

<sup>249</sup> S37 Constitution Federal Republic Nigeria 1999

<sup>250</sup> Art 16 (1) United Nations declaration on human rights, provides men and women of full age have the right to marry and found a family.

<sup>251</sup> S33 Constitution of the Federal Republic of Nigeria 1999

<sup>252</sup> S34 as above

<sup>253</sup> S42 as above

<sup>254</sup> S35 as above

<sup>255</sup> S40 as above

<sup>256</sup> S41 as above

<sup>257</sup> S39 as above

All these rights encompass the issues that raise concern in the child marriage cases. In the institution of child marriage, the girl child's life is threatened by the early pregnancy, her dignity and respect as a person is compromised by the lack of consent and relationship in the age gap between her and her husband.<sup>258</sup>

Most times she is unlawfully detained and not allowed access to her family and friends.<sup>259</sup> The act is one of discrimination as in Nigeria marriage is not forced on the boy child.<sup>260</sup> The girl child's education is also compromised by the marriage and she is prevented or crippled from contributing to her society.<sup>261</sup> It is Nwauche's view that these provisions are elaborate protection against child marriage in Nigeria.<sup>262</sup> The same constitution provides the government responsibility to provide access to health and other socio economic related facilities in chapter II of the constitution.<sup>263</sup>

The same constitution provides the right to fair trial within which is embedded the right to access to court.<sup>264</sup> This is a platform of opportunity for infringements of the provided rights to be addressed and redressed.<sup>265</sup> In this case, victims of child marriages are provided measures through the judicial institutions to enforce their rights or prevent it from being infringed.

The Nigerian constitution also provides the right to religion<sup>266</sup> which is argued as a right to practice child marriage and therefore a barrier to the enjoyment of other rights by the girl child.<sup>267</sup> To this end, the Nigerian

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<sup>258</sup> A Atsenuwa, Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014)282-285

<sup>259</sup> Fayokun (n 245 above) 461

<sup>260</sup> As above. Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia' in C Ngwena & E Durojaye (eds) (n 258 above)288

<sup>261</sup> Atsenuwa as above 285.

<sup>262</sup> ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' (2015) 15 AHRLJ 426

<sup>263</sup> Chapter II of the Constitution of the Federal Republic of Nigeria 1999 provides for Fundamental Objectives and Directive Principles of State Policy which are the objectives or goals which the government should strive to attain for its citizens.

<sup>264</sup> S36 Constitution of the Federal Republic of Nigeria 1999

<sup>265</sup> As above

<sup>266</sup> S38 Constitution of the Federal Republic of Nigeria 1999

<sup>267</sup> Nwauche ( n 262 above) 428

Constitution is compared to the constitutions of South Africa and Malawi, particularly in terms of Customary and Islamic law.

Like Nigeria, Malawi recognises Customary law but differs by subjecting it to the provision or respect for the rights of citizens. Section 12 of the Constitution of Malawi of 2010 provides that “the Constitution is founded upon the following underlying principles: All legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests; the inherent dignity and worth of each Human requires that the state and all persons shall recognize and protect Fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote”.<sup>268</sup>

S22(5) recognizes customary marriages and S26 provides for the right to culture and the participation of citizens therein. S26 is similar to S30 of the Constitution of South Africa but the latter goes further by adding that “but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.<sup>269</sup>

S20(1) of the Malawian Constitution prohibits discrimination on the basis of sex, and S20(2) specifically states that ‘Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts’.<sup>270</sup>

The right to protection against discrimination is reinforced by Section 24 which includes gender as a ground of discrimination. Section 24(2) of the Malawian Constitution expressly states that ‘Any law that discriminates against women on the basis of gender or marital status shall be invalid’.<sup>271</sup> It also obligates the government to take legislative measures to eliminate customs and practices that discriminate against women, including practices

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<sup>268</sup> S12 Constitution of Malawi

<sup>269</sup> S30 Constitution of the Republic of South Africa

<sup>270</sup> S20 Constitution of Malawi

<sup>271</sup> S24(2) Constitution of Malawi

such as sexual abuse, harassment and violence, and the deprivation of property, including property acquired by inheritance.<sup>272</sup>

Customary law in Malawi may also be said to be curtailed by S5, S10 (2) and S44 of the Constitution.<sup>273</sup> In such ways the Malawian Constitution seeks more clearly than the Nigerian Constitution to mediate between customary practices and human rights, particularly those affecting women, although the courts still face obstacles in performing their duties.

The Malawian Constitution also contains provisions expressly prohibiting marriage for minors<sup>274</sup> and requiring the consent of spouses over the age of eighteen years.<sup>275</sup> The Nigerian Constitution cannot be said to be as explicit, making inference and interpretation necessary in applying it for the protection of women and children.

Notwithstanding the constitution is the highest law and within it exist a plethora of protection for the citizens particularly on fundamental human rights and access to its protection and redress of infringement in Nigeria.<sup>276</sup>

#### **4.9 Legislative provisions**

The Nigerian legislature is made up of laws of statutes and subsidiary legislation.<sup>277</sup> The Constitution itself is a local enactment but of a different character and importance to other legislation.<sup>278</sup> Legislation is the product of a deliberate and formal expression of rules of conduct made by a recognised and relevant law making authority.<sup>279</sup> In Nigeria, statutes consist of ordinances,<sup>280</sup> acts,<sup>281</sup> Laws,<sup>282</sup> decrees and edicts,<sup>283</sup> and policies.<sup>284</sup>

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<sup>272</sup> As above

<sup>273</sup> S5 'any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid'. S10(2) in the application and development of customary law, the relevant organs of the state shall have due regard to the principles and provisions of the constitution.

<sup>274</sup> S22(6)

<sup>275</sup> 22(4)

<sup>276</sup> Chapter IV Constitution of the Federal Republic of Nigeria 1999

<sup>277</sup> Soyaju (n 10 above)30.

<sup>278</sup> Asein (n 4 above)27.

<sup>279</sup> As above.

<sup>280</sup> Soyaju (n 10 above) 32. The word ordinance is the name for the rules or laws promulgated before Nigeria's independence.

Legislation refers to laws that are formulated by the country's legislative organ and is different from the main or supreme law. According to Agbede,<sup>285</sup> legislation is the most important source of law in Nigeria today.<sup>286</sup>

Legislation takes the form of primary or subsidiary legislation<sup>287</sup> and can be used to repeal existing English and even Customary laws. Legislative power in Nigeria is divided between the federal or central government and the states.<sup>288</sup> While the Constitution is the most important law in the country,<sup>289</sup> legislation can be a useful tool in tackling social and cultural issues since it provides a framework for the legal protection of citizens, guidance of leadership and legitimacy of policy makers and their actions.<sup>290</sup> The fact that

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<sup>281</sup> As above. Acts are laws made a country as a sovereign and independent nation, after 1960 enactments of the federal legislature were renamed Acts, a bill is the initial state of an act, a proposed law, before it is approved or passed into law, it becomes an Act after being passed. Presently acts are the laws of the National Assembly

<sup>282</sup> As above. Laws on the other hand are those of the state house of assembly, only applicable in its state.

<sup>283</sup> As above. Decrees are laws made during a military regime after signature by the head of the military government while edicts are laws made at the state level during a military regime and usually issued by the state executive council after the military governor's signature.

<sup>284</sup> As above. There are many policies in Nigeria on several issues and on issues of the girl child, adolescents, health and reproduction

<sup>285</sup> Agbede (n 18 above), 18.

<sup>286</sup> As above. See also Soyeju (n 10 above) 30. Soyeju was of the same opinion, on this note he was referring to local legislation as opposed to legislation or laws made for the community before it attained its independent. Of course some laws were put together or enacted for the communities before independence and some of them may still be in place as laws of the country.

<sup>287</sup> Soyeju (n 10 above)30. Primary legislation is made by the main law making body of the land but because of complexities of administration and the existence of delegated authority, sometimes public authorities and government officials are given authority to make laws in form of regulations and orders to supplement legislative enactment, the legislations so made are called subsidiary legislation.

<sup>288</sup> S4 (1) and (3) Constitution of the Federal Republic of Nigeria 1999. In a federal state, the central government often has law making powers for the whole federation and each region or state within the federation also has law making powers. In Nigeria, the law making power for the federation is the National Assembly while the house of Assembly of each state have law making powers too and the powers of these organs are usually provided in the constitution. In addition to these, there are areas or issues where both the federal and state government have concurrent legislative jurisdiction. This necessarily implies that in Nigeria there exist two principal sets of legislation, Acts of the National Assembly operative in all the states and laws of states houses of Assembly operative in each promulgating state, apart from bye laws of local governments, government policies and some other existing laws. Some issues have been ousted from the law making jurisdiction of states for the purpose of uniformity throughout the federation and protection of the individuals as special duties of the federal government. Issues like criminal matters and human rights fall within this category, such that laws relating to them are principally federal government issues although this is not implying that states government are not bound to protect the human rights of citizens. The Criminal code and Penal code are therefore federal enactments which are not state prerogatives.

<sup>289</sup> Asein (n 4 above) 25. A constitution is a document having a special legal sanctity which sets out the framework, the organs of government within a state and their functions and also declares the principles by which those organs must operate. It is the assemblage of laws, institutions and customs derived from certain fixed principles of reason that form the general system according to which a community has agreed to be governed. See also S1 Constitution of the Federal Republic of Nigeria 1999

<sup>290</sup> A Davies, Postles and G Rosa *A girl's right to say no to marriage- working to end child marriage and keep girls in school* (2013) 10.

legislation can also be a vital instrument in social engineering means that it is an important aspect of this thesis on the elimination of child marriage and the legal protection of the girl child.<sup>291</sup>

Child marriage is a social problem that has implications for the health of particular and individual girl child, infringes on her human rights and has a major impact on the development of societies in which it is practiced.<sup>292</sup> The interpretation and analysis of legislation prohibiting the practice, or the promulgation of laws if none exist, may therefore be a useful exercise in an effort to eradicate child marriage and protect the girl child in the Nigerian society.<sup>293</sup>

Various legislations exist as protection against child marriage in Nigeria. Apart from substantive provisions in the Nigerian Criminal and Penal Codes, procedural laws such as the Evidence Act. As pieces of legislation on marriage, these provisions are examined as well as the Marriage Act and the Matrimonial Causes Act<sup>294</sup> in this section of the thesis, particularly in terms of capacity and consent to marriage and to sexual relations.<sup>295</sup>

The earlier discourse of the Marriage Act and the Matrimonial Causes Act are based on the provision of the legal order within the Nigerian legal system. In this latter part, the discourse is about the provision of the documents as substantive law.

#### **4.10 The Constitution of Nigeria and its provision against child marriage**

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<sup>291</sup> Asein (n 4 above) 28.

<sup>292</sup> Atsenuwa (n 258 above) 285

<sup>293</sup> Davies et al (n 290 above) 10

<sup>294</sup> The Marriage Act and Matrimonial Causes Act are Statutory provisions and English law provisions on marriage applicable in Nigeria till date.

<sup>295</sup> 'Statutory law and child marriage' 31 March 2012 <http://www.okeyeni.com/2012/03/law-journal-006-statutory-law-and-child.html> (accessed 28 December 2016). The Criminal and Penal codes regulate sexual relations apart from marriage bringing the connection between sexual relations and criminal law, the criminal law in Nigeria is administered by written provisions. The Criminal Code applies in the South and other parts while Penal Code applies in the North. They both have provisions that criminalize sexual abuse of the girl child and other sexual offences.

The Constitution provides that the state policy must be directed towards ensuring that children and young persons are protected against any exploitation whatsoever.<sup>296</sup> It also contains a list of fundamental human rights<sup>297</sup> as well as fundamental objectives and directive principles.<sup>298</sup>

The fundamental human rights listed in the Constitution include the right to life<sup>299</sup>, human dignity<sup>300</sup> and freedom from discrimination.<sup>301</sup> In the context of this thesis, the right to private life is significant in terms of the right to marry and establish a family,<sup>302</sup> while reproductive rights, which include the right to reproductive decision making, are related to voluntary choice in marriage as well as the equality of men and women and freedom from the gender based discrimination that characterises child marriage.<sup>303</sup> S35 of the Constitution also deals with personal liberty and S38 with the right to religion.<sup>304</sup>

The constitutional provisions for protection also include directive principles on state policies<sup>305</sup> related to the rights to education and health and basically any rights that are termed sociocultural in the context of international human rights.<sup>306</sup>

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<sup>296</sup> S17 (2) particularly (a), (b), (c)CFRN 1999

<sup>297</sup> Chapter IV Constitution of the Federal Republic of Nigeria 1999

<sup>298</sup> Chapter II CFRN 1999

<sup>299</sup> S33 as above

<sup>300</sup> S34 as above

<sup>301</sup> S42 as above

<sup>302</sup> S37 as above.

<sup>303</sup> Atsenuwa, Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia, in C Ngwena & E Durojaye (eds) (n 258 above) 281

<sup>304</sup> This can be assumed to permit the type of marriage according to individual's religion and belief. Since the constitution recognizes Islamic and customary law, it can be deduced that it recognizes marriage under their laws too.

<sup>305</sup> S13-21, Constitution of the Federal Republic of Nigeria 1999. These are not couched as rights but duties of state to the citizens. Although these are not enforceable they are goals or directives which government aspire or strive to accomplish. The Constitution provides that the country's social order is founded on the ideals of freedom, equality, equity and justice and the directive principles also provide that the state shall direct its policies towards ensuring that children and young persons are protected against any exploitation whatsoever, against moral and material neglect and by the express provision of minimum age for childhood, it can be subsumed to mean a recognition for the category and class of children and intention of provision for their protection. S29 (4) (a) of the same constitution provides that full age shall be 18 years and above, although this was referring to the issue of change of citizenship.

<sup>306</sup> Atsenuwa (n 258 above) 281



S17 of the Constitution provides that children shall be protected against sexual exploitation and against moral and material neglect,<sup>307</sup> with eighteen years being given as full age or the age of attainment of adulthood. A person who has reached eighteen years is no longer considered a child but an adult.<sup>308</sup> The Constitution also provides that when a person's right has been or is about to be infringed, they have the right to access the court for the prevention of the infringement or remediation for the infringement.<sup>309</sup>

These are aspects that can be inferred from provisions of the Constitution on fundamental human rights and generally applied if and when child marriage is acknowledged as an infringement of human rights, although this cannot be said to be the case in Nigeria.<sup>310</sup>

Nwauche is of the opinion that there are enough human rights provisions in the Nigerian Constitution to protect the girl child against child marriage despite there not being explicit references to gender or children or specific prohibitions of child marriage.<sup>311</sup> Braimah, on the other hand, holds that while there may be other provisions in terms of child marriage, Part 1 of Item 61 of the Constitution is an obstacle to the girl child's enjoyment of any human rights or protection against the practice of child marriage.<sup>312</sup>

#### **4.11 The Marriage Act and the Matrimonial Causes Act**

The Marriage Act<sup>313</sup> and the Matrimonial Causes Act<sup>314</sup> regulate English law marriages and attending issues.<sup>315</sup> The important elements to investigate in

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<sup>307</sup> S17 (3) (f) Constitution of the Federal Republic of Nigeria 1999

<sup>308</sup> S29(4) (a) Constitution of the Federal Republic of Nigeria 1999, although that section provides that for the purpose of this section, which is for the issue of citizenship and it would be found out in chapter 6 of this thesis that this is not the minimum age for marriage.

<sup>309</sup> S 46 (1) and also 36 provides for fair hearing.

<sup>310</sup> In a Northern Nigerian case of forced marriage, a judge had ruled that the rights of the lady had not been infringed and that it was not a case of human rights. 'Nigeria' - Researched and compiled by the Refugee Documentation Centre of Ireland on 25 March 2011 Oct 2010 BBC report 'Nigeria court rejects forced marriage' [www.bbc.com](http://www.bbc.com) (accessed 17 March 2016).

<sup>311</sup> Nwauche (n 262 above) 426.

<sup>312</sup> Braimah (n 245 above)281.

<sup>313</sup> A federal legislation applicable in all the states of the federation Marriage is defined as the formal union of a man and woman typically recognized by law by which they become husband and wife. Under this law marriage is monogamous, the union of a man and a woman of full age, consent and capacity. The parties will be deemed to have capacity to marry if they satisfy the conditions of age, consent, subsisting marriage and celebration.

<sup>314</sup> Although this deals more with issues of marriage dissolution etc.

these provisions are those of capacity and consent in terms of age and free will in marriage.

Since the Marriage Act does not specify a marriageable age,<sup>316</sup> Nwogugu<sup>317</sup> holds that recourse must be made to the common law of England which specifies the age of puberty, being fourteen years for boys and twelve for girls.<sup>318</sup> Although no marriageable age is prescribed, age is a very important factor in capacity to marry. Should either of the spouses not be of marriageable age, the marriage is void.<sup>319</sup>

The couple's consent is therefore important and must voluntary or real, and without fraud or duress. <sup>320</sup> Parental consent is only required where either or both parties are under twenty one, in which case the absence of parental consent will invalidate the marriage.<sup>321</sup>

Sexual intercourse is an essential element of every marriage. A marriage that is not consummated may be dissolved.<sup>322</sup>

Issues relating to statutory marriage can be initiated or resolved at the High Court which has original jurisdiction over it, while appeals are brought before the Court of Appeal.<sup>323</sup>

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<sup>315</sup> Nwogugu (n 11 above) 23

<sup>316</sup> S49 Marriage Act. But provides that anyone who marries or assist anyone to marry a minor under 21 years, shall be liable to 2 years' imprisonment. See S49. Marriage is defined as the formal union of a man and woman typically recognized by law by which they become husband and wife. Under this law marriage is monogamous, the union of a man and a woman of full age, consent and capacity. The parties will be deemed to have capacity to marry if they satisfy the conditions of age, consent, subsisting marriage and celebration.

<sup>317</sup> Nwogugu (n 11 above) 23

<sup>318</sup> As above 24

<sup>319</sup> S3 (1) (d) (e) Matrimonial Causes Act 1970

<sup>320</sup> S3 (1) (d) (I) Matrimonial Causes Act 1970. *Mbonu v Mbonu* 1976 FNLr, where the petitioner claimed she was induced by fraud and duress to consent was held not enough to rebut the presumption that she consented willingly and voluntarily to the marriage.

<sup>321</sup> S33 (3) Marriage Act S3 1 Matrimonial Causes Act 1970 No 18 now LFN 1990 Cap 220 mentions marriageable age without a specific age One thing is clear about statutory marriage, that is, it prohibits forced marriage as consent is a major requirement for it although consent can be two sides consent of the spouses and that of the parents. Unlike customary marriage, statutory marriage does not mandate parental consent except where one or both spouses are minors, but it mandates consent of the spouses.

<sup>322</sup> S15 (1) (2) (a) Matrimonial Causes Act 1970 Cap 220 LFN 1990 that the respondent has wilfully and persistently refused to consummate the marriage

<sup>323</sup> Primarily, statutory marriage is the English type marriage and requires the English type formal adjudication to determine its issues.

#### 4.12 The Child Rights Act of 2003

International and national laws can be effective tools in ending child marriage, and the two can be combined by incorporating international treaties into the laws of the country.<sup>324</sup> As legislation providing for the protection of the rights of children in Nigeria, the Child Rights Act is an example of such domestication <sup>325</sup>

The Child Rights Act of 2003 is the domesticated version of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACWRC)<sup>326</sup> and has provisions that are similar to those of the CRC and ACWRC, best interest being the first.<sup>327</sup>

The Child Rights Act upholds the application of fundamental human rights as contained in the Nigerian Constitution of 1999<sup>328</sup> and goes further by expressly providing for the child's right to freedom from discrimination,<sup>329</sup> dignity,<sup>330</sup> health and access to health services.<sup>331</sup> It also stipulates that no child shall be subjected to physical, mental or emotional abuse, neglect or maltreatment, including sexual abuse,<sup>332</sup> to torture, inhuman or degrading treatment or punishment, or to being held in slavery or servitude while in the care of a parent, legal guardian or any person having the care of the child.<sup>333</sup>

The Child Rights Act provides that no person under the age of eighteen is capable of contracting a marriage<sup>334</sup> and voids any marriages so contracted. It even prohibits child betrothal by a parent or guardian,<sup>335</sup> criminalising the practice and providing for the punishment for offenders who could be the

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<sup>324</sup> S12 Constitution Federal Republic of Nigeria 1999. Protecting the girl child, using laws to end child, early and forced marriage and related human rights violation, 2014, equality Now at [www.equalitynow.org](http://www.equalitynow.org).

<sup>325</sup> The preamble child rights act 2003

<sup>326</sup> Although it is not expressed in the body of the Act.

<sup>327</sup> S1 Child Rights Act 2003

<sup>328</sup> S3 Child Rights Act 2003

<sup>329</sup> S10 Child Rights Act 2003

<sup>330</sup> S11 Child Rights Act 2003

<sup>331</sup> S13 Child Rights Act 2003

<sup>332</sup> S13 (a) Child right Act 2003

<sup>333</sup> As above

<sup>334</sup> Part iii, S21 Child Right Act 2003

<sup>335</sup> S22 Child Right Act 2003

parent or guardian, or the person who marries or is betrothed to the child.<sup>336</sup>

Unlawful sexual intercourse is prohibited under the Child Rights Act.<sup>337</sup> Sexual intercourse in a marriage with a child would be regarded as unlawful sexual intercourse but the Act goes further by specifying forms of sexual abuse and exploitation<sup>338</sup> as well as providing blanket cover against any form of exploitation which is not expressly named in the Act but which is prejudicial to the welfare of the child.<sup>339</sup>

The Child Rights Act is however a domestic law with international foundations like the domesticated African Charter on Human and People's Right as analysed in the case of *Abacha v Fawehinmi*.<sup>340</sup> As such, it is not above the provisions of the Constitution although it may have the same status as other domestic legislation. Currently, only the Child Rights Act expressly prohibits child marriage in Nigeria and it is a general blanket provision on the rights of children.<sup>341</sup>

The implementation of the Child Rights Act faces challenges in certain northern parts of the Nigeria, in particular on the issue of marriageable age.<sup>342</sup> The disputes are primarily around the provisions of certain sections of the Constitution and their interpretation for which there is no judicial precedent or for which the opinion of any relevant court sought.<sup>343</sup>

Braimah highlights Item 61 Part 1 and the Second Schedule of the Nigerian Constitution along with some other provisions as factors inhibiting the acceptance and application of the Child Rights Act in certain of the northern states.<sup>344</sup> While not refuting Braimah's position, Nwauche nonetheless contends that there is extensive provision in fundamental human rights

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<sup>336</sup> S23 Child Right Act 2003

<sup>337</sup> S31 Child Right Act 2003, this amount to rape with the punishment of life imprisonment and it is immaterial that he believes the girl is above 18 or that she consented S31 (2) & (3) of the Act

<sup>338</sup> S32 Child Rights Act 2003.

<sup>339</sup> S33 Child Right Act 2003

<sup>340</sup> SC45/1997

<sup>341</sup> Braimah (n 245 above) 480

<sup>342</sup> Fayokun ( 245 above)

<sup>343</sup> As above

<sup>344</sup> Braimah (n 245 above)485.

principles for the protection of children against child marriage in Nigeria and that the provisions of the Constitution supercede those of any and all religions in the country.<sup>345</sup>

It is true that the Child Rights Act contains provisions against child marriage although its implementation faces legal challenges including provisions in the Constitution.<sup>346</sup> Nwauches's argument is that if the Child Rights Act fails to be accepted in a state, recourse can be sought in the domesticated African Charter on Human and People's Rights through the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act Cap 10 of the Laws of the Federation of Nigeria 1990 for protection of the girl child against child marriage.<sup>347</sup> He holds that this Act is not being argued and was judicially settled in the celebrated case of *Abacha v Fawehinmi*<sup>348</sup> amongst others.<sup>349</sup>

The Africa Charter on Human and People's Rights (Ratification and Enforcement) Act Cap 10 of the Laws of the Federation of Nigeria 1990 is a domesticated legislation, and its provisions and application for the enforcement of the rights of citizens is not a matter of debate.<sup>350</sup> It can therefore be employed in any instance relating to the rights of citizens.<sup>351</sup>

In places in the North of Nigeria where the Child Rights Act has not been adopted, the Child and Young Persons Act<sup>352</sup> or law can be argued to be in operation. This too contains provisions which can be interpreted to provide protection against child marriage. Although it provides that a child is a person under 14 years,<sup>353</sup> while the Child Rights Act provides 18 years.<sup>354</sup>

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<sup>345</sup> Nwauche (262 above)430

<sup>346</sup> Braimah ( n245 above) 485. Details of this and more form the content of chapter 6 of this thesis.

<sup>347</sup> Nwauche (n 262 above)427

<sup>348</sup> 2001 51 WRN 29. (2000) 6 NWLR Pt 660

<sup>349</sup> Nwauche (n 262 above) 427

<sup>350</sup> *Abacha v Fawehinmi* (2001) 51 WRN 29.

<sup>351</sup> It is discussed in chapter of this thesis under the topic of international provisions protecting the girl child against child marriage in Nigeria.

<sup>352</sup> Cap 32 LFN

<sup>353</sup> S2 Child and young persons' Act

<sup>354</sup> S21 Child Rights Act 2003

The possession, transfer or custody of a child for the purpose of any pecuniary benefit is prohibited.<sup>355</sup> This possession or custody may be in line with customs but must not be repugnant to natural justice, morality or humanity.<sup>356</sup> While child marriage is not mentioned, it can be implied in the provision to make for the prohibition of the practice.

#### **4.13 Criminal provisions on child marriage in Nigeria**

Criminal provisions in Nigeria are contained in the Criminal and Penal Codes. The Criminal Code applies in all parts of Nigeria except the North where the Penal Code is operative.<sup>357</sup> Neither of these codes expressly prohibit child marriage since they do not constitute prohibitory legislation on child marriage or deal specifically with women or children.<sup>358</sup> They are related to criminal issues and the prohibition, criminalisation and punishment of sexual crimes and other offences.<sup>359</sup>

Criminal law prohibits forced nonconsensual sexual intercourse.<sup>360</sup> When it comes to the issue of proving that intercourse was forced, the issue of age and capacity to give consent also comes up, which is pertinent to the issue of child marriage under discussion here. While it may be argued that the codes do not have explicit provisions on child marriage, it would be relevant to investigate their contribution to the protection of girl children against the practice, particularly in terms of prohibitions against or criminalisation of sexual intercourse with children.<sup>361</sup>

The fact that child marriage is not explicitly mentioned or criminalised in the Criminal and Penal Codes does not excuse the practice or exculpate offenders as long as it is prohibited under any other legislation. They do however constitute an effort to ground the practice as an offence or crime

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<sup>355</sup> S30 (1) Child and Young Persons Act

<sup>356</sup> S30 (2) Child and Young Persons Act

<sup>357</sup> J Olakanmi & Co Criminal Code: Synoptic Guide (2009) 177.

<sup>358</sup> A Onuora-Ogunu & O Adeniyi 'Sexual abuse and child marriage: Promise and pathos of international human rights treaties in safeguarding the rights of the girl child in Nigeria' (2015) 16(2) Child Abuse Research: A South African journal 80

<sup>359</sup> As above

<sup>360</sup> This is rape, a criminal offence in almost all jurisdictions.

<sup>361</sup> Sexual intercourse with children will amount to forceful intercourse which could be statutory rape or defilement.

through the essential elements of a crime, namely mens rea and actus reus, except in the case of strict liability offences.<sup>362</sup>

Mens rea is the intention to commit a crime while actus reus is the actual committing therefore, and both must be established for an accused to be found culpable.<sup>363</sup> Although an accused can be charged with the intention or attempt to commit an offence before the offence has taken place, the need for mens rea can be revoked by the provision of statute.<sup>364</sup> In *Abeke v State*,<sup>365</sup> mens rea was defined as a guilty mind which the accused must possess at the time of performing whatever conduct or requirements that are stated in the actus reus.

This is important in that child marriage may not be explicitly criminalised in criminal provisions and a man cannot be accused or convicted of an offence which is not expressly defined as a crime.<sup>366</sup> The fact that child marriage is not explicitly listed as a crime in the Criminal Code does not however exclude it from being pronounced as such in other legislation, for example the Child Rights Act previously discussed.<sup>367</sup>

Again, while the intention or mens rea of a perpetrator may not be to cause harm, the causation of harm should be reasonably expected in child marriage.<sup>368</sup> For instance, the parents who give their daughter away in marriage at a ridiculously young age may not anticipate their harm or death when they proceed with the marriage. Whether intended or not, child marriage nonetheless harms the girl child either directly through sexual intercourse or indirectly through the impact on her education or future.<sup>369</sup>

#### **4.13.1 The Criminal Code**

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<sup>362</sup> n 360 above 181

<sup>363</sup> As above

<sup>364</sup> As above. *Amofa v R* (1952) 14 WACA 238.

<sup>365</sup> 2007 9 NWLR part 1040, 411

<sup>366</sup> This is not just a fundamental human right provision but a criminal provision too.

<sup>367</sup> S21 and relevant provisions in the Child Rights Act.

<sup>368</sup> *Atsenuwa* (n258 above) 285

<sup>369</sup> As above

The Criminal Code does not prohibit or criminalise child marriage but it does sanction certain offences related to the practice in one way or the other and holds some provisions that connect with child marriage.<sup>370</sup> For example, a person who takes a female of any age away or detains her against her will with the intention to marry or carnally know her or to cause her to be married to or carnally known by any other person will can be charged with abduction.<sup>371</sup>

Specifically, it is a crime to abduct a girl younger than sixteen years for any reason,<sup>372</sup> irrespective of whether the offender believed the girl was older than sixteen<sup>373</sup> or that she was taken with her consent.<sup>374</sup> This introduces the issue of intention of the abductor as well as the age of the girl as it has a bearing on her consent.

The recent case of Ese Oruru that went viral is actually a criminal case of abduction under the cited provisions.<sup>375</sup> Although defended on the basis of child marriage under Islamic law, since the requirement of parental consent on behalf of a minor was not met, it could not properly be labelled an Islamic marriage.<sup>376</sup> Even so, the arguments raised regarding the girl's consent to convert to Islam or run away with the abductor and her choice to marry him are certainly aligned with S363 (b) of the Nigerian Constitution of 1999 according to which her consent is immaterial.<sup>377</sup>

S358 of the Criminal Code provides for the offence of rape as being the unlawful carnal knowledge of a woman or girl, whether consensual or not, obtained by means of force, threats or intimidation of any kind, or due to

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<sup>370</sup> (n 359 above) 'Statutory law and child marriage' March 31 2012 <http://www.okeyeni.com/2012/03/law-journal-006-statutory-law-and-child.html> (accessed 28 December 2016).

<sup>371</sup> S361 Criminal Code Act Cap C34 Laws of the Federation of Nigeria, 2004.

<sup>372</sup> S362

<sup>373</sup> S363 (a) Criminal Code

<sup>374</sup> S363 (b) Criminal Code

<sup>375</sup> 'Ese Oruru Kidnap: Shocking revelation about the forced marriage revealed' 11 March 2016 Latest Nigerian News <http://www.latestnigeriannews.com/news/2700509/ese-oruru-kidnap-shocking-revelation-about-the-forced-marriage-revealed.html> (accessed 30 December 2016). The Post appeared first on Nigeria News today & Breaking news | Read on NAIJ.COM (accessed 18 March 2016).

<sup>376</sup> As above.

<sup>377</sup> 'Abduction: 14-yr-old Ese Oruru 5 months pregnant' 3 March 2016 <http://www.vanguardngr.com/2016/03/abduction-14-yr-old-ese-oruru-5-months-pregnant/> (accessed 18 March 2016). The girl was abducted and impregnated.



fear of harm, for which a perpetrator is liable to life imprisonment. The case of *R v Olugboja* is relevant to this definition of rape.<sup>378</sup>

S218 of the Criminal Code criminalises the defilement of girls younger than thirteen years, and the attempt to have unlawful carnal knowledge of girls between the ages of thirteen and sixteen.<sup>379</sup> This includes the unlawful indecent treatment of girls under sixteen years of age.<sup>380</sup>

While these sections do not mention child marriage, some of the provisions refer to offences which could be assumed to take place within child marriage. For example, since a girl child cannot consent to sexual intercourse or marriage, keeping her in a building (her supposed husband's house or anywhere else) for the purpose of the marriage and consequent sexual intercourse will fall under the crime of unlawful detention with intention to defile.<sup>381</sup>

In addition, having carnal knowledge of a girl without her consent or where the consent is obtained by force or by means of threat or intimidation, is rape.<sup>382</sup> Sexual intercourse within child marriage is forced since the girl cannot give consent by virtue of her age, and therefore amounts to rape. In the same vein, parents or guardians who give girls out in marriage may be charged under S222A (1).<sup>383</sup>

Here the question arises of the age of capability of giving sexual consent in Nigeria. According to the Penal Code, the age appears to be fourteen years in the North<sup>384</sup> and thirteen years in the South.<sup>385</sup> A child younger than these ages in the two regions is not capable of giving consent to sex, and if given out in marriage, the marriage is considered nonconsensual which is

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<sup>378</sup> 1981 3 WLR 585

<sup>379</sup> S221 Criminal Code

<sup>380</sup> S222 Criminal Code

<sup>381</sup> S226 and S227 Criminal Code

<sup>382</sup> S357 Criminal Code

<sup>383</sup> S222A. Whoever has the custody, charge or care of a girl under 16, causes or encourage the seduction, unlawful carnal knowledge or indecent assault of the girl shall be liable to imprisonment for two years.

<sup>384</sup> S282 (1) Penal Code

<sup>385</sup> S218 Criminal Code

criminalised by these two provisions.<sup>386</sup> The age of consent was recently lowered to 11 years.<sup>387</sup>

However it is to be noted that child marriage is not expressly included in these provisions and the connections made to child marriage are purely analogous. Child marriage is mentioned nowhere in the Criminal Code.

#### **4.13.2 The Penal Code**

The Penal Code applies in the North of Nigeria as the statute code for criminal law and procedure.<sup>388</sup> Most of its provisions are Islam based and therefore suited to the prevailing religious affiliation in the North, although staunch Muslims argue that it is not exactly Sharia law.<sup>389</sup> Presently, there are two penal codes in Nigeria, the one that has been in effect since 1960 and the Sharia Penal Code of 1999 that is applicable in certain northern states which have started implementing Sharia as the exclusive law.<sup>390</sup>

In the same way as the Criminal Code in the other parts of the country, the Penal Code contains provisions that criminalise certain offences and thus act as law protecting the girl child against sexual abuse. It does not expressly mention child marriage since child marriage is not recognised, but it criminalises the exploitation of children<sup>391</sup>, and it can be argued that child marriage constitutes exploitation of the girl child.<sup>392</sup> In this way, the Penal Code can be said to prohibit child marriage.

Both the initial Penal Code and the Sharia Penal Code provide for rape as an offence with penal consequences. S283 of the Penal Code and S128 (1) of the Zamfara Penal Code define rape as intercourse with a woman by a man

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<sup>386</sup> Nwauche (n 262 above)437.

<sup>387</sup> Sexual Offences Act. 'Nigerian Senate Lowers Age of Consent for Sex from 18 to 11; Faces Backlash' 9 June 2015 ibtimes <http://www.ibtimes.co.in/nigerian-senate-lowers-age-consent-sex-18-11-faces-backlash-635241> (accessed 30 December 2016).

<sup>388</sup> Olakanmi (n 359 above) 177.

<sup>389</sup> As above.

<sup>390</sup> R Peters 'The reintroduction of Islamic criminal law in Northern Nigeria' (2001) 3 [http://rezaei.typepad.com/hassan\\_rezaei/files/islamic-criminal-law-nigeria\\_en.pdf](http://rezaei.typepad.com/hassan_rezaei/files/islamic-criminal-law-nigeria_en.pdf) (accessed 30 December 2016). GJ Weimann *Islamic criminal law in Northern Nigeria: politics, religion, judicial practice* (2010) 83. Sexuality and Laws in Nigeria May 5 2013

<sup>391</sup> S278-280 Penal Code

<sup>392</sup> Child marriage, Child protection information sheet UNICEF 2006 1 [https://www.unicef.org/infobycountry/files/Child\\_Marriage.pdf](https://www.unicef.org/infobycountry/files/Child_Marriage.pdf) (accessed 30 December 2016).

against her will, without her consent or with her consent obtained by threat or fear of death or harm, or with or without her consent if she is under fifteen years of age or of unsound mind.<sup>393</sup>

The Penal Code<sup>394</sup> contains provisions for the protection of the girl child against sexual abuse. These provisions criminalise rape, forced and unlawful sexual intercourse or carnal knowledge, indecent assault, defilement, hijacking, kidnapping and harbouring.

Apart from the Criminal and Penal Codes, the criminal laws of some Nigerian states also have provisions for the protection of the girl child against sexual abuse.<sup>395</sup> Some of these provisions can unequivocally be said to prohibit the practice without actually mentioning the term child marriage.<sup>396</sup>

Apart from criminal provisions for the protection of the girl child, Federal Acts and state laws have been put in place for the same purpose of protecting women and children in Nigeria, and thereby obviously also the girl child.<sup>397</sup>

#### **4.14 The Trafficking in Persons (Prohibition) Enforcement and Administration Act**

One such Federal Act is aimed at protecting children from trafficking and other forms of exploitation<sup>398</sup> through the National Agency for the Prohibition of Trafficking in Persons (NAPTIP). The Act criminalises sexual

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<sup>393</sup> S283 Nigerian Penal Code. S128(1) Zamfara State Penal Code. 'Child bride aged 14 'killed 35-year-old husband with rat poison and signed confession with thumbprint' Mirror 23 December 2014 <http://www.mirror.co.uk/news/world-news/child-bride-aged-14-killed-4867292>. The experience of the girl bride Wasila Tasiu who killed her husband comes to mind. She had told her lawyer that what she wanted to do was to stop him from having sexual intercourse with her, an expression that betrays the fact that she did not want it. Not only was it painful, it was forced.

<sup>394</sup> S222 Nigerian Criminal Code on procuring girls. S223 Criminal Code on abduction.

<sup>395</sup> Edo State Criminal Code (Amendment) Law 2000 Cap 48 prohibits trafficking and sexual exploitation of women and girls. Zamfara State Sharia Penal Code of 2000 vol 1 no 4 sections 207-239.

<sup>396</sup> Nwauche (n 262 above) 425.

<sup>397</sup> As above

<sup>398</sup> Trafficking in persons Prohibition Law Enforcement and Administration Act 2003 amended in 2015 (NAPTIPACT) S1. The objectives of this Act are to (a) provide an effective and comprehensive legal and institutional framework for the prohibition, prevention, detection, prosecution and punishment of human trafficking and related offences in Nigeria.

intercourse with a person under the age of eighteen and as such may be the basis for the prosecution of persons involved in child marriage.<sup>399</sup> Where a girl child is exchanged or transferred, or this is done across countries or states, and money has changed hands, which can include the payment of a bride price, it is deemed to be trafficking.<sup>400</sup> All of these offences can also happen in the case of child marriage.<sup>401</sup>

The NAPTIP works with the Trafficking in Persons (Prohibition) Enforcement and Administration Act of 2015. A Federal High Court recently sentenced a woman to thirty years in prison for the procurement and exportation of young Nigerian women to Libya for purposes of prostitution.<sup>402</sup> She was convicted of offences that contravene Sections 13 (4b), 14(b) and 18 of the Trafficking In Persons (Prohibition) Enforcement and Administration Act 2015. The offender was investigated arrested by officers of the NAPTIP after a group of solicitors and human rights advocates petitioned against the suspected human trafficking activities being carried out by her and her family.<sup>403</sup>

The NAPTIP has offices in almost all states in the country, including those in the North where there is resistance to the prohibition of child marriage.<sup>404</sup> The challenge here is that the people do not see or acknowledge child marriage as trafficking, even though the girl brides are generally exchanged for money or goods in the name of dowry or bride price.<sup>405</sup>

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<sup>399</sup> S16(1) S15(1) NAPTIPACT. Nwauche (n 262 above)425

<sup>400</sup> S16(2) S13. (1) All acts of human trafficking are prohibited in Nigeria. (2)(i) Any person who recruits, transports, transfers, harbours or receives another person by means of-(a) threat or use of force or other forms of coercion;(b)abduction, fraud, deception, abuse of power or of a position of vulnerability; or (c) giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation of that person, commits an offence and is liable on conviction to imprisonment for a term of not less than 2 years and to a fine of not less than N250,000.00.

<sup>401</sup> The viral case of senator Yerima and his wedding with a 13-year-old girl was said to have involved a huge amount of money as bride price for the girl, an occurrence which is not alien to child marriage.

<sup>402</sup> '59 Yr Old Woman Bags 30 Years Imprisonment And N1 Million Fine For Human Trafficking ... 2 Others Convicted For Obstructing Naptip Officers' 28 September 2016 <http://www.naptip.gov.ng/> (accessed 11 November 2016).

<sup>403</sup> As above

<sup>404</sup> 'Senator Shehu Sani signs on to fight human trafficking...commends NAPTIP' 27 Oct 2016 <http://www.naptip.gov.ng/> (accessed 11 November 2016).

<sup>405</sup> I Mbakogu 'Trafficking Of Nigerian Women And Children: Implications For Attaining Sustainable Development In Nigeria' *Yonsei Journal of International Studies* 50-51.

#### 4.15 The Violence against Persons (Prohibition) Act

Some states in Nigeria have general laws that prohibit harmful practices<sup>406</sup> and a newly promulgated Federal Act prohibiting violence against persons is now also in place. While the Act is considered to be an improvement on how the Criminal and Penal Codes deal with matters of violence, it cannot be said that a generally accepted or applicable Federal Act prohibiting child marriage exists.<sup>407</sup>

It is commendable that the provisions of the Violence against Persons (Prohibition) Act expands the meaning of rape and its prohibition, although it is argued that it is only with respect to certain aspects of rape.<sup>408</sup> While other laws limit their scope to the protection of females against vaginal penetration without consent, the Violence Against Persons (Prohibition) Act has expanded the definition specifically to protect men and women.<sup>409</sup>

Rape is thus defined as the intentional penetration of the vagina, anus or mouth of another person with any part of his or her body or anything else without consent, or where such consent is obtained by means of force, threat or intimidation of any kind, through fear of harm, by means of false and fraudulent representation as to the nature of the act, through the use of any substance or additive capable of taking away the will of such person, or in the case of a married person by impersonating his or her spouse.<sup>410</sup>

Rape as gender biased has been a jurisprudential issue in Nigeria for a long time.<sup>411</sup> While rape is a feature of child marriage, the expansion of the

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<sup>406</sup> Ebonyi state abolition of harmful traditional practices against women and children law 2001. Edo state female circumcision and genital mutilation prohibition law 1999. Rivers State Abolition of Female Circumcision Law 2001. Ogun State Female Circumcision and Genital Mutilation Prohibition Law 2000.

<sup>407</sup> Although Cross River has the Cross Rivers State girl child marriage and female circumcision prohibition law 2000, and the prohibitions in the Child Rights Act which some Northern states have not adopted.

<sup>408</sup> AA Nwazuoke 'A Critical Appraisal of the Violence Against Persons (Prohibition) Act 2015' (2016) 47 *Journal of law Policy and globalization* 69

<sup>409</sup> As above. S357 Criminal Code Act

<sup>410</sup> S1(1)(a)-(c) Violence against Persons Prohibitions Act

<sup>411</sup> EOC Obidimma & QC Umeobika 'Time for a new Definition of Rape in Nigeria (2015)' 5 *Research on Humanities and Social Sciences* 120

definition of rape in the Violence against Persons (Prohibition) Act makes no contribution to resolving the issue of child marriage.

The Violence against Persons (Prohibition) Act specifically prohibits female genital mutilation and related acts but does not mention child marriage.<sup>412</sup> It also prohibits abduction, forced isolation or separation from family and friends, all of which characterize the practice of child marriage.<sup>413</sup> Lack of consensus on the wrongness of child marriage is probably the reason why the practice is not expressly mentioned but the fact remains that this is yet another act in which child marriage does not feature.

The act also states that where there is a conflict between any provision of the act and any other provision on similar offences in the Criminal Code, Penal Code or Criminal Procedure Code, the provisions of the Act supercede.<sup>414</sup> It duplicates some provisions in the Criminal and Penal Codes.<sup>415</sup>

The Violence against Persons (Prohibition) Act only has effect in the Federal Capital Territory of Abuja.<sup>416</sup> In this sense, whether it mentions child marriage or not is irrelevant since it in any case cannot be applied to sexual offences, abduction or other issues related to child marriage anywhere other than in Abuja.

#### **4.16 Policies relevant to the practice of child marriage**

Certain federal or national legislation and policies can count as protecting the girl child against sexual abuse as they provide for reproductive health.

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<sup>412</sup> S6(1)-(4) Violence against Persons Prohibition Act

<sup>413</sup> 'Child marriage' A CFR InfoGuide Presentation [http://www.cfr.org/peace-conflict-and-human-rights/child-marriage/p32096#!/?cid=otr\\_marketing\\_use-child\\_marriage\\_Infoguide#!%2F](http://www.cfr.org/peace-conflict-and-human-rights/child-marriage/p32096#!/?cid=otr_marketing_use-child_marriage_Infoguide#!%2F) (accessed on 1 February 2017).

<sup>414</sup> S45 Violence against Persons (Prohibition) Act

<sup>415</sup> 'The Violence against Persons (Prohibition) Act 2015 Brief Introduction' LawPavillion.com <http://lawpavillion.com/blog/the-violence-against-persons-prohibition-act-2015/> (accessed 30 December 2016).

<sup>416</sup> S47 Violence against Persons Prohibitions Act

The National Policy on Education is relevant although not specifically about child marriage or sexual abuse.<sup>417</sup> There are also several other policies for the protection of the girl child, although they do not expressly mention the girl child or child marriage. These are the National Reproductive Health Policy and Strategy 2001, the National Adolescent Health Policy 1995, the National Policy on HIV/AIDS 2003, the National Policy on Women 2000, another in 2004, the National Policy on the Elimination of FGM 1998 and another in 2002, the National Policy on Maternal and Child Health 1994, the National Strategy Framework and Plan of Action for VVF Eradication in Nigeria 2005-2010, and the National Plan of Action and Guidelines on OVC 2001.

Some of these policies do not expressly prohibit child marriage but are for the prevention of the certain consequences of child marriage and as such can be categorised as provisions against child marriage. Policies such as the Strategic Plan of Action/Implementation Framework 2007, the National Policy and Guidelines on Gender in Basic Education 2007 is aimed at the acceleration of the education of the girl child in order to achieve gender parity in access, retention, completion and achievement in basic education by 2015.

The importance of some of these policies, particularly those related to education, is that it is generally argued that promoting and achieving education for the girl child may encourage a change in perceptions with respect to marriageable age.<sup>418</sup> If society succeeds in delaying marriage for girls, the practice of child marriage can slowly be eradicated.<sup>419</sup> In addition, girls who empowered are better equipped to make their own choices and fight for their rights.<sup>420</sup>

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<sup>417</sup> The National policy on Education 1999, revised in 2004 Yet there are policies on other issues even though seemingly far-fetched are connected such that utilizing them will deal with the issue of prohibiting child marriages in Nigeria. For example, where education is provided compulsorily as basic for a particular age, it may act to curb, hamper or lessen the incident of child marriages. The Constitution provides for right to education and the Child Right Act provides for basic primary education.

<sup>418</sup> Fayokun (n245 above)460-461

<sup>419</sup> As above

<sup>420</sup> As above

#### **4.17 Institutions that handle related issues apart from the Police and courts.**

Apart from the courts, the police and the NAPTIP, some other institutions deal with matters relevant to this discourse on child marriage. These are government established organs, professional groups and no governmental organisations. These are discussed under this head.

##### **4.17.1 The National Human Rights Commission**

The National Human Rights commission was established pursuant to the National Human Rights Commission Act of 1995.<sup>421</sup> It was established in accordance with a United Nations General Assembly resolution enjoining all member states to establish a commission for the promotion and protection of human rights and was amended in 2010.<sup>422</sup>

The functions of the commission are related to the promotion, protection and enforcement of the rights of citizens, including children.<sup>423</sup> It is expected to have an office in every state in the federation but this is not yet the case.<sup>424</sup>

While the Human Rights Commission has commented or remarked on child marriage as a form of human rights abuse<sup>425</sup> and reiterated the need to put an end to the practice,<sup>426</sup> it deals with human rights abuses in general and particularly infringements by government. It is concerned with sensitising people about child marriage<sup>427</sup> but does not have a specific programme on the practice itself.

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<sup>421</sup> National Human Rights Commission at [www.nigeriarights.gov.ng/NigerianChild.php](http://www.nigeriarights.gov.ng/NigerianChild.php), accessed on 15 August 2016.

<sup>422</sup> As above

<sup>423</sup> As above

<sup>424</sup> As above.

<sup>425</sup> 'NHRC commends Sanusi's call against child marriage' May 30 2016 [www.blueprint.ng/2016/05/30/nhrc-commends-sanusis-call-against-child-marriage/](http://www.blueprint.ng/2016/05/30/nhrc-commends-sanusis-call-against-child-marriage/) (accessed 15/8/2016). Prof Ben Angwe the executive secretary of the commission had commended emir Sanusi on his call against child marriage.

<sup>426</sup> 'Nig: NHRC reiterates need to end Early, forced marriage as human rights abuse' [allafrica.com/stories/201506170074.html](http://allafrica.com/stories/201506170074.html) (accessed 15 August 2016).

<sup>427</sup> As above



Even if it did, the fact that it deals with human rights issues in general restricts its effectiveness in the area of child marriage which requires a very focused and specific approach.

#### **4.17.2 The International Federation of Women Lawyers (FIDA)**

Professional bodies and Non-governmental organisations also have an important role to play in the eradication of child marriage.<sup>428</sup> Their activities may include advocacy and lobbying for laws, enlightenment and other ways of achieving the goal of ending the practice.<sup>429</sup>

It is important to have organisations which can offer legal assistance such as bringing actions on behalf of girls, suing the government for non-fulfillment of its obligations, representing girls in actions brought against them pro bono or with legal aid, and even providing shelter for girls escaping the institution of child marriage.<sup>430</sup>

The International Federation of Women Lawyers (IFWL) is a professional association known as Federacion Internacional de Abogadas (FIDA) in Spanish.<sup>431</sup> An international NGO and not-for-profit organisation, it engages in initiatives to elevate the status of women and children by providing legal aid, legal literacy and educational programmes.<sup>432</sup>

As the women's branch of the Nigerian Bar Association, the IFWL uses advocacy, lobbying for law reform, research and publications to fight for the cause of women and children on issues such as battery, human trafficking, rape and child abuse in general.<sup>433</sup> By providing legal aid and advocating for the education of the girl child, the organisation is involved in the issue of

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<sup>428</sup> V Pelayo 'Child Marriage: Addressing the Challenges and Obstacles in the Post-2015 Agenda 2015' Independent Study Project (ISP) Collection Paper 2105 [http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3135&context=isp\\_collection](http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3135&context=isp_collection) (accessed 11 November 2016).

<sup>429</sup> As above

<sup>430</sup> As above

<sup>431</sup> FIDA 'Who we are' <http://www.fidafederation.org/who-we-are/> (accessed 11 November 2016).

<sup>432</sup> As above

<sup>433</sup> As above. International federation of Women lawyers Nigeria at <http://www.fida.org.ng/> (accessed 30 December 2016)

child marriage in Nigeria. In the North, and particularly in Kano, it is known for its assistance in many child marriage cases.<sup>434</sup>

The notorious case of Wasilat Tasiu was successfully defended by a member of FIDA/IFWL.<sup>435</sup> FIDA has specifically lobbied for the domestication of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the adoption of the Child Rights Act by states in Nigeria that have not done so, and has gone as far as proposing the promulgation of a law against child marriage in the country.<sup>436</sup>

#### **4.17.3 The Isa Wali Empowerment Initiative**

The Isa Wali Empowerment Initiative is another NGO that has been involved in the protection of the girl child against child marriage in Nigeria through its interest in the protection of children generally.<sup>437</sup> It is more focused on the education, empowerment and health of girls than the issue of child marriage per se.<sup>438</sup>

The organisation's founder Ms Maryam Uwais has written papers on the protection of children, the Child Rights Act and Sharia laws in Nigeria, as well as specifically on the subject of child marriage<sup>439</sup> which she describes as violence against the girl child. Uwais is of the opinion that the reason why there is no minimum marriageable age in Nigeria is because one has not

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<sup>434</sup> As above.

<sup>435</sup> 'Child-bride: Girl faces murder trial over forced marriage' 4 August 2014 Vanguard <http://www.vanguardngr.com/2014/08/girl-faces-murder-trial-forced-marriage/> (accessed 30 December 2016). 'Child bride freed by Nigerian authorities looks to new beginnings' The Guardian 11 June 2015 <https://www.theguardian.com/global-development-professionals-network/2015/jun/11/child-bride-threatened-with-death-freed-nigeria> (accessed 30 December 2016).

<sup>436</sup> 'Fida Chairperson advocates Child Rights Act domestication' News Agency of Nigeria 06 August 2016 [guardian.ng/news/fida-chairperson-advocates-child-rights-act-domestication/](http://guardian.ng/news/fida-chairperson-advocates-child-rights-act-domestication/) (accessed 15 August 2016).

<sup>437</sup> 'About the Initiative' Isa Wali Empowerment Initiative <http://iwei-ng.org/> (accessed 30 December 2016).

<sup>438</sup> As above. It followed up Wasila Tasiu's case giving her education, has a fund from Ford foundation to build 6 hospitals in Kano, and from Canadian High Commission on child marriage.

<sup>439</sup> As above. Her books have been referenced in this thesis and the researcher had one on one discussion with her on phone and on email which contributed to this research.

been incorporated into the country's laws and because existing laws are not being implemented effectively.<sup>440</sup>

The Isa Wali Empowerment Initiative also conducts research on child marriage, and has revealed that there are more underage girls in child marriages in Nigeria than any other country in West Africa, with girls as young as nine years old being married.<sup>441</sup>

While the programmes of these various institutions are related to human rights and very laudable, their impact on the eradication of child marriage is minimal,<sup>442</sup> possibly because they focus on treating the symptoms or effects of child marriage, which they do well, rather than the root cause. They have been and still are effective in the areas of health, dissemination of information and even legal aid.

As NGOs they have strong lobbying power and through drawing attention and mobilising public support,<sup>443</sup> should be capable of persuading government to pass a bill prohibiting child marriage which is the one major shortcoming on the issue in Nigeria, but in their defence one must add that there are few matters on which NGOs can force the government's hand.

Such is the role and function of these organisations but actual execution and implementation lies with the government.<sup>444</sup> They should nonetheless not relent in their efforts and continue to lobby and work together to get legislation passed that protects the rights of the girl child, particularly in terms of child marriage.

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<sup>440</sup> 'Child marriage as violence against the girl child' The forum on women, religion, violence and power at Carter Center 18 March 2015 [forumonwomenblog.cartercenter.org/2015/03/18/child-marriage-as-violence-against-girl-child/](http://forumonwomenblog.cartercenter.org/2015/03/18/child-marriage-as-violence-against-girl-child/) (accessed 15 August 2016).

<sup>441</sup> 'The Plight of Nigeria's young brides' 20 Oct 2016 Isa Wali empowerment initiative at the global panorama.com/tag/isa-wali-empowerment-initiative/ (accessed 15 August 2016).

<sup>442</sup> M Muftuler-Bac 'Divergent pathways: Turkey and the European Union: Rethinking the dynamics of Turkish European Union relations (2016) 121. In Nigeria there are more NGOs dealing with Fistula cases than eradication of child marriage. See 7, 13-14 Federal Ministry of Health National strategic framework for the elimination of obstetric fistula in Nigeria 2011-2015 [https://fistulacare.org/archive/files/5/5.4/Nigeria\\_National\\_Strategy\\_2011-2015.pdf](https://fistulacare.org/archive/files/5/5.4/Nigeria_National_Strategy_2011-2015.pdf) (accessed 1 February 2017).

<sup>443</sup> Y Kim, The Unveiled power of NGOs: how NGOs influence states' foreign policy behaviors, Unpublished PhD Thesis of University of Iowa, 2011, 25, 156-159.

<sup>444</sup> As above

#### **4.18 Evaluating the protection against child marriage afforded by legal provisions in Nigeria**

Girl children are among most vulnerable members of society who are subjected to indescribable injustices within and outside the home and therefore need protection from a variety of vices including sexual abuse in the form child marriage.<sup>445</sup> Among the best approaches to the protection of children are the promulgation of national legislation broadly aimed at child protection, the prescription of a specific age for childhood, taking the best interest of the child into consideration, adhering to the principle of non-discrimination and incorporating international standards into national legislation.<sup>446</sup>

Three issues underlie the discourse in this thesis, namely the provisions of existing law, the pressing social problem of child marriage in terms of its prevalence and effects on the girl child as well as the development of society, and the state response to the problem.

International and regional treaties form part of Nigerian law through the provisions of the Constitution and the domestication of ratified treaties.<sup>447</sup> General and specific international treaties related to the protection of the girl child that have been ratified by the country include the United Nations Declaration on Human Rights, the African Charter on Human and Peoples Rights and its Protocol on the Rights of Women, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of Children.<sup>448</sup>

However these treaties cannot be directly applied by the courts for the benefit of citizens unless they have been domesticated so as to form part of

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<sup>445</sup>Young women and girls remain the most vulnerable Medical Brief 23 June 2015 <http://www.medicalbrief.co.za/archives/young-women-and-girls-remain-the-most-vulnerable/> (accessed 30 December 2016).

<sup>446</sup> '100 Best practices in child protection: A series of 100 best practices Vol iii 2013 The John Hopkins University, school of advanced international studies, International centre for missing and exploited children.

<sup>447</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>448</sup> These are discussed extensively in chapter 5 of this thesis.

domestic law.<sup>449</sup> The Child Rights Act,<sup>450</sup> which domesticates agreements on the rights of children and specifically refers to child marriage, is not a nationally accepted law because of the nature of Nigeria's legal system and federal form of government.<sup>451</sup> This has a negative impact on efforts to eradicate child marriage in the country, particularly in the North where the practice is most prevalent.<sup>452</sup>

While it cannot be denied that the Nigerian government has taken positive and commendable steps to improve the protection and welfare of children,<sup>453</sup> Upon closer examination of the reality of situation and comparing the action taken to the state response on other issues, it would appear that government has not done enough to ensure the protection of the girl child, particularly against child marriage.<sup>454</sup>

Despite public outrage about the issue of child marriage in recent times, no steps have been taken to promulgate a law prohibiting the practice.<sup>455</sup> The Child Rights Act rejected by Northern states was not insisted on by the government. As of today there is no specified marriageable age, which is related to the lack of consensus on the age of childhood in the country.<sup>456</sup> The controversial constitutional provision on the age of adulthood continues to have implications for the Nigerian girl child.<sup>457</sup>

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<sup>449</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>450</sup> A Federal Act of 2003 in Nigeria

<sup>451</sup> Fayokun (n 245 above). 463-464.

<sup>452</sup> As above

<sup>453</sup> Mary Odili 'The Nigerian Child and Cross Cultural Protection of Rights' 2005 [www.thisdayonline.com/nview.php?id=32772](http://www.thisdayonline.com/nview.php?id=32772) Like promulgating the Child Rights Act 2003 although still having implementation problems and the child care and survival division and the child rights promotion and protection division. Signing the UN Convention on the Rights of the Child in 1991, establishing child development department as a department in the ministry of women affairs in 1992, establishing a National child rights implementation monitoring committee, Organising a national summit on children to set the direction for a national policy on children for the 21<sup>st</sup> century.

<sup>454</sup> Braimah (n 245 above) 487.

<sup>455</sup> As above. Although promulgations have been made on several issues except on child marriage. Nigeria: Senate passes law criminalising HIV non-disclosure, exposure and transmission with vague and overly broad statutes in the Sexual Offences Bill For example failure to expose HIV status has been criminalized, 4 June 2015, HIV Justice Network at <http://www.hivjustice.net/news/nigeria-senate-passes-law-criminalising-hiv-non-disclosure-exposure-and-transmission-with-vague-and-overly-broad-statutes-in-the-sexual-offences-bill/> (accessed 30 December 2016).

<sup>456</sup> Braimah (n 245 above) 488

<sup>457</sup> Members of the Nigerian senate having succeeded in voting for its retention in the Constitution that is S29 (4) (b).

Due to the disparate religious and cultural affiliations of the Nigerian people, the issue of marriageable age is the challenge currently faced by the Child Rights Act.<sup>458</sup> By virtue of country's federal system of government, states are not legally obliged to adopt an Act, and not all of them have adopted the Child Rights Act, particularly states in the North.<sup>459</sup> Some states, such as Jigawa, did so after changing the marriageable age from eighteen years to puberty with no response from the government.<sup>460</sup> To date, no prosecution has taken place for this shameful and blatantly public amendment of an act by a senator<sup>461</sup> since no complaint or charge was laid and there was in any case no law criminalising the deed at the time, making prosecution impossible.<sup>462</sup>

Even the federation's Attorney General declared that the deed, though ignoble, had not contravened any criminal law in the country and the senator could therefore not be tried or prosecuted.<sup>463</sup> To make matters worse, when arguments on the constitutionality or legality of child marriage were raised, the Attorney General, who is the protector of the rights of the citizens of the country and also the custodian of the law, took no clear stand or any action at all in defense of the laws.<sup>464</sup>

Unlike in South Africa,<sup>465</sup> Malawi<sup>466</sup> and Zambia,<sup>467</sup> the Nigerian Constitution does not provide for a Public Protector or Prosecutor. Through the Ministry of Justice, the Attorney General decides on who should be prosecuted for crimes and issues *nolle prosequi* where he deems fit<sup>468</sup> or

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<sup>458</sup> UN Cedaw and CRC Recommendations on minimum age of marriage laws around the world as of November 2013 [www.ohchr.org](http://www.ohchr.org) (accessed 4 August 2015). Even if to fix it at 16 which is lower than the recommended 18 years, yet the margin of appreciation does permit it and some Countries have 16 years as the marriageable age today but Nigeria generally cannot be said to have not adopted one.

<sup>459</sup> Braimah (n 245 above)481

<sup>460</sup> As above. Jigawa Child Rights Law.

<sup>461</sup> Braimah (n 245 above) 485-486.

<sup>462</sup> S36(12) Constitution of the Federal Republic of Nigeria. *Aoko v Fagbemi* (1963), ALL NL.

<sup>463</sup> 'Braimah (n 245 above) 485-486. 'Nigerian senator who 'married girl of 13' accused of breaking Child Rights Act' The Guardian 25 July 2013 <http://www.theguardian.com/world/2013/jul/25/nigeria-senator-accused-child-bride> (accessed 19 March 2016).

<sup>464</sup> As above

<sup>465</sup> S181-183 Constitution of Republic of South Africa.

<sup>466</sup> S101 Constitution of Malawi

<sup>467</sup> S180 Constitution of Zambia

<sup>468</sup> S73(1) Criminal Procedure Act

legal advice for prosecution through the director for public prosecution.<sup>469</sup> Perhaps it is time the Constitution was amended to allow for a Public Protector to deal with social issues such as child marriages, particularly if a law prohibiting the practice is promulgated.

Along with the fact that no such law has been promulgated, the Attorney General's inaction can be argued as amounting to non-response on the part of the government and an indictment of the law and thereby also the government.<sup>470</sup> This is especially disturbing in light of the extremely negative and far reaching effects of the practice of child marriage on the development of the country and particularly the northern region, and the fact that far more adolescent or teenage pregnancies occur within the institution of marriage than outside it.<sup>471</sup>

Government is seen to pay immediate attention to other social issues and offer legislative support to prohibit or curb them. For example, it did not take long for government to take a stance on same sex marriages and to pass a bill prohibiting it.<sup>472</sup> A law is in place to deal with almost every issue in Nigeria. A law that was recently promulgated in Lagos to criminalise the notorious problem of land grabbing is very likely to be implemented successful.<sup>473</sup> And even recently non disclosure of HIV status was criminalized by a newly promulgated law.<sup>474</sup>

This omission to legislate does not seem to stem for avoidance of duplication of laws as already even the newly promulgated Violence against Persons Prohibition Act duplicates many offences in both the Criminal and Penal

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<sup>469</sup> Public Prosecution Department, Federal Ministry of Justice at <http://www.justice.gov.ng/index.php/about-us/departments/public-prosecution> (accessed on 1 January 2017)

<sup>470</sup> As above

<sup>471</sup> AA Agbaje & AO Agbaje 'Early marriage, child spouses: What roles for counselling psychology' 2013 2 *Asian Journal of Social science and humanities* 51. Laws should be modernized to fit modern civilization.

<sup>472</sup> Same Sex Marriage Prohibition Law 2014.

<sup>473</sup> Lagos State Properties Protection Law 2016

<sup>474</sup> 'Nigeria: Senate passes law criminalising HIV non-disclosure, exposure and transmission with vague and overly broad statutes in the Sexual Offences Bill HIV Justice Network 4 June 2015 <http://www.hivjustice.net/news/nigeria-senate-passes-law-criminalising-hiv-non-disclosure-exposure-and-transmission-with-vague-and-overly-broad-statutes-in-the-sexual-offences-bill/> (accessed 30 December 2016).

Codes of Nigeria.<sup>475</sup> In light of the foregoing, it is surprising that no law has yet been proposed to prohibit child marriage.

While this has been blamed on lack of political will, the reality is that government has failed to take sufficient legislative action in this regard. Although several policies exist<sup>476</sup> and programmes continue to be implemented on issues such as education and children's health, the fact is that policies are not really effective unless expressed as laws.<sup>477</sup>

It is worth noting that Nigeria's First Lady has expressed an interest in the enactment of a law that will prohibit child marriage in the country.<sup>478</sup> This could contribute to the much needed political will, particularly in light of the fact that both she and the President are Muslim Northerners. The draft of an act on the prohibition of child marriage proposed in this thesis is therefore relevant and timely.<sup>479</sup>

In terms of the judiciary, there has been no judgment or declaration from and on behalf of the government on the issue of child marriage, even in response to arguments on constitutional support for the continuance of the practice.<sup>480</sup> The dearth of judicial precedence in this regard is not difficult to explain.

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<sup>475</sup> The Violence against Persons (Prohibition) Act 2015 BRIEF INTRODUCTION Lawpavillion.com <http://lawpavillion.com/blog/the-violence-against-persons-prohibition-act-2015/> (accessed 30 December 2016). Offences like rape, defilement are duplicated, although rape was extended in this Act. The fact of duplication is made clear when the Act provides that where there is conflict between its provision and the Criminal Codes, the former prevails.

<sup>476</sup> National Policy of Education 2004, National health policy 2004, National policy on HIV/AIDS for the education sector in Nigeria 2005, National population policy 2006, National youth policy 2009, National policy on HIV/AIDS 2009, National Nutrition Policy 2011.

<sup>477</sup> CN Okeke 'International law in the Nigerian legal system' (1997) 27 *Cal.w.Int'LJ* 311. O Nwankwo 'Nigeria obligation to women under human rights treaties and instruments: Issues, Realities and Challenge' <http://aaacoalition.org/DOCS/PDFS/microsoftword-nigeriasobligationtowomenpdf>. GU Mugwuanya 'Examination of state reports by the African Commission: A critical Appraisal' (2001) 2 *African human rights law Journal* 268. GW Mugwuanya *Human rights in Africa; Enhancing human rights through the African regional human rights systems* (2003) 315-366.

<sup>478</sup> 'Aisha Buhari seeks legislation against child marriage in Nigeria' 13 May 2015 <http://www.stelladimokokorkus.com/2015/05/aisha-buhari-seeks-legislation-against.html> (accessed 22 March 2016)

<sup>479</sup> As above.

<sup>480</sup> Nwauche (n 262 above)427



Firstly, there is an absence of law as a basis for prosecution.<sup>481</sup> It is trite that the judiciary can only make pronouncements on matters that come before it for adjudication, even if it is to defend the Constitution.

Secondly, it is difficult if not impossible for girls to take their parents to court because of their age and understanding, the societal implications, lack of funds and legal loopholes.<sup>482</sup> In addition, in the absence of a specific law on child marriage, cases can only be brought for the enforcement of fundamental human rights or criminal provisions such as those on sexual abuse, assault and abduction, all which are flawed.<sup>483</sup>

The fact also remains that government itself has not been challenged legally on its failure to perform its responsibilities.<sup>484</sup> Whether the state can be sued is another issue for legal debate.<sup>485</sup> In the recent case of *Frank Tietie v the Attorney General of the Federation & Others*,<sup>486</sup> the state was found guilty of failing to protect the fundamental rights of two girl children who had been sexually assaulted by non prosecution of the culprit.<sup>487</sup>

While it is possible to sue the government, this has not happened on the issue of child marriage and the abominable practice continues unabated.<sup>488</sup> Weighing up the ongoing prevalence of the practice against legislative action

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<sup>481</sup> Braimah (n 245 above) 486

<sup>482</sup> 'Divorced at 14: How thousands of Nigerian girls are forced into marriage only to be thrown out and end up with no education and no hope' Mail on line 30 June 2014 <http://www.dailymail.co.uk/news/article-2673817/Divorced-14-How-thousands-Nigerian-girls-forced-marriage-thrown-end-no-education-no-hope.html> (accessed 22 January 2017).

<sup>483</sup> As will be seen in the discourse in chapter 6 of this thesis where the conflict of laws and other legal issues contributing to child marriage in Nigeria is discussed.

<sup>484</sup> Unlike in Zimbabwe where the government was taken to court on the challenge that the marriage Act was discriminatory for providing 16 years as marriageable age for girls and 18 for boys, the court had ordered that 18 years as minimum marriageable age for boys and girls under the different types of marriages and prohibiting marriages under 18 years for all the types whether registered or not. [www.one.org/us/2016/01/21/zimbabwes-top-court-has-outlawed-child-marriage/](http://www.one.org/us/2016/01/21/zimbabwes-top-court-has-outlawed-child-marriage/) (accessed 22 January 2016).

<sup>485</sup> The researcher wrote on the topic Actions against the state in Nigeria for her master's thesis in Obafemi Awolowo University in 2003.

<sup>486</sup> M/336/12

<sup>487</sup> Frank Tietie is a case in the federal capital territory of Nigeria, Abuja. The Attorney General and some state officers were sued for not prosecuting the sexual assault of some girls, it is therefore possible to sue the government via his agents or agencies but this has not been done on the issue of child marriage in Nigeria, it was done in Malawi.

<sup>488</sup> Nwauche (n 262 above)427.

to date, the Nigerian government cannot be said to have done its utmost to respond to the issue of child marriage.<sup>489</sup>

It is true that there are laws which offer the girl child the same broad protection as all other citizens of the country.<sup>490</sup> Scattered provisions can be found in or deduced from the Constitution, specifically in terms of human rights, and legislative instruments such as the Criminal and Penal Codes. However, there is no law specifically prohibiting child marriage.<sup>491</sup>

Although Nwauche argues that within Nigeria's legal framework such prohibition is embedded in the constitutional provisions on human rights, child marriage and indeed any form of marriage is not associated with human rights in the eyes of Northern Nigerian society.<sup>492</sup> One can therefore conclude that while there are laws, they do not offer the girl child adequate protection and do not specifically denounce child marriage.<sup>493</sup>

There is evidence of initiatives and programmes aimed at improving the lives of children and even attempts to reduce gender discrimination, but none of these specifically address the issue of child marriage.<sup>494</sup> In Northern Nigeria, for instance, programmes were initiated to encourage the education of girl children and keep them in school for longer, and an effort was made to offer afternoon classes and programmes for the continued education of pregnant and/or married girls.<sup>495</sup>

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<sup>489</sup> Nwauche (n262 above)428, 432. It would be admitted that it has tried but the efforts have been like treating symptoms and not the cause, there are so many programs on treating VVF in the North, educational programs to keep girls in school for long inclusive of assistance for compulsory education for basis primary education and for pregnant girls all in the North, while this has helped with education it has not stopped child or early marriage in the North. The government can do more than this to prevent or curb the problem especially by promulgating a child marriage prohibiting Act as it did on the issue of same sex marriage.

<sup>490</sup> As above

<sup>491</sup> A reference is made to all the provisions in above and the summary and conclusion of this chapter.

<sup>492</sup> Nwauche (n 262 above)424.

<sup>493</sup> Braimah (n 245 above) 474

<sup>494</sup> 'Is Nigeria taking all steps to curb discrimination against women' Africa Check 7 October 2014 <http://africacheck.org/reports/is-nigeria-taking-all-steps-to-curb-discrimination-against-women/#starsh.OTOj/vph.dpy>.

<sup>495</sup> A Ishaq & M Ali 'Non-Formal Education and the Girl-Child in Northern Nigeria: Issues and Strategies' (2014) 5 *Journal of education and practice* 46. PM Adebuseye (ed) *Matan Kwarai Insights into Early Marriage and Girls' Education in Northern Nigeria* (2011)7. Most of the innovators in the book completed or went further in their education while married or after marriage.

The problem is that such measures can actually be seen as accommodating child marriage rather than attempting to eliminate it and will therefore contribute to its continued practice.<sup>496</sup>

It has been noted that there are departments for the management of issues such as sexual abuse<sup>497</sup> in the office of the federal government,<sup>498</sup> and additional offices have been established to give the relevant departments more particular responsibilities in terms of addressing all forms of violence against children,<sup>499</sup> but once again, there is no record of any office dedicated to the issue of child marriage or its prohibition.

Whether this is an oversight or not is irrelevant; it is clearly an omission to act and to afford the girl child adequate protection. It is therefore recommended that a Gender Commission and specifically a Child Commission be established to deal with the scourge of child marriage, even as an office for the enforcement of the proposed child marriage prohibition acts.<sup>500</sup>

While there are NGOs and international donors and partners working in the area of child marriage, the real question is about the response of the federal and state governments in Nigeria as the protector of the rights of all citizens including the girl child. As previously noted, when compared to government action on other issues in the country, the state response has been inadequate, which is why the problem has continued unabated.<sup>501</sup>

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<sup>496</sup> Adebuseye as above. The illustration in the book proves that despite child or early marriages, the women were still able to go to school. An evidence that it has not been prohibited and not seen as a problem troubling enough to necessitate such drastic actions while the evidence around shows that it is.

<sup>497</sup> The Nigerian Police Service which already exist but recently a special office was created specifically to manage the issues of violence against women and children.

<sup>498</sup> Special presidential committee on human trafficking, child labour and slavery, federal ministry of women affairs, federal ministry of justice. Federal ministry of information and national orientation

<sup>499</sup> NAPTIP office. There is a special office in the Immigration and Customs service in charge of issues of trafficking and other related vices.

<sup>500</sup> There is none in existence so far in Nigeria and its one innovative contribution of this thesis.

<sup>501</sup> Nigeria: 2015 Report country reports on human rights practices Bureau of Democracy, Human Rights, and Labor US Department of states at <https://www.state.gov/j/drl/rls/hrrpt/2015/af/252715.htm> accessed on 22 January 2017. See also Submission for the Office of the High Commissioner for Human Rights (OHCHR) report on child, early and forced marriage (A/HRC/RES/24/23). December 2013 save the children report. For instance, the issue of Ebola which was successfully hijacked and stopped cannot be said to be an effortless one but it was attended to with all resources and hands unlike the issue of child marriage which

What possible steps could have been taken by the state in this regard? The office of the Attorney General could have taken legal action against those states which have not adopted the Child Rights Act and where child marriage continues to be practiced. This would at least have been an opportunity to obtain a judicial decision to determine the legal debates and arguments caused by the uncertainties surrounding the issue and act as a judicial precedent.

However, such legal action is ruled out because by virtue of the federal system of government in Nigeria, states are empowered to make their own laws on certain matters,<sup>502</sup> while the Federal and State High Courts exist as courts to deal with questions of law and interpretation of the Constitution.<sup>503</sup>

The Nigerian government could demonstrate lack of support for child marriage by criminalising the practice.<sup>504</sup> Prosecution of the senator who openly celebrated child marriage would have constituted such a demonstration in the eyes of the public but there was no law under which to do so.<sup>505</sup> This calls for the establishment of a reference law to bring such acts and perpetrators to book.<sup>506</sup>

In Ghana, the government has made efforts to curb early and forced marriages through the Constitution,<sup>507</sup> a Domestic Violence Act<sup>508</sup> and a Criminal Code that criminalises forced marriages.<sup>509</sup>

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politicization and religious sentiments have been allowed to circumvent without disregard to the lives of the girls affected and its effect on the development and the future of the society.

<sup>502</sup> S12 (2) (3), also Item 61, Part A, 2<sup>nd</sup> Schedule CFRN 1999

<sup>503</sup> Asein (n 4 above).

<sup>504</sup> Since the Child Rights Act has been faulted by some states, this could have been included in the Prohibition of Violence against Persons Act but this is not the case as child marriage was not expressly mentioned in the new Act.

<sup>505</sup> Braimah (n 245 above) 474. See also Nigeria: Sex in Nigeria Vanguard All Africa 4 February 2015 at <http://allafrica.com/stories/201502040386.html?mstac=0> (accessed 22 January 2017).

<sup>506</sup> Braimah (n 245 above) 488. Especially since the marriage as not celebrated in Abuja the federal capital territory where the Child Rights Act can be said to be enforceable. Meanwhile the senator had disagreed that the bride was 13 years although the fact remains that she was under 18 as at the celebration of the wedding.

<sup>507</sup> The Constitution 1992 has been amended to expressly define a child as a person below 18 years, Art 26 (2) abolishes all customary practices which dehumanize and are injurious to persons and Art 12 (1) provides for the enactment of legislation or other means to effect the materialization of the fundamental rights guaranteed in the Constitution. There was a parliamentary seminar on combating early and forced marriage in Ghana March 3-4, 2014 organized by WILDAF with financial support

India promulgated a Child Marriage Prohibition Act in 2006 and even the United Kingdom recently took legislative steps against the practice.<sup>510</sup> In Nigeria, even the fundamental rights to reproductive health and education are not justiciable as expressed in the Constitution,<sup>511</sup> and the Criminal and Penal codes have not been amended despite obviously discriminatory provisions.<sup>512</sup>

In the analyses of child marriage and approaches to eliminating the practice, legislation, and specifically prohibitory legislation, is the only area that has not been thoroughly explored. Initiatives such as the programmes for the education of the girl child are commendable and can be effective without contributing in any way to the elimination of child marriage.<sup>513</sup> It is unfortunate that government policy has no effective impact except when expressed as law<sup>514</sup> and that there is to date no federal legislation specifically prohibiting child marriage in Nigeria.<sup>515</sup>

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from the department of foreign affairs and international trade and development, Canada and The John D and Catherine T Mac Arthur Foundation.

<sup>508</sup> Domestic Violence Act (Act 732) 2007

<sup>509</sup> Hon Ebo B Oduro for the speaker of parliament Hon Doe Adjaho, the parliamentary seminar on combating early and forced marriage, march 3-4, 2014, Ghana, wiLDAF.

<sup>510</sup> The UK Forced Marriage Civil Protection Act 2007 and after analysing its effect again included its criminal provision in its Anti-Social Behaviour, Crime and Policing Act 2014

<sup>511</sup> S17, issues of reproductive rights which can be said fall under socio economic or cultural rights are under state principles and objectives which are not justiciable in Nigeria. *Okogie v Att Gen of Lagos State* 1986 2 NCLR 337.

<sup>512</sup> At least until recently, another issue of political will. C Nwonu & I Oyakhiromen 'Nigeria and child marriage: Legal issues, complications, implications, prospects and solutions' (2014) 29 *journal of law, policy and globalization* 124. See how the issue of Ebola was treated with urgency and practical actions that saw the eradication of Ebola in Nigeria, concentrated efforts by the government in like manner with resolute and strong will action will rid the country of the menace of child marriage.

<sup>513</sup> Adebuseye (n 495 above). In the North of Nigeria, effort is being made to ensure girls go to school, even from their husbands' house, such that education al provisions, incentives and opportunities has not stopped or put an end to child marriage.

<sup>514</sup>NI Aniekwe 'A Legal perspective on reproductive health and gender specific human rights in Nigeria' (2004) 3 *Journal of medicine and Biomedical Research* 28.

<sup>515</sup> That is apart from the Child Rights Act which has not been accepted in all the States again under the fault of law specifically the Constitution

#### **4.19 Summary and conclusion**

The Nigerian plural legal system makes available a plethora of domestic laws available for the protection of citizens inclusive of the girl child in the Constitution, legislations, policies and judicial precedence with their various legal institutions at the federal and state levels. Again there are policies or legislations directed towards sexual and reproductive health rights and educational policies under which child marriage may be subsumed.

Judicial institutions are established in the country to take care of diverse and various issues and legal problems all over the federation as federal or state high superior or inferior courts. These institutions also exist as per legal systems of English, customary and Islamic. On family issues this system based institutions relates based on marriage types.

Protective laws include the constitution which provides fundamental human rights. The Marriage Act and the Matrimonial Causes Act provide for capacity and consent to marry. The Criminal and Penal Codes provide protection against abduction, defilement, unlawful carnal knowledge, rape and sexual abuse generally. The Prohibition of Violence against Persons protect from violence generally and enlarged the definition of rape. The NAPTIP Act protects against child exploitation and the Child Rights Act is the protective instruments for children generally.

Other institutions apart from the Courts include the Police and National Agency for the Prohibition of Trafficking in Persons Commission (NAPTIP) which exist to prevent child exploitation. Some professional bodies like FIDA and Non-Governmental Organisations like Isa Wali Empowerment Initiative exist to handle such related cases like child sexual abuse, exploitation and child marriage cases.

While the part or role of judiciary cannot be underplayed in the advancement or development of law in all societies and in this issue, the inadequacy of legislation is and can be a major drawback as it is the existing

laws that give the judiciary the jurisdiction and opportunity to perform and this can be said to be the case in the issue of child marriage in Nigeria.

It is from this analysis that it can be concluded that there are laws for the protection of the girl child generally, there are specific laws for her protection against abduction which can be interpreted to accommodate forced marriage or otherwise. There are laws against sexual abuse as in the criminal and penal provisions against forced, non-consensual intercourse with children or defilement ad statutory rape (which inevitably happens within child marriage relationship) even though sexual abuse as a term is not used.

The Child Rights Act though prohibits child marriage is a general child Rights protective legislation not marriage specific and has not been adopted by some Northern states although it is not gainsaying that the problem of child marriage deserves a better attention and focus through a specific law than a general one like even much more than the issue of same sex marriage which has been prohibited through the Same Sex Marriage Prohibition Act. Yet, public display of non-compliance with the provisions of the child rights act by individual and states have gone without response or action by the government legally under the argument that it is not an offence and cannot be prosecuted.

Thus conclusively, the girl child is not sufficiently protected against child marriage by domestic laws and the international provisions prohibiting the practice are restricted from being effective by the same domestic provisions. In the main, since it is the responsibility of the state to enact legislation which cannot be categorically said to have been done in the case of Nigeria, the state is faulted as not responding adequately to the issue of the protection of the girl child against child marriage in Nigeria.

## **CHAPTER FIVE**

### **International framework for the protection of the girl child against child marriage**

#### **5.1 Introduction**

This chapter covers eight sections. The first section is on the responsibilities of states with respect to international human rights. The second section is on the related multilateral treaties. The third section is on discussion of the implementation of treaties by member states and the fourth section is on challenges of treaties related to women and children. The fifth section discusses the emerging trends in state obligations under international law to protect the girl child against child marriage. The sixth section discusses the domestication and applicability of treaties in Nigeria. The seventh section is a discussion of the country's implementation of international law for the protection of the girl child. The eighth aspect discusses an assessment of the fulfilment of Nigeria's obligations under international human rights instruments. The chapter then concludes with a summary.

#### **5.2 State obligations under international human rights**

Nigeria has been signatory to many international and regional treaties and human rights have been part of its constitutions since its independence.<sup>1</sup> This situation has implications for the issue of child marriage and the protection of the girl child which is the concern of this chapter.<sup>2</sup>

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<sup>1</sup> JA Dada 'Human Rights under the Nigerian Constitution: Issues and Problems' (2012) 2 *International Journal of Humanities and Social Science* 33-34. JA Dada 'Impediments to Human Rights Protection in Nigeria' (2012) 18 *Annual Survey of International & Comparative Law* 68. The influence of the United Nations Human Rights and treaties is evident in her various constitutions especially by the enshrinement of a chapter on fundamental human rights. Chapter IV 1999, 1989, 1979, 1963 and 1960 of the Nigerian constitutions.

<sup>2</sup> The girl child is a child in the Children's Instrument, human/female/spouse in the general human rights instrument, spouse/partner in the marriage instrument and woman in the women's human rights instruments.



A treaty is an international agreement concluded between states or a compact made between two or more independent nations in the interests of the public welfare.<sup>3</sup> An instrument is a treaty if it creates rights and duties that are enforceable under international law.<sup>4</sup> Treaties are international agreement concluded between states, which exist in written form, are governed by international law and may be embodied in a single instrument or in two or more related instruments.<sup>5</sup>

Treaties are given a number of different names, such as international conventions, international agreements, covenants, final acts, charters, protocols, pacts, accords and constitutions of international organisations.<sup>6</sup> They may be bilateral (involving two parties) or multilateral (involving several parties) and are usually only binding on the parties to the agreement.<sup>7</sup> Bilateral treaties usually enter into force when both parties agree to be bound to the agreement as of a certain date.<sup>8</sup>

Treaties are important in the current global dispensation because it serves as an agreement between and among states for the common good and recognition of the rights of citizens.<sup>9</sup> This situation requires both national and international responses for the realisation of its purpose.<sup>10</sup>

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<sup>3</sup> Art 2(1) Vienna Convention on the Law of Treaties. Cruz 'Limits on the treaty power' (2014) 127 *Harvard law review Forum* 93. DB Hollis 'An Intersubjective Treaty Power' (2015) Vol 90:4 *Notre Dame law review* 1421

<sup>4</sup> 'Law of Treaties 1: What is a treaty?' Public international law <https://ruwanthikagunaratne.wordpress.com/2013/05/26/law-of-treaties-vienna-convention-on-law-of-treaties-1969/> (accessed 25 July 2016)

<sup>5</sup> Art 2 The Vienna convention on the law of treaties. The Vienna Convention on the Law of Treaties of 1969 (VCLT) is the main instrument that regulates treaties. It defines a treaty and relates to how treaties are made, amended, interpreted, how they operate and are terminated. It does not aim to create specific substantive rights or obligations for parties – this is left to the specific treaty (i.e. the Vienna Convention on Diplomatic Relations creates rights and obligations for States in their diplomatic relations).

<sup>6</sup> n 4 above.

<sup>7</sup> As above

<sup>8</sup> 'Treaties and International Agreements' Beckley law library university of California at <https://www.law.berkeley.edu/library/dynamic/guide.php?id=65> (accessed 25 July 2016).

<sup>9</sup> World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations Just Societies Sixty-seventh General Assembly 24 September 2012 General Assembly Plenary GA/11290 UN meetings coverages and press releases <http://www.un.org/press/en/2012/ga11290.doc.htm> (accessed 2 January 2016).

<sup>10</sup> As above.

After treaties, customary international law is the second primary form of international law.<sup>11</sup> Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, and the United Nations and its member states to be one of the primary sources of international law.<sup>12</sup>

Customary international law is the outcome of the general and consistent practice by states of principles they follow from a sense of legal obligation.<sup>13</sup> This section explores the obligations of states, and particularly the obligation of the state of Nigeria in terms of the protection of the girl child, under treaties and international customary law.

It is the duty of states to fulfil their obligations under international agreements.<sup>14</sup> State responsibility is a cardinal institution of international law which results from the general legal personality of every state under international law and from the fact that states are the principal bearers of international obligations.<sup>15</sup>

The international responsibility of states is based on two legal precepts, firstly, that a state must be subject to international obligations, and secondly, that a state must be held responsible for noncompliance with such obligations.<sup>16</sup> One of the duties of government is the protection and security of its citizens.<sup>17</sup> In terms of international human rights, this duty extends to

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<sup>11</sup> Art 53 Vienna Convention on the Law of Treaties. M Fitzmaurice & A.Quast *Law of Treaties* (2007)9. EA Posner & JL Goldsmith 'A Theory of Customary International Law' (1999) 66 *University of Chicago Law Review* 1113.

<sup>12</sup> Art 38 (1)(a)-(c) Statute of the International Court of justice.

<sup>13</sup> S Sahl 'Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law' (2007) Globalex Hauser Global Law School Program New York University School of Law [http://www.nyulawglobal.org/globalex/Customary\\_International\\_Law.html](http://www.nyulawglobal.org/globalex/Customary_International_Law.html) (accessed 25 July 2016). C Deane An update of S Sahl's to this was done in July 2016 (accessed 3 January 2016).

<sup>14</sup> 'International human rights law' United Nations Human Rights office of the High commissioner <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 3 January 2016).

<sup>15</sup> EB Weiss 'Invoking state responsibility in the twenty-first century' (2002) 96 *Am. J. Int'l L.* 798.

<sup>16</sup> GS de Tagle 'The objective international responsibility of states in the Inter-American human rights system' (2015) 7 *Mexican Law Review* 115

<sup>17</sup> As above 118

securing and ensuring that the individual rights of citizens and the rights of all the groups and communities within the territory are protected.<sup>18</sup>

In the case of *González and Others v. Mexico*, popularly known as the Cotton Field case (Campo Algodonero),<sup>19</sup> the Inter-American Court of Human Rights reached a landmark decision, ruling that Mexico violated both the American Convention of Human Rights (the “American Convention”) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (the “Convention of Belém do Pará”) when it failed to prevent and investigate the disappearance and murder of three poor migrant women, two of whom were minors.<sup>20</sup>

This case is relevant because the court analysed the relationship between the rights and obligations contained in the two treaties. The legal conclusion of the court were however unprecedented in that it held that states have affirmative obligations to respond to violence against women by private actors, and that those obligations are justiciable under Article 7 of the Convention of Belém do Pará.<sup>21</sup>

In light of this precedent, the state can be held responsible for not fulfilling the obligations in the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa or the provisions of the African Charter on the Rights and Welfare of the Child.<sup>22</sup> This include in terms of preventing sexual abuse and violence against women, or (in the context of this study) prohibiting child marriage as an act of sexual abuse of the girl

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<sup>18</sup> As above. H Gandois ‘Sovereignty as responsibility: Theory and practice in Africa’ 2008 Paper presented at the annual meeting of the ISA’s 49th ANNUAL CONVENTION, BRIDGING MULTIPLE DIVIDES, Hilton San Francisco, SAN FRANCISCO, CA, USA Online [http://research.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/2/5/0/5/5/p250558\\_index.html?phpsessid=alra7hpe4kqptenv05bud04555](http://research.allacademic.com/meta/p_mla_apa_research_citation/2/5/0/5/5/p250558_index.html?phpsessid=alra7hpe4kqptenv05bud04555) (accessed 3 December 2016).

<sup>19</sup> Cotton Field, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009)

<sup>20</sup> As above.

<sup>21</sup> C Bettinger-Lopez ‘The Challenge of Domestic Implementation of International Human Rights Law in The Cotton Field Case’ (2012) 15 *Cuny Law Review* 316.

<sup>22</sup> M Geldenhuys et al ‘The African Women’s Protocol and HIV: Delineating the African Commission’s General Comment on articles 14(1)(d) and (e) of the Protocol’ (2014)14 *AHRLJ* 683

child committed by private actors, that is, parents, guardians or family members.<sup>23</sup>

A state is bound to act in accordance with international customary law and to follow any international treaty it has signed and ratified.<sup>24</sup> This is a fundamental principle in international law called *pacta sunt servanda* (meaning agreements must be respected) which follows from both the Vienna Convention on the Law of Treaties and international customary law. International humanitarian law (IHL) conventions and human rights treaties are examples of sources of a state's international obligations.<sup>25</sup>

In international human rights, citizens are recipients or beneficiaries of rights while states are obliged to ensure that these rights are enjoyed by citizens.<sup>26</sup> International human rights law lays down obligations which states are bound to respect.<sup>27</sup> By becoming parties to international treaties, states assume obligations and duties under international law to respect, protect and fulfil human rights.<sup>28</sup>

The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights.<sup>29</sup> The obligation to protect requires states to protect individuals and groups against human rights abuses, and the obligation to fulfil means that states must take positive

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<sup>23</sup> As above.

<sup>24</sup> VO Ayeni 'Introduction and preliminary overview of findings' in VO Ayeni (ed) *The impact of African charter and the Maputo Protocol in selected African states* (2016)9.

<sup>25</sup> 'Enforcement of International Law' 11 December 2013 diakona International humanitarian Law Resource Center <https://www.diakonia.se/en/IHL/The-Law/International-Law1/Enforcement-of-IL/> (accessed 11 December 2016).

<sup>26</sup> As above. RC Slye 'International Law, Human Rights Beneficiaries and South Africa: Some Thoughts on the Utility of International Human Rights Law' (2001) 2 *Chicago Journal of International Law* 60

<sup>27</sup> 'Preamble and Art 30 of the Universal Declaration of Human rights' <http://www.un.org/en/universal-declaration-human-rights/index.html>. The foundation for international human rights law, United Nations <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (accessed 3 December 2016).

<sup>28</sup> 'International human rights law, United Nations Human Rights Office of the Commissioner' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 3 December 2016). 'International Human Rights Law and Sexual Orientation & Gender Identity' Fact sheet [https://www.unfe.org/system/unfe-6-UN\\_Fact\\_Sheets\\_v6\\_-\\_International\\_Human\\_Rights\\_Law\\_and\\_Sexual\\_Orientation\\_Gender\\_Identity.pdf](https://www.unfe.org/system/unfe-6-UN_Fact_Sheets_v6_-_International_Human_Rights_Law_and_Sexual_Orientation_Gender_Identity.pdf) (accessed 3 December 2016). UC Jha *Human Rights and justice: International documents* (2010) 44.

<sup>29</sup> As above

action to facilitate the enjoyment of basic human rights.<sup>30</sup> States have the obligation to implement and the obligation to report under treaties.<sup>31</sup>

In the fulfilment of their responsibilities, states have to provide a legislative framework for the implementation of treaties in their domestic domains<sup>32</sup> which may involve all three arms of government. In the domestication of international treaties in dualist states, the executive ratifies and then the legislature enacts.<sup>33</sup> The state's obligation is however not totally fulfilled until promulgated laws are translated into reality for citizens, this being the duty of the judiciary as the arm of government responsible for interpretation of laws.<sup>34</sup>

In Nigeria, the President, through any agency to which he may delegate the responsibility, is responsible for the ratification of treaties, i.e. the signing with international bodies, while the legislative arm of government is in charge of domestication.<sup>35</sup>

This separation of the power and duties of in a federalist state is at the heart of the current conflict on the domestication of the Child Rights Act in Nigeria.<sup>36</sup> Some Northern states are claiming that in terms of the Nigerian Constitution, it is not within the jurisdiction of the federal government to ratify a treaty prohibiting child marriage or imposing a marriageable age.<sup>37</sup>

A major and common obligation in these treaties is that legislative measures be taken by state parties.<sup>38</sup> States must make laws that will enable the

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<sup>30</sup> 'International Human Rights Law' United Nations Human Rights Office of the High Commissioner <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 12 November 2016).

<sup>31</sup> F Viljoen 'Contemporary challenges to international human rights law and the role of human rights education' (2011) 44 *De jure Law journal* 212.

<sup>32</sup> Art 1 African Charter on Human and Peoples Rights. Art 26 Vienna Convention on Law of Treaties 1969 state parties are to provide their obligation under a treaty in good faith.

<sup>33</sup> VO Ayeni 'The Impact of the African Charter and the Maputo Protocol in Nigeria' in VO Ayeni (ed)(n 24 above) 184.

<sup>34</sup> 'The limits of legal realism' (1978) 87 *Yale Law Journal* 474. S6(1) Constitution of the Federal Republic of Nigeria 1999 The judicial powers of the Federation shall be vested in the courts

<sup>35</sup> Ayeni (n 23 above)184. B I Olutoyin 'Treaty Making and Its Application under Nigerian Law: The Journey So Far' (2014) 3 *International Journal of Business and Management Invention* 9.

<sup>36</sup> TS Braimah 'Child marriage in Northern: Section 61 Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African human rights law journal* 475

<sup>37</sup> As above.

<sup>38</sup> 'International human rights law, United Nations Human Rights Office of the High Commissioner <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 3 December 2016)

realisation of the purposes of a treaty and the enjoyment of its benefits by their citizens.<sup>39</sup> This is one major way in which treaties can translate from mere documents into application in the ratifying states,<sup>40</sup> although the obligation to legislate on these issues would already have been discharged if there are existing provisions in the laws of a state.<sup>41</sup>

The major responsibility of states however is argued to be the prevention of the infringement of the rights of citizens and the protection and defending of those rights.<sup>42</sup>

### **5.2.1 The responsibility to protect, to prevent and to defend**

The responsibilities of states everywhere include the duty to protect their citizens in pursuance of their agreement under international human rights.<sup>43</sup> According to Viljoen, one such basis that has gained much international acceptance is the responsibility to protect which is based on the premise that state sovereignty implies responsibility; a state must be willing and able to protect its populace.<sup>44</sup>

This responsibility to protect is expressed in human rights instruments as obligations of government.<sup>45</sup> The United Nations Convention on the Rights of the Child provides that state parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, including sexual

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<sup>39</sup> Olutoyin (n 35 above) 8.

<sup>40</sup> As above. D Olowu 'Human Rights and the avoidance of domestic implementations: The Phenomenon of non-judicial Constitutional guarantees' (2006) 69 *Saskatchewan Law Review* 39.

<sup>41</sup> Art 31 of the Protocol. See Art 41 UN Convention on the Rights of the Child, Art 1 (2) of the African Charter on the Rights and Welfare of the Child, Art 23 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

<sup>42</sup> S Goonesekere 'A rights-based approach to realizing gender equality' <http://www.un.org/womenwatch/daw/news/savitri.htm> (accessed 3 December 2016).

<sup>43</sup> Gandois (n 18 above). This includes the responsibility to respect, protect, fulfil and promote human rights.

<sup>44</sup> F Viljoen *International Human Rights Law in Africa* (2012) 21.

<sup>45</sup> L Glanville 'The Responsibility to Protect Beyond Borders' (2012) *Human rights law review* 3. SP Rosenberg 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to Protect* 446

abuse while in the care of parents, legal guardians or any other person who has care of the child.<sup>46</sup>

Similar provisions exist in the African Charter on the Rights and Welfare of the Child. Current state parties to Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment, and especially physical or mental injury or abuse, neglect or maltreatment, including sexual abuse.<sup>47</sup>

The type of protective measures required to realise this are stipulated and include prevention and defending.<sup>48</sup> In terms of protection against child marriage, these measures will not only involve the promulgation of laws to protect the girl child from this abuse,<sup>49</sup> they will include criminalising the practice which entails actual prosecution and sanctioning.<sup>50</sup>

It is the duty of governments to prevent harm or injury to citizens in the fulfilment of their obligations under ratified treaties.<sup>51</sup> This is particularly relevant to child marriage as harmful practice. The African Charter on the Rights and Welfare of the Child provides that state parties to the current Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, and in particular customs and practices that are

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<sup>46</sup> Art 19(1) CRC.

<sup>47</sup> Art 16(1) African Charter on the Rights and the Welfare of the Child

<sup>48</sup> Art 16(2) African Charter on the Rights and Welfare of the Child.

<sup>49</sup> 'Lack of legal protection exposes girls to early marriage' The Star 19 January 2014 [www.thestar.com/news/world/2014/01/19/laws-failing-to-stop-child-marriage-rights-group-reports.html](http://www.thestar.com/news/world/2014/01/19/laws-failing-to-stop-child-marriage-rights-group-reports.html)- The Associated Press (accessed 25 July 2015). Like laws and policies to ensure enlightenment to prevent these from happening, ensuring she is in school when she ought to be, enlightenment and education on reproductive health and rights

<sup>50</sup> F Simmons & J Burn 'Without consent: Forced marriage in Australia' (2013) 36 *Melbourne University law Review* 972. This might fall under deterrence, ensuring that those who whether consciously or in the name of tradition and religion abuse the girl child are punished will deter others in society. Even where parents are taken up for given their daughters away in marriage prematurely, others will refrain from doing it, the same goes for men who marry underage girls prosecuting them for it will deter others.

<sup>51</sup> 'Report on citizen security and human rights Inter American Commission on Human rights para 40' <https://www.cidh.oas.org/countryrep/Seguridad.eng/CitizenSecurity.IV.htm> (accessed 3 December 2016).

prejudicial to the health of the child, and that are discriminatory towards the child on the grounds of gender or any other status.<sup>52</sup>

Child marriage is specifically mentioned as a practice to be eliminated through legislation specifying eighteen years as the minimum age for marriage.<sup>53</sup> A similar provision exists in the Convention on the Rights of the Child (CRC) which stipulates that state parties shall take all effective and appropriate measures to abolish traditional practices that are prejudicial to the health of children.<sup>54</sup> Since child marriage has been shown to harm the health, dignity and normal development of the girl child, the obligation to prevent its occurrence through the prohibition of the practice is a leading obligation expressed in human rights instruments.<sup>55</sup>

The word prevention specifically appears in CRC provisions on the protection against sexual exploitation.<sup>56</sup> The current Charter provides that state parties shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent the inducement, coercion or encouragement of a child to engage in sexual activity.<sup>57</sup>

It is also the duty of governments to defend the rights provided for in terms of the protection of the girl child.<sup>58</sup> This will also include defending her by whatever means against abuses and abusers generally, either before an act of abuse is committed or, and particularly, through the provision of legal aid following such an act as well as redress and reparation.<sup>59</sup>

Defence as a state responsibility is included in the African Charter on the Rights and Welfare of the Child (AWRC) where it provides that state parties shall undertake to provide special treatment to expectant mothers and to

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<sup>52</sup> Art 21(1) African Charter on the Rights and Welfare of the Child

<sup>53</sup> Art 21(2) African Charter on the Rights and Welfare of the Child.

<sup>54</sup> Art 24(3) Convention on the Rights of the Child.

<sup>55</sup> As above

<sup>56</sup> Art 27(1)(a) African charter on the rights and welfare of the child

<sup>57</sup> As above.

<sup>58</sup> G Odongo 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms' (2012)12 *AHRLJ* 112, 117-118

<sup>59</sup> 'Children's rights: International laws Library of Congress <http://www.loc.gov/law/help/child-rights/international-law.php> (accessed 3 December 2016).



mothers of infants and young children who have been accused or found guilty of crimes in the ways provided in the Charter.<sup>60</sup>

Measures to protect, prevent and defend are not necessarily primarily legislative.<sup>61</sup> They can take the form of enlightenment and education; measures that may or may not be stipulated in the instruments but that are appropriate and can be referred to as appropriate measures.<sup>62</sup>

Part of this responsibility is also to adhere to the recommendations of a treaty's Committee of Experts or those of the Secretary which are generally given at the end of a reporting session.<sup>63</sup> Unfortunately, these recommendations have often been little more than the expression of expectations, which may account for the non-compliance of state parties.<sup>64</sup> The question is what powers of enforcement are given to these committees, and whether they have the authority to do more than urge states to take certain measures and to take action against sovereign states for failing in their responsibilities or obligations.<sup>65</sup>

On the issue of child marriage in Nigeria, recommendations have been in the form of urging the state to take prompt measures to address the practice of early marriage, particularly in the North, and to harmonise religious and customary laws with international standards, particularly in terms of minimum age and the definition of childhood.<sup>66</sup> It has further been recommended that Nigeria pass legislation prohibiting child marriage, that is, marriages of children younger than eighteen, ensure the adoption of Convention on the Rights of the Child by all Nigerian states, and place the

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<sup>60</sup> Art 30 of the African charter on the Rights and Welfare of the Child, Art 40 of the CRC

<sup>61</sup> Art 19 CRC

<sup>62</sup> As above

<sup>63</sup> 'Treaty bodies' Child Rights International Network CRIN <https://www.crin.org/en/guides/un-international-system/other-treaty-bodies> (accessed 3 December 2016).

<sup>64</sup> As above

<sup>65</sup> Art 42 (b) to monitor the implementation and ensure protection of the rights enshrined in the African charter on the Rights and Welfare of the Child. Art 45 UN Convention on the Rights of the Child provides the functions of the committee of experts but from the provision, the authority or mandate does not exceed recommendation, it does not extend to sanctions.

<sup>66</sup> Committee on the Rights of the Child fifty-fourth session June 2010

Child Rights Act on the Concurrent List of legislation which will make it automatically applicable in all states.<sup>67</sup>

The provisions of domestic laws however have always been an excuse for lack of implementation of ratified treaties even in Nigeria<sup>68</sup> and thus a type of constraint. It is possible that probably more stringent measures than mere urges may be effective, like mild sanction for example or refusal of report where adequate evidence of implementation of earlier recommendation is not given.

### **5.2.2 Responses of international communities and citizens**

One then needs to look at what may happen, what citizens could do or what international communities could or would do if states fail to fulfil their obligations in protecting and defending the rights of their citizens. Maiese<sup>69</sup> listed some of the actions international communities could take and they are summarised as: provision of safe havens and shelters, education, dialogue, provision of external specialist to assist with legislative assistance on drafting issue or guidance for drafting of laws for securing gender equality and such related legislation; international observers and witnesses; truth commissions, monitors which are common for election issues; humanitarian aids and development assistants.<sup>70</sup>

For the case of child marriage in Nigeria, some of these may help, like assistance with safe havens or shelters for girls fleeing from child marriages which are not common in Nigeria.<sup>71</sup> Dialogue with and education or

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<sup>67</sup> As above.

<sup>68</sup> S12 Constitution of the Federal Republic of Nigeria 1999.

<sup>69</sup> M Maiese 'Human rights protection' June 2004 Beyond Intractability <http://www.beyondintractability.org/essay/human-rights-protect> (accessed 4 December 2017).

<sup>70</sup> As above. Some treaty bodies provide monitoring bodies to improve government practice. EM Hafner- Burton & K Tsutsui 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American journal of sociology* 1374.

<sup>71</sup> THE GLOBAL NETWORK OF WOMEN'S SHELTERS, 2012 Global Data Count,6 Alberta council of women's shelters ACWSA [http://www.endvawnow.org/uploads/browser/files/global2012countreport\\_gnws\\_en.pdf](http://www.endvawnow.org/uploads/browser/files/global2012countreport_gnws_en.pdf) (accessed 4 January 2017). Safe havens and shelter homes are not common in Nigeria, where often times divisions on religious grounds create problems. The researcher has been involved in a case of sexual abuse of children in a Quranic school by an Imam, while the case was on, there was need for a home for the children. Their religious background became necessary for consideration, while there was no government shelter available and the only homes were Christian based.

enlightenment for communities can also be supported by international communities.<sup>72</sup> Assistance with specialists for guidance in the drafting of laws on gender equality on child marriage specifically and on the Nigerian constitution will also be helpful.<sup>73</sup> Not in the least, humanitarian aid and development assistance is required especially in the North where the practice is rife.<sup>74</sup>

For citizens, where the conventions have not been domesticated, legal professional groups, NGOs and civil societies may mount pressure on the government to domesticate so as to make the rights enforceable by citizens.<sup>75</sup>

In the case where the conventions or treaties have been domesticated, they obviously form part of a country's domestic laws and citizens may bring actions to enforce them, as happened in the celebrated case of *Abacha v Fawehinmi*.<sup>76</sup>

In Nigeria, plaintiffs seeking to claim the socioeconomic rights guaranteed in the African Charter on the Human and People's Rights may commence such action by means of a writ or the Fundamental Rights Enforcement Procedure Rules 2009.<sup>77</sup> Nwauche however does not believe the issue of justiciability of socio economic rights has been properly dealt with and put to rest although they are enforceable.<sup>78</sup>

It is possible for citizens to take the government to court on the inadequacy or insufficient protection of the constitution or other legislation. Specifically

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<sup>72</sup> 'Working together for gender equality' The EU – UN Women Partnership (2016). UN Women EU [https://eeas.europa.eu/statements-eeas/docs/unw16012\\_brochure\\_v07\\_final\\_web.pdf](https://eeas.europa.eu/statements-eeas/docs/unw16012_brochure_v07_final_web.pdf) (accessed 4 December 2016).

<sup>73</sup> IS Emakhu 'The nature and prevalence of violence against women in Nigeria' proceedings of 1st Annual International Interdisciplinary Conference AIIC 2013, 24-26 April Azores, Portugal, 782. The Nigerian constitution is indeed in need of reform, many National confab have been held but none has come up with a new constitution. Assistance is obviously required with this.

<sup>74</sup> 'Nigeria' USAID <https://www.usaid.gov/nigeria> (accessed 4 January 2016). The North particularly is in need of assistance on development issues.

<sup>75</sup> E Aloyo 'Protecting Individual and Group Rights for Students, Educators, and Trainers, Beyond Intractability' <http://www.beyondintractability.org/userguide/rights-educators> (accessed 4 January 2016). Emakhu (n 78 above) 782

<sup>76</sup> [2001] 51 WRN 29

<sup>77</sup> Order II Rules 2-4 Fundamental rights enforcement procedure rules 2009.

<sup>78</sup> ES Nwauche 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' (2010) 10 *African Human Rights Law Journal* 512

on child marriage, in the Zimbabwean case of *Loveness Mudzuru, Ruvimbo Tsopodzi v Minister of Justice, Legal & Parliamentary Affairs N.O and Two Others*<sup>79</sup> the practice was outlawed.<sup>80</sup>

There is also however the question of accountability of states which breach international agreements by not domesticating or implementing their provisions or by using their own domestic laws as an excuse. Can such states be held liable or sued, and if so, where and how?

After exhausting domestic procedures in search of justice, individuals can take action or litigation against state government through treaty bodies or international or regional judicial institutions set up for the purpose.<sup>81</sup> An example is the case of *AS V Hungary*,<sup>82</sup> where after failing in a case against the Hungarian government, AS was successful in applying to the Convention on the Elimination of all Forms of Discrimination against Women, although the implementation of the judgement took some time since the Hungarian government essentially had to enforce a judgement against itself.<sup>83</sup>

Citizens can also appeal to the Community Court of the Economic Community of Western African States (ECOWAS) which is now authorised to deal with actions for the enforcement of rights guaranteed in the African Charter on Human and People's Rights.<sup>84</sup> One example of this is the notorious case of *SERAC V and Another v Nigeria*.<sup>85</sup>

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<sup>79</sup> Judgement No CCZ 12/2015, Const. Application No. 79/14

<sup>80</sup> As above. The case was that the Marriage Act and the Customary marriages Act violated the constitutional provision by setting marriage age below that provided by the constitution and they won the case.

<sup>81</sup> 'Human Rights Treaty Bodies - Individual Communications' United Nations human rights office of the High commissioner  
<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> (accessed on 4 January 2016).

<sup>82</sup> Communication No. 4/2004, CEDAW/C/36/D/4/2004

<sup>83</sup> 'From Rights to Remedy: Structures, strategies for implementing international human rights decisions' 10.

<sup>84</sup> ST Ebobrah 'The Future of Economic, Social and Cultural Rights Litigation in Nigeria Review of Nigerian Law and Practice (2007). ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption: competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' 2007 AHRLJ .

<sup>85</sup> (2001) AHRLR 60 (ACHPR 2001)

Another case relating to forced marriage that was decided by the ECOWAS Court is *Hadijatou Mani vs Niger*.<sup>86</sup> The Court in that case found the State of Niger guilty of leniency in protecting its citizens from slavery. While the judgement does not outline in concrete terms what the government should have done, it found the state guilty of failing to take any active steps to protect its citizens, and Hadijatou in particular.<sup>87</sup>

The State of Niger was ordered to pay 10 million West African Francs in compensation to allow Hadijatou to rebuild her life and ensure that her children do not suffer the same kind of abuse.<sup>88</sup> While the implementation of decisions and recommendations by the African Commission on Human and People's Rights is a separate problem,<sup>89</sup> the rulings of the ECOWAS Court are binding on all member states, and the case of Hadijatou Mani vs Niger highlights the potential effectiveness of regional human rights courts.<sup>90</sup>

### **5.3 Related multilateral instruments on child marriage**

There are several global and regional human rights instruments with provisions on marriage which emphasise capacity (age), consent and protection against sexual abuse, and which expressly or by implication prohibit forced intercourse and thereby child marriage. The instruments which mention such prohibitions are dealt with in this section.

For example, instruments related to women and children contain provisions for the protection of the girl child against sexual abuse, against discrimination based on gender, and harmful cultural and religious practices, and provisions on equality in marriage.<sup>91</sup> The International Covenant on Civil and Political Rights (ICCPR) and International Covenant

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<sup>86</sup>Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008. West-African court slavery judgement report Ecowas Court rules on forced labour [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_140854.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_140854.pdf) (accessed 21 April 2016).

<sup>87</sup> As above

<sup>88</sup> As above

<sup>89</sup> M Hansungule African courts and the African Commission on Human and Peoples' Rights 233 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.490.6079&rep=rep1&type=pdf> (accessed 4 January 2017).

<sup>90</sup> As above

<sup>91</sup> Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

on Economics, Social and Cultural Rights (ICESCR) are very specific on the elimination of harmful cultural practices<sup>92</sup>, as is the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages on issues of marriage.<sup>93</sup>

These instruments exist as treaties or agreements between members of international communities for the protection of the rights of humans everywhere, although they may also exist as customary international law or human rights norms and acceptable practices.<sup>94</sup>

### **5.3.1 Global and regional human rights instruments with provisions on child marriage**

The provisions against child or early marriages can be found in general instruments such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and People's Rights.<sup>95</sup> They can also be found in children-specific instruments such as the Convention on the Rights of the Child (CRC) and its regional counterpart, the African Charter on the Rights and Welfare of Children.<sup>96</sup>

The prohibition of child marriage can also be found in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>97</sup>, the International Convention on Economic Social and Cultural rights (ICESCR)<sup>98</sup>, the International Convention on Civil and Political Rights (ICCPR)<sup>99</sup> and the marriage specific instrument of the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of

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<sup>92</sup> Art 23(3) International Convention on Civil and Political Rights (ICCPR); Art 10 (3) International Covenant on Economic, Social and Cultural Rights: Children and young persons should be protected from economic and social exploitation.

<sup>93</sup> Preamble to the Convention. Art 1 of the Convention.

<sup>94</sup> Art 1(a) and (b) Vienna convention on the law of treaties between states and international organisations and or between international organisations.

<sup>95</sup> Art 16 Universal Declaration on human rights. Art 18(3) African charter on human and peoples' rights provide: The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

<sup>96</sup> The instruments mentioned here are the international instruments and their regional counterpart for the African region.

<sup>97</sup> Article 16 CEDAW 1979

<sup>98</sup> Art 10(1) ICESCR 1966

<sup>99</sup> Art 23(2)(3)(4) ICCPR 1966

Marriages<sup>100</sup> as well as the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (the Slavery Convention) 1956.<sup>101</sup> The most relevant provisions contained in these agreements are discussed below.

General comments, observations and recommendations of these treaty bodies<sup>102</sup> especially with regard to Nigeria are also relevant, as is Nigeria's response and the impact of both on the position of the girl child in terms of protection against child marriage.<sup>103</sup>

### **5.3.2 General treaties on capacity and consent to marriage**

The Universal Declaration on Human Rights is described as the advent of international human right instruments and documents.<sup>104</sup> As early as it was, it recognised the importance of marriage and the need for equal rights for spouses.<sup>105</sup> The Declaration provides for the recognition of the right of men and women but not children to marriage,<sup>106</sup> and specifies that marriage shall be entered into only with the full and free consent of the intending spouses.<sup>107</sup>

Since this provision does not express that children are capable of giving the requisite consent,<sup>108</sup> the requirement of free and full consent of the

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<sup>100</sup> Art 2 Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1964

<sup>101</sup> Art 2 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (the Slavery Convention) 1956. 'International and regional standards for protection from child marriage' African child Policy Forum May 2013 <http://www.girlsnotbrides.org/wp-content/uploads/2015/03/Intl-and-Reg-Standards-for-Protection-from-Child-Marriage-By-ACPF-May-2013.pdf> (accessed 6 February 2016).

<sup>102</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 21, Equality in marriage and family relations 1994. (Para. 36) (Para. 38)(Para. 39)

<sup>103</sup> D Olowu (ed) *An Integrative rights-based approach to human development in Africa* (2009)38. Treaty bodies are the institutions set up to monitor or administer the provisions of the treaties and its observances by state members.

<sup>104</sup> Universal declaration of human rights 1948, most constitutions of states borrowed from it to include provision on human rights. It contained provisions on the equality of all men everywhere irrespective of race, colour, creed and its provisions was subsequently followed by the argument of cultural relativism vs universality of human rights.

<sup>105</sup> Art 16(1) United Nations Declaration of Human Rights

<sup>106</sup> As above. Full age was specifically mentioned, a fact that decries child marriage even though child marriage was not expressed.

<sup>107</sup> As above

<sup>108</sup> U.N.G.A Res217 A (111) UN Doc A/810(1948). International Covenant on Civil and Political Rights 19 Dec 1966, 999 U.N.T.S 171.

intending spouses underlies the reference to the prohibition of child and forced marriages.

The right to full and free consent to marriage can also be linked to the right to dignity of every human and the importance of family.<sup>109</sup> Art 7 provides for the right to non-discrimination of all and Art 5 states that no person shall be subjected to torture or to any cruel or inhuman treatment. Research has proved that inhuman treatment and sexual abuse occur within child marriage.<sup>110</sup>

These provisions have come into being as a result of the various harmful effects of child marriage on the girl child personally and its impact on the development of the society following which certain measures were recommended to state parties in order to eliminate the practice.<sup>111</sup>

### **5.3.2.1 The African Charter on Human and People's Rights (ACHPR) 1981**

This is a general provision on human rights for the African region. It is not specific to women or children but does provide for the protection of women and children, even against child marriage, and includes a Protocol on the Rights of Women.<sup>112</sup>

The ACHPR provides for the elimination of every discrimination against women and the protection of the rights of women and children as stipulated in international declarations and conventions.<sup>113</sup> Child marriage is argued to be an offshoot of discrimination against the girl child as it is predominant in

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<sup>109</sup> Preamble to the Universal Declaration on Human Rights. It is a document on the basic human rights; the inclusion of the right to consent to marriage in a document that provides basic rights to dignity, equality underscores not only the importance of marriage but also its link to the dignity and equality of man and the respect for it.

<sup>110</sup> THEMATIC REPORT: Unrecognised Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage', 2015, 2. ECPAT INTERNATIONAL, Thailand.

<sup>111</sup> Para 23, 24, 25, UNITED NATIONS GENERAL ASSEMBLY UNGA A/HRC/26/22, 2 April 2014, HRC Twenty- sixth session Agenda items 2&3, Prevention and elimination of child, Early and Forced marriage. Report of the office of the UN High Commissioner for Human rights. These paragraphs discuss the effects of child marriage and the measures particularly legislative and legal amendment or reform to eliminate the practice.

<sup>112</sup> The African Charter on Human and People's Rights on Women's Protocol.

<sup>113</sup> Art 18 (3) African Charter on Human and Peoples Rights.



societies where the girl child has no value other than that of childbearing.<sup>114</sup> When taken alongside Art 1, the implication of Article 18 is that member states are obliged to promulgate laws that will ensure that women and children enjoy protection by eradicating practices that discriminate against them.<sup>115</sup>

The ACHPR enshrines the principle of equality before the law which is infringed in the practice of child marriage.<sup>116</sup> It also provides that the dignity of the person be respected and prohibits all forms of exploitation, degrading treatment, torture and cruelty.<sup>117</sup> At the same time it provides for the individual's right to liberty and to an environment that is conducive to development,<sup>118</sup> which are again denied the girl child within the institution of child marriage.<sup>119</sup>

The reference to development implies intent for the protection of children, although the document does not mention children. In his discourse on child marriage, Nwauche expresses the opinion that the ACHPR can be applied to protect children in Nigeria, although he also mentions that the dearth of rights-based litigation in this regard is disturbing.<sup>120</sup>

The reason for this is that child marriage is not regarded as an issue of rights in Nigeria, but as one of culture and religion, hence the relevance of relativism to this thesis. The fact that child marriage is not acknowledged especially as a rights issue is evidenced by the fact that the domesticated African Charter on Human and People's Right is not contested in Nigeria and has been adjudged superior to national legislation in cases other than *Abacha v Fawehinmi*.<sup>121</sup> This is unlike the Child Rights Act which is still

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<sup>114</sup> [www.womeninworldhistory.com/WR-11.html](http://www.womeninworldhistory.com/WR-11.html) (accessed 25 July 2015).

<sup>115</sup> Art 1 states that member states shall take legislative or other measures to effect the rights. Art 18(1) states the family shall be protected by the State which shall take care of its physical health and moral.

<sup>116</sup> Art 3 (1) and (2) also Art 19, all people shall be equal, enjoy the same rights and respect.

<sup>117</sup> Art 5

<sup>118</sup> Art 24.

<sup>119</sup> Art 6

<sup>120</sup> ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' (2015) 15 *African Human Rights Law Journal* 427.

<sup>121</sup> [2001] 51 WRN 29. *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR (Pt 163) 607, *UAC (NIG) Ltd v Global Transport SA* (1996) 5 NWLR (Pt 448) 291

being contested because of its recommendation on marriageable age which is said to oppose Islam.<sup>122</sup>

Apart from provisions regarding the family and society,<sup>123</sup> the ACHPR goes further to state that the rights and freedoms of individuals should be exercised with due regard for the rights of others, collective security, morality and common interest.<sup>124</sup> This will be linked to the constitutional window for legislation against child marriage in Nigeria in the interests of public health, public morality or the protection of the rights and interests of others, as part of the responsibility of the state.<sup>125</sup> It is also relevant to the call for a specific child marriage prohibition act in the country, particularly since the ACHPR has been domesticated and forms part of domestic laws in Nigeria.<sup>126</sup>

The ACHPR was ratified by Nigeria on 22 June 1983 and domesticated as the African Charter on Human and People's Rights (Ratification and Enforcement) Cap 10 Act 1990. The implications of its implementation were analysed in the celebrated case of *Abacha v Fawehinmi*.<sup>127</sup>

Although the ACHPR has been applied in several cases on the human rights of individuals, it has not been examined in terms of child marriage.<sup>128</sup> However from this discourse, the feasibility of its application as a domestic law in Nigeria for the protection of the girl child against child marriage is possible.<sup>129</sup>

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<sup>122</sup> KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights' (2015) 5 *US-China Education Review B* 461-462.

<sup>123</sup> Art 27(1)

<sup>124</sup> Art 27(2)

<sup>125</sup> S45 Constitution Federal Republic of Nigeria 1999. S45(1) provides: Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons. S37, 38, 39 provide for freedom of conscience thought, religion, freedom of expression, right to privacy of home. In this wise linked to child marriage, it cannot be argued that it is a private issue or that of religion, based on S45 legislation may be promulgated for the sake of public peace, health and morality.

<sup>126</sup> As above. This forms part of the solution to child marriage in Nigeria which is discussed in chapter 6 of this thesis after a discourse on the legal problems and issue.

<sup>127</sup> [2001] 5 WRN 29. As a domesticated law in Nigeria having provisions on marriage that can be interpreted to prohibiting child marriage, girl children are entitled to the enjoyment of its provisions, the protection it offers them and the interpretation of the judiciary in their interest and for their benefit, while the government is under obligation to avail them of the protection it affords them.

<sup>128</sup> Nwauche (n 120 above)427

<sup>129</sup> As above.

### **5.3.2.2 The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)**

On the basis of the names of these Covenants, one might assume that they do not include anything on marriage, but the institution of marriage does involve cultural rights as well. Marriage is also a social institution that affects the economic rights of the parties and society.<sup>130</sup> In his discourse on marriage and particularly Islamic marriage in Nigeria, Gurin acknowledges that marriage is cultural, social, and both a moral and religious obligation that can affect the civil rights of people within the marriage institution in many societies.<sup>131</sup>

The ICESCR, in recognising that economic, social and cultural rights derive from the inherent dignity of the human person,<sup>132</sup> provides that state members must undertake to ensure the equal right of men and women to enjoy all economic, social and cultural rights set forth in the Covenant.<sup>133</sup> It provides that states shall ensure that these rights are enjoyed without discrimination<sup>134</sup> although economic rights are subject to citizenship.<sup>135</sup>

The ICESCR provides for the protection of children and young persons from economic and social exploitation<sup>136</sup> but does not expressly prohibit child marriage. It nonetheless expects marital unions to be based on the acknowledged consent of the intending spouses,<sup>137</sup> which means that here again the consent of intending spouses is a prerequisite for marriage.

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<sup>130</sup> S Struber 'The Effect of Marriage on Political Identification' (2010) 2 *Inquiries journal* 1. 'Cultural Anthropology/Social Institutions/Marriage' [http://wikieducator.org/Cultural\\_Anthropology/Social\\_Institutions/Marriage](http://wikieducator.org/Cultural_Anthropology/Social_Institutions/Marriage) (accessed 5 December 2016).

<sup>131</sup> Unpublished: AM Gurin 'Comparative study of matrimonial law of Northern Nigeria with emphasis on Islamic law' unpublished PHD thesis of the Center for Islamic studies, Ahmadu Bello University, Zaria, 1991 i.

<sup>132</sup> Preamble, para 2 of the International Covenant on Economic, Social and Cultural Rights.

<sup>133</sup> Art 3 Covenant on Economic, Social and Cultural Rights

<sup>134</sup> Art 2(2)

<sup>135</sup> Art 2(3)

<sup>136</sup> Art 10, many places where child marriage exist, the girl brides are exploited sexually especially since money or dowry is exchanged for them.

<sup>137</sup> Art 10 (1) International Convention on Economic, Social and Cultural Rights (ICESCR) 1966

Although the ICESCR does not mention age or stipulate a marriageable age, full and free consent cannot be established in the case of a child marriage.<sup>138</sup> It does provide for the economic rights of women, particularly in terms of paid maternity leave for working mothers or maternity leave with adequate social security benefits,<sup>139</sup> which does not apply to married girls.<sup>140</sup>

This should be considered in light of the fact that the same Section provides that child marriage can be related to socioeconomic rights, linking the economic issues of poverty and education to the issue of reproductive health and the rights of the girl child and adolescents, legislation and the politics of states.<sup>141</sup>

This and more can be gleaned from the part of this Covenant which provides for the right to physical and mental health<sup>142</sup> and that member states should ensure the reduction of stillbirths and child mortality<sup>143</sup> which are very common when child brides become mothers. In adhering to Art 2(a) of the ICESCR, the Nigerian government has attempted to make primary education compulsory and free, yet child marriage is restricting the girl child's access to education in the North of the country.<sup>144</sup>

The provisions of the ICESCR are relevant in terms of its position that states are held accountable much more than the entitlements of individuals in whose interest the rights are provided.<sup>145</sup> Although the right to culture has been used to argue for the retention of religious practices of individuals and even to support the practice of child marriage, the provisions of this Covenant are worth considering.

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<sup>138</sup> A Ukwuoma *Child marriage in Nigeria: The Health hazards and sociolegal implications (X-Raying the human rights and development issues in girl child early marriage)* (2014) 126

<sup>139</sup> Art 10(2), the question here is, is a child eligible to work in the first instance and in this case the girl child in marriage when she becomes a mother, or before it, is she qualified age wise to work?

<sup>140</sup> J Poduval & M Poduval 'Working Mothers: How Much Working, How Much Mothers, And Where Is The Womanhood?' (2009) 7(1) *Mens Sana Monographs* 63. Girls as children are not legally expected to work, it is women, adult girls that work and are entitled to leave and other work related benefits.

<sup>141</sup> OA Savage-Oyekunle & A Nienaber 'Adolescent girls' access to contraceptive information services: An analysis of legislation and policies, and their realization in Nigeria and South Africa' (2015) 15 *African human rights law Journal* 437.

<sup>142</sup> Art 12 (1) ICESCR

<sup>143</sup> Art 12 (2) (a) ICESCR

<sup>144</sup> Fayokun (n 122 above) 467

<sup>145</sup> Art 12 ICESCR

For example: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.<sup>146</sup>

This will be in agreement with the provisions of S45 of the Nigerian Constitution and the endorsement by Nwauche.<sup>147</sup> The same is also true of the following ICESCR proviso: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant”.<sup>148</sup>

In terms of child marriage in Nigeria and the argument of this thesis, Articles 4 and 5 of the ICESCR can be used to support the call for a law or specific legislation prohibiting child marriage, irrespective of arguments that it is a religious or cultural practice.<sup>149</sup>

Nigeria acceded the International Covenant on Economic, Social and Cultural Rights on 29 July 1993.<sup>150</sup> By virtue of its provisions on health, it is crucial to and indispensable for the exercising of all other fundamental human rights and the right to a life of dignity.<sup>151</sup>

The International Convention on Civil and Political Rights (ICCPR) recognises the right of men and women of marriageable age to marry and start a family<sup>152</sup> and to enter into marriage with the free and full consent of

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<sup>146</sup> Art 4 ICESCR

<sup>147</sup> Nwauche (n 120 above)429.

<sup>148</sup> Art 5(1)

<sup>149</sup> As above

<sup>150</sup> ‘Human rights: International Covenant on Economic, Social and Cultural Rights’ 5 January 2017, United Nations Treaty Collection [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en) (accessed 5 January 2017).

<sup>151</sup> Art 12 ICESCR. CESCR, General Comment No. 14 (2000)

<sup>152</sup> Art 23 (2) International Convention on Civil and Political Rights

the intending spouses.<sup>153</sup> Importantly, the ICCPR ensures equal rights and responsibilities of the spouses in a marriage.<sup>154</sup>

The ICCPR prohibits torture and exploitation, cruel or inhuman and degrading treatment<sup>155</sup> and servitude,<sup>156</sup> all of which are experienced by the girl child in a child marriage. In the case of *President of the Republic of Mozambique v Bernardo Sacarolha Ngomacha*,<sup>157</sup> the Mozambique Supreme Court held that the traditional authorities had breached Articles 8, 23 and 24 of the ICCPR when they forced a six-year old girl to leave her family to live with a man until she gave birth to a daughter in order to compensate him for the death of one of his children.<sup>158</sup>

Art 18 (3) on the right to freedom of religion provides that the freedom to express one's religion or beliefs may only be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. This is again akin to S45 of the Nigerian Constitution, as Nwauche argues.<sup>159</sup>

In Nigeria, where child marriage is defended on the basis of the right to practice one's religion and legislation prohibiting the practice is accused of infringing on the right to freedom of religion, this provision can be used to support the imposition of a marriageable age and the promulgation of an act specifically prohibiting child marriage, as in the case of the provision in the African Charter on Human and Peoples' Right.<sup>160</sup>

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<sup>153</sup> Art 23 (3) of the Convention.

<sup>154</sup> Art 23 (4), this step will include legislation to implement this, and obviously, a child will not be able to enforce rights or fulfil marital responsibilities, which is the crux of the argument against child marriage.

<sup>155</sup> Art 7 Covenant on Civil and Political Rights.

<sup>156</sup> Art 8 Covenant on Civil and Political Rights

<sup>157</sup> Supreme Court (Tribunal Supremo), criminal section I, Proc.5/2004-A.

<sup>158</sup> As above. This is inclusive of breaching Art 3 of the CRC.

<sup>159</sup> S45 Constitution of the Federal Republic of Nigeria 1999 provides (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons. Nwauche (n 120 above) 429.

<sup>160</sup> As above.

Although the ICCPR recognises the right of men and women of marriageable age to marry<sup>161</sup> and stipulates that the free and full consent of spouses is necessary for marriage,<sup>162</sup> no specific marriageable age is prescribed. The Covenant does however specifically state that all children shall be entitled to all necessary protective measures as required by their status as minors. The girl child as a minor should also be protected against the practice of child marriage through measures taken by her family and society.<sup>163</sup>

The ICCPR was ratified by Nigeria on 29 July 1993. The committee's recommendations in terms of the problem of child marriage have been that Nigeria enact, enforce, harmonise and uphold laws and policies aimed at preventing the practice in the country. It has also been recommended that Nigeria, through repealing and amending relevant laws, remove any and all legal provisions which may enable and justify the practice or allow perpetrators to escape prosecution and punishment.<sup>164</sup>

### **5.3.3 Women specific human rights charters**

Some human rights instruments exist for the benefit of women specifically both on the international and African regional level.<sup>165</sup> While they have provisions for women, they invariably provide for the issue of women's rights within the family and in marriages and also to protect them against violence, abuse and other assaults that stem from their vulnerable position in societies.<sup>166</sup>

In providing for women issues, they include the girl child as young female in the radar and these instruments will be examined in this section.

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<sup>161</sup> Art 23 (2) ICCPR

<sup>162</sup> Art 23(3)ICCPR

<sup>163</sup> Art 24 (1)ICCPR

<sup>164</sup> UNGA ORAL REVISIONS 02/07, United Nations A/HRC/29/L.15, Para 3, 5, 1 July 2015, Human Rights Council, Twenty-ninth session, Agenda item 3, provision and protection of human rights, Civil, Political, Economic, Social and Cultural rights, including the right to development.

<sup>165</sup> 'Women's rights are human rights' United Nations human rights office of the high commissioner UN New York, Geneva (2014) 5

<sup>166</sup> As above

### **5.3.3.1 The United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)**

CEDAW is not the most comprehensive international charter on human rights but it is the only major international instrument that is specifically concerned with the rights of women.<sup>167</sup> The definition of discrimination in this Convention has relevance for the everyday life of women particularly in traditional African societies.<sup>168</sup> The reference to “irrespective of their marital status” can be taken as meaning that younger women and therefore girls are beneficiaries of the purpose and content of the Convention.<sup>169</sup>

The CEDAW provides for the elimination of discrimination against women<sup>170</sup> and all forms of exploitation of women.<sup>171</sup> The definition of discrimination in the Convention is broad in that it includes intentional discrimination as well as acts resulting from laws and policies, or the lack thereof, which allow for the continuation of practices such as child marriage.<sup>172</sup>

On marriage, the CEDAW obligates states to eliminate discrimination against women in matters relating to marriage and family relations.<sup>173</sup> Art 16 (1) (a) provides that women shall have the same right as men to enter into marriage. Art 16 (b) states that women shall have the right to freely choose a spouse and to enter into marriage with their free and full consent, and Art 16 (2) provides that a minimum age is to be specified and that child marriage shall have no legal effect.<sup>174</sup> An acceptable minimum age for marriage is not however provided in the Convention.<sup>175</sup>

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<sup>167</sup> Unpublished: AT Adefemi ‘Widows as cultural tools: Translating widows’ rights into local realities in Uganda and Nigeria’ unpublished master’s thesis, University of Saskatchewan, Saskatoon, 2015 35.

<sup>168</sup> As above

<sup>169</sup> Art 1 CEDAW

<sup>170</sup> Art 2 (a) CEDAW

<sup>171</sup> Art 6 CEDAW.

<sup>172</sup> ‘A fact sheet on Cedaw: Treaty for the rights of women’ <http://www.amnestyusa.org/sites/default/files/pdf/cedaw-fact-sheet.pdf> (accessed 25 July 2015).

<sup>173</sup> Art 16(1) CEDAW

<sup>174</sup> Art 16(2) CEDAW.

<sup>175</sup> Art 16(2) provides: all necessary action, including legislation, shall be taken to specify a minimum age for marriage. E Warner ‘Behind the Wedding Veil: Child Marriage as a form of trafficking in Girls



It should be noted that the World Health Organisation has linked sexual rights and reproduction to consent to marriage and sexual intercourse, which definitely relates to the issue of child marriage.<sup>176</sup>

The CEDAW was ratified by Nigeria on 13 June 1985 but has not yet been domesticated for reasons that are not hard to fathom.<sup>177</sup> It is criticised for its incompatibility with certain cultural and religious values and for its “un-African” content.<sup>178</sup> These relativist arguments are raised despite the fact that the CEDAW does not refer to the elimination of harmful cultural practices as does its counterpart, the Protocol on the Rights of Women.<sup>179</sup> The CEDAW has also been faulted for lacking certain substantial provisions such as the right to be free from violence, but is nonetheless still an important instrument for the protection of the rights, security, dignity and integrity of women.<sup>180</sup>

As mentioned, the CEDAW has not been domesticated in Nigeria, and the country’s Violence against Persons (Prohibition) Act is not an adequate substitute, particularly in terms of the protection of women.<sup>181</sup> The Act does not include child marriage in its provisions and is only applicable in the Federal Capital Territory.<sup>182</sup>

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(2004) 12 *Journal of Gender, Social Policy and Law* 253-254. CEDAW does not define child although it expressly outlaws child marriage.

<sup>176</sup> ‘Defining Sexual Health: Report of a Technical Consultation on Sexual Health’ 28-31 January 2002 Geneva published 2006 World Health Organization (WHO) [http://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sexual\\_health.pdf?ua=1](http://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf?ua=1) (accessed 5 January 2016).

<sup>177</sup> S Tamale ‘Exploring the contours of African Sexualities: Religion, law and Power’ (2014) 1 *African Human Rights Law Journal* 169

<sup>178</sup> As above.

<sup>179</sup> As above. E Durojaye & LN Murungi ‘The African Women's Protocol and sexual rights’ (2014) 18:7-8 *The International Journal of Human Rights* 881-897.

<sup>180</sup> Adefemi (n 167 above)35.

<sup>181</sup> The Violence against Persons Prohibition Act 2015 is a general Act for all persons and was not intended to even take the place of Cedaw. GM Olatokun et al ‘Making a Case for the Domestication of CEDAW in Nigeria: Empirically and Conceptually Justified; (2014) 22 *Journal of Law, Policy and Globalization* 46-47.

<sup>182</sup> S46 Violence against Persons Prohibition Act 2015. C Onyemelukwe ‘Overview of the violence against Persons (Prohibition) Act 2015’ (2015) 3 (accessed on 5 December 2017) Although the only Act to prohibit violence, while some states have adopted it, it is not clear whether without a related law, it will be applicable in all the states as applied to the Child Rights Act. Whether or not, it is a good sign for the child marriage prohibition draft suggested in this thesis. ‘Why Nigeria’s new Violence against Persons (Prohibition) Act is only the beginning’ Ventures Africa 15 June 2015 <https://venturesafrica.com/why-nigerias-new-violence-against-persons-prohibition-act-is-only-the-beginning/> (accessed 5 January 2017).

The recommendations by the various committees set up under the treaty and on the United Nations Human Rights Committee both severally and jointly is to take adequate and consequential measures to correct the situation of the persistence of child marriage in Nigeria and the domestication of the treaty.<sup>183</sup>

Despite its promise, the CEDAW's lack of domestication in Nigeria means that it cannot be adequately implemented for the benefit of women generally or the girl child specifically on the issue of child marriage.<sup>184</sup> It does however have value insofar as it has been ratified by the country.<sup>185</sup>

### **5.3.3.2 Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa**

This Protocol includes girls in its definition of women,<sup>186</sup> and its definition of discriminatory acts<sup>187</sup> includes harmful practices<sup>188</sup> and violence against women.<sup>189</sup> Art 3 provides for the right of women to dignity, respect as a person and free development of her personality. Art 3 (1) includes the right to life, integrity and the protection of her person and prohibits all forms of abuse for undue gain.<sup>190</sup> It also provides that states shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection from all forms of violence, particularly sexual and verbal violence.<sup>191</sup>

The Protocol provides for the elimination of all forms of discrimination against women.<sup>192</sup> In addition, coerced, unwanted sexual intercourse or

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<sup>183</sup> UN CEDAW- Cedaw/C/NGA/19/6, 8 July 2008, Para 321, 323. Cedaw forty-first session-30June-18 July 2008, concluding observations of the committee on Elimination: Nigeria {Part of A/63/38} The tripartite legal system of statutory, religious and customary laws have been the problem of compliance by the state with its obligations under the conventions and leads to discrimination against women.

<sup>184</sup> L Omo-Aghoja 'Sexual and reproductive health: Concepts and current status among Nigerians' (2013) 12 *Afr J Med Health Sci*, 103-113.

<sup>185</sup> *Abacha v Fawehinmi*. In this case it was held that undomesticated yet ratified treaties although may not have legal effect on the rights of the citizens it would act as a measure of hope for them that the government may act on it to influence decisions concerning their rights.

<sup>186</sup> Art 1 (k) of the Protocol.

<sup>187</sup> Art 1 (f) of the Protocol

<sup>188</sup> Art 1 (g) of the Protocol

<sup>189</sup> Art 1 (j) of the Protocol

<sup>190</sup> Art 3(1) of the Protocol

<sup>191</sup> Art 3 (4) of the Protocol.

<sup>192</sup> Art 2 (1) of the Protocol, the other measures are apart from legislation, see Art 2 2 of the Protocol.

similar unlawful acts are prohibited.<sup>193</sup> It can generally be said to cover the eradication of all forms of violence against women.<sup>194</sup> It prohibits and condemns all forms of harmful practices which infringe on the rights of women and which are contrary to recognised international standards, and calls for the elimination of such practices.<sup>195</sup> This provision for the elimination of harmful practices is an improvement on the CEDAW which is silent in this regard.<sup>196</sup>

On marriage, Art 6 states that marriage shall be with the free and full consent of both parties and that the minimum age for marriage is eighteen years. In a General Comment, the Human Rights Committee has recognised the right to free and informed choice in marriage as an element of women's right to equality.<sup>197</sup> In more ways than one, it can be argued that the Protocol was needed to address the inadequacy and ineffectiveness of the African Charter on Human and People's Rights.<sup>198</sup>

According to Ngwenya, Articles 2, 5, 6 and 16 of the Protocol are specific provisions which prohibit child and forced marriage,<sup>199</sup> while Art 14 is acclaimed as a provision on the sexual health and reproductive rights of women which encompasses a host of rights that are necessary for every woman.

Durojaye and Murungi are of the view that despite criticisms that it is insufficient, the protection provided by Art 14 is actually adequate when the first General Comment of the Commission is taken into account.<sup>200</sup> The

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<sup>193</sup> Art 4 (2) (a) of the Protocol.

<sup>194</sup> Art 4 (2) (b) of the Protocol. The sexual abuse that happens to the girl child within marriage is forced sex in private and can therefore fall under this provision as acts to be prohibited.

<sup>195</sup> Art 5 of the Protocol

<sup>196</sup> CEDAW does not mention the word harmful practice, although it provides that existing laws, regulations, customs and practices which constitute women discrimination be abolished-Art 2(f) penal laws that are women discriminatory be repealed- Art 2(g) and social and cultural patterns be modified-Art 5(a) Again 16(2) provides child marriage is of no effect.

<sup>197</sup> 'The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights', A briefing Paper, Feb 2006, Center for Reproductive Rights, (Human Rights Committee, General Comment 28, *supra* note 47, para. 23), accessed 24/3/2016.

<sup>198</sup> As above.

<sup>199</sup> CG Ngwenya Sexual Health and Human Rights in the African Region (2011)156

<sup>200</sup> Durojaye & Murungi (n 179 above)881-897. Art 14 is on health and reproductive rights.

provision has nonetheless been criticised in Nigeria as calling for the right to legalise abortion.<sup>201</sup>

The Protocol on the Rights of Women in Africa was ratified by Nigeria on 16 December 2004 but has not been domesticated for the same reason that the CEDAW has not, although there have been attempts to domesticate the latter.<sup>202</sup> The ACHPR has however been domesticated and has the same provisions on human rights as the Protocol albeit not women specific.

This non-domestication has various implications. Is it law in Nigeria or not because of its non domestication. Flowing from this therefore are women's rights protected in Nigeria in its absence and can they be enforced legally. These questions are also relevant because already the African charter from the provision of Art 18 (3) of the African Charter incorporates the women's Charter by express reference; obliging states to ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.<sup>203</sup> This African Charter has already been domesticated in Nigeria and legally enforceable. Will this then mean that the women's protocol is automatically domesticated irrespective of the non domestication of the latter.

It is argued that although it remains just a piece of paper without domestication, it has been domesticated through a process of legislative transformation.<sup>204</sup>

Viljoen opines that the protocol requires domestication to actualise its potential.<sup>205</sup> In Francophone countries, treaties are ratified after conflicting

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<sup>201</sup> 'The Maputo Protocol', Family policy brief of Family Watch International at [http://www.familywatchinternational.org/fwi/documents/fwipolicybriefmaputoprotocol\\_000.pdf](http://www.familywatchinternational.org/fwi/documents/fwipolicybriefmaputoprotocol_000.pdf), accessed 25/3/2016.

<sup>202</sup> Tamale (n 177 above) 169.

<sup>203</sup> Art 18(3) African Charter on Human and Peoples' Rights. Many countries have responded to it making legislations and reforms that are women protective. Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 60th meeting-commission on the status of women 18 March 2016 New York <http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed on 5 January 2017). Justice Lucy Asuagbor Commissioner Special Rapporteur on the Rights of Women in Africa (African Commission on Human and Peoples' Rights)

<sup>204</sup> 'Africa: The Maputo Protocol - Evaluating Women's Rights' Pambazuka News 11 June 2015 <http://allafrica.com/stories/201506130377.html> (accessed 5 January 2016). VO Ayeni The impact of the African charter and the Maputo Protocol in Nigeria in VO Ayeni (eds) (n124 above) 187

provisions in national legislation have been amended.<sup>206</sup> This is not the case in Nigeria and to date, the Nigerian Constitution and legislation still contain many provisions that conflict with those of the Protocol, with the result that its ratification has not changed the status quo.<sup>207</sup> Because of this, although there is no case law to that effect, it can be said that as per Nigeria's dualist tradition, the Protocol technically does not form part of Nigerian laws until it has been domesticated.<sup>208</sup>

This is unlike the situation in Malawi for example where the Constitution has been reviewed to accommodate and reflect the provisions of the Protocol.<sup>209</sup> South Africa has also implemented some of the Protocol's requirements as reflected in laws such as the Sexual Offences and Related Matters Amendment Act<sup>210</sup>, the Reform of Customary Law of Succession and Regulation of Related Matters Bill<sup>211</sup> and the Domestic Violence Act.<sup>212</sup> The Protocol was mentioned in the *Bhe v Magistrate Khayelitsha* case.<sup>213</sup>

### 5.3.4 Children specific human rights instruments

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<sup>205</sup> F Viljoen 'An introduction to the Protocol to the African charter on human and peoples right on the rights of women in Africa' (2009) 16.WASH. & LEE J.C.R & SOC. JUST 11, 46

<sup>206</sup> M Killander & H Adjohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010)5.

<sup>207</sup> S12 Constitution of the Federal Republic of Nigeria 1999. In Nigeria treaty may be ratified but not domesticated and may be at the individual judges discretion whether it will be applied or not.

<sup>208</sup> As above. Ayeni in VO Ayeni(eds) (n 124 above) 201. Domestication is a factor that may impede or enhance the impact of the Maputo Protocol

<sup>209</sup> Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 60<sup>th</sup> meeting-commission on the status of women,18 March 2016, New York at <http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 5 January 2017). Justice Lucy Asuagbor Commissioner, Special Rapporteur on the Rights of Women in Africa (African Commission on Human and Peoples' Rights) Several sections of the Malawi constitution make provision for equality, non-discrimination, conflict between customary provisions and human rights of citizens, age of marriage and requirement of consent to marriage, these have been discussed in detail later in this chapter.

<sup>210</sup> Sexual Offences and Related Matters Amendment Act 32 of 2007.

<sup>211</sup> Reform of Customary Law of Succession and Regulation of Related Matters Bill 10 of 2008

<sup>212</sup> The Domestic Violence Act 116 of 1998

<sup>213</sup> 2005 1 SA BCLR 1 (CC).

Children comprise a special sector of the international community who are seen and perceived to deserve protection by virtue of their vulnerability.<sup>214</sup> Two instruments are examined with regard to the issue of child marriage, namely the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

#### **5.3.4.1 The Convention on the Rights of the Child (CRC)**

The CRC provides for the right to non-discrimination.<sup>215</sup> Discrimination is an underlying feature of child marriage. According to Art 12 (1), in all matters affecting the child, the views of the child must be given due consideration, and he or she has the right to express those views freely.<sup>216</sup> This right is infringed in child marriages since the consent of the girl child is immaterial and consent is given by the parents or guardians for and on her behalf.<sup>217</sup>

S18 (1) of the CRC provides that the best interest principle shall apply in the upbringing and development of the child.<sup>218</sup> Child marriage is obviously not in the best interest of the child's development, particularly considering the many adverse effects on her health and education.<sup>219</sup> It may rather be argued as in the interest of values as perceived by some groups or parents responsibility to protect the virtue of their children<sup>220</sup> which will not even be tenable as being in the best interest of the society too.

Art 19 (1) of the CRC provides for the protection of the child from sexual abuse, while Art 34 prohibits forced intercourse or intercourse by coercion

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<sup>214</sup> TC Nhenga-Chakarisa 'Who does the law seek to protect and from what? The application of international law on child labour in an African context' (2010) 10 *African Human Rights Law Journal* 163

<sup>215</sup> Art 2 (1) UN CRC

<sup>216</sup> Art 12(1) UN CRC

<sup>217</sup> T Jelenic & M Keeley 'End Child Marriage : Report on the forced marriage of children in Australia' (Research Report, National Children's and Youth Law Centre, 2013) 7-8. Marriage affects the child, she must be of the age to form and express her view about the choice and time freely and this must be considered.

<sup>218</sup> This shall be the common responsibility of both parents not only that of the father alone and in (2) it is the responsibility of states to render such appropriate assistance to parents.

<sup>219</sup> Jelenic & Keeley (n 217 above) 10-11

<sup>220</sup> Jelenic & Keeley (n 217 above) 8.

of the child.<sup>221</sup> Art 24 (4) stipulates that traditional practices prejudicial to the health of the child should be abolished,<sup>222</sup> providing not only for the child's right to health,<sup>223</sup> but the right to enlightenment on decisions related to birthing and childbearing intervals.<sup>224</sup>

The Convention on the Rights of the Child prohibits the forceful luring and engagement of children in sex or similar and connected acts<sup>225</sup> or anything that will be prejudicial to the wellbeing of the child.<sup>226</sup>

The CRC introduces the principle of best interest of the child<sup>227</sup> in all matters and provides that the views of the child are taken into consideration in all matters affecting the child,<sup>228</sup> an approach which cannot be said to apply in child marriages. The same convention imposes a duty on the parents, guardians and other relevant individuals to ensure the protection of the child through appropriate legislation and administration.<sup>229</sup>

The Convention on the Rights of the Child provides protection against all forms of exploitation and practices that are prejudicial to the welfare of the child, but child marriage is not explicitly mentioned.<sup>230</sup> However the comments on such conventions have helped to address inadequacies.<sup>231</sup> For example, the General Comment on the CRC specifically identifies early

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<sup>221</sup> Art 36, Art 37(b). Coercion and inducement is particularly mentioned in 34, these two are often common elements in child marriage, and also constitute sexual abuse, see also Art 36, 37 (b) restrained liberty also happens in child marriage.

<sup>222</sup> Jelenic & Keeley (n 217 above) 8. Child marriage and the attending forced intercourse with its consequences are prejudicial to the health of the girl child so falls under traditional practices that must be abolished, not because of the value but in the best interest of the girl child and society.

<sup>223</sup> Art 24 (1) UN CRC

<sup>224</sup> Art 24 (2) (f) UN CRC

<sup>225</sup> Art 34 (a) (b) UN CRC

<sup>226</sup> Art 36 UN CRC

<sup>227</sup> Art 3

<sup>228</sup> Art 12

<sup>229</sup> Art 3(2)

<sup>230</sup> CRC 20 November 1989 1577 U.N.T.S 3, Art36

<sup>231</sup> April 2011, Gen comment 13, 25(d) 29 (e), 72(g) and 12 FN13, this general comment also clarifies the term children. para 320-323, UN Cedaw, Cedaw/C/NGA/10/6, 8 July 2008, Cedaw forty-first session {Part of A/63/38. Para 11-UN CRC-CRC/C/NGA/CO/3-4, 11TH June 2010, Committee on the Rights of the Child- fifty-fourth session, concluding observations: Nigeria. Raising minimum age of marriage to 18 years, define rape as sexual intercourse without consent, delete the provision that legalizes it within marriage with girl children and work on ensuring non complying states to adopt the CRC as well as insisting that Jigawa adopts a marriageable age and Akwa Ibom review its 16 years to 18 years., see also CRC/C/15/Add.257,para.27. Also see UN CEDAW & CRC Observations and Recommendations on Minimum age of Marriage laws around the world as of Nov 2013 [www.equality.org/childmarriagereport](http://www.equality.org/childmarriagereport) (accessed 7 February 2016).

marriage as a harmful practice which amounts to child prostitution, and recommends corrective state action.<sup>232</sup>

The United Nations Convention on the Rights of the Child was ratified by Nigeria on 19 April 1991.<sup>233</sup> Looking at the provisions of the CRC as they relate to child marriage in Nigeria, it does not explicitly mention the practice but, if domesticated and implemented, has potential for the prevention of child marriages.<sup>234</sup> It makes efforts to curb the practice, and any others that might impede the development or affect the wellbeing of the child, as not only the duty of the government but of parents and other citizens.<sup>235</sup>

Nigeria's Child Rights Act 2003 represents the domestication of the CRC and the ACHPR<sup>236</sup> but the responses of the different states to the Act have varied, in particular due to criticisms from the Islamic North of the provisions on the prohibition of child marriage.<sup>237</sup>

To date, there has been no judicial decision to put an end to the ongoing debate, but several researchers support enforcing the adoption of the Child Rights Act by all non-complying states.<sup>238</sup> This will be difficult however, particularly in light of the argument that there is support for child marriage in existing legislation.<sup>239</sup>

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<sup>232</sup> As above

<sup>233</sup> Promotion and protection of the rights of children Status of the Convention on the Rights of the Child Report of the Secretary-General, General Assembly Fifty-first session Agenda item 106, 27 September 1996 United Nations General Assembly at <http://www.un.org/documents/ga/docs/51/plenary/a51-424.htm>

<sup>234</sup> Art 24(3) States should abolish traditional practices prejudicial to the health of the child. Other similar provisions which can be assumed as protective of the girl child and prohibitory of child marriage also exists.

<sup>235</sup> Art 3(2) UNCRC.

<sup>236</sup> Section 21 of the CRA 2003 prohibits child marriage by stating that "No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void of no effect whatsoever. Section 22 states that: "(1) No parent, guardian or any other person shall betroth a child to any person; and (2) A betrothal in contravention of subsection (1) of this section is null and void.

<sup>237</sup> Nwauche (n 120 above) 423. TS Braimah 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 2 AHRLJ 475. Fayokun (n 122 above) 463

<sup>238</sup> 'Nigeria: Child Marriage - the Imperative of Judicial Interpretation' All Africa 3 August 2013 Africa <http://allafrica.com/stories/201308051168.html>. P Dada (accessed 29 March 2016). More of this to be discussed in Chapter 6 of this thesis on problem of law particularly conflict of law in Nigeria on child marriage. Fayokun (n 122 above) 463-467

<sup>239</sup> As above.



#### **5.3.4.2 The African Charter on the Rights and Welfare of the Child (ACRWC)**

The ACRWC contains similar provisions on the rights of the child and explicit protection against child marriage. Ekundayo is of the opinion that the ACRWC was necessary because Africans were underrepresented in the drafting of the CRC and a document which focused on the children of Africa and the peculiarities of their situation was needed.<sup>240</sup>

The best interest principle is found in Art 4(1) of the ACWRC which provides that in all actions concerning the child, the best interest principle should be a major factor, not an afterthought.<sup>241</sup> Art 20(1)(a) also states that parents are responsible for the child's protection according to the best interest principle. Art 21(1) prohibits harmful customs and practices, and Art 21(2) expressly prohibits child marriage and prescribes eighteen as the minimum age for marriage. The Charter expressly prohibits not only child marriage but the betrothal of young girls and boys.<sup>242</sup>

In establishing eighteen as the age of majority without allowance for any alternative, stipulating that child marriage is a harmful social practice which should be prohibited by effective action (including legislation on minimum age and the compulsory registration of marriages), the ACWRC is more explicit on the prohibition of child marriage than the CRC.<sup>243</sup>

In Art 7, the ACWRC provides that any child who is able to express his or her opinion or views is entitled to the opportunity to do so in all matters.<sup>244</sup> The rationale here is that a child will not be able to give her opinion on the issue of marriage because she does not understand it.

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<sup>240</sup> O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions? Examining the Similarities and the Differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 147

<sup>241</sup> Art 4(1) ACRWC. Person or authority here includes parents and authority includes cultural or religious including state authorities.

<sup>242</sup> Art 21 (2) of the Charter.

<sup>243</sup> Art 2 and Art 21 African Charter on the Rights and Welfare of the Child 29 November 1999, OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>244</sup> Art 7. Especially the issue of marriage, this underscores the importance of capacity on the issue of age to consent to marriage.

The ACWRC specifically prohibits any custom, tradition or cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter.<sup>245</sup> It also provides for the right to non-discrimination,<sup>246</sup> and recognises the importance of good health care for children and the responsibility of government to make it accessible to citizens.<sup>247</sup> On the issue of child abuse, the Charter protects the child from all forms of torture, abuse, neglect and degrading treatment<sup>248</sup> and all forms of sexual abuse and exploitation<sup>249</sup> under which child marriage may be categorised.

It specifically provides for the elimination of harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child,<sup>250</sup> particularly customs and practices which are prejudicial to the health and life of the child<sup>251</sup> and customs and practices that are discriminatory to the child on the grounds of sex or any other status.<sup>252</sup>

The African Union Charter on the Rights and Welfare of the Child was ratified by Nigeria on 23 July 2001,<sup>253</sup> and both this Charter and the Charter on the Rights of the Child have been domesticated in the Child Rights Act.<sup>254</sup> However the impact of this on child marriage is questionable due to the number of controversies surrounding its application, particularly in the North and on the issue of marriageable age.<sup>255</sup>

From all the instruments, a recurring obligation of states is to have legislation to eradicate harmful cultural practices that are prejudicial to the child, protect the child against sexual abuse and exploitation, specify a

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<sup>245</sup> Art 1 (3) African Charter on the Rights and Welfare of the Child.

<sup>246</sup> Art 3 of the charter

<sup>247</sup> Art 14 (2) of the Charter

<sup>248</sup> Art 16 (1) of the Charter

<sup>249</sup> Art 27 (1) of the Charter

<sup>250</sup> Art 21 (1) of the Charter

<sup>251</sup> Art 21 (1) (a) of the Charter

<sup>252</sup> Art 21 (1) (b) of the Charter.

<sup>253</sup> Ratification Table: African Charter on the Rights and Welfare of the Child, African commission on human and peoples' rights, <http://www.achpr.org/instruments/child/ratification/> (accessed 6 January 2017).

<sup>254</sup> Passed in 2003.

<sup>255</sup> Fayokun (n 122 above)463.

minimum marriageable age and ensure the right to full and free consent to marriage as measures for the legal protection for children.<sup>256</sup>

This may include the revision of existing laws or the promulgation of new ones. The new Constitutions of Kenya and Zimbabwe have already adopted a gender sensitive dimension which enhances women's rights, and legal reforms tackle issues such as violence against women, stereotypes, discrimination, nationality and poverty.<sup>257</sup> Article 144 of the Namibian Constitution incorporates the Maputo Protocol into Namibian domestic laws, which means that the rights and freedoms provided in the Protocol are enforceable in Namibian.<sup>258</sup>

In Nigeria, the issue of marriageable age remains a problem.<sup>259</sup> In the North, steps have been taken to improve the education and development of children and particularly the girl child,<sup>260</sup> but not to eradicate the practice of child marriage on which the Child Rights Act is criticised as being contrary to Islamic beliefs and practice.<sup>261</sup>

Despite the challenges of acceptance and application, the relevant instruments undoubtedly provide for the prohibition of child marriage and the protection of the girl child against the practice.<sup>262</sup>

#### **5.3.4.2.1 Challenges relating to women and children specific treaties**

While it is argued that the documentation or formalising of human rights is a western cultural product (not concept), such rights have enjoyed international or rather universal acceptance through the ratification of

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<sup>256</sup> Art 21(1) ACRWC.

<sup>257</sup> JL Asuagbor Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 60th meeting commission on the status of women, 18th March 2016 at <http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>, accessed on 13/11/2016

<sup>258</sup> As above.

<sup>259</sup> Nigeria's opportunity to clarify its position on minimum age of marriage Think Africa Press 28 August 2013 <http://www.girlsnotbrides.org/nigerias-opportunity-to-clarify-its-position-on-minimum-age-of-marriage/> (accessed 6 January 2017).

<sup>260</sup> PM Adebusey (ed) Matan Kwarai: Insights into Early Marriage and Girls' Education in Northern Nigeria (2011) 2-3

<sup>261</sup> Fayokun (n 122 above) 465-466.

<sup>262</sup> Fayokun (122 above) 467-468.

treaties by numerous states.<sup>263</sup> The major challenges with regard to treaties on the rights of women and children have been related to the universalism versus cultural relativism debate.<sup>264</sup>

International human rights provisions have tried to be sensitive to the culture of individuals and communities but relativists still argue that they constitute an attempt to impose western culture on other parts of the world<sup>265</sup> and are incompatible with the beliefs and culture of some peoples.<sup>266</sup> This incompatibility with the values and culture of other communities has been the foremost relativist criticism of human rights provisions.<sup>267</sup> Many of these communities or countries have signed reservations to international treaties and have continued with practices despite their being irreconcilable with modern day human rights.<sup>268</sup> As expected, many of these practices are based on patriarchal beliefs and perceptions about the subordinate position of women and children which are contrary to the provisions of human rights on equality, non-discrimination and dignity.<sup>269</sup>

Apart from the issue of reservations, another major challenge has been the application of international human rights treaties on women and children by

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<sup>263</sup> 'Ratification of 18 International Human Rights Treaties, Status of Ratification Interactive Dashboard' United Nations Human Rights Office of the High Commissioner, at <http://indicators.ohchr.org/> (accessed 6 January 2017).

<sup>264</sup> 'J Bauer The Challenge to International Human Rights' 28 March 2003 Carnegie council for ethics in International Affairs [http://www.carnegiecouncil.org/publications/articles\\_papers\\_reports/905.html](http://www.carnegiecouncil.org/publications/articles_papers_reports/905.html) (accessed 6 January 2016)

<sup>265</sup> Tom O Connor 'Debating Human Rights – universal or relative to culture?' 11 February 2014 DevelopmentEducation.ie <http://www.developmenteducation.ie/blog/2014/02/debating-human-rights-universal-or-relative-to-culture/> (accessed 6 January 2017).

<sup>266</sup> As above. This is the argument in the Islamic Northern Nigeria on the minimum marriageable age; Udoka Okafor 'The Practice of Child marriage in Nigeria' 04 December 2014 [www.huffingtonpost.com/udoka-okafor/the-practice-of-child-marriage-s133881.html](http://www.huffingtonpost.com/udoka-okafor/the-practice-of-child-marriage-s133881.html) (accessed 22 April 2015).

<sup>267</sup> As above.

<sup>268</sup> Conventions on the elimination of all discrimination against women: Declarations, Reservations and Objections to CEDAW, UN WOMEN <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (accessed 6 January 2017). LM Keller 'The impact of states parties' reservations to the convention on the elimination of all forms of discrimination against women' (2014) *Michigan state law review* 310-311.

<sup>269</sup> Keller as above 314. It is in situations like these that the argument of relativism is strongest which brings up the supposition of the argument of the relativist as a justification for the system that favours the oppression or suppression of the weak by the powerful.

ratifying states.<sup>270</sup> The majority of these countries have not been able to apply or enforce these treaties in their domestic territories, a point which underscores the essence of the provisions.<sup>271</sup> The reason has often been related to provisions for the domestication of international human rights in domestic laws.<sup>272</sup>

Some practices which are deemed sexual abuse according international human rights are actually argued as the norm and accepted cultural or religious practices in parts of the world.<sup>273</sup> For example, some societies hold that child marriage is a cultural practice which preserves the chastity and honour of girls and the family.<sup>274</sup>

One common problem encountered by general international human rights treaties however has been enforcement through implementation, especially by the domestic laws of member states.<sup>275</sup> Till date, women specific instruments have not been domesticated in Nigeria despite there being no reservations.<sup>276</sup> In the absence of this domestication, the protection of women against abuse lies in the application of the provisions of domestic laws, especially the Constitution which is a document for all citizens.<sup>277</sup>

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<sup>270</sup> 'The Human rights of women' 2006 United Nations population fund at <http://www.unfpa.org/resources/human-rights-women> (accessed 6 January 2017). Challenges of law, poverty and such related issues which affect application.

<sup>271</sup> As above

<sup>272</sup> NW Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *AHRLJ* 417. The constitution is particularly important as the highest law of most countries and the grund norm like in the case of Nigeria, the provision of S12 of the Constitution of the Federal Republic of Nigeria.

<sup>273</sup> 'Targeting girls in the name of Islam: Child marriage' July 15 2010 US Department of State [www.state.gov/s/girls/rls/rem/2010/144989.htm](http://www.state.gov/s/girls/rls/rem/2010/144989.htm) (accessed 22 July 2015).

<sup>274</sup> Jelenic & Keeley (n 217 above) 8. 'This nonsense of Hyena culture must stop, Nyasa Times of July 26, 2016 at: <http://www.nyasatimes.com/president-mutharika-orders-arrest-hiv-infected-man-paid-devirginise-girls-malawi-nonsense-hyena-culture-must-stop/#sthash.CKSdjKWr.dpuf> (accessed 29 July 2016).

<sup>275</sup> Orago (n 272 above) 417. Especially by the issue of legal provisions on the application of treaties in many countries including Nigeria, this problem is explained as the relationship between internal law and domestic law.

<sup>276</sup> HI Bazza 'Domestic Violence and Women's Rights in Nigeria' (2009) 4 *Societies without borders* 177, 179.

<sup>277</sup> JA Dada 'Human Rights under the Nigerian Constitution: Issues and Problems' (2012) 2 *International Journal of Humanities and Social Science* 34. The Nigeria Cedaw NGO Coalition Shadow Report submitted to the 41st session of the UN Committee on the Elimination of all forms of Discrimination against women at the UN Plaza, New York between 30th June – 18th July 2008, for the consideration by the CEDAW committee in its review of the government of Nigeria's 6th periodic Country report(2004-2008) on the implementation of Cedaw in Nigeria- Despite the fact that several committees year after year have recommended its full domestication and implementation, see UN CEDAW- Cedaw/C/NGA/10/6, 8 July 2008. The constitutional provisions however has its

In terms of child marriage in Nigeria, the Northern Islamic states are resisting the application or rather the adoption of the Child Rights Act on the basis of its postulated incompatibility with Islamic tenets on marriageable age.<sup>278</sup>

Nigeria has not to date complied with the recommendations of the expert committees on the CEDAW and CRC because of such related religious and legal reasons.<sup>279</sup> For example, the government has unsuccessfully been urged to ensure that the definition of the child in legislations domesticating the Child Rights Act at state level is fully compliant with that of the two children Conventions and to remove Section 29(4) of the Constitution.<sup>280</sup>

The legal challenges women and children's rights experience in Nigeria are basically due to conflict of laws which has done much to hamper the implementation of international and regional human rights provisions and made the continued perpetration of child marriage possible in Nigeria, particularly in the North of the country.<sup>281</sup>

#### **5.3.4.3 Marriage specific instruments**

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages is an international marriage specific human rights instrument.<sup>282</sup> The Preamble explains why the Convention came about, one of the reasons being to put a permanent end to child marriage and the practice of betrothing young girls to adult men before they are mature enough for marriage.<sup>283</sup>

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limitations both within and outside the constitution. This is properly treated in Chapter 6 of this thesis.

<sup>278</sup> Fayokun (n 122 above)463

<sup>279</sup> As above. CRC Concluding observations June 2010, at CRC/C/15/Add.257, para 27

<sup>280</sup> As above

<sup>281</sup> Fayokun ( n 122 above) 463-468. This discourse is elaborately discussed in Chapter 6 of this thesis along with the legal solutions.

<sup>282</sup> The Title and preamble, para 1 Convention on Consent to marriage, Minimum age for Marriage and Registration of Marriages.

<sup>283</sup>Preamble 2 to the Convention on Consent to marriage, Minimum age for Marriage and Registration of Marriages.

The Preamble reiterates the United Nations General Assembly resolution to eradicate child marriage.<sup>284</sup> Art 1 provides that no marriage shall be entered into without the full and free consent of both parties. Art 2 provides that no marriage shall be entered into by persons under a minimum age. The Convention also specifies that consent must come from the parties to the marriage and not by others not on their behalf,<sup>285</sup> and that it is the responsibility of government to prescribe a minimum marriageable age.<sup>286</sup>

In leaving minimum age to the discretion of member states, requiring the elimination of child marriage and betrothal of young persons before the age of puberty, yet not specifying a marriageable age, it can be argued that the Convention is not conclusive on the practice.<sup>287</sup>

In addition, although called a convention on marriage, the majority of its provisions focus on the working and operation of the Convention rather than on the issue of marriage which was probably the motivation behind drawing it up.<sup>288</sup>

Apart from the Preamble's reiteration of the provisions of the United Nations Declaration on Human Rights and its prohibition of child marriage, the Convention makes recommending that states specify a minimum marriage age at their own discretion.<sup>289</sup>

Art 2 of the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages is explicit in its condemnation of child marriage.<sup>290</sup> Although Nigeria is not a state party to this Convention,<sup>291</sup> it is party to other instruments with provisions which prohibit child marriage and the sexual abuse of children, some of which prescribe a minimum

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<sup>284</sup> Resolution 843(ix) 17 Dec 1954.

<sup>285</sup> Art 1 of the Convention

<sup>286</sup> Art 1 of the Convention.

<sup>287</sup> Art 2 of the Convention

<sup>288</sup> Only Arts 1-3 have provisions on marriage, the remaining sections do not provide anything on marriage but on the convention coming into use.

<sup>289</sup> Art 2 of the Convention.

<sup>290</sup> 521 U.N.T.S 231 (December 9 1946

<sup>291</sup> MU Abubakar 'Infantilizing Teenagers in Nigeria as Unfit for Marriage: A Double Standard' Zamfara Post July 31 2013 <https://www.facebook.com/zamfarapost.tudu/posts/494858947261741> (accessed 29 March 2016).

marriageable age. By virtue of its ratification of these, the country is obliged to respect the protection of the girl child with regard to these issues.<sup>292</sup>

#### **5.4 Deductions for international and regional human rights provisions on child marriage**

On the basis of the analysis of global and regional human rights instruments, it is submitted that the prohibition of sexual abuse, harmful practices and child marriage does exist within their provisions.<sup>293</sup> Even where child marriage is not explicitly mentioned, there is the promise of using international instruments to eradicate the practice, whether as sexual abuse, exploitation or harmful practices prohibited by the provisions.<sup>294</sup>

It is therefore reasonable to say that international and national laws can be effective tools in ending child marriage and that in Nigeria the two can be combined by incorporating the provisions of international treaties into domestic Nigerian laws.<sup>295</sup> Viljoen asserts that the purpose of international law is defeated if it is not implemented in domestic laws in the interest of citizens.<sup>296</sup>

While focusing on the challenges facing instruments in terms of human rights education rather than the external challenges from party states or other environmental issues, Viljoen expands on some of the challenges or deficiencies of the instruments themselves.<sup>297</sup> These are that treaty bodies and the more political organs lack institutional cohesion and do not live up

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<sup>292</sup> The African Charter on Human and Peoples Rights and its Protocol on women's Rights. Also the CRC and its regional counterpart.

<sup>293</sup> United Nations Declaration on human rights, the CEDAW, ACHPR, UNCRC, ACRWC and others discussed. A Onuora-Oguno & O Adeniyi 'Sexual abuse and child marriage: Promise and pathos of international human rights treaties in safeguarding the rights of the girl child in Nigeria' (2015) 16(2) *Child Abuse Research: A South African Journal* 78-79. K Muller 'Early marriages and the perpetuation of gender inequality' 205-209 <http://www.ufh.ac.za/speculumjuris/files/pdf/SJ0314FPMuller.pdf> (accessed 6 January 2017).

<sup>294</sup> Oguno & Adeniyi (n 293 above) 80. For example, as explained earlier on the general comments NO 13 on the CRC in April 2011, whether this can be said of domestic legislation particularly in the case of Nigeria is part of what will be researched in this thesis.

<sup>295</sup> S12 Constitution of the Federal Republic of Nigeria 1999. Fayokun (n 122 above) 465-468. 'Protecting the girl child, using laws to end child, early and forced marriage and related human rights violation' 2014 equality Now at [www.equalitynow.org](http://www.equalitynow.org).

<sup>296</sup> F Viljoen 'Contemporary challenges to international human rights law and the role of human rights education' (2011) 15 *De Jure Law Journal* 214-215.

<sup>297</sup> As above 209



to their commitments due to lack of effective enforcement.<sup>298</sup> This is of course partly the fault of member states, a point which is linked to the need for legislation for implementation and the controversial issue of state sovereignty.<sup>299</sup>

Koneva sees the challenges facing human rights instruments as being twofold, namely lack of capacity of treaty bodies and lack of capacity of states.<sup>300</sup> According to him, the backlogs faced by treaty bodies due to resource constraints have resulted in delays in the consideration of reports and thereby the comments and recommendations needed for improvements in each party state.<sup>301</sup>

With regard to states, Yerima asserts that the major challenge of non-compliance with reporting obligations is primarily due to lack of capacity, in terms of which resources are a big concern.<sup>302</sup> In this way, poverty is an inhibiting factor in the enforcement of international and regional human right treaties.<sup>303</sup>

Assefa lists inadequate domestication, ineffective follow-up mechanisms, weak institutions, the failure of states to report, and lack of enforcement, lack of political will and lack of implementation of laws as being among the problems experienced in the enforcement of international human rights provisions.<sup>304</sup> Koneva also mentions lack of political will, lack of coherence between the independence of treaty bodies and the expertise of treaty body members and lack of awareness and visibility of the treaty body system as problems, and makes recommendations to improve their work in the interests of accessibility to human rights by all citizens.<sup>305</sup>

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<sup>298</sup> As above

<sup>299</sup> As above.

<sup>300</sup> AE Koneva 'Challenges Facing The Human Rights Treaty Body System' (2014) 2 *Вестник РУДН, серия Юридические науки* 245-246.

<sup>301</sup> As above.

<sup>302</sup> TF Yerima 'Comparative Evaluation of the challenges of the African regional human rights courts' (2011) 4 *Journal of Politics and law* 125

<sup>303</sup> As above.

<sup>304</sup> Unpublished: AG Assefa 'The impact of the African Charter on Human and Peoples Rights and the Protocol on the rights of women on the South African judiciary, LLM Dissertation, University of Western Cape, South Africa, 2011 40-43.

<sup>305</sup> Koneva (n 300 above) 245-246.

It cannot be denied that these global and regional instruments face a variety of challenges either by virtue of their inherent nature or due to the nature of the domestic laws of ratifying states.<sup>306</sup> For example, Lloyd is of the opinion that the success of the CRC is dependent on the member states and their commitment to ensuring respect for the rights of children as well as the efficiency and effectiveness of the committee.<sup>307</sup>

For Nigeria, with the peculiarities of its tripartite legal system and federal government, the comments of treaty bodies on child marriage have been revealing and therefore relevant and important.<sup>308</sup> Recommendations thus far have been legal reform and harmonisation and the specification of a minimum marriageable age along with the identification of strategies to formally engage traditional and religious leaders in ensuring the implementation of rights at local level.<sup>309</sup>

The response of states to recommendations irrespective of the challenges is a concern since so many states default both in terms of implementation and reporting. This is probably linked to the issue of sovereignty.<sup>310</sup> But it may also have to do with the weakness of the treaty body. McSweeney is of the view that the proper role or purpose of the CRC committee for example is to encourage not compel compliance, and that a court-like approach would alienate states parties or deter them from ratifying in the first place.<sup>311</sup>

The fact that the powers or jurisdiction of treaty bodies have been limited to urging and recommendations is one of the reasons they have not had a

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<sup>306</sup> Assefa (n 304 above) 2

<sup>307</sup> A Lloyd 'A Theoretical analysis of the reality of children's rights in Africa: An introduction to the African charter on the rights and welfare of the child' (2002) 2 *African Human Rights Law Journal* 23.

<sup>308</sup> UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL DISCRIMINATION AGAINST WOMEN/C/NGA/10/6, 8 July, 2008, Cedaw forty first session, 30<sup>th</sup> June-18<sup>th</sup> July 2008, concluding observations of the committee on Elimination of discrimination against Women: Nigeria {Part of A/63/38}, Para 320, S29 of the Constitution should be deleted, Cedaw should be fully implemented, take steps including enacting legislation to modify or eliminate harmful practices and discriminatory stereotypes- para 323.

<sup>309</sup> UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD- CRC/C/NGA/CO/3-4, 11<sup>th</sup> June, 2010, Para 11.

<sup>310</sup> Yerima (n 302 above) 122.

<sup>311</sup> KA McSweeney 'The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base' (1993) 16 *Boston College International & Comparative Law Review* 486-487.

significant impact.<sup>312</sup> While sanctions are one option, no matter how small, there is the question of whether this would not exceed the legal jurisdiction of a treaty body.<sup>313</sup>

Some of these limitations are related to the fact that the committees lack the power to impose sanctions and that there is no clear mode of enforcement.<sup>314</sup> Apart from financial constraints, the principle of state sovereignty has played a role in rendering human rights instruments ineffective.<sup>315</sup> Byaruhanga agrees that the principle of sovereignty is actually a challenge to the protection and promotion of human rights by treaty bodies.<sup>316</sup>

On the issue of child marriage in Nigeria, the excuses proffered undoubtedly have undertones of sovereignty, in terms of the sovereignty of the Nigerian state, the autonomy of the federal states and even the sovereignty of religious institutions.<sup>317</sup> This amounts to a complex situation of conflict of laws,<sup>318</sup> which is to be expected in plural legal societies such as Nigeria.<sup>319</sup>

Nigeria has defended its position on the legislation on marriageable age as required by international and regional instruments on the basis of the provision on domestication of S12, Item 61, Part 1, Second Schedule of the 1999 Nigerian Constitution which can be taken to mean state and religious sovereignty.<sup>320</sup> Whether this argument will remain tenable under the rule of law and constitutionalism is an issue for another discourse, but it cannot be denied that they are issues of sovereignty as it relates to domestic law.<sup>321</sup>

## **5.5 Implementation of treaties by member states**

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<sup>312</sup> The outcome of the general assembly's treaty body strengthening process: An Important Milestone on a Longer Journey, POLICY BRIEF, June 2014, 6 Christen Broecker and Michael O'Flaherty.

<sup>313</sup> McSweeney (n 311 above)122.

<sup>314</sup> Lloyd (n 307 above)23.

<sup>315</sup> Yerima (n 302 above)122.

<sup>316</sup> J Byaruhanga 'United Nations and Human Rights Promotion and Protection in Africa: Roles, Achievements and Challenges, UN-Human Rights Diplomacy' 2014 (accessed 30 March 2016).

<sup>317</sup> S12 Constitution of the Federal Republic of Nigeria 1999. Also Item 61 Part 1 CFRN 1999. Fayokun (n 122 above)463-464. Braimah (n 86 above) 481-483

<sup>318</sup> Fayokun (n 122 above)464-465.

<sup>319</sup> When Legal worlds overlap: Human Rights, State and Non-State Law, 2009 1.

<sup>320</sup> Braimah (n86 above) 483

<sup>321</sup> Nwauche (n 120 above)422-427.

Once an international treaty has been signed and ratified, ratifying states are obliged to implement the provisions of the treaty in their individual domestic states for the enjoyment of their citizens.<sup>322</sup> Although the reference is commonly to the individuals as the right holders, the human rights instruments discussed are also perceived as being the responsibility of government,<sup>323</sup> this being the essence of the due diligence principle in international human rights.<sup>324</sup>

What is meant by implementation of a treaty is the steps or actions taken by a member state to fulfil their obligations or responsibilities under the treaty.<sup>325</sup> States which are signatories to international and regional treaties on the protection of the rights of children are obliged to implement their provisions in their countries in accordance with their domestic laws.<sup>326</sup> Since domestic laws already exist in these states, it may be necessary to review and reform legislation to accommodate the requirements or obligations of the ratified treaties.<sup>327</sup>

Although the Vienna Convention contains the interpretation of international treaties, the domestic laws of each state will normally also have provisions in terms of the relationship between domestic and foreign laws or treaties.<sup>328</sup> The legal obligation of member states will usually entail the promulgation or

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<sup>322</sup> Overview of the human rights framework, International justice resource center at <http://www.ijrcenter.org/ihr-reading-room/overview-of-the-human-rights-framework/> (accessed 6 January 2017). F-X Bangamwabo 'The implementation of international and regional human rights instruments in the Namibian legal framework' 165-166 <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/bangamwabo.pdf> (accessed 6 January 2017).

<sup>323</sup> Art 1 African Charter on Human and Peoples Rights.

<sup>324</sup> J Goldscheid & DJ Liebowitz 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48 *Cornell intl law journal* 301 Which entails the mandatory expectation of states to take action to prevent, protect, fulfil and promote the human rights of its citizens or all persons within its sovereign jurisdiction.

<sup>325</sup> SNC Wernig 'Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal system' (2010) 14 *Max Planck Yearbook of United Nations Law*, 412, this means to commit themselves to carry out all appropriate legislative and administrative actions and policies necessary to fully protect and ensure the rights guaranteed by that treaty, that is to implement the international treaty effectively within the domestic legal order.

<sup>326</sup> BI Olutoyin 'Treaty making and its application under Nigerian law: The journey so far' (2014) 3 *International Journal of Business and Management Invention* 12.

<sup>327</sup> As above. N Perrault et al 'Assessing Compliance of National Legislation with International Human Rights Norms and Standards' 2008 2 [https://www.unicef.org/policyanalysis/files/Assessing\\_COMpliance\\_of\\_National\\_Legislation\\_with\\_International\\_Human\\_Rights\\_Norms\\_and\\_Standards.pdf](https://www.unicef.org/policyanalysis/files/Assessing_COMpliance_of_National_Legislation_with_International_Human_Rights_Norms_and_Standards.pdf) (accessed 6 January 2017).

<sup>328</sup> Art 26 and Art 27 Vienna Conventions on the Law of Treaties. S12 Constitution of the Federal Republic of Nigeria 1999

reform of legislation to make human rights accessible to its citizens.<sup>329</sup> For example, Art 6(4) of the African Charter on the Rights and Welfare of the Child provides that “State parties shall undertake that their constitutional legislation recognise the principles according to which a child shall acquire the nationality of the state in the territory of which he has been born.....”<sup>330</sup>

With respect to the elimination of harmful cultural practices, the ACRWC provides that “....State parties shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.”<sup>331</sup> On child marriage specifically, it states that “.....Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation shall be taken to specify the minimum age of marriage to be 18 years....”<sup>332</sup> These provisions constitute proof that legislation is part of the expectations and obligations in terms of the effecting of treaties in the domestic laws of member states.<sup>333</sup>

The legislation (or not) of international human rights provisions is an issue of domestication.<sup>334</sup> Domestication is about the perceived relationship between universal and domestic law and has to do with a particular country’s procedure for accommodating treaties.<sup>335</sup> In most countries, this is provided in the Constitution.<sup>336</sup>

There are two recognised systems governing the relationship between international and national law; namely monism and dualism.<sup>337</sup> These terms

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<sup>329</sup> Olutoyin (n 326 above)8, 12.

<sup>330</sup> Art 6(4) African Charter on the Rights and Welfare of the Child.

<sup>331</sup> Art 21(1) African Charter on the Rights and Welfare of the Child

<sup>332</sup> Art 21(2) African Charter on the Rights and Welfare of the Child.

<sup>333</sup> A-M Slaughter & W Burke-White ‘The Future of International Law Is Domestic (or, The European Way of Law’ (2006 ) 47 *Harvard Intl Law Journal* 328

<sup>334</sup> As above

<sup>335</sup> CN Okeke ‘International law in the Nigerian legal system’ (1997) 27 *Cal. Western. Int’l. L. J.* 335-336

<sup>336</sup> In the case of Nigeria it is in S12 Constitution of the Federal Republic of Nigeria 199

<sup>337</sup> Okeke (n 335 above)335-337

describe two different theories of the relationship between international law and national law.<sup>338</sup>

Monism posits that reality consists of one fundamental ultimate essence. Monists thus maintain that internal and international legal systems form a unity.<sup>339</sup> Both national legal rules and any international rules accepted by a state by way of a treaty for example, determine whether actions are legal or illegal, with no further action required than the ratification of the relevant treaty.<sup>340</sup>

From a purely monist point of view, international law does not need to be translated into national law, it is just incorporated with automatic effect in national or domestic laws.<sup>341</sup> The act of ratifying an international treaty immediately incorporates the law into national law.<sup>342</sup> Customary international law is also treated as part of national law.<sup>343</sup> International law can be directly applied by a judge and directly invoked by citizens as though it were national law.<sup>344</sup> In states where international rules supersede national rules, a judge can declare a national rule invalid if it contradicts international rules.<sup>345</sup>

From a human rights point of view, monism has its advantages. Without waiting for international law to be translated into national law, citizens can seek for the enforcement of rights contained in treaties.<sup>346</sup> After all, the government may neglect or even be unwilling to translate such rights into domestic law.<sup>347</sup>

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<sup>338</sup> Unpublished: CWA Weber 'The Decline of Dualism: The Relationship Between International Human Rights Treaties and the United Kingdom's Domestic Counter-terror Laws' Doctoral thesis, The University of South Africa, 2012 5.

<sup>339</sup> Okeke (n 335 above)335

<sup>340</sup> RF Oppong 'Re – imagining International law: An examination of recent trends in the reception of international law into National legal system in Africa' (2006) 30 *Fordham International Law Journal* 298-299

<sup>341</sup> Okeke (n 335 above)335

<sup>342</sup> As above

<sup>343</sup> As above

<sup>344</sup> Oppong (n 340 above) 297

<sup>345</sup> As above

<sup>346</sup> SD Kanga 'An assessment of the possibilities for impact litigation in Francophone African countries' (2014) 14 *Ahrli* 455

<sup>347</sup> As above.

In states with a dualist system, international law is not directly applicable in the domestic environment.<sup>348</sup> It must be translated into national legislation before it can be applied by the national courts. Dualism is based on the view that international law and domestic law are two different systems and that international law must therefore first be aligned with domestic law before being applicable.<sup>349</sup> Without this translation, international law does not exist as law.<sup>350</sup>

From the dualist perspective, one cannot claim the provisions of a treaty that has not become part of national law.<sup>351</sup> Citizens cannot rely on it and judges cannot apply it, and national laws that contradict the provisions of the treaty remain in force.<sup>352</sup> In dualist countries, it is only insofar as the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.<sup>353</sup>

In some countries, such as the UK for instance, the dualist view is predominant. International law is only part of British national law once it is accepted in national law.<sup>354</sup> The United States of America has a mixed system in that international law applies directly in the country's courts in some instances but not in others.<sup>355</sup> Art VI of the Supremacy clause of the United States does indeed state that treaties are part of the Supreme Law of the Land.<sup>356</sup>

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<sup>348</sup> OWC Duru 'International law versus municipal law: a case study of six African countries: three of which are monist and three of which are dualist' 7, 18 [https://www.academia.edu/5185447/INTERNATIONAL\\_LAW\\_VERSUS\\_MUNICIPAL\\_LAW\\_A\\_CASE\\_STUDY\\_OF\\_SIX\\_AFRICAN\\_COUNTRIES\\_THREE\\_OF\\_WHICH\\_ARE\\_MONIST\\_AND\\_THREE\\_OF\\_WHICH\\_ARE\\_DUALIST](https://www.academia.edu/5185447/INTERNATIONAL_LAW_VERSUS_MUNICIPAL_LAW_A_CASE_STUDY_OF_SIX_AFRICAN_COUNTRIES_THREE_OF_WHICH_ARE_MONIST_AND_THREE_OF_WHICH_ARE_DUALIST) (accessed 7 January 2017).

<sup>349</sup> As above

<sup>350</sup> As above

<sup>351</sup> E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African law* 254.

<sup>352</sup> As above.

<sup>353</sup> As above

<sup>354</sup> 'UK's legal relationship with EU Parliamentary Business [www.parliamentary.uk, http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63304.htm](http://www.parliamentary.uk/publications/2010/11/cmselect/cmeuleg/633/63304.htm) (accessed 13 November 2016).

<sup>355</sup> JF Coyle 'Incorporative Statutes and the Borrowed Treaty Rule' (2010) 50 *Virginia Journal of International Law* 655

<sup>356</sup> RJ Delahunty & J Yoo 'Executive power v International law' 30 *Harvard Journal of Law & Public policy* 74

However, as recently as the case of *Medellín v. Texas*<sup>357</sup>, the Supreme Court reiterated that some treaties are not "self-executing." With regard to customary international law, the Supreme Court similarly stated in the case of the *Pacquete Habana (1900)*<sup>358</sup> that "international law is part of our law." However, it also stated that international law would not be applied if there is a controlling legislative, executive or judicial act to the contrary.<sup>359</sup>

Both monist and dualist states can comply with international law, although a state with a monist system is less at risk of violating international rules because its judges can apply international law directly.<sup>360</sup> Dualism is however preferable in light of the risk that national judges may not be sufficiently familiar with international law which is a highly complex field of law, and may therefore be liable to make mistakes.<sup>361</sup>

Many states, perhaps even most, are partly monist and partly dualist in the actual application of international law in their national systems.<sup>362</sup> Many states have provisions in their constitutions for applying international treaties either without the need for domestication or with the need for domestication.<sup>363</sup> Nigeria falls in the latter category and this forms the basis of one of the current arguments around child marriage in the country, as discussed in this thesis.<sup>364</sup>

## **5.6 Domestication and applicability of treaties in Nigeria**

Treaties and customary international law constitute the most important sources of international law.<sup>365</sup> The Vienna Convention on the Law of

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<sup>357</sup> 552 US 491

<sup>358</sup> 175 US 677

<sup>359</sup> As above. Delahunty & Yoo (n 356 above) 74.

<sup>360</sup> F Spagnoli *Democratic imperialism: A practical guide* (2004) 17.

<sup>361</sup> As above.

<sup>362</sup> D Sloss 'Domestic application of treaties' (2011) 2 <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs> (accessed 7 January 2017).

<sup>363</sup> As above.

<sup>364</sup> S12 CFRN 1999. Fayokun (n 122 above) 463. This led to the domestication of the Child Rights Act 2003.

<sup>365</sup> C Greenwood 'Sources of International Law: An Introduction' (2008) [http://legal.un.org/avl/pdf/ls/greenwood\\_outline.pdf](http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf) (accessed 7 January 2016).



Treaties governs the interpretation of international treaties, particularly on the point of *pacta sunt servanda* or agreement in good faith.<sup>366</sup>

From the various international conventions to which Nigeria is a signatory one could logically claim that a considerable part of the Nigerian *corpus juris* actually originates from treaties which impose obligations on government and also customary international law.<sup>367</sup> These obligations are also within the ordinary and regular functions of government, to wit law making, law interpretation and administration.<sup>368</sup>

A treaty can be consented to by means of signature and ratification<sup>369</sup> and one stage of treaty making is domestication.<sup>370</sup> Ratification is the final establishment, subsequent to formal confirmation of consent; the intentional act whereby a country signifies its intention on the international level to be bound by the provisions of the treaty.<sup>371</sup> Ratification is usually used by states which are required to initiate some form of parliamentary process to obtain approval for its being bound by the international agreement in question.<sup>372</sup>

Domestication is the initiation like process a treaty undergoes to become applicable in some countries.<sup>373</sup> According to Longjohn, it is done by subjecting treaties to the same internal legislative process as is the country's regular legislation.<sup>374</sup> Domestication may take place through the

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<sup>366</sup> Art 26 VCLT

<sup>367</sup> Fayokun (n 122 above) 462. The UNCRC has attained the status of customary international law.

<sup>368</sup> The doctrine of separation of powers (a South African perspective) April 2013, Advocate, Forum at <http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf> (accessed 7 January 2016) by Judge Phineas M Mojapelo Deputy Judge President of the Southern Gauteng High Court. Through its regular and traditionally recognized organ and arms, that is the legislative who make the laws, the judiciary who interpret and the executive who execute.

<sup>369</sup> Art 12 Vienna Convention 1969, some states only sign without ratifying.

<sup>370</sup> Frans Viljeon *International Human Rights law in Africa* 2012 23. Frans elaborated the 7 stages or phases of life of a treaty as elaboration, adoption, adherence, entry into force, operationalization, domestication and internalization.

<sup>371</sup> Art 2 (1) Vienna Convention 1969

<sup>372</sup> Viljoen (n 370 above) 23

<sup>373</sup> Unpublished: CD Longjohn 'Implementation and application of treaties in Nigeria' Master's thesis, the Institute of Advanced Legal Studies 2010 23

<sup>374</sup> As above.

incorporation of the treaty into local legislation or its acceptance as a transformed law.<sup>375</sup>

The questions relating to domestication are whether international law can be invoked as part of the municipal law or legal system, and if so what weight is attached to it or to what extent can it be accessed as a guide to the interpretation of the legal provision or as a substantive basis of a legal remedy.<sup>376</sup>

In Nigeria, treaties are classified into three types.<sup>377</sup> Law making treaties affect or amend existing legislation or powers of the legislature and have to be enacted into law.<sup>378</sup> Agreements which impose financial, political and social obligations or have scientific or technological importance need only be ratified. Lastly, treaties dealing with cultural and educational exchanges need not be ratified.<sup>379</sup>

The treaties which oppose child marriage, the sexual abuse of children or harmful cultural practices require promulgation, enactment or modification of existing legislation, which means they are law making treaties.<sup>380</sup> This study and thesis is therefore concerned with law making treaties.

In Nigeria, the treaty process practically involves the three arms of government, starting with the federal government Executive.<sup>381</sup> Although the Constitution does not specify who is responsible for treaty making, it is within the purview of the federal government in the person of the Chief Executive, the President and the Legislature,<sup>382</sup> although in practice it is done through public officials in relevant government ministries such as the

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<sup>375</sup> FA Onomrerhinor 'A re-examination of the requirement of domestication of treaties in Nigeria' (2016) NAUJILJ 21

<sup>376</sup> As above 20-21.

<sup>377</sup>IA Abubakar *Anti-Money Laundering and Counter-Terrorism Financing: Law and Practice in Nigeria* (2015) 272.

<sup>378</sup> Nigerians Treaties (Making Procedure) Decree No 16 of 199, now Cap T Vol 16 LFN, when it affects the legislative powers, it is law making and must be enacted into law, S3(2) (a).

<sup>379</sup> Abubakar (n 377 above) 272

<sup>380</sup> For example, Art 21 (2) of the African Charter on the Rights and Welfare of the Child provides that child marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation shall be taken to specify the minimum age of marriage to be 18 years.

<sup>381</sup> Olutoyin (n 326 above) 8-15

<sup>382</sup> CN Okeke (n 335 above) 311,337.

Ministers of Foreign Affairs or Justice who usually have the responsibility of signing and registering treaties.<sup>383</sup>

The Department of International Law and Treaties within the Federal Ministry of Justice has been delegated with the power to enter into international relations or sign treaties on behalf of the state while the National Assembly has the duty to enact it into law.<sup>384</sup> According to Nwabueze,<sup>385</sup> “The president as the chief executive of the federal government is designated head of state with the consequences that all his legally relevant international acts are considered to be acts of his state...it comprises in substance chiefly reception and mission of diplomatic agents and consults, conclusion of international treaties, declaration of wars...”<sup>386</sup>

The next step in the process is the enactment of the treaty concluded by the President into law by the National Assembly,<sup>387</sup> without which the treaty cannot have the force of law in the country. The Nigerian Constitution provides that “No treaty between the federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”<sup>388</sup> It is this provision that establishes Nigeria as a dualist commonwealth country as held in the case of *Ibidapo v Lufthansa Airlines*.<sup>389</sup>

S12 has been the excuse of Nigeria for failure to respect human rights of citizens as they claim that the treaties have not been domesticated in their

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<sup>383</sup> As above. A state governor cannot do this. However here, a distinction needs to be made between law making treaty and treaty contracts, it is the law making treaty that a governor within a federation cannot make on behalf of the country, in practice, state governors enter into loan treaties or program between their states and another country or international organization. In fact, in international law only sovereign states can sign treaties, not individuals- Anglo Iranian oil case 1952 ICJ Rep 93, within a federation a state cannot do this- Att Gen Federation v AG Abia State and 35 Others 2002 161 WRN 1PG 75. Art 7 Vienna Convention, provides that to represent a state in international law, a person must produce full powers which are documents certifying status from the competent authorities of the state in question.

<sup>384</sup> Olutoyin(n 326 above) 8-15

<sup>385</sup> BO Nwabueze *Federation in Nigeria under the presidential constitution* (1983)255-256.

<sup>386</sup> As above

<sup>387</sup> S4 (1) Constitution of the Federation of the Republic of Nigeria 1999.

<sup>388</sup> S12(1) CFRN 1999.

<sup>389</sup> 1997 4NWLR Part 498. See also Egede (n351 above), this is like the UK experience, in which, it is the executive that concludes treaty agreements but the legislature must enact it to have the force of law.

states so it cannot be enforced or applied by the Courts.<sup>390</sup> This is notwithstanding the fact that States may not invoke their domestic law as justifications for failure to perform a treaty obligation.<sup>391</sup>

Although South Africa is a dualist state like Nigeria, there is a provision in the South African Constitution which enables the court to apply international or foreign law when interpreting any legislation and also to promote the values that underlie an open democratic society based on human dignity, equality and freedom.<sup>392</sup>

Again by provision of the Nigerian Constitution, implementation by legislative powers is divided into two on the basis of subject matter.<sup>393</sup> There are matters that fall under the Exclusive List<sup>394</sup> and others that fall under the Concurrent List.<sup>395</sup> A problem that arises here is when the subject matter of a treaty is a matter for both federal and state government or is not specified on either list.<sup>396</sup>

Some treaties have been signed and ratified by Nigeria but have not been implemented, that is transformed, hence they cannot have the force of law no matter how important they are to the citizens or the intent of the state when signing in the first instance.<sup>397</sup> Oyeboode is of this opinion when he states that “the implementation and enforcement of international law is what makes it law.”<sup>398</sup> Viljoen explains that implementation is the same thing as state compliance.<sup>399</sup>

As a fall out of non implementation of some treaties in Nigeria, the response of the Nigerian judiciary has not been consistent or predictable in this regard, particularly with respect to the issue of undomesticated treaties. In

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<sup>390</sup> Olutoyin (n 326 above) 18

<sup>391</sup> Art 27 Vienna Convention

<sup>392</sup> S39 (1) Constitution of South Africa

<sup>393</sup> S12 (3) CFRN 1999

<sup>394</sup> S12 (1) CFRN 1999

<sup>395</sup> S12 (2) & (3) CFRN 1999

<sup>396</sup> S12 (3) CFRN 1999

<sup>397</sup> CN Okeke ‘The Use Of International Law In The Domestic Courts Of Ghana And Nigeria’ (2015) 32 *Arizona Journal of International & Comparative Law* 2.

<sup>398</sup> AB Oyeboode ‘Of Norms, Values and attitudes: The cogency of international law’ (2011) 31.

<sup>399</sup> Viljoen (n above)34

the case of *Abacha v Fawehinmi*,<sup>400</sup> undomesticated treaties in Nigeria were held not to be enforceable, but to possibly have persuasive influence that might encourage the government to act on them at a later date.<sup>401</sup>

In *Frank Tietie v AG Federation & Others*,<sup>402</sup> the respondents were reprimanded for failing to comply with or breaching the provisions of the Child Rights Act. The court held that notwithstanding the lack of adoption of the CRA by some constituent states, the African Charter on Human and Peoples Rights stands in as a domestic law.<sup>403</sup>

It can be said that determining the use of unimplemented treaties depends on the courts and the willingness of judges to apply or use their discretion in fulfilling their lawful duties. In *Nzekwu v Nzekwu and others*,<sup>404</sup> the Supreme Court recognised a customary tradition which barred a female from a family inheritance. This can be said to be discriminatory against women and contrary to the provisions of the undomesticated CEDAW. In *Mojekwe v Ejikemi*,<sup>405</sup> on the other hand, the court held that the lli-ekpe custom which discriminates against women, was repugnant to good justice.

In *Anode v Mmeka*<sup>406</sup>, the culture and practice which allows a daughter to procreate out of wedlock in the absence of a male heir was held by the Supreme Court to be abominable,<sup>407</sup> and on the issue of forced marriage in Nigeria, there is precedence to argue for lack of jurisdiction by a court where the matter was originally instituted and the matter held to be proper before the Sharia court.<sup>408</sup>

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<sup>400</sup> 2001 51 WRN 29

<sup>401</sup> As above

<sup>402</sup> m/336/12

<sup>403</sup> As above. The Child Rights Act having been domesticated by the National Assembly is a federal Act applicable in the federal capital territory although it needs to be adopted by the states to be applicable in those states, this was also part of the decisions in the case.

<sup>404</sup> 1989, 2 NWLR PT 104, 373

<sup>405</sup> 1997, 7 NWLR, PT 512, 263

<sup>406</sup> 2008, 10, NWLR pt. 1094

<sup>407</sup> As above. It was held to be immoral as it promotes sexual promiscuity, it was even against the Nigerian Constitution

<sup>408</sup> Nigerian court rejects forced marriage case, 22 Oct, 2010 at [www.bbc.com/news/world-africa-11607532](http://www.bbc.com/news/world-africa-11607532) (accessed 2 January 2016). The judge held that the lady's human rights had not been violated and that it was a matrimonial matter for an Islamic court.

Such issues have been attributed to the vagueness of the provision in S12 of the Nigerian Constitution, but in reality it could be argued that this Section does not apply to customary international law<sup>409</sup> and the Bangalore Principles<sup>410</sup> on the conduct of judges. Oji<sup>411</sup> is however of the opinion that it is accepted that customary international law forms part of Nigerian law despite the fact that there is no express provision in this regard.<sup>412</sup>

This may be said to apply through the English Common Law, as supported by the case of *Ibidapo v. Lufthansa Airlines*<sup>413</sup> where the Nigerian Supreme Court held that Nigeria, like all other commonwealth countries, inherited the English Common Law rules governing the municipal application of customary international law. In addition, where a rule of customary law conflicts with a domestic law, domestic law prevails although there is no local judicial precedence to this effect and case law from foreign jurisdictions have only persuasive authority in Nigeria.<sup>414</sup>

The role of the courts in interpreting laws and acts of state pursuant to that, specifically in terms of international treaties, cannot be overemphasised. This is moreso with international customary law which does not require domestication to be applicable.<sup>415</sup>

Undomesticated treaties can also be of assistance in the interpretation of statutes, which may be said to be in accordance with the Bangalore Principles.<sup>416</sup> These urge the judiciary to make use of global instruments and agreements when attempting to clarify the provisions of legislation,

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<sup>409</sup> Art 38 (1) (b) ICJ, Statute.

<sup>410</sup> The Bangalore principles of judicial conduct 2002 [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (accessed 7 January 2017). This is an international Document on the expectation and performance of judges and judicial officers inclusive of the requirement to keep themselves informed of development of international human rights treaties, especially Art 6:4.

<sup>411</sup> EA Oji 'Application of customary international law in Nigerian court' (2010) *NIALS Law and Development Journal* 152.

<sup>412</sup> S1(3) Constitution of the Federal Republic of Nigeria 1999 is the closest to this in the Nigerian Constitution without mentioning international customary law. S231 1996 South African Constitution.

<sup>413</sup> 1997 4 N.W.L.R 124

<sup>414</sup> Oji (n 411 above) 166.

<sup>415</sup> Oji (n 411 above) 168

<sup>416</sup> Concluding statement of the judicial colloquium held in Bangalore, India, 24<sup>th</sup> – 26<sup>th</sup> FEB 1998, see also Para 7 of the commonwealth secretariat and interrights, developing human rights jurisprudence vol 7, seventh judicial colloquium on the domestic application of international human right norms 1978 217-218

irrespective of the domestication of treaties by their states.<sup>417</sup> This is now the practice in some countries as reflected in decisions over the past fifteen years.<sup>418</sup> India's constitutional jurisprudence will recognise international law as long as it does not conflict with domestic law.<sup>419</sup>

The international and regional instruments which provide for the protection for women and children and which prohibit child marriage have not been domesticated in Nigeria.<sup>420</sup> Legally speaking therefore they cannot be applied to protect the rights of the girl child on the issue.<sup>421</sup> While the CEDAW has not been domesticated at all, an attempt was made to domesticate the CRC in the form of the Child Rights Act but the application of this Act remains a struggle.<sup>422</sup> Following recent trends however, the judiciary in Nigeria has been attempting to achieve justice through references to undomesticated treaties. In *Asika v Atuanya*,<sup>423</sup> for example, the judge mentioned a provision of the CEDAW.

It should be noted that although the domestication of the CEDAW and CRC has faced stiff opposition on the basis of religious beliefs and customary perceptions, it would nonetheless have taken place if the Nigerian government had viewed the treaties as essential for the enjoyment of rights by the citizens of the country.<sup>424</sup>

While this may be an issue of lack of government or political will, the feasibility of the enjoyment of rights is more particularly linked to

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<sup>417</sup> As above

<sup>418</sup> M Anderson, Domestication of International human rights law- Trends in commonwealth including the UK being a paper, delivered at the British Nigeria Law week, 23-27 April 2001 at Abuja

<sup>419</sup> The Status of International Law under the Constitution of India, 8 May 2011, Legal India at <http://www.legalindia.com/the-status-of-international-law-under-the-constitution-of-india/>, accessed on 7 January 2017.

<sup>420</sup> I Nnadi 'An Insight into Violence against Women as Human Rights Violation in Nigeria: A Critique' (2012) 5 *Journal of Politics and Law* 55. Oji (n 411 above)159.

<sup>421</sup> As above

<sup>422</sup> Fayokun (n 122 above) 463-464. The argument against the application of the Child Rights Act was discussed to an extent in the previous chapter and will be discussed in detail in the next one under conflict of laws.

<sup>423</sup> 2008 17 NWLR (pt. 1117) Also in Mojekwe's case

<sup>424</sup> UN CRC-CRC/C/NGA/CO/3-4, 11th June, 2010, UN- CEDAW/C/GC/31-CRC/C/GC/18, 14<sup>TH</sup> Nov 2014, joint general recommendation No 31 of the Committee on the Elimination of Discrimination against Women/general comment No 18 of the committee on the Rights of the Child on harmful practices.UNGA ORAL REVISIONS 02/07, United Nations A/HRC/29/L.15, 1 July 2015

government and especially legislative efforts to implement them.<sup>425</sup> The comments, observations and recommendations on reports from Nigeria relating to the elimination of child marriage have always emphasised the need for full domestication and implementation of the CEDAW and CRC.<sup>426</sup>

The fact that international treaties prohibiting child marriage have yet to be domesticated, whatever the reason, means that they cannot have the intended and expected impact in Nigeria.<sup>427</sup> This being the case, citizens cannot bring actions to enforce them and if they do not appear before the judge for determination, the issues of interpretation, customary international law or even the Bangalore Principles cannot be raised.

There is a dearth of reported and/or decided cases on child marriage in Nigeria<sup>428</sup> and where they do exist, they are brought on the grounds of domestic law which is applicable and enforceable in the country.<sup>429</sup> Although there is opportunity for actions under the domesticated African Charter on Human and Peoples Rights as found in *Abacha v Fawehinmi*.<sup>430</sup>

As a federal Act the domesticated Child Rights Act is superior to any adopted state law but the fact that it has not been adopted in a federation where such matters fall within the jurisdiction of the state is the current challenge with respect to marriageable age in Northern Nigeria.<sup>431</sup>

It is commendable however, that in *Frank Tietie v AG Federation & Others*<sup>432</sup> the Attorney General and his officers were held liable for not fulfilling their duties with respect to the protection of the girl child as contained in the

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<sup>425</sup> S12 Constitution of the Federal Republic of Nigeria, Item 61 Part1 Second schedule of the same constitution. Fayokun (n 122 above)<sup>464</sup>

<sup>426</sup> As in 424 above.

<sup>427</sup> *Abacha v Fawehinmi* 2001 5 WRN 29

<sup>428</sup> *Nwauche* (n 120 above) 427

<sup>429</sup> 'Child kidnap, rape, imprisonment, forced Islamisation/marriage by sharia court 8 March 2016 Nairaland <http://www.nairaland.com/2978813/child-kidnap-rape-imprisonment-forced> (accessed 7 January 2017). Where some cases which went before the sharia court on issue of forced marriage were discussed. The case of *Ese Oruru v sharia hisbah commission*, *Rita Chinedu Ukeje v sharia*, *Ifeoma Nichodemus v The Sharia Court Kaduna*, *Charity v Sharia Court Minna*. One such cases whuch went before the federal high court on fundamental human rights was faulted as not being an issue of fundamental human rights and to be proper before a sharia court.

<sup>430</sup> 2001 5 WRN 29

<sup>431</sup> Item 61, Part 1, 2<sup>nd</sup> Schedule, 1999 Constitution.

<sup>432</sup> m/336/12, although not on child marriage was based on the domesticated Child Rights Act which as a Federal Act was unarguably applicable in the Federal Capital Territory.



Child Rights Act which was applicable in the Federal Capital Territory although not yet law in some parts of the country.<sup>433</sup>

### **5.7 Emerging trends with respect to state obligations under international law to protect the girl child against child marriage**

The approach of states to the implementation of international human rights treaties often differs and their respective Constitutions play an important role in this regard.<sup>434</sup> This is because the legality of the process of law making, enforcement of laws and the extent and limitations of powers, authorities and institutions which perform governmental functions are constitutionally determined, in Nigeria and elsewhere.<sup>435</sup>

The recent global trend in the fight against child marriage is to criminalise the practice,<sup>436</sup> outlaw it or reform existing laws to accommodate its prohibition. All these in the response to the provisions of international and regional agreements.<sup>437</sup> Some countries have responded to this in implementing these provisions thereby fulfilling their obligations in the provisions which relate to them or in responding to the practice as a problem in this century.

The United Kingdom promulgated a law criminalising child and forced marriages as practiced among the country's migrant communities,<sup>438</sup> and the practice was officially criminalised in England and Wales in 2014.<sup>439</sup> The Forced Marriage Act passed by Scotland in 2011 also criminalises forced marriages. The Act empowers courts to issue protection orders that speak to

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<sup>433</sup> As above

<sup>434</sup> Bangamwabo (n above)165.

<sup>435</sup> Functions of the executive, legislative and judiciary are issues of constitutionalism found in all constitutions. In Nigeria it is found in S4, S5, S6 CRN 1999

<sup>436</sup> Criminalization of forced and child marriage, UNWOMEN, United Nations Entity for women for gender equality and the empowerment of women, at <http://www.endvawnow.org/en/articles/629-criminalization-of-forced-and-child-marriage.html?next=630> (accessed 13 November 2016).

<sup>437</sup> These provisions require legislation and other measures which could take the form of law reform, specific marriageable age to eliminate the practice.

<sup>438</sup> Forced Marriage Civil Protection Act 2007.

<sup>439</sup> Anti-Social Behaviour, Crime and Policing Act. 2014.

the specific needs of the victim and makes the violation of such orders a criminal offence.<sup>440</sup>

Although India had a Child Marriage Restraint Act for years, the country recently passed a Child Marriage Prohibition Act.<sup>441</sup> In December 2011, Pakistan passed the Prevention of Anti-Women Practices Bill and the Criminal Law Bill, which amended the country's Penal Code and Code of Criminal Procedure. The Prevention of Anti-Women Practices Bill makes it unlawful to "compel or arrange or facilitate" the marriage of a woman and punishes violations with imprisonment of three to seven years and a fine of five hundred thousand rupees. Pakistan has also set up a National Commission on Women.<sup>442</sup>

Norway's Penal Code of (2003) punishes forced marriage as a felony against personal liberty. Section. 222 (2) states that "Any person who by force, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct forces anyone to enter into a marriage shall be guilty of causing a forced marriage."<sup>443</sup>

The penalty for causing a forced marriage is imprisonment for a term not exceeding six years. Any person who aids and abets such an offence shall be liable to the same penalty." Section 220 of the Penal Code also imposes a prison sentence of up to four years on "any person who enters into marriage with a child under the age of 16, or who aids and abets such a marriage."<sup>444</sup>

Since 2015, the minimum marriageable age in all of Canada is sixteen. Under Canada's Constitution Act, marriage is a federal matter.<sup>445</sup> Similar laws have been enacted in Maryland and New York.<sup>446</sup> Anyone who celebrates, aids or participates in a marriage rite or ceremony knowing that

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<sup>440</sup> Scotland forced Marriage Act 2011

<sup>441</sup> Child marriage restraint Act 1929 reviewed, now Child Marriage Prohibition Act 2015

<sup>442</sup> The Prevention of Anti Women Practices Bill

<sup>443</sup> S222 Norway's Penal Code of 2003

<sup>444</sup> S220 Norway Penal Code.

<sup>445</sup> The Law and Underage Marriage, Justice and Law Social issues, Feb 28, 2014 <http://www.cbc.ca/fifth/blog/the-law-and-underage-marriage> (accessed 13 November 2016)

<sup>446</sup> States Make New Push to Curb Child Marriage 20 February 2016 Newyork Times <http://www.nytimes.com/2016/02/21/us/states-make-new-push-to-curb-child-marriage.html> (accessed on 7 January 2017).

one of the persons being married is under the age of sixteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.<sup>447</sup>

On the African continent, child marriage has been outlawed in Gambia and Tanzania.<sup>448</sup> Some countries have promulgated a Child Rights Act according to which child marriage is prohibited and/or a minimum marriageable age is provided to conform with international requirements.<sup>449</sup>

The Child Rights Act enacted in Lesotho includes the prohibition of child marriage and betrothal but does not specify a marriageable age.<sup>450</sup> Ghana's Children's Act criminalizes child marriages, apart from entrenching it in the Criminal code.<sup>451</sup> Ghana also set up Child Marriage Coordinating Unit; the commissioning of an Advisory Committee; the establishment of a network of stakeholders; and development of a national strategic framework.<sup>452</sup>

In South Africa, the Children's Act 38 of 2005 prohibits forced marriage and names Ukuthwala as one type, although Nwambene and Nielsen, in their analysis of the Act, disagree that Ukuthwala is a form of forced marriage which is forbidden by the Constitution as discrimination.<sup>453</sup> The age of majority in South Africa was reduced from twenty one to eighteen years by

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<sup>447</sup> America's child marriage crisis: Virginia law tackles continuing issue, 8 July 2016, the Guardian at <https://www.theguardian.com/society/2016/jul/08/child-marriage-forced-minors-virginia-law>, accessed on 7 January 2017.

<sup>448</sup> M Jones, Gambia and Tanzania outlaw child marriage, Paper Chase, July 9, 2016, at <http://www.jurist.org/paperchase/2016/07/gambia-and-tanzania-outlaw-child-marriage-practices.php>, accessed on 13/11/2016..

<sup>449</sup> Children's Rights: International Law, Library of Congress at <https://www.loc.gov/law/help/child-rights/international-law.php> (accessed 13 November 2016).

<sup>450</sup> The country promulgated The children's protection and welfare Act 2011, Act No 7 2011. In this Act S15 protects the child from exploited labour, S16 protects the child from torture and degrading treatment while S17 protects the child from harmful cultural rites, customs and traditions. See also Day of the African Child in Mafeteng 17 June 2016 LNBS <http://lnbs.org.ls/?p=497> (accessed 7 January 2017).

<sup>451</sup> Ghana leads global campaign to end child marriage, Government of Ghana at <http://www.ghana.gov.gh/index.php/media-center/news/2612-ghana-leads-global-campaign-to-end-child-marriage> (accessed 7 January 2017). Ghana outlines strategy against child marriage, 20 March 2016, Ghana Business News <https://www.ghanabusinessnews.com/2016/03/20/ghana-outlines-strategy-against-child-marriage/> (accessed 7 January 2017) Violet Odala Protection of children from harmful practices through the law in Africa The African child policy forum International expert consultation on harmful practices, 13<sup>th</sup> -15<sup>th</sup> June 2012 at Addis Ababa.

<sup>452</sup> As above

<sup>453</sup> L Nwambene and J S-Nielsen 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' 2011 2 *Journal of Family law and Practice*

the Children's Act.<sup>454</sup> A person under the age of eighteen cannot marry without parental consent, and a boy under eighteen or a girl under fifteen cannot marry without the special consent of the Minister of Home Affairs. Although this discriminatory provision for girls and boys is contrary to the provisions of the Constitution, it has not been challenged.<sup>455</sup>

In accordance with international human rights provisions, S9 of the South African Constitution prohibits discrimination on any ground.<sup>456</sup> The issue of equality and non-discrimination has formed the basis of some judicial decisions in the country. In the case of *Bhe & Others v Magistrate Khayelitsha*, Langa D.C.J. noted that “.....The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender....”.<sup>457</sup>

Section 12(1) of the South African Children's Act provides that every child has the right “not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing”. This is also a provision in Art 21(1) of the ACRWC. Notwithstanding the cultural and religious rights included in the South African Constitution in accordance with the provisions of the Universal Declaration of Human Rights, ICESCR, ICCPR, CEDAW and other conventions, religion does not trump Constitutional provisions in South Africa.<sup>458</sup>

In the case of *Christian Education of South Africa v Minister of Education*<sup>459</sup> the Constitutional Court disregarded the argument that religion should trump constitutional rights and did not allow the right to religion to

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<sup>454</sup> S1(b) Births and Deaths Registration Amendment Act, 2001 Government Gazette Republic of South Africa, Vol. 441 Cape Town 19 March 2002 No.23243 No. 1 of 2002: at <http://www.treasury.gov.za/legislation/acts/2002/act01.pdf>, accessed on 7 January 2017.

<sup>455</sup> Nwambene and S-Neilsen (n 453 above)

<sup>456</sup> Art 1 UN Charter; art 2 Universal Declaration; art 2 ICESCR; art 2(1) ICCPR; art 2 CEDAW; arts 2 & 3 African Charter

<sup>457</sup> *Bhe & Others v Magistrate Khayelitsha* (Commissioner for Gender Equality as Amicus Curiae) 2005 1 BCLR 1 (CC); 2005 1 SA 580 (CC).

<sup>458</sup> No, religious freedom does not justify discrimination, 27 June 2016, Constitutionally speaking at <http://constitutionallyspeaking.co.za/no-religious-freedom-does-not-justify-discrimination/> (accessed 7 January 2017)

<sup>459</sup> 2000 4 SA 757 (SCA) 711, para 26

supersede the Bill of Rights.<sup>460</sup> A case such as this can act as a precedent to oppose claims in Northern Nigeria that child marriage is a religious practice and under religious rights and to outlaw the practice.<sup>461</sup>

The best interest of the child is even constitutionalised in South Africa in S28 (2) of the Constitution. This is not the case in Nigeria although the best interest of the child is included in the Child Rights Act.<sup>462</sup>

S12 (2)(a) of the Children's Act of South Africa prohibits the "giving out" in marriage or engagement "of a child below the minimum age set by law for a valid marriage", which is in accordance with Art 21 (2) of the ACRWC, and also specifies a minimum age of eighteen for customary marriages.<sup>463</sup>

Malawi recently passed reformed marriage laws which now not only prohibit child marriage but provide a minimum marriageable age of eighteen years.<sup>464</sup> While the new legislation could play an important role the prevention of child marriages, there is a risk that conflicting national and constitutional laws may undermine efforts to do so.<sup>465</sup>

Kenya's recently reformed Marriage Act also prohibits child marriage and provides a minimum marriageable age.<sup>466</sup> In the case of *Loveness Mudzuru, Ruvimbo Tsopodzi v Minister of Justice, Legal & Parliamentary Affairs N.O and Two Others*,<sup>467</sup> Zimbabwe recently outlawed child marriage whether by religious or customary law. It upheld the constitutional minimum marriageable age of eighteen years and declared the Marriage Act invalid in

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<sup>460</sup> As above.

<sup>461</sup> Although foreign decisions cannot be cited neither do they act as precedents in Nigerian courts and in fact on the issue of child marriage and constitutional provisions, the argument has gone beyond rights to religion alone, other issues which fall under complex conflict of law arise, these are dealt with in chapter 6 of this thesis.

<sup>462</sup> S1 Child Rights Act 2003

<sup>463</sup> Act 120 of 1998

<sup>464</sup> J Yang, Malawians take steps to end sexual initiation of girls, 20th January 2014, at [www.thestar.com/news/world/2014/01/20/Malawians-take-steps-to-end-sexual-initiation-of-girls.html](http://www.thestar.com/news/world/2014/01/20/Malawians-take-steps-to-end-sexual-initiation-of-girls.html), accessed on 25/7/2015

<sup>465</sup> V Wang, 2016, Ending child marriages – new laws bring progress but hurdles remain, The <http://www.cmi.no/publications/5802-ending-child-marriages-new-laws-bring-progress-but>, accessed 21 July 2016).

<sup>466</sup> S3 (4) Kenya Marriage Act 2014.

<sup>467</sup> Judgement No CCZ 12/2015, Const. Application No. 79/14

terms of its inconsistency with the eighteen years prescribed the Constitution.<sup>468</sup>

Perhaps a similar suit against the Nigerian government would help establish the legal status of the practice of child marriage in the country, despite there being no certainty about the decision of the court.<sup>469</sup>

Many countries, including India<sup>470</sup> and the United Kingdom<sup>471</sup> have promulgated child marriage prohibition laws. Yet other countries where the problem of child marriage is rife have included a minimum marriage in their laws.<sup>472</sup>

Some constitutions have been reformed. In South Africa, it is already a constitutional requirement that the courts promote the values that underlie an open democratic society based on human dignity, equality and freedom in interpreting any legislation and that they consider international or foreign law.<sup>473</sup>

Many of these countries have also reformed their criminal legislations. The Criminal Law (Sexual Offences) Amendment Act of South Africa.<sup>474</sup> An extension of the definition of rape was allowed by the court in *Masiya v Director Public Prosecution (The State & Another)*.<sup>475</sup> The Combating of Rape Act of Namibia, the Sexual Offences Special Provision Act of Tanzania, the Sexual Offences Act of Lesotho.<sup>476</sup> The Sexual Offences and Domestic Violence Bill of Swaziland, and the Criminal Law

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<sup>468</sup> As above

<sup>469</sup> Seri Solebo, Chief magistrate of family Court and Assistant Registrar, although there is no Constitutional Court in Nigeria, but the Supreme Court has powers like the Constitutional Court of Zimbabwe; the Federal High Court can also be accessed on similar issues. The researcher communicated with her via email.

<sup>470</sup> The Prohibition of Child Marriage Act 2006.

<sup>471</sup> UK Forced Marriage Civil Protection Act 2007

<sup>472</sup> Egypt in 2008, Algeria since 2005, Morocco in 2004, Turkey in 2001 in its Civil Amendment Code and even Sierra Leone in 2007. Musawah- Report to be written pursuant to HRC Resolution A/HRC/RES/24/23 on Child, Early and Forced Marriage, 13/Dec/2013.

<sup>473</sup> S39 (1) Constitution of South Africa

<sup>474</sup> United Nations. A Brief Overview of Recent Development s in Sexual Offences Legislation in Southern Africa Expert Paper by K Stefizen May 12 2008, Expert Group Meeting on good practices in legislation on violence against women United Nations Office at Vienna, Austria 26 to 28 May 2008 at [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVA](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVA) (accessed 7 January 2017).

<sup>475</sup> 2007 5 SA (CC).

<sup>476</sup> As in 474 above

(Codification and Reform) Act of Zimbabwe which replaced its Sexual Offences Act in 2004.<sup>477</sup>

There have been some amendments to legislation in Ethiopia in the areas of family and criminal related provisions.<sup>478</sup> Kenya has also had success in affording this vulnerable sector greater protection,<sup>479</sup> apart from reforming the Marriage Act to expressly prohibit child marriage,<sup>480</sup> the Kenyan Constitution already makes provision for the protection of the rights of children against infringement.<sup>481</sup>

In addition, the Kenyan system is monist which means that international law are applicable directly following ratification.<sup>482</sup> and in *CK. (A Child) & 11 Others v Commissioner of Police/ Inspector General of the National Police Service and 2 Others*.<sup>483</sup> the Police was held accountable for inaction in the case of child sexual abuse. Their petitions were based on the Constitution of Kenya, 2010, the Sexual Offences Act, 2006, The Police Act of the Laws of Kenya, the Universal Declaration of Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.<sup>484</sup>

Malawi not only has comprehensive laws on child care and a specific Protection and Justice Act,<sup>485</sup> its Constitution also contains provision on the rights of children<sup>486</sup> and provides that international conventions be part of applicable law in the country.<sup>487</sup> In addition, Malawi has also amended its marriage laws and prescribed eighteen years as the minimum marriageable

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<sup>477</sup> As above

<sup>478</sup> Revised Penal Law 2004, Revised Family Code Proclamation No 213 of 2000.

<sup>479</sup> Sexual Offences Act 2006

<sup>480</sup> S3(4) Kenya Marriage Act 2014.

<sup>481</sup> Art 53 Kenya Constitution

<sup>482</sup> Art 2(5) and in Art 2(6).

<sup>483</sup> Petition no 8 of 2012, High Court of Meru, (2012) ekLR

<sup>484</sup> 'Kenyan Court holds police accountable for inaction in child sexual assaults' [http://www.law.utoronto.ca/utfl\\_file/count/documents/reprohealth/lg02\\_ck\\_ripples\\_kenya.pdf](http://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/lg02_ck_ripples_kenya.pdf) (accessed 1 January 2016). This caused harm to the petitioners, and also created a climate of impunity for defilement because the perpetrators were not held accountable for their unlawful acts. The Court further acknowledged that the petitioners suffered physical and psychological harm. The Court also stated that while the perpetrators were directly responsible for the harm caused, the respondents were culpable for the ongoing failure to ensure that criminals were brought to book through proper and effective investigation and prosecution of these crimes, resulting in a climate of impunity for sexual offences against children.

<sup>485</sup> Act no 22 of 2010

<sup>486</sup> S23

<sup>487</sup> S211 Malawi Constitution

age.<sup>488</sup> In response to this reform, some 300 child marriages were annulled by a traditional leader who sent the affected children back to school.<sup>489</sup> This was only possible because there was a reference law.<sup>490</sup>

The best interest principle has been applied for the protection of children in some cases in Malawi. In *Nwangwu v Republic*,<sup>491</sup> a case brought against a man who defiled his own daughter, the court convicted the man of his incest and in *Republic v Cidreck*,<sup>492</sup> the accused was convicted of rape.

While these developments are going on in other jurisdictions, progress has been slow in Nigeria, particularly in terms of legislation and judiciary or court attempts to protect the girl child.<sup>493</sup> Where attempts have been made, the decisions reached in similar cases have been described as conflicting. In *AG Ondo State v AG Federation and 33 Others*,<sup>494</sup> the decision was that Chapter 11 of the Constitution on Fundamental Objectives and Directive Principles of State Policy is not enforceable by the courts<sup>495</sup> except where the National Assembly has made specific laws for their enforcement.<sup>496</sup>

The same constitutional provision was held justiciable in *Adamu v AG Borno State*,<sup>497</sup> and the more recent case of *Frank Tietie v Attorney General Federation & Others*<sup>498</sup> where the respondents were held liable for not prosecuting the case of the rape of two female minors in the city. This was

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<sup>488</sup> The Marriage, Divorce and Family Relations Bill passed in February 2015 [www.mw.one.un.org/malawi-passes-the-marriage-divorce-and-family-relations-bill-2015/](http://www.mw.one.un.org/malawi-passes-the-marriage-divorce-and-family-relations-bill-2015/) (accessed 25 July 2015).

<sup>489</sup> Dedza 'Malawian chief voids 330 child marriages, enrolls them back in school' the Maravi post June 23 2015 <http://www.maravipost.com/national/malawi-news/district/9114-malawian-chief-voids-330-child-marriages-enrolls-them-back-in-school-html> (accessed June 23 2015)

<sup>490</sup> As above. (n 488 above)

<sup>491</sup> 2008 MLR 103

<sup>492</sup> [1995]MLR 695

<sup>493</sup> Fayokun (n 122 above) 465

<sup>494</sup> 2002 9 NWLR Pt 772, 222

<sup>495</sup> S13-21 Constitution of the Federal Republic of Nigeria 1999. These provisions are relevant for their health, reproductive rights and educational objectives for citizens. Chapter 11 is the provisions on fundamental objectives and directives principles of state policy which contains the provisions on social cultural rights, health and reproductive rights.

<sup>496</sup> S6 (6) (c) Constitution of the Federal Republic of Nigeria 1999. shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

<sup>497</sup> 1996 8 NWLR Pt 465, 203

<sup>498</sup> M/336/12



similar to the Kenyan case of *CK (A child) & 11 others v Commissioner of Police/ Inspector General of the National Police & 2 Others*.<sup>499</sup>

In Nigeria, S12 of the Constitution provides for the application of treaties. Only domesticated treaties are applicable and enforceable as laws in the country. The Constitution does not however provide for the status of ratified treaties but this was determined in the case of *Abacha v Fawehinmi*.<sup>500</sup>

In Zambia, a dualist country, treaties must be enacted or transformed into national law in order to become part of Zambian law.<sup>501</sup> The courts have been reluctant to make use of international law, with some notable exceptions such as *Longwe v Intercontinental Hotels*, where the CEDAW was cited despite not being domesticated.<sup>502</sup> In deciding in favour of the petitioner, the High Court held that on an issue not covered by domestic legislation, a court could take judicial notice of international treaties and conventions, such as the African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination against Women, if they had been ratified without reservation whereby a state indicates its willingness to be bound by their provisions.<sup>503</sup>

Discrimination is already covered by Art 23 of the Zambian Constitution but it cannot be denied that international instruments were persuasive and helped in the final decision of the court in the matter of *Longwe v Intercontinental Hotels*.<sup>504</sup> As in Nigeria, Zambian courts are plagued by inconsistencies on the issue of discriminatory laws and the application of undomesticated treaties, despite the provision on nondiscrimination in Art 23 of the Constitution.<sup>505</sup>

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<sup>499</sup> Petition no 8 of 2012, High Court of Meru, (2012) ekLR

<sup>500</sup> 51 WRN 29

<sup>501</sup> K Starmer & TA Christou *Human rights manual and sourcebook for Africa* (2005) 967.

<sup>502</sup> 1992/HP/765; [1993] 4 LRC 221.

<sup>503</sup> As above.

<sup>504</sup> As in 502 above. M Hansungule 'Domestication of International human rights law in Zambia' in M Killander (ed) *International law and domestic human rights litigation in Africa* 2010 75

<sup>505</sup> Hansungule 'Domestication of International human rights law in Zambia' in Killander (n 504 above) 74

An example is the case of *Elizabeth Mwanza v Holiday Inn Hotel*,<sup>506</sup> where the view of the court differed from that in *Longwe v Intercontinental Hotels Limited*.<sup>507</sup> Hansungule links this problem to the issue of judicial precedence of stare decisis where the decisions of state High Courts create binding law, save for inferior courts and only in circumstances where there is no contrary ruling by another High Court or Supreme Court.<sup>508</sup>

In South Africa, apart from the constitutional provision for the application of international law in the interpretation of laws, Section 28 of the Constitution provides for children's rights.<sup>509</sup> Not only this, litigation has been one of the most effective tools for holding the state accountable and making sure that government delivers on its obligation to protect the constitutional rights of the country's children.<sup>510</sup>

Ngidi makes mention of the willingness of the South African courts to adhere to the Constitution and international law obligations on the issue of children's rights despite the challenges in protecting and developing these rights.<sup>511</sup>

In this regard it should be noted that Art 38 does not only apply to the Bill of Rights in interpreting the Constitution but also to other legislation in South Africa.<sup>512</sup> S233 of the Constitution provides that: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".<sup>513</sup>

This Section clarifies that the use of international law as an interpretive tool in South Africa is not limited to the interpretation of the constitutional rights contained in the Bill of Rights but applies to constitutional issues in

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<sup>506</sup> 1997/HP/2054 (unreported).

<sup>507</sup> 1992/HP/765; [1993] 4 LRC 221.

<sup>508</sup> Hansungule 'Domestication of International human rights law in Zambia' in Killander (n 504 above)76

<sup>509</sup> RLK Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in M Killander (ed) *International law and domestic human rights litigation in Africa* 2010 173

<sup>510</sup> As above

<sup>511</sup> As above.

<sup>512</sup> As above

<sup>513</sup> S233 South African Constitution.

general in South Africa.<sup>514</sup> This is notwithstanding the constitutional provision that an international treaty shall not have effect until enacted into domestic legislation.<sup>515</sup>

While some countries expressly make constitutional provision for the protection of children, the same cannot be distinctly said of Nigeria.<sup>516</sup> The CEDAW has not been domesticated, but it has been mentioned in some cases and decisions, even where the decisions were not made on the basis of its provisions.<sup>517</sup>

In Botswana, the importance of the judiciary seems to have been expressed by the judges in *Ramantele v Mmusi & Others*<sup>518</sup> with the analogous explanation that it is the duty of the courts to breathe life into the Constitution through their interpretation of its provisions, particularly those on fundamental rights, to which they must adopt a general approach.<sup>519</sup>

Should no clear provisions exist, a general approach for the judiciary could be through the use of customary international law or the Bangalore Principles.<sup>520</sup> In Zambia, customary international law is part of the laws of the country in the form of common law<sup>521</sup>, and the situation is similar in Nigeria.<sup>522</sup>

In terms of the issue of child marriage in Nigeria, it is doubtful that a particular law can be referenced, which highlights the importance of establishing a law which specifically prohibits child marriage and is

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<sup>514</sup> Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective, in Killander (n 509 above) 175

<sup>515</sup> S231 South African Constitution.

<sup>516</sup> Like the South African constitution

<sup>517</sup> EO Ekhatior 'Women and the Law in Nigeria: A Reappraisal' (2015)16(2) *Journal of International Women's Studies* 293.

<sup>518</sup> GACGB 104 at para 69.

<sup>519</sup> As above

<sup>520</sup> 'Strengthening Jurisprudence of Equality Violence Against Women' Commonwealth secretariat (2014) 9.

<sup>521</sup> Hansungule 'Domestication of International human rights law in Zambia' in Killander (n 504 above)72

<sup>522</sup>CJS Azoro 'The Place of Customary International Law in the Nigerian Legal System – A Jurisprudential Perspective' (2014) 1 *International Journal of Research* 74. Oji(n 411 above)164-165

applicable throughout the country, particularly since application of the Child Rights Act's is contested.<sup>523</sup>

Apart from the fact that this Act does not specifically address marriage or child marriage, it is not being implemented and is ineffective thanks to certain other laws and specifically some constitutional provisions.<sup>524</sup> For the Child Rights Act to be effective, a reform of parts of the Constitution and certain other legislation related to marriage and sex amongst others is needed.

## **5.8 Assessing the response of Nigeria to its obligation under human rights instruments**

The provisions of treaties create obligations for or place demands on state parties and constitute a legal expectation that states will fulfil their obligations under the agreements.<sup>525</sup> For this to happen, government needs to provide enabling law, institutional support in the form of the eradication of poverty and positive child-friendly policies.<sup>526</sup> Even more, government must have the political will to implement and enforce existing promulgated laws to ensure the guaranteed protection.<sup>527</sup>

Specifically on the issue of child marriage, government has a responsibility to make enactment specifying a minimum marriageable age of eighteen where none exists or the existing one is ambiguous.<sup>528</sup> It also has a duty to raise awareness with respect to the implementation of an acceptable minimum age in laws relating to marriage and to amend laws which allow for a lower marriageable age than eighteen and which exempt perpetrators of rape and statutory rape from punishment.<sup>529</sup> The amendment of all existing provisions on discrimination and similar or related laws that permit

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<sup>523</sup> Braimah (n 86 above)474.

<sup>524</sup> As above. The Child Rights Act has been discussed in Chapter 4 of this thesis and the conflicting issue is the focus of chapter 6 of this thesis.

<sup>525</sup> See Mount video Convention of 1933 on the Rights and duties of states.

<sup>526</sup> Art 4 UNCRC, Art16(1) Art 21 African charter on the rights and welfare of the child. The treaties specifically ask for legislative and other measures for the protection of children.

<sup>527</sup> Mary Odili 'The Nigerian child and cross cultural protection of rights', 11 July 2005 [www.thisdayonline.com/inview.php?i=32772](http://www.thisdayonline.com/inview.php?i=32772) (accessed 8 January 2016).

<sup>528</sup> Art 19 UN CRC, Art 21(1) and (2) African Charter on the Rights and Welfare of the Child.

<sup>529</sup> Protecting the girl child, using law to end early and forced marriage and related human rights violation, 2014, Equality Now at [www.equalitynow.org](http://www.equalitynow.org).

or are capable of sustaining discrimination against women is also necessary.<sup>530</sup>

The important question here is whether Nigeria as a member state has fulfilled its obligations. Has the Nigerian government protected and defended human rights or prevented their infringement, and if so, how and to what extent? What laws have been promulgated and what laws reviewed to prevent child marriage? What steps have been taken to protect the girl child against child marriage either by legislation to eradicate the practice or prosecuting offenders? And what impact have ratified treaties had on the protection of the girl child in Nigeria?

The Protocol to Prevent, Suppress and Punish Trafficking in Persons that was ratified on 28 June 2001 and domesticated by the Trafficking in Persons Prohibition Law Enforcement and Administration Act No 24 of 2003 is proof that the Nigerian government has an interest in domestication.<sup>531</sup> The government may have acted so quickly in this case because human trafficking ranks very highly as a global criminal activity and exist on a high scale even in Nigeria.<sup>532</sup>

Obviously child marriage has not enjoyed the same priority which would explain the lack of domestication of applicable treaties to date,<sup>533</sup> although it must be acknowledged that an attempt was made to do so and the same opposition and government response has remained.<sup>534</sup>

The Violence against Persons Prohibition Act was recently enacted but it does not constitute a domestication of the CEDAW and does not specifically prohibit child marriage, although it did amend the criminal provisions on rape in Nigeria.<sup>535</sup>

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<sup>530</sup> As above

<sup>531</sup> T Olajuwon 'Combating Trafficking in Person: A case study of Nigeria' (2008) 24 *European journal of Scientific Research* 27-28, 30-31

<sup>532</sup> As above 23

<sup>533</sup> The same applies to CEDAW and the Protocol to women's Rights on the African Charter on Human and Peoples Rights, unfortunately these are the two key international instruments that deals specifically with issues the female gender and express provisions on child marriage.

<sup>534</sup> Braimah (n 86 above) 479-481.

<sup>535</sup> S1(1) (a), S15 Harmful traditional practices prohibited and forced financial dependence prohibited-S15 Violence against Persons Prohibited Act 2015, all which happen within child marriage.

This development is akin to South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which expanded the common law offence of rape and replaced it with a broader statutory offence.<sup>536</sup> The Zambian penal provision and penalties or sanctions with respect to rape are also commendable.<sup>537</sup>

It should be noted however that on 16 March 2016, Nigeria's Senate rejected the Gender and Equal Opportunity Bill aimed at eliminating "all forms of discrimination" against women.<sup>538</sup> The Bill was set to promote women's equality in marriage, inheritance and education but the same traditional reasoning on women's issues on religious and cultural grounds foiled the passing of the Bill.<sup>539</sup>

Although Nigeria fulfils its duty to report and has introduced policies promoting girl child education with a view to reducing the occurrence of child marriage, particularly in the North, this cannot be said to be adequate fulfilment of its duties.<sup>540</sup> The attempt to improve education and to allow pregnant girls and nursing mothers to attend school cannot categorically be said to be aimed at eradicating child marriage because in reality it has not. In fact, it has rather been seen as an opportunity for the education of girls in early marriages.<sup>541</sup>

In the same vein, laws that can be described as opposing gender equality have not been reviewed.<sup>542</sup> Specifically on the issue of child marriage, the

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<sup>536</sup> Although not a specific prohibition of child marriage or Ukwuthwala that happens in South Africa.

<sup>537</sup> S137 although too not a child marriage prohibition provision but compared to the Nigerian criminal provision neither the South African nor the Zambian laws legitimize sexual intercourse with a child whether in marriage or not like S282(2) Penal Code and S6 Interpretation Criminal Code Nigeria.

<sup>538</sup> T Oshi 'Nigerian Senate rejects bill seeking gender equality in marriage' March 15 2016 <http://www.premiumtimesng.com/news/top-news/200202-nigerian-senate-rejects-bill-seeking-gender-equality-marriage.html> (accessed 2 April 2016). The bill, titled "Gender Parity and Prohibition of Violence against Women", was presented by Abiodun Olujimi, representing Ekiti south, during the senate's plenary session. According to Mrs. Olujimi, the bill would seek equal rights for women in marriage, education and job.

<sup>539</sup> As above

<sup>540</sup> International Human Rights Law United Nations human rights office of the high commissioner at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>, accessed on 8 January 2017.

<sup>541</sup> PM Adebuseye(ed) Matan Kwarai: Insights into Early Marriage and Girls' Education in Northern Nigeria (2011)6

<sup>542</sup> 'Nigeria: Rape, the silent weapon' Amnesty International 28 November 2006 <https://www.amnesty.org/en/documents/AFR44/020/2006/en/> (accessed 8 January 2017). One of

promulgated Child Rights Act has been rendered ineffective by a variety of conflicting laws with the result that there is insufficient protection of the girl child against child marriage in Nigeria.<sup>543</sup> And despite the fact that many of the provisions of the international treaties require the legislation of a specific minimum marriageable age, Nigeria has neither accepted a minimum age nor reviewed existing provisions in order to meet this requirement.<sup>544</sup>

Criminal provisions on rape, forced intercourse, defilement and others have not been reviewed on the basis of recent global developments or requirements, and neither have the provisions of the Evidence Act that is discriminatory in terms of the evidence of children and the proof of rape.<sup>545</sup>

The fact is that given the evident prevalence and multiple negative effects of child marriage in Nigeria, the government's response has been negligible and one would have expected a quicker or more radical response following the recommendation of the proportionality approach.<sup>546</sup>

Although Nigeria has ratified a number of international treaties, the domestication process is slow.<sup>547</sup> Government has taken no action whatsoever to domesticate some treaties and attempts to domesticate others have been frustrated by several customary and religious arguments,<sup>548</sup> despite the indisputable fact that both international and national laws are critical in the fight against child marriage.<sup>549</sup>

On the basis of this, in the sense that an obligation involves taking all measures including specific legislative action, it can be said that Nigeria has

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the reasons why rape continues in Nigeria is because the state has failed to tackle discrimination against women or to address the infringement of those rights.

<sup>543</sup> Fayokun (n 122 above)463-465

<sup>544</sup> As above

<sup>545</sup> n 542 above

<sup>546</sup> Human rights from the expert consultation to address harmful practices against children, 13th-15th June, 2012. This approach says the more severe the level of violation, the quicker the response will be. No major effort has been taken to bring the local laws of Nigeria to conform with international provisions.

<sup>547</sup> Tripartite legal system hinders progress towards gender equality in Nigeria, say experts on women's anti-discrimination committee, 20 January 2004, Meetings coverage and press releases, United Nations at <http://www.un.org/press/en/2004/wom1427.doc.htm> (accessed 8 January 2017).

<sup>548</sup> As above. Which are legally recognized in the Nigerian law

<sup>549</sup> Protecting the girl child using laws to end child early and forced marriage and related human rights violation, 2014, Equality Now at [www.equalitynow.org](http://www.equalitynow.org). In the case of Nigeria this cannot be done without implementing the international treaties.

not fulfilled its obligations in terms of human rights treaties.<sup>550</sup>In the context of this discourse on child marriage and sexual abuse in Nigeria, by virtue of having ratified the relevant instruments the state is under the obligation to ensure their implementation and cannot cite the provisions of S12 of the Nigerian Constitution or any other law as an excuse for not doing so.<sup>551</sup>

It must fulfil its obligations by domesticating the CEDAW and ensuring the protection of children by finding a way to enforce the Child Rights Act in all the constituent states of the federation or using other legislative means to specify a minimum marriageable age or specifically prohibit child marriage.<sup>552</sup> This is even clear from the comments, observations and recommendations of the committees of experts on the treaties to date.<sup>553</sup> With the status quo in Nigeria, the country cannot be said to have fulfilled its duties, specifically under the CEDAW and the CRC.<sup>554</sup>

## **5.9 Summary and conclusion**

Child marriage is prohibited under international and regional human rights treaties as a harmful cultural practice, sexual abuse, sexual exploitation and/or expressly as child marriage. These prohibitions are found in treaties and possibly in the application of customary international law.

The primary treaties in this regard that are discussed and analysed in this thesis are:

- The Universal Declaration of Human Rights
- The African Charter on Human and People's Rights (ACHPR) and the Maputo Protocol on the Rights of Women

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<sup>550</sup> Art 16(1) ACRWC, Art 21(1) and (2) ACRWC

<sup>551</sup> Art 27 Vienna Convention on the Law of Treaties.

<sup>552</sup> CRC/C/15/Add.257, para-27. Fayokun (n 122 above)469. Braimah (n 86 above)488

<sup>553</sup> UNGA A/HRC/26/22/2 April, 2014, HRC, Twenty Sixth Session Agenda items 2 & 3, preventing and eliminating child, early and forced marriages, report of the office of the High Commissioner for Human Rights.

<sup>554</sup> UN CEDAW and CRC RECOMMENDATIONS ON MINIMUM AGE OF MARRIAGE LAWS AROUND THE WORLD as of November 2013 [http://www.equalitynow.org/sites/default/files/UN\\_Committee\\_Recommendations\\_on\\_Minimum\\_Age\\_of\\_Marriage\\_Laws.pdf](http://www.equalitynow.org/sites/default/files/UN_Committee_Recommendations_on_Minimum_Age_of_Marriage_Laws.pdf) (accessed 8 January 2016).



- The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- The United Nations Convention on the Rights of the Child (CRC)
- The African Charter on the Rights and Welfare of the Child (ACRWC)
- The International Covenant on Economic, Cultural and Social Rights (ICESCR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

Apart from providing for the rights of the girl child, these treaties constitute the obligation of states to ensure the protection of such rights. While this means that states have the responsibility to protect, promote and defend the girl child, treaties relating to women and children have been challenged in many countries, especially on the basis of cultural and religious relativism.

State obligations under treaties are to be fulfilled through all measures including legislation, and it is in this regard that the relationship between universal law and domestic law, as reflected in the monist or dualist systems of states, has been problematic in the domestication and hence application of treaties.

Emerging trends show that jurisdictions within Africa and beyond are reforming their laws and constitutions, amending criminal provisions and enacting laws to prohibit child marriages. In addition, there are states which have adopted the criminalisation of the practice and the application of customary international law and the Bangalore Principles to promote the protection of the girl child from a judicial perspective.

States like The United Kingdom, Norway, Scotland, US, India and even Pakistan have prohibitions for child marriage within their laws now. African countries like Ghana, Zambia, Zimbabwe, Malawi, Kenya and South Africa have also taken legislative steps to eradicate the practice.

Nigeria has ratified some of these treaties, the only problem being that Nigeria has not utilized these agreements. As a dualist country, treaties must be domesticated to be applicable despite the fact that states are not permitted to raise their domestic laws as excuse to escape their international obligation.

Again as a plural legal country where relativism is argued against the application of some human rights although the country did not put in any reservation against the treaties in discourse, it has found domesticating the treaties difficult. It has not reformed its constitution or aligned its laws to conform with international standards on issues relating to child marriage or to improve the issue of gender discrimination in the country. No specific legislation has been promulgated to criminalise or prohibit the practice or specify a marriageable age.

In a nutshell the assessment of the impact of these treaties, the status quo of the legal system and the situation of its laws as at present fault the Nigerian government for failing in its responsibility or obligation to protect the girl child against child marriage.

However, there are promises within these provisions and some practices of International law, such as opportunities for judicial intervention for the application of these treaties and from learnings from the mentioned jurisdictions from which Nigeria can learn. This however can still be accessed.

## CHAPTER SIX

### **Conflict of laws, legal challenges and legal solutions to the problem of child marriage in Nigeria**

#### **6.1 Introduction**

This chapter discusses eight sections within the three aspects explicit in its topic. The three aspects are conflicts of law, the second is the legal challenges while the third is the legal solutions. The first section examines the conflicts of law on the issue of age of childhood in Nigeria as it relates to child marriage and the inevitable attending sexual abuse. The second section looks specifically at the conflict between the three main aspects within the country's plural legal system. This is followed by the third section which is a discussion of the conflict within each of the English, customary and Islamic systems of law and the implications thereof on the issue of child marriage. The fourth section deals with the conflict within each law or piece of legislation. This is followed by a discussion of other legal challenges including the problems of vagueness, *lacunae*, issues of interpretation and express acknowledgement of child marriage as the fifth section. The sixth section analyses the effect of these conflicts and challenges. The seventh section explores what Nigeria can learn from other jurisdictions on the issue of conflicts of law. Lastly, the eighth section discusses the possible legal solutions and the chapter ends with a conclusion.

#### **6.2 Explaining conflict of law**

The chapter seeks to identify the legal reasons why child practice persists in Nigeria despite the existence of domestic provisions prohibiting or criminalising nonconsensual and forced sexual intercourse with a girl child and international treaties which prohibit child marriage.<sup>1</sup>

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<sup>1</sup>KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions against Realisation of Education Rights' (2015) 5 *US-China Education Review B* 460-470. TS Braimah 'Child marriage in Northern

Fayokun explains that this is because several legal orders coexist within the Nigerian legal system, primarily customary, Islamic and English law, each with their own provisions on marriage.<sup>2</sup> Each of these has its own definition of the age of childhood and attainment of adulthood, a definition which is linked to capacity and consent to marriage and sexual intercourse.<sup>3</sup> Since these different positions are reflected in the various and diverse laws of the country, this chapter specifically looks at the persistence of child marriage in Nigeria from the perspective of conflicts of law among other legal challenges.<sup>4</sup>

The chapter also includes a discussion of other problems in Nigeria's system of law such as interpretation of the law, *lacunae* and vagueness in legal provisions, also outdated and archaic provisions that are out of touch with the realities and peculiarities of the country's dispensation. These all play a role in the continued perpetration of child marriage in Nigeria.<sup>5</sup>

The simultaneous co existence of three different legal orders in Nigeria is the first fact that signals conflict before the consideration of the provisions of other legislations.<sup>6</sup> Conflict of law is actually a situation of discord, inconsistency or difference between the laws of different states or countries in the context of persons who have acquired rights, incurred obligations, sustained injuries or damages or made contracts within a territory that falls under two or more jurisdictions.<sup>7</sup>

Although Agbede does not specifically define conflict of law, his position that the conflicts in Nigeria exist not only at international level but equally so at state and local level is aligned with the ordinary English meaning of the term

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Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 474-488. Both authors discussed and explained the existence of domestic and international laws and try to explain the issue of conflict of laws as the legal reasons why child marriages persist in Nigeria.

<sup>2</sup> Fayokun (n1 above)461-465

<sup>3</sup> As above

<sup>4</sup> As above

<sup>5</sup> S29(4) (b) CFRN 1999.

<sup>6</sup> RA Ige 'Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village' (2015) 34 *Journal of Law, Policy and Globalization* 59 61 and 62

<sup>7</sup> As above. In his explanation, conflict of law does not ordinarily suggest that two principles of law are in conflict or in competition with each other, it is the case of 2 principles of law existing in 2 different countries over the same subject matter and the determination of which of the 2 principles is to be applied by the court.

conflict.<sup>8</sup> Following this line of thought, all issues and challenges of law which are the source of problems in a society like Nigeria can be classified as conflicts of law.<sup>9</sup>

Knop et al<sup>10</sup> explains that conflict of law exists because of differences in systems of municipal law in addition to differences in the approaches that legal systems take in solving conflicts of law. In this view, conflict of law is a general term used to refer to disparities among laws, regardless of whether the legal systems in question are international or interstate.<sup>11</sup>

In discussing the problem of child marriage in Nigeria, Fayokun states that “There are wide disparaging views of the subject based on cultural and religious differences, regional and ethnic disparities, as well as dichotomy of conflict of law issues.”<sup>12</sup> Braimah examined the problem of child marriage from the perspective of conflicting legislative jurisdictions that arise from the federalist nature of Nigeria’s legal system while also linking it to conflicts between domestic and international law.<sup>13</sup>

Conflict of law itself has its source in situations where the final outcome of a legal dispute depends upon which of one or more laws is applied as well as the manner in which the court resolves the conflict between those laws.<sup>14</sup> This can be about resolving conflicts between competing systems or about the “conflict” issue itself.<sup>15</sup>

Whatever the definition of conflict of law, it is basically an issue of competing and conflicting legal rules<sup>16</sup> and serves to signify that the laws of different countries or certain laws within a country are contradictory.<sup>17</sup>

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<sup>8</sup> IO Agbede *Themes on conflict of laws* (1989)1,3, 8.

<sup>9</sup> As above

<sup>10</sup> K Knop ‘International law in domestic courts: A conflict of laws approach’ (2009) Cornell Law Faculty Working Papers. Paper 69.1

<sup>11</sup> As above. K Likoko Conflict of Laws [https://www.academia.edu/5275415/CONFLICT\\_OF\\_LAWS](https://www.academia.edu/5275415/CONFLICT_OF_LAWS) (accessed 14 November 2016).

<sup>12</sup> Fayokun (n 1 above)461

<sup>13</sup> Braimah(n 1 above) 475-476

<sup>14</sup> IO Agbede *Legal pluralism* 1991, 9-10.

<sup>15</sup> As above.

<sup>16</sup> V Allarousse ‘A Comparative Approach to the Conflict of Characterization in Private International Law’ (1991) 23 *Case W. Res. J. Int’l L.* 479.

<sup>17</sup> As above 480. ‘Conflict of laws’ Collins Dictionary of Law 2006 <http://legal-dictionary.thefreedictionary.com/conflict+of+laws> (accessed 14 November 2106).

Conflict of law therefore refers to the totality of inconsistencies and contradictions embedded within the laws of a legal system which result in the individuals in a society being faced with several choices.<sup>18</sup> A further effect is that the court has to make a choice when determining the issue before it.<sup>19</sup>

This chapter is also about conflict of law in terms of the employment of universal choice of law rules to determine "what law governs".<sup>20</sup> In the context of the thesis, this is about the application of international and regional provisions to find a solution to the continued practice of child marriage in Nigeria.

The fundamental fact which gives rise to conflicts of law is the division of the world into territorial states with their own court systems and distinct legal bodies for handling internal or local cases.<sup>21</sup> Conflicts can arise when a different legal system is brought to bear in a community.<sup>22</sup>

In Nigeria, conflicts of law can occur in many ways.<sup>23</sup> There is the conflict between the elements of the country's tripartite legal system stemming from

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<sup>18</sup> 'Conflict of laws' Encyclopedia.com <http://www.encyclopedia.com/social-sciences-and-law/law/law/conflict-laws> (accessed 10 January 2017).

<sup>19</sup> 'Conflict of laws' Wikipedia [https://en.wikipedia.org/wiki/Conflict\\_of\\_laws](https://en.wikipedia.org/wiki/Conflict_of_laws) (accessed 10 January 2017). 'Customary justice and legal pluralism in post conflict and fragile states' 2009 George Washington University. A situation that you find in plural legal societies which features are overlapping jurisdictions, lack of clarity of roles, tensions between the systems and on access to justice and sometimes the possibility of further injustice. Choice of law, issues of jurisdiction and enforcement of foreign judgements are the issues of conflict of laws. Again there is further inconsistency in the various court decisions which creates another chain reaction in the society. The first presupposition of conflict of law is the existence of two or more coexisting legal systems, although uniformity is the destination and not the direction. PA Freund 'Chief justice Stone and the conflict of laws' (1946) 59 *Harvard Law Review* 1210-1211. In essence conflict of law exists because there are differences in the systems of municipal law with each system having its peculiar rules and each country its peculiar way of resolving the issues of conflict of laws. JO Asien *Introduction to Nigerian Legal System* (2005) 140-141.

<sup>20</sup> MG Paulsen & ML Sovern 'Public Policy in the Conflict of Laws' (1956) 56 *Colum. L. Rev.* 969. B Currie & HH Schreter 'Unconstitutional Discrimination In The Conflict Of-Laws:Privileges and Immunities' (1960) 69 *The Yale Law Journal* 1323.

<sup>21</sup> EE Cheatham 'Internal Law distinctions in the conflict of Laws' (1936) 21 *Cornell Law Review* 570 <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1372&context=clr> (accessed 12 November 2016).

<sup>22</sup> As above

<sup>23</sup> MT Ladan & League of democratic women (Leads- Nigeria) 'A handbook of sharia implementation in Northern Nigeria: Women and children rights focus' (2005)1-2. According to Ladan, this conflict is international, inter state, inter local( or inter-personal) and inter-temporal. OJ Omligbe 'Nigerian legal system: internal conflicts of laws' 10 December 2013 [https://web.facebook.com/notes/ogbaji-john-omligbe/nigerian-legal-system-internal-conflicts-of-laws/559764254102988/?\\_rdr](https://web.facebook.com/notes/ogbaji-john-omligbe/nigerian-legal-system-internal-conflicts-of-laws/559764254102988/?_rdr) (accessed 10 January 2017).

their different laws on the same issue,<sup>24</sup> particularly, in the context of this thesis, that of the age of childhood as it impacts on marriage, capacity and consent to sexual intercourse.<sup>25</sup> Secondly, there is conflict between laws within each of these legal systems on various issues including that of marriage,<sup>26</sup> and thirdly, conflict within particular pieces of legislation on marriage and sexual intercourse.<sup>27</sup>

There is the conflict resulting from the multiplicity of laws in a federal system, in other words the issue of federal and state legislative capacity,<sup>28</sup> and lastly, the conflict between international and domestic laws and the challenges relating to the application of international law in the country.<sup>29</sup> Conflicting provisions can also be caused by ambiguities, vagueness or *lacunae* in particular laws.<sup>30</sup>

### **6.3 The general conflict of law among the three legal orders with regard to age of childhood as it affects capacity to consent to marriage and sexual intercourse in Nigeria**

This thesis propounds that one major challenge in dealing with the continued practice of child marriage is the inconsistency of provisions which exist on the issue of age in the different legal orders of the Nigerian legal system.<sup>31</sup> Despite the importance of age in every society,<sup>32</sup> inconsistencies in

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<sup>24</sup> Ige (n 6 above) 59.61 and 62.

<sup>25</sup> Fayokun (n 1 above) 464-467

<sup>26</sup> El Nwogugu *Family Law in Nigeria* (2001) 1-66.

<sup>27</sup> Criminal and Penal Code provisions excluding marital forced intercourse from bring rape. S6 CC. I Nnadi 'An Insight into Violence against women as human rights violation in Nigeria: A critique' (2012) 5(2) *Journal of Politic and Law* 50-51

<sup>28</sup> Item 61 Part 1 Second schedule CFRN 1999. See also Braimah (n 1 above) 476

<sup>29</sup> S12 Constitution of Federal Republic of Nigeria 1999. Agbede (n 8 above) 1-8 where he categorized it under three heads: private international law on problems of conflict of law of international dimension, interstate conflict of laws as in within a state federal versus state and legal pluralism or internal conflict of laws as between or among the different systems of law particularly between the general law and the local laws. Eyidondegha of Akugbene v Egbe of Akugbene suit no AC 68, Supreme Court of Nigeria, Lagos judicial Division 15<sup>th</sup> December, 1952. Agbede (n 14 above) 20 explained that the coexistence of customary law and written law will be compatible where legislature by statute expressly prohibits certain rules of customary law because it would be impossible or incompatible with such statute to continue to enforce such rules that have been expressly abolished. Once a written law has abolished a customary rule, then it would be incompatible with the same written law, as in any statute to enforce such rules that have been superseded.

<sup>30</sup> S29(4)(2) Constitution of the Federal Republic of Nigeria 1999. Fayokun (n1 above) 460-470

<sup>31</sup> Fayokun (n 1 above) 462-463

<sup>32</sup> 'Universal periodic review: Nigeria' 2013, Defence for children International at [www.defenceforchildren.org](http://www.defenceforchildren.org). This inconsistency is revealed in even the many laws in the Country

the definition of age of childhood abound in Nigeria resulting in a lot of complex legal issues.<sup>33</sup>

The Criminal Procedure Act defines an infant as someone under seven years of age, a child as under fourteen, a young person as aged between fourteen and sixteen, and an adult as seventeen years or older, while a juvenile offender is defined as someone who is younger than seventeen years of age.<sup>34</sup> According to the Immigration Act any person younger than sixteen is a minor.<sup>35</sup> On the other hand, the Electoral Act of 2011 gives eighteen years as full age,<sup>36</sup> as does the Nigerian Constitution.<sup>37</sup> The Wills Law stipulates eighteen years as full age<sup>38</sup> and the minimum age for employment is not fixed.<sup>39</sup> These varying provisions are indicative of the inconsistency with respect to the age of childhood and obviously represent a conflict of law.<sup>40</sup>

At least two of Nigeria's constituent states have modified the definition of the child as stipulated by the Child Rights Act.<sup>41</sup> In the Southern state of Akwa-Ibom, a child is defined as a person sixteen years or younger, and children older than that are presumably sentenced as adults. In the Northern state of

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which does not agree on a fixed age for maturity or attainment of adulthood for children and young persons

<sup>33</sup> I Okagbue 'Children in conflict with the law: The Nigerian Experience' Nigerian Institute of Advanced Legal Studies [https://www.unicef-irc.org/portfolios/documents/487\\_nigeria.htm](https://www.unicef-irc.org/portfolios/documents/487_nigeria.htm) (accessed 10 January 2017). The word juvenile is not defined in any law in Nigeria and the country has adopted various age demarcations for assigning responsibility depending on the circumstances.

<sup>34</sup> Criminal Procedure Act 1945. The Children and Young Person's Law too has its own age provisions- The plurality in this legal system in this instance is a state of confusion and anarchy. Nwonu & I Oyakhiromen 'Nigeria and child marriage: Legal issues, complications, prospects and solutions' (2014) 29 *Journal of law, policy and globalization* 122-123.

<sup>35</sup> 37(1) Immigration Act Chapter 171 Laws of the Federation of Nigeria 1990, it has been amended however in S116 Interpretation section of the IMMIGRATION ACT, 2015 "minor" means any young person under the age of 18 years;"

<sup>36</sup> S12(1) Electoral Act 2011

<sup>37</sup> S29 (4) (a) Constitution of the Federal Republic of Nigeria 1999

<sup>38</sup> Section 3 of the Wills Law provides that the minimum age at which a person can make a will is 18 years.

<sup>39</sup> S59 Labour Act. 'National law and policies on minimum ages – Nigeria', Right to education project, Nigeria at <http://r2e.gn.apc.org/country-node/382/country-minimum>, accessed on 14/11/2016.

<sup>40</sup> Nwosu & Oyakhiromen(n 34 above)124.

<sup>41</sup> Inhuman sentencing of children in Nigeria Briefing for the 17<sup>th</sup> session of the Human Rights Council Universal Periodic Review in October 2013, submitted by the Child Rights International Network ([www.crin.org](http://www.crin.org)), March 2013 Child Rights International Network (CRIN) [https://www.crin.org/sites/default/files/crin\\_upr17\\_nigeria.pdf](https://www.crin.org/sites/default/files/crin_upr17_nigeria.pdf) (accessed 10 January 2017).



Jigawa, a child is defined in terms of puberty.<sup>42</sup> These disparate provisions are found in different laws or different legislative jurisdictions in Nigeria.<sup>43</sup>

By extension, the country's legal systems observe different marriageable ages<sup>44</sup> and logically also have different ages for consent to sexual intercourse, although only statutory law has recognised jurisdiction on criminal matters.<sup>45</sup> Marriageable age in Nigeria is a highly controversial issue and varies from region to region.<sup>46</sup> In the North 12-15, puberty is considered the threshold of maturity, the age of marriage is therefore between the girl's second and third menstruation,<sup>47</sup> while in the Southern states, definitions of marriageable age vary between eighteen years and twenty one years.<sup>48</sup>

Nigeria's federal character again complicates the issue since it allows individual states to have their own provisions which may differ from federal provisions on the same issue.<sup>49</sup> This is why for instance the Sharia North can prescribe puberty as marriageable age while the federal Child Rights Act specifies eighteen years.<sup>50</sup>

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<sup>42</sup> NO Odiaka 'The concept of gender justice and women's rights in Nigeria: Addressing the missing link' (2013) 2 *Afe Babalola University: Journal of Sustainable Development Law and Policy* 199. 'Corporal punishment of children in Nigeria' Report prepared by the Global Initiative to End All Corporal punishment of Children ([www.endcorporalpunishment.org](http://www.endcorporalpunishment.org)) last updated March 2016 (accessed 4 April 2016).

<sup>43</sup> n 32 above.

<sup>44</sup> 'Child marriage laws: Please let's elevate this discussion Sahara Reporters 21 July 2013 <http://www.latestnigeriannews.com/news/465389/child-marriage-law-please-lets-elevate-this-discussion-by-egghead-odewale.html> (accessed on 10 January 2017).

<sup>45</sup> OA Adedeji 'Native law and customs in a democratic setting: The Nigerian experience' 11 <http://ssrn.com/abstract=2102829> (accessed 7 January 2016) although since 2010, some states in the North that profess to be sharia states have widened the scope of sharia jurisdiction to criminal matters.

<sup>46</sup> F Banda *Women, Law and Human Rights: An African Perspective* (2005)97. 'Child marriage' Council of foreign relations [http://www.cfr.org/peace-conflict-and-human-rights/child-marriage/p32096#!/?cid=otr\\_marketing\\_use-child\\_marriage\\_infoguide#!%2F](http://www.cfr.org/peace-conflict-and-human-rights/child-marriage/p32096#!/?cid=otr_marketing_use-child_marriage_infoguide#!%2F) (accessed 10 January 2017).

<sup>47</sup> As above. Girls as young as 9 are known to get married.

<sup>48</sup> As above. 'National law and policies on minimum ages – Nigeria, Right to education project, Nigeria' <http://r2e.gn.apc.org/country-node/382/country-minimum> (accessed 14 November 2016).

<sup>49</sup> Braimah (n 1 above)485

<sup>50</sup> As above. The puberty here is the start of menstruation for the girl child. OMCT & CLEEN (2005), different laws and circumstances apply to different states. The conflicting situation on the provision of different ages for children has given rise to child marriage and the absence of the most appropriate law to prosecute offenders; it has also influenced the courts and unavoidably brought about various conflicting decisions.

Statutory law does not specify an age for capacity to contract marriage,<sup>51</sup> neither does customary law prescribe a marriageable age. Provisions on marriageable age vary across the country by practice and by law,<sup>52</sup> and even where an age is prescribed, it is often disregarded.<sup>53</sup> The Marriage Act refers to marriageable age but without giving a precise definition or age.<sup>54</sup>

Under the Penal Code which applies in Northern Nigeria children under the age of fourteen cannot consent to sexual acts, while in the South sexual intercourse with a girl under thirteen is a crime.<sup>55</sup> Despite these provisions, girls are not infrequently married from the age of twelve.<sup>56</sup> A child bride has no protection against the sexual abuse that accompanies her marriage.<sup>57</sup> She is deemed to be an adult in that regard from the moment of her marriage, although not in terms of voting or other adult privileges.<sup>58</sup>

According to Islamic law, marriage can take place any time after puberty,<sup>59</sup> although international law prescribes a minimum age for marriage.<sup>60</sup> Marriages in Nigeria can be contracted under statutory, customary or

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<sup>51</sup> See S3 (I), Matrimonial Causes Act 2004, S18 Marriage Act.

<sup>52</sup> Protecting the girl child: Using the law to end child, early and forced marriage and related human rights violations (2014) 10, Equality Now at [http://www.equalitynow.org/sites/default/files/Protecting\\_the\\_Girl\\_Child.pdf](http://www.equalitynow.org/sites/default/files/Protecting_the_Girl_Child.pdf) (accessed 10 January 2017).

<sup>53</sup> For instance, each tribe had some provisions regarding age of marriage but in practice people give and marry at lower ages, Native Authority (Declaration of Biu Native marriage laws and custom) Order 1964 S1(a).

<sup>54</sup> S3(1) S18 Marriage Act.

<sup>55</sup> EOC Obidimma 'Time for a new Definition of Rape in Nigeria' (2015) 5 *Research on Humanities and Social Sciences* 115

<sup>56</sup> Banda (n 46 above) 97. even at age 9

<sup>57</sup> 'Child marriages: 39 000 every day', WHO [http://www.who.int/mediacentre/news/releases/2013/child\\_marriage\\_20130307/en/](http://www.who.int/mediacentre/news/releases/2013/child_marriage_20130307/en/) (accessed 10 January 2017).

<sup>58</sup> 'Women's Access To Justice And Personal Security In Nigeria: A Synthesis Report, For The Safety, Security And Access To Justice Programme Of The Department For International Development' United Kingdom 9-10. Compiled By Baobab For Women's Human Rights <http://gsdrc.ids.ac.uk/docs/open/ssaj33.pdf> (accessed 10 January 2017).

<sup>59</sup> 'Reproductive health issues in Nigeria: The Islamic Perspective' 2004 Pathfinder International Nigeria/policy Project Renowned Islamic scholars[ULAMA]15. Quran 4:6 NNNBadli Shah, Marriage and divorce under Islamic law (1998)6. This could be between as early as 8 and as late as 12 and the criteria for checking were the onset or start of menstrual cycle for the girl child. Islamic law has been argued as divine law to be immutable not amenable to change in society, development or even state reform.

<sup>60</sup> T Khabir 'The role of Islam in child hood marriage case study: Nigeria' 2008 a paper presented at the 17th annual convention of Global Awareness Society Int, San Francisco, CA, USA. International law prescribed 18 years, in all the instruments that relate to marriage, women and children, that prohibit sexual abuse and enhance the dignity and equality of persons, CRC, CEDAW, this is reasoned that because a child cannot properly fulfil the parental role, more so, her body is not yet properly developed for such role as birthing, child training etc.

Islamic law,<sup>61</sup> but the Constitution gives legislative jurisdiction over customary and Islamic marriages to the states while statutory marriages fall under the Federal House of Assembly.<sup>62</sup> This is another situation which allows for deviations from global standards.

On the related issue of consent to marriage, statutory law requires that the spouses give their consent without duress or fraud.<sup>63</sup> The Nigerian Criminal Code mentions the prohibition of forced marriage although it uses the term abduction.<sup>64</sup> These are English style provisions which differ from those of customary and Islamic law.

Customarily, parental and family consent to a marriage were more important than the consent of the spouses since parents were seen as the keepers of their children's conscience.<sup>65</sup> Age for marriage was not based on chronological time but on maturity which is linked to perceptions of the attainment of adulthood and is similar to Islamic provisions.<sup>66</sup>

Islamic law is said to be particular about the consent of the spouses to a marriage which is considered to be mandatory,<sup>67</sup> although the Maliki School in Nigeria holds that a father or guardian can consent on behalf of his minor daughter and thus give her away in marriage without her personal consent.<sup>68</sup> This right of compulsion by a father or legal guardian is called *Ijbar*.<sup>69</sup>

This provision is supported by judicial precedence such as the case of *Yakubu v Paiko*<sup>70</sup> where the Sharia Court mentioned that under Maliki Islamic law the father or guardian has the right of *Ijbar* to compel his virgin

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<sup>61</sup> *Improving Women's Access to Justice in Northern Nigeria* (2010) 35. 'Types of marriages under Nigerian law' The lawyers chronicle <http://www.thelawyerschronicle.com/types-of-marriages-under-nigerian-law/> (accessed 10 January 2017)

<sup>62</sup> Item 61, part 1, second schedule, Constitution of the Federal Republic of Nigeria 1999. Braimah(n 1 above).

<sup>63</sup> S3 (1) (d) (i) MCA 1970, consent of parent is required where one spouse is under 21 years.S18-20 Marriage Act 1914 Cap 218 LFN 1990.

<sup>64</sup> S361 Nigerian Criminal Code but calls it abduction.

<sup>65</sup> MC Onokah *Family law* (2003)83-86, but this was not in all societies.

<sup>66</sup> As above) 78.

<sup>67</sup> Shah(n 59 above) 14

<sup>68</sup> (n 61 above) 39-40.

<sup>69</sup> As above.

<sup>70</sup> 1 Sharia law report 126 CA Kaduna Nig 137.

daughter to marry without her consent. There have however been opposing judgements in this regard, such as in the case of *Hajia Kaka v Zaka Bukma*<sup>71</sup> where the Sharia Court of Appeal declared a marriage null and void on the basis of the girl not having given consent to the marriage. The case of *Mairo Baba Nasidi v Alhaji*<sup>72</sup> was brought against an uncle who exercised the right of Ijbar and married his fourteen year old niece to a seventy year old man. A lower court upheld the marriage but the Sharia Court of Appeal held the uncle to be in the wrong.<sup>73</sup>

The right of Ijbar can also be lost or transferred by an act of acceptance or acquiescence as in the case of *Alh Isa Bida v Baiwa, daughter of Alhaji Isa Bida*.<sup>74</sup> A daughter complained that her father refused to allow her to marry the man of her choice on the false grounds that the man was leprous. The court held that the father had transferred the power of Ijbar to the girl when he told her to bring a man of her choice and that he could not reverse it.<sup>75</sup>

Sexual intercourse is automatically linked to the issues of consent and age in marriage since it is an adjunct to marriage.<sup>76</sup> Under statutory law, sex is an important aspect of marriage since non-consummation of a marriage can be grounds for divorce.<sup>77</sup> Although premarital sex is not expressly forbidden,<sup>78</sup> the provisions of the law imply that sex is not for children and criminalise such sexual intercourse as defilement or statutory rape.<sup>79</sup> Nonconsensual sexual intercourse amounts to rape or indecent assault.<sup>80</sup>

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<sup>71</sup> sharia Court of App (Bos/SCA/Cr/81/91

<sup>72</sup> Unreported Upper Court Kano

<sup>73</sup> A Sharia Law Report of the Center for Islamic legal studies. Unpublished: AM Gurin 'Comparative study of matrimonial laws of Northern Nigeria with emphasis on Islamic law' 1991 doctoral thesis, Ahmadu Bello University 71.

<sup>74</sup> Case no SCA/NWS/CV/47/70 Sharia Law Report, Center for Islamic Studies Vol 1, Pg. 85.

<sup>75</sup> As above

<sup>76</sup> S15(2) S36(1) Matrimonial Causes Act. The Marriage and Matrimonial Causes Act discuss the issue of sexual intercourse and how it bears on the marriage union. Violence prevention, the evidence-changing cultural and social norms that support violence –series of briefings on violence prevention, 2009, a World Health Organization publication <http://www.who.int/violence/prevention/publications/en/index.html>.

<sup>77</sup> As above

<sup>78</sup> 'Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex' (1991) 104 *Harvard law review* 1660. It is a matter between two consenting adults, not one for public law, as long as it is not forceful and non-consensual

<sup>79</sup> S218, S225, S361, S362, S363 Nigerian Criminal Code

<sup>80</sup> S357 CC, S358, S360 Nigerian Criminal Code

It is worth noting that the same inconsistencies that plague the provisions on child marriage are apparent with respect to sexual intercourse in marriage.<sup>81</sup> While nonconsensual sex is deemed rape, marital rape is not recognised by any of Nigeria's three systems of law,<sup>82</sup> and forceful nonconsensual intercourse with a child bride is not deemed rape, sexual abuse or defilement.<sup>83</sup> In fact, neither the Criminal Code nor the Penal Code criminalise sexual intercourse with a wife even if she is a child.<sup>84</sup>

Criminal law actually provides for the offence of rape or defilement in two places, namely the defilement of girls under the age of thirteen<sup>85</sup> and the defilement of girls under sixteen but over thirteen years of age.<sup>86</sup> The abduction of girls for the purpose of defilement<sup>87</sup> or even marriage is criminalised.<sup>88</sup> This latter provision constitutes the explicit prohibition and criminalisation of forced marriage and even the mere indecent interaction with an underage girl.<sup>89</sup>

Despite this, a man who marries a thirteen year old girl and has forced intercourse with her is exempt under Nigeria's criminal law.<sup>90</sup> This is not the case in the criminal laws of other jurisdictions, such as Zambia where

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<sup>81</sup> M Kane et al 'Reassessing customary law systems as a vehicle for providing equitable access to justice for the poor' (2005)3 conference paper Arusha Conference "New Frontiers of Social Policy" – December 12-15, 2005  
<http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Kane.rev.pdf>  
 (accessed 11 January 2017).

<sup>82</sup> EOC Obidimma & AE Obidimma 'Spousal Rape in Nigeria: An Aberration' (2015) 13 *International Journal of African and Asian Studies* 173-174. OC Emeka & CT Emejuru 'An Appraisal of the Jurisprudence of Spousal Rape in Nigeria' (2015) 1 *Donnish Journal of Law and Conflict Resolution* 004. In the case of child marriage sexual intercourse will fall under non-consensual sex, since it cannot be taken that the girl consented to what she cannot or does not understand and its implications. A Atsenuwa 'Promoting sexual and reproductive rights through legislative interventions: A case study of child rights legislation and early marriage in Nigeria and Ethiopia' in C Ngwenya & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 284. At any rate it is established that within child marriage, sexual intercourse is always forced and a nightmare for the bride and the implication of pregnancy and childbirth is another agony, leading to the many cases of vesico vagina fistula which is common in the Northern part of Nigeria where child marriage is rampant.

<sup>83</sup> S6 Nigerian Criminal Code

<sup>84</sup> S282 (2) Penal Code, S6 Criminal Code

<sup>85</sup> S218 Nigerian Criminal Code

<sup>86</sup> S221 as above

<sup>87</sup> S225 as above

<sup>88</sup> S361 as above

<sup>89</sup> S222 as above

<sup>90</sup> S282(2) Penal Code, S6 Interpretation schedule of Criminal Code

sexual offences involving children are criminalised<sup>91</sup> and there is no provision exculpating intercourse with a married child.<sup>92</sup> South African criminal provisions have also been reviewed to expand the definition of rape despite the fact that the country has no provision legalising forced sexual intercourse with a minor, as is the case in Nigeria.<sup>93</sup>

Under customary law in Nigeria, consent to marriage automatically constitutes consent to sex as the duty of the woman and the right of the man.<sup>94</sup> This is obviously the basis for the lack of statutory recognition of marital rape.<sup>95</sup> Islamic law is similar to customary law but with a few differences.<sup>96</sup> Its provisions regulate every aspect of the lives of Muslims including the private and personal matter of sexual intercourse.<sup>97</sup>

Sharia law prohibits a woman from refusing to have sex with her husband. She is expected to fulfil his sexual desires except when she has a lawful excuse such as menstruation.<sup>98</sup> A husband is entitled to withdraw maintenance from his wife if she refuses him unduly.<sup>99</sup> This Islamic principle on a wife's refusal to have sexual intercourse raises the issues of force, coercion and non-consent which ultimately amount to rape.<sup>100</sup>

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<sup>91</sup> S137 and S138 of the Zambian Penal Code. Section 138 (1): "Any person who unlawfully and carnally knows any girls under the age of sixteen years is guilty of a felony and is liable to imprisonment for life. 'Shortcomings and risk factors within the legal framework' <https://www.hrw.org/reports/2003/zambia/zambia1202-06.htm> (accessed 11 January 2017).

<sup>92</sup> There is no provision like this in Zambia criminal codes as it exist in S6 Criminal Code and S282(2)Penal Code

<sup>93</sup> Criminal Law (Sexual offences and Related Matters) Amendment Act 2007, although it has been argued that the same law permits sexual acts between children or minors though not between an adult and a minor, see the case of *The teddy bear clinic for abused children and 1 Other v Minister of Justice and Constitutional Development & 5 Others* Case CCT 12/13 {2013} ZA CC 35

<sup>94</sup> Obidimma & Obidimma (n 82 above) 174, 176.

<sup>95</sup> As above. 'Sexual assault and cultural norms' Advocates for human rights [www.stopvaw.org/sexual-assault-and-cultural-norms](http://www.stopvaw.org/sexual-assault-and-cultural-norms) (accessed 1 August 2015). J Birech 'Child Marriage: A Cultural Health Phenomenon' (2013) 3 *International Journal of Humanities and Social Science* 97

<sup>96</sup> C Rautenbach 'Some comments on the current (and future) status of muslim personal law in south Africa' (2004)7(2) *PER/PELJ* 96. Until of recent in most jurisdictions Islamic law was treated as customary law. O Eni 'Conflict of laws and Child marriage' 27 October 2012 Law journal-004, <http://www.okeyeni.com/2012/10/law-journal-004-conflict-of-laws-and.html> (accessed 12 January 2017).

<sup>97</sup> Quran, Surat Azhab33:21 'which says ye have indeed in the apostle of God, a beautiful pattern of conduct for any one whose hope is in God and the final day and who engage in the praise of God'

<sup>98</sup> Unpublished: AM Gurin, Comparative study of matrimonial laws of Northern Nigeria with emphasis on Islamic law, unpublished Phd Thesis, Ahmadu Bello University, 1991 307, 310-313

<sup>99</sup> 'Women's access to justice and personal security in Nigeria: A synthesis report For the safety, security and access to justice programme of the department for International development United Kingdom' (2002)15

<sup>100</sup> As above

Nonetheless, the Penal Code of Nigeria's North and even the Criminal Code applicable in other regions hold that a man cannot be said to have raped his wife.<sup>101</sup>

Apart from the fact that marital rape is not legally recognised, conflicting provisions on child marriage are most evident when it comes to the issue of sexual intercourse with a wife who is under the age of eighteen years.<sup>102</sup> While rape is considered an offence and forced sexual intercourse with a girl younger than fourteen is a crime,<sup>103</sup> the Penal Code does not criminalise sexual intercourse with a wife who has reached puberty, even if she is younger than eighteen.<sup>104</sup>

Although Islam can be said to permit marriage with a girl who is younger than eighteen, the real issue is that in Islam she is not considered a child because she is perceived as having attained the level of maturity required for marriage.<sup>105</sup> It is argued that there is no Islamic provision allowing a husband to consummate a marriage before his wife can bear it physically and psychologically,<sup>106</sup> but the evidence says otherwise, with married girls falling pregnant and becoming mothers barely a year after their weddings.<sup>107</sup> The issue of age in terms of maturity or readiness for sex again comes into play.

The majority of cases of conflict of law in Nigeria as discussed under this heading involves the general conflicts between statutory, customary and

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<sup>101</sup> S6 Criminal Code and S282 (2) Penal Code. The Penal Code is codified refined Islamic law, Quran 23:5&6. The original Sharia penal code is being used in some Northern Nigerian states presently after the 2000 created Sharia or Islamization of some Northern states. Apart from the Penal code, the Criminal code itself which is operative in other parts of the country apart from the South does not recognize marital rape.

<sup>102</sup> Criminal Code, Penal Code as above

<sup>103</sup> S282 (1) (b) Penal Code

<sup>104</sup> As above. Ordinarily carnal knowledge is rape of a child complete upon penetration but in this section the word unlawful is added and interpreted as carnal connection which takes place otherwise than between a husband and wife. S357 Criminal Code. Violence prevention, the evidence, changing cultural and sexual norms that support violence, 2009, WHO

<sup>105</sup> Shah (n 59 above) 6.

<sup>106</sup> Eni (n 96 above) child marriage, Law journal-004.

<sup>107</sup> This has resulted into high maternal mortality and morbidity in the North of Nigeria and the over 800,000 fistula cases, highest in the world. 'Underage Marriage: Building Nigeria on Deceit' Vanguard July 27 2013 [www.vanguardngr.com/2013/07/underage-marriage-building-nigeria-on-deceit/](http://www.vanguardngr.com/2013/07/underage-marriage-building-nigeria-on-deceit/) (accessed 5 February 2016). 'Reproductive health issues in Nigeria: The Islamic Perspective' 2004 Pathfinder International, Nigeria/Policy Project. Quran 4:6. No age is specified.

Islamic provisions on marriageable age as it relates to capacity and consent, and also the capacity and consent in terms of sexual intercourse.<sup>108</sup>

## **6.4 Specific situations of conflict of law in Nigeria**

Having attempted a discourse of the general situation of conflict of laws as it exists on the issue of age of childhood in Nigeria, this section seeks to analyse specific conflict situations which have impact on the issue of child marriage in the country. These conflicts could be within specific legal orders and within specific legislation in Nigeria.

### **6.4.1 Conflicts of law within the same legal system**

Within each of the three legal orders that make up Nigeria's tripartite legal system there are inconsistent provisions on the issue of capacity on age of consent to marriage and consent to sexual intercourse.<sup>109</sup> This issue is analysed under this heading as it relates to the issue of child marriage.

Conflict of law within a legal system takes the form of a particular law conflicting with itself or with another law within the same system. One example of this would be the Constitution having conflicting provisions within itself or a provision which conflicts with another piece of legislation within the statutory legal system.<sup>110</sup>

Another example would be a provision in the Criminal Code which conflicts with another provision in the same code<sup>111</sup> or with a provision in other legislation such as the Evidence Act, where both pieces of legislation are part of Nigeria's statutory legal system.<sup>112</sup> Conflicts within the statutory legal system, within the Islamic legal system and within the customary legal

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<sup>108</sup> As in n 96 above. It is quite obvious that the dual legal system breeds conflicts and contradiction instead of complimenting each other, a situation which allows the continuous perpetration of child marriage in Nigeria.

<sup>109</sup> Nwonu & Oyakhirome (n 34 above) 124.

<sup>110</sup> S29 Constitution of the Federal Republic of Nigeria 1999 conflicting with the provisions of S42 on the right to non discrimination

<sup>111</sup> S6 Criminal Code on excluding defilement if within marriage and the provisions which criminalise defilement, statutory rape in S352 S357 CC.

<sup>112</sup> O Soyeju *Rudiments of Nigerian law* (2005)30. Asein (n 19 above) Introduction to Nigerian legal system (2005) 27-39. Statutory laws are the written laws in Nigeria legal system, they are also the English type laws as opposed to customary and Islamic laws or provisions.



system are discussed below as they relate to marriage and sexual intercourse.

#### **6.4.1.1 Conflicts within the marriage laws**

While the conflict between statutory marriage and customary marriage is prominent as contributory factor to the persistence of child marriage in Nigeria, it is needful to note that lack of harmony within the provisions of the Marriage and the Matrimonial Causes Act can raise also issues of conflict. The unclear or inexplicit provisions of these two Acts on marriageable age and the issue of consent can be seen as an aspect of conflict of laws which permit the practice of child marriage in Nigeria.<sup>113</sup>

The Matrimonial Causes Act provides that, for a marriage to be valid, the parties must be of age and must consent to the marriage, but it does not provide any specific age.<sup>114</sup> The Marriage Act provides for parental consent in the case of either spouse being younger than twenty one but does not provide for the consent of the spouses. Neither does it mention a specific age at which a person may legally contract a marriage.<sup>115</sup>

Again the express provision of two different places for joining, the state and a minister of religion<sup>116</sup> can impact the acceptance of child marriage where certain religions permit it.<sup>117</sup> The Marriage Act provides this while the Matrimonial causes Act is silent. However the matrimonial causes Act provides for situation for the application of private international law<sup>118</sup> but no such provision is explicit in the Marriage Act.

Neither of the two Acts specifically prohibit child marriage while in Kenya on the other hand, the Marriage Act expressly prohibits child marriage and

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<sup>113</sup> Onokah (n65 above) 124

<sup>114</sup> S3 (1) (d) (iii) (e) while lumping consent together with marriageable age.

<sup>115</sup> Nwogugu (n 26 above) 23.

<sup>116</sup> S6(1) Marriage Act provides that the governor may licence any place of worship to be a place of celebration of marriage.

<sup>117</sup> S21 Marriage Act: Marriage shall be celebrated in any licenced place of worship by any recognized minister of the church, denomination or body to which such place of worship belongs and according to the rites or usages of marriage observed in such church, denomination or body.

<sup>118</sup> S6(2) Matrimonial Causes Act

provides for a penalty.<sup>119</sup> Both Acts seem to encourage child marriage in that they have requirement that validates marriage of teenagers where the parents have consented.<sup>120</sup> At the same time this provision contradicts the criminalization of defilement of girls under the age of sixteen years but above thirteen years.<sup>121</sup>

#### **6.4.1.2 Conflicts within criminal provisions**

As an adjunct to marriage,<sup>122</sup> sexual intercourse is automatically linked to the issues of marriageable age and consent to marriage.<sup>123</sup> Under Nigerian statutory law, sexual intercourse is an important element of marriage since non-consummation of a marriage can be grounds for divorce.<sup>124</sup> It can however be said that although premarital sex is not expressly forbidden,<sup>125</sup> the provision of law implies that sex is not for children and criminalises it as defilement or statutory rape.<sup>126</sup> Nonconsensual sexual intercourse amounts to rape or indecent assault.<sup>127</sup>

The first thing to note is that there are variants of criminal provisions in Nigeria. The Criminal Code is applicable in the Southern region,<sup>128</sup> the Sharia Penal Code in twelve of the Northern states and the Penal Code in the non-Muslim majority Northern states.<sup>129</sup> This is a situation which paves the way for the reality of discrimination.<sup>130</sup>

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<sup>119</sup> S4 Marriage Act of Kenya, Section 87 of the Act further stipulates that it is a criminal offence under the Act to marry a person under 18 years and prescribes a penalty of a maximum of 5 years in jail or payment of a fine of a maximum of 1 million shillings or to both (section 89 of the Act).

<sup>120</sup> Onokah (n 65 above)<sup>124</sup>

<sup>121</sup> S221 CC

<sup>122</sup> P Reynolds *How marriage became one of the sacraments: The sacramental theology of marriage from its medieval origins to the Council of Trent* (2016) 386.

<sup>123</sup> 'Violence prevention, the evidence- changing cultural and social norms that support violence – series of briefings on violence prevention' 2009 World Health Organization publication <http://www.who.int/violence/prevention/publications/en/index.html>.

<sup>124</sup> Sections 15(2)(a) and 36 (1) Matrimonial Causes Act 1970

<sup>125</sup> It is a matter between two consenting adults, not one for public law, as long as it is not forceful and non-consensual

<sup>126</sup> S218, S225, S361, S362, S363, CC. Since children are deemed not to be capable of giving consent to sexual intercourse.

<sup>127</sup> S357 CC, S358, S360 CC

<sup>128</sup> Jide Olakanmi & Co, Criminal Code: Synoptic Guide (2009) L1177

<sup>129</sup> 'Political Shari'a? Human Rights and Islamic Law in Northern Nigeria' 21 September 2004 Human rights watch <https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria> (accessed 12 January 2016).

<sup>130</sup> EO Ekhatior 'Women and the Law in Nigeria: A Reappraisal' (2015) 16 *Journal of international women's studies* 285-296

Some provisions of the Penal and Criminal Codes are clearly discriminatory in that there are different provisions on the indecent treatment of boys and on unlawful carnal knowledge of girls.<sup>131</sup> S216 of the Criminal Code provides that any person who unlawfully and indecently interacts with a boy under the age of fourteen years is guilty of a felony and liable to seven years in prison. S221 on the other hand provides that any person who has unlawful carnal knowledge of a girl older than thirteen years but younger than sixteen is guilty of a misdemeanour and liable to two years in prison with or without caning. The defilement of girls younger than thirteen is punishable by life imprisonment.<sup>132</sup>

Criminal law actually provides for the offence of rape or defilement in two places, namely the defilement of girls under the age of thirteen<sup>133</sup> and the defilement of girls under sixteen but over thirteen years of age.<sup>134</sup> It even criminalises the abduction of girls for the purpose of defilement<sup>135</sup> or even marriage.<sup>136</sup> This latter provision constitutes the explicit prohibition and criminalisation of forced marriage and even the mere indecent treatment of an underage girl.<sup>137</sup>

Notwithstanding these provisions, girls are not infrequently married from the age of twelve. A child bride has no protection against the sexual abuse that accompanies her marriage. Despite this, a man who marries a thirteen year old girl and has forced intercourse with her is exempt under Nigeria's criminal law.<sup>138</sup>

The Criminal Code by S6 Interpretation Schedule which provides that "when the term carnal knowledge or the term carnal connection is used in defining an offence, it is implied that the offence so far as regards that element is

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<sup>131</sup> S216 and S218 of the criminal code. S216 provides any person who unlawfully and indecently deals with boy under 14 years is guilty of a felony and liable to imprisonment for seven years. S218 provides any person who has unlawful carnal knowledge of a girl under 13 years is guilty of a felony and is liable to imprisonment for life. For the attempt it is a felony and the culprit is liable to imprisonment for 14 years with or without caning

<sup>132</sup> As above

<sup>133</sup> S218 Criminal Code

<sup>134</sup> S221 as above

<sup>135</sup> S225 as above

<sup>136</sup> S361 as above

<sup>137</sup> S222 as above

<sup>138</sup> S282(2) Penal Code, S6 Interpretation schedule of Criminal Code

complete upon penetration, it goes further that unlawful carnal knowledge means connection which takes place otherwise than between husband and wife.”<sup>139</sup> This provision in clear terms is a withdrawal of the protection granted the girl child against forced intercourse that happens within child marriage union and a cover for the culprits.<sup>140</sup>

Ekhatior<sup>141</sup> is of the view that this law is founded on the culture and religious antecedents of Nigerian society and can also be found in the erstwhile English common law. In the case of *R v Roberts*,<sup>142</sup> the court held that the status of being married connotes that a woman has given her husband consent to have sexual intercourse with her for the duration of the marriage and that there is no need for consent on each occasion as she cannot unilaterally withdraw her consent.<sup>143</sup>

In Zambia sexual offences involving children are criminalised<sup>144</sup> and there is no provision exempting intercourse with a married child.<sup>145</sup> South African criminal provisions have also been reviewed to expand the definition of rape despite the fact that the country has no provision which legalises forced sexual intercourse with a minor, as is the case in Nigeria.<sup>146</sup>

It is worth noting that the same inconsistencies that plague the provisions on child marriage are apparent with respect to the issue of sexual intercourse in marriage. While nonconsensual sex is deemed rape, marital rape is not recognised by any of Nigeria’s three systems of law,<sup>147</sup> such that

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<sup>139</sup> Part 1, introductory application general principles, Chapter 1- Interpretation

<sup>140</sup> B Gupta & M Gupta ‘Marital Rape: Current Legal Framework in India and the Need for change’ (2013) 1 *Galgotias Journal of Legal Studies* 26

<sup>141</sup> Ekhatior ( n 130 above) 287

<sup>142</sup> 1986 Crim LR 188.

<sup>143</sup> As above

<sup>144</sup> S137 and S138 of the Zambian Penal Code

<sup>145</sup> ‘well-being of girls should be underpinned by robust set of laws commission on status of women told’ 1 March 2007 Press release United Nations <http://www.un.org/press/en/2007/wom1612.doc.htm> (accessed 23 January 2017). In an oral discussion with Professor Michelo Hasungule on the thesis. Prof argues that this is a strong difference between the legal provisions of Zambia and Nigeria.

<sup>146</sup> Criminal Law (Sexual offences and Related Matters) Amendment Act 2007, although it has been argued that the same law permits sexual acts between children or minors though not between an adult and a minor, see the case of The teddy bear clinic for abused children and 1 Other v Minister of Justice and Constitutional Development & 5 Others Case CCT 12/13 {2013} ZA CC 35

<sup>147</sup> Ekhatior (n 130 above) At any rate research establishes that within child marriage, sexual intercourse is always forced and a nightmare for the bride and the implication of pregnancy and

forced nonconsensual sexual intercourse with a child bride is not deemed rape or sexual abuse.<sup>148</sup> In fact, neither the Criminal Code nor the Penal Code in Nigeria criminalises sexual intercourse with a wife even if she is a child.<sup>149</sup>

In a situation where culprits are not prosecuted, it is a leeway for the practice to continue despite express prohibitions.<sup>150</sup>

#### **6.4.1.3 Conflicts between the Constitution and other laws**

Conflicts are also apparent between the provision in the Nigerian Constitution on the human right to non-discrimination and the provisions of the Evidence Act.

For example, while the Constitution provides for non-discrimination, the Evidence Act requires corroboration of the testimony of a child in order to convict an accused person of forced sexual intercourse.<sup>151</sup> In *State v Akingbade*,<sup>152</sup> the court did not convict the accused of a rape offence because of corroboration, while in *Uphar v State*<sup>153</sup> the Court of Appeal insisted on corroboration and even widened its scope.

Also while the constitution provides the rights to access to fair hearing, this provision of the Evidence Act restricts the rights of children to the provided access to justice.<sup>154</sup> This discrepancy is an injustice and constitutes a restriction of the protection of the girl child if she attempts to seek for justice on the issue of child marriage.

Again S29 of the constitution is contrary to the provisions other laws on the age of childhood, it contradict the provisions of legislations like the Child

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childbirth is another agony, leading to the many cases of vesico vagina fistula which is common in the Northern part of Nigeria where child marriage is rampant.

<sup>148</sup> S6 Criminal Code

<sup>149</sup> S282 (2) Penal Code

<sup>150</sup> Fayokun (n 1 above) 464-465.

<sup>151</sup> S179 (5) Evidence Act S209 (3) which is on the requirement of evidence of rape.

<sup>152</sup> (1971) All NLR 508

<sup>153</sup> 2003 6 NWLR Pt 816, 230

<sup>154</sup> S36 Constitution of the Federal Republic of Nigeria 1999

Rights Act. The Child Rights Act provides the age of a child to be under 18<sup>155</sup> while S29(4) (b) provides that a married girl shall be deemed to be an adult. This provision which also impliedly supports child marriage is against another provision of the child rights Act which expressly prohibits child marriage.<sup>156</sup> S22-23 of the CRA are further provisions that emphasises the prohibition of child marriage.<sup>157</sup>

These provisions are contradicted by the provisions of S29 (4)(b), the effect of this is to create confusion on the legal status of child marriage in Nigeria.<sup>158</sup> According to Fayokun, these are issue of conflict of laws which aid the persistence of child marriage in Nigeria.<sup>159</sup>

## 6.5 Conflicts within Islamic law

Several authors have conceded that there are various versions and usages of Sharia law although its content is fixed and not easily amended.<sup>160</sup> Even in Islamic law there is no agreement on the issue of age and consent to marry.<sup>161</sup>

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<sup>155</sup> S277 Child Rights Act 2003

<sup>156</sup> S21 CRA 2003 “No person under the age of 18 years is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void of no effect whatsoever.

<sup>157</sup> Section 22 states that: “(1) No parent, guardian or any other person shall betroth a child to any person; and (2) A betrothal in contravention of subsection (1) of this section is null and void. S23 provides that A person—(a) who married a child; (b) to whom a child is betrothed; (c) who promotes the marriage of a child; or (d) who betroths a child, commits an offence and is liable on conviction of a fine of 500,000 Naira or imprisonment for a term of five years or both such fine and imprisonment.

<sup>158</sup> Fayokun (n 1 above)463-464

<sup>159</sup> As above

<sup>160</sup> ‘Reclaiming Tradition: Islamic Law in a Modern World’ International Affairs Review <http://www.iar-gwu.org/node/23> (accessed 12 January 2017). J Rumminger, J Maussa,Z Anwah et al ‘Cedaw and Muslim Family Laws in search of common ground’-, Musawah 2011. It can only be corrected based on Islamic law and Muslim jurisprudence, International human rights, through rights based interpretation of Islamic principles, National law and constitutional guarantee of equality and lived realities, which is a good one anyway, at least there exist the possibility of its being amenable to suit society and the purpose of law.

<sup>161</sup> Shah (n 59 above) 14. Although the prescription is maturity, Surah an- N -sa 4:6 requires that orphans reach the age of marriage and be found to be of sound judgment before they marry, thus attaining maturity alone is not sufficient, ability to make sound decision is also necessary, this would in effect mean that marriage of minors is not contemplated. The various Islamic schools have different opinions on the issue of age of marriage, the feminist Muslim women school of thought see it as a feature of domination of the female sex, another school considers child marriage as permissive not a law, not mandatory. The various Islamic schools have conceptions or beliefs about the issue of age and consent to marriage. It is only the Maliki school which is operative in Nigeria that concedes to the practice of Ijbar or power of the parent or guardian to consent to marriage on behalf of his daughter or ward and as regarding the issue of age, there is the argument that it is not a prescription or requirement but a practice that does not have to be followed This is evident in the fact that there is no consensus on these even in purely Islamic countries and their response to the provisions of age of marriage in International human rights provisions. In Algeria the age of marriage is 19 years,

It is argued that no verse in the Quran or Sunnah explicitly stipulates guardianship as a condition for a marriage contract and that Ijbar has little support from the Quran and Sunnah but is rooted in the social customs of Arab society.<sup>162</sup> This is despite the fact that the provisions of the Quran and Sunnah are interpreted by the various Islamic schools as constituting present-day Islamic law together with the words, teachings and practices of the Prophet Muhammad himself.<sup>163</sup>

This also applies to provisions relating to marriage, the relationship between spouses and even sexual intercourse (when, how etc.).<sup>164</sup> Ijbar is said to be a particular practice of the Maliki School and not of Islamic schools generally.<sup>165</sup> Followers of the Maliki School believe, teach and practice that the consent of the father constitutes the consent of the girl child in marriage.<sup>166</sup> This can also be seen as an area of conflict within Islam on the matter of marriage.<sup>167</sup>

From the various arguments of these conflicting provisions, even in Nigeria, the stance of Islam on child marriage is not clear.<sup>168</sup> Nonetheless it is a situation which allows for the continuance of child marriage.<sup>169</sup>

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Bangladesh 18 for girls and 21 for males, Morocco has 18 years, Turkey 18, Sierra Leone 18 after different reforms at various times to meet with the requirements of the present times.

<sup>162</sup> CEDAW and Muslim Family Laws In Search of Common Ground(2012) 30-32. Musawah, Malaysia

<sup>163</sup> Shah(n 59 above)2,

<sup>164</sup> Shah(n 59 above)1

<sup>165</sup> As in n 164 above

<sup>166</sup> As above

<sup>167</sup> As above

<sup>168</sup> J-Ann Walker 'Engaging Islamic Opinion Leaders on Child Marriage: Preliminary Results from Pilot Projects in Nigeria' (2015) 13 *The Review of Faith & International Affairs* 55. A Ukwuoma *Child marriage in Nigeria: The health hazards and sociolegal implications (Xraying the human rights and development issues in girl child early marriage)* (2014)16

<sup>169</sup> Fayokun (n 1 above)466-467

## 6.6 Conflicts within customary law

Since customary law is unwritten, provisions on the age for marriage vary from tribe to tribe and, since states are marked out by tribe, also from state to state.<sup>170</sup> Depending on the practice of each tribe, in some states (such as the Northern states of Nigeria) marriageable age is not a matter of age per se but of the attainment of puberty.<sup>171</sup> Nwogugu is of the opinion that this situation has encouraged child marriage.<sup>172</sup>

In customary law, forced intercourse is generally considered to be rape and is punishable.<sup>173</sup> There is no such thing as rape within marriage and a woman may not refuse to have sexual intercourse with her husband,<sup>174</sup> although in certain regions this is permitted during menstruation.<sup>175</sup> Again, rape is condoned as cultural practice in some instances,<sup>176</sup> and the treatment or perception of rape therefore is not general in customary law.<sup>177</sup>

It can be deduced therefore, that traditionally rape may or may not be condoned, creating a situation of uncertainty about the stance of customary law on rape.<sup>178</sup> This as a matter of transferred analysis is also the case in child marriage which tends to allow its persistence, apart from the non recognition of marital rape.<sup>179</sup>

Customary laws as a matter of morality will condemn sex with a child but where its stance on rape is not clear and with a mindset of non recognition

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<sup>170</sup> Nwogugu (n 26 above)43

<sup>171</sup> Fayokun (n 1 above)462

<sup>172</sup> Nwogugu (n above) 43

<sup>173</sup> A Armstrong 'Women and rape in Zimbabwe, Human and peoples' rights project' Monograph No 10 (1990) 8-9.

<sup>174</sup> SA Adamo 'The injustice of the marital rape exemption: a survey of common law countries' (1989) 4 *American University International Law Review* 555

<sup>175</sup> W Kamau et al 'The legal impunity for marital rape in Kenya: A woman's equality issue' 9 <http://theequalityeffect.org/wp-content/uploads/2013/04/Marital-Rape-Paper-Winnie-Kamau-Final-edited-July-18.pdf> (accessed 16 November 2016).

<sup>176</sup> ED Butler 'The man hired to have sex with children' BBC News Malawi July 21 2016 <http://www.bbc.com/news/magazine-36843769> (accessed 16 November 2016).

<sup>177</sup> W Kamau 'Legal treatment of consent in sexual offences in Kenya' 2013 14 <http://theequalityeffect.org/pdfs/ConsentPaperKenya.pdf> (accessed 16 November 2016).

<sup>178</sup> Armstrong (n 175 above) 8,9, 10.

<sup>179</sup> Nwogugu (n above) 43



of marital rape, can be a support for the continuous practice of child marriage.<sup>180</sup>

## **6.7 Conflicts within the Nigerian Constitution**

Conflicts of law in Nigeria are not only found between the statutory, customary and Islamic systems of law that make up the country's plural legal system, there are also conflicts within particular laws. These can take the form of contradictions within the Nigerian Constitution or within criminal provisions as well as conflicts between the provisions of these laws. The conflict within the constitution with itself and other legislation is treated separately because of the status of the constitution as the highest norm in the land.<sup>181</sup>

In terms of child marriage, the controversial matter of the age of childhood is an example of where there are conflicting provisions within the Constitution and between the Constitution and other laws. S29(4)(1) of the Constitution provides that full age is eighteen years which contradicts the provision in S29(4)(2) that any woman who is married shall be deemed of full age. This particular conflict has been the source of much controversy in Nigeria.<sup>182</sup>

Irrespective of the fact that S29(4)(2) deals with the subject of citizenship, whether or not it amounts to acceptance of child marriage is not the issue. The problem is that it is a constitutional provisions which is conflicting, confusing and unclear.<sup>183</sup> It also continues to be used as an instrument for the continuance of child marriage in Nigeria.<sup>184</sup>

S29(4)(2) of the Constitution is also said to contradict S42 on the fundamental right to non-discrimination.<sup>185</sup> Linked to this, Item 61 Part 1 Second Schedule similarly leads to conflicts.<sup>186</sup> The conflict of item 61 is a

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<sup>180</sup> As above

<sup>181</sup> S1 Constitution of the Federal Republic of Nigeria 1999

<sup>182</sup> Fayokun (n 1 above)463-464

<sup>183</sup> As above.

<sup>184</sup> As above

<sup>185</sup> 'Confusion or Collusion? Senate Did Not Approve Early Marriage: Senators Ekweremadu/Odunsi/Abaribe' July23/2013 <http://www.gistmania.com/talk/topic,162345.0.html> (accessed 4 April 2016).

<sup>186</sup> Braimah (n 1 above)485.

legislative one between the federal and state, that is the National house of Assembly and the states house of Assembly.<sup>187</sup>

The provision of Item 61 vests legislative powers on customary and Islamic marriages issues in the states leaving only the legislation of statutory marriage issues with the National house of Assembly.<sup>188</sup> This way since child marriage or marriageable age is deemed Islamic, it is argued then that it not an issue of concern of the federal government but that of the state.<sup>189</sup>

S12 of the Constitution contradicts S19 on the issue of international treaties. S12 provides that “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”<sup>190</sup> S19 on the other hand provides that “The foreign policy objectives shall be the respect for international law and treaty obligations.”<sup>191</sup> However these two instances are connected to the conflict between domestic and international law in Nigeria and will be properly dealt with under that head.

There are provisions within the Constitution which have implications for the human rights of the girl child as well as for the issue of child marriage, for example the issue of *locus standi* as it conflicts with the human right to access to justice. This is the conflict between S6(6)(c) and S46(1) of the Constitution.<sup>192</sup>

Again Nwauche discusses the issue of child marriage as a clash of human rights between the provision of rights to religion and right to family life which item 61 appears to defend but which may breach the right to non

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<sup>187</sup> As above

<sup>188</sup> Item 61 part 1 second schedule CFRN 1999 provides: The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto.

<sup>189</sup> As above

<sup>190</sup> S12 (1) Constitution of the Federal Republic of Nigeria 1999.

<sup>191</sup> S19 (d) above.

<sup>192</sup> S6(6) above provides for non justiciability of some human rights while S46 provides for the right to access to court.

discrimination as regards the girl child in the North and other parts of Nigeria.<sup>193</sup>

These provisions also conflict with that of S45 which can limit the former provisions. He argues that in reality child marriage could be legal as well as illegal in Nigeria.<sup>194</sup> These conflicting and confusing provisions do not make it clear whether child marriage is legal or not. Besides this, the situation is one which buttresses the fact that the girl child is not adequately protected against child marriage in Nigeria.<sup>195</sup>

Although Nwauche argues against the submission of the legality of child marriage in Nigeria because of these conflicting laws, he however agrees that they are issues which raise the case of conflict of laws, affects the protection of the girl child against the practice and needs to be resolved.<sup>196</sup>

## **6.8 Conflicts between domestic law and international law on the issue of child marriage**

One important point to reiterate at this juncture is a fact that proceeds from the discourse on the general conflict on the issue of age of childhood as it affects the issue of capacity to consent to marry and to sexual intercourse in Nigeria which inadvertently affects the issue of child marriage. This fact is the conflicting status of the Nigerian legal system and domestic laws.<sup>197</sup> This is needful because, besides specific provision that guides the application of international in the country, the fact that domestic laws are not in agreement assumes a state of unpreparedness for the application of foreign law.

The application of international law within domestic courts involves a relationship between laws which is another source of conflict of law.<sup>198</sup>

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<sup>193</sup> ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' (2015)15 *African Human Rights Law Journal* 428-430

<sup>194</sup> As above

<sup>195</sup> Braimah (n 1 above) 474

<sup>196</sup> Nwauche (n 193 above)430, 432

<sup>197</sup> En i(n 96 above)

<sup>198</sup> K Knop, R Michaels, A Riles 'International Law in Domestic Courts: A Conflict of Laws Approach' Cornell Legal Studies Research Paper No. 09-016 & Duke Law School Public Law & Legal Theory Paper No. 253, The Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1413189> (accessed 9 April 2016).

International law is a source of Nigerian rules of private international law to the extent that Nigerian courts and legislatures are aware of the international context within which this aspect of the law operates.<sup>199</sup>

Despite Nigeria's ratifying and being bound by obligation to international instruments and treaties, the application of international provisions on the prohibition of harmful and discriminatory cultural and religious practices involving the girl child as compared to the provisions of domestic laws is still a source of conflict of law in the country.<sup>200</sup>

While it cannot be said the Nigerian domestic law endorses the sexual abuse of a girl child, the conflict of laws does not permit the opportunity of a definite stand against the practice or for it.<sup>201</sup> Although this is the case with domestic laws, the stand of international law on child marriage is clear with the plethora of provision prohibiting the practice.<sup>202</sup> The problem arises on the approach of Nigerian domestic law to the application of international law within its domain which is a strict one.<sup>203</sup>

On marriage, generally, Nigerian law allows each of the three legal systems to determine the attributes of a marriage independently<sup>204</sup> and even global standards provide that the formal requirements with respect to marriage are governed by the law of the region in which a particular marriage is celebrated.<sup>205</sup> This obviously leads to a conflict of law because when there are disputes or contentions regarding a marriage, particularly on the issue

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<sup>199</sup> Agbede (n8 above) 19. In illustrating this capacity to marry is a typical example being much a part of private international law and family law at the same time. In the view of Olaniyan, where there is a dispute that has to do with the proper venue of hearing a matter with interstate elements is an issue of conflict of laws called private international law. H Olaniyan 'Territorial Jurisdiction and matters arising' *The Punch* 13 June 2014.

<sup>200</sup> This aspect has been discussed in detail in chapter 5 and to an extent in chapter 4 although the conflict was not discussed in chapter 4.

<sup>201</sup> Nwauche (n 193 above) 432

<sup>202</sup> 'Ending Child Marriage Meeting the Global Development Goals' Promise to Girls' 2015 Human rights watch <https://www.hrw.org/world-report/2016/ending-child-marriage> (accessed 13 January 2017)

<sup>203</sup> S12 Constitution of the Federal Republic of Nigeria 1999

<sup>204</sup> Item 61 part 1 schedule 2 CFRN 1999. BI Olutoyin 'People Perish For Lack Of Knowledge: Revisiting of the role of Custom in the development of Nigerian Legal System' Ministry of Justice Ekiti State 3 March 2014 <http://moj.ekitistate.gov.ng/online-journal/people-perish-for-lack-of-knowledge-revisiting-of-the-role-of-custom-in-the-development-f-nigerian-legal-system/> (accessed 13 January 2017). Although the federal government has jurisdiction over statutory marriages and its issues through the Marriage and the Matrimonial Causes Act.

<sup>205</sup> Art 3 Hague Convention on the Celebration and Recognition of the validity of marriage 1978.

of child marriage the question arises of whether domestic law or international law or domesticated international law should apply.<sup>206</sup>

The conflict with respect to child marriage may be one of jurisdiction. Is the matter one for the High Court as an issue of infringement of human rights or for the Sharia Court in the case of an Islamic marriage? *Yakubu v Paiko*<sup>207</sup> and *Ketural v Matthew*<sup>208</sup> are relevant cases in this regard. In another case in 2010,<sup>209</sup> the High Court declined jurisdiction and also decided that the marriage was not a forced marriage.

The jurisprudence on which the courts rely relates to the existence and interpretation of international norms, the decisions of international tribunals which may be relevant on international issues, and international agreements which are binding on sovereign states.<sup>210</sup>

S12 of the Nigerian Constitution specifically provides for the applicability of treaties. Inter alia, “No treaty between the federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”<sup>211</sup>

It is clearly a fact that the law in some countries expressly provides for the use of international law when interpreting domestic law, while others do not.<sup>212</sup> For example, the South African Constitution provides for this<sup>213</sup> while the Nigerian Constitution does not. S39(1) of the South African Constitution

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<sup>206</sup> S12 Constitution of the Federal Republic of Nigeria 1999. Nwauche (n above) 422-427

<sup>207</sup> 1985 1 sharia law report 126, CA/ K/80s/85(unreported)

<sup>208</sup> Area court held that the father had the right to give his daughter to any man of his choice, overruled at upper Area court but returned at the Sharia Court of Appeal. IKE Oraegbunam ‘A critique of certain aspects of Islamic personal law in Nigeria: Examining the jurisprudence of women’s right’ (2013)3 *African Journal of Law and Criminology* 11-12. IKE Oraegbunam & BOS Udezo ‘Women’s Rights in Matrimonial Jurisprudence under Islamic Family Law in Nigeria: A Need for Reform’ 101-102. <http://www.ajol.info/index.php/jrhr/article/viewFile/86984/76761>, (accessed on 13 January 2017)

<sup>209</sup> ‘Nigerian Court rejects forced marriage case’ BBC News 22 Oct 2010 <http://www.bbc.co.uk/news/world-africa-11607532>.

<sup>210</sup> RF Oppong ‘Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa’ (2006) 30 *Fordham international law journal* 299-300.

<sup>211</sup> S12(1) Constitution of the Federal Republic of Nigeria 1999 Therefore International treaties to be applicable in Nigeria must first be domesticated or made part of the domestic law, then it can be applicable, if it is not domesticated it does not and cannot have the force of law.

<sup>212</sup> The constitution of Cape Verde provides for this, Namibia constitution too but not the constitution of Zimbabwe (Art 111(b) Constitution of Zimbabwe 1993, even South African Constitution

<sup>213</sup> S39 Constitution of the Republic of South Africa.

provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law.<sup>214</sup>

S12 is argued to conflict with that of S19 which promises to respect international agreements.<sup>215</sup> This provision however is often argued and held to be non-justiciable by virtue of S6(6)(c),<sup>216</sup> despite the provisions of S13<sup>217</sup> and others in the Constitution.<sup>218</sup>

The key issue is that a great deal is left to the judiciary or the municipal courts when it comes to upholding international human rights principles within their domestic jurisdictions.<sup>219</sup> This duty of the judiciary or judges can be performed through the application of customary international law or the Bangalore Principles.<sup>220</sup> The Vienna Convention on the Law of Treaties already provides that states may not invoke municipal law to justify the failure to honour international human rights obligations.<sup>221</sup>

On the issue of child marriage, the recognition of foreign law in the English court system was confirmed in *Mohammed v Knott*,<sup>222</sup> although if the same situation were to arise today, the decision would certainly be different. While

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<sup>214</sup> S39 (1) (b) and (c) Constitution of the Republic of South Africa.

<sup>215</sup> S19 Constitution of the Federal Republic of Nigeria 1999 is on foreign policy objective, S19 (d) provides that the foreign policy objective shall be respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication.

<sup>216</sup> S6(6)(c) provides The judicial powers vested in accordance with the foregoing provisions of this section, shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution

<sup>217</sup> S13 Constitution of the Federal Republic of Nigeria 1999 provides It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

<sup>218</sup> S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 237.

<sup>219</sup> The Bangalore principle. K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *AHRLJ* 242.

<sup>220</sup> M Kirby 'Domestic courts and international human rights law: The ongoing judicial conversation' (2010) 6 *Utrecht Law Review* 170. The Bangalore principle which the courts in Nigeria have made attempt to follow without direct reference to it. CN Okeke 'The use of international law in the domestic courts of Ghana and Nigeria' (2015) 32 *Arizona Journal of International & Comparative Law* 426, 428

<sup>221</sup> Art 27 Vienna Convention on the Law of Treaty 1969. S46(1) Vienna Convention

<sup>222</sup> 2 WLR 1446 where a Nigerian man had an under aged wife who was with him in England. At interception by the welfare, the council held she was underage and needed state protection from sexual assault from the husband, but a higher court disapproved with the decision, claiming that it was in England that child marriage was not known but it was recognized as valid marriage in Nigeria, where the couple came from and where they contracted the marriage.

the practice of child marriage may be acknowledged in Nigeria, it is not and will not be accepted as lawful because of prevailing international norms in this dispensation in the form of international requirements on minimum marriageable age.<sup>223</sup>

The purpose of stipulating marriageable age is to protect immature and unprepared persons from the rigours of marriage and its attending sexual responsibilities, including the physical and emotional stress of childbirth.<sup>224</sup> Although Enabulele admitted that the essence of treaty is to regulate the activities of individuals and private entities, where they are not domesticated or applied this will not be feasible.<sup>225</sup>

The problem however is that the international standard on marriageable age conflicts with some of Nigeria's domestic laws, and it is the girl child who suffers as a result.<sup>226</sup> The current dilemma is that the domestic legal system and laws have conflicting provisions on the issues of marriageable age and consent to marriage. This has also affected legal provisions on sexual intercourse and by extension child marriage.<sup>227</sup> This is another fall out of gender issues problem in the country.<sup>228</sup>

Despite being domesticated, the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child, as expressed in Nigeria's Child Rights Act, face legal conflict challenges in the country,<sup>229</sup> primarily due to the provisions of domestic laws.<sup>230</sup>

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<sup>223</sup> Early marriages were legal a long time ago even in now developed countries they were outdated or changed by progressive laws, industrialization and compulsory education. Johanna Eriksson Takyo of Unicef in Parliamentary seminar on combating early and forced marriage in Ghana, 2014, wiLDAF Ghana.

<sup>224</sup> Nwauche (n 193 above) 425-427

<sup>225</sup> AO Enabulele 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' (2009) 17 *African Journal of International and Comparative Law* 326

<sup>226</sup> Fayokun (n 1 above) 460-470

<sup>227</sup> I Nnadi 'An Insight into Violence against Women as Human Rights Violation in Nigeria: A Critique' (2012) 5 *Journal of Politics and Law* 49-53

<sup>228</sup> As above. 'Nigerian Senate votes down gender equality bill due to 'religious beliefs'' Independent 17 March 2016 <http://www.independent.co.uk/news/world/africa/nigerian-senate-votes-down-gender-equality-bill-due-to-religious-beliefs-a6936021.html> (accessed 13 January 2017).

<sup>229</sup> Fayokun (n 1 above) 463-465

<sup>230</sup> As above

Argument abound that the provision of S12 of the Nigerian is a general blanket provision which is not clear enough.<sup>231</sup> The Nigerian Treaties (Making Procedure Decree which exist as the specific legislation for the relationship between domestic and International law too is argued to be inadequate.<sup>232</sup> Treaty making is the prerogative of the federal government.<sup>233</sup> The Act makes the procedure to be binding and applicable for the making of any treaty between the federation and any other country on any matter on the Exclusive Legislative List contained in the Constitution.

While matters on the exclusive list are provided for, it is silent on the matters that are not, thus leaving it as an open ended issue and rather one of conflict.<sup>234</sup> This is one of the challenges of the issue of marriageable age in Nigeria today especially when Item 61 is taken into consideration.<sup>235</sup> The Nigerian Constitution does not state expressly in any of its provisions the mode of receiving international law in any of its courts.<sup>236</sup>

S1(3) of the Nigerian constitution does not mention international law at all whether customary or treaty. Even where treaties are domesticated following S12, it could conflict with a domestic law. Where it conflicts with the constitution, the constitution prevails, where however the conflict is with a legislation, they have equal status.<sup>237</sup>

It should be noted that this problematic situation of conflict should not arise in the first place given that states are not allowed to hide behind domestic provisions in order to shirk their obligations under international treaties or agreements, whether domesticated or not.<sup>238</sup> As of now however, the conflicting and unclear provisions relating to the application of treaties in

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<sup>231</sup> FA Onomrerhinor 'A re-examination of the requirement of domestication of treaties in Nigeria' (2016) *NAUJILJ* 18. BI Olutoyin 'Treaty Making and Its Application under Nigerian Law: The Journey So Far' (2014) 3 *International Journal of Business and Management Invention* 10

<sup>232</sup> Olutoyin (n281 above)9-10

<sup>233</sup> As above 9-10

<sup>234</sup> Olutoyin (n 281above)11

<sup>235</sup> Nwauche (n 193 above) 422-423

<sup>236</sup> Olutoyin (n281 above) 11

<sup>237</sup> *Abacha v Fawehinmi* 613

<sup>238</sup> Art 27, Art 46 (1) Vienna Convention on the law of treaties, 1969



Nigeria is impacting much on the issue of child marriage and affecting the protection of the girl child against the practice.

## **6.9 Other legal challenges relating to the issue of child marriage in Nigeria**

Apart from conflicts of law, there are other legal problems which compromise the protection of the girl child in Nigeria and must therefore be dealt with. These issues are lacunae, the expressed acknowledgement of the existence of child marriage in Nigeria and the problem of locus standi. All these are legal issues and or provisions which impact on the protection of the girl child and have bearing on the argument in support of the continuance of child marriage in Nigeria.

### **6.9.1 *Lacunae*, vagueness, obsolete laws and other legal issues in Nigeria**

Meaning imprecise, uncertain or indefinite, the term vague is frequently used to describe a statute written in language that is so lacking in precision that an individual with normal intelligence is forced to guess at its meaning.<sup>239</sup> Other meanings of the term are ambiguous, confused, cloudy or blurred. Statutes that are vague are generally considered void on that ground.<sup>240</sup>

*Lacunae* are unfilled spaces, vacuum, or gaps, and in the legal context the reference is to situations where there is no applicable law or where the law provides opportunity or it to be misread, misinterpreted or even misapplied.<sup>241</sup> Obsolete means to be out of date or no longer applicable,<sup>242</sup> and in the context of the law is used to describe laws which have lost their efficacy without being repealed.<sup>243</sup> The term can also mean neglected or not

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<sup>239</sup> 'Vague' <http://legal-dictionary.thefreedictionary.com/vague> (accessed 15 November 2016).

<sup>240</sup> As above.

<sup>241</sup> 'Lacunae Law and Legal definition' <http://definitions.uslegal.com/l/lacunae/> (accessed 15 November 2016).

<sup>242</sup> 'Meaning of "obsolete" in the English Dictionary' <http://dictionary.cambridge.org/dictionary/english/obsolete>, (accessed 16 November 2016).

<sup>243</sup> 'Obsolete' Legal dictionary <http://legal-dictionary.thefreedictionary.com/obsolete> (accessed 16 November 2016).

observed, and is applied to statutes which have become non-functional over time.<sup>244</sup>

In this section, certain of Nigeria's legal provisions are examined in terms of these definitions and as they relate to the issue of child marriage. First to note however is that child marriage itself is an antiquated harmful rite.<sup>245</sup> It is an age long practice that has come to be accepted as norm although developed societies have stopped the practice.<sup>246</sup> The connection here is that laws which accommodate it in their provisions must be likewise archaic.<sup>247</sup>

A cursory glance reveals that the majority of existing applicable laws in Nigeria are obsolete, archaic, spent or duplicated, or even more disturbingly, contradictory.<sup>248</sup> One of such archaic provision is the controversial S29(4)(b) of the Constitution which provides that a married woman is deemed to be of full age, following immediately after the provision of (a) that full age is 18 years. Fayokun called this provision archaic, obnoxious and unnecessary in the Nigerian constitution.<sup>249</sup> This provision has been raised by many as the legal justification in support of child marriage in Nigeria.<sup>250</sup>

Still on archaic provisions and obsolescence, although the present Constitution bears the official date of 1999, its provisions are substantially the same as those of the preceding Constitution, with only slight changes if any.<sup>251</sup> The present constitution is the ninth constitution in 53 years, last amended in 1999 and containing little or none of the requirement of the

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<sup>244</sup> 'What is OBSOLETE? definition of OBSOLETE' Law Dictionary: (Black's Law Dictionary) <http://thelawdictionary.org/obsolete/> (accessed 16 November 2016).

<sup>245</sup> PA Cholewka & MM Motlagh (eds) *Health capital and sustainable socioeconomic development* (2008) 360.

<sup>246</sup> As above

<sup>247</sup> Even earlier laws that initiated its prohibition are dated far back as 1929, The child marriage Restraint Act.

<sup>248</sup> 'Laws regulating criminal trials in Nigeria archaic' – CJN 1 March 2015 <http://www.vanguardngr.com/2015/03/laws-regulating-criminal-trials-in-nigeria-archaic-cjn/the>, I Nnochiri (accessed 4 April 2016) the CJN said this in a refresher course for judges in the Country.

<sup>249</sup> Fayokun (n 1 above) 464

<sup>250</sup> As above. Aplerku 'One Senator Kept Child Marriage Alive in Nigeria Last Month', *Vive* 8 August 2013 <https://www.vice.com/gr/article/child-marriage-was-nearly-made-illegal-in-nigeria-last-month> (accessed 13 January 2017).

<sup>251</sup> There is the 1979, 1989 and the present operational 1999 Constitution

necessary modern international human rights provisions.<sup>252</sup> While the constitutions of other countries have been amended to comply with global and regional human rights standards, some of the provisions in the Nigerian Constitution bear witness to the fact that it is relatively old.<sup>253</sup>

There are provisions which make use of discriminatory terms despite the fact that the Constitution itself provides for the right to non-discrimination in its section on fundamental human rights.<sup>254</sup> The language of the constitution could be argued as a proof of gender discrimination.<sup>255</sup> For example the masculine pronoun “he” predominates, even in the provisions on human rights.<sup>256</sup> The same obsolescence is found in provisions of the Evidence Act<sup>257</sup> and the Criminal and the Penal codes,<sup>258</sup> and even in the Marriage Act and the Matrimonial Causes Act.<sup>259</sup>

In 2012, a group of Nigerian citizens wrote to the Attorney General demanding a revamp of the laws of the country and asserting that “apart from the Constitution of Nigeria 1999, other legislative provisions, inclusive

<sup>252</sup> Nigeria: Nine constitutions in 24 years of democracy! – 25 November 2013, New African Magazine at <http://newafricanmagazine.com/nigeria-nine-constitutions-in-24-years-of-democracy/>, accessed on 13 January 2017.

<sup>253</sup> Kenya’s constitution is 2010, Zambia is 2015

<sup>254</sup> S42 Constitution of the Federal Republic of Nigeria 1999

<sup>255</sup> ‘How Nigeria legalizes discrimination against women’ Premium Times 28 July 2013 <http://www.premiumtimesng.com/opinion/141797-how-nigeria-legalizes-discrimination-against-women-by-aminu-hassan-gamawa.html> (accessed 13 January 2017)

<sup>256</sup> The use of ‘his life’ in S33(1) Constitution of the Federal Republic of Nigeria 1999. K Ketefe 1999 Constitution and gender discrimination 24 May 2011 USA Africa dialogue series <https://groups.google.com/forum/m/#!topic/usaafricadialogue/Ua8I-ZSZKJ0> (accessed 13 January 2017). The male pronouns appear about 253 times in the 1999 constitution. While this may appear innocuous especially in the light of the Interpretation Act which makes all male pronouns used in statutes applicable to women as well, yet the fact still remains that most modern constitutions [E.g. South Africa] have moved away from the patriarchal mentality of using exclusive male pronouns in the constitution to the gender neutral of using “a person” instead of “he” or to the gender sensitive of using “He or She” instead of exclusive use of “he”.

<sup>257</sup> Although recently reviewed with the old one repealed, the repealed Evidence Act was enacted by the colonial administration in 1943 and came into force in 1945. The Act witnessed minor amendments in 1948, 1958 and 1991 but remained substantially the same till its repeal in 2011. The provisions of the Act were based primarily on the book, “Digest of the Law of Evidence” by Sir James Fitzjames Stephen. The Evidence Act 2011 (also referred to as the Act) came into force on 3 June 2011 when it received the assent of the President of the Federal Republic of Nigeria (as it contains no commencement date). AJ Ikpang ‘A Critical assessment of milestone in the Nigerian Evidence Act 2011’ (2013) 2(1) *Humberside Journal of Social Sciences* an attempt at reforming of the laws of Nigeria.

<sup>258</sup> These have provisions that definitely require review for being obsolete, conflicting and women discriminatory

<sup>259</sup> The Marriage and Matrimonial Causes Act have not been amended, the reason why they still bear 21 as age of majority.

of civil and criminal laws are backward and fall short of international standards, expectations and best practices.”<sup>260</sup>

Certain laws in Nigeria, including the 1999 Constitution, contain provisions that are no longer relevant in light of present day societal needs and challenges, and provisions that are aligned with contemporary social realities, particularly in terms of criminal justice and human rights, are lacking.<sup>261</sup> For instance, modern criminal intelligence and investigative capabilities and capacities continue to elude the security authorities in Nigeria because of the almost total absence of supporting legal provisions in the country’s body of criminal laws and court rules.<sup>262</sup> Even the Attorney General agreed with critics when he stated that “It is disheartening that many of our laws are still archaic, obsolete, alien and are not consistent with current realities.”<sup>263</sup>

Child marriage has been linked to discriminatory perception of women and the girl child in patriarchal societies.<sup>264</sup> Where these laws find expression in secular laws and the constitution will tend to give support to practices like child marriage that are not healthful for this class of the society.<sup>265</sup> This is one of the arguments for the continuance of child marriage in Nigeria.

Another issue is the often non justiciability of fundamental directives and principles of state policy under which socio economic rights fall.<sup>266</sup> These socio economic rights include the rights to sexual and reproductive rights

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<sup>260</sup> ‘Intersociety Writes AG, Demands Revamp of Nigeria’s Archaic Laws’ Nigeria Masterweb Citizen News 17 December 2012 <http://nigeriamasterweb.com/blog/index.php/2012/12/17/intersociety-writes-ag-demands-revamp-of-nigeria-s-archaic-laws> (accessed 4 April 2016)

<sup>261</sup> As above

<sup>262</sup>As above. The contents of the letter had included,” time is overdue to raise global awareness on the need for all State-actors/parties to protect and respect the rights of their citizens and eliminate the corruption within their systems, it is also high time for the review and reform of laws and policies, as a means of raising them to align with the essence essential global and regional documents”.

<sup>263</sup> ‘Nigeria’s Democracy and the rule of flaws’ National Daily Newspaper 12 October 2015 <https://nationaldailyng.com/2015/nigerias-democracy-and-the-rule-of-flaws/> (accessed 4 April 2016) S Elijah cited that the Attorney General said so at the law summit the Nigeria Institute of Advanced Legal Studies organized in 2013 in Abuja.

<sup>264</sup> K Muller ‘Early marriages and the perpetuation of gender inequality’ 203 <http://www.ufh.ac.za/speculumjuris/files/pdf/SJ0314FPMuller.pdf> (accessed 13 January 2017).

<sup>265</sup> As above

<sup>266</sup> S6(6)(c) Constitution of the Federal Republic of Nigeria 1999

and health.<sup>267</sup> While the Constitution provides for fundamental human rights and for fundamental objectives and directive principles of state policy, it simultaneously rules that these objectives are non-justiciable.<sup>268</sup>

This is in the provision of S6(6)(c) of the constitution which amounts to taking away the right already given.<sup>269</sup> This contradiction undoubtedly has implications for the socioeconomic rights of the girl child which is a real issue in the practice of child marriage.<sup>270</sup>

It is not surprising that despite provisions on access to justice as a fundamental human right in the Nigerian Constitution,<sup>271</sup> perpetrators of child marriages are rarely prosecuted.<sup>272</sup> Not only is it difficult or unacceptable for a girl to take her parents or husband to court, there are also provisions in some pieces of legislation which can actually impede her right of access to justice as they purportedly legalise the practice of child marriage.<sup>273</sup>

One such principle in issue is that of *locus standi*. According to Taiwo, the principle of *locus standi* has been an intractable concept for ages and has posed serious problems for both litigants and the courts.<sup>274</sup> In Nigeria, *locus standi* has generated a considerable volume of interesting litigation in the past and is likely to continue doing so in light of its narrow and restrictive interpretation under Nigerian law.

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<sup>267</sup> C Ngwena & E Durojaye (eds) 'Strengthening the protection of sexual and reproductive health through human rights in the African region: An introduction' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health through human rights in the African region* (2014)1

<sup>268</sup> S6 (6) (c) Constitution of the Federal Republic of Nigeria 1999. Thematic Report Nigeria: Gender and Age, Dec 2012, Country of Origin and Information (CORI), United Nations High Commission for Refugees UNHCR.

<sup>269</sup> S6 (6)(c) provides that The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this constitution

<sup>270</sup> Ngwena & Durojaye (n 267 above)1.

<sup>271</sup> S46 Constitution of the Federal Republic of Nigeria 1999. Also access to fair hearing, through access to the Courts, see the provision of S36 and S46 the constitution S46 is the provision on legal aid and special jurisdiction of the High Court.

<sup>272</sup> T Ogunlesi 'Opinion poll does not reveal real extent of child rape in Nigeria' Africa Check 24 July 2014 <https://africacheck.org/reports/opinion-poll-does-not-reveal-real-extent-of-child-rape-in-nigeria/> (accessed 13 January 2017).

<sup>273</sup> Fayokun (n 1 above) 464

<sup>274</sup> EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *AHRLJ* 546-575

S46 of the Constitution provides that “Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.”<sup>275</sup>

The constitutional provision on *locus standi* is found in S6(6)(b) which provides that “The judicial powers vested in accordance with the foregoing provision of this section, shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person” - not another person on his behalf.<sup>276</sup>

This provision is open to numerous interpretation. In terms of the girl child and the practice of child marriage, does the law then say that only the High Court can properly handle a child marriage matter as an acknowledged human rights issue? Does S6 mean that no one other than the girl child can bring such an action? Does it mean that nobody can take legal action on behalf of the girls in Northern Nigeria against the government for its nonchalant attitude to the continued practice of child marriage?

The primary contention in this regard has been about the person bringing the action and whether it must be the person who is directly adversely affected by the transgression in question.<sup>277</sup> This is particularly relevant to public issues since they hinge on the provision of the Nigerian Fundamental Rights (Enforcement Procedure) Rules which states that “Any person who alleges that any of the Fundamental rights provided in the Constitution to which he is entitled has been, is being or is likely to be infringed may apply to the court in the state where the infringement occurred or is likely to occur for redress to the High court.”<sup>278</sup>

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<sup>275</sup> S46 Constitution of the Federal Republic of Nigeria 1999

<sup>276</sup> Emphasis is mine

<sup>277</sup> S46 (1) CFRN 1999 says “Anyone”

<sup>278</sup> S2 (1) Fundamental Rights (Enforcement Procedure) Rules

Although this provision was a major factor in the case of *Anuka Community Bank v Otua*,<sup>279</sup> the Nigerian courts have tended to interpret it in different ways and sometimes restrictively in the sense that the plaintiff has to be the affected person and not anyone else on their behalf.<sup>280</sup>

It should however be noted that lawyers have sometimes been allowed to bring actions on behalf of citizens. In *Richard Oma Ahonarogho v Government of Lagos State*,<sup>281</sup> the objection that the lawyer had no *locus* was dismissed as false.<sup>282</sup>

S6 of the Nigerian Constitution, which can be described as restrictive or having *lacunae* which lay it open to interpretation, is unlike the Bill of Rights of South Africa which is explicit on this issue and provides a detailed list of the people who can bring an action on the enforcement of the Bill.<sup>283</sup>

The principle of *locus standi* has great significance for the protection and enforcement of the human rights and freedoms enshrined in the constitutions of several countries as well as in international human rights instruments.<sup>284</sup> Strict or rigid interpretation of the principle can be disastrous for the actualisation of the human rights of citizens.<sup>285</sup>

By reason of her age, a girl child in Nigeria cannot bring an action herself but a person or organisation can do so on her behalf. Although not common, there have been such cases but the fact remains that the issue of age as it relates to legal capacity undermines the protection of the girl child.<sup>286</sup> The principle of *locus standi* should not infringe on her right of access to justice

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<sup>279</sup> 2000 12 NWLR (Pt 682) 641 at 662 Tobi JCA said fundamental rights can be enforced at any time, all the applicant needs to show that he has locus standi is that his fundamental rights has been contravened or likely to be contravened.

<sup>280</sup> *Uzoukwu v Ezeonu ii*, 1991, 6NWLR (Pt 200) 708 at 762

<sup>281</sup> 1994 HLP Vol 4, Nos 1,2,3 at 185 a legal practitioner had filed a proceeding in his name to enforce the fundamental right to life of a young person, charged with armed robbery with a death penalty/sentence.

<sup>282</sup> The question might be that is it only a legal practitioner that will have the locus, can an individual with interest only in the legal administration of things have a locus to bring action on behalf of a child? This problem of locus standi has been attributed to the provision which did not fully expatiate on these points, i.e. S6(b) CFRN 1999

<sup>283</sup> S38 1996 Constitution South Africa

<sup>284</sup> A'Degol-H 'Lecture Note: Enforcement of fundamental rights vis-à-vis Locus Standi in Ethiopia' (2011) 3 *Jimma University Journal of Law* 93, 95, 97

<sup>285</sup> As above.

<sup>286</sup> *Legal minimum ages and the realization of adolescents' rights: A review of the situation in Latin America and the Caribbean* (2016) 60.

but should be applied in a flexible manner to allow individuals, NGOs or other groups to bring actions against the Nigerian government on its responsibility to protect the girl child against sexual abuse and the culturally accepted practice of child marriage in the country.

Canada has a legal provision called public interest litigation.<sup>287</sup> There is no such provision in Nigeria although *locus standi* can be interpreted either strictly or broadly which of course makes it an area of vagueness in the Nigerian Constitution. This may have been the reasoning in the case of *Frank Tietie v AG Federation & Others*,<sup>288</sup> where the court heard the petitioner's argument and held the respondents liable and responsible for the prosecution of culprits in the fulfillment of their obligation to protect and defend the girl child in Nigeria.<sup>289</sup>

### **6.9.2 Expressed acknowledgement of child marriage**

Another problem undermining the protection of the girl child against child marriage in Nigeria is the provision which mentions the recognition of child marriage practice in the constitution.<sup>290</sup> Although the provision does not pronounce child marriage as law, the mention of married children under the age of 18 years in the constitution is an acknowledgement of its existence and therefore condonation by the law.

At the most, this provision can be described as vague, having lacuna which makes it prone to various interpretations which have been utilised to support the legality of the perpetration of child marriage in Nigeria on the argument that it is a government recognised practice.<sup>291</sup> The provision is different from S29(4)(b) in that it clearly expresses that children under 18 years do get married while S29(4)(b) upgrades a married girl to an adult by

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<sup>287</sup> Costs and access to justice in public interest environmental litigations submissions to the federal Court of Appeal and Federal Court rules committee November 23 2015 2 <http://www.cela.ca/sites/cela.ca/files/Costs-Access-to-Justice-Public-Interest-Envl-Litigation.pdf> (accessed 13 January 2017).

<sup>288</sup> M/336/12. This occurred in Abuja the capital territory. The respondent's argument on lack of locus standi of the applicant was dismissed.

<sup>289</sup> As above.

<sup>290</sup> Fifth Schedule Part 1 of the Code of Conduct for Public Officers CFRN 1999

<sup>291</sup> CFRN 1999.... And those of his unmarried children under the age of 18 years.



virtue of marriage. Both provisions are however contained in the constitution of Nigeria.<sup>292</sup>

While the provision of the fifth schedule can be explained away in the interest of the protection of all the living children of a deceased civil servant, the fact remains that it must have been included in the Constitution a long time ago when child marriage was still the norm. It has clearly outlived its purpose and time. Its retention is proof of vague provisions as well as evidence of the lack of development that characterises the Nigerian Constitution and other laws.

Ayeni was of the opinion that the 1999 Constitution is near verbatim adaptation of the 1979 constitution and hence in need of reform.<sup>293</sup> Fayokun was of the same view that the Nigerian Constitution is long due for reform especially because of the archaic provisions which tend to validate child marriage in the country.<sup>294</sup>

Finding this provision, alongside other conflicting, vague, *lacunae* provisions, one is left with no option than to assume that child marriage can continue in the country except there is a clear specific law on the issue.<sup>295</sup>

## **6.10 The effect of conflicts of law and other legal issues**

Asein rightly concedes that there is conflict of law with respect to marriage in Nigeria.<sup>296</sup> The existence of conflicting laws and the vagueness and *lacunae* in certain provisions and principles are a considerable challenge in terms of marriage as well as sexual intercourse,<sup>297</sup> both of which are related to the issue of child marriage.

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<sup>292</sup> S29(4)(b) Constitution of the Federal Republic of Nigeria 1999 and Fifth schedule Part 1 of the Code of Conduct for Public Officers of the constitution 1999

<sup>293</sup> VO Ayeni 'the impact of the African charter and the Maputo protocol in Nigeria' in VO Ayeni (eds) *The impact of the African charter and the Maputo Protocol in selected African states*(2016)189

<sup>294</sup> Fayokun (n 1 above) 469

<sup>295</sup> Braimah (n 1 above)488

<sup>296</sup> Asein (n 19 above)140. LD Wardle 'Marriage and religious liberty: Comparative law, problems and conflict of law solutions' (2010) 12 *Journal of law and family studies* 315.

<sup>297</sup> Wardle (n 296 above) 315.

As a result, the position on child marriage in Nigeria is not clear.<sup>298</sup> Is the practice prohibited or not? Is it legal or illegal?<sup>299</sup> Is it a crime or a private family issue? Does it constitute an infringement of a right, and if so, whose right, that of the girl child or a religious group? If it is an infringement, which court has jurisdiction? Who can sue, the girl or anybody on her behalf? Who should be sued, the parent, the groom or the instructing religious community through its leaders or the officiating person who performs the wedding? With the protection of human rights being the responsibility of government, can the government be sued? If so, how and by whom? In which court<sup>300</sup>

All of these unanswered questions have collectively contributed to a permissive atmosphere in which the practice of child marriage is able to continue.

Fayokun's view that as a result of conflicts of law, child marriage is not illegal in Nigeria<sup>301</sup> is supported by TS Braimah<sup>302</sup> and Nwosu *et al*,<sup>303</sup> while Nwauche<sup>304</sup> disagrees. According to Nwauche, there are enough provisions under human rights alone to refute the idea that child marriage is legal in Nigeria.<sup>305</sup>

The reality is that although there are laws for the protection of the girl child, their effectiveness has been eroded by the existing conflict of laws and the ensuing confusion which tend to support rather than prevent her abuse.<sup>306</sup>

In the absence of an explicit stance on marriageable age in the Matrimonial Causes Act and the Marriage Act, and unclear provisions on sexual intercourse between spouses irrespective of age, statutory law can be considered to acknowledge the practice of child marriage practice in Nigeria. Although abduction for the purpose of marriage or sex is prohibited and

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<sup>298</sup> Nwauche (n 193 above) 421-432

<sup>299</sup> As above.

<sup>300</sup> Nwonu & Oyakhiromen (n 34 above) 122-124.

<sup>301</sup> Fayokun (n 1 above)464

<sup>302</sup> Braimah (n 1 above)481.

<sup>303</sup> Nwonu & Oyakhiromen (n 34 above) 122-124.

<sup>304</sup> Nwauche (n 193 above)424

<sup>305</sup> Nwauche (n 193 above) 427

<sup>306</sup> Fayokun (n 1 above) 464-465

forced sexual intercourse with a minor is deemed defilement, this is overruled by the provisions of S6 Part 1 of Chapter 1 of the Code of Criminal Law and by S282(2) of the Penal Code.<sup>307</sup>

It may be argued that in terms of the present provisions of the Criminal and Penal Codes in Nigeria, the offender cum husband who has sexual intercourse with a girl child cannot be accused of defilement or rape by virtue of the fact that he is married to the girl.<sup>308</sup>

Although the Prohibition of Violence against Persons Act constitutes an attempt to amend Nigeria's criminal laws by expanding the definition of rape in order to facilitate prosecution, and another attempt is on the way,<sup>309</sup> it does not apply to child marriage.<sup>310</sup> This is important in light of the country's recently publicising its serious intention to eradicate child marriage.<sup>311</sup>

A look at conflicts within the Constitution brings up the same argument. While the Constitution does not have a provision on children and does not define the child in its interpretative section, S29 specifies full age as being eighteen years while also providing that a married woman is deemed to be of full age. This constitutes not only a vague provision and a *lacuna* which allows for different interpretations.

Combined with the constitutional provision on non-discrimination,<sup>312</sup> S46 on access to justice,<sup>313</sup> provisions on the socioeconomic right to education and health<sup>314</sup> and the non-justiciability and *locus standi* provisions of

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<sup>307</sup> Unlawful carnal means carnal connection which takes place otherwise than between husband and wife.

<sup>308</sup> S6 CC and S282 PC

<sup>309</sup> 'Rape cases: Amending the law to ease prosecution?' Nigerian Tribune Jan 26 2016 <http://tribuneonline.ng/rape-cases-amending-the-law-to-ease-prosecution> (accessed 6 April 2016).

<sup>310</sup> The Act extended the meaning of rape to cover rape of men, but did not include any provision on child marriage. It is also applicable only in the federal capital territory.

<sup>311</sup> 'Nigeria: Government Moves to End Child Marriage' All Africa 25 March 2016 <http://allafrica.com/stories/201603250317.html>, (accessed 6 April 2016).

<sup>312</sup> S42(2) Constitution of the Federal Republic of Nigeria 1999

<sup>313</sup> Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress

<sup>314</sup> S16, S17, S18 Constitution of the Federal Republic of Nigeria 1999

S6(6)<sup>315</sup> result in a bundle of confusion. This is not to mention the right to religion<sup>316</sup> pitched alongside Item 61 Part 1 Second Schedule of the Constitution.<sup>317</sup>

S12<sup>318</sup> and S19<sup>319</sup> represent another area of conflict in the Nigerian Constitution. The vagueness of S12 alone has resulted in the redundancy of a federal act, namely the Child Rights Act. While this Act prohibits child marriage, according to the provisions of Item 61 Part 1 Second Schedule of the Constitution, it is only enforceable in the Federal Capital Territory.<sup>320</sup>

Looked at in the context of S29(4)(b) of the Constitution, the mention in the Fifth Schedule Part 1 of the Code of Conduct for Public Officers of an officer's married children who are younger than eighteen constitutes an admission that the practice of child marriage is the norm.<sup>321</sup> Given the unclear provisions which abound in Nigerian law, as long as there is no legal provision expressly prohibiting child marriage it is obvious that the girl child will not be adequately protected against the practice.<sup>322</sup>

The implications of these conflicts are serious in light of the persistence of child marriage and the state's response. Apart from the child marriage of Senator Yerima in 2010 and Wasila's case,<sup>323</sup> there was the wedding of the

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<sup>315</sup> S6(6)(c) provides The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;

<sup>316</sup> S42 (1) Constitution of the Federal Republic of Nigeria 1999.

<sup>317</sup> Braimah (n 1 above)485.

<sup>318</sup> S12 provides No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly

<sup>319</sup> S19 (9) provides The foreign policy objectives shall be (respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication; although read alongside S6(6)(c), it is also non justiceable.

<sup>320</sup> Item 61 provides exclusive jurisdiction to states to legislate on issues of Islamic and customary marriages and its related issues to the exclusion of the Federal legislative arm.

<sup>321</sup> S29 says full age is 18 years and a married woman is deemed to be of full age.

<sup>322</sup> G OJlon 'Constitution amendment: The rage, festering controversies over marriage' National Mirror 28 July 2013 <http://nationalmirroronline.net/new/constitution-amendment-the-rage-festering-controversies-over-marriage/> (accessed 4 April 2016).

<sup>323</sup> JS Clarke 'Nigeria: Child brides facing death sentences a decade after child marriage prohibited' Guardian 11 March 2015 <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides> (accessed 17 November 2016).

Emir of Katsina to a fourteen year old girl in the latter part of 2016.<sup>324</sup> This was after the case of Ese Oruru which was also argued as being Islamic.<sup>325</sup>

The public celebration of these marriages and subsequent debates, including the response of the Attorney General, speak volumes about the legal uncertainties around the practice of child marriage despite public uproar and reactions.<sup>326</sup> The reason given by the Attorney General for the fact that Senator Yerima was not prosecuted for marrying a thirteen year old Egyptian girl was that the senator had not committed any crime in his state.<sup>327</sup>

The effect of legal conflicts, vagueness and *lacunae* can be clearly seen in the persistence of child marriage in Nigeria despite existing laws and the government's lack of response.<sup>328</sup> The Nigerian government is culpable because the protection of the girl child is its obligation and responsibility.<sup>329</sup> The promulgation of laws to maintain peace and order in society is the

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<sup>324</sup> 'Emir of katsina's marriage to 14 year old Habiba-Reno' Vanguard Oct 15 2016 <http://www.vanguardngr.com/2016/10/emir-katsinas-marriage-14-year-old-habiba-reno/> (accessed 17 November 2016). The premium news reported that it was the emirs aide that married the girl, whether or not she 14 years and thus the marriage should have been illegal except for arguments of Islam. 'Katsina Emirate says marriage of 'abducted' 14-year-old to Emir's aide irreversible' Premium Times October 14 2016 <http://www.premiumtimesng.com/news/top-news/212730-katsina-emirate-says-marriage-abducted-14-year-old-emirs-aide-irreversible.html> (accessed 17 November 2016).

<sup>325</sup> K Baffour 'MURIC director on Ese Oruru and Muslim practices in Nigeria' <https://www.naij.com/754147-child-marriage-nigeria-ese-oruru-muric-islam-nigeria-ishaq-akintola.html> (accessed 17 November 2016) In an interview with founder of MURIC, he said MURIC believes in all Shariah-compliant marriages, regardless of the age of the girl. The sensationalisation of intra-Muslim marriages to the so-called minors is uncalled for and more often than not, done with hidden malice. For your information, we don't have what you call 'child marriage'. We have nikah (Islamic marriage). I affirm clearly, emphatically and unequivocally that what happens among Muslims is strictly a Muslim affair and should remain so as long as it is Shariah-compliant.

<sup>326</sup> Fayokun (n 1 above)464

<sup>327</sup> 'Overcoming challenges of senator yerima's child marriage in Nigeria' Daily Independent [www.dailyindependentng.com/2012/11/overcoming-challenges-of-senator-yerimas-child-marriage-in-nigeria-2/](http://www.dailyindependentng.com/2012/11/overcoming-challenges-of-senator-yerimas-child-marriage-in-nigeria-2/) (accessed 5 February 2016). This was Carol's paper at International Bar Association conference, Dublin, Ireland, Oct 2, 2012. CK Jiduwa 'Attorney General Federation is dancing on senator Yerima and his 13 year old wife' <https://mbasic.facebook.com/notes/charles-kash-iduwah/agf-is-dancing-on-senator-yerima-and-his-13-years-old-wife/>, <http://234next.com/csp/sites/> accessed 5 February 2016. F Aboyade et al 'AGF: Yerima's marriage irresponsible but difficult to prosecute' 11 August 2010 This Day News [www.thisdaylive.com/articles/agf-yerima-s-marriage-irresponsible-but-difficult-to-prosecute/81236/](http://www.thisdaylive.com/articles/agf-yerima-s-marriage-irresponsible-but-difficult-to-prosecute/81236/) (accessed 5 February 2016) the Attorney General had said yerima's act of the marriage was irresponsible and insensitive but we deal with laws as it is not as it ought to be, until there is amendment, it may be pretty difficult for the AG to prosecute Yerima as Yerima argued that it had been contracted under the Islamic law not marriage Act and by Item 61 it is lawful, Yerima has not committed crime as the CRA was enacted to protect the Nigerian child and not any child from another jurisdiction.

<sup>328</sup> As above

<sup>329</sup> AJ Isokpan and E Durojaye 'Impact of the Boko Haram Insurgency on the Child's Right to Education in Nigeria' (2016) 19 PER / PELJ 16 18

responsibility of government, and it cannot be said that the Nigerian government has done so effectively with respect to curbing the practice of child marriage.

### **6.11 Recent legal developments on child marriage in other jurisdictions**

Given the legal position of child marriage in Nigeria, it is important to examine how other countries, particularly those with plural legal systems, have been able to deal with the issue of child marriage. Another issue is to know how other jurisdictions have been able to solve their conflict of law issues. Particularly where customary law and Islamic laws conflict with the human rights provisions, discrimination cases and issues relating to marriage and sexual intercourse.

In Kenya the constitution explicitly provides that any law including customary law that is inconsistent with the constitution is void to the extent of the inconsistency and any act or omission in contravention of this constitution is invalid.<sup>330</sup> The constitution also provides that the general rules of international law shall form part of the law of the country.<sup>331</sup>

These provisions in Kenya are explicit provisions on the application of international law or international principles which is not the case in Nigeria where S12 of the Constitution is often criticised as a restriction to the application and recognition of even ratified treaties.

The Children's Act and the Sexual Offences Act in Kenya have accommodated universal and regional human right treaties, they prohibit early marriage and marriage to a minor respectively.<sup>332</sup>

Sexual cleansing (kusasa fumbi) is an African tradition practiced in parts of Kenya, Zambia, Malawi, Uganda, Tanzania, Mozambique, Senegal, Angola, Ivory Coast, Congo, Ghana and Nigeria.<sup>333</sup> In this tradition, a woman is expected to have sex as a cleansing ritual after her first period, after being

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<sup>330</sup> S2(4) The constitution of Kenya 2010

<sup>331</sup> S2(5) The constitution of Kenya 2010

<sup>332</sup> S15 and S15 Kenya Children Act 2010 Cap 141. S8, 12, 18 Kenya Sexual Offences Act 2006

<sup>333</sup> JRS Malungo 'Sexual cleansing (Kusalazya) and levirate marriage (Kunjililamung'anda) in the era of AIDS: changes in perceptions and practices in Zambia' (2001) 53 *Social Science & Medicine* 371–382

widowed or after having an abortion.<sup>334</sup> The intercourse which can be termed as coerced is usually with a selected future husband in the case of a young girl, and the deceased husband's brother or other relative in the case of a widow, or otherwise by a paid sex worker.<sup>335</sup>

On the application of international treaties, while some countries make provision for the use of international law in interpreting their domestic laws, others do not.<sup>336</sup> The South African Constitution provides this<sup>337</sup> in S39(1) which states that “When interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law; and (c) may consider foreign law.”<sup>338</sup>

The South African Bill of Rights provides that when interpreting any legislation, when developing the common law or Customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>339</sup> Customary law and other legislation are also recognized to the extent that they are consistent with the Bill of Rights.<sup>340</sup>

S19 of the Nigerian Constitution<sup>341</sup> is the closest provision to S39(1) of the South African Constitution, but it is often argued and held to be non-justiciable by virtue of S6(6)(c),<sup>342</sup> despite the provisions of S13<sup>343</sup> and others in the Constitution.<sup>344</sup>

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<sup>334</sup> As above

<sup>335</sup> As above. See also Sexual cleansing, Wikipedia at [https://en.wikipedia.org/wiki/Sexual\\_cleansing](https://en.wikipedia.org/wiki/Sexual_cleansing), (accessed 16 November 2016).

<sup>336</sup> The constitution of Cape Verde provides for this, Namibia constitution too but not the constitution of Zimbabwe (Art 111(b) Constitution of Zimbabwe 1993, even South African Constitution

<sup>337</sup> S39 Constitution of the Republic of South Africa.

<sup>338</sup> S39 (1) (b) and (c) Constitution of the Republic of South Africa.

<sup>339</sup> S39(2) Constitution of Republic of South Africa

<sup>340</sup> S39 (2) and (3) Constitution of the Republic of South Africa.

<sup>341</sup> S19 provides that one of Nigerian foreign policy objectives is the respect for international law and treaty obligations.

<sup>342</sup> S6(6)(c) provides The judicial powers vested in accordance with the foregoing provisions of this section, shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution

<sup>343</sup> S13 Constitution of the Federal Republic of Nigeria 1999 provides It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

<sup>344</sup> S Ibe ‘Beyond justiciability: Realising the promise of socio-economic rights in Nigeria’ (2007) 7 *African Human Rights Law Journal* 237.

On the issue of locus standi, S38 of the Constitution of the Republic of South Africa provides a list of persons with the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, for appropriate relief or mere declaration of rights.<sup>345</sup>

Included in the list are persons acting in their own interest, persons acting on behalf of another person or people who cannot act in their own name, persons acting in the public interest and even associations acting in the interest of its members.<sup>346</sup> These explicit provisions in terms of individuals, groups and even public interest eliminate any uncertainties about the issue of *locus standi*.

Mqingswana is of the opinion that the provisions in the S38 has created the opportunity for legal disputes in the public interest to be litigated and for the courts to pronounce on matters in which the complainant need not have sustained personal damage or injury.”<sup>347</sup>

In the context of child marriage, it can be argued from the provision that anyone is entitled or empowered to bring an action in the interest of an individual girl child, in the interest of girl children as a social group or in the public interest.<sup>348</sup> Public interest in such a case will be interpreted as meaning “general welfare,”<sup>349</sup> the common good or even “national interest” which, in light of the impact of child marriage on society, would not be out of place.<sup>350</sup>

In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, And Another*,<sup>351</sup> the applicants were held to have legal standing to

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<sup>345</sup> S38 Constitution of Republic of South Africa

<sup>346</sup> S38(a) – (e) Constitution Republic of South Africa 1996

<sup>347</sup> Unpublished: B Mqingswana ‘An Analysis of Locus Standi in Public Interest Litigation with Specific Reference to Environmental Law’: A Comparative Study Between the Law of South Africa and The Law of the United States of America’ unpublished LLM dissertation, University of Pretoria, 2011 1

<sup>348</sup> As above

<sup>349</sup> R Pandey ‘Public interest litigation and child labour: An analysis of the MC Mehta case’ (2016) *ILLI Law Review* 62-63

<sup>350</sup> As above. Fayokun (n 1 above) 469

<sup>351</sup> 2001 (2) SA 609 (E). The matter was ultimately taken on appeal and was reported as *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA).



pursue their respective actions in terms of Subsections 38(b), (c) and (d) of the Constitution.<sup>352</sup>

The situation is even better in India where any member of the public can bring an action. Rather than filing an action, it is even permissible to forward a written letter to the court, particularly when acting *pro bono*. The submission of such a letter is appropriate procedure in terms of Art 32 of the Indian Constitution.<sup>353</sup>

In Canada persons can bring action on behalf of others through the provision called public interest litigation.<sup>354</sup>

On dealing with child marriage specifically, one notable approach identified appears to be legislation expressly prohibiting child marriage and the provision of a specific marriageable age to eliminate any doubt about whether the practice is legal or not.<sup>355</sup> Criminalisation is another measure that has been taken as well as the reform of existing laws to align them with specific legislation for the protection of the girl child.<sup>356</sup>

In Kenya for instance the Marriage Act expressly prohibits child marriage and provides for a penalty.<sup>357</sup> India, a state with multiple religions and a plural legal system, has also promulgated an act prohibiting child marriage,<sup>358</sup> as have Zambia,<sup>359</sup> Malawi<sup>360</sup> and Norway<sup>361</sup> amongst other countries.<sup>362</sup> It is time that Nigeria followed their example.

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<sup>352</sup> As above

<sup>353</sup> Commonwealth Secretariat (1998), "Liberty and Security of the Person in India, with Particular Emphasis on Access to Courts", in *Developing Human Rights Jurisprudence: Volume 7: Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms*: Georgetown, Guyana, 3–5 September 1996, 203 at 212.

<sup>354</sup> Costs and access to justice in public interest environmental litigations submissions to the federal Court of Appeal and Federal Court rules committee, 23 November 2015 2 <http://www.cela.ca/sites/cela.ca/files/Costs-Access-to-Justice-Public-Interest-Envl-Litigation.pdf> (accessed 13 January 2017).

<sup>355</sup> B Maswikwa et al 'Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa' (2015) 41(2) *International Perspectives on Sexual and Reproductive Health* 66

<sup>356</sup> 'Ending Child Marriage in Africa : Opening the Door for Girls' Education, Health, and Freedom from Violence' 9 December 2015 Human Rights Watch <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (accessed 23 January 2017).

<sup>357</sup> S4 Marriage Act of Kenya, Section 87 of the Act further stipulates that it is a criminal offence under the Act to marry a person under 18 years and prescribes a penalty of a maximum of 5 years in jail or payment of a fine of a maximum of 1 million shillings or to both (section 89 of the Act).

<sup>358</sup> Child marriage prohibition Act 2006

<sup>359</sup> Marriage Bill 2015 specifies 18 as the minimum marriageable age.

The Constitutional Court in Zimbabwe recently settled the issue of conflict of law as it affects child marriage through its decision in the case of *Loveness and Another v Minister of Justice, Legal & Parliamentary Affairs N.O.*<sup>363</sup> However, one thing that is clear from all these examples is that to avoid the circumvention of legal processes in marriage rites, a new national definition of marriage based on constitutional reform is necessary.<sup>364</sup>

Countries such as Malawi, Namibia, Lesotho and South Africa have amended their laws,<sup>365</sup> and even Ghana repealed a law that permitted marital rape.<sup>366</sup> The amendments to provisions on rape in these jurisdictions have complied with international standards on the protection of women and in the interest of children.<sup>367</sup> An example is the amended criminal legislation of South Africa, one of its provisions which replaced the common law offence of rape with a broader statutory offence.<sup>368</sup>

The definition of rape in South Africa has been broadened to allow for easier prosecution and marital rape has been made illegal by Section 56 of the Act which provides that “Whenever an accused person is charged with an offence under section 3, 4, 5, 6 or 7 it is not a valid defense for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.”<sup>369</sup>

This was in response to the fact that South Africa has one of the highest rape rates in the world, including the rape of children and infants.<sup>370</sup> In this

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<sup>360</sup> ‘Malawi bans child marriage lifts minimum age to 18’ World News- REUTERS 16 February 2015 <http://uk.reuters.com/article/uk-malawi-childmarriage-law-idUKKBN0LK1Y920150216> (accessed 23 January 2017)

<sup>361</sup> S222 Norway’s Penal Code criminalises forced marriage. Unpublished: KM Winther ‘Forced Marriages In a Human Rights and Women’s Rights Perspective, Exemplified through Norwegian and Pakistani Legislation’ unpublished graduate thesis. The University of Oslo, 2006 49-53

<sup>362</sup> This has been discussed extensively in chapter 5 of this thesis.

<sup>363</sup> Judgment No CCZ 12/2015, Const. Application No 79/14, also at [www.veritaszim.net](http://www.veritaszim.net), accessed on 5/2/2016

<sup>364</sup> CU EZE-NLIAM ‘A Legal Axis of Confusion: The Nigerian Experience’ [https://www.academia.edu/734824/A\\_Legal\\_Axis\\_of\\_Confusion](https://www.academia.edu/734824/A_Legal_Axis_of_Confusion) (accessed 4 April 2016).

<sup>365</sup> L Oette Criminal law reform and transitional justice: Human right perspective, 2013.

<sup>366</sup> S42 (g) Ghana’s Criminal Code 1960, Act 29.

<sup>367</sup> Oette (n 364 above)

<sup>368</sup> Sexual Offences and Related Matters) Amendment Act 2007

<sup>369</sup> S6 South Africa’s Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007

<sup>370</sup> FACTSHEET: South Africa’s 2014/15 assault and sexual crime statistics, Factsheets & Guides Africa Check <https://africacheck.org/factsheets/factsheet-south-africas-201415-assault-and-sexual-crime-statistics/> (accessed 23 January 2017)

regard, the South African criminal provision on rape has also been revised in order to expand the definition even though there is no provision which legalises forced sexual intercourse with a minor.<sup>371</sup>

Zambian law criminalises sexual offences against children<sup>372</sup> and there is no provision that excludes intercourse with a married child from being deemed criminal. In Kenya, the requirement of corroboration to prove cases of rape was declared discriminatory and unconstitutional by the Court of Appeal in the famous case of *Mukungu vs The Republic*.<sup>373</sup>

Constitutional developments in most jurisdictions, including Zambia, Kenya and South Africa, have involved the introduction of gender-friendly terms in place of the male gender pronoun,<sup>374</sup> and Nigeria should do the same.

These are all positive examples which Nigeria should emulate to ensure the protection of the girl child against sexual abuse and even possibly against child marriage, but the government is yet to institute such reforms.

One way of solving the problem of conflicting laws is to avoid arbitrariness. To this end, the law must be concise and specific,<sup>375</sup> which is why this thesis recommends the promulgation of a specific child marriage prohibition act with clear provisions on the issue as well as the reform of existing and related laws to remove the *lacunae*, vagueness and arbitrariness that are the source of conflicts.

## **6.12 Legal solutions to the problem of child marriage**

Dealing with the problem of child marriage in Nigeria requires much more than mere press releases, ceremonial outings, national policies or education

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<sup>371</sup> Criminal Law (Sexual offences and Related Matters) Amendment Act 2007, although it has been argued that the same law permits sexual acts between children or minors though not between an adult and a minor, see the case of *The teddy bear clinic for abused children and 1 Other v Minister of Justice and Constitutional Development & 5 Others* Case CCT 12/13 {2013} ZA CC 35

<sup>372</sup> S137 and S138 of the Zambian Penal Code

<sup>373</sup> (2003) AHRLR 175 (KeCA 2003).

<sup>374</sup> The constitutions of these countries are gender neutral. For example S44(2)(a) A person belonging to a cultural or linguistic community has the right with other members of that community to enjoy the person's culture and use the person's language. The Nigerian constitution still uses the term "He" throughout the constitution.

<sup>375</sup> JL Cohen *Regulating intimacy* 2002 12

of the girl child.<sup>376</sup> The issue must be attacked strategically on all fronts and using all possible measures, including and especially the law.<sup>377</sup> To date, the possibility of specific legislation (a draft of which is proposed in this thesis) has not been explored.<sup>378</sup>

Braimah<sup>379</sup> has suggested that a child marriage prohibition act may be necessary although Nwauche<sup>380</sup> is of the opinion that there are sufficient provisions within the laws of Nigeria to constitute the prohibition of child marriage, particularly provisions on human rights he also advocated an agreeable marriageable age.<sup>381</sup>

Nour was of the opinion that protective laws for the girl child against the practice have been ineffective so far.<sup>382</sup> The position of this thesis is in agreement with Braimah in light of the fact that conflicts of law have rendered existing laws ineffective, and an act specifically prohibiting child marriage may therefore be useful.<sup>383</sup>

Potential arguments against such prohibition are that imposing a law will merely drive the practice underground rather than eliminating it, or that it could lead to unrest as Muslims may see it as an attack on their religion.<sup>384</sup> Others may point to the failure or non-enforcement of already existing laws,<sup>385</sup> but this thesis has shown that the reason for this is the confusion created by conflicting legal provisions. It should be remembered that existing laws made it possible for Senator Yerima to evade prosecution for

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<sup>376</sup> A Ukwuoma 'The state of child marriage in Nigeria' 4 November 2013 Plaintalk [www.plaintalkbm.com/nigeria-2/](http://www.plaintalkbm.com/nigeria-2/) (accessed on 18/8/2015).

<sup>377</sup> As above.

<sup>378</sup> The Appendix to this thesis contains a draft of the child marriage prohibition Act as prepared by the researcher as a solution to the legal protection of the girl child against child marriage in Nigeria

<sup>379</sup> Braimah (n 1 above) 488

<sup>380</sup> Nwauche (n 193 above) 427.

<sup>381</sup> Nwauche (n193 above) 432

<sup>382</sup> NM Nour 'Child Marriage: A Silent Health and Human Rights Issue' (2009)2 (1)*Reviews in Obstetrics & Gynecology* 53

<sup>383</sup> Braimah (n 1 above) 488

<sup>384</sup> Unpublished: A Bunting 'Particularity of rights, diversity of contexts: Women, international law and the case of Early marriage' unpublished Doctoral thesis, University of Toronto(1999)9-10.

<sup>385</sup> OS Akinwumi 'Legal impediments to on the Practical Implementation of the Child Rights Act 2003' (2009) 37 *International Journal of Legal Information* 385, 392. Like the Child marriage Acts 2003 which is a general provision not child marriage specific and a domestic law with an international flavour which brings the argument of relativism to bear, or the long forgotten colonial Child marriage Restraint Act which is nowhere in the memory of people.

his marriage to a child because of the conflicts of law<sup>386</sup> discussed in this thesis.<sup>387</sup> It is the author's belief that enforcement will only be possible and realistic if these conflicts are addressed.

Finding a solution to the continued practice of child marriage in Nigeria will involve both a legal and sociolegal approach to the challenges identified.<sup>388</sup> The importance of the legal aspect cannot be overemphasised since it is the central point of this discourse and of the solution. For example, attempts to eradicate poverty and ignorance will of necessity involve policies or legislation.<sup>389</sup>

A marriageable age has to be imposed through legislation, and the involvement of customary and religious leaders to mobilise community support for the elimination of child marriage will require a law or policy that empowers them to do so.<sup>390</sup>

The legal approach will be a holistic one involving the legislature and judiciary as well as enforcement and the application of domestic and, where possible, international legal mechanisms.<sup>391</sup> Appropriate legislation will be a great step in the right direction for the eradication of child marriage and the protection of the girl child against the practice.<sup>392</sup>

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<sup>386</sup> SK Kigbu & YB Hassan 'Legal Framework for Combating Human Trafficking In Nigeria: The Journey So Far' (2015) 38 *Journal of Law, Policy and Globalization* 215. Child marriage has for long been an issue of conflicting laws. E Warner 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2004) 12 *American University Journal of Gender, Social Policy & the Law* 243-244

<sup>387</sup> 'Child marriage not in conformity with Nigerian law' Vanguard 27 July 2013 <http://www.vanguardngr.com/2013/07/child-marriage-not-in-conformity-with-nigerian-law/> (accessed 11 April 2016).

<sup>388</sup> Ending Child Marriage: Progress and Prospects. 2014, UNICEF, New York: 'How to end child marriage, Action Strategies for Prevention and Protection' 2007 International centre for research on women, Washington DC, USA.

<sup>389</sup> EO Osakinle, FO Ibimiluyi, HF Okunade 'Combating Child Marriage Through Education in Sub-Saharan Africa' (2015) 4 *Kuwait Chapter of Arabian Journal of Business and Management Review* 13-15.

<sup>390</sup> As above

<sup>391</sup> 'Ending child marriage in Africa' A brief by Girls Not Brides <http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf> (accessed 14 January 2017). National action plan that will include reform of laws generally and specifically specifying marriageable age

<sup>392</sup> Braimah (n 1 above) 487. A Powell 'African Union Pledges to Stop Child Marriage' VOA 26 November 2015 <http://www.voanews.com/content/african-union-pledges-to-stop-child-marriage/3074812.html> (accessed 11 April 2016). Also N Cole 'Strengthening linkages between child protection and social protection systems in Nigeria' Project Briefing, NO 62, September 2011, 4. Potential child protection link include legislation. Overseas Development Institute, at [www.odi.org.uk](http://www.odi.org.uk) (accessed 11 April 2015).

The following discussion of possible solutions to the problem covers legislation to prohibit child marriage and provide a specific marriageable age,<sup>393</sup> criminalisation of the practice and the harmonisation and reform of existing laws.

### **6.12.1 Specific legislation on child marriage**

The first step in eradicating child marriage in Nigeria is the promulgation of a child marriage prohibition act. Research has shown that conflicts of law have rendered the various existing laws ineffective and insufficient for the protection of the girl child against the practice.<sup>394</sup>

Legislation was not a popular solution in the past but has recently become the trend in several jurisdictions.<sup>395</sup> Legislations on child marriage commonly includes prohibiting, criminalising and specifying minimum marriageable age.<sup>396</sup> The United Kingdom has promulgated a law to criminalise child and forced marriages in the country's migrant communities,<sup>397</sup> and the practice was criminalised in England and Wales in 2014.<sup>398</sup>

In 2011, Scotland also passed the Forced Marriage Act which criminalises forced marriage, empowers the courts to issue protection orders based on the needs of the victim and makes violation of those orders a criminal offence.<sup>399</sup>

Although there was a Child Marriage Restraint Act in India for years, that country recently enacted a Child Marriage Prohibition Act.<sup>400</sup> In 2011,

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<sup>393</sup> As above.

<sup>394</sup> NM Nour 'Health Consequences of child marriage in Africa' (2006) 12(11) *Emerging Infectious Diseases* 1644.

<sup>395</sup> 'Child Marriage in India: Achievements, Gaps and Challenges Response to Questions for OHCHR Report on Preventing Child, Early and Forced Marriages for Twenty-sixth Session of the Human Rights Council, [ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/HAQCentreForChildRights1.pdf](http://ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/HAQCentreForChildRights1.pdf) (accessed 14 January 2017).

<sup>396</sup> B Maswikwa et al 'Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 59, 65-66.

<sup>397</sup> Forced Marriage Civil Protection Act 2007.

<sup>398</sup> Anti-Social Behaviour, Crime and Policing Act. 2014.

<sup>399</sup> Scotland Forced Marriage Act 2011

<sup>400</sup> Child marriage restraint Act 1929 reviewed, now Child Marriage Prohibition Act 2015

Pakistan passed the Prevention of Anti-Women Practices Bill and the Criminal Law Bill which amended the country's Penal Code and Code of Criminal Procedure. The Prevention of Anti-Women Practices Bill makes it unlawful to "compel or arrange or facilitate" the marriage of a woman, punishing violations with imprisonment of three to seven years and a fine of five hundred thousand rupees. Pakistan also established a National Commission on Women.<sup>401</sup>

### **6.12.1.1 Justification for specific legislation**

To start with, legislation prohibiting child marriage is provided for in international and regional treaties and is recommended by the various treaty bodies.<sup>402</sup> The African Charter on the Rights and Welfare of the Child, the Convention on the Rights of the Child, the African Charter on Human and People's Rights and the Maputo Protocol on the Rights of Women, the Convention on the Elimination of Discrimination against Women, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights have all been mentioned in this regard.<sup>403</sup>

Secondly, legislative promulgation is the recent trend in attempts to eradicate child marriage as seen in several jurisdictions.<sup>404</sup> In some jurisdictions like Kenya<sup>405</sup> and South African,<sup>406</sup> legislation has included the inclusion of children's rights in the national constitution.<sup>407</sup>

Thirdly, as an instrument of social change, the law should be alive to the needs of and developments in social thinking.<sup>408</sup> Laws provide the

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<sup>401</sup> The Prevention of Anti Women Practices Bill of Pakistan

<sup>402</sup> Universal human rights instruments, United Nations Human Rights Office of the High Commissioner

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> (accessed 14 January 2017).

<sup>403</sup> The details of these are discussed in chapter 5 of this thesis.

<sup>404</sup> Forced Marriage Civil Protection Act 2007 in UK, The Anti Social Behaviour, Crime and Policing Act 2014 in UK, Scotland forced Marriage Act 2011, Child Marriage Prohibition Act 2015 in India.

<sup>405</sup> S21(3)Kenya Constitution

<sup>406</sup> S28 The constitution of the Republic of South African. 'Do children have rights?' Center for child law at <http://www.centreforchildlaw.co.za/children/your-rights> (accessed 14 January 2017).

<sup>407</sup> G Odongo 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms' (2012) 1 *African Human Rights Law Journal* 121-122

<sup>408</sup> S.Durgalakshmi, R.Ammu 'Law as an instrument of social change and for empowerment of the masses' (2015) 5(12) *Indian Journal of Applied Research* 130

framework for action against child marriage which could be through the reform of existing laws, enactment of laws and enforcement.<sup>409</sup>

Nwagbara is of the view that “No meaningful development can be achieved in an atmosphere devoid of orderliness. Law seeks to control not only human beings, but also Social Institutions, some of which are direct creatures of the Law itself. It is the duty of law to ensure that the integrity, security and well-being of the State and citizens are not jeopardized”.<sup>410</sup>

In Nigeria, legislation has often been employed to prohibit or regulate other social issues.<sup>411</sup> It would be expedient and should be possible in the case of child marriage too.<sup>412</sup> Considering the role of conflicts of law in the continued practice of child marriage in Nigeria, one way to make it clear that the practice is not legal would be a reference law on its prohibition.<sup>413</sup>

Law was used to make it clear that same sex marriage is illegal in Nigeria, despite the fact that same sex intercourse was already illegal in the country.<sup>414</sup> The fact that the Criminal and Penal Codes<sup>415</sup> already criminalise same sex intercourse did not stand in the way of the promulgation of the Same Sex Marriage (Prohibition) Act in 2013.<sup>416</sup>

Similarly, the existence of provisions in Nigeria’s Criminal and Penal Codes on assault and similar offences were not seen as obviating the need for the promulgation of the Violence against Persons (Prohibition) Act.<sup>417</sup>

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<sup>409</sup> ‘Child marriage’ UNPFA <http://www.unfpa.org/child-marriage> (accessed 14 January 2017). ‘Nigeria: Child brides facing death sentences a decade after child marriage prohibited’ The Guardian 11 March 2015 <https://www.theguardian.com/global-development-professionals-network/2015/mar/11/the-tragedy-of-nigerias-child-brides> (accessed 14 January 2017).

<sup>410</sup> C Nwagbara ‘The efficacy of the law as an instrument of social control in Nigeria’ 2015 3(1) *International Journal of Business & Law Research* 44.

<sup>411</sup> Nwagbara (n 409 above)46

<sup>412</sup> Braimah (n 1 above)488. R Omote ‘Law: a strategic tool for social engineering’ The Lawyers Chronicle <http://www.thelawyerschronicle.com/law-a-strategic-tool-for-social-engineering/> (accessed 1 November 2016).

<sup>413</sup> Fayokun (n 1 above)465

<sup>414</sup> Anti same sex marriage Act

<sup>415</sup> S214, S215 and S217 Criminal Code and S284 Penal Code.

<sup>416</sup> E Obidimma & A Obidimma ‘The Travails of Same-Sex Marriage Relation under Nigerian Law (2013)17 *Journal of Law, Policy and Globalization* 42

<sup>417</sup> Violence against person’s prohibition Act 2015



So far only legislative attempt is yet to be thoroughly applied in child marriage eradication,<sup>418</sup> this is because specific legislation has not yet been promulgated<sup>419</sup> but has become necessary. Legislation on child marriage would not be out of place considering the function of law in societies.<sup>420</sup> Such legislation called for by global and regional instruments on the issue of child marriage.<sup>421</sup>

Government is a role player not just role model and has a legislative obligation to protect the rights of all citizens, particularly the vulnerable ones.<sup>422</sup> The Nigerian government can be faulted for the state of affairs given that legislation and enforcement of the law are the responsibility of the governments and Nigeria is no exception.<sup>423</sup> If government recognised child marriage for the major problem it is and as a crime against humanity, particularly the girl child,<sup>424</sup> it would see the need for action. In the expedience of the matter therefore a law expressly prohibiting the practice is not too much to ask.

It can therefore be argued that there is a need for home grown legislation which is specific on the prohibition of child marriage in Nigeria.<sup>425</sup> While the Child Rights Act contains provisions on child marriage,<sup>426</sup> it is a general law with respect to children and not marriage specific.<sup>427</sup> In addition, the acceptance of the Act's provision on marriageable age by all the constituent

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<sup>418</sup> Outcomes of the 17th UPR session Final adoption Country Reports UN Human Rights Council - 25th session 7 at <http://ilga.org/wp-content/uploads/2016/02/Outcomes-of-the-17th-UPR-session-Final-adoption-Country-Reports-UN-Human-Rights-Council-25th-session.pdf> (accessed 14 January 2016).

<sup>419</sup> INFORMATION SHEET: The Child's Rights Act, August 2007 UNICEF [https://www.unicef.org/wcaro/WCARO\\_Nigeria\\_Factsheets\\_CRA.pdf](https://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf) (accessed 14 January 2017) The Child Rights Act is child specific but not child marriage specific.

<sup>420</sup> Nwagbara (n 370 above)46

<sup>421</sup> For example Art 19 UNCRC, State parties shall take specific legislative measures ..., also S16 African Charter on the Rights and Welfare of the Child.

<sup>422</sup> The provisions of international and regional treaties name the government as role actor. 'Child marriage around the world: Nigeria' <http://www.girlsnotbrides.org/child-marriage/nigeria/> (accessed 12 April 2016) the present first lady promised her support for child marriage prohibition legislation.

<sup>423</sup> S4 Constitution of the Federal Republic of Nigeria 1999. Asein (n 19 above)27

<sup>424</sup> Fayokun (n 1 above) 465. Probably not from the view of relativism or provisions of international standards but in the reality of its effect on the girl child and society particularly in the North of Nigeria.

<sup>425</sup> Braimah (n 1 above) 488.

<sup>426</sup> S21CRA 2003, it says no person under 18 years is capable of contracting a child marriage and nullifies such marriage, but it does not expressly prohibit the practice although it provides punishment for it- S23 (a) (d) CRA.

<sup>427</sup> See Title- An Act to provide and protect the right of the Nigerian child and other related matters 2003.

states in Nigeria has been stymied by a contradictory constitutional provision.<sup>428</sup>

While it can be argued that another Federal Act will probably face the same challenges, the fact is that enforcing existing provisions on child marriage has been difficult because there is no nationally binding reference law as a basis for prosecution - a gap which the act proposed in this thesis would fill.

Specific legislation on child marriage will in any event do no harm, barring the fear of threats from Muslim quarters,<sup>429</sup> and the fact that the Boko Haram saga<sup>430</sup> and the scourge of the Shiite<sup>431</sup> or Fulani cattle rearers<sup>432</sup> could be cause for concern. The question is whether such fears are sufficient reason to continue to jeopardise the lives and future of Nigerian girls and sacrificing the development of Nigerian society at the altar of religious and cultural beliefs or argued rights.

A child marriage prohibition Act may also be necessary as evidence of state action or response on the issue of the protection of the girl child.

A major obstacle to the promulgation of the proposed national legislation is the fact that the federal government cannot legislate on Islamic marriage which falls under the state legislative list. It is important that the proposed act not suffer the same fate as the Child Rights Act.<sup>433</sup>

The question is whether it is possible to dodge the notorious provision of the Constitution's Item 61 and pass legislation prohibiting child marriage that will apply throughout the country. While one way of dealing with these

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<sup>428</sup> Item 61, Part 2, 2<sup>nd</sup> Schedule of the CFRN 1999 which gives states exclusive jurisdiction to make laws in relation to Islamic and customary marriages

<sup>429</sup> M Mark 'Nigerian child brides: decadent customs nullify progressive laws' *The Hindu* 4 September 2013 [thehindu.com/todays-paper/tp-international/nigerian-child-brides-decadent-customs-nullify-progressive-laws/article5091709.ece](http://thehindu.com/todays-paper/tp-international/nigerian-child-brides-decadent-customs-nullify-progressive-laws/article5091709.ece) (accessed 12 April 2016). MU Abubakar 'Child's Rights Act: Critical Analysis from the Islamic Perspective GLOBAL NETWORK FOR ISLAMIC JUSTICE NIGERIA <http://www.gamji.com/article4000/NEWS4861.htm> (accessed 12 April 2016).

<sup>430</sup> AF Ahokegh 'Boko Haram: A 21st Century Challenge in Nigeria' (2012) 8(21) *European Scientific Journal* 46

<sup>431</sup> A Alabelewe 'El-Zakzaky's Shi'ite group and its many controversies' *The Nation* 15 December 2015 <http://thenationonlineng.net/el-zakzakys-shiite-group-and-its-many-controversies/> (accessed 12 April 2016).

<sup>432</sup> ME Ochonou 'The Fulani Herdsmen Threat to Nigeria's Fragile Unity' *Sahara Report* 8 March 2016 <http://saharareporters.com/2016/03/08/fulani-herdsmen-threat-nigeria%E2%80%99s-fragile-unity-moses-e-ochonu> (accessed 12 April 2016).

<sup>433</sup> Item 61, Part 1 Second Schedule of the 1999 Constitution. .

problems would be to pass specific legislation,<sup>434</sup> the question is whether this would be constitutional or not.

International law obliges Nigeria to refrain in good faith from promulgating acts which would defeat the objectives and purpose of a treaty to which the state has appended its signature and ratification.<sup>435</sup> Any domestic provision which is contrary to this obligation is then essentially unlawful or at least conflicting.<sup>436</sup>

Is it possible to access constitutional provisions to support a home grown child marriage prohibition act? It should be noted that all of these provisions are subject to S1 of the Constitution and particularly S1(3) which nullifies any law that is contrary to the provisions of the Constitution.

Several other sections of the Constitution are also relevant and can be applied to the issue of child marriage, such as S42 on non-discrimination.<sup>437</sup> Girls who live in a state with a law which recognises child marriage are discriminated against, while girls in other states are not. This is contrary to S42. The Child Rights Law in Nigeria's Northern states which specifies puberty as marriageable age can also be considered discriminatory<sup>438</sup> and in violation of S4(5) of the Constitution and thereby void.

A child marriage prohibition Act can reasonably be argued as necessary on the basis of the same constitutional provision.<sup>439</sup>

Again, Section 45(1) provides that "Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defense, public safety, public

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<sup>434</sup> Braimah (n 1 above) 488.

<sup>435</sup> Art 18 Vienna Convention on the Law of Treaties

<sup>436</sup> section 29(4)(b) of the 1999 constitution is clearly in contravention of Nigeria's international obligation under these treaties as The 1999 constitution came into force after Nigeria became a state party to the UNCRC.

<sup>437</sup> Nwauche (n193 above) 424

<sup>438</sup> Braimah n 1 above) 481. Jigawa state child rights law which provides puberty as the marriageable age.

<sup>439</sup> If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.

order, public morality or public health (b) for the purpose of protecting the rights and freedom of other persons”.<sup>440</sup>

Child marriage is not in the interests of the protection and security of the girl child, the society in which it is practised or the development and stability of Sub-Saharan Africa.<sup>441</sup> It is the immoral and abominable practice of having sexual intercourse with children who have no understanding of the act or its repercussions.<sup>442</sup>

The public celebration of child marriages is an issue of public morality which should be seen and treated as such.<sup>443</sup> This standpoint is supported by the fact that unlawful carnal knowledge and defilement fall under the title of “offences against morality” in Nigeria’s Criminal Code.<sup>444</sup> Child marriage also leads to a cycle of poverty which affects the general development of the society.<sup>445</sup>

That the provision in Section 45(1)(a) of the Constitution takes public health into consideration is commendable and relevant as child marriage is associated with grave medical risks for the girl child, including fistula which is prevalent in the Northern states, and teen pregnancy which is linked to maternal deaths and infant mortality.<sup>446</sup>

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<sup>440</sup> S45(1)CFRN 1999

<sup>441</sup> GT Lemmon & LS ElHarake ‘Child brides, global consequences- How to end child marriage’ July 2014 vii, 4 [www.cfr.org/child-brides-global-consequences/p33284](http://www.cfr.org/child-brides-global-consequences/p33284) (accessed 8 January 2016). R Vogelstein ‘Child marriage in Latin America’ 4 August 2015 Council on Foreign Relations blogs.cfr.org/women-around-the-world/2015/08/04/child-marriage-in-latin-america/. R Vogelstein ‘Ending child marriage and advancing US Policy’ 31 July 2013 csis.org/event/ending-child-marriage-and-advancing-us-policy (accessed 8 January 2016).

<sup>442</sup> As above. B Awosusi ‘Why you must stand up against child marriage in Nigeria’ MDGs in Africa Word Press 21 July 2013 <https://mdgsinAfrica.wordpress.com/201/07/21why-you-must-stand-up-against-child-marriage-in-nigeria/> (accessed on 8 January 2016). ‘Are there benefits of child marriage’ [www.debate.org/opinions/are-there-benefits-child-marriage](http://www.debate.org/opinions/are-there-benefits-child-marriage) (accessed 3 January 2016). A child needs education and play, not house work and mothering, this amounts to deprivation of childhood.

<sup>443</sup> As above.

<sup>444</sup> Chapter 21 Criminal Code Act

<sup>445</sup> ‘What is the impact of Ukuthwala on the community’ <http://www.justice.gov/docs/articles/2009/ukuthwala-kidnapping-girls.html> (accessed 6 January 2016). The same is also the case in Nigeria where this problem has affected the development of the area, high level of high illiteracy in girl children, prostitution, which has been linked or connected to child marriage.

<sup>446</sup> S Tangri ‘The impact of early marriage: Domestic violence and sexuality’ Breakthrough TV 28 August 2013 [www.breakthrough.tv/earlymarriage/20133/08/impact-early-marriage-domestic-violence-sexuality/](http://www.breakthrough.tv/earlymarriage/20133/08/impact-early-marriage-domestic-violence-sexuality/) (accessed 3 January 2015). The family of the girl bride who murdered her husband were put at risk in the society by her behaviour. Also much of government fund in the North is expended on the treatment of the huge population of fistula patients in hospitals, and again the huge

Without directly focusing on marriage in terms of Islam, it can be argued that the National Assembly is mandated by Section 45(1)(a) of the 1999 Constitution to pass a law prohibiting child marriage. Such an Act is also supported by Section 45(1)(b) on the rights and freedom of other persons, since child marriage infringes on the rights of the girl child in several ways including her right to life, health and dignity.<sup>447</sup>

Item 61 can also be bypassed through the application of the constitutional provisions of S1(3) which state that “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall, to the extent of the inconsistency, be void.” In this case state laws which are contrary to the general provision should be void.

### **6.12.2 Harmonisation or unification of laws**

Another solution to child marriage is Harmonisation. Nigeria’s existing laws need to be unified and customary laws brought in line with a culture of respect for the female.<sup>448</sup> Harmonisation will resolve the dilemmas associated with the choice of law and jurisdiction and the recognition and enforcement of foreign laws on the protection of the girl child.<sup>449</sup> Harmonisation will entail a broad review of existing laws and policies and consolidation of laws relating to children, including adhoc amendments and formulation such related laws targeting existing or new issues and leading to specific amendments or statutes on particular issues.<sup>450</sup>

Traditional and religious laws must be harmonised with state laws and state laws unified with international law.<sup>451</sup> The ideal would be to follow the

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number of prostitutes in the North is attributed to the child marriage practice. AS. Erulkar & M Bello *The experience of married adolescent girls in northern Nigeria* 2007 9

<sup>447</sup> G Kangaude & T Banda ‘Sexual health and rights of adolescents: A dialogue with sub-saharan Africa’ in C Ngwenya & E Durojaye(eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 254.

<sup>448</sup> ME Nwocha ‘Customary Law, Social Development and Administration of Justice in Nigeria’ (2016) 7(4) *Beijing Law Review*, 431

<sup>449</sup> ‘In the best interest of the child, Harmonising Laws on Children in West and Central Africa’ 2011, 8.

<sup>450</sup> As above

<sup>451</sup> Human rights from the international expert consultation to address harmful practices against children, 13<sup>th</sup>-15<sup>th</sup> June, 2012, Addis Ababa, Ethiopia

example of South Africa's provision for the interpretation of customary and common law on the basis of the Bill of Rights.<sup>452</sup>

Kenya's model post-independence marriage law provides that all marriages must be registered while still allowing for the practice of customary and religious marriages.<sup>453</sup> The 2014 Kenya Marriage Act expressly prohibits marriage for anybody under eighteen years.<sup>454</sup>

It should be noted that the South African situation was not achieved immediately. When the property issues relating to customary marriage and divorce were addressed in the post-apartheid dispensation, a compromise was reached between customary and international equality norms.<sup>455</sup> South Africa also has a Civil Marriage Act which, although not applied by the Muslim and Hindu communities, is the basis for many court cases in the country.<sup>456</sup>

In a plural legal system such as Nigeria's, the harmonisation of laws on a particular issue (in this case child marriage) not only involves compromise but must comply with the CEDAW's provisions on minimum marriageable age. Olowu<sup>457</sup> is of the opinion that the Islamic laws or legal system allow for this. Nzarga also maintains that in the best interest of the girl child and vulnerable sectors of society, all laws should be harmonised with human rights.<sup>458</sup>

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<sup>452</sup> S39 (2) The constitution of the Republic of South Africa, 1996. Although in that constitution Islamic law is not mentioned which is a factor in the Nigerian case.

<sup>453</sup> S53-57 Kenya Marriage Act 2014

<sup>454</sup> S4 Kenya Marriage Act 2014 provides that a person shall not marry unless that person has attained the age of 18 years. S2 provides that a child is anyone who has not attained the age of 18 years.

<sup>455</sup> RH Kaddari and MA Freedom 'Economic consequences of marriage and its dissolution: Applying a Universal equality norm in a fragmented Universe' (2012)13:1 *Theoretical inquiries in law* 356-357.

<sup>456</sup> As above. Adopted in 1998.

<sup>457</sup> D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 12(2) *Law, Democracy & Development* 63.

<sup>458</sup> FD Nzarga 'Impediments to the Domestication of Nigeria Child Rights Act by the States' (2016) 6(9) *Research on Humanities and Social Sciences* 129

The intention is not to cancel the practice of customary laws or to criticise the plural legal system per se, but to ensure that no system of law escapes the test of time and effectiveness.<sup>459</sup>

The first step in the harmonisation process would be to analyse each of Nigeria's three legal systems in terms of their relevance to international human rights and development.<sup>460</sup> Currently Islamic law in particular and even the Nigerian constitution in S29(4)(b) is said to be lacking in this regard and to belong to a long outdated era, especially where the practice of child marriage is concerned.<sup>461</sup>

Rabb<sup>462</sup> and An Naim<sup>463</sup> are of the opinion that Islamic law is open to reform in compliance with international standards although there are others who disagree with this view.<sup>464</sup> Islamic countries such as Algeria<sup>465</sup>, Palestine<sup>466</sup> Sri Lanka,<sup>467</sup> Morocco<sup>468</sup> and Yemen<sup>469</sup> have reformed their laws in order to make them CEDAW complaint.

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<sup>459</sup> CJ Abara 'Child marriage/Betrothal in Nigeria' 2011, being a paper prepared for circulation at the second International conference of the federation of human right museums for 10 -13 October 2011, at the International slavery museum, Liverpool, UK, with the theme Fighting for equality: Social change through human rights activism and the sub theme: Modern slavery at [www.fihrm.org/documents/JulieChinweAbara.doc](http://www.fihrm.org/documents/JulieChinweAbara.doc) (accessed 18 August 2015).

<sup>460</sup> Nzarga (n 458 above) 123. In the paper, the author analysed the Child Rights Act in Nigeria in the light of its provisions as proceeding from the CRC and the African Charter on the Rights and welfare of the child.

<sup>461</sup> Fayokun (n 1 above) 462, 464.

<sup>462</sup> Intisar Rabb 'Internal Reform of Islamic Family Law through Evolving Standards of...Religion' JOTWELL (September 13 2013) (reviewing John Hursh, *Advancing Women's Rights Through Islamic Law: The Example of Morocco*, 27 *Berkeley J. Gender L. & Just.* 252 (2012)), <http://family.jotwell.com/internal-reform-of-islamic-family-law-through-evolving-standards-of-religion/> (accessed 14 January 2017).

<sup>463</sup> AA Naim 'Islamic Law, International Relations, and Human Rights: Challenge and Response' (1987) 20(2) *Cornell International Law Journal* 333

<sup>464</sup> R Eslami-Somes 'Human rights and Islamic reform' in Q-ul Huda(ed) *Crescent and Dove: Peace and conflict resolution in Islam* (2010) 137-138. I Cismas *Religious actors and international law* (2014) 304.

<sup>465</sup> The Family Code amended in 2005, Art 4. 9 Marriage is a legal consensual contract entered into by a man and a woman" and that "the marriage contract is concluded by mutual consent between the two spouses". Art 13 prohibits forcing a minor to marry without her consent. Algeria has forbidden guardian consent to compel a woman to marry.

<sup>466</sup> Palestine now has law that marriage without a woman's consent is void. *Mst Humera Mahmood v The State & Others* PLD 1999 Lahore 494.

<sup>467</sup> S Goonesekere and H Amarasuriya *Emerging concerns and case studies on child marriage In Sri Lanka* (2013) 6. In *Guneratnam v Registrar General* (2002) 2 Sri Lanka reports 302 a refusal by a registrar of marriages to register the marriage of a girl under 18 years was challenged by parents on the ground that the law as amended in 1995 retained the requirement of parental consent to marry, and therefore gave parents a right to have such a marriage solemnized. Justice Tillekawardena cited the General Marriage Ordinance provision on the age of capacity to marry, which clearly referred to 18 years, and held that an underage marriage was void, and had no legal consequences, even if the parents expressed their consent to such a marriage. The current Sri Lankan law and policy on early marriage is in harmony with obligations of the State under international law, and specifically as State

### 6.12.3 Legal reform

Another legal solution to child marriage in Nigeria is legal reform. This reform is necessary in order to make human rights accessible to all citizens, particularly in plural legal systems.<sup>470</sup> Such reform must be all inclusive and involve the Constitution as well as legislation and the system of legal administration.<sup>471</sup> Rwezaura suggests that a nation's constitution represents a powerful framework for linking international standards on child rights which have been universally accepted through the ratification of the Convention of the Rights of the Child by the nations of the world.<sup>472</sup>

The reform of laws on violence against children is essential for achieving a robust national legal framework for the protection of children.<sup>473</sup> Law reform is in fact an ongoing process aimed at the explicit and comprehensive prohibition of all forms of violence and there is evidence that it is most successful when promoted through the involvement of all stakeholders in the community.<sup>474</sup>

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Parties to the UN Convention on the Rights of the Child (CRC) and the UN Women's Convention (CEDAW), and local policy statements such as the Children's Charter (1992) and the Women's Charter (1993) that incorporate these commitments.

<sup>468</sup>, 'Morocco eyes law on rape and child marriage' Perspective March 7 2013 <http://english.alarabiya.net/en/perspective/2013/03/07/Morocco-eyes-law-on-rape-and-child-marriage-.html>, AFP Rabat (accessed 18 November 2016). Art 19 Family Code adopted 2004 prohibits marriage of under 18 years. Couples may not be coerced into marriage under any circumstance

<sup>469</sup> 'Yemen: End Child Marriage: Enact Law Establishing Minimum Age: Punish Violators' Human rights watch April 27 2014 <https://www.hrw.org/news/2014/04/27/yemen-end-child-marriage> (accessed 18 November 2016). 'Yemen: End Child Marriage: Use Transition to Set 18 as Minimum Age' Human Rights Watch September 10 2013 <https://www.hrw.org/news/2013/09/10/yemen-end-child-marriage> (accessed 18 November 2016). Yemen has a draft bill on child marriage prohibition. Many other countries in the Middle East and North Africa that recognize Sharia as a source of law have set the marriage age at 18 or higher, with some allowing exceptions in narrow circumstances. These include: Algeria, Egypt, Iraq, Libya, Tunisia, Morocco, Jordan, Oman, and the United Arab Emirates.

<sup>470</sup> Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State Department of justice and constitutional development, South Africa February 2012 3, 5.

<sup>471</sup> NS Okogbule 'Access to justice and Human rights protection in Nigeria: Problems and prospects' (2005) 3(2) *Sur International journal on human rights* 94, 106-108.

<sup>472</sup> B Rwezaura 'Protecting the rights of the girl child in common wealth jurisdictions' in A Brynes et al *Advancing the human rights of women: Using international human right standards in domestic litigation* (1997)126 being Papers and statement from the Asia/ South pacific Regional judicial colloquim Hong Kong 20-22 May 1996 Center for comparative and pubic law, The university of Hong Kong for the common wealth secretariat.

<sup>473</sup> 'Human rights from the international expert consultation to address harmful practices against children' 13th -15th June 2012.Addis Ababa, Ethiopia.

<sup>474</sup> As above.



Post 1990, most states have reviewed their constitutions to accommodate gender equality, eliminate discrimination and include provisions on children.<sup>475</sup> Zambia, Kenya and South Africa are examples of countries which have followed the trend of incorporating children's rights into their respective constitutions.<sup>476</sup> The Nigerian constitution does not contain express or specific provision for children or their rights, legislation of children are still contained in several legislations.<sup>477</sup> In this wise the constitution needs reform.

The Nigerian Constitution's provision on the right of access to court uses the words "his"<sup>478</sup> and "he" 235 times.<sup>479</sup> It is aspects such as these that need to be reformed to align them with internationally accepted standards.

Laws that are old and serve no purpose other than simply being there should not be retained. S12 of the Nigerian Constitution is an example of a relic which should be done away with.<sup>480</sup> The fact that it remains part of the Constitution labels Nigeria as a dualist country, makes a mockery of ratified treaties and renders important human rights seemingly inaccessible to citizens, especially children.<sup>481</sup>

Most countries have also reviewed their criminal and penal provisions on rape, sexual abuse and the age of consent. The Southern African Development Community (SADC) has a model law on the eradication of child marriage,<sup>482</sup> and Malawi amended its Penal Code Act in 2011 to increase the

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<sup>475</sup> F Raday 'Gender and democratic citizenship: The impact of CEDAW (2012) 10(2) *Int J Constitutional Law* 517.

<sup>476</sup> Art 53 Kenya constitution 2010. S28 South African constitution 1996.

<sup>477</sup> TT Bella et al 'Children within the juvenile justice system in Nigeria: psychopathology and psychosocial needs (2010) 8(1) *Annals of Ibadan postgraduate medicine* 35

<sup>478</sup> S36 (1) In the determination of his civil rights and obligations, does this include women, although it proceeds by saying a person shall be entitled to.....

<sup>479</sup> [www.africa4womensrights.org/public/Dossier\\_of\\_claims/Nigeria\\_Uk.pdf](http://www.africa4womensrights.org/public/Dossier_of_claims/Nigeria_Uk.pdf) (accessed 18 June 2015).

<sup>480</sup> E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51(2) *Journal of African law* 251. He said S12 in the Nigerian constitution is merely a historic incidence and an European relic and he referred to the case of *Ibidapo v Lufthansa Airlines* 1997 4 NWLR (Pt 498), where it was said inter alia that Nigeria inherited dualism like any other common wealth country.

<sup>481</sup> As above

<sup>482</sup> 'Model law on eradicating child marriage and protecting children already in marriage' .SADC Parliamentary Forum <http://www.girlsnotbrides.org/wp-content/uploads/2016/10/MODEL-LAW-ON-ERADICATING-CHILD-MARRIAGE-AND-PROTECTING-CHILDREN-ALREADY-IN-MARRIAGE.pdf> (accessed 18 November 2016).

age of sexual consent from thirteen to sixteen years.<sup>483</sup> Malawi also revised its marriage laws through the new Marriage Act which specifies eighteen as the marriageable age.<sup>484</sup>

In Ethiopia, while eighteen is given as the legal age for marriage in the Revised Family Code of 2000, special provisions in the Criminal Code of 2005 (Article 649) criminalise child marriage.<sup>485</sup> The Criminal Code explicitly states that, apart from the exceptions allowed by the Family Code, marriage with someone under the age of eighteen is punishable with imprisonment of up to three years.<sup>486</sup>

The situation in Nigeria calls for certain specific legal actions.<sup>487</sup> A prescribed minimum marriageable age must be instituted as this is not presently in place.<sup>488</sup> Existing marriage laws need to be amended to provide a specific age for marriage where none is currently provided,<sup>489</sup> and the Marriage Act should be amended to consolidate all marriage laws in the country, statutory, customary and Islamic, as was done with the Kenyan Marriage Act of 2014.<sup>490</sup>

Provisions in the Criminal and Penal Codes which exempt marital rape from prosecution, particularly with regard to minors, must be amended.<sup>491</sup> There should be legislation making education compulsory up to the age of at least eighteen years so that government can support, help and encourage parents

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<sup>483</sup> "I've Never Experienced Happiness" 'Child Marriage in Malawi' Human Rights Watch March 6 2014 <https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi> (accessed 18 November 2016).

<sup>484</sup> V Wang 'Ending child marriages – new laws bring progress but hurdles remain' May 2016 <https://www.cmi.no/publications/5802-ending-child-marriages-new-laws-bring-progress-but> (accessed 18 November 2016).

<sup>485</sup> Art 649 Ethiopia criminal code of 2005

<sup>486</sup> As above. Wang (n 484 above)

<sup>487</sup> 'Protecting the girl child: Using law to end child, early and forced marriage and related human rights violation' 2014 12, 16

<sup>488</sup> 'UN Cedaw and CEC observations and recommendations on minimum age of marriage around the world as of Nov 2013 [www.equalitynow.org/childmarriagereport](http://www.equalitynow.org/childmarriagereport) (accessed 7 February 2016). Government attempt to do this has been frustrated by religious argument especially in the North; this will be in fulfilment of states obligation under the child rights Act and Cedaw and will be state response to the occurrence of child marriage in Nigeria.

<sup>489</sup> The Marriage Act and Matrimonial Causes Act do not provide a marriage age, customary laws provide different ages and Islamic law provides maturity, this should be corrected.

<sup>490</sup> The preamble provides AN ACT of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes

<sup>491</sup> S6Criminal Code, S282 Penal Code which exempts sexual intercourse between husband and wife from unlawful carnal knowledge should be amended, alongside its counterpart in the Penal code.

and girls to avail themselves of educational opportunities.<sup>492</sup> While this is already in progress, it has not contributed to the eradication of child marriage.

Nigerian criminal provisions on age and consent also need amending<sup>493</sup> and Chapter 2 of the Constitution must be made justiciable. The Child Rights Act should be fully implemented, particularly in order to ensure that children remain in school until SS3 when they are sixteen or older. Uniform Islamic and statutory marriage certificates should be issued and all marriages registered for purposes of legal validation.<sup>494</sup>

Law enforcement is the final aspect addressed by this thesis statement since those who break a law that has been put in place must be liable for prosecution.<sup>495</sup> A Gender and Child Commission such as that established in Zambia<sup>496</sup> should be put in place to address this and related issues, and there should be an office within the Commission that deals specifically with cases of child marriage.

Not only old laws but also those which are vague or prone to *lacunae* need to be reviewed, S29 of the Constitution being one example.<sup>497</sup> It should be noted that there is no age-related definition of a child anywhere in the Nigerian Constitution, although it does provide the following description of who is considered a child: “child includes a step child, a lawfully adopted child, a child born out of wedlock and any child to whom any individual stands in place of a parent”.<sup>498</sup>

It is in S29 that full age is defined in terms of number of years. It has been argued that S29 is about citizenship not child marriage but it cannot be

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<sup>492</sup> A Davies et al ‘A girls right to say no to marriage- working to end child marriage and keep girls in school’ (2013) 10-11.

<sup>493</sup> This 16 years minimum is a recommendation of committee of expert inclusive of the fact that the law should not allow exceptions to minimum age of marriage without consent.

<sup>494</sup> S Solebo is a magistrate of the family court in Lagos, she is a female, a Muslim and a barrister at law.

<sup>495</sup> As n 487 above. ‘Violence Prevention, the evidence, changing cultural and sexual norms that support violence’ WHO 2009.

<sup>496</sup> Art 263

<sup>497</sup> S29(4)(b) which provides that a married woman is deemed to be of full age.

<sup>498</sup> 5th Schedule interpretation item 19 CFRN 1999

denied that the provision is problematic.<sup>499</sup> Even the provisions on age in the Marriage Act and the Matrimonial Causes Act need to be amended.<sup>500</sup>

Law has to change because society changes along with circumstances with the passage of time. When this happens, some established and previously useful legal solutions obviously become outdated, resulting in conflicts of law. One way of solving the problem is to override old laws with more contemporary ones.<sup>501</sup>

According to Rwezaura,<sup>502</sup> since child marriage is a structural problem, efforts to correct the situation must of necessity be grounded in a strategy where law is an important element of the overall design. Takyo<sup>503</sup> concurs with this, stating that because child marriage is the result of not only one but a combination of factors, the problem has to be attacked from a number of angles, including and especially that of the law.

With a reference law prohibiting child marriage in place and laws reformed and harmonised, the judiciary will have every opportunity to be innovative in the judicious application of the law for the protection of the girl child.

The final step is to engage in enlightening the citizens of the country about the existence of laws for the protection of the girl child.<sup>504</sup>

From the radical feminist perspective, discriminatory attitudes towards and perceptions of the girl child must be changed. The eradication of child marriage will require that the fundamental gender inequalities and discriminatory norms that underpin the practice be dealt with through the

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<sup>499</sup> CJ Abara 'Child marriage/betrothal in Nigeria' 2011 a paper prepared for the second international conference of the federation of human right museums on 10-13 Oct, 2011 at the international slavery museum Liverpool UK [www.fihrm.org/documents/julieChinweAbara-doc](http://www.fihrm.org/documents/julieChinweAbara-doc) (accessed 18 August 2015).

<sup>500</sup> Where the age is not clear the minimum age should be provided where there is none, it should be provided, where it is 23, it should be corrected, all unclear and vague terms should be worked upon.

<sup>501</sup> Q Johnstone 'An evaluation of the rules of statutory interpretation' (1954) 3 *Kansas Law Review* 1954-1955.

<sup>502</sup> Rwezaura (n 472 above). Law alone will not do it but it can lead and educate, to achieve this it must be studied carefully, interpreted dynamically and applied imaginatively, it is in this way that it can provide a basis for social action and a political platform for change. This is because law alone cannot change society but it can guide, lead and educate to create the necessary change.

<sup>503</sup> J E Takyo 'Parliamentary seminar on combating early and forced marriages in Ghana' 2014 wilDAF Ghana.

<sup>504</sup> A Ukwuoma 'The state of child marriage in Nigeria' Plaintalk Nov 4 2013 [www.plaintalkbm.com/nigeria-2/](http://www.plaintalkbm.com/nigeria-2/) (accessed 18 August 2015).

reform of laws and transformation of attitudes.<sup>505</sup> Law reform is therefore a critical component in eliminating practices that are harmful to children.<sup>506</sup>

### **6.13 Summary and conclusion**

Conflicts of law exist in several areas in Nigeria and are particularly apparent with respect to marriage and sex-related issues. It is believed that these conflicts have rendered existing laws for the protection of the girl child redundant and ineffective. There are conflicts between Nigeria's statutory, customary and Islamic systems of law on the age of childhood, the attainment of adulthood and marriageable age. Conflicts on the issue of age and consent also exist within each of these systems, within specific pieces of legislation or laws, within the Constitution itself and between the Constitution and other laws.

The definition of the age of childhood still varies depending on the purpose of the document. The effectiveness of the Child Rights Act is challenged by certain conflicting provisions in the Constitution and Islamic law. Even within the Islamic system of law, schools of thought do not agree on the issues of age and consent or whether the practice of child marriage is essentially Islamic. Only the Maliki School in Nigeria supports the practice of Ijbar whereby the consent of the father or guardian constitutes the bride's consent to marriage.

Many of the provisions within the Nigerian Constitution are contradictory, while some are discriminatory and contrary to human rights provisions. The Constitution has been in use since 1999 with no amendments while there are other jurisdictions with fairly new constitutions that have been aligned with international standards and content. The Nigerian Constitution also fails to define who is deemed a child or to include specific provisions on children as do those of other jurisdictions.

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<sup>505</sup> L Thompson & AM Glinski 'How to end child marriage in a generation' International centre for research on women may 2014.

<sup>506</sup> Human rights from the international expert consultation to address harmful practices against children, 13<sup>th</sup>-15<sup>th</sup> June, 2012, Addis Ababa, Ethiopia.

The effectiveness of Nigeria's laws is also challenged by vagueness, lacunae and archaic or outdated laws that have outlived their purpose. Certain principles of law such as locus standi are further obstacles in the protection of the girl child against child marriage or her access to justice and equality. Apart from these, there is the express recognition of child marriage within the Nigerian constitution.

S12 of the Nigerian Constitution is vague and archaic, and conflicts with other provisions such as S19. Item 61 Part 1 Second Schedule also contradicts S3. The provision in the Code of Conduct for Public Officers which mentions the unmarried children of an officer who are younger than eighteen years is archaic and constitutes an acknowledgement of child marriage and should therefore be deleted. S29(4)(b) needs to be expunged as *lacuna*, being open to interpretation and the source of much controversy on the issue of child marriage in the country.

The fact that Nigeria's Marriage Act and Matrimonial Causes Act do not specify a marriageable age is a source of conflict and constitutes a gap in the law. Nigeria's Criminal and Penal Codes also contain contradictory provisions, first criminalising defilement and unlawful carnal knowledge of a girl but excluding such acts within the institution of marriage. Sexual intercourse with a minor is forced and nonconsensual and no law should condone it on any grounds, even marriage.

The cumulative effect of all these conflicting, contradictory, vague, inadequate and archaic provisions and principles is a situation in which it is unclear whether child marriage is legal or not in Nigeria. The end result is a permissive atmosphere in which child marriage continues to thrive in spite of its many negative repercussions and effects.

Some jurisdictions in Africa and elsewhere have processed their laws to eliminate conflicting provisions and to offer the girl child access to legal protection; an example which Nigeria can and should emulate. Countries such as India, the United Kingdom, Zambia and Malawi, and even some

Islamic countries, have prohibited child marriage, criminalised the practice and reformed all pertinent laws to this effect.

Three principal ways of dealing with the conflicts which hinder the protection of the girl child from marriage have been explored, namely legislation, harmonisation of laws and legal reform.

Legislation will involve the specific prohibition of child marriage, the prescription of a minimum marriageable age and the criminalisation of the practice. Harmonisation involves bringing the three different systems of law in Nigeria together in alignment with international expectations and standards, while law reform involves amending the various necessary laws such that legislation can have an impact and meet international standards.

For Nigeria to provide legal protection for the girl child against child marriage, a child marriage prohibition act needs to be promulgated. The draft proposal provided as an appendix to this thesis includes the specification of a minimum marriageable age, the prohibition of child marriage and the criminalisation of the practice. The Nigerian Constitution, Marriage Act, Matrimonial Causes Act and Criminal and Penal Codes all need to be reviewed and socioeconomic rights made justiciable.

The call for a child marriage prohibition act is a justifiable one since such legislation will be in line with the international obligations of government and the legislative actions taken by most countries, including some where child marriage is rife such as India. By eliminating any doubt on the legality of child marriage in Nigeria it will also solve the problem of conflicting laws. In addition, the call for such an act is justifiable on the grounds that law is an instrument for social change. It also has the support of some of the provisions in the Nigerian Constitution.

Finally, the need for the harmonisation of Nigeria's three system of law and the reform of laws where necessary has been emphasised. In support of all of these initiatives, it is recommended that a Gender and Child Commission be established with an office dedicated to the issue of child marriage.

## **CHAPTER SEVEN**

### **Conclusion and Recommendation**

#### **7.1 Introduction**

This chapter brings the whole thesis together and provides recommendation for the elimination of the problem of child marriage in Nigeria. It does this from its analysis of the state of Nigerian legal system and laws and a comparison of recent law development in some jurisdictions particular but not mainly Africa in dealing with the problem of child marriage.

##### **7.1.1 Child marriage problem in Nigeria**

Child marriage is a problem in Nigeria particularly in the North, where it seems that despite the existence of domestic laws inclusive of ratified international and regional treaties, the problem persists. In arriving at the solution to the problem, the thesis sought to answer some questions which are paramount and form the basis of the research. The questions are: Why does child marriage continue in Nigeria? What is the nature and effects of child marriage in Nigeria? Is the girl child legally protected against child marriage in Nigeria and what is the sufficiency of this protection? Is there international protection for the girl child against child marriage in Nigeria and has the Nigerian state fulfilled its obligation under ratified treaties in this regard. What are the legal reasons, constraints and issues militating against the protection of the girl child against the practice of child marriage in Nigeria and how can law be harnessed as an instrument to provide protection for the girl child against the practice in the country.

##### **7.1.2 Thoughts on child marriage**

Applying liberal feminist and radical feminist theory, the thesis approaches the problem of child marriage in Nigeria as a situation brought about by the



patriarchal perception of women and girls in society which has been structured into law and argues for a change by re-imagining mind-sets and perceptions of women and girls through, amongst others, specific legislation and the reform of law.

Rights theory is applied in the thesis to highlight child marriage as an infringement of the rights of the girl child through sexual abuse and as a practice argued for or defended on the basis of cultural/religious relativism. The practice is specifically linked to sexual relativism as it demonstrates predominant cultural beliefs and laws about the sexual rights of men in the home and marriage.

With child marriage being a rights issue, the Nigerian government is held accountable for the fulfilment of its obligation to protect the rights of the girl child under ratified international and regional human rights treaties. The issue of accountability raises the matter of sovereignty and dualist versus monist systems for dealing with the application of international human rights provisions in the domestic terrains of member states.

As matters or issues of law, the foundation is laid for the sociolegal approach which focuses on the nature of law and its function as a social engineering mechanism for the protection of the girl child in Nigeria. This involves examining the role of Nigeria's plural legal system and federalist form of government in defining the nature and function of law on the issue of child marriage.

This thesis argues that the law, and by extrapolation human rights, is binding, not by virtue of its source or origin (divine or moral, domestic or international) or its form (codified or not), but because it relates to human beings irrespective of gender, age or race. It is further argued that it is expedient for the law to have a reference framework that renders it not only accessible to all but supportive of the development and advancement of society, and as such relevant for its purposes.

The thesis is based on the assumption that Nigeria's legal system creates an atmosphere that is conducive to the practice of child marriage because existing laws are not sufficiently protective of the girl child.

The reason for this lies in the discriminatory nature of certain legal provisions which are grounded in the patriarchal system that pervades the customary, Islamic and statutory laws in the country as recognised by the Constitution. Nigerian laws also contain confusing and conflicting provisions which make the stance on child marriage unclear, particularly in terms of the issues of marriageable age and consent to sexual intercourse which are already determined by the predominant culture and religion in the country.

The thesis takes a sociolegal approach by examining the role that the law plays in the continued practice of child marriage in Nigeria and by proposing a combination of specificity and clarification as an instrument for the same law to resolve the issue.

### **7.1.3 Child marriage in perspective**

The issues and arguments surrounding child marriage have been identified and analysed, in particular the marriage institution itself, sexual abuse, the girl child and the age factor in terms of capacity and consent to sexual intercourse. In interrogating child marriage as a form of sexual abuse, case studies of the sexual experiences of child brides in Nigeria were used to illustrate the role and repercussions of capacity, consent, force and harm. The causes, meaning, underpinning principles, effects and legal implications of child marriage have been analysed, including cultural and religious perspectives, and various sociolegal ways of supporting the eradication of the practice have been explored.

Linked as it is to procreation, marriage is an important part of every society and has significance for individuals, families and communities, particularly in African traditional society. Child marriage is a non-consensual union in the sense that the child spouse lacks the capacity to consent to the marriage and to the sexual intercourse that follows. It can be argued that the sexual

act which occurs within child marriage is criminal. This is so because for all intents and purposes it is sexual abuse, except for the fact that social acceptance of the practice of child marriage means that it is not perceived as such and culprits go free.

Child marriage is the union between a much older man and a girl child who is not physically or psychologically mature enough to understand or give consent to the marriage. It is brought about by poverty, patriarchy and religion and kept alive by applicable laws which are recognised by society but which either do not prohibit the practice or simply contain provisions which are insufficiently clear.

Being a form of sexual abuse, the sexual intercourse that accompanies a child marriage contravenes provisions on the human rights of the girl child, in particular her right to health, to life, to dignity and to non-discrimination, and as a form of forceful intercourse it is a criminal act of statutory rape or defilement. Hence it is a legal issue in several areas, namely human rights, criminal law, international law, jurisprudence, family law and constitutional law as well as in the related areas of health, sociology, religion, politics and government.

The pain and trauma experienced by the child bride in fulfilling her wifely duties is a moral issue, and the open celebration of child marriages goes against all sense of public morals and decency. Other consequences of child marriage include illiteracy among girl children, teenage and early pregnancies, VVF, maternal mortality and morbidity and HIV/AIDS, all of which are public health issues and contribute to general social underdevelopment. These are common features in Northern Nigeria where child marriage prevails and are also said to impact on the security of other people and society at large.

In this sense, the consequences of child marriage are seen in the individual girl bride, the group or class of girl children, the children they bear, the family, the society and the nation. In the long run the practice has a global

impact and thus calls for government intervention through legislation and other social interventions.

There are legal and sociological methods that can be applied to solve the problem of child marriage. Sociological approaches that can be followed are advocacy, dialogue, poverty eradication, education (including special innovative programmes to encourage the education of girls), empowerment of girls and women, and incentives for parents to abandon the practice. Efforts to reduce ignorance about child marriage, particularly its negative effects, and to clarify the arguments regarding its cultural and religious affiliations with the help of traditional and religious leaders can bring about the desired change. The programmes run by NGOs can also continue to assist.

Another possible approach to the eradication of child marriage is the exploratory and innovative application of cultural practices and/or cultural principles. Suggestions in this regard are the use of best practice, rediscovery, substitution, prohibition, modification, adoption, adaptation and development alongside the promulgation of by-laws by customary leaders. Such measures will necessitate the provision of formal or substantive laws to give them effect or legality.

#### **7.1.4 Domestic legal framework on child marriage in Nigeria**

The Nigerian plural legal system makes a plethora of domestic laws available for the protection of citizens, including the girl child, in the Constitution, legislation, policies and judicial precedence with their associated legal institutions at federal and state level. There are policies and pieces of legislation on sexual and reproductive health rights as well as educational policies under which the issue of child marriage may be subsumed.

Judicial institutions exist to deal with the various issues and legal problems in the form of federal or state high, superior and inferior courts, and are linked to Nigeria's English, customary and Islamic systems of law respectively.

Laws relating to the protection of the girl child against child marriage start with the provisions of the Constitution on fundamental human rights. The Marriage Act and the Matrimonial Causes Act have provisions on capacity and consent to marry, while the Criminal and Penal Codes provide protection against abduction, defilement, unlawful carnal knowledge, rape and sexual abuse generally.

The Prohibition of Violence against Persons Act offers general protection against violence and its enactment enlarged the definition of rape in Nigeria. The NAPTIP Act protects against child exploitation and the Child Rights Act is the protective instrument on all issues relating to children.

Apart from the judiciary, other pertinent institutions and agencies include the police force and the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) which focuses on the issue of child exploitation. Professional bodies such as the FIDA and NGOs such as the Isa Wali Empowerment Initiative assist with cases of child sexual abuse, exploitation and child marriage.

While the role of the judiciary in the advancement or development of law in all societies cannot be underplayed, the inadequacy of legislation can be and is a major obstacle in dealing with the issue of child marriage in Nigeria since it is existing laws which give the judiciary the jurisdiction and opportunity to perform its duties.

From this analysis it can be concluded that Nigeria does have laws for the general protection of the girl child as well as specific laws protecting her from abduction which can be interpreted as including forced marriage. There are also laws against sexual abuse such as the provisions in the Criminal and Penal Codes on forced, non-consensual intercourse with children, defilement and statutory rape (which is inevitable in the institution of child marriage), even though the term sexual abuse is not used.

The Child Rights Act does prohibit child marriage although it is a general not marriage specific law on child rights and has not been adopted by some

of Nigeria's Northern states. The existence of this prohibition does not gainsay the fact that the problem of child marriage deserves the attention and focus of a more specific law, even more so that the issue of same sex marriage which has been prohibited through the Same Sex Marriage Prohibition Act. Open instances of non-compliance with the provisions of the Child Rights Act by individuals and states have gone without legal response or action on the part of the government on the grounds that such non-compliance is not an offence and cannot be prosecuted.

It can conclusively be said that the girl child is not adequately protected against child marriage by Nigeria's domestic laws and that the effectiveness of international provisions prohibiting the practice is restricted by the same domestic provisions.

In the main, since the enactment of legislation is the responsibility of government and the Nigerian government can categorically be said not to have fulfilled this responsibility, the state is faulted for responding inadequately to protect the girl child in Nigeria against child marriage.

#### **7.1.5 International legal framework on child marriage**

Child marriage is prohibited under international and regional human rights treaties as a harmful cultural practice, sexual abuse, sexual exploitation and/or expressly as child marriage. These prohibitions are found in treaties and possibly also in the application of customary international law.

The primary treaties in this regard that are discussed and analysed in this thesis are:

- The Universal Declaration of Human Rights
- The African Charter on Human and People's Rights (ACHPR) and the Maputo Protocol on the Rights of Women
- The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

- The United Nations Convention on the Rights of the Child (CRC)
- The African Charter on the Rights and Welfare of the Child (ACRWC)
- The International Covenant on Economic, Cultural and Social Rights (ICESCR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

Apart from providing for the rights of the girl child, these treaties constitute the obligation of states to ensure the protection of such rights. Despite the fact that this means that states are responsible for protecting, promoting and defending the girl child, treaties relating to women and children have been challenged in many countries, especially on the basis of cultural and religious relativism.

State obligations under treaties are to be fulfilled through all measures including legislation, and it is in this regard that the relationship between universal law and domestic law, as reflected in the monist or dualist systems of states, has been problematic in the domestication and hence the application of treaties.

Emerging trends show that jurisdictions within Africa and elsewhere are reforming their laws and constitutions, amending criminal provisions and enacting laws to prohibit child marriages. In addition, there are states which have adopted the criminalisation of the practice and the application of customary international law and the Bangalore Principles to promote the protection of the girl child from a judicial perspective.

States such as the United Kingdom, Norway, Scotland, the United States of America, India and even Pakistan now have prohibitions on child marriage in their laws. African countries such as Ghana, Zambia, Zimbabwe, Malawi, Kenya and South Africa have also taken legislative steps to eradicate the practice.

Nigeria has ratified some of the international treaties on the protection of children but the problem is that the treaties are not being utilised. In dualist states such as Nigeria, treaties have to be domesticated before being applicable in the country, although international law decrees that states are not permitted to use domestic laws as an excuse to escape their international obligations.

Despite the fact that Nigeria has not signed any of these treaties with reservations, as a country with a plural legal system where relativism is raised to oppose the application of certain human rights, it has found the domestication of international instruments difficult. No efforts have been made to reform the Nigerian Constitution, to align laws with international standards on issues relating to child marriage or to reduce gender discrimination. Neither has specific legislation been promulgated to criminalise or prohibit the practice of child marriage or to specify a marriageable age.

In a nutshell, an assessment of the impact of international treaties and the status quo in Nigeria's legal system and laws makes it clear that the government can be accused of failing in its responsibility or obligation to protect the girl child against child marriage.

Nonetheless, there are provisions and practices in international law which hold some promise, such as specific legislation, constitutional reform and related opportunities for judicial intervention for the application of treaties. There is also much that Nigeria can learn from developments in other jurisdictions.

#### **7.1.6 Conflicts of law, legal issues and legal solutions**

Conflicts of law exist in several legal areas in Nigeria and are particularly apparent with respect to marriage and sex-related issues. It is believed that these conflicts have rendered existing laws for the protection of the girl child redundant and ineffective. There are conflicts between Nigeria's statutory, customary and Islamic systems of law on the age of childhood, the



attainment of adulthood and marriageable age. Conflicts on the issue of age and consent also exist within each of these systems, within specific pieces of legislation or laws, within the Constitution itself and between the Constitution and other laws.

The definition of the age of childhood still varies depending on the purpose of the legislation. The effectiveness of the Child Rights Act is challenged by certain conflicting provisions in the Constitution and Islamic law. Even within the Islamic system of law, schools of thought do not agree on the issues of age and consent or on whether the practice of child marriage is essentially Islamic. Only the Maliki School in Nigeria supports the practice of Ijbar whereby the consent of the father or guardian constitutes the bride's consent to marriage.

Many of the provisions within the Nigerian Constitution are contradictory, and some are discriminatory and contrary to human rights provisions. The Constitution has been in use since 1999 with no amendments, while other jurisdictions have fairly new constitutions that have been aligned with international standards and content. The Nigerian Constitution also fails to define who is deemed a child or to include specific provisions on children as do the constitutions in other jurisdictions.

The effectiveness of Nigeria's laws is also challenged by vagueness, lacunae and archaic or outdated laws that have outlived their purpose. Certain principles of law such as locus standi are further obstacles to the protection of the girl child against child marriage or to her access to justice and equality.

S12 of the Nigerian Constitution is vague and archaic, and conflicts with other provisions such as S19. Item 61 Part 1 Second Schedule also contradicts S3. The provision in the Code of Conduct for Public Officers which mentions the unmarried children of an officer who are younger than eighteen years is archaic and constitutes an acknowledgement of child marriage and should therefore be deleted. S29(4)(b) needs to be expunged as

a *lacuna* which is open to interpretation and the source of much controversy on the issue of child marriage in the country.

The fact that Nigeria's Marriage Act and Matrimonial Causes Act do not specify a marriageable age is a source of conflict and constitutes a gap in the law. Nigeria's Criminal and Penal Codes also contain contradictory provisions, first criminalising defilement and unlawful carnal knowledge of a girl but then excluding such acts within the institution of marriage. Sexual intercourse with a minor is forced and nonconsensual and no law should condone it on any grounds, even marriage.

The cumulative effect of all these conflicting, contradictory, vague, inadequate and archaic provisions and principles is a situation in which it is unclear whether child marriage is legal or not in Nigeria. The end result is a permissive atmosphere in which child marriage continues to thrive in spite of its many negative repercussions and effects.

Some jurisdictions in Africa and elsewhere have processed their laws to eliminate conflicting provisions and to offer the girl child access to legal protection; an example which Nigeria can and should emulate. Countries such as India, the United Kingdom, Zambia and Malawi, and even some Islamic countries, have prohibited child marriage, criminalised the practice and reformed all pertinent laws to this effect.

Three principal ways of dealing with the conflicts which hinder the protection of the girl child from marriage have been explored, namely legislation, the harmonisation of laws and legal reform.

Legislation will involve the specific prohibition of child marriage, the prescription of a minimum marriageable age and the criminalisation of the practice. Harmonisation involves bringing the three different systems of law in Nigeria together in alignment with international expectations and standards, while law reform involves amending the various necessary laws such that legislation can have an impact and meet international standards.

For Nigeria to provide legal protection for the girl child against child marriage, a child marriage prohibition Act needs to be promulgated. The draft proposal provided as an appendix to this thesis includes the specification of a minimum marriageable age, the prohibition of child marriage and the criminalisation of the practice. Nigeria's Constitution, Marriage Act, Matrimonial Causes Act and Criminal and Penal Codes all need to be reviewed and socioeconomic rights made justiciable.

The call for a child marriage prohibition Act is justifiable since such legislation would be in line with the international obligations of government and the legislative action taken by most countries, including some places where child marriage is rife such as India. By eliminating any doubt on the legality of child marriage in Nigeria it will also solve the problem of conflicting laws. In addition, the call for such an act is justifiable on the grounds that law is an instrument for social change. It also has the support of some of the provisions in the Nigerian Constitution.

Finally, the need for the harmonisation of Nigeria's three systems of law and the reform of laws where necessary has been emphasised. In support of all of these initiatives, it is recommended that following the legislation of the Act, a Gender and Child Commission be established with an office dedicated to the issue of child marriage.

## **7.2 Thesis recommendation: Specific actions for the eradication of child marriage in Nigeria**

The eradication of child marriage will involve a combination of actions and steps on the part of all stakeholders, but the role of government cannot be underestimated, particularly in terms of legislation and enforcement.<sup>1</sup>

This thesis lists a number of recommendations for the eradication of child marriage in Nigeria and also for law reform in the country. These are as follows.

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<sup>1</sup> GT Lemmon & LS ElHarake 'Child Brides Global Consequences How to End Child Marriage' 2014

## **Recommendation for child marriage eradication in Nigeria**

- It is proposed that a Committee on Cultural and Religious Values Pertinent to Child Marriages in Northern Nigeria should be established. The purpose of establishing this Committee is to have a body assigned with the responsibility of consulting the cultural and religious leaders of affected communities, impacting cultural and religious values, with the aim of making recommendations and/or preparing a Draft Action Plan. The report, recommendation and action plan of the Committee shall be made available to the Ministry of Women, children and Youth Affairs and any other Ministry/Ministries that may be relevant for such related purposes. It shall also be made available for use by the legislators of the Federal Republic of Nigeria.
- Constitutional dialogue on child marriage with customary and religious leaders should be initiated.
- Action Research: This will explore the investigation which will involve engaging an appreciation inquiry of the community in Northern Nigeria suggesting by themselves how they think child marriage can be eradicated in their society and how they can contribute to the eradication. A cooperative inquiry of many researchers on the topic will also be useful.
- There should be a specific child marriage prohibition act to provide clarity and eliminate the existing conflicts and confusion on the issue. A draft of such an act is provided as an appendix to the thesis.<sup>2</sup>

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<sup>2</sup> In the past, a Child marriage prohibiting Act was discouraged. Unpublished: A Bunting 'Particularity of rights, diversity of contexts: women, International human rights and the case of early marriage' unpublished Doctor of Juridical Science thesis, University of Toronto, 1999 i. Also Dr AO Jegede of Venda University initially opposed such Act based on the provision of Item 61, Part 1, second schedule 1999 Constitution and the fact that Nigeria is multi cultural, multi legal and multi religious, he however, reconsidered his stand looking at S46 and other provisions of the constitution. Recently however contemporary authors, legal researchers in the area of child marriage recommend specific Prohibition Act despite the provision and recommend its deletion or modification. Authors like TS Braimah 'Child marriage in Northern Nigeria: Section 61 part 1 of the 1999 constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 488. KO Fayokun 'Legality of Child Marriage in Nigeria and Inhibitions against realisation of Education Rights' (2015) 5(7) *US-China Education Review B* 469. BO Itejide 'Forced marriages: Moral failures vs Religious nuances' (2016) 12(17) *European Scientific Journal* 308. However although they recommend

- A law should be enacted for the sensitization of the elimination of child marriage in Northern Nigeria.<sup>3</sup>
- A clause should be added to the Constitution to subject customary and Islamic laws to provisions on fundamental human rights which should state that “The provision of Chapter 4 of the Constitution on fundamental rights applies to all laws, persons, institutions and authorities and binds the legislature, the executive and the judiciary.”
- S6(c) of the Nigerian Constitution should be deleted so that the state and government are responsible under the Fundamental Objectives and Directive Principles of State Policy.
- Chapter 2 of the Constitution should be made justiciable.
- S29(4)(b) of the Constitution should be deleted as confusing and contradictory, regardless of its focus on citizenship. In the interests of clarity and specificity, it could be replaced with the following: “For the purpose of clarity, marriage is not an indicator of adulthood and will not be of effect for the purpose of this section or any other provision.”
- The Nigerian Constitution should provide a definition of the child other than on the basis of citizenship to read as follows: “For all purposes in Nigeria, a child shall be anybody 18 years and under.” This should be in addition to the provision on full age in S29 on citizenship.
- All provisions in the Constitution which use the masculine pronoun “he/him” to connote human, as in men and women, should be changed to “he or she/him or her”.
- The phrase “unmarried children who are not yet 18 years” should be deleted from the Fifth Schedule Part 1 of the Code of Conduct for Public Officers.

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legislation, none of them provides a draft bill. It is with these recent authors that the researcher stands arguing for a child marriage prohibition Act a draft which is provided in the appendix as one of the researcher’s contribution to law in the area.

<sup>3</sup> This is also an innovative draft provided in the appendix of this thesis by the researcher.

- In S182(2) of the Penal Code, and S6 Part 1 Chapter 1 of the Criminal Code, the phrase “Definition of unlawful carnal knowledge means carnal connection which takes place otherwise than between husband and wife” is not necessary and should be deleted and replaced with the following: “Marriage shall no longer be an excuse for sexual intercourse with an underage girl.” In addition to this, marital rape should be recognised and criminalised.
- All pieces of legislation on marriage and relating to children should be amended to reflect eighteen years as the end of childhood and the minimum marriageable age. The Matrimonial Causes Act and the Marriage Act are due for reform in accordance with modern day provisions on marriageable age and the need for the consent of spouses, not only parents.
- The Marriage Act and Matrimonial Causes Act should include the explicit prohibition of child marriage and a specific provision on marriageable age. The following are some examples in this regard.
  - In this Act, unless the context requires otherwise, “child” means an individual who has not attained the age of eighteen years.<sup>4</sup>
  - A person shall not marry unless that person has attained the age of eighteen years.”<sup>5</sup>
  - A union is not a marriage if at the time of the making of the union (a) either party is younger than the minimum age for marriage,<sup>6</sup> (b) the consent of either party has not been freely given,<sup>7</sup> and (c) consent is not freely given where the party who purports to give it is influenced by coercion or fraud.<sup>8</sup>
- Item 61 Part 1 Second Schedule of the 1999 Constitution should be deleted. All marriages should be under the jurisdiction of the federal government.

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<sup>4</sup> S2, first paragraph on interpretative section of Kenya Marriage Act 2014

<sup>5</sup> S4, Part II General provisions in Kenya Marriage Act 2014.

<sup>6</sup> S11(1)(a) Kenya Marriage Act 2014.

<sup>7</sup> S11(1)(e) Kenya Marriage Act.

<sup>8</sup> S11(2)(a) Kenya Marriage Act 2014

- All marriages should be regulated by the government, and marriages performed under customary or Islamic law should be registered. The reformed Marriage Act should contain a provision such as the following: “A marriage may be registered under this Act if it is celebrated in accordance with the rites of a Christian denomination; as a civil marriage; in accordance with the customary rites relating to any of the communities in Nigeria; in accordance with Islamic law.”<sup>9</sup>
- There should be uniform registration and issuing of certificates of marriage for all marriages, including Islamic marriages, for purposes of legal validation.
- S12 of the Nigerian constitution 1999 should be deleted. Not only does it make no contribution other than supporting resistance to the application of international treaties, it also contradicts S19 of the Constitution. It is a colonial relic that has no purpose in the present human rights dispensation and is therefore due for change.
- The Convention on the Elimination of all Discrimination against Women (CEDAW) should be domesticated.
- Government must ensure that girls and women have both legal and actual substantive equality with male citizens, particularly in terms of marriage and the family.
- The Human Rights Commission should consider introducing moderate sanctions against states which fail to fulfil their obligations under relevant international instruments.
- All customary and religious laws should be reviewed and the legal system reformed to ensure this.
- Formal education to a particular level should be made compulsory and enforced, where possible with incentives to support and encourage parents and girls to comply.

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<sup>9</sup> S6(1)(a) -(e) Kenya Marriage Act 2014

- The public should be enlightened with regard to the law prohibiting child marriage.
- A Child Commission as well as a Gender Commission should be established with offices in all Nigeria's constituent states to attend to issues arising in this regard.
- Courts and judges should be encouraged to adhere to principles of international law such as the Bangalore Principles. Judges should receive specific training in this area and the government should invest in training judges abroad.
- Family courts should be established to handle cases relating to marriage, children and related issues, with trained personnel in charge.



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## **Comments, Observations and Recommendations**

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## **Appendix**

### **The Proposed Draft Bill on Child Marriage Prohibition for Nigeria**

#### **THE NIGERIAN CHILD MARRIAGE PROHIBITION ACT**

An Act to provide for the prohibition of the conduction of child marriages, provide maximum protection for the girl child, effective remedies for victims, punishment for offenders and for matters connected therewith or incidental thereto.

Be it enacted by National Assembly of Nigeria as follows:

1. Short title, extent and commencement: (1) This Act shall be called the Child Marriage Prohibition Act. (2) It extends to the whole of Nigeria and applies to all citizens without and beyond Nigeria. Provided that nothing contained in this Act shall apply retrospectively to marriages already contracted except as otherwise indicated by the parties or any other law for that matter (3) It shall come into force on such date as the Federal government may by notification in the official gazette.

2. Child marriage inclusive of child betrothal is hereby prohibited everywhere in the Country and any such act is hereby criminalized inclusive of the consummation of such marriages. The provisions any other legislation with expressed or implied relevance to child marriage are hereby repealed in so far as it (they) conflict with the provisions of this Act.

3. Definitions: In this Act, unless the context otherwise requires, (a) Child means a person who has not completed 18 years whether they be male or female (b) child marriage means a marriage to which either of the contracting party is a child; (c) contracting party in relation to a marriage means either of the parties whose marriage is or is about to be solemnized. (d) child marriage prohibition officer includes the child marriage prohibition officer appointed under this Act; (e) district court means court in any area for which a family court established under the Child Rights Act, such family court, and in any area for which there is no family court but a high court,

that court, and in any other area the principal high court of original jurisdiction and includes any other civil court which may be specified by the state government by notification in the official gazette as having jurisdiction in respect of the matters dealt with in this Act. (f) Minor means a person who is deemed not to have attained his or her majority that is 18 years.

3. Child marriages to be voidable at the option of contracting party being a child. (1) Every child marriage, whether solemnized before or after the commencement of this Act shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provide that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. (2) If at the time of filing a petition the petitioner is a minor; the petition may be filed through his or her next friend along with the child marriage prohibition office. (3) The petition under this section may be filed at any time before the child filing the petition completes two years of attaining majority. (4) While granting a Decree of nullity under this section the district court shall make an order directing both parties to the marriage and their parents or their guardians to return to the other party, his or her guardian as the case may be the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side or an amount equal to the value of such valuables ornaments, other gifts and money: Provided that no order under this section shall be passed unless the concerned parties have been given notice to appear before the district court and show cause why such order should not be passed.

4. Provision for maintenance and residence to female contracting party to child marriage: (1) while granting a decree under s3 the district court may also make an interim or final order directing the male contracting party to the child marriage to pay maintenance to the female contracting party to the marriage until her remarriage. (2) The Quantum of maintenance payable shall be determined by the district court having regard to the needs of the child, the lifestyle enjoyed by such child during her marriage and the means of income of the paying party. (3) The amount of maintenance may be

directed to be paid monthly or in lump sum. (4) In case the party making the petition under section 3 is the female contracting party, the district court may also make a suitable order as to her residence until her marriage.

5. Custody and maintenance of children of child marriages: (1) Where there are children born of the marriage, the district court shall make an appropriate order for the custody of such children. (2) While making an order for the custody of a child under this section, the welfare of and best interest of the child shall be the paramount consideration to be given by the district court. (3) An order for custody of a child may also include appropriate directions for giving to the other party access to the child in such a manner as may best serve the interest of the child and such other orders as the district court may in the interest of the child deem proper. (4) The district court may also make an appropriate order for providing maintenance to the child by a party to the marriage or their parents or guardians.

6. Legitimacy of children born of child marriages: Notwithstanding that a child marriage has been annulled by a decree of nullity under s3 every child begotten or conceived of such marriage before the decree is made whether born before or after the commencement of this Act, shall be deemed to be legitimate child for all purposes.

7. Power of district court to modify issues under section 4 or section 5: The district court shall have the power to add to modify or revoke any order made under S4 or 5 and if there is any change in the circumstances at any time during the pendency and even after the final disposal of the petition.

8. Court to which petition should be made: For the purpose of grant of reliefs under s3, 4 and 5, the district court having jurisdiction shall include the district court having jurisdiction over the place where the defendant or the child resides or where the marriage was solemnized or where the parties last resided together or the petitioner is residing to the date of the presentation of the petition.

9. Punishment for male adult marrying a child: Whoever being a male adult above 18 years contracts a child marriage that is marriage with a female under 18 years shall be liable to punishment with rigorous imprisonment which may extend to 2 years or with fine which may extend to .... Or with both.

10. Punishment for solemnizing a child marriage: Whoever performs, conducts directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to ---unless he had reason to believe that the marriage was not a child marriage.

11. Punishment for promoting or permitting solemnization of child marriages: (1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized or negligently fails to prevent it from being solemnized including attending or participating in a child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend up to ---. (2) For the purpose of this section it shall be presumed unless and until the contrary is proved that where a minor child has contracted a marriage the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized.

12. Marriage of a minor child to be void in certain circumstances: Where a child being a minor: (a) is taken or enticed out of the keeping of the lawful guardian; or (b) by force compelled or by any deceitful means induced to go from any place; whether from within Nigeria or outside it; or (c) is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be void



13. Power of court to issue injunction prohibiting child marriages: (1) Notwithstanding anything to the contrary contained in this Act, if on an application of the child marriage prohibition officer or on receipt of information through a complaint or otherwise from any person, a judicial magistrate is satisfied that a child marriage in contravention of this Act has been arranged or is about to be solemnized such magistrate shall issue an injunction against any person including a member of an organization of persons prohibiting such marriage. (2) A complaint under sub-section (1) may be made by any person having a personal knowledge or reason to believe and a non-governmental organization having reasonable information relating to the likelihood of taking place of solemnization of child marriage or child marriages. (3) The court of the judicial magistrate of the first class magistrate may also take suo moto cognizance on the basis of any reliable report or information. (4) The district magistrate shall also have additional powers to stop or prevent solemnization of child marriages and for this purpose he may take all appropriate measures and use the minimum force required. (5) No injunction under subsection (1) shall be issued against any person or member of any organization or association of persons unless the court has previously given notice to such person, members of the organization or association of persons as the case may be and has offered him or them an opportunity to show cause against the issue of injunction: provided that in the case of any urgency the court shall have the power to issue an interim injunction without giving any notice under this section. (6) An injunction issued under subsection (1) may be confirmed or vacated after giving notice and hearing the party against whom the injunction was issued. (7) The court may either on its own motion or on the application of any person aggrieved rescind or alter an injunction issued under sub-section (1). (8) Where an application is received under sub-section (1), the court shall afford the applicant an early opportunity of appearing before it either in person or by an advocate and if the court after hearing the applicant rejects the application wholly or in part, it shall record in writing its reasons for so doing. (9) Whoever knowing that an injunction has been issued under sub-section (1) against him disobeys such injunction shall be punishable with

imprisonment of either description for a term which may extend to two years or with fine which may extend to ---- or both: Provided that no woman shall be punishable with imprisonment.

14. Child marriages in contravention of injunction orders to be void: Any child marriage solemnized in contravention of an injunction order issued under S13 whether interim or final shall be void ab initio.

15. Offences to be cognizable and non-bail able: Notwithstanding anything contained in the Criminal and Penal Codes, an offence punishable under this Act shall be cognizable and non-bail able.

16. Child Marriage Prohibition Officers: (1) The state government shall by notification in the official Gazette, appoint for the whole state or such part thereof as may be specified in that notification an officer or officers to be known as the child marriage prohibition officer having jurisdiction over the area or areas specified in the notification. (2) The state government may also request a respectable member of the locality with a record of social service or an officer of the government or any public sector undertaking or an office bearer of any non-governmental organization to assist the child marriage prohibition officer and such member, officer or office bearer, as the case may be, shall be bound to act accordingly. (3) It shall be the duty of the child marriage prohibition officer-(a) to prevent solemnization of child marriages by taking such action as he may deem fit; (b) to collect evidence for the effective prosecution of persons contravening the provisions of this Act; (c) to advise either individual cases or counsel the residents of the locality generally not to indulge in promoting helping aiding or allowing the solemnization of child marriages; (d) to create awareness of the evil which results from child marriages; (e) to sensitize the periodic returns and statistics as the state government may direct; and (g) to discharge such other functions and duties as may be assigned to him by the state government. (4) The state government may by notification in the official gazette, subject to such conditions and limitations invest the child marriage prohibition officer with such powers of a police officer as may be specified in

the notification and the child marriage prohibition officer shall exercise such powers subject to such conditions and limitations as may be specified in the notification. (5) The child marriage prohibition officer shall have the power to move the court for an order under sections 4, 5, 13 and along with the child under section 3.

17. Child marriage prohibition officers to be public servants: The child marriage prohibition officers shall be deemed to be public servants within the meaning of this Act.

18. Protection of action taken in good faith: No suit, prosecution or other legal proceedings shall lie against child marriage prohibition officer in respect of anything in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

19. Power of state government to make rules: (1) The state government may by notification in the official gazette, make rules for carrying out the provisions of this Act without compromising on any ground whether of culture or religion especially and particularly on the minimum age of marriage. (2) Every rule made under this Act shall as soon as may be after it is made be laid before the legislature.

20. Amendment of Act

### **The Proposed Draft Bill for Sensitisation in Northern Nigeria for the Eradication of Child Marriage in Nigeria**

A bill to prepare the ground for the reception of child marriage prohibition Act in Nigeria.

This Bill is particularly addressed to The Sharia Council, The inter religious council and other relevant organisations necessary to be consulted and engaged in reaching a decision on the issue of child marriage in Northern Nigeria.

Realising the concern that culture and religion is held first and foremost by the people in this part of Nigeria as a way of life and as obligation.

Accepting that both culture and religious background acknowledge that children are gifts that should be protected by parents and all members of the society.

Noting that it is obligatory upon all Muslims to enjoin good and forbid wrong doing to the extent of their knowledge and abilities

It is hereby proposed as follows:

It shall be lawful to work hand in hand with customary leaders, religious leaders and acknowledged respectable members of the society in every region of this Northern part of Nigeria. In furtherance of which following steps shall be taken to make the proposed Act practicable and implementable in Nigeria.

1. Set up a research committee, which shall work with religious leaders to know and verify the exact position of the Quran on the issue of child marriage
2. Dialogue with communities and stakeholders in the different part of the region
3. Educate religious and cultural leaders on customarily based positive interpretations of cultural practices and religious ideas relating to marriage, particularly the rights of the girl child through Traditional and more contemporary forms of enlightenment
4. Make primary education up to tertiary levels mandatory and to criminalise conduct or omission by parents and guardians to send children to school
5. Incentives should be provided to support or encourage education, particularly for girls
6. Poverty eradication
7. There should be the engagement of women empowerment programs through education, skill acquisition, training and other means.
8. Conduct community-wide education on the dangers of child marriage in local languages throughout Nigeria spear headed by religious and community leaders particularly in the local language and dialect of the people
9. Enlightenment, education and community engagement to transform mind-sets and perceptions, particularly on gender inequality

10. Media should be harnessed in all forms particularly radio, indigenous local drama, simple educative posters, Islamic education and enlightenment on the issue in mosques and public places and other easily accessible means to the indigenes.
11. Advocacy for child marriage elimination based on the conclusion of research, dialogue and teachings
12. Consultation and communication with all groups and stakeholders on the drafting of the child marriage prohibition Bill
13. Engage the Hisbah in training and involve them in the working of the proposed bill alongside the officers in charge by the state
14. Set up a commission for the purpose of the implementation of this Bill; the commission which shall have an office, officers and shall report to the ministry of women, Gender and children affairs in each state of the region
15. Lobby for a constitutional sitting to amend the constitution of the Federal Republic of Nigeria to entrench culture and religious beliefs and practices prevalent in each community simultaneously as to provide for the development of culture
16. Establish a constitutional court with mandate to interpret the constitution, including the bill of rights
17. Provide for the principle of subsidiarity in relation to the hierarchy of rights in the federal and state constitution while guaranteeing the autonomy of federal states as provided in the constitution.