**THESIS TITLE:**

# INTERNATIONAL LAW AND THE END OF CHILD MARRIAGE: A CASE STUDY OF NIGERIA

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN THE FACULTY OF BUSINESS, LAW, AND SOCIAL SCIENCES**

**BIRMINGHAM CITY UNIVERSITY.**



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**DECLARATION**

**This thesis is submitted in fulfilment for the degree of Doctor of Philosophy in the Birmingham City University, England, UK. I confirm that this research is an original work from my study, analysis, and findings, except for citations and quotations which have been duly acknowledged.**

**This work has not been previously submitted, either in whole or part for any other qualification at Birmingham City University or other higher institutions.**

**Signed**

**Emmanuela Nwabundo Enweonwu**

**February 2022.**

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**DEDICATION**

**This thesis is first dedicated to God Almighty. It has been such a long windy journey with so many hurdles, nothing like I ever expected it to be. Yet I am confident in the fact that your grace and mercy kept me. Thank you, Lord.**

**To my parents Anthony Azubuike and Obiageli Ifeanyichukwu Enweonwu, you may only be memories today, but I will never forget the great sacrifices you made for me to get to where I am today. I hope I have made you proud every step of the way. Keep resting in the Lord.**

**To every Nigerian Child, this one is also for you. I remain hopeful that one day you will live free and without fear to enjoy your childhood.**

**To my precious daughter, Isioma, thank you for keeping me grounded. I love you.**

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## ABBREVIATIONS

| | |
|---|---|
| ACRWC | African Charter on the Rights and Welfare of the Child |
| ACHPR | African Commission on Human and People's Rights |
| AU | African Union |
| C4D | Communication for Development |
| CEDAW | Convention for Elimination of all Forms of Discrimination Against Women |
| CESCR | Committee on Economic, Social, and Cultural Rights |
| CRA | Child Rights Act |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on Rights of Persons with Disabilities |
| CYPA | Children and Young Persons Act |
| ECOSOC | Economic, Social, and Cultural |
| FCT | Federal Capital Territory |
| FGM | Female Genital Mutilation |
| HBRA | Human Rights-Based Approach |
| HRC | Human Rights Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social, and Cultural Rights |
| JS | Joint Submission |
| MDGs | Millennium Development Goals |
| NCRIC | National Child Rights Implementation Committee |
| NHRC | National Human Rights Commission |

| | |
|---|---|
| PEPFAR | U.S President's Emergency Plan for AIDS Relief |
| SDGs | Sustainable Development Goals |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNFPA | United Nations Population Fund |
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children's Fund |
| UNSMRAJ | United Nations Standard Minimum Rules for the Administration of Juvenile Justice |
| UPR | Universal Periodic Review |

## LIST OF CASES AND PAGES

**Nigerian Cases**

**Foreign Cases**

## ABSTRACT

Child marriage is defined as the union between a child under the age of 18 and an adult or another child and remains a prevalent issue globally, with significant implications for the well-being of affected individuals. UNFPA-UNICEF statistics reveal that 650 million girls and women have experienced marriage as minors worldwide. In Nigeria, recent data from 2019 shows worrying figures, indicating that 44 percent of girls and women aged 20 to 24 are married before reaching 18, with 18 percent marrying before 15. Child brides face overwhelming challenges, including limited economic and educational opportunities, heightened risks of domestic violence, maternal mortality, birth complications, and sexually transmitted infections.

This thesis undertakes a wholistic and broad analysis of the legal landscape surrounding child marriage in Nigeria, with particular focus on its placement within the constitutional framework. Remarkably, the issue of child marriage is placed under the 'residual list of the Nigerian Constitution thereby placing it within the jurisdiction of the States' Houses of Assembly. Consequently, the Child Rights Act of 2003, aimed at addressing child marriage, requires individual state-level domestication, leading to inconsistencies across the federation. This poses a significant obstacle, as nine states are yet to domesticate the Act, enabling child marriage, particularly in regions governed by religion-based personal laws.

Furthermore, this research analyses Nigeria's engagement with international mechanisms, such as the African Union and the United Nations, to fulfil its obligations in fighting child marriage. Through a critical analysis, this thesis argues that Nigeria falls short of meeting the international legal standards in addressing this issue. This research also argues that Nigeria can draw lessons from the regional and international framework to achieve its goal of ending child marriage.

Adopting a dual methodological approach, the research engages with both doctrinal and non-doctrinal methods. The doctrinal method analyses written domestic and international legal frameworks, while the non-doctrinal method will be used to analyse the intersection between law and society. Using this approach, this research recognizes the multifaceted nature of law's influence and acknowledges the socio-economic, cultural, and political factors shaping legal norms and practices, and vice versa.

In its argument for the eradication of child marriage, this research advocates for constitutional review and amendment, activation and implementation of international laws and instruments on child marriage and strengthening of institutions in Nigeria to better equip them to implement and enforce laws against child marriage at the national and state levels.

Finally, the thesis concludes by offering practical recommendations to enhance Nigeria's efforts in safeguarding the rights and well-being of girls exposed to the dangers of child marriage.

# CHAPTER 1: INTRODUCTION

## 1.1 Background to the Research

### *1.1.1 Child Marriage: its meaning*

While some statutes, scholars, and organizations[1] define child marriage with specific reference to the age of either party to the marriage, others define child marriage with reference to the word "child" necessitating a reference to the meaning of the word 'child' to fully comprehend the meaning of child marriage. There is no definition for child marriage that is generally agreed upon by all organizations and scholars.

Child marriage is "any formal marriage or informal union where one or both of the parties are under 18 years of age".[2] Girls Not Brides, defines child marriage as "a marriage or union between two people, of whom one or both parties are under the age of 18"[3], making the only difference from the latter, to be the use of words.

UNICEF recognizes the human element in the issue and defines child marriage as "a formal marriage or informal union before age 18 and is a violation of human rights".[4]

[1] Example of such organizations include -Girls not Brides, WHO, UNICEF, ICRW,
[2] World Health Organization, 'Child Marriage'. ( 2021) <https://www.who.int/news-room/fact-sheets/detail/child-marriage> accessed May 13, 2023 ; See also Article 16(1) of Universal Declaration of Human Rights, the United Nations General Assembly which proclaimed that only men and women of full age, without any limitation due to race, nationality, or religion, have a right to marry and to found a family.
[3] Girls Not Brides. 'What Is Child Marriage?' (2021) <https://www.girlsnotbrides.org/what-is-child-marriage/> accessed May 13, 2023
[4] UNICEF, 'Child Marriage' (2021) <https://www.unicef.org/protection/child-marriage> accessed May 13, 2023

Also, it views child marriage as a violation of human rights and an impediment to sustainable development, which denies girls the right to choose their own future, and often results in girls dropping out of school, having limited opportunities for social and economic empowerment, and being at higher risk of experiencing violence and health problems.[5]

This research argues that the definition of child marriage advanced by WHO and UNICEF is to be preferred because of its wider scope. The use of the words 'formal' and 'informal' union or marriage extends the definition to cover instances where the parties to the marriage are not formally married under any law, custom, or tradition. Thus, the definition covers cases for instance, where a man picks up a girl under 18 years of age and starts cohabiting with her without going through a formal marriage ceremony.

One potential limitation of these definitions however is that they focus primarily on the age of the individuals involved, rather than the power dynamics and other factors that often underlie child marriage like poverty, gender inequality, and harmful traditional or cultural practices. Another limitation of these definitions is that they do not fully capture the diversity of experiences and perspectives of individuals and communities affected by child marriage. For example, some cultural or religious traditions may view early marriage as a positive or necessary practice, while others may see it as harmful. Additionally, some individuals who enter into child marriages may do so voluntarily, rather than being forced or coerced.

Overall, while the definitions of child marriage provided by various organizations are a useful starting point for understanding the issue, they should be viewed as provisional and subject to ongoing refinement and revision based on new research and insights. It is important to recognize

[5] Ibid

the complex social, cultural, and economic factors that contribute to child marriage, and to adopt approaches that are sensitive to the needs and perspectives of affected individuals and communities.

### *1.1.2 Places where Child Marriage is Prevalent*

Child Marriage is still one of the major societal problems confronting developing countries, especially in Sub-Saharan Africa and South Asia.[6]

In Sub-Saharan Africa, over 37% of young women are given into marriage before attaining the age of 18.[7] In countries like Nigeria, Niger Republic, Central African Republic, and Chad, the rates of child marriages are even higher. For example, in Niger Republic, the rate is as high as 76% most of whom are girls.[8] Although child marriage affects both girls and boys, it disproportionately and negatively affects girls, who are more likely to be given out in marriage earlier in life than boys, especially in Sub-Saharan Africa.[9] The practice of child marriage in Sub-Saharan Africa is deeply rooted in pre-existing traditional norms customs and practices passed down through generations which has debilitating effects on the girl child, their families, and society at large.[10]

In South Asia, about 24.4 million women aged 20–24 years (representing nearly 46% of women in the region) were married before attaining the age of 18. From the year 2010, there has been a significant decline, especially among girls under 15 years, in the rate of child marriage in South

[6] Nour, Nawal M. 'Child Marriage: A Silent Health and Human Rights Issue.' [2009] 1 Reviews in obstetrics and gynaecology 51.
[7] Ibid
[8] Lowe M., Joof M., Rojas B.M. 'Social and cultural factors perpetuating early marriage in rural Gambia: An exploratory mixed methods study.' [2020] F1000Research 8
[9] Fan S., Koski A. 'The health consequences of child marriage: A systematic review of the evidence. [2022] BMC Public Health 309. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9691026/#B3-ijerph-19-15138> accessed April 28, 2023
[10] Lowe M., Joof M., Rojas B.M. (n 8)

Asia.[11] This decline is driven predominantly by India, where the child marriage rate declined from 47% in 2005 to 27% in 2016.[12] However, despite the observed decline in child marriage in South Asia from 63% in 1985 to 45% in 2010 and 32% to 17% for girls under 15 years of age,[13] this practice continues to be widespread and often concentrated in certain geographic regions or among specific cultural groups, necessitating more targeted efforts to protect adolescents from marriage. It is projected that about 130 million girls are likely to be victims of child marriage between 2010 and 2030 in South Asia.[14]

Child marriage is not restricted to developing countries or countries in Sub-Saharan Africa or South Asia. Even developed countries still experience some incidences of child marriage.[15] Also, the prevalence of child marriage in Latin America is quite notable. Around 25% of girls in Latin America and the Caribbean are married before the age of 18.[16] In countries like the Dominican Republic, Honduras, and Nicaragua, the prevalence of child marriage is still high.[17] In the Middle East and North Africa, around 18% of girls are married before the age of 18. Compared with sub-Saharan Africa which has a higher prevalence of child marriage, the incidence of child marriage in North Africa is quite low.

Yemen, Syria, and Sudan are also countries with a high prevalence of child marriage.[18] In Yemen, poverty is significantly impacting child marriage.[19] Girls are increasingly being married off as a

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[11] UNICEF. Child Marriage around the World. (2020). <https://www.unicef.org/stories/child-marriage-around-world> accessed on 3 May, 2023

[12] International Institute for Population Sciences, *National Family Health Survey* (NFHS-4) International Institute for Population Sciences 2017

[13] UNICEF (n 11)

[14] UNFPA . Marrying too Young: End Child Marriage. UNFPA; New York, NY, USA: 2012

[15] Buzome Chukwuemeke, Henry Nebechi Ugwu and Momoh Aneru Radietu, 'Early Child Marriage in Nigeria Causes, Effects and Remedies' [2018] 4 Social Science Research 49

[16] UNICEF, 'A Profile of Child Marriage and Early Unions in Latin America and the Caribbean' (UNICEF, 2022) 3 <https://www.unicef.org/lac/media/8256/file/Profile%20of%20Child%20Marriage%20in%20LAC.pdf > accessed 2 May 2023

[17] Ibid

[18] Ibid

[19] European Commission, 'Yemen' (2019) <https://ec.europa.eu/echo/where/middle-east/yemen> accessed 7 May 2023.

source of income (for the bride price) as ongoing conflict drives families deeper into poverty and desperation.[20] Around 10% of girls in East Asia and the Pacific are married before the age of 18.[21] However, in some countries like Cambodia and Indonesia, the prevalence of child marriage is high. In Cambodia, according to a UN report from 2020, 14% of women aged 20-24 were married before the age of 18 while in Indonesia, despite the huge difference in population, the rate still stands at 14%.[22]

East Asia, Malaysia, records the least incidences of child marriage. 7% of women aged 20-24 were married before the age of 18 in Malaysia.[23] It's important to note that these statistics may not reflect the full extent of child marriage in these countries, as some marriages may not be registered or officially recognized. Additionally, child marriage rates vary within different regions of each country. However, each year, at least fifteen million girls are estimated to be married before they become eighteen.[24]

The fact remains that child marriage is more prevalent in developing countries, particularly in South Asia and sub-Saharan Africa.[25]

Nour rightly observes that the widespread practice of child marriage and its impacts are a major global concern,[26] at least fifteen million girls are estimated to be married before they become

[20] lkibsi, T., Hunersen, K., Attal, B., Jeffery, A., Metzler, J., Elnakib, S., & Robinson, W, 'Child Marriage in Yemen: A Mixed Methods Study in Ongoing Conflict and Displacement',[2021] Vol 34 Issue 4, Journal of Refugee Studies, 4551.
[21] Ibid
[22] UNICEF (n 16)
[23] UNICEF 'Child marriage is a violation of human rights, but is all too common' https://data.unicef.org/topic/child-protection/child-marriage/ assessed 07 May, 2023
[24] UNICEF (n 16)
[25] UNICEF (n 11)
[26] Ibid 55

eighteen.[27] This is due to various factors, including poverty, insecurity, gender inequality, increased risks of sexual and gender-based violence, breakdown of the rule of law and state authority, and lack of access to education, among others which are exacerbated in humanitarian settings.[28]

### *1.1.3 Problems Associated with Child Marriage: An Introduction*

Child Marriage has a significant effect on the development of a country. It has economic consequences, social consequences, and health consequences amongst others. According to most reports and studies, child marriage primarily affects girls or women, although boys may be affected too.[29] This has led to a concerted international effort to combat child marriage through international treaties, conventions, and other initiatives. Therefore, this research will focus more on child brides in answering the research questions.

Child marriage has adverse consequences for child brides which include limiting economic opportunities, which significantly restricts their ability to remain in school to complete their education; also, they are exposed they are elevated risks of domestic violence.[30] Furthermore, according to UNICEF and UNFPA statistics, child brides are more likely to get pregnant at such a young age, thus increasing the likelihood of age-related and pregnancy-related difficulties, as well as maternal and newborn mortality and morbidity.[31] Lack of access to reproductive health and

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[27] UNFPA-UNICEF, '2017 Annual Report: UNFPA-UNICEF Global Programme to Accelerate Action to End Child Marriage' (UNFPA-UNICEF 2017) <https://reliefweb.int/sites/reliefweb.int/files/resources/Global_Programme_Child_Marriage_Annual_Report.pdf> accessed December 20, 2020.

[28] United Nations , 'Child and forced marriage, including in humanitarian settings' < https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings#:~:text=In%20its%20resolution%20(A%2FHRC,highly%20exacerbated%20in%20humanitarian%20settings> accessed 21 February 2021 ; See also Resolution A/HRC/RES/35/16, July 2017.

[29] UNICEF, *Early Marriage: Child Spouses* (UNICEF 2001) <www.unicef-irc.org/publications/pdf/digest7e.pdf>. accessed 21 February 2021

[30] UNFPA-UNICEF, "UNFPA-UNICEF Global Programme to Accelerate Action to End Child Marriage: Phase I Evaluation Summary" (UNFPA-UNICEF 2019) <www.unicef.org/sites/default/files/2019-06/GP-2019-Evaluation-Summary-English.pdf> accessed February 21, 2021

[31] Ibid.

sexual rights, under Article 14 of the Protocol on the Rights of Women in Africa (under the African Charter on Human and People's Rights), is another instance of human rights violation.[32] This includes the inability to negotiate safer sexual practices, make educated decisions about their sexual and reproductive health, and determine whether or not and when to have children.[33]

Furthermore, child marriage propagates the feminisation of poverty and gender inequalities and prevents female children from attaining their full potential in developing their social capabilities. Child marriage results in physical and psychological harm to the child brides,[34] child brides are more likely to face domestic violence as data indicates that women married before the age of 18 are three times more likely than women married at age 21 or older to have been beaten by their husbands.[35] Girls in this scenario are the least likely to speak out about such abuses.[36]

According to a UNICEF report, one of the grave causes of gender inequality in society today is child marriage.[37] To further support this point, research from various African nations shows that child marriage is responsible for 12% to 22% of female school leavers.[38] When there is an imbalance in education wherein a particular gender in society have better opportunity and access to education, then gender equality will remain a mystery.[39] When all of these factors are taken into account, it is evident that child marriage – and all of the factors that go along with it, such as high levels of violence and low levels of education, abuse, and health deterioration – leads to increased

[32] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa accessed 27 December 2020.

[33] Ibid.

[34] Ibid.

[35] World Policy Analysis Centre, 'Assessing National Action on Protection from Child Marriage' (World Policy Analysis Centre,2015) <https://www.worldpolicycenter.org/sites/default/files/WORLD_Fact_Sheet_Legal_Protection_Against_Child_Marriage_2015.pdf> accessed February 23, 2021.

[36] Humanists International, 'Child Marriage: A Violation of Human Rights' (*Humanists International* April 23, 2007) <https://humanists.international/2007/04/child-marriage-violation-human-rights/> accessed February 19, 2021.

[37] UNFPA-UNICEF, (n. 7) 5

[38] World Policy Analysis Centre, (n. 35)

[39] Humanists International (n. 36)

vulnerability on the part of the child bride and increased empowerment on the part of the spouse, resulting in a damaging and destructive power dynamic.[40]

### *1.1.4 Background on Child Marriage in Nigeria vis-à-vis inadequate legal mechanisms*

Nigeria being the most populous black nation on earth,[41] has an alarmingly high rate of child marriage. According to data published in 2021, Nigeria ranks as the 9th African country with a high prevalence of child marriage.[42] The data shows that 43% of girls are married off in Nigeria before their 18th birthday. Also, 16% of girls are married before the age of 15.[43] This statistic indicates a slide shift from the data released in 2019 which shows that 44% of girls and women between the ages of 20 to 24 in Nigeria were in a legal relationship before they reached the age of 18. The data further shows that even before the age of 15, at least 18% of girls and women aged 20 to 24 years have married.[44] Before the age of 18, more than 3,742,000 Nigerian females get married or enter into a union.[45] Child marriage is most widespread in Nigeria's North-West and North-East regions, where 68% and 57% of women aged 20 to 49 were married before they were 18.[46]

In Nigeria, the rate of child marriage varies by area, with estimates as high as 76% in the north and as low as 10% in the south.[47] The Hausa/Fulani, a significant Northern ethnic group, has a 15–18

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[40] Ibid.

[41] OCED, Nigeria (2012) https://www.oecd.org/swac/publications/Nigeria_e-version_en_light.pdf accessed May 7,2023

[42] Uzonna Anele, 'Top 10 African Countries with the Highest Rates of Child Marriage' (Talk Africana, 2021) available at https://talkafricana.com/top-10-african-countries-with-the-highest-rates-of-child-marriage/ accessed May 7, 2023.

[43] Ibid

[44] UNICEF, 'The State of the World's Children 2019: Children, Food and Nutrition"' (UNICEF 2019),234 <https://reliefweb.int/sites/reliefweb.int/files/resources/SOWC_2019_Children-food-and-nutrition_en.pdf> accessed February 23, 2021.

[45] Ibid.

[46] Ibid.

[47] Save the Children Nigeria, 'Every Last Child: Changing the Story (of the Nigerian Girl-Child)' (The Save the Children Fund 2016) 3 <https://resourcecentre.savethechildren.net/pdf/nigeria.pdf/> accessed April 12, 2021.

times greater rate of girl-child marriage than the Southern main ethnic groupings (Yorubas and Igbos).[48]

Patriarchal cultural norms and gendered social roles in Nigerian communities are two factors that impact the high incidence of child marriage.[49] In most communities, women are left out of decision-making processes relating to governance, community development, and policymaking.[50] The men control economic and public affairs while the women's role (in many cases, but not exclusively) includes childbearing and taking care of children.[51]

Nigeria is a particularly relevant case study for research on child marriage for the reasons above and makes it one of the countries with the highest prevalence of child marriage in the world. By examining regional variation in the prevalence and drivers of child marriage, this research provides insights into the complex social, cultural, and economic factors that contribute to the practice.

Nigeria and other countries in Sub-Saharan Africa are yet to align local laws with international laws and global best practices with regard to child marriage,[52] what exists are flawed legal mechanisms, towards addressing the practice of child marriage.

This research argues that Nigeria has a range of policies and laws aimed at addressing child marriage, such as the Child Rights Act of 2003(CRA) and the Violence Against Persons Prohibition Act of 2015; However, the implementation of these laws and policies has been uneven, and there are many challenges to their effective implementation.

[48] Jacob Wale Mobolaji, Adesegun O Fatusi and Sunday A Adedini, 'Ethnicity, Religious Affiliation, and Girl-Child Marriage: A Cross-Sectional Study of Nationally Representative Sample of Female Adolescents in Nigeria' (2020) 20 *BMC Public Health* 583.

[49] Ayako Kohno and others, 'Investigation of the Key Factors That Influence the Girls to Enter into Child Marriage: A Meta-Synthesis of Qualitative Evidence' (2020) 15 PLoS ONE 1.

[50] Buzome Chukwuemeke, Henry Nebechi Ugwu and Momoh Aneru Radietu,(n 15)

[51] ibid

[52] Nigeria for instance have enacted the Child Rights Act 2003 but it only applies to the Federal Capital Territory, Abuja.

It also argues the federal system of government in place in Nigeria and the legal pluralism of the Nigerian constitution, the constitutional structure, and the legislative autonomy of the states are the major challenges to the elimination of Child marriage in Nigeria. As a result of the foregoing, there is no law on marriageable age that applies generally to all parts of the country and to all three recognized forms of marriage in Nigeria - customary marriage, statutory marriage, and Islamic marriage. These forms of marriage have different effects on the rights, duties, and responsibilities of the parties thereto and they are regulated by different laws with different consequences; For example, in Nigeria, the Child Rights Act sets the marriageable age at eighteen for both males and females. However, the Islamic or Shariah Law permits marriage at puberty which could be from the age of nine or even younger.[53] The deeply rooted culture of child marriage practices, which is allowed under Shariah law and customary authorities makes the implementation of national policies such as the Child Rights Act 2003 difficult in most northern states. The legal framework on children's rights lacks proper implementation. The practice of child marriage is widely acknowledged as one of the most well-known violations of children's rights in Nigeria and a major social development question.[54]

This research argues that the challenges to ending child marriage in Nigeria are multi-dimensional, so it will evaluate the various legal framework that strives for the elimination of child marriage in Nigeria. Starting with the Nigerian constitution, to the various domestic laws enacted by the Nigerian legislature, to Islamic and customary law; and will evaluate the legal challenges as well as the social and cultural challenges to ending child marriage in Nigeria. Beyond the domestic legal framework, this research will critically examine regional and international frameworks for

[53] Mortimer, Clarie, 'Global age of marriage' HJFRT (2015) http://www.independent.co.uk/news/ accessed 18 April, 2023

[54] Human Right Watch, 'Nigeria: Child Marriage Violates Girls' Rights' (HRW, 2022) https://www.hrw.org/news/2022/01/17/nigeria-child-marriage-violates-girls-rights accessed May 4, 2023.

ending child marriage in Nigeria. Thus, an analysis of treaties, conventions, protocols, and other international instruments speaks to child marriage and creates a binding obligation on Nigeria by reason of Nigeria being a signatory thereto or having ratified such instruments. This research shall point out the conflict in these instruments with domestic law and custom and recommend the best possible way of aligning local laws to meet international standards regarding the all-important subject of child marriage.

This research shall argue that other factors that led to the failure of CRA in the constitution are ineffective funding from the legal bodies, federal nature of the government, corruption, bottlenecks of the administrative bodies as well as inadequate guarantees of the true independence of the judiciary[55] which with other non-legal bodies are not equipped to sufficiently promote the rights and protection of children, which partly explains the failure to fully implement the CRA in Nigeria.[56] Beyond the four conflicting legal frameworks, the failure of the government to adequately respond to the threat posed to national development by child marriage could also be a result of the knowledge gap which this study fills.

In evaluating Nigeria's efforts to end child marriage, this study utilises the UNFPA-UNICEF Global Programme to End Child Marriage (hereinafter referred to as the Global Programme) as a standard to evaluate the domestic legislation in Nigeria regarding child marriage, because it is the only existing UN program on child marriage that has adopted international law rules on standards to end child marriage.[57] The success of the program in target countries – including the facilitation of the enactment of legislation prohibiting child marriage in such countries – as well as how the

[55]Opeloye, Muibi O. 'Child Rights Act 2003 in Nigeria: What Implications for the Application of Child's Rights in Islam?' (2016) Proceedings Of Icwc 2016 Ubang Jaya, Malaysia 183.

[56]Okpara, Stellamaris Ngozi, *Child Protection and Development in Nigeria: Towards a More Functional Media Intervention In Media and Its Role in Protecting the Rights of Children in Africa*, ( IGI Global, 2020) 57

[57] Okeke, John. U 'Child Marriage in Nigeria: An Analysis of Legislative and Policy Frameworks.' (2020) Journal of African Law, 64

Programme's successes in the countries cited can be effectively replicated in Nigeria to end child marriage – are also examined in this study.

## 1.2 Gaps in the literature addressing Child Marriage in Nigeria

This research has identified existing lacuna within the literature on child marriage in Nigeria that needs to be addressed. The various aspects of the issue will be discussed as follows:

### *1.2.1 Sociocultural Literature Gap.*

While child marriage is a widespread phenomenon in Nigeria, this research argues the need for more research that examines the sociocultural dynamics that drive the practice, particularly in relation to the various social factors that contribute to the practice.

For example, there is limited research on the role of poverty in child marriage in Nigeria; Poverty is a major factor that contributes to child marriage in many communities, as families may see marrying off their daughters at a young age as a way to alleviate economic hardship.[58] However, the relationship between poverty and child marriage in Nigeria is not well understood, and more research is needed to explore this issue.[59] Buzome's research examines early child marriage in Nigeria;[60] it looks at the causes, effects (viz, psychological and mental stress, lack of personal development, and contracting sexually transmitted diseases (STDs), which are prevalent in Nigeria), remedies in Nigeria, and the concept of early marriage and trends of early child marriage in Nigeria. Buzome concludes by recommending the total abolition of child marriage and the

[58] Makama, Godiya Allanana. 'Patriarchy and gender inequality in Nigeria: The way forward.' (2013) European scientific journal 17
[59] Ibid
[60] Buzome Chukwuemeka, 'Early Child Marriage in Nigeria: Causes, Effects and Remedy' (2018) SSR Social Science Research, https://journals.aphriapub.com/index.php/SSR/article/download/890/863 accessed 19 April 2023.

objectives of the Sustainable Development Goals (SDGs), Beijing conference on women and empowerment among others be upheld by all stakeholders.

As with other researchers, this research argues that Buzome's recommendation is too generic to be of any practical relevance in addressing the challenge of child marriage in Nigeria. The import of his research is that he saw child marriage as a human rights issue, however throughout his work, no analysis was made on the human rights element of child marriage.

In the area of prevention of the practice of child marriage and promoting girls' education and empowerment, Nwonu and Ifidon call for more efforts to stop the practice and also argue that child marriage is a major threat to sustainable development in Nigeria and call for more efforts to prevent the practice and promote girls' education and empowerment.[61] One of the strengths of the article is its thorough analysis of the various factors that contribute to child marriage in Nigeria; However, the article does not provide a clear discussion of the potential solutions to address child marriage in Nigeria, which this thesis will provide.

Envuladu et. al research revolves around the voluntariness or otherwise of child marriage.[62] They use the Plateau state of Nigeria as a case study, using indicators like the level of education of parents, place of residence, religion, father's employment, and number of siblings. The authors conduct primary research by distributing questionnaires to school girls. 46% of the girls identify that they were forced by their parents to get married before 18, which is the case for most girls who get married before age 18. In their analysis, the authors leaned more on poor education as the major cause of child marriage in Nigeria. This research argues that a major gap in the research is

[61]Chidiebere Nwonu & Sarah Ifidon, 'Child Marriage in Nigeria: A Threat to Sustainable Development' (2019) International Journal of Humanities and Social Science Research 143

[62] Envuladu, E., Umaru, R., Lorapuu, N., Osagie, I., Okoh, E., & Zoakah, A. 'Determinants and Effect of Girl Child Marriage: A Cross Sectional Study of School Girls in Plateau State, Nigeria', (2016) Vol 5 International Journal of Medicine and Biomedical Research, 122

the limited geographic scope of the study, which was conducted in only two states in Nigeria, and it is possible that the findings may not be representative of other regions. To address this gap, this thesis shall critically analyze data and literature from different regions in Nigeria to obtain a more comprehensive understanding of the prevalence and factors associated with child marriage across the country.

The study conducted by Olaide Adedokun, Oluwagbemiga Adeyemi, and Cholli Dauda on child marriage and maternal health risks among young mothers in Gombe and Adamawa State in Nigeria provides important insights into the impact of child marriage on maternal health.[63] Adedokun et al study also identifies illiteracy as a major cause of child marriage in Nigeria and recommends that strategies to end child marriage in Nigeria should include mass and compulsory education of girls, provision of other options to early marriage and childbearing and involvement of fathers in preventing and ending the practice.[64] However, this raises an argument that there are some gaps in the research that, even though will not be filled by this thesis, should be addressed in future studies. One of the major gaps in the study is the small sample size; the study included only 120 respondents, which may limit the generalisability of the findings; a larger sample size would provide a more representative sample and allow for a more robust statistical analysis. Another gap in the research is the lack of focus on the perspectives of girls who are at risk of child marriage but have not yet been married. Their research only included the perspectives of girls who were already married, which limits the understanding of the factors that contribute to the initiation of child marriage.

[63] Olaide Adedokun, Oluwagbemiga Adeyemi, and Cholli Dauda, 'Child marriage and maternal health risks among young mothers in Gombi, Adamawa State, Nigeria: implications for mortality, entitlements and freedoms' (2016) Afr Health Science 986
[64] Ibid

Another social gap in the literature on child marriage in Nigeria is the lack of attention given to the experiences of boys and men. A study by the International Centre for Research on Women (ICRW) found that boys in northern Nigeria are often expected to marry at a young age in order to uphold traditional gender roles and gain respect in their communities.[65] However, little is known about the impact of child marriage on boys and men in Nigeria, including the health, education, and economic consequences they may face.

Adebayo & Oyewole, through their research,[66] made a valuable contribution to the literature on child marriage in Nigeria. However, this thesis argues that there are some gaps in the study that could be addressed in this and future studies. First, the study identifies poverty, gender inequality, and cultural practices as the main drivers of child marriage in Nigeria but does not provide a detailed analysis of how these factors interact. This thesis in chapter 3, critically provides an interplay between social, religious, economic, and cultural factors that contribute to child marriage in Nigeria.

Also, Adebayo & Oyewole briefly mention the legal frameworks related to child marriage and briefly mention some interventions in Nigeria but do not provide a comprehensive analysis of their effectiveness. This thesis will analyse the strengths and weaknesses of the legal frameworks and their impact on reducing child marriage in Nigeria.

A wide lacuna is evident in the exploration of the cultural beliefs and practices that contribute to the problem.[67] Culture and patriarchy play important roles in how women are abused within the matrimonial family contexts.[68] Princewill et. al states that marriage practices vary greatly from

[65]Tunde-Awe, O. O., & Olotu, A. A. 'Child marriage in Nigeria: Implications for social work practice'. (2017). Social Work and Society 15
[66] Adebayo, Y. A., & Oyewole, O. I. 'Child Marriage in Nigeria: Implications for Social Development'. (2016) vol 31(2)Journal of Social Development in Africa, 7
[67] Makama, Godiya Allanana. 'Patriarchy and gender inequality in Nigeria: The way forward' (2013) Vol 9 European scientific journal 17
[68] Ibid

country to country and from tradition to tradition, especially when it comes to the issue of 'Bride Price'.[69] Nigeria and some other sub-Saharan countries have a cultural way of getting married which involves the gift of money or material possessions also known as 'Bride Price'.[70] Marriage in Nigerians is more of a beneficial agreement between two families.[71] For instance, if an unmarried woman were to give birth before marriage, the child must remain with the family of the maternal grandfather and will only be released to his father's family once the bride price has been paid.[72] According to Kyari, bride price to traditional Nigerians signifies the intention a man has to marry a woman legally.[73] So, if two couples were to get married in court or church, without the bride price the groom has to pay, the woman remains unmarried to her family.[74]

Some authors have taken a dive into this section and have identified some negative consequences of bride price in relation to child marriage.[75] Princewill et al. have described this act as a means of 'business transaction' for families to build alliances and sometimes even for political advancement. Research has shown that the bride price reduces women's autonomy and places women as an object for sale, giving men the upper hand and liberty to control the woman as he wishes.[76]

To Jaiyeola and Choga, the bride payment can also be viewed as a form of security.[77] If a man pays the bride price to a woman's family, she can stay in a family home until demand decides she moves in; but, if the man's family does not pay the bride price, she may be rejected officially by

[69] Chitu Womehoma Princewill, The Role of Education, Culture, and Religion on Domestic Violence on Women in Nigeria, (2020) London Journal Press.
[70] Makama, Godiya Allanana. (n 67)
[71] Ibid
[72] Law, Kingsley O. Mrabure Ph D. 'Unabated Menace of Child Marriage in Nigeria. The Need for an Enabling Constitutional Provision.' (2020) Vol 98 Journal of Law, Policy and Globalization 179

[73] Kyari, Gimba Victor, and Joseph Ayodele. 'The socio-economic effect of early marriage in North Western Nigeria.' (2014) vol 5(11) Mediterranean Journal of Social Sciences 582
[74] Ibid
[75] Example of such authors are Princewill et. al, Buzome et al amongst others.
[76] Chitu Womehoma Princewill, (n 69)
[77] Afeez Olalekan Jaiyeola & Ireen Choga, 'Assessment of poverty incidence in Northern Nigeria' (2021), Journal of Poverty, 25

her husband's family, leading him to remarry another woman.[78] Research shows that when a woman is married traditionally, she is taken and introduced to her new community but if she is not married traditionally and lives with him, it can tarnish the image of the woman.[79]

Other contributors have equally analysed the extent of the problem of child marriage and its consequences for both the individual and society as a whole and whilst they have made recommendations on how to end child marriage, they failed to articulate a workable programme for the implementation of those recommendations.[80]

Sarumi et al have shown in their study that cultural beliefs and traditions are the vital forces that potentially influence the marriage of children all over the globe, particularly in Nigeria.[81] While agreeing with Sarunmi et al, Onnebune and Emmanuel analysed that child marriage is one of the common practices in Northern Nigeria with a high percentage rate of 76%.[82] They argued that this part of Nigeria has a high influence of Islam as well as cultural beliefs. This solidifies Braimah's earlier assertion in his article that the reason for high rates of child marriages in the Northern part of Nigeria can be attributed to the fact that people living in those parts value the Islamic cultural traditions and that endorse the marriages of children.[83] Similarly, Suleiman argues that there is a strong link or association between cultural beliefs and that of religious beliefs.[84] Both concepts are similar and inseparable in many respects with a synergy that makes it difficult to differentiate both

[78] ibid
[79] Ibid

[80] Ogunniran Iyabode 'Child Bride and Child Sex: Combating Child Marriages in Nigeria' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 85; See also Jacob Wale Mobolaji, Adesegun O Fatusi and Sunday A Adedini, (n. 48); see also Chidinma Ewelike , Child Marriage in Nigeria , < www.academia.edu/31011447/Child_Marriage_in_Nigeria_by_Chidinma_Kosa_Ewelike > accessed November 2021

[81] Sarumi, Rofiah Ololade, Olumuyiwa Temitope Faluyi, and Obianuju E. Okeke-Uzodike. 'Transcending Ethnic and Religious Barriers in Decision-Making: A Case of a Muslim Women Civil Organisation in Nigeria' (2019) 9 Frontiers in psychology 2693.

[82] Onebunne, Jude IfeanyiChukwu, and Emmanuela Odoh. 'Critically Questioning The Nigerian Version Of Child's Right Brouhaha' (2018). Journal of Moral Education In Africa 3

[83] Braimah, Tim S. 'Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage. '(2014) 14 no. 2 African Human Rights Law Journal 474

[84] Ibid 36.

terms. As cited by Ikpebe, 'religion is a set of systematic beliefs originated from the ideas of living, the purpose of life and existence, etc. whereas culture is a total sum of the habits, actions, and beliefs of the people that allow them to act in a certain way'.[85] This research argues that both definitions are similar and most Nigerians living in the Northern states fuse both religious and cultural values, which promotes child marriage.

### *1.2.2 Legal Literature Gap.*

Most researchers and commentators have concentrated their efforts on arguing for the passage of new legal instruments to tackle child marriage in Nigeria as a means of contributing to the drive to stop child marriage in the country. [86] For example, Braimah, a strong advocate for the abolition of child marriage in Nigeria, has argued for the enactment of new legislation to curb the prevalence of child marriage in Nigeria.[87] According to Braimah, there should be a uniform age set for a child to marry in all of Nigeria's legislation that deals with children. Braimah's argument is premised on his finding that one of the major reasons for the prevalence of child marriage in Nigeria is as a result of the inadequacy of the legal framework for prohibiting the practice. He concluded by recommending that while pressure should be put on all Nigerian states that are yet to domesticate the Child Rights Act to domesticate same, there is a need for a new Act (Prohibition of Child Marriage Act) which, if enacted, should automatically apply to all states in Nigeria in order to protect the girl child.[88] Braimah's recommendation is significantly flawed in that it fails to engage with what this thesis argues is the real issue (the legislative lists). Braimah did not take into

[85]Ikpebe, Ene. 'Child Marriage Policy in Nigeria: A Policy Innovation Model' (2019) < https://www.ippapublicpolicy.org/file/paper/5cf51feea90a7.pdf> accessed 19 February, 2023

[86] Authors such as Tim S Braimah; Enyinna S Nwauche; Buzome Chukwuemeke, Henry Nebechi Ugwu and Momoh Aneru Radietu;

[87] Tim S Braimah (n. 83). s

[88] Ibid

account the federal nature of the Nigerian Constitution, if Braimah's recommendation of enacting a new Prohibition of Child Marriage Act is adopted, the law will still not apply to all states in Nigeria because the subject marriage is not within the exclusive legislative list. Laws made by the federal government regarding marriages other than statutory marriage do not apply to the states automatically save if it is adopted by the state.

Ngozi Nwokorie examines the problem of child marriage in Nigeria, which is a violation of children's rights and a major hindrance to social and economic development.[89] Nwokorie argues that despite the existence of legal frameworks to protect children from early marriage, the practice remains prevalent in Nigeria due to a lack of enforcement and cultural and religious beliefs that promote the idea that girls should be married off at a young age.[90] She suggests that a lack of political will and corruption are major obstacles to effective enforcement. Nwokorie's article offers a comprehensive analysis of the legal, cultural, and social factors that contribute to the problem of child marriage in Nigeria. One of the strengths of Nwokorie's argument is the way she highlights the complex cultural and economic factors that contribute to child marriage in Nigeria.[91] This nuanced approach is essential for understanding the complexity of the issue and designing effective solutions. This argument is well-supported by evidence, and her recommendations for improving enforcement mechanisms are practical and well-considered.

However, one weakness of the article is that it does not offer a detailed discussion of the potential challenges and limitations of the proposed solutions. For example, while Nwokorie suggests that the domestication of the Child Rights Act by all states in Nigeria is a necessary step, she does not

[89] Nwokorie, Ngozi. 'Child Marriage in Nigeria: Legal Issues and Prospects for Reform.' (2016) 60 no 1 Journal of African Law 113.
[90] Ibid 125
[91] Ibid 127

explore the potential challenges that may arise during the domestication process, such as resistance from conservative religious groups. Overall, Nwokorie's article provides a valuable contribution to the literature on child marriage in Nigeria.

Just as Braimah, Onyinye Amucheazi in her article, also analyses the legal frameworks in Nigeria that seek to combat child marriage.[92] The article provides a critical analysis of the various international and national legal instruments that are available to combat child marriage in Nigeria and evaluates their effectiveness, weaknesses, and strengths. One of the strengths of Amucheazi's article is its comprehensive coverage of the legal instruments that are available to combat child marriage in Nigeria. She highlights the challenges that exist in implementing the legal frameworks and identifies the gaps that need to be addressed. Her article also provides recommendations on how the legal frameworks can be strengthened to effectively combat child marriage in Nigeria. For instance, Amucheazi argues that an enactment of a comprehensive law to tackle child marriage is necessary.[93] However, one limitation of her article is its focus on legal frameworks alone. This research argues that the issue of child marriage is a complex social issue that cannot be fully addressed by legal frameworks alone. The article does not sufficiently explore the socio-economic and cultural factors that contribute to child marriage in Nigeria.

Also, in a bid to fill the legal gaps in the existing knowledge on child marriage, Nwauche has concentrated his argument on the illegality and unconstitutionality of child marriage in Nigeria.[94] First, he elaborates on the constitutional protection of children and argued that child marriage is not just illegal, but also unconstitutional. Second Nwauche argues that religious marriages trump

[92] Amucheazi, Onyinye, 'Legal Frameworks for Combating Child Marriage in Nigeria: An Analysis.' (2015) 38 Journal of Law, Policy and Globalization, 31
[93] Ibid 39
[94] Enyinna S Nwauche, 'Law, Religion and Human Rights in Nigeria' (2008) 8 African Human Rights Law Journal 568

children's rights in Nigeria's constitutional jurisprudence. These issues are discussed together in the context of the belief that the absence of statutory protection of children is not fatal to their human rights protection and that neither an Islamic nor any other religious marriage trumps the rights of children in Nigeria. Nwauche recommends a negotiated consensus in determining the minimum age for child marriage, given Nigeria's plural and religious constituents. In addressing the constitutional issues relating to child marriage in Nigeria, Nwauche was silent on the right to freedom of thought, conscience, and religion provided by section 38 of the Nigerian Constitution and which this thesis explores.[95] This is particularly important because the quest to abolish child marriage in the Northern part of Nigeria has been greeted with some opposition on religious grounds. For instance, since the constitution in section 38 guarantees the right to freedom of religion, activists have opposed child marriage because according to them, there is in place a hadith of the Prophet Mohammed where the practice of child marriage is encouraged.[96]

Mrabure et al. examine the menace of unabated child marriage in Nigeria. In their work, they define child marriage in tandem with marriageable age and examine the applicable laws and international instruments on child marriage.[97] Their research work posits that child marriage remains prevalent especially in northern Nigeria because the practice of child marriage is accepted within the applicable customary law of the people. They argued that despite the laudable provisions of the Child Rights Act of 2003, it has failed in tackling child marriage due mainly to the non-enactment of the law by northern States in Nigeria except Jigawa. The paper recommends that early marriage as it pertains to marriageable age be made a fundamental right under chapter iv of the Constitution of Nigeria and multi-faceted approaches through mass enlightenment and

[95] Section 38 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[96] "Narrated 'Aisha: that the Prophet married her when she was six years old and he consummated his marriage when she was nine years old, and then she remained with him for nine years (i.e., till his death)." (Sahih Bukhari, Book 62, Hadith 64).
[97] Mrabure, Kingsley & Ovakporae, Mudiaga Kennedy (n 72).

grassroot door-to-door campaign is necessary to tackle the menace of child marriage.[98] Even though the paper considerably discusses the extent to which the Nigerian constitution can contribute to ending the practice of child marriage in Nigeria, this thesis will supplement Mrabure et al.'s research by proposing the alteration of the legislative list of the Nigerian constitution.

Gwangndi's article offers an analysis of the impact of the Shariah controversy on women's rights in Nigeria.[99] In the article, a clear relationship is shown between women's rights and child marriage. To the author, child marriage is a violation of the rights of women from a very tender age.[100] The author highlights the complex socio-legal context of the Nigerian legal system and its implications for women's rights, particularly in the context of debates about the role of Shariah law in the country.[101] One of the key strengths of the article is its focus on the intersection of law and culture in Nigeria. The author argues that the Nigerian legal system is influenced by both Islamic and customary law, as well as colonial-era laws, which creates a complex legal landscape for women's rights. The article provides a detailed analysis of the history of the Nigerian legal system and the ways in which it has been shaped by these different legal traditions.

However, there are some gaps in the analysis that could be addressed. For example, the article focuses primarily on the impact of Shariah law on women's rights, without exploring how customary law and colonial-era laws also contribute to the marginalisation of women in Nigeria. A more comprehensive analysis of the legal and cultural factors that contribute to gender inequality in Nigeria would provide a better understanding of the challenges facing women in the country.

[98] Ibid
[99] Gwangndi, Maryam Ishaku. 'The Socio-Legal Context of the Nigerian Legal System and the Shariah Controversy: An Analysis of Its Impact on Some Aspects of Nigerian Women's Rights.' (2016) 45 JL Pol'y & Globalisation 60.
[100] Ibid
[101] Ibid

Another gap in the analysis is the limited focus on the experiences of women themselves, it does not give voice to the experiences of women who are directly impacted by these laws and practices.

Finally, the article could benefit from a more explicit discussion of the implications of the Shariah controversy for women's rights in Nigeria. While the author highlights the ways in which debates about Shariah law have impacted women's rights, she does not offer a clear analysis of the implications of these debates for the future of women's rights in the country. A more comprehensive analysis of the legal and cultural factors contributing to gender inequality in Nigeria and a more in-depth exploration of women's experiences and perspectives would provide a proper understanding of the challenges facing women in the country.[102]

This research argues that one major source of concern for most authors who have carried out research on child marriage is the legal implications of Child Marriage in Nigeria. The absence of uniform fixed legal marriageable age by law has given rise to Child Marriage and the most appropriate law to prosecute culpable abusers. Plurality in this context connotes a state of confusion, anarchy, and doom for any effort in this direction such as witnessed in the National Assembly recently. More worrisome is the fact that more men in the high places than the middle class and poor are the ones who are carrying out these condemnable acts. No single person has been tried in any court of law and convicted in Nigeria and yet the government spends millions of taxpayers' money treating women with cases of Child Marriage related diseases. This measure to us is a cosmetic solution to the real issue at hand. Fixing the marriageable age by an Act and prosecuting the offenders is a pragmatic way of putting an end to Child Marriage as identified by

[102] Ibid

a majority of authors, however, this researcher takes this a step further by introducing a new commendation in the amendment of the exclusive legislative list to include child protection.

Amina Salihu and Yakubu Mukhtar provides a comprehensive analysis of the legal frameworks surrounding child marriage in Nigeria and identifies several gaps in the legal regime.[103] The authors suggest ways to address the issue through legal reform, which is a critical step in addressing the harmful practice of child marriage in Nigeria.[104] One strength of the article is that it provides a detailed review of the legal frameworks related to child marriage in Nigeria, including international and domestic laws and policies. The authors argue that the inconsistencies and gaps in the legal regime is a critical issue that needs to be addressed in order to protect children from the harms of early marriage. Another strength of the article is the authors' discussion of the cultural and social factors that contribute to child marriage in Nigeria. They note that child marriage is often rooted in deeply ingrained cultural practices and beliefs and that it is essential to understand these factors in order to develop effective strategies to address the issue. This is an important point, as cultural and social norms play a significant role in shaping attitudes toward child marriage and can hinder efforts to address the problem.

However, this research will supplement Salihu and Muktar's research by providing a clear roadmap for legal reform in Nigeria to address child marriage. While the authors make several recommendations, such as harmonising the legal definition of a child, increasing penalties for those who facilitate or engage in the practice, and improving access to justice for victims, they do not provide a detailed plan for implementing these reforms. This research will improve on that.

[103] Salihu, A., & Mukhtar, Y. Child Marriage in Nigeria: Examining Legal Frameworks and Challenges (2019). 8(4) International Journal of Humanities and Social Science Research 47
[104] Ibid.49

A report by African Child Policy Forum highlights the issue of child marriage in Nigeria and provides recommendations for policymakers and practitioners to address this issue. In terms of compliance with international law on child marriage, the report states that though Nigeria is a signatory to several international conventions that prohibit child marriage, including the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, the application of these conventions in Nigeria has been greeted by several legal controversies.[105]

One of the key gaps in the report is the lack of emphasis on the enforcement of existing laws and policies related to child marriage in Nigeria. While the report provides several recommendations for new policies and programs, it does not adequately address the issue of implementation and enforcement of existing laws and policies. This is important because Nigeria has several laws that prohibit child marriage, including the Child Rights Act of 2003, which criminalizes child marriage and provides penalties for offenders. However, the implementation of these laws has been weak, and there have been several cases of child marriage that have gone unpunished.

Another gap in the report is the limited focus on the root causes of child marriage in Nigeria. While the report provides some insights into the social, economic, cultural, and religious factors that contribute to child marriage in Nigeria, it does not go into detail on how these factors can be addressed. Addressing the root causes of child marriage is critical to preventing it from occurring in the first place.

[105] Ibid

### *1.2.3. Religious Literature Gap.*

There are some religious gaps in the existing literature on child marriage. While child marriage is a complex issue that affects many communities and cultures, it is often associated with certain religions or religious practices.[106] However, many studies on child marriage do not adequately explore the religious beliefs and practices that influence child marriage in different communities.[107] For example, there is limited research on how religious beliefs and practices contribute to child marriage in certain Muslim communities. Similarly, there is limited research on the role of religion in child marriage in certain Hindu, Christian, or Buddhist communities. Tariq and Abbasi argue that while child marriage is not solely a religious issue, it is often influenced by religious beliefs and practices in different contexts.[108] However, the role of religion in shaping attitudes towards child marriage and influencing social norms and practices is not always fully explored in the existing literature.[109]

Mobolaji et. al carried out a study on Ethnicity, religious affiliation, and girl-child marriage in Nigeria.[110] Their study investigates the prevalence and the influence of ethnicity and religious affiliation on the girl-child marriage among female adolescents in Nigeria. They concluded that ethnicity and religion have independent associations with girl-child marriage in Nigeria; interventions must address culturally-laden social norms that vary by ethnic groups as well as religious-related beliefs. While Mobolaji et al's work is recommended for its originality in that it

[106] Shaikh, S., & Hatcher, J. 'Religion and child marriage: A scoping review. (2018) 57(3) Journal of Religion and Health' 1061.
[107] Ibid
[108] Tariq, A., & Abbasi, F. 'Child marriage in Pakistan: A critical analysis of the law and the prevalence. (2017) 5(9) Journal of Social Issues & Humanities' 1
[109] Ibid
[110] Mobolaji, J.W., Fatusi, A.O. & Adedini, S.A. (n 48)

studied child marriage in individual ethnic groups and made recommendations in each peculiar case, there are some limitations and obvious gaps in existing knowledge.

First, the study uses a cross-sectional design, which limits its ability to establish causal relationships between variables.[111] The study cannot determine whether ethnicity or religious affiliation directly causes child marriage, or whether there are other factors that mediate this relationship. Further, the study does not consider the role of cultural and social norms in shaping attitudes and behaviours related to child marriage. This thesis argues that while ethnicity and religious affiliation may be important factors in determining these norms, other factors such as geographic location, socioeconomic status, and family dynamics may also play a role.[112]

Also, the study does not fully explore the complex interactions between ethnicity, religion, and gender in the context of child marriage. For example, while the study finds that Muslim girls are more likely to be married as children than Christian girls, it does not explore how gender norms and power dynamics within these religious communities may contribute to this disparity. Despite these limitations, the study by Mobolaji et al.  provides important insights into the factors that contribute to child marriage in Nigeria. The study highlights the need for targeted interventions and policies that consider the diversity of ethnic and religious communities in Nigeria, as well as the importance of addressing underlying cultural and social norms that perpetuate child marriage.[113]

[111] Ibid
[112] Ibid
[113] Ibid 134

T. Khabir's work explores the issue of childhood marriage in Nigeria and the role of Islam in perpetuating this practice.[114] One strength of the presentation is its focus on providing a case study of Nigeria, which allows for a detailed analysis of the cultural and religious factors that contribute to childhood marriage in the country.[115] The author highlights the prevalence of childhood marriage in Nigeria, particularly in the northern regions where Islamic law is practised, and provides examples of the negative consequences of this practice on young girls' health, education, and overall well-being.[116]

The author also provides an in-depth analysis of the role of Islam in perpetuating childhood marriage in Nigeria. He argues that while Islam does not explicitly condone childhood marriage, cultural practices and interpretations of Islamic law have led to the normalisation of this practice in some Muslim communities.[117] The author also highlights the efforts of some Islamic scholars and organisations to challenge these practices and promote alternative interpretations of the Islamic law that prioritise the protection and well-being of young girls.[118]

Overall, T. Khabir's presentation provides a valuable analysis of the role of Islam in childhood marriage in Nigeria. While it could benefit from a more nuanced analysis of the political and economic factors that contribute to this practice, its focus on providing a case study of Nigeria and its detailed analysis of the role of Islam makes it a valuable contribution to the literature on childhood marriage in the country.

[114] T. Khabir's work 'The Role of Islam in Childhood Marriage Case Study: Nigeria' (Annual Convention of the Global Awareness Society International in San Francisco ,2008)
[115] Ibid 2
[116] Ibid
[117] Ibid
[118] ibid

### *1.2.4. Economic Literature Gap.*

Also, Michael Olakunle et al. argue that through the poverty reduction fund, the government was able to retain almost 100,000 children in school who otherwise would have been dropouts due to poverty.[119] According to the authors, due to the financial stress on the family, many of the parents indulge in the wrongful practice of child marriage, especially in rural areas, and coerce their children into labour practices, which deprived them of their basic right of freedom and education.[120]

Magbadelo's article provides a critical analysis of the state of education and well-being of children in Nigeria, with a focus on the challenges and opportunities for improving their rights to education and well-being.[121] The author draws a direct link between poor education and child marriage in Nigeria. He argues that the rate of child marriage is prevalent in the northern part of Nigeria not because it is dominated by a particular religion or ethnic group, but rather, because of the low rate of education in the North. He further argues that despite Nigeria's commitment to children's rights and the various legal and policy frameworks that have been put in place to protect and promote these rights, children in Nigeria still face significant barriers to accessing quality education and achieving their full potential.[122]

One of the strengths of the article is its comprehensive review of the various legal and policy frameworks that have been put in place to protect children's rights in Nigeria. The author highlights the significance of the Convention on the Rights of the Child (CRC) and the African Charter on

[119]Michael, Olakunle, Olufunke Justina, and David Olabode. 'Child Labour and Protection: An Exploration of Vulnerable Children in Lagos State, Nigeria.' (2018) 6 Humanities and Social Sciences Letters 171.
[120]Ibid 40
[121] Magbadelo, John Olushola. 'Children's rights to education and wellbeing in Nigeria: An appraisal.' (2019) 23 World Affairs: The Journal of International 112.
[122] Ibid 119

the Rights and Welfare of the Child (ACRWC), as well as the National Policy on Education and the Universal Basic Education Act, in guaranteeing children's right to education and well-being.

However, one of the limitations of the article is that it does not provide a detailed analysis of the cultural and social factors that contribute to the challenges faced by children in Nigeria. For example, the article briefly mentions the issue of child marriage and its impact on girls' education but does not explore the underlying cultural and social norms that perpetuate this practice. This thesis complements Magbadelo's research by not only providing a detailed analysis of the cultural and social factors that contribute to child marriage in Nigeria but also evaluating Nigeria's compliance with international law on child marriage.

The research by Akinwumi et al. is a comprehensive review of the literature on child marriage in Nigeria.[123] The study provides an overview of the drivers and consequences of child marriage in Nigeria, identifies gaps in the literature and suggests areas for future research.

One of the strengths of the study is its comprehensive review of the literature on child marriage in Nigeria, which provides a solid foundation for the analysis. The authors also use a rigorous methodology for the review, which enhances the credibility of the findings.[124]

However, despite the strengths of the study, there are some gaps that need to be addressed. Firstly, the study does not provide a clear definition of child marriage, which can lead to confusion about what constitutes child marriage in Nigeria. Secondly, the study focuses primarily on the drivers and consequences of child marriage in Nigeria without providing a clear understanding of the prevalence and distribution of child marriage across the country. This research will provide a better

[123] Akinwumi, O. C., Olapeju, B., Okusanya, B. O., & Okusanya, A. O. 'Drivers and consequences of child marriage in Nigeria: a scoping review of evidence. ' (2021) 21 BMC Public Health 1
[124] Ibid

understanding of these issues to help contextualize the drivers and consequences of child marriage. In addition, the study does not provide a detailed analysis of the role of gender norms and patriarchal structures in perpetuating child marriage in Nigeria. This is a significant gap, as gender norms and patriarchal structures are important drivers of child marriage in Nigeria. A more in-depth analysis of the role of these factors would enhance the understanding of the drivers of child marriage in Nigeria.

Asiyanbola provides a comprehensive review of the literature on child marriage and identifies the key factors that contribute to the practice in Northern Nigeria.[125] One of the strengths of this article is that it provides an in-depth analysis of the cultural, economic, and social factors that contribute to child marriage in northern Nigeria. The author also discusses the legal and policy frameworks that have been put in place to address the issue of child marriage in the region.[126] This comprehensive approach to the study of child marriage is commendable. However, there are some gaps in the article that need to be addressed. Firstly, unlike this thesis, Asiyanbola's article focuses primarily on northern Nigeria, which limits its generalisability to other regions of Nigeria. This thesis argues that child marriage is a nationwide problem, and a more comprehensive study that includes all regions of Nigeria would be more informative.

Secondly, while the article provides a broad overview of the factors that contribute to child marriage, it does not provide a detailed analysis of the complex interplay between these factors.

[125] Asiyanbola, R. A. Child Marriage in Northern Nigeria: A Review of Key Factors. (2021) 8(2) Journal of Social Sciences and Humanities Review, 215
[126] Ibid s

### 1.3 Impact of Research and Contribution to Knowledge

From the foregoing literature review, it is evident that there are gaps within the child marriage discourse in Nigeria. To address this void, this research will give an in-depth analysis of how Nigeria is not complying with international laws and standards aimed at ending child marriage due to institutional failure in terms of human rights respect, fulfilment, and protection. proposing practical solutions to the problem of child marriage in Nigeria. The research will thoroughly investigate Nigeria's constitutional framework and religion-based personal laws which have further contributed to the incidence of child marriage in Nigeria.

To overcome these obstacles, this research will recommend that appropriate UN and AU mechanisms and procedures be activated, operationalized, and implemented. The research also suggests constitutional amendment strategies for addressing the underlying issues that underpin child marriage in Nigeria, such as putting key international norms under the federal government's jurisdiction, particularly in the case of children, through legislative list amendments. The research further argues that the country's institutions, such as the Nigerian National Human Rights Commission and the National Child Rights Implementation Committee, be strengthened. These institutions should be given the task of establishing an Action Plan to eliminate child marriage in Nigeria, in accordance with international standards. Furthermore, via programs aimed at reducing child marriage in Nigeria, stakeholders should be involved at the international, regional, national, and local levels.

The solutions proffered in this work are not only practicable and sustainable, but they also fill the current void in the knowledge of workable solutions for ending child marriage in Nigeria. In setting out these sustainable solutions, this research approaches the problem from a new dimension by analysing the position of Nigeria as a State party to International Charters and Treaties that

proscribes child marriage and the obligations that arise thereto. Although there is a lot of research discussing Nigerian marriage in Nigeria, there is minimal scholarly review of the failure of the institutional mechanism in place to tackle child marriage in Nigeria. This further includes absence of concrete research on how Nigeria can use the lessons learnt from the global programme or the UN and AU mechanisms to solve the problem of child marriage within the country.

The impact of this research is far reaching and will be very beneficial to the Federal and State governments in Nigeria as it could lead to an overhaul of the Nigerian legal framework (laws, programs, and policies) on the protection of children from child marriage. This study also serves to raise awareness about the misreading of preconceived norms surrounding child marriages and the emotional and psychological effect that this practice has on those subjected to it via the dissemination of information. These are some of the extraneous variables that impact society, particularly legislators, when it comes to enacting and approving legislative changes. Furthermore, in the context of child marriages, this research shines light on the knowledge and arguments produced via traditional customs and practices.

### 1.4 Aims of the Research

The aim of this research is to critically evaluate the various factors that contribute to child marriage in Nigeria and to present arguments for the effects of this harmful practice on the lives of children in Nigeria. While the research will focus on Nigeria as the selected case study, the thesis shall also analyse child marriage in the context of other developing countries, where child marriage is prevalent.

The research will critically assess the national and international instruments that affect child marriage to determine their effectiveness or otherwise in ending child marriage in Nigeria.

After appraising both domestic and international legal frameworks on child marriage, the research aims at evaluating the extent of Nigeria's compliance with international law on child marriage using, where necessary, the Global Programme as the standard to measure the extent to which Nigeria complies with international laws in the eradication of child marriage. In the identification of examples of domestic non-compliance, this thesis will make recommendations.

This research aims to contribute to the existing body of knowledge on child marriage by identifying and evaluating the continuous prevalence of the harmful practice despite the enactment of laws, development of policies and programmes to end the practice. The research will provide insights into how this practice can be addressed effectively by revisiting the legal framework in Nigeria.

This research will make several contributions to the existing literature on child marriage. First, it will provide a comprehensive overview of the factors that contribute to child marriage, including the role of poverty, cultural norms, and gender inequality. Second, it will identify the specific ways in which child marriage affects the lives of children, particularly girls, highlighting the adverse effects on their health, education, and social status. Third, the research will critically evaluate the effectiveness of existing legal and policy frameworks in addressing child marriage and will identify gaps and areas for improvement. Finally, this research will identify promising community-based interventions that have been implemented to address child marriage and will evaluate their effectiveness in reducing the prevalence of this practice.

Overall, this research aims to provide a comprehensive understanding of child marriage and to contribute to efforts to address this harmful practice in Nigeria. Also, by a critical analysis of the

socio-cultural and religious factors contributing to child marriage in Nigeria, this research aims at providing insight into the role of traditional, cultural, and religious institutions in ending this harmful practice through community-based interventions that empower girls and shift societal attitudes.

### 1.5 Objectives of the Research

1. The primary objective of this research is to critically evaluate and analyse the effectiveness of the existing legal framework governing child marriage in Nigeria, including enforcement mechanisms and the accessibility of justice for victims of child marriage in Nigeria; This will involve an evaluation of national laws, policies, and regulations related to child marriage, as well as their alignment with international human rights conventions such as the African Charter on Human and People's right, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

2. To investigate the cultural and social factors that contribute to child marriage in Nigeria. This will involve a review of existing literature on the drivers of child marriage, including poverty, lack of education, gender inequality, and other harmful traditional practices.

3. To evaluate Nigeria's compliance with international law on child marriage and identify areas of weakness. This will involve a comparative analysis of Nigeria's legal framework and compliance with international human rights conventions, as well as an assessment of the cultural and social factors that contribute to child marriage. The study will also consider the

effectiveness of existing interventions and policies aimed at preventing and addressing child marriage, including awareness-raising campaigns and support services for victims.

4. Finally, the fundamental objective of this research is to propose workable solutions to address the problem of child marriage in Nigeria. Based on its findings, the research will propose a set of recommendations aimed at strengthening Nigeria's legal framework and addressing the root causes of child marriage. The recommendations will be evidence-based, gender-sensitive, and aligned with international human rights standards.

## 1.6 Research Questions

To achieve its objectives, this research will answer the overarching question viz: "*To what extent does the Nigerian Constitution and the Federal System of government in place in Nigeria impact child marriage in Nigeria?"*

Other research questions which will be considered in this research to support the critical evaluation of the problem of child marriage in Nigeria include:

- To what extent is Nigerian law in compliance with international laws and norms on child marriage and why?
- How can the international initiatives of the United Nations and the African Union, help to contribute to Nigeria ending the practice of child marriage?

## 1.7 Scope and Limitation of the Research

This research focuses on the corpus of international law and safeguarding mechanisms prohibiting child marriage. Thus, the research shall in addition to reviewing domestic laws on child marriage, analyse international instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[127] the Convention on the Rights of the Child (CRC),[128] the International Covenant on Civil and Political Rights (ICCPR),[129] the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on Rights on Persons with Disabilities (CRPD), African Charter on the Rights and Welfare of the Child (ACRWC) amongst others.

In addition to analysing the national, regional, and international legal framework for ending child marriage in Nigeria, this research shall consider the socio-cultural and religious factors that affect Nigeria's compliance with its international obligation on child marriage. The study is limited to Nigeria although data and literature on children from other countries will be reviewed.

## 1.8 Research Methodology

The purpose of this research is to examine Nigeria's compliance with international law on child marriage, identify the weakness in the legal framework for combating child marriage in Nigeria, and evaluate the sociocultural factors responsible for the continued prevalence of child marriage

[127] Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 16.

[128] Convention on the Rights of the Child 1989, Article 34.

[129] International Covenant on Civil and Political Rights, 1966, Article 24(1)

in Nigeria. To achieve its objective, this research will use both doctrinal and non-doctrinal methods to analyse the issue of child marriage in Nigeria.

However, it is worthy to note that the researcher started off by considering other methods for this research before settling for these methods used. For example, in the early stages of this research, qualitative and quantitative research methods were employed to systematically conduct interviews and collect data geared towards finding answers to the research questions. In the process of my field work, it became apparent that using those method would widen the research and take it beyond the scope anticipated. This led to a return to the drawing board and the decision to change the research methods to doctrinal and non-doctrinal methods to help keep arguments of the research precise, clear and within scope. Qualitative and quantitative research methods will be ideal for future further research especially as the findings from interviews and focus groups will give the research more human touch.

### *1.8.1 The Doctrinal Method*

Doctrinal research method is also known as theoretical legal study which centres on what the law is in a particular area. It is research into the law and legal concepts and why these laws exist. The main reason for this research approach is to answer the overarching research question which is determining the extent to which the Nigerian Constitution and the Federal system of government in place in Nigeria impact child marriage in Nigeria, and to access Nigeria's compliance with international laws on child marriage, the thesis adopts a doctrinal approach. This research method involves analysing legal sources, such as statutes, case law, and legal literature, to establish legal principles and rules.[130] In using the doctrinal method, the study will analyse Nigerian laws and

[130] Livermore, M. A., & Rockmore, D. N. 'Doctrinal Research in Legal Scholarship' (2018) 14 Annual Review of Law and Social Science 107.

regulations related to child marriage and compare them with international legal standards on child marriage.

### *1.8.2 Non-Doctrinal Method*

Non doctrinal research method is a multidisciplinary field of inquiry that explores the intersection between law and society. This approach recognizes that law is shaped by social, economic, cultural, and political factors and that legal norms and practices, in turn, influence behaviour and social change.[131] To determine the role religious, cultural, and traditional institutions play in ending child marriage in Nigeria, this thesis adopts the non-doctrinal approach, which is a research method that involves analysing non-legal sources, such as empirical data, interviews, and surveys, to establish the social, economic, and cultural factors that influence the issue being studied.[132] Bouchrika argues that non-doctrinal research is the most appropriate method to analyse non-legal factors that affect the implementation of the law.[133] Crouch and McKenzie also argue that non-doctrinal research method allows for a broader and more comprehensive approach to a research topic[134] Thus, this research method will be most appropriate for analysing chapters 2 and 7 of this thesis. In using the non-doctrinal method, the study will examine the social, economic, and cultural factors that contribute to child marriage in Nigeria. The adoption of this method of research is premised on the fact that it does not rely solely on legal texts or doctrinal analysis but incorporates social, cultural, and economic factors that may impact Nigeria's compliance with international standards on child marriage.

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[131] Salim Ibrahim Ali, Dr. Zuryati Mohamed Yusoff, Dr. Zainal Amin Ayub , 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 International Journal of Trend in Research and Development 1; see also Synder, F 'Effective Legal Research, Books, Manuals, and Guides -- More Than Enough' (1988).Faculty Journal Articles & Other Writings. 34.

[132] Ibid ; see also Imed Bouchrika 'How to Write Research Methodology: Overview, Tips, and Techniques' <https://research.com/research/how-to-write-research-methodology> accessed 8 May, 2023

[133] Ibid

[134] Crouch, M., & McKenzie, H. *The Routledge Handbook of Non-Doctrinal Research Methods in Law and Society*. (Routledge 2021).

### 1.9. Structure of the Research Work

This research consists of eight chapters. Chapter one of this study contextualises the significant issues in the research work. It identifies the gaps within the child marriage discourse which this research plans to fill to a great extent. It also sets out the aims and objectives of this inquiry, how the research will be approached, and a synopsis of the chapters of this research.

Chapter two of the study argues that there are several barriers to ending child marriage in Nigeria, including socio-cultural, economic, legal, and religious barriers. These barriers will be analysed and consider ways Nigeria can handle them in its quest to end child marriage.

In Chapter Three, Nigeria's Domestic Legal Framework for Ending Child Marriage is critically analysed. Most importantly, this chapter gives an in-depth analysis of the Child Rights Act and its role in ending Child Marriage in Nigeria, the marriageable age under the Marriage Act in Nigeria, the constitutional balance in Nigeria, and the Nigerian Legal System.

Continuing with the analysis of the Nigerian Constitutional system, Chapter Four argues the Human rights implication of the prevalence of Child Marriage in Nigeria. It will present the Human Rights Based Approach to ending Child Marriage, an overview of the Nigerian Human Rights Framework relevant to Child Marriage, and the balance of rights implicated in the practice of Child Marriage in Nigeria.

Chapter Five establishes a critical examination of the African Union (AU) and the mechanism in place to ensure compliance with human rights provisions by State parties. It brings to fore the various regulatory framework of regional instruments that engage with the issue of child marriage.

This chapter concludes that the AU provides a more suitable framework through which countries like Nigeria are mandated to comply with human rights obligations.

Chapter Six analyses the extent which Nigeria violates international standards and provides a review of appropriate international mechanisms to encourage Nigeria to reform its law. The UN framework for ending Child Marriage is the focus of this chapter - the opportunities within the UN's organs, the Universal Periodic Review (UPR), and Human Rights Commission (HRC), and UN Women intergovernmental mechanisms for enforcement of human rights provisions. This includes Universal Periodic reviews and sanctions and it argues the UN policies to end child marriage through the lens of the Global Programme which sets the standard of application of international law on child marriage and the programme's achievements in accelerating the decline of child marriage in target states, pointing out lessons that could be learned and applied in Nigeria; and how Nigeria has complied with the standards and norms argued in chapter six, with an analysis of the Nigerian third periodic review and stakeholders' submission on Nigeria's periodic review. The arguments in this chapter will prove that Nigeria has failed to comply with international laws and standards on child marriage.

Chapter seven of the research is an evaluation of Nigeria's Compliance with its international obligations on Child Marriage Also, in this chapter, this research will apply the principle of good faith under international law to analyse Nigeria's efforts to end child marriage. It will also analyse the clear distinction between the law in theory and the law as it is in practice as obtainable in Nigeria.

Finally, Chapter Eight concludes this research by answering the research questions and offering practical recommendations on the way forward for the Nigerian government. This chapter also

provides suggestions for further research, policymaking, and legislative action to minimise the occurrence of child marriage in Nigeria.

# CHAPTER 2: SOCIOCULTURAL AND RELIGIOUS BARRIERS TO ENDING CHILD MARRIAGE IN NIGERIA

## 2.1 Introduction

The overarching research question of this thesis is to determine the extent to which the Nigerian Constitution and the other domestic laws are compliant with international law to end child marriage in Nigeria. Having laid background to the statement of the problem in chapter 1, it is important to now identify social and cultural elements that play a significant role in the prevalence of child marriage. Hence a juxtaposition of these socio-cultural factors contributing to child marriage and the inadequacy of the legal framework, to wit: the constitution of the Federal Republic of Nigeria.

Millions of girls and women throughout the world, particularly in underdeveloped nations, are impacted by the worldwide human rights problem of child marriage.[135] According to the United Nations International Emergency Fund (UNICEF), child marriage refers to both legally recognized weddings and unofficial relationships in which minors under the age of 18 cohabitate with a spouse as though they were married. Nigeria has 3,538,000 confirmed child brides, which is the third-highest number in the world, and the 11th-most instances of child marriage overall. In Nigeria, 16% of girls are married before they become 15, and 43% get married before they turn 18. They add that millions of girls and women worldwide, particularly in poor nations, suffer from child marriage, which is a problem for human rights.[136] UNICEF defines child marriage as the union of

[135] UNFPA, 'State of the world population' (UNFPA 2016) <http://www.unfpa.org/sites/default/files/sowp/downloads/The_State_of_World_Population_2016_-_English.pdf> accessed 4 June 2023.
[136] UNICEF, 'Nigeria - Child marriage country profile'. (UNICEF 2022) https://data.unicef.org/wp-content/uploads/country_profiles/Nigeria/Child%20Marriage%20Country%20Profile_NGA.pdf accessed 4 June 2023

a girl or a boy before they are 18 years old. It also refers to both legal and informal unions in which minors under the age of 18 reside with a partner as if they are married.

The rights, medical care, female empowerment, and general well-being of girls are seriously harmed and negatively affected by child marriage. The right to select a life partner, to agree to marriage, and to use reproductive and sexual health services is frequently denied to child brides. In addition, they are more likely to face domestic abuse, drop out of school, get HIV/AIDS and other STDs, endure maternal morbidity and mortality, and give birth to infants with low birth weight and malnutrition.[137] Additionally, child marriage reduces girls' abilities to contribute to social and economic growth, which perpetuates poverty and inequality throughout whole communities and nations.[1]

This chapter introduces the social, cultural, and religious barriers to ending child marriage in Nigeria and explains that it is a prevalent practise, particularly in the northern part of the country; and also explores the various cultural factors that contribute to the practise of child marriage in Nigeria. The research argues in this chapter that in many communities in Nigeria, marriage is seen as necessary for a girl's social and economic status, particularly in rural settings where farming and family chores are the norms; further, many Nigerians view girls as property that can be protected by marrying them off at a young age. The chapter also notes that a lack of education and awareness about the harmful effects of child marriage can perpetuate the practise.

On the effect of religion on the prevalence of child marriage in Nigeria, this chapter argues that many religions in Nigeria, including Islam and Christianity, do not explicitly forbid child marriage and some interpretations of religious texts even support the practise. Additionally, religious leaders

[137] Adebowale, S. A., Fagbamigbe, F. A., Okareh, T. O., & Lawal, G. O.'Survival analysis of timing of first marriage among women of reproductive age in Nigeria: regional differences' (2012) 16 (4) African journal of reproductive health, 95.

can hold significant influence in their communities, and their endorsement of child marriage can contribute to its perpetuation in Nigeria.

## 2.2 Social and Cultural Barriers to Ending Child Marriage in Nigeria

### *2.2.1 Ethnicity and Child Marriage in Nigeria*

One of the factors that contribute to child marriage in Nigeria is ethnicity. Ethnicity plays a crucial role in shaping social norms, attitudes, and behaviours related to marriage decisions, including the practise of marrying off young girls.[138]

Nigeria is a multi-ethnic country with over 250 ethnic groups, each with its distinct cultural practices and traditions.[139] Some ethnic groups in Nigeria, such as the Hausa, Fulani, and Yoruba, have a long history of practising early marriage as part of their cultural heritage.[140] In these communities, marriage is often seen as a way of strengthening family and kinship ties and ensuring social and economic security.[141] As a result, families tend to marry off their daughters at a young age, often before they reach the age of 18.[142]

The problem of early marriage in Nigeria is not limited to certain ethnic groups. However, studies have shown that some ethnic groups are more likely to practise early marriage than others.[143] Mobalaji et al's research shows that the ethnic groups with the highest rates are the Kambari and *Fulfude – two Northern ethnic minority groups with the prevalence of 74.9% and 74.8%*

[138] Nwonu, Christopher Okafor, and Ifidon Oyakhiromen. 'Nigeria and child marriage: Legal issues, complications, implications, prospects and solutions' (2014) 29 JL Pol'y & Globalisation 120
[139] Okunogbe O. *Does Exposure to Other Ethnic Regions Promote National Integration*? Evidence from Nigeria. (Development Research Group, 2019)
[140] Mobolaji, J.W., Fatusi, A.O. & Adedini, S.A (n 48)
[141] Ibid
[142] Ibid
[143] Ibid

*respectively compared to 54.8% among the Hausa/Fulani group.*[144] *Their finding supports the argument advanced by this research that regardless of geographical coexistence, ethnic groups in* Nigeria are distinct and diverse in beliefs and practices, particularly in relation to gender norms.

The cultural practices and beliefs that support early marriage in some ethnic groups in Nigeria also create significant barriers to ending this practice. One of the main barriers is the perception that marriage and childbearing are essential for the social and economic well-being of girls and their families.[145] Many families believe that by marrying off their daughters at a young age, they are providing them with economic security and reducing their burden on the family.[146] Moreover, the practice of early marriage is seen as a way to protect girls from negative social influences and prevent premarital sex and unwanted pregnancies.

Another significant barrier is the perception that girls are a form of property that parents can sell off to the highest bidder.[147] In some ethnic groups in Nigeria, girls are regarded as a source of wealth, and marrying them off at a young age is seen as a way of maximising the family's income.[148] This research argues that this perception which is common in most ethnic groups in Northern Nigeria, not only perpetuates child marriage but also creates a context where girls are vulnerable to several forms of abuse, including physical and sexual violence.

[144] Ibid 7
[145] Ado, Y. U. 'Early marriage and its health implications in Northern Nigeria.' (2018) 7 (9) International Journal of Medical Science and Public Health, 720
[146] Ibid
[147] Ibid
[148] Odimegwu C, Somefun OD. Ethnicity, gender and risky sexual behaviour among Nigerian youth: an alternative explanation. (2017) 14 (1) Reprod Health.16.

### *2.2.2 The Effect of Social Norms on Child Marriage in Nigeria*

Individuals play different roles within society that are based on their status and socialisation. In the context of child marriage, Nwonu argues that as a norm some societies expect girls to assume the role of wife and mother at an early age.[149] This expectation is often reinforced by cultural norms and beliefs that prioritise female domesticity over education and personal development. In some Nigerian communities, there is always pressure on girls to marry before a certain age. This pressure is necessarily rooted in the established culture and tradition of the society and is also a result of peer influence, social status, etc.[150] For instance, in Nigeria, especially among the Yoruba, people tend to give more respect to married people than those that are not.[151] Married people are seen and treated as responsible people while unmarried adults are viewed as either unserious or as having some problems.[152] It is generally believed that it is abnormal for a man or a woman to still be single at thirty-five or worse still, forty and above.[153] People attribute their excesses in any area or their shortcomings to their being single. The younger ones who are married try as much as possible to avoid them; some older ones treat them with disgust while some always pity them.[154] The situation is worse for female single adults than for male.[155] Stigmatisation against unmarried ladies or ladies who marry late is more prevalent in Northern Nigeria, where societal norms place a premium on women being married. According to a study by Ibrahim and Mahmud, girls who are unmarried or marry late in Northern Nigeria face social and economic exclusion, as well as

[149] Nwonu, Christopher Okafor, and Ifidon Oyakhiromen. 'Nigeria and child marriage: Legal issues, complications, implications, prospects and solutions.' (2014) 29 JL Pol'y & Globalisation 120.
[150] Abe, G. 'The Jewish and Yoruba Social Institution of Marriage: A Comparative Study' (1989) 21 Ibadan Journal of Religious Studies 8
[151] Oderinde, Olatundun, 'A Socio- Religious Perspective of Late Marriage and Stigmatization of Single Adults and its Impact on the Church in Nigeria.' (2013) 5 Review of European Studies.10
[152] Ibid
[153] Ibid
[154] Ibid
[155]Ibid 6

discrimination from family and community members.[156] At the age of 20 in Northern Nigeria, an unmarried lady begins to have feelings of unrest as the pressure to get married keeps mounting through discrimination and marginalisation which often lead to feelings of shame, low self-esteem, and hopelessness.[157]

Ado argues that there is social pressure for women to get married at a young age, with some families even arranging marriages for them. This pressure can lead to forced marriages or early marriages, which have significant negative consequences on their physical, social, and emotional well-being.[158] This research argues that the stigmatisation against unmarried ladies in Northern Nigeria is deeply rooted in societal expectations and traditions, causing social and economic exclusion, discrimination, and pressure to conform to societal norms and this has resulted in the rising cases of child marriage in Nigeria. This argument is further strengthened by a study by the Population Council, which posits that the stigma against unmarried women is often reinforced by religious and cultural beliefs that emphasise the importance of early marriage and motherhood for women and this puts pressure on families to marry off their daughters at an early age, and those who resist are viewed as disobedient and deserving of social exclusion.[159] In this context, this research argues that child marriage is viewed as a solution to the stigma that these young women face. By getting married, they are able to gain social approval and respect, even if it means sacrificing their education, health, and other life opportunities.

[156] Ibrahim, M. T., & Mahmud, Z. 'Stigmatisation and social exclusion of unmarried females in Northern Nigeria.' (2017) 22 (10) (Journal of Humanities and Social Sciences, 51.
[157] Ibid
[158] Ado, Y. U. (n 145)
[159] Population Council, Stigma and Social Norms in the Lives of Adolescent Girls: A Review of the Literature. (Population Council 2018)

Furthermore, the perpetuation of child marriage can be seen as a result of power dynamics between parents, communities, and patriarchal societies.[160] Through the lens of societal role theory, this research argues that ending child marriage must involve challenging these established gender roles and promoting alternative modes of societal organization that prioritise girls' agency and empowerment.

One way to challenge established gender roles and promote girls' agency and empowerment is through education. By providing girls with access to education, they are given the opportunity to develop their own identities and pursue their own goals. Education can also help to shift social norms and beliefs that prioritise domesticity over personal development. Additionally, education can provide girls with the skills and knowledge necessary to make informed decisions about their own lives, including decisions about marriage and family planning.[161]

## 2.3 The Role of Poverty, Family Honour, and Dowry in Child Marriage in Nigeria

### *2.3.1 Poverty, Dowry, and Child Marriage in Nigeria*

Poverty is one of the main factors that contribute to child marriage. Economic hardship often drives parents to marry off their daughters in exchange for money or goods.[162] In Nigeria as well as many developing countries, girls are seen as financial burdens on their families. Marrying off a daughter at an early age means that the family is relieved of the financial responsibility of raising her.[163]

[160] Ahman E., Bukar M., Ali A. K., Umar D. Drivers of Child Marriage in Northern Nigeria: Findings from Six States. (Population Council, 2016).
[161] Ibid
[162] UNICEF (n 7)
[163] Ahman E., Bukar M. (n 160)

The bride price or dowry paid by the groom's family also provides an additional source of income for the girl's family. Moreover, in some communities, it is customary for the bride's family to offer significant dowries, which have been described as “ransom payments” used to secure better husbands for daughters.[164]

Poverty also limits the opportunities available to girls, leaving education as their only viable option.[165] However, many parents are reluctant to invest in their daughters' education, believing that it will not guarantee them a better future.[166] Instead, they opt for child marriage in the hope that their daughters' future will be more secure.[167] Moreover, in many impoverished regions, girls are expected to contribute to household chores, leaving little time for education.[168] Thus, this thesis argues that poverty creates a vicious cycle where lack of education leads to early marriage, and early marriage leads to the curtailment of educational opportunities.

In many societies, dowry is a significant financial burden on the bride's family, often leading to significant debts. However, dowry is seen as a way of ensuring that the groom's family is financially invested in the marriage. In many cases, a higher dowry is demanded for younger brides, increasing the likelihood of child marriage.[169] It is the argument advanced by this thesis that a higher dowry creates a power dynamic, where the groom's family has greater control over the bride's family; in some cases, the bride's family may be forced to accept a lower dowry than what they had hoped for, leading to a greater sense of powerlessness and vulnerability.

[164] United Nations. ‘Child, early and forced marriage: A multi-country study.’ (UNICEF 2013) <.https://www.unicef.org/media/files/Child_Early_and_Forced_Marriage.pdf> accessed 23 May, 2023
[165] Ibid
[166] Ado, Y. U. (n 145)
[167] Ibid
[168] United Nations Children's Fund (UNICEF) ‘Child marriage in Nigeria.’ (UNICEF 2013 ) <https://www.unicef.org/nigeria/stories/child-marriage-nigeria> accessed 23 May, 2023
[169] Girls Not Brides (n 3 )

### *2.3.2 Family Honour and Child Marriage*

The concept of family honour is crucial to understanding the prevalence of child marriage in many societies. Honour pervades many aspects of social life in these communities, including the way girls are expected to behave in public. In almost all known cultures in Nigeria, a girl is expected to maintain her virginity until marriage, and a failure to do so is regarded as a stain on family honour. Marrying off daughters at an early age is seen as a way of preserving their virginity and safeguarding family honour.[170]

Family honour also plays a role in the choice of a suitable spouse. Parents are often more concerned with selecting a spouse who comes from a respectable family and has a good reputation in the community than with their daughter's wishes. In many cases, girls are married off to men who are much older than them or whom they may not have even met before. This not only violates their rights but also exposes them to the risk of domestic violence and other forms of abuse (Plan International, 2020).

## 2.4 Gender inequality and child marriage in Nigeria

Gendered norms and stereotypes play a significant role in perpetuating child marriage as in many cultures, a girl's primary role is to get married and start a family.[171] Connell expounds on the relationship between gender inequality and child marriage in his *sex role theory*.[172] The role concept has been used since the 1930s and is suitable for virtually all sorts of human conduct, both broadly and limited.[173] The fundamental concept of sex role is the two different sexes, to be a male or a female. The man and woman are taught the meaning of their role, what is accepted behaviour

[170] Abe, G. (n 150)
[171] Muhammad, A. (n 156)
[172] Connell, R. W. *Gender and power: Society, the person, and sexual politics*. (Stanford University Press, 1987).
[173] Ibid

and what is not. Women are more often viewed as submissive instead of being contributory. When acting accordingly to the role given, they are rewarded. When not, corrections are in place instead. If and when moving away from the roles, one must make alterations to the anticipations and for example enforce new laws prohibiting discrimination due to sex. The differences between men and women are significant in this matter; therefore, the sex role theory is a good choice to apply to the subject. Applying the theory on child marriage in reality is suitable and in the words of Connell "The result of using the role framework, then, is an abstract view of the differences between the sexes, and between their situations, not a concrete account of the relations between them."[174]

This thesis argues that child marriage in Nigeria is also prevalent because of gender inequality. Accordingly, in some communities in Nigeria, girls are seen as having no role to play in the development of the society except the role of home keeping.[175] As a result of this orientation, most parents especially in northern Nigeria decline to send their female children to school and rather marry them off because of the belief that their role in the society is restricted to homekeeping.[176]

Another author, Makama observed “Gender inequality, deeply entrenched in Nigerian culture and society, is one of the foremost causes of child marriage in Nigeria.”[177] The societal belief that girls are subordinate to men and their place is in the home limits a girl's potential and leads her family to believe that early marriage would be the best solution for them.

[174] Connell (n172) 47-50

[175] Nzarga, Felix Daniel. ‘Impediments to the domestication of Nigeria Child Rights Act by the states.’ (2016) 6 Research on Humanities and Social Science 123.

[176] Ibid

[177] Makama, Godiya Allanana. ‘Patriarchy and gender inequality in Nigeria: The way forward.’ (2013) 9 European scientific journal 17.

According to Alabi et.al, "being born and growing up as a girl in a developing society like Nigeria is almost like a curse due to contempt and ignominious treatment received from the family, the school and the society at large".[178] It is very common thinking in Nigeria, and it is safe to say that in most African countries, women are seen or stereotyped to the private sphere, that is: in the house doing laundry, taking care of the children, cleaning and all other household chores available.

### 2.5 Religious Perspectives Underpinning the Prevalence of Child Marriage in Nigeria

Religion plays a pivotal role in Nigeria's society and faith leaders are major stakeholders in household decision-making in Nigeria. Amzat and Razum observed that *". . . religion is a major institution that shapes every aspect of human life. It is a force dominating individuals in Africa. Congregations are usually full of people praying for protection (i.e., against calamities) and prosperity (to escape poverty and related socio-economic calamities)."*[179]

Religion is a significant factor for social control due to the high value placed on the doctrine and belief of organised religions by adherents.[180] Religious teachings, beliefs, and doctrines can positively be harnessed to promoting behaviour and practises that will be beneficial to children and ultimately to the society.[181] In sociology, religion is a fundamental aspect of culture and a major aspect of the social system with enormous influence on social life and events. The Durkheimian perspective traced to Emile Durkheim (a classical French sociologist), is still a primary reference in explaining the place of religion in human society.[182] Durkheim, in Elementary

[178] Alabi, T. and Alabi O.S. 'Female education: A sociological analysis of girl-child education in Nigeria' (20140 1 International Journal of Educational Policy Research and Review 394.
[179] Amzat J. 'Plucking the flower just too early: Some community perspectives on marriage age of adolescent girls in a Nigerian state.' (2019) 17 The Nigerian Journal of Sociology and Anthropology 1.
[180] Giddens & Sutton, *Sociology* (Polity 2017); See also John J Macionis, *Sociology* (Prentice Hall, 1999)
[181] Christian Aid. 'Religion and the adolescent girl: A formative study in Kaduna state' (2017) <https://www.christianaid.org.uk/resources/about-us/religion-and-adolescent-girl-formative-study-kaduna-state> accessed 12 May 2023
[182] Durkheim É., *The elementary forms of religious life* (Karen E. F., Trans The Free Press 1995).

forms of religion,[183] and, later, Thomas[184] provided more insights into the sociology of religion. For Durkheim, the main argument is that religion exacts an enormous influence on the thinking and behaviour of members of society. Religion mediates actions and provides conviction or justification for practises. The implication is that most community members adhere to religious injunctions and opinions to rationalize their actions. Egebeen, Wale, and other scholars posit that in some communities of Nigeria, religion is still a significant factor in marriage, childbirth, and, in general, everyday life.[185] Religion remains central to marital life: spouse selection, solemnisation, and dissolution of marriage.[186] Thus, marriage is one of the religious rites and rituals in both Christianity and Islam. According to Thomas Luckmann, unlike in developing societies, religion is gradually becoming invisible in modern societies.[187] Such invisibility of religion is why religion might not be a significant factor in the everyday life for most people in developed societies.

The association between religion and child marriage varies in the reports. According to the ICRW, there is no correlation between a specific religion and child marriage across the world. However various religions can have an impact on child marriage in different countries.[188] UNFPA in its 2012 article states[189] that religion does in fact have an impact on the prevalence of child marriage, but this is not further and deeper discussed in the report.[190] Religion is not mentioned in the majority of the reports regarding the subject.

[183] first published in 1912
[184] Thomas Luckmann , *The Invisible Religion :The Problem of Religion in Modern Society* (Tom Kaden, Bernt Schnettler,1st edn, Routledge 2022)
[185] Eggebeen D., Dew J. 'The role of religion in adolescence for family formation in young adulthood'. (2009) 7 (1) Journal of Marriage and Family, 108.
[186] Ibid
[187] Thomas Luckman (n 184)
[188] ICRW, 'How to end child marriage: Action strategies for prevention and protection' (ICRW 2007) < https://www.icrw.org/publications/how-to-end-child-marriage/> accessed 20 May 2023
[189] UNFPA, 'Marrying too Young: End child marriage' (UNFPA, 2012) < https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf> accessed 20 May 2023
[190] ibid

Nigeria is a multi-religious country with about 53.5%, Muslims, 46.9% Christians, and 0.6% professing indigenous beliefs.[191] These religious affiliations are interconnected with the culture and tradition of the people, influencing every aspect of their lives.[192] Consequently, it is the argument advanced by this thesis that religious perspective shapes the socio-cultural landscape of Nigeria, defining gender roles, norms, and practices. Hence, the need to discuss the religious perspective alongside the constitutional framework of Nigeria to unravel the link between religion, Nigeria's legal framework, and child marriage.

Nigeria is a secular state with no state religion. Under section 10 of the 1999 Constitution, the government 'shall not adopt any religion as a state religion'.[193] Despite this provision, Islam and Christianity are de facto state religions in Nigeria, given their prominence in constitutional and governmental recognition.[194] Such constitutional recognition of religion in the Nigerian State can be seen in the constitutional arrangement whereby the federal and state governments share legislative power resulting in differences between federal and state laws and differences among the individual states' laws - federal laws govern marriages under the Marriage Act. In contrast, state laws govern Islamic and customary law marriages.[195]

### *2.5.1 Christianity and Child Marriage in Nigeria*

As noted earlier in this chapter, Christianity is one of the dominant religions in Nigeria with about 46.9 % of the population professing the faith. Although there are Christians in the Northern part of Nigeria, the religion is predominantly practised by people in the Southern and Eastern parts of

[191] The Pew Research Centre, *Nigeria's Religiously Divided Society* (Pew Research 2015); see also the World Religion Database.
[192] Ibid
[193] Section 10, 1999 Constitution (as amended)
[194] Enyinna S Nwauche, (n 94) 577
[195] Item 61 of Part 1 of the Second Schedule to the 1999 Constitution (as amended).

the country.[196] Christians believe that marriage is a sacred and intimate union ordained by God for companionship and procreation. It is permanent, and only death can dissolve it.[197] The Holy Bible, which regulates Christianity, does not provide a minimum age for marriage. However, most Christian Scholars[198] believe that marriage should be between people who have attained adulthood because the Bible says, 'for this reason, a '*man*' shall leave his father and mother and shall cleave unto his wife, and the two shall be one flesh.'[199]

Even though there is no minimum age for marriage in Christianity, in recent times, early marriage has not been a common practice among Christians. Research has indicated that only about 10 percent of girls in the south and eastern part of Nigeria get married before the age of 18 and only about 4 percent of boys marry before the age of 18.[200] This is major because of the monogamous nature of Christian marriages and because it is a union for life. Christian marriage is a marriage under the Matrimonial Causes Act as the officiating minister often gives the parties marriage certificates.[201]

Abowale argues that the effect and impact of Christianity on the prevalence of child marriage is quite low and quite negligible.[202] In essence, he argued that Christianity does not by its teaching or the interpretation of its doctrines, encourage child marriage and this has accounted for the low prevalence of child marriage in Christian dominated states. Abowale's argument is supported by data published by UNICEF, which indicates that the rate of child marriage is as low as 10 % in

[196] Danfulani Kore, *Culture and Christian Home Evaluating Christian Marriage* (Bukuru Nigeria 2012).

[197] Most marital vows end with the phrase; 'till death do us part' and this is a common slogan used to refer to Christian couples.

[198] For example, Myles Munroe, *Single, Married, Separated, and Life after Divorce* (Destiny Image Publishers 2003).

[199] Genesis 2:24, Holy Bible.

[200] UNICEF MICS (n. 21).

[201] Palmer J in *Obiekwe v. Obiekwe* (1973) ENLR 197

[202] Adebowale SA. 'Dynamics of child marriage and marital timing in Nigeria: A retrogression or progression?' (2018) Health Care Women Int.19

states which have greater Christian population. Also, all the Christian dominated states have domesticated the Child Rights Act.[203]

### *2.5.2 Islam and Child Marriage in Nigeria*

Islam as a religion plays a critical role in the lives of the majority of Northerners in Nigeria, comprising primarily the Hausa and Fulani tribes to the extent that it has now become the bedrock of the customs and values of the people (more particularly Muslims) in that region. This has influenced their perspective on child marriage as they widely believe that Islam does not frown at such a practise, thus making it a norm/custom instead of a punishable offence.

Tribal and cultural practices have a profound impact on sustaining child marriages by people who are governed or regulated by such practices in their respective communities.[204] Moreover, this dissimilarity stems from the fact that under Islamic family law practice, age is considered by physical rather than mental maturity, which is why females under the age of nine (9) are identified as girls and those of fifteen (15) years, and above are classified as women.[205]

Northerners have shown strict adherence to the primary sources of Sharia which are the Quran and the Traditions of the Holy Prophet (Peace Be Upon Him).[206] The Hausa and Fulani cultures and customs are linked with the Islamic faith. The phenomenon of child marriage in the north is highly

[203] According to a report by UNICEF, as of 2021, the following states have not yet domesticated the Child Rights Act in Nigeria: Bauchi State, Yobe State, Sokoto State, Zamfara State, Kano State, Katsina State, Borno State, Gombe State, Jigawa State, Kaduna State

[204] Thais Bessa, 'Informed Powerlessness: Child Marriage Interventions and Third World Girlhood Discourses' (2019) 40 Third World Quarterly 1941.

[205] Ibid

[206] Irini Ibrahim, Faridah Hussain and Norazlina Abdul Aziz, 'The Child Bride: Rights under the Civil and Shariah Law' (2012) 38 Procedia - Social and Behavioral Sciences 51

concerning since UNICEF estimates that the north accounts for 78 percent of all child marriages in Nigeria.[207] Researchers have attributed this fact to the practise of Islam in the North.[208]

Marriage (Al-Zawaj) is seen in Islam as a union that encourages modesty, reproduction, and the love and satisfaction of the spouses.[209] Marriage is an institution pleasing to Almighty Allah (SWT) as the Holy Quran expressly provides:

> '*Among His proofs is that He created for you spouses from among yourselves, to have tranquillity and contentment with each other, and He placed in your hearts love and care towards your spouses. In this, there are sufficient proofs for people who think.'*[210]

Under these Islamic conditions for marriage, consent is one of the requirements in addition to adulthood and sanity. Both parties are required to have the freedom and capacity to consent.[211] Throughout the Qur'an and other Islamic texts, the prohibition of forced marriage and the encouragement of a healthy consensual partnership is emphasised.

The Qur'an states:

> *It is not lawful for you to inherit women by force. Nor may you treat them harshly so that you can make off with part of what you have*

[207] UNICEF, *The State of the World's Children 2017: Children in a Digital World* (UNICEF 2017).

[208] For instance, Judith-Ann Walker,( n. 30); Jimoh Hamzat PhD, [n. 30]

[209] Holy Quran 4:1, 25:74, 30:21

[210] Holy Quran 30:21

[211] Islamic Relief Worldwide, *An Islamic Human Rights Perspective on Early and Forced Marriages: Protecting the Sanctity of Marriage* (Islamic Relief Worldwide 2018) <https://www.islamic-relief.org/wp-content/uploads/2018/03/EFM-HUMAN-RIGHTS-CSW62.pdf>. accessed 12 May 2022

> *given them unless they commit an act of flagrant indecency. Live together with them correctly and courteously.*[212]

This reiterates the fact that consent is of course a very important prerequisite for marriage in Islam.

It was reported by Abu Huraira that the Holy Prophet (SAW) explicitly stated that:

> *The widow and the divorced woman shall not be married until the order is obtained, and the virgin shall not be married until her consent is obtained.*[213]

This thesis argues that the prevalent practise of forcing female youngsters under the age of 18 into marriage at the cost of their personal development, health, and overall well-being has no validity in Sharia.[214] On the contrary, its unacceptability in Islam is based on the fact that Islam which holds marriage as one of the most sacred covenants, requires the free and unfettered consent of both parties. This can be elicited from the conditions for marriage as contained in the Holy Quran and enumerated below: For a legally valid marriage under Islamic law, certain conditions must be met. These conditions include:

a. It should be an agreement concluded by two legally capable parties.[215] Its categorisation as the most solemn form of the covenant in Islam means that both intending spouses' free and considered consent must be considered.[216]

[212] Ibid; Quran 4:19
[213] Islamic Relief Worldwide (n. 211)
[214] Ibid
[215] Quran 2.
[216] Ibid

b. Determining mutual attraction and compatibility.[217] Thus, the intending spouses must be attracted to each other and must also not fall within the prohibited degrees of consanguinity or affinity, otherwise, such marriage would be void or voidable depending on the circumstances.

c. The intending spouses must be of the same or similar faiths and beliefs.[218]

d. Agreement on *mahr* (dower) paid by the groom directly to the bride.[219]

e. Agreement on other terms of marriage in which husband and wife must mutually agree upon details.[220]

f. Understanding the marriage contract, including the responsibilities and rights of spouses, with a solemn and mutual acceptance of the contract.[221]

g. The capability of a male to provide for the family.[222]

h. Physical maturity, post-puberty development, and sound judgement (*rushd)*, particularly with regard to financial transactions (such as dowry) or the level of maturity required to conduct one's affairs.[223]

On the requirement or condition of physical maturity, post-puberty development, and sound judgement (*rushd)*, particularly with regards to financial transactions (such as dowry) or the level

[217] Quran 2:221, 2:235, 30:21, 33:52
[218] Quran 2:221, 60:10
[219] Qur'an 4:4, 4:24
[220] Quran 4:4
[221] Qur'an 4:21, 2:232, 2:237, 24:33
[222] Qur'an 2:228, 2:233, 4:34, 65:6
[223] Qur'an 4:6

of maturity required to conduct one's affairs, there is no clear-cut age which acts as a minimum threshold for marriage. This creates a schism between the requirement of consent under the Quran and the legally stipulated age of consent which is 18 years. Herein lies the challenge. In the wordings of the text of the Quran, marriage is consensual, but technically, one cannot infer consent when no specific age of consent is set out. This only gives an opening or leeway for misconstruction and misinterpretation in practise. There is no yardstick whereby anyone can be held to be in default as puberty and maturity vary from one person to the other.

#### *2.5.2.1 Islamic Personal Law in Nigeria*

Personal law regimes are regimes whereby members of a definite ethnic group will be governed concerning matters that relate to personal law, including marriage. Customary or religious courts apply these personal laws. In Nigeria, this is applicable in the Northern States, where Sharia is practised, and every other law viewed as contrary to Shariah law is vehemently opposed and rejected. Research shows that the Northern parts of Nigeria strongly believe in the Islamic and cultural traditions due to which child marriage is justified under the influence of the traditional practices.[224] In addition to this, Islam is the primary religion of the people living in the Northern parts of Nigeria, and people continue to practise the teachings of Islam historically.

The Nigerian Constitution recognises Islamic personal laws, for which the Shariah court was established.[225]Islamic personal law consists of questions involving validity or dissolution of

[224] Ibid

[225] Section 262, 1999 Constitution

marriages conducted under Islamic law,[226]guardianship of infants,[227]property—charitable endowment (wakf), gift, or succession—and administration of the affairs of persons with diminished capacities[228]—infants, prodigals, or persons of unsound mind.[229]

The recently enacted Sharia Penal Codes is another example of a religion-based law. The document codifies Islamic criminal law as found in the primary sources: the Quran, Hadith, and 5Fiqh, and is applicable in all Northern States excluding Niger State, which simply amended the old penal code.

Under Sharia law, child marriages are not illegal as the minimum age for marriage in Islamic law falls short of the minimum age for marriage as provided for by international, regional, and national age for marriage.[230] According to Sharia law, the marriage of a girl is legal when she attains puberty, which usually occurs at the age of 13-15 years or younger in some cases.[231] Despite the proscription of the Nigerian government through the CRA on marriages involving children below the age of 18, these marriages are still happening in Northern Nigeria with the support of Sharia law.[232] The justification of child marriages in Islam by those who practise it stems from their perceived interpretation of the tradition in which the Holy Prophet Muhammed (SAW) married Aisha (May Allah be pleased with her) when she was six (6) years old and consummated the marriage when she was nine (9) years old.[233] This is a significant limitation to the acceptance of

[226] Section 262[2][a]

[227] Section 262[2][b]

[228] Section 262[2][c]

[229] Section 262[2][d]

[230] Irini Ibrahim, Faridah Hussain and Norazlina Abdul Aziz, (n 206)

[231] Ibid.

[232] Patrick S Nash, 'Sharia in England: The Marriage Law Solution' (2017) 6 Oxford Journal of Law and Religion 523

[233] IslamFYI, 'Muhammad's Marriage to Ayesha' (*IslamFYI*September 19, 2017) <https://islamfyi.princeton.edu/is-it-true-that-muhammad-married-a-child-bride-by-the-name-of-ayesha-when-he-was-53-and-she-was-9-years-old-if-so-how-do-muslims-justify-this-from-their-exemplary-prophet/> accessed February 25, 2022.

CRA in the Northern States of Nigeria; it potentially conflicts with the traditional teachings of Islam due to which the people living in Northern parts have objected to the promulgation of the act in the state. For instance, the provisions of the CRA conflict with that of the minimum age criterion for the marriages of children as prescribed by the traditional teachings of Islam. [234] The minimum criterion of age that has been set out by the CRA is eighteen for both male and female children to enter into a valid contract of marriage.[235]

Conversely, in Islamic law, there is no criterion for measuring the childhood of the children. Despite this, the teachings of Islam direct towards the criteria for assessing the maturity of the children for getting married. Additionally, it has been argued that maturity in children can be attained with the appearance of physical symptoms such as menstruation, pubic hair, and development of the breasts in females whereas the appearance of the semen or the development of beard and other pubic hair in males.[236]

#### *2.5.2.2 Provision for Age of Marriage and Consent under Islamic School of Thought Practised in Nigeria*

There are four main schools of legal thought in Sunni Islam namely the Hanafi school, the Maliki school, the Shafi'i school, and the Hanbali school.[237] The Islamic school of thought applicable in

[234] Temitope Francis Abiodun, Marcus Temitayo Akinlade and Olanrewaju Abdulwasii Oladejo, 'The State and Challenges of Human Trafficking in Nigeria: Implications for National Peace and Security' (2021) 11 Journal of Public Administration and Governance 110

[235] Ibid.

[236] Michael Addaney and Onuora-Oguno Azubike, 'Education as a Contrivance to Ending Child Marriage in Africa: Perspectives from Nigeria and Uganda' (2017) 9 Amsterdam Law Forum 110.

[237] The names of the schools refer to the names of the leading legal scholars Abu Hanifa, Malik ibn Anas, Muhammad ibn Idris al-Shafi'i and Ahmad ibn Hanbal. ;See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society 2011) 228.

Northern Nigeria is that of the Maliki School. The Maliki School has had a significant influence on Islam as practised in Nigeria and has been the dominant school in the north since around the thirteenth century.[238] The Maliki School of thought as applicable in Nigeria is recognised and given a legal endorsement by the Shariah Court of Appeal Laws of the states in northern Nigeria.[239] The Maliki school of thought principles is contained in the book of Fiqh. Maliki school provides guidance wherever the Quran and Sahih Hadiths do not provide explicit guidance. It derives its rulings from pragmatism using the principles of *istislah* (public interest).

All the schools of thought agree that for a marriage to be valid, the parties must be sane and must have attained adulthood (*bulugh*) unless the contract is concluded on behalf of the parties to the marriage by the guardian of any of them.[240]On what constitutes adulthood, the four major schools agree that menstruation and pregnancy are the proofs of female adulthood.[241]According to these schools, menstruation is a mark or indication of female puberty. To provide uniformity, the Maliki school of thought set the age of the legal capacity to marry at 17 for both sexes.[242]

On the issue of consent, according to the Maliki School, where there is coercion, consent is absent, and marriage is invalid. Under the Maliki school, consent is an integral part of the Islamic framework and is the basic right of the children.[243] Children should be provided with an environment where instead of remaining silent, they can provide their consent without having to

[238] Ahmed Beita Yusuf, *Legal Pluralism in the Northern States of Nigeria: Conflict of Laws in a Multi-Ethnic Environment* (State University of New York at Buffalo, 1976) 71–75; Z Zayyanu Musa Dogon Daji and Abubakar Bako, 'The Concept of Ijtihad (Analogical Deduction) and Followership in Maliki School of Law in Nigeria: An Appraisal' (2019) 1 EAS Journal of Humanities and Cultural Studies 228 .

[239] Section 14. Laws of Northern Nigeria, Sharia Court of Appeal Law (1963) Cap. (122),

[240] Allamah Muhammad Jawad Maghniyyah, *Marriage according to the Five Schools of Islamic Law*, vol. 5 (Islamic Culture and Relations Organisation 2010) <http://ijtihadnet.com/wp-content/uploads/Marriage-according-to-the-Five-Schools-of-Islamic-Law1.pdf> accessed April 4, 2001

[241] Ibid.

[242] Mahdi Zahraa, 'The Legal Capacity of Women in Islamic Law' (1996) 11 Arab Law Quarterly 245;See also, Ruth Maclean, 'Senior Islamic Cleric Issues Fatwa against Child Marriage' (*The Guardian* June 21, 2019) <https://www.theguardian.com/global-development/2019/jun/21/senior-islamic-cleric-issues-fatwa-against-child-marriage> accessed April 4, 2021.

[243] John L Esposito and Natana J Delong-Bas, *Shariah Law* (Oxford University Press 2018).

fear the choices of any of their guardians.[244] The School holds that 'free' consent of both parties is a necessary condition for a valid contract. The study of Hin illustrates the importance of consent, suggesting that marriages are termed void if the consent is not present for the children in their marriage.[245] Moreover, the law has guided the parents to inform their children about marriage and allow them, especially women, to select their partner. In a Hadith narrated by a companion of the Holy Prophet (Peace Be Upon Him), Abu Huraira (May Allah Be Pleased with Him), a daughter is not allowed to marry a man without her consent.

From the foregoing, this research argues that since Islam does not ascribe an age limit to 'marriageable girls', discretion is left to both the parents and the persons to be joined in wedlock to exercise if or when they are ready for marriage. However, this discretion can be made in favour of the stipulation of the CRA, which already pegs the age of marriage from 18 years. The age still covers the aforementioned requirements for eligibility according to Islamic law. The age of marriage as provided by the Maliki School and as practised in Nigeria falls short of the international standard of 18 years. The requirement for consent is widely violated in Nigeria in the practise of the Maliki School of Thought on Islamic marriage. Parents and guardians make these decisions on behalf of the unwilling child brides, most times forcing them out of school to marry and begin a family. Younger daughters are given in marriage to men much older than the girls, which is against their consent and violates their rights provided within the Islamic framework of the law.[246] As a result of this, many young girls have been subjected to various mental, emotional, and health problems in society, which restricts their ability to participate in social activities within

[244] Ibid. 113

[245] Ooi Kok Hin, *Child Marriages in Malaysia: Reality, Resistance and Recourse* (Penang Institute 2017).

[246] Noorul Huda Sahari and Najibah Mohd Zin, 'Managing Disputes in the Division of Matrimonial Property Involving Polygamous Marriage in the Malaysian Shariah Courts' in Mohd Amli Abdullah, Nazirah Ramli, Wan Kalthom Yahya and Siti Rosiah Mohamed (ed) Regional Conference on Science, Technology and Social Sciences (RCSTSS 2014): Business and Social Sciences (Springer 2016). 865-877.

society.[247] In practise in Nigeria and as is found in most communities where the rate of child marriage is high, silence is accepted as the consent for females, and the element of coercion in the event of the existence of verbal consent is present.[248] Suffice to note that consent cannot be said to exist where the bride is incapable of understanding or appreciating the transaction or incapable of forming a rational opinion as to the union because of the tenderness of age.[249] More often than not, the children or victims are not in any way prepared for married life. They are only informed after the decision as to whom, when, and where they are to be married has been made. Knowledge (which comes with education and self-development) and consent (of which the ability to give comes with adulthood and sanity) are crucial and necessary elements for entering into a marriage contract. Knowledge and consent can hardly be said to be present when a child is given away to an adult much older than her age.[250] And according to Okafor, for one to consent to something, one must be fully aware and can understand what you are consenting to. Children lack this ability.[251]

The Al Azhar mosque, popularly regarded as one of the highest authorities in Sunni Islam issued a Fatwa against child marriage wherein it stated that*:*

> *Marriage in Islam is based on the consent of both parties, particularly the young woman. Such consent requires the young*

[247] Ibid 116

[248] John L Esposito and Natana J Delong-Bas, (n 243)

[249] Kayode Olatunbosun Fayokun, 'Legality of Child Marriage in Nigeria and Inhibitions against Realisation of Education Rights' (2015) 12 US-China Law Review 460

[250] Ibid.

[251] Udoka Okafor, 'The Practice of Child Marriage in Nigeria' (*HuffPost*April 12, 2014) <www.huffpost.com/entry/the-practice-of-child-mar_b_5133881> accessed January 23, 2021.

*woman to have reached the age of maturity and reason so that her consent is validly given,* [252]

Al Azhar University also issued a publication in collaboration with UNICEF, where it also denounced child marriage and declared it does not conform with the Islamic principles.[253]They agreed that the 'definition of childhood should apply to humans up to the age of 18 years.[254] They stated that Islam has nothing to do with child marriage.[255] In other words, early marriage is not an 'iron cast' rule in Islam as there are no known Islamic principles to support it.

It is evident that in traditional regulations of Islam, as practised in Nigeria, the law conceptualises the age of marriage differently from modern international conventions and the Child Rights Act enacted by the Nigerian government. This is due to the existence of personal laws which reinforce the non-implementation of child protective international laws. Thus, the country cannot protect the rights of its children, especially girls, who are humiliated through domestic violence due to early marriages.[256] Most people from the Northern States perceive the CRA as alien to their culture and a threat to their belief systems and have rejected the CRA because it reflects the culture of the white man who has made several attempts to steal their culture and religious identity.[257] This perception potentially creates vagueness in the implementation of CRA. The following section will discuss how religion has enforced this deviation from international standards.

[252] Ruth Maclean, (n. 242)

[253] Al-Azhar University and UNICEF, *Children in Islam: Their Care, Upbringing and Protection* (Al-Azhar University/UNICEF 2005).

[254] Ibid.

[255] Ibid.

[256] Kathryn M Yount and others, Child Marriage and Intimate Partner Violence in Rural Bangladesh: A Longitudinal Multilevel Analysis (2016) 53 Demography 1821.

[257] Owohunwa Folayemi Oluwatosin, 'Extent, Experiences, and Perceptions on the Practice of Child Marriage in Northern Nigeria' (Ph.D. Thesis, University of Leeds, 2018).

### *2.5.2.3 Evolving Islamic Law Schools of Thought on Age of Consent*

According to Abd al Ati, the marriage of a minor ordinarily implies a betrothal or some formal agreement to marry while deferring final consummation to a later date.[258] Notwithstanding the child's age as at betrothal, final consummation must be delayed until the parties are ready for marital relations, a condition usually determined by puberty.[259] Abd al Ati further stated that the law suggests all marriage arrangements must be made in the best interest of the minors involved as it will be unlawful to do anything disadvantageous to them. [260]

Many Islamic scholars agree that some particular prerequisites must be completed before the marriage is recognised as genuine in order to avoid possible misinterpretation of the theory on marriage. Certain precise restrictions have been established by Islam. First, a minor's marriage is void unless the guardian consents and participates.[261] When a minor reaches puberty, he or she has the option of upholding or annulling a marriage contract entered on their behalf while they were minors. Taken together, these provisions appear to indicate that, in the end, the law's primary focus is on the minor's best interests and welfare.[262] Abd Al Ati went on to say that some tradition-bound Muslims assume that a parent or guardian would generally act in the best interests of the minor and that a father who, aside from his assumed love and care for his children, has the qualifications of a legal guardian, would be expected in tradition-bound societies to know more about the 'field of eligibles' and at least have a general idea of his ward's inclinations and expectations.[263] Given that a ward's humility (haya) and respect for parents are among the highest Islamic values, and

[258] Hammudah Abd Al-Ati, *The Family Structure in Islam* (American Trust Publications 1977).
[259] Ibid.
[260] Ibid
[261] Ibid
[262] Ibid
[263] Ibid

since marriage is a union of more than two people, any patterned grand-scale coercion is implausible. It is likely that the children's approval of what their parents do on their behalf is expected or assumed. They are not allowed to say anything about a father's choice, whether they approve or disapprove. On the other hand, Muslim jurists interpret quiet as approval rather than compulsion or hostility.[264]

According to Abd Al Ati, Islamic jurists agree that the father seeking the approval of his maiden daughter before giving her in marriage is at least praiseworthy, though some believe it is required. The Prophet (SAW) said and did this to his own daughters. He made it a habit to announce a suitor's proposal to the girl in question from behind a curtain. If the girl remained silent, it meant she agreed to marry. On the other hand, shaking the curtain showed she was objecting to the suggestion, and the Prophet would ignore it. The most common justification for requesting the girl agree is that it will make her happy and foster goodwill between them.[265]

Modernisation and globalisation could be held responsible for the emergence of child rights conventions and laws around the world. This is usually met with hostile reactions in communities and countries where the cultural and religious norms are fundamentally different from the league of nations through which the United Nations usually agree as to the minimum benchmark for acting or living. Thus, the classical conception of marriage, particularly the notion of child marriage, is an issue confronting both secular and religious scholars today, and attempts are being made to reconcile religious texts and human rights instruments. One may view Islam as inherently rigid, but this is not the case. According to Buchler and Schlatter, Islamic law is inherently suited to

[264] Ibid

[265] Ibid.

reform.[266] There have been, and there still are, efforts by some Islamic scholars to re-read classical Islamic law and liberate it from rigidities. This is an initiative that is the redynamisation of Islamic thought.[267] They went further to assert that:

> *Major changes in Islamic societies, partly because Western ways of life and Western science were beginning to infiltrate the Islamic world, prompted a new, reform-oriented hermeneutic interpretation of religious source texts.*

Muslim intellectuals sought social, political, and legal reform during the nineteenth century. Many of these efforts were directed at containing and consolidating the Ottoman Empire. A new set of governmental powers for regulating coalesced with the traditional Islamic legal system, which had, until then, been the only source of law. Personal status law was the only area in which classical Islamic law remained dominant.[268]

Modern Islamic legal scholars are using various methodological approaches to avoid the strict constraints imposed on their work by traditional Islamic academic tradition and the literal fidelity to source texts required for exegesis, which is a requirement in the field of Islamic law. A foundation for interpretative initiatives is being built on references to Islam's history and the historicization of certain Islamic legal concepts. The purpose of this is not to say the Islamic tradition should be abandoned. Instead, inspiration should be drawn from its core, and law brought closer to its original intent of achieving justice.[269] However, this transition has brought about the

[266] Andrea Büchler and Christina Schlatter, 'Marriage Age in Islamic and Contemporary Muslim Family Laws: A Comparative Survey' (2013) 1 Electronic Journal of Islamic and Middle Eastern Law (EJIMEL) 37

[267] Ibid.

[268] Ibid

[269] Ibid

categorization of Muslims into three broad categories as far as their responses to the challenges posed to Islam by modern ideas, institutions, and values are concerned.[270] Those in the first category see no point in changing fourteen centuries of tradition and view any 'modernization' of religion as a death blow to Islam.[271]

On the other hand, the second group has an opinion that opposition to change is unwise and counterproductive, especially if Muslims are to be active participants in the modern world.[272] They intend to convey Islam in a way appropriate for those living in the current day, but they do not go so far as to fundamentally alter historically held Islamic beliefs, institutions, and values.[273] While the third type seeks to represent Islam by challenging significant past components, dismissing what is not relevant to this modern age, and stressing what is relevant, they also want to stay committed to the unchangeable ethos, aims, and ideals of the Qur'an.[274] This means that, despite the perceived rigidity of Islamic injunctions, advancements in Islamic scholarship (particularly among Islamic scholars in non-Muslim countries) could very well result in the ability of Islamic countries to bring their Sharia laws into compliance with international best practices when it comes to the issue of child marriage. In contrast, this is not the situation with Nigerian Islamic law, which is still far from making the necessary shift to manage child marriage due to the rigorous interpretation method appropriately.

On the other hand, child marriages are frequently associated with the notion of Shariah because of the stereotype that has been ingrained in the minds of the public, which associates child marriages

[270] Abdullah Saeed, *Interpreting the Qur'ān: Towards a Contemporary Approach* (Routledge 2006).

[271] Ibid.

[272] Ibid.

[273] Ibid.

[274] Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press 2017). pp. 3–10; Farid Esack, *Qur'an, Liberation & Pluralism: An Islamic Perspective of Interreligious Solidarity against Oppression* (Oneworld 1997). pp. 49–81.

with Islam. Child marriage practises in many Islamic countries have poured this stereotype into the minds of the people since many political leaders have been presented with a distorted image of Islam, as a result of which they have labelled Islam as a cultural issue.[275] One of the main reasons, as discussed in the research of Symons, is that every individual interprets the Holy Book (Quran) and the sayings of Prophet Muhammad (SAW) called Hadiths, which have led to the emergence of different schools of thought.[276]

Shamin Asghari, on the other hand, had a more realistic approach to the situation. His research has revealed that early marriage has been a source of conflict between the international human rights framework and Islamic law throughout his career (which is the dominant religion practised in Iran).[277] According to her, what is missed in these mostly legal disputes is the reality of early marriage as a way of life for Muslims who live their lives in accordance with their religious beliefs. According to his argumentation, those who call for the abolition of early marriage provide a single perception of such marriage as coerced and destructive, but those who reject the international approach in Islamic nations only focus on the Islamic foundations of their current legislation. So, in practise, marriage is a problematic social construct to understand and deal with. He emphasised that Islam has played a significant role as a source of legal principles in Muslim nations since the commencement of the codification of law in such countries. As a result, a measure will not become law in such a country unless it fits with religious standards and practices. Accordingly, he stated that to comprehend the attitude taken by the legal system toward the age of marriage, one must

[275] Md Kamrul Islam, Md Rabiul Haque, and Mohammad Bellal Hossain, 'Regional Variations in Child Marriage in Bangladesh' (2016) 48 Journal of Biosocial Science 694.

[276] Jayne Louise Symons, 'Travelling Theories and Early Marriage: Human Rights, Feminism and Islam (in North Sudan)' (PhD Thesis, The University of Hong Kong 2017).

[277]Shamin Asghari, 'Early Marriage in Iran: A Pragmatic Approach' . (2019) 11 Journal of Human Rights Practice, 569.

thoroughly examine the Shi'i perspective on the matter. Before delving into the age of marriage in Islam, he emphasised the need to understand the hierarchy of sources in Shi'i jurisprudence.

Asghari believes that the fundamental disagreement between Islamic schools and the international human rights system lies in the notion of childhood when it comes to early marriage. However, while both systems identify adulthood as the culmination of childhood, their meaning of the term is vastly different. In terms of the age of maturity, Islamic schools themselves are not entirely in accord (*buluq*). According to the features employed by Shi'i academics to describe the idea of maturity, it is primarily associated with sexual development and is connected with the process of puberty.

He asserted that both the Qur'an and the Hadith abstain from stating an actual age of maturity for a person. The Qur'an refers to the term '*holm*', which refers to sexual dreams that result in spontaneous orgasm, as the point at which boys have reached full adulthood. Such an encounter can occur at a variety of ages. The Qur'an shows that maturity does not have to be defined in terms of age and may be viewed as having an idiosyncratic component. The Qur'an does not refer to the age at which a girl reaches sexual maturity.

Furthermore, he pointed out that the Hadith establishes the requirements for girls' maturity by employing the same individual criterion used to determine when menstruation is considered the threshold. While certain Hadiths specify an age restriction for maturity, such as nine, thirteen, or fifteen, in the end, it is menstruation that determines the exact age of maturity. According to him, if a female begins menstruation later in life, the age of maturity will be advanced. Overall, he believes that when a Hadith mentions an age restriction, it refers to one of the signs of puberty rather than a formal age limit. According to him, the varying age limitations specified in different

Hadiths may be explained by taking this method. For the most part, the principal sources of Islamic norms take a flexible approach to developing maturity.

As a final point, Asghari said that to address early marriage, one should examine the many factors and settings that impact this institution and decide if the negative repercussions are universally applicable in all situations of early marriage. He suggested that the international human rights system should respond to early marriage in a context-sensitive manner and that the human rights discourse is not the only forum in which to address early marriage. According to him, the common classification of early marriage as a violation of human rights fails to understand a variety of circumstances that impact the date of marriage, including the agency of young women in their decisions. Consequently, he contends that in order to address early marriage in Islam successfully, a multidisciplinary strategy would be required.

### 2.6 Summary of the Chapter

In this chapter, it has been argued that various social and cultural beliefs play a significant role in fuelling the practice of child marriage in Nigeria. It is also clear that some ethnic groups in the country have a long history of early marriage than others, which is deeply ingrained in their culture and traditions. The chapter also explored the different religious perspectives of the Nigerian people and how these religious practices underpin child marriage. Christianity and Islam as shown do not specify the minimum age for marriage, however, research has shown that the incidence of child marriage is less likely to happen within the Christian community than in an Islamic community. This is due to some Islamic personal laws practiced by the people. This research also challenged the notion that Islam is rigid as Islamic scholars in recent times have been seen to evolve in their thinking about childhood, child marriage and how it affects the child.

This chapter concludes by stating that in navigating the challenging waters of child marriage peculiar to Nigeria, it must keep at its fore religious, cultural and social perspectives as they are all intertwined. Suffice to say, ending child marriage cannot be done using a one-sided approach, but Nigeria requires a more comprehensive and wholistic approach which will involve engaging with communities and religious leaders to change social norms and ensure that girls are protected from all forms of abuse and exploitation. Without addressing these barriers, Nigeria's ability to comply with or meet up with its international law obligations to end child marriage will continue to be threatened.

# CHAPTER 3: NIGERIA'S LEGAL FRAMEWORK AND THE PRESERVATION OF CHILD MARRIAGE

## 3.1 Introduction

In the previous chapter, this thesis has analysed the sociocultural and religious factors that constitute barriers to ending child marriage. The analysis provided context to the ethnic and religious line across the country. This chapter moves on to examining the legal aspect of these barriers and aims to answer the question: *What limitations in the 1999 Constitution of Nigeria impact on the country's ability to comply with international laws on child marriage?* The analysis of this question will provide more perspective on the premise that will be laid out in subsequent chapters of this research. This premise is set out in international laws and periodic reports of the Nigerian Government that concludes that Nigeria is not in compliance with international laws on child marriage.

In answering this question, the chapter begins by examining the major Nigerian legislation on child rights which is the Child Rights Acts, 2003. The chapter discusses the historical changes that have shaped the legal system, fostered legal plurality, produced the presence of customary law, and impacted federalism and legislative competence in Nigeria.

The chapter further investigates the position of the Child Rights Acts vis-à-vis the provisions of the 1999 Constitution. The chapter also analyses the 'legislative lists' dilemma, while assessing the attitudes of several authorities who have interacted with it. It investigates how and why this constitutional formulation, connected with Nigeria's federal structure, explains the failure to implement the Child's Rights Act in every state of the federation and its consequences for attempts to eliminate child marriage in Nigeria. It also provides a possibility of attempting to re-enact the

CRA under the treaty domestication clause of the Nigerian constitution by analysing current facts that were not present at the time the Act was enacted by the legislature. The argument of this chapter is that for the practice of child marriage to be curtailed in Nigeria, international human rights-based instruments and standards protecting the rights of the child should be domesticated and applied across every state in the federation.

### 3.2 An Analysis of the Child Rights Act and its Role in Ending Child Marriage in Nigeria

Before the enactment of the Child Rights Act, child protection in Nigeria was governed by the Children and Young People's Act (CYPA) 1943, a juvenile justice-focused statute. The CYPA was first adopted by the British colonial administration but was subsequently reformed and integrated into Nigeria's federal legislation in 1958.[278] The CPYA is not a human rights statute; it was designed to ensure the welfare and administration of justice for juvenile offenders. The Act established juvenile courts and established sanctions for minor offenses. However, its legislative provisions fell short of the rights guaranteed by the African Charter on the Rights and Welfare of the Child (ACRWC), the United Nations Convention on the Rights of the Child (CRC), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (UNSMRAJ). According to section 2 of the CYPA, a 'child is a person under the age of fourteen years', while 'young person' means a 'person who has attained the age of fourteen years and is under the age of seventeen years'.

[278] formerly Chapter 32 of the Laws of the Federation of Nigeria and Lagos.

The CRA, which Nigeria passed in 2003, establishes the rights and welfare of children in Nigeria in accordance with the provisions of the United Nations Convention on the Rights of the Child. The CRA extends to children the human rights enshrined in Nigeria's 1999 constitution and also incorporates the African Charter on the Rights and Welfare of the Child. As the principal piece of law addressing children's rights, the Act recognizes children's rights holistically. A child is defined under the Act as a 'person who is under the age of eighteen years'.[279] This implies that the Act's protection is limited to those under the age of eighteen. However, the Act has particular provisions under which the Act's provisions may continue to apply to people beyond the age of eighteen but under the age of twenty-one.[280]

The Child Rights Act has measures prohibiting discrimination on the basis of race, ethnic origin, sex, religion, birth circumstances, handicap, deprivation, or political viewpoint; and it states explicitly that the child's dignity will be maintained at all times.[281] Additionally, the Act states that no Nigerian child should be subjected to physical, mental, or emotional harm, abuse or neglect, maltreatment, torture, cruel or humiliating punishment, or assaults on his or her honour or reputation. The Act provides for children who need particular protection (mentally, physically challenged, or street children): they are safeguarded in a way that enables them to attain their best potential moral development and social integration.[282]

Pregnant women and nursing mothers are not left out as the child's ability to enjoy the encapsulated rights is related to the mother's access to and enjoyment of rights. Additionally, the Act protects children under the age of five by requiring that any parent or guardian with legal care of a child

[279] Section 277, Child Right Act

[280] For instance, Section 179(2), Child's Right Act allows a child to enjoy the assistance provided by the section notwithstanding the fact that he has exceeded 18 years provided he is still below 21 years of age

[281] Part IV, Child Right Act

[282] Part III and V, Child Right Act

under the age of two years guarantee the child's vaccination against illnesses or face disciplinary action. Causing tattoos or marks, as well as female genital mutilation/cutting, are made punishable offenses under the Act; as is exposure to pornographic materials, child trafficking, their use of narcotic drugs, or their use in any criminal activity, abduction, and unlawful removal or transfer from lawful custody, as well as employment of children as domestic help outside their own home or family environment. Child abduction and forced exploitative labour or employment in an industrial enterprise are likewise defined as crimes.[283] These provisions are not applicable if the child is employed by a family member in agricultural, horticultural, or domestic labour and is not expected to lift or move anything heavy that is likely to impair the child's moral, mental, physical, spiritual, or social development. The Act makes it illegal to buy, sell, hire, or trade-in minors for the purpose of begging, hawking, prostitution, or other illicit immoral objectives.[284] These provisions are intended to create a society where the child would have a chance at a decent life, free from exploitation and fears.

### *3.2.1 Provision of the Child Rights Act on Child Marriage*

Notably, the Act has made elaborate provisions on child marriage. The Act expressly provides in section 21,

> 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 and of no effect whatsoever.

[283] Part III and VII, Child Right Act

[284] Ibid

Section 22 of the CRA provides:

> (1) No parent, guardian, or any other person shall betroth a child to any person.
>
> (2) A betrothal in contravention of subsection (1) of this section is null and void.

It goes further to provide the punishments in the following words:

> A person - (a) who marries a child; or (b) to whom a child is betrothed; or (c) who promotes the marriage of a child, or (d) who betroths a child, commits an offence and is liable on conviction to a fine of N500,000; or imprisonment for a term of five years or to both such fine and imprisonment.[285]

The CRA is the only legislation in Nigeria that has made categorical and comprehensive provisions regulating the marriage of persons under 18 years, thus meeting the set benchmarks and international standards.[286] The CRA prohibits the early marriage of children and betrothal, irrespective of the circumstances. Unfortunately, the Act's jurisdiction was initially restricted only to the FCT before some states started adopting it. This is legally possible because Section 299 and 299(a) of the 1999 Constitution states that:

[285] Ibid Section 23

[286] Olaitan Olusegun and Amos Idowu, 'Child Abuse in Nigeria: Dimension, Reasons for Its Persistence and Probable' (2016) 4 Child and Family Law Journal.

> The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the Federation; and accordingly -
>
> (a) all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and the courts of a State shall, respectively, vest in the National Assembly, the President of the Federation, and in the courts which by the preceding provisions are courts established for the Federal Capital Territory, Abuja;

By the above provisions, the FCT is the first place the Child Rights Act became operational, as no further form of adoption is needed in this instance.

### *3.2.2 Structure of the Act*

Twenty-five sections comprise the Child Rights Act. Part I states that all actions, whether conducted by a person, a public or private entity, institution, or service, a court of law, or an administrative or legislative authority, must prioritize the child's best interests.[287] Section 2 of the Act provides that a child shall be given the protection and care necessary for his/her well-being.[288] Part I has just these two sections.

[287] Section 1, Child Rights Act

[288] Ibid Section 2.

Part II of the CRA mainly focuses on creating the rights and responsibilities of a child. Some of the fundamental rights of children which have been established in the provisions of the CRA are discussed below.

Perhaps, the most essential right of the child spelt out in Part II of the act is the weaving of Chapter IV of the 1999 Constitution into the CRA as if they were expressly stated in the Act.[289] The Act goes further to provide that every child has a right to survival and development;[290] a right to name;[291] a right to freedom of association and assembly in conformity with the law and accordance with the necessary guidance and directions of his parents;[292] a right to freedom of thought, conscience and religion;[293] every child is entitled to his privacy, family life, home, correspondence, telephone conversation, and telegraphic communications;[294] every child is entitled to freedom of movement subject to parental control which is not harmful to the child;[295] a child is to be free from any form of discrimination merely because he belonged to a particular community or ethnic group or because of his place of origin, sex, religion or political opinion;[296] every child is entitled to the dignity of his person;[297] every child is entitled to enjoy the best attainable state of physical, mental, and spiritual health;[298] amongst other rights. This part of the Act has a total of 18 sections.

[289] Section 3(1)
[290] Section 4
[291] Section 5
[292] Section 6
[293] Section 7
[294] Section 8
[295] Section 9
[296] Section 10
[297] Section 11
[298] Section 13

Part III of the Act made provisions on the protection of the rights of a child from certain vices, which include child marriage,[299] child betrothal,[300] tattoos, skin marks,[301] drugs, and narcotics,[302] amongst others. Emphatically, the Act expressly prohibits the employment, use, or involvement of children in the commission of a criminal offence.[303] Similarly, another notable provision of this Part is that using children in exploitative labour is strictly prohibited.[304] Exploitative labour here refers to illegal ways of using children or maltreating them for personal benefits.[305] In the same vein, other provisions of Part III emphasize that sexual intercourse with children is highly unlawful and punishable.[306] The Act outlawed the conscription of children in the armed forces of Nigeria.[307] This Part has a total of 20 sections concerning child rights protection.

Part IV of the Act provides for the role of the state and federal governments, and other authorities and individuals in protecting children in times of emergency.[308] This is applicable if there are reasonable grounds to assume that a child is at imminent risk of serious injury. Part V provides for the care and protection of children.[309] Part VI makes adequate provisions for the powers of the Court in making appropriate care orders concerning a child to the care of a designated authorised person, appropriate authority, or the State Government.[310]

[299] Section 21

[300] Section 22

[301] Section 24

[302] Section 25

[303] Section 26

[304] Section 28

[305] Samantha Dowling, Karen Moreton and Leila Wright, *Trafficking for the Purposes of Labour Exploitation: A Literature Review* (UK Home Office 2007).

[306] Section 31

[307] Section 34

[308] Sections 41 - 49

[309] Sections 50 - 52

[310] Sections 53 - 62

Part XIII establishes a family court in each state of the federation and the Federal Capital Territory.[311] The court shall apply the provision of the Act, and in exercising its discretion, the interest and welfare of the child should be of utmost priority.[312] Due to the nature of the federal system of government as practiced in Nigeria, the court can only be established and operational in states (except for the Federal Capital Territory where it is automatically operational) that have adopted the Child Rights Act as a law. Federalism (as described earlier) also gives the states the authority to modify the court's power differently from what is initially obtainable in the Act. This can lead to a whittle-down effect of the real intention of the Act and, by extension, the Convention on the Rights of a Child.

### *3.2.3 The National Child Rights Implementation Committee (NCRIC)*

The Child Rights Act establishes the National Child Rights Implementation Committee. The Act states:

> There is established a committee to be known as the National Child Rights Implementation Committee…[313]

The functions of this committee include the following:

1. Initiating actions that shall ensure the observance and popularization of the rights and welfare of a child as provided for in the Act, United Nations Convention on the Rights of

[311] Sections 149 - 162
[312] Section 149,
[313] Section 260

the Child, Organization of African Unity Charter on the Rights and Welfare of the child, Declaration of the World Summit for Children;[314]

2. Continually review the state of implementation of the child protection and rights statutes or regulations;[315]

3. Create and suggest to the Federal, State, and Local Governments particular programs and initiatives that will facilitate the execution of children's rights. ;[316] and

4. Ensure active documentation of all issues relating to the rights and welfare of children.[317]

State Child Rights Implementation Committee is established in section 264 of the Act with similar functions enshrined in section 265, while the Local Government Child Rights Implementation Committee is established in section 268 of the Act with its functions enshrined in section 269 of the Act. The members of the committee are appointed by the Act itself in section 260.

These provisions are laudable in the light of child rights protection because they provide an avenue through which the Child Rights Act would be felt even at the grassroots level.[318] However, there is no identifiable framework for protecting prospective and actual victims of child marriage. Also, the function of this Committee would be significantly hindered in states where the Child Rights Act has not been adopted as law.

[314] Section 261(1)(a)

[315] Section 261(1)(b)

[316] Section 261(1)(c)

[317] Section 261(1)(d)

[318] For instance, the Lagos State Government, in 2019, set up committees for the implementation of the Child's Rights Law at the local government level - Oladimeji Ramon, "British Council, Lagos Collaborate on Child's Rights Law" *Punch Newspapers* (May 30, 2019) <https://punchng.com/british-council-lagos-collaborate-on-childs-rights-law/> accessed May 24, 2021.

### *3.2.4 Limitations in the Provisions of the Child Rights Act 2003*

Discussed below are shortcomings in provisions of the Child Rights Act, which hinder the document from meeting international standards and requirements to end child marriage.

**(a) Inadequate Deterrent System Provision**: Section 23 of the Act provides that a person who marries a child or to whom a child is betrothed; or who promotes the marriage of a child; or who betroths a child, is guilty of an offence and is liable to a fine of NGN 500,000 (five hundred thousand Naira) which is equivalent to 897.41 British pounds and 1,209 US dollars.[319] The punishment provided by the section is alternative as the offender may also be liable to five years imprisonment, or both fines and imprisonment can be applicable in case of any violations. The option of fine as stipulated by the section is rather trivial considering the heinous nature of the act and the prevalence of child marriage in Nigeria and this has made this provision less effective.[320] Considering the offenders in child marriage (the parents on one hand and the husband on the other hand), the fine imposed has no practical implications for violating the Act's provisions. In most cases, the parents/wrongdoers are extremely poor and struggle to make ends meet. Under such circumstances, they cannot afford to pay such a significant amount and may end up in prison with little or no provisions made for the children who would be left without parents. On the part of the husband who may be of affluence, the fine provided may be of no

[319]These amounts represent the current exchange rate at the time of this research. See: https://ngn.fxexchangerate.com/usd/500000-currency-rates.html accessed February 27, 2022

[320] C Offiong and Daniel E Gberevbie, 'An Assessment of the Implementation of the Nigerian Child Rights Policy of 2003' (2018) 1 AKSU Journal Of Social And Management Science 64; See also Nonyelum A Ujam, 'Child Marriage in Nigeria: Wedded to Poverty – Analysis' (*Eurasia Review* December 22, 2019) <www.eurasiareview.com/22122019-child-marriage-in-nigeria-wedded-to-poverty-analysis/> accessed May 13, 2021.

consequence to him and would not serve as a deterrent. Practical sentencing is expected to address each convict, considering social and economic factors surrounding each situation.

**(b) Lack of rehabilitation Provisions for Survivors and Victims of Child Marriage**: The Child Rights Act makes no provision for rehabilitation of children who have already experienced child marriages to restore and improve the physical and mental health of the young girls who may have experienced sexual and physical abuse during the duration of the marriage by their husbands and in-laws. This should be a foundational reason for the enactment of the Act in addition to the deterrence of future child marriages; the protection of the child's dignity,[321] considering the number of young girls in Nigeria currently experiencing child marriage.

**(c) Conflict with existing Laws in Nigeria**: a plethora of laws exist in Nigeria, which all provide different ages in the definition of whom a child is, thus, leading to complications in adjudication on Child Marriage.[322] As a consequence, legal problems become complicated, and it becomes difficult to determine and reconcile the marriageable age of a female child in Nigeria without upsetting religion or cultural norms. Under section 29(4)(a) of the 1999 Constitution,[323] which provides: 'full age' means the age of eighteen and above, i.e., the benchmark is 18 years. The CRA, in accordance with the Constitution, defines a child as a person who has not yet reached the age of eighteen years. However, section 2 of the CYPA (which has been adopted similarly in the Eastern, Western, and Northern regions), defines a 'child' is defined as 'a person under the age of fourteen years'

[321] Section 11, Child Rights Act 2003

[322] EO Osakinle and Olufunmilayo Tayo-Olajubutu, 'Child Marriage and Health Consequences in Nigeria' (2017) 30 American Academic Scientific Research Journal for Engineering, Technology, and Sciences 351.

[323] Section 29(4), 1999 Constitution (as amended)

while a 'young person' is defined as 'a person who has attained the age of fourteen years but is under the age of seventeen years.'

(a) Furthermore, the Immigration Act stipulates that any person below 16 years is a minor,[324] whereas the Matrimonial Causes Act puts the age of maturity at 21.[325] Section 18 of the Marriage Act states that if either a party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he is dead or of unsound mind or absent in Nigeria, of the mother, must be produced and annexed to such affidavit as aforesaid before a license can be granted or a certificate (Marriage Certificate) issued.[326] However, this would only apply to marriages under the Act and not marriages conducted under Islamic or Customary laws. Section 12(1) of the Electoral Act, 2011, states that a person shall be qualified to be registered as a voter if such a person is a citizen of Nigeria and has attained the age of 18 years. Section 3(1) (e) of the Matrimonial Causes Act provides that a party to a marriage must not be an infant. He/she must be mature enough for marriage. All these laws, which have made provisions on the ages of children, fail to be in harmony on the age of marriage in Nigeria. However, in cases of conflict between the constitution and any other laws in existence in Nigeria, the Constitution, which is supreme above other laws, will take precedence.

(b) **Coverage in states that have not ratified the Act:** The Child Rights Act has made significant provisions for the protection of the rights of children in Nigeria. Research has shown that the adoption of the CRA was historically the right step of the government in

[324] Immigration Act [Nigeria], 1963, Cap. 11 LFN 2004

[325] Matrimonial Causes Act, 1970, Cap. M7 Laws of the Federation 2004

[326] Section 18, Marriage Act, 1914, Cap M6 Laws of the Federation,1990

the right direction to protect the rights of Nigerian children.[327] Even though the provisions of the CRA are highly effective, not all the states have domesticated the statute into their respective legislation [328] and so, the age restrictions on marriage do not apply in these States, and Child marriage continues to be sanctioned by State Laws. To have an effect on statistics on child marriage in Nigeria and internationally, the Child Rights Act of 2003 must be enacted into law by each of Nigeria's states, effectively criminalizing child marriage state-wide, since children remain the legislative province of states.[329] Presently, only 27 states of Nigeria have enacted the provisions of the CRA into their domestic laws.[330] Children in the remaining 9 States that have not domesticated the Act are not protected by the provisions of the Act.

**(f) Lack of Jurisdiction over Child Marriages conducted under Islamic and Customary Law**: Another limitation is that the CRA lacks jurisdiction over child marriages conducted under Islamic or customary law. A good example is the case of Ahmed Yerima, a former Governor and Senator, who was reported nationwide and globally, to have married a thirteen-year-old Egyptian girl in 2013.[331] This generated protests from different quarters, which led to a petition that was sent to the National

[327] Buzome Chukwuemeke, Henry Nebechi Ugwu and Momoh Aneru Radietu, (n. 15).

[328] Ibid18

[329] Ibid.

[330] Michael Akpa Ajanwachuku and Hemen Philip Faga, 'The Nigerian Child's Rights Act and Rights of Children with Disabilities: What Hope for Enforcement?' (2018) 72 Curentul Juridic, The Juridical Current, Le Courant Juridique 57; These states are Abia, Akwa-Ibom, Anambra, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Imo, Jigawa, Kaduna, Kogi, Kwara, Lagos, Nasarawa, Niger, Plateau, Ogun, Ondo, Osun, Oyo, River, Taraba

[331] The Independent, 'Nigerian Senator 'Married 13-Year-Old Girl' *The Independent* (April 29, 2010) <https://www.independent.co.uk/news/world/africa/nigerian-senator-married-13yearold-girl-1958710.html> accessed April 14, 2021; see also Afua Hirsch, 'Nigerian Senator Who 'Married Girl of 13' Accused of Breaking Child Rights Act' *The Guardian* (July 25, 2013) <https://www.theguardian.com/world/2013/jul/25/nigeria-senator-accused-child-bride> accessed April 14, 2021

Assembly asking for his resignation[332] But to the dismay of the various human rights groups, the then Attorney-General admitted that Yerima could not be prosecuted legally.[333] Yerima justified his position with the following words:

> *Prophet Muhammad (SAW) married Aisha at the age of nine. Therefore, any Muslim who marries a girl of nine years and above is following the teaching and practices of Prophet Muhammad (SAW). If there is anybody who will tell me that what I did contradicts Islam, I will say I will submit, and I will do whatever they ask me to do.*[334]

It is pertinent to point out that in Nigeria, marriage can be conducted under the statute, customary law, and Islamic law. However, going by the provisions of Item 61 of the Exclusive Legislative List contained in Part I of the Second Schedule of the 1999 Constitution, the National Assembly can only make laws regarding:

> The formation, annulment, and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto

Hence, the regulation of marriages conducted under Islamic law and native customs is outside the purview of the legislative competence of the National Assembly. This has been the greatest factor hindering the effective implementation of the Child Rights Act 2003. This implies that the

[332] Ogunniran Iyabode, (n. 80)
[333] Tim S Braimah (n. 83)
[334] Ibid 486

legislature has no authority or influence over customary or Islamic weddings, but only over those performed in accordance with the legislation. Thus, if a person marries a child under Islamic or customary law, he cannot be punished by the federal government since the prosecution would constitute a breach of the requirements of Item 61 of the Exclusive Legislative List included in Part I of the Second Schedule of the Constitution. Even though the CRA is intended to replace all other laws affecting children's rights,[335] the constitution is supreme and overrides all other laws in Nigeria. In this light, commentators like Akinlami and Braimah argue that the said provision of the constitution renders the CRA useless.[336] Therefore, although Senator Yerima's marriage contravenes section 21 of the CRA, it has been argued that he cannot be prosecuted because the Federal Government does not have the legal authority to do so due to the provisions of Item 61 of Part I of the Second Schedule of the Constitution. The legal interpretation of the provision reduces the effectiveness of the CRA in protecting vulnerable and young children. additionally, it is a legal barrier towards having a national legislation that can proscribe early or child marriage in Nigeria.[337] The Federal Government's inability to override the dedicates of Islamic and customary marriages through the CRA is quite disheartening and more young girls may still fall victim to child marriages.[338]

**(f) Lack of General Acceptance in all States of the Federation**: The 9 states yet to domesticate the Child's Rights Act are all in Northern Nigeria.[339] Though there have been few discussions and debates about the domestication of the Child Rights Act in these states, formal bills are yet to be presented in the state legislatures, save for Kano where the Child

[335] Bar Human Rights UK and UNICEF, *The Child Rights Manual: Nigeria* (Bar Human Rights UK 2013)
[336] Tim S Braimah, (n. 83)
[337] Ibid 487
[338] Ibid.
[339] They are Bauchi, Yobe, Sokoto, Adamawa, Zamfara, Gombe, Katsina, Kebbi, and Kano states.

Protection Bill has been in the House of Assembly since the beginning of the 9th Assembly of the House. However, these States have significantly implemented the penal code of Nigeria that is completely based on the Islamic Shariah law.[340] It has been argued that the major reason for the unacceptance of the Child Rights Act in these Northern States is its conflicts with the traditional teachings of Islam.[341] For instance, the provision of the minimum age of the Child Rights Act conflicts with the criterion for the marriages of children as prescribed by the traditional teachings of Islam which does not give a minimum age for marriage.[342] Based on this, the states in Northern Nigeria have shown high levels of reluctance in implementing the Child Rights Act.[343] For instance, Jigawa state has successfully adopted the provisions of the CRA but completely neglected the age factor, i.e. 18 years as specified in the CRA.[344] Instead of 18 years, the state law provides for the determination of the age of marriage based on the 'attainment of puberty'.[345]

In addition to this, apart from the conflicts between the provisions of the Act and the traditional teachings of Islam concerning the age of marriage, another reason for the rejection of the Act by the Northern States is its incompatibility with the freedom of religion of States in Northern Nigeria.[346] On the one hand, the principal purpose of the Act is to protect the fundamental human rights of the child, while on the other hand, the provisions of the Act potentially result in an infringement of the fundamental right of the

[340] Musa Y Suleiman and Abiodun Amuda-Kannike, 'Some Religio-Cultural Practices against the Property Rights of Women and Children in Nigeria and Specified African Countries' (2019) 10 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 166 .

[341] C Offiong and Daniel E Gberevbie, (n. 320).

[342] Abdullah bin Muhammad bin Saleh, 'Determining Marriage at an Age above Puberty: A Jurisprudential Study' (2017) 10 Journal of Islamic Science 1849.

[343] Mariam A Abdulraheem-Mustapha, 'Child Justice Administration in the Nigerian Child Rights Act: Lessons from South Africa' (2016) 16 African Human Rights Law Journal 435.

[344] Ibid 451

[345] The law further provides that any violation of a child below that age will have the full consequence of prosecution.

[346] Michael Wiener, 'Freedom of Religion or Belief and Sexuality: Tracing the Evolution of the UN Special Rapporteur's Mandate Practice over Thirty Years' (2017) 6 Oxford Journal of Law and Religion 253.

freedom of religion, belief, conscience and thoughts as stated in the 1999 Constitution. The 1999 Constitution provides that all the individual citizens of the state are entitled to the fundamental rights of the freedom of beliefs, religions, thoughts as well as the freedom to change their religion and beliefs. It also permits the individuals to propagate and manifest their religion in public.[347] The curbing and prohibition of the early marriages of children as specified by the provisions of the CRA potentially infringe on the right of individuals to practice certain aspects of Islam such as the same early marriages of the children. It has been strongly argued that in case of a severe clash between the religion and that of the CRA concerning the protection of the children as in the case of the people living in the Northern regions of Nigeria, the well-being and the best interest of the children must be given profound significance and consideration.[348] It has been asserted that in determining the interests and well-being of the child priority should be given to the physical, mental, emotional, and psychological needs of the child.[349] Maximum protection must be provided to the children until they are mature enough to make sensible decisions about their marriage.[350] However, the Islamic practices regarding the marriage of children neglect the rights of the child to make independent choices about their marriage which results in the harm associated with the physical, mental, psychological as well as emotional needs of the child.[351] Thus, if such practices are not in the best interest of the child, then the right to freedom of religion can potentially be limited.

[347] Section 38, 1999 Constitution

[348] Zainab Abass and Wasiu Babalola, (n. 202) 130.

[349] Section 1, Child Rights Act

[350] Miriam Chinyere Anozie, Millicent Ele, and Elizabeth Ijeamaka Anika, 'The Legal, Medical and Social Implications of Child Marriage in Nigeria' (2018) 32 International Journal of Law, Policy and the Family 119.

[351] Olaitan Olusegun and Adedokun Ogunfolu, (n. 200)

## 3.3 The Nigerian Legal System

As noted above, the constitutional provisions and the judicial interpretation of some key provisions have made the prohibition or proscription of child marriage a bit more complex in Nigeria. Aside from that, there are historical reasons why, child marriage remains prevalent in the country despite the enactment of the Child Rights Act. An analysis of the precolonial history of the legal system of Nigeria will help provide illumination of the current constitutional practices which preserve child marriage in the country. This makes for a better understanding of issues to be addressed to enable the country to fulfill its duty of protection and care to children and; equally, assume a position of good standing in its international obligation to end child marriage and other harmful traditional practices.

### *3.3.1 Historical Reasons for the Prevalence of Child Marriage Post-2013*

In this section, the precolonial history of the Nigerian legal system will be considered from the perspectives of the three major ethnic groups – Igbo in the East, Yoruba in the West, and Hausa/Fulani in the North.

#### *3.3.1.1 Northern Nigeria*

The Maliki school of Islamic Jurisprudence established by Uthman dan Fodio after his successful Jihad (holy war), which took place between 1804 and 1810,[352] created a highly centralized system of government the jihad was successfully carried out against the established Hausa dynasty in what is now Northern Nigeria and brought about the establishment of Islam in the region. Upon

[352] African Studies Centre, 'Islam in Nigeria' (*African Studies Centre Leiden November* 15, 2002) <www.ascleiden.nl/content/webdossiers/islam-nigeria> accessed January 3, 2021.

capturing the Hausa lands, Uthman dan Fodio established the emirates, which continued until 1859.[353] He went further to unite the Hausa states under Islamic law, and in 1812, the Hausa dynasties became part of the Islamic State or Caliphate of Sokoto.[354] The caliphate was the beginning of the unifying foundations for an Islamic federal theocracy which commenced the systematic purging of non-Muslim ideologies in the Hausa/Fulani states.[355] This laid the foundations for resistance against non-Islamic viewpoints on certain legal and moral issues such as the focal theme of this thesis which is child marriage.[356]

The dominance of Islam in the Northern region after the jihad ensured that the laws in those Islam-dominated areas were largely influenced by tenets of Islam so much so that it became a unifying and common factor of all the Hausa City-States and their Non-Hausa speaking neighbours.[357] Over time, these provisions of Sunni Islamic law became ingrained in the daily lives of the people in the North that it had become accepted as law and tradition regulating every area of their lives, especially family law.[358] To preserve this highly organized system, and for ease of administration, the British adopted the indirect rule system of colonial administration which ensured that the traditional institutions and local customs were preserved. Despite the abolition of the Sokoto Caliphate in 1903, the Sunni Islamic law provisions became congruent with the traditional institutions and local customs of the people. The system of indirect rule obliged British colonial administrators to show a certain degree of deference to the state-centered form of Islam.[359] What was abolished was the political setup of the Caliphate as the Northern region became a protectorate

[353] Ibid.; see also Elizabeth Isichei, *A History of Nigeria* (Longman 1984) 207

[354] Elizabeth Isichei, (n. 288).

[355] Door Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to Its History* (Longman 1979), p. 97

[356] Abdulmajeed Hassan Bello, 'Islam and Cultural Changes in Modern Africa' (2018) 2 Arts & Humanities Open Access Journal 1.

[357] Taslim Olawale Elias, *The Nigerian Legal System* (Routledge & Paul 1963) 8.

[358] Ibid.

[359] Allan Christelow, 'Islamic Law and Judicial Practice in Nigeria: An Historical Perspective' (2002) 22 Journal of Muslim Minority Affairs 185.

from 1903.[360] The indirect rule essentially stated local governance should be left to traditional chiefs under the supervision of European officials. Native bodies were utilised and interference with local customs was kept to a minimum.[361]

During this period, women's roles and opportunities were restricted in the public sphere. Islam encouraged the practice of seclusion whereby women were seldom seen walking about in public places or forbidden from mixing with men. They only had the opportunity of relating with other women within their vicinity.[362] Women, in general, held an inferior position in society both legally and in fact.[363] Traditionally, the leader of the family introduced the female child to the suitor and instructed her to accept the suitor's decision as Allah's will.[364] Thus, the consent of the girl bride is not sought in compliance with the dictates of Islam.

This history demonstrates that the Northern Region has always resisted laws and policies that contradict the tenets of Islam practised in the Islamic States in Northern Nigeria. This preservation of religion-based law has also accounted for the rejection of the CRA 2003 by the Northern States.[365]

This is reflected in the varying statistics in child marriage in the various regions as noted in the first chapter of this research study. Notably, child marriage is 15–18 times more prevalent among

[360] Door Michael Crowder and Guda Abdullahi, (n. 290) 13.

[361] Abdulmumini Adebayo Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 The International and Comparative Law Quarterly 817 ;see also Yahaya A Mohammed, *Constitutional Foundation of a Shariah Legal System in Nigeria* (Pumark Nigeria Limited 2001), p. 2

[362] Catherine Coles and Beverly Mack (eds), *Hausa Women in the Twentieth Century* (University of Wisconsin Press 1991).

[363] Paul E Lovejoy, Concubinage and the Status of Women Slaves in Early Colonial Northern Nigeria' (1988) 29 The Journal of African History 245.

[364] Annabel Erulkar and Mairo Bello, *The Experience of Married Adolescents in Northern Nigeria* (The Population Council 2007) <www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/PopulationCouncil24.pdf>.accessed 20 June 2020

[365] Yahaya A Mohammed (n. 296) 2

the Hausa/Fulani, the primary Northern ethnic group, than among the Southern major ethnic groupings (Yorubas and Igbos).[366]

### *3.3.1.2 Yoruba Tribe (South-Western Nigeria)*

Child marriage is limited among the Yoruba people, with the Yoruba ethnic group marrying children under the age of 18 at a rate of 3%, the lowest percentage among Nigeria's three main ethnic groups.[367]

Before colonial rule, the political system of the Yoruba kingdom was more like a cross between the highly centralized Hausa-Fulani caliphate of the North and the 'chiefless' or 'stateless' native administration of the Igbo, Ibibio, and Ogoja peoples of the South-East with no known centralized system of government.[368]

The king known as the Oba was the supreme head of the government in the Yoruba kingdom. He was considered the representative of *Olodumare* (God Almighty).[369] The Oba was vested with all governmental powers - legislative, judicial, and executive - but also shared this power with certain individuals, groups, and institutions to ensure the smooth running and stability of the communities. These groups were in place to exercise reasonable constraints on the political powers of the king. To check his excesses, the king ruled with his council of chiefs.[370]

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[366] Jacob Wale Mobolaji, Adesegun O Fatusi and Sunday A Adedini (n. 26)

[367] Ibid. 31; See also Immigration and Refugee Board of Canada, *Nigeria: Prevalence of Forced Marriage, Particularly in Muslim and Yoruba Communities; Information on Legislation, Including State Protection; Ability of Women to Refuse a Forced Marriage* (Government of Canada 2012) </www.refworld.org/docid/50b4ab202.html> accessed October 19, 2021.

[368] Adiele Eberechukwu, *Afigbo Chiefs: The Warrant Indirect Rule in Southeastern Nigeria 1891-1929* (Longman 1972).

[369] Tunde Onadeko, *Yoruba Traditional Adjudicatory Systems* (African Study Monographs 2008), p. 17.

[370] JA Atanda, 'Government of Yorubaland in the Pre-Colonial Period' (1971) 4 Tarikh 1; See also AI Akinjogbin and EA Ayandele, 'Yoruba Land up to 1800' in Obaro Ikime (ed), *Groundwork of Nigeria History* (Heinemann Educational Books (Nigeria) Plc 1980), p. 130-140

In the south-western parts of Nigeria, the rules of customary law in the Yoruba kingdoms were largely unwritten and not embodied into a legal code.[371] Despite this obvious limitation, these laws were widely known, accepted, and respected amongst the Yoruba.[372]

The acceptance and spread of the Christian religion in most parts of Yoruba land facilitated the integration of the English Legal system and local customs.[373] The decentralized system of the Yoruba political arrangement practiced in the pre-colonial Yoruba land, the acceptance of Christianity as well the practice of African traditional religion accounted for the easy assimilation of English customs and its legal system by the western region of Nigeria This is evident from the fact that the introduction of the Criminal code in Lagos and subsequently, to other western states witnessed no resistance as opposed to resistance to introduction of the criminal code and enactment of the penal code in Northern Nigeria. In conclusion, the influx of Christianity alongside Western values, into the Yoruba states greatly influenced the Yoruba attitudes toward marriages concerning both the number of wives and also child marriages.

#### *3.3.1.3 Igbo Tribe (Eastern Nigeria)*

People of the Igbo tribe are found in the former Eastern region and some parts of the Mid-Western region. Most of the Igbo tribes were known to have no king and had what can be called a fragmented political system where political authority was shared among various units and groups.[374] Thus, it was a 'chiefless society which was segmentary and egalitarian in nature'.[375]

[371] GO Oguntomisin, 'Political Change and Adaptation in Yorubaland in the Nineteenth Century' (1981) 15 Canadian Journal of African Studies 223

[372] Ibid.

[373] Tunde Onadeko,( n. 305)

[374] Chukwuemeka Onwubu, 'Ethnic Identity, Political Integration, and National Development: The Igbo Diaspora in Nigeria' (1975) 13 The Journal of Modern African Studies 399; Eghosa E Osaghae, 'Ethnic Minorities and Federalism in Nigeria' (1991) 90 African Affairs 237.

[375] Chukwuemeka Onwubu, (n. 310) 402.

Title holders were highly recognized for their accomplishments but never revered as kings.[376] This, however, did not imply that the Igbo area lacked mechanisms for sustaining the rule of law and ensuring peace and order within the Igbo community. The only difference between what was obtainable within the Igbo community and the other two (Hausa and Yoruba), is the means employed to administer justice.[377]

Various institutions within the pre-colonial Igbo society were charged with the responsibility of judicial, legislative, and executive functions. They included: *Oha na Eze,* Council of elders, *Ofor* Title holders, family, *Ozo* title holders, Age grade, the *Umuada*, *Ala* or, the Earth goddess represented by a chief priest. In the few communities that had a king, he was vested with the judicial, legislative, and executive powers but did not work alone.[378] The council of elders, which was made up of chiefs and elders, was always on hand to advise him or remove him if he was no longer working in the interest of the community.[379]

Judicial administration in Igbo communities involved every member of the community. For example, the family settled minor disputes while the more serious offenses or disputes were referred to the Council of elders. However, offenses like murder were said to be crimes against the earth goddess and were usually referred to the chief priest who is the representative of the earth goddess.[380]

[376] Ibid 403

[377] Taslim Olawale Elias (n. 292) 8.

[378] Ikpechukwuka E Ibenekwu, 'Igbo Traditional Political System and the Crisis of Governance in Nigeria' (2012) 9 Ikoro Journal of the Institute of African Studies UNN 1; E Nwaubani, 'Igbo Political Systems' (2009) 12 Lagos Notes and Records 1; See also Emmanuel C Onyeozili and Obi NI Ebbe, 'Social Control in Precolonial Igboland in Nigeria' (2012) 6 African Journal of Criminology and Justice Studies 29

[379] Ikpechukwuka E Ibenekwu, (n. 378) 3; E Nwaubani, (n. 314)

[380] Ikpechukwuka E Ibenekwu, (n. 378) 3

Before the coming of the British colonialist, the influence of Christianity spread by Monks from Portugal was already felt in Nigeria starting from Western Nigeria and spreading rapidly to the East. During colonialism, Christianity was already being assimilated by the Igbos.[381] This situation made it quite easy to implant British laws and customs in the people. Yahaya contended that religion had a significant part in the Criminal Code's acceptability in Nigeria's Eastern and Western regions.[382] To him, the Igbo cultural practices were not deeply rooted in the people because a clear distinction could be drawn between their culture and religion. The widespread Christianity in Igbo land ushered in a departure from native customs. Since Christianity was gaining its way into the lives of the Igbo people, adopting English laws was easier in the East than in any other part of Nigeria.[383] For instance, natives of the Eastern and Western regions, in addition to their traditional marriage, go through another form of marriage under English law which was referred to as 'church blessing'.

The precolonial history of the major tribes in Nigeria shows that the laws of each community incorporated the customs of the people, especially those that were widely accepted. The pre-colonial concept of law and justice cannot be separated from religion, ethics, and morality[384] as they are all interrelated. As will be examined shortly, these aspects remain interrelated to a large extent in the prevailing Nigerian legal system.

[381] Chukwuemeka Onwubu (n. 310), 401

[382] Ibid.

[383] Ibid.

[384] Emmanuel C Onyeozili and Obi NI Ebbe, (n. 314); Micheal Nkuzi Nnam, *Anglo American and Nigerian Jurisprudence: A Comparison and Contrast in Legal Reasoning and Concept of Law* (Fourth Dimension Publishers 1989) 6

### *3.3.2 Legal Pluralism and the Place of Customary Law: Testing the Validity of the Child Marriage Custom*

Oba observes that 'law in Nigeria is a plural complex with the English style common law, Islamic law and the indigenous African law', co-existing in a competing manner.[385] He is correct in this observation given the existence of heterogenous systems of native law and customs, the superimposition of received English law as a legacy of colonization, and the evolution of Nigeria's constitution influenced by political developments, which have all culminated in a legal system characterised by legal pluralism.

As a starting point, it is imperative to define what 'customs' are and to conceptualise 'legal pluralism' in the context of this discourse. Custom has been described in Nigerian case law as 'a mirror of the culture of the people.'[386] In this sense, custom is conceptualised as a way of life attributable to a group of people. Customary law is a rule which, in a particular district, has, from long usage, obtained the force of law.[387] It has also been described as 'unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behaviour in any particular matter.'[388]

Some attempts have been made to distinguish custom from customary law, such as the following explanation by Nwabueze:

> *Customs are defined as rules of conduct; when such rules of conduct attain a binding or obligatory character, they become customary*

[385] Abdulmumini Adebayo Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52 The American Journal of Comparative Law 859.

[386] *Oyewunmi Ajagungbade III v. Ogunsesan* (1990) 3 NWLR 182 at 207.

[387] Section 254(1), Evidence Act, 2011

[388] *Alfa and Others v Arepo* (1963) WNLR 95, 97.

> *law. It is the assent of the particular community involved that gives a rule of conduct its obligatory nature supported by a sanction and enforceable. Customary sanction takes the form of ostracism, compensation, propitiation, restoration, or apology. It is this element of sanction that distinguishes a custom from customary law.*[389]

This explanation would appear valid since there are aspects of the culture of the indigenous people of Nigeria that can hardly be deemed customary law. For instance, it is a custom of the Yoruba people for a young lady to kneel when greeting an elder as a gesture of respect, but it would be absurd to consider this custom part of Yoruba customary law. And it would appear to be a valid point of distinction that this custom is not customary law because it is not enforceable by sanctions or other means.

However, while the above distinction between custom and customary law is useful conceptually, it would appear the said distinction is moot and, in some cases, misleading when one considers references to the term 'custom' in practical contexts of the Nigerian jurisprudence. For instance, the Evidence Act defines 'custom' as 'a rule which, in a particular district, has, from long usage, obtained the force of law.[390] This definition clearly renders moot the earlier mentioned distinction between custom and customary law as far as the proof of a custom in court proceedings is concerned.

[389] Remigius Nwabueze, 'The Dynamics and Genius of Nigeria's Indigenous Legal Order' (2002) 1 Indigenous Law Journal 153, 158.
[390] Section 258(1), Evidence Act 2011.

Further, an examination of the use of the term 'custom' in Nigerian case law will reveal a conceptualisation of custom as synonymous with customary law. For instance, in *Nezianya v. Okagbue*,[391] the court held that a widow's ownership of her late husband's property is not that of a stranger, and regardless of how long it lasts, it is not detrimental to her husband's family, and she cannot deal with his property without his family's agreement.[392] The use of the term 'native law and custom' reveals the court's conceptualisation of custom as synonymous with, or at least as a counterpart of, native law. Consistent with the statutory and case law conceptualisation of the term, unless otherwise expressed in the context, references to "custom" in this research conceptualised as synonymous with customary law.

Finally, 'custom' or 'customary law' as used in this research must be distinguished from international custom or international customary law. International customary law has been defined as 'evidence of a general practice accepted as law'[393] or more aptly as a 'general and consistent practice of states followed by them from a sense of legal obligation.'[394] While "customary law" in the context of this research, and 'international customary law' are similar in that they both refer to practices underlined by a legal obligation, they are distinguishable in that the former refers to practices of 'native'[395] people or people of 'a particular district'[396] while the latter refers to practices of sovereign states. Having defined custom. It is necessary to define legal pluralism.

'Legal pluralism' has been defined by Woodman as 'the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms.'[397] Griffiths

[391] [1963] 1 All NLR 352.

[392] Ibid.358.

[393] Article 38(1)(b), Statute of the International Court of Justice 1946

[394] Restatement (Third) of the Foreign Relations Law of the United States, s 102(2) ALI 1987.

[395] *Nezianya v. Okagbue* [1963] 1 All NLR 352, 358.

[396] See the definition of 'custom' in Evidence Act, s 258(1).

[397] Gordon R Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 Journal of African Law 152, 157.

defines it simply as "the presence in a social field of more than one legal order."[398] As will be seen shortly, both definitions reflect the reality in the "social relations" or "social field" of child marriage in Nigeria where distinguishable legal norms apply or purport to apply, to legitimise or illegitimise the familial practice.

Also relevant to this research are two types of legal pluralism identified by Woodman. The first type is one in which 'state law coexists with customary law' which Woodman calls 'deep legal pluralism'.[399] It arises from the colonial experience of an imposed state law which was very different from the pre-existing indigenous laws. He identifies a notable obstacle to justice that arises from deep legal pluralism as:

> [*T]he conflicts which ensue when at least one of the bodies of law (the state law) claims exclusive legitimacy, those who apply it denying the legal character of norms of the other law (in the present case, customary law), although they are accepted by at least some subjects.*[400]

This contradiction is observable in the Nigerian setting and will be highlighted via an examination of the validity standards for the enforcement of Nigerian customary law.

The second type of legal pluralism identified by Woodman is called 'state law pluralism.' According to Woodman:

[398] John Griffiths, 'What Is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1.
[399] Gordon R Woodman (n. 397) 157
[400] Ibid158.

> *State law pluralism arises from the policy embedded in many state laws in Africa, including those studied by Morris and Read, of recognizing and incorporating into the state legal system parts of the bodies of customary law existing within that state's claimed field of jurisdiction. This is sometimes regarded as the primary type of legal pluralism.*[401]

As conceptualised by Woodman, deep legal pluralism can be distinguished from state law pluralism in that deep legal pluralism refers to a state of affairs where customary law has been displaced and excluded from enforcement by state law (notwithstanding the continued existence of the excluded customary law outside the courts), while state law pluralism refers to a state of affairs where customary law has been infused into state law albeit subject to its meeting defined standards for admission. In the Nigerian context, these standards for admission are called validity tests for the enforceability of customary law as will be examined shortly.

However, beyond the aforementioned forms of legal pluralism, Oba[402] identifies three distinct forms of legal pluralism in Nigeria. In his words:

> *First, there is the legal pluralism arising from the multifarious legal traditions or legal cultures in the country. Laws in Nigeria are derived from three distinct laws or legal systems: customary law, Islamic law, and English-style laws. Customary law is indigenous to*

[401] Ibid 158.

[402] Abdulmumini Adebayo Oba, 'Religious and Customary Laws in Nigeria' (2011) 25 Emory International Law Review 881.

*Nigeria with each of the various ethnic groups in the country having its own distinctive customary law…*

*The second form of legal pluralism in the country arises from the country's federal system, whereby the federal and state governments share legislative power. This has resulted in differences between federal and state laws as well as differences among the individual states' laws. For example, federal laws govern statutory marriages while state laws govern Islamic and customary law marriages.*

*The third expression of legal pluralism in the country is connected to the country's political history. Colonial authorities administered the northern and southern protectorates separately until their amalgamation in 1914. With the introduction of regionalism in 1954, the country was divided into three regions: northern, western, and eastern. These regions had a large measure of autonomy and thus developed along slightly different lines. Despite the subsequent creation of states beginning in 1967 (Nigeria now has thirty-six states and a Federal Capital Territory), this regionalism holds the key to understanding the current legal arrangements in the country. Until the regions were broken into states, uniform laws applied in each of the regions. Today, the bulk of the laws in the states owe their origin to the era of regionalism. Uniformity of laws in the northern states, particularly regarding Islamic and customary laws, continued largely until 1999 when twelve of the nineteen states in*

> *the north adopted Islamic law as the basic source of laws in their states in a largely uniform manner.*[403]

Oba is largely correct in his categorisation of legal pluralism in Nigeria. The first form of legal pluralism identified by Oba is apt, with the qualification that customary law and Islamic law are not as distinct as Oba describes. As will be seen in the analysis below, Islamic law operates in Nigeria as the customary law of parts of northern Nigeria where it has been adopted to replace the customary laws indigenous to those areas. The second form of legal pluralism identified by Oba is consistent with the federal nature of Nigeria's legal system and, as will be seen in the analysis later in this chapter, is at the centre of the conundrum created by the constitutional 'legislative lists' formulation as an impediment to ending child marriage in Nigeria. However, the third form of legal pluralism identified by Oba can hardly be said to be a form of legal pluralism. The mere fact that, by reason of political history, the contents of the laws adopted by various states of the federation were derived from the respective regions into which Nigeria was organised under previous constitutions can hardly be a basis for a form of legal pluralism. The mere divergence in the content of the laws of the respective states (traceable to their history) does not translate to a divergence in legal norms or legal orders which is the basis for legal pluralism as conceptualised by Woodman and Griffiths. More so, if Oba's third categorisation were to be admitted, then it would overlap the first form of legal pluralism identified by the scholar (which is based on the Islamic law vs. customary law vs. English law premise) since the basis of the third categorisation is that the laws of the northern states have an almost uniform Islamic or customary law colouration

[403] Ibid. 882-883

by reason of their common political history, as distinct from the southern states which lack such colouration in the content of their state laws.

However, consistent with the first and second forms of legal pluralism identified by Oba, Legal Pluralism is expressed through various sources of Nigerian law including the constitution, statutes passed by Nigeria's legislature, Nigerian case law, received English law (including rules of common law, doctrines of equity and statutes of general application, to the extent not inconsistent with statutes enacted by Nigeria's legislature),[404] customary law, Islamic law and, to the extent domesticated, international law. Customary law and Islamic law are particularly relevant to the issues of child marriage in Nigeria since they constitute the legal substance of the practice. Against this backdrop, it is pertinent to locate their place and status in the Nigerian legal system and investigate the extent to which the validity of the custom can be impugned.

Before situating customary law in the legal system, however, it is pertinent to understand the legal parameters of religious practice embedded in Nigerian statutes and (as will be seen in the next section of this chapter) in the constitution. Such a question may arise especially in light of the provision of section 10 of the 1999 constitution that states:

> The Government of the Federation or of a State shall not adopt any religion as State Religion.

[404] For instance, by virtue of Section 32(1) of the Interpretation Act Cap I23, Laws of the Federation of Nigeria (LFN) 2004, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall be in force in Nigeria except a contrary provision is made in a Federal law.

Despite this clear prohibition of state religion, the constitution itself recognises and acknowledges religious practice and accommodates religious legal systems in what might appear to be an inherent contradiction. Section 244 of the 1999 Constitution states as follows:

> (1) An appeal shall lie from decisions of a **Sharia Court of Appeal** to the Court of Appeal as of right in any civil proceedings before the **Sharia Court of Appeal** with respect to any question of **Islamic personal law** which the **Sharia Court of Appeal** is competent to decide.
>
> (2) Any right of appeal to the Court of Appeal from the decisions of a **Sharia Court of Appeal** conferred by this section shall be -
>
> (a) exercisable at the instance of a party thereto or, with the leave of the **Sharia Court of Appeal** or of the Court of Appeal, at the instance of any other person having an interest in the matter; and
>
> (b) exercised in accordance with an Act of the National Assembly and rules of court for the time being in force regulating the powers, practice, and procedure of the Court of Appeal.

Given that Section 10 of the 1999 Constitution expressly prohibits state religion, how is it that the Constitution itself recognises religious practice and accommodates religious legal systems? The answer lies in the precolonial history of the Nigerian legal system given earlier in this chapter, particularly as it relates to northern Nigeria. For most parts of northern Nigeria, pre-Jihad era 'customary law' became extinct and supplanted by Islamic law. In other words, Islamic law has

the same legal status as customary law. Consequently, and in light of the pluralistic nature of Nigeria's legal system, the constitutional necessity to recognise customary (personal) law regimes translated to a constitutional necessity to recognise Sharia (customary/personal) law regimes, including in relation to marriage, and the ancillary Sharia court system. This nuance is important for appreciating the legal analysis of Islamic law on child marriage in Nigeria.

Additionally, it is worth noting that customary law in Northern Nigeria contains Islamic law.[405] This is understandable in light of the precolonial depiction of Nigeria's legal system provided previously in this chapter. In most States in the northern part of Nigeria, pre-colonial, historical developments saw the dominance of Islam in the Northern region after the jihad ensured that the laws in those Islam-dominated areas were largely influenced by tenets of Islam so much so that it became a unifying and common factor of all the Hausa City-States and their Non-Hausa speaking neighbours. Over time, these provisions of Sunni Islamic law became so ingrained in the daily lives of the people in the North that it had become accepted as law and tradition regulating the very area of their lives, especially family law. Consequently, for parts of northern Nigeria, pre-Jihad era 'customary law' became extinct and supplanted by Islamic Law.

Customary law is a law that has acquired the force of law in a specific territory through lengthy practice.[406] It has also been described as 'unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behaviour in any particular matter.'[407] The enforceability of customary law in Nigeria is achieved through provisions for its application

[405] Section 2, High Court Law of Northern Nigeria, 1963

[406] Section 254(1), Evidence Act, 2011

[407] *Alfa and Others v Arepo* (1963) WNLR 95, 97.

in various High Court Laws. Notably, Section 34 of the High Court Law of Northern Nigeria[408] provides for the application of customary law as follows:

> (1) The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom.
>
> (2) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law.
>
> (3) No party shall be entitled to claim the benefit of any native law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law or that such

[408] High Court Law of Northern Nigeria Cap 49, Laws of Northern Nigeria, 1963 (High Court Law of Northern Nigeria).

> transactions are transactions unknown to native law or custom."

The provision of Section 34(1) of the High Court Law of Northern Nigeria quoted above (as is also provided in the High Court laws in other parts of Nigeria) is very key in determining the place and status of Islamic law or customary law in the Nigerian legal system. A similar provision is echoed in Section 18(3) of the Evidence Act 2011 which provides that:

> [i]n any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.

The effect of these provisions is that a custom shall not be enforceable where the court finds it:

(i) repugnant to natural justice, equity, and good conscience,

(ii) incompatible either directly or by implication with any law for the time being in force, or

(iii) contrary to public policy.

These three standards are called the 'repugnancy test,' the 'incompatibility test,' and the 'public policy test,' respectively, and are collectively called the "validity tests" of customary law.

A logical consequence of rendering customary law unenforceable where it is incompatible with 'any law for the time being in force' is that customary law is lower in hierarchy to laws validly made by Nigeria's legislature. Beyond this, however, a more profound implication of the tests in

the context of this discourse is that the custom of child marriage would be unenforceable if found to have failed any of the tests. In this vein, Fayokun argues that child marriage as practiced under Islamic personal law 'may be easily struck down under the validity tests prescribed for customary law.'[409] As a premise for this argument, he asserts that:

> *[C]hild marriage, weighed against the background of contemporary global sense of justice, if tested, will not only be held offensive to natural justice, equity, and good conscience, but is also obviously incompatible with existing statute law, or simply contrary to public policy.*[410]

While it is correct that the practice of child marriage under Islamic personal law (being customary law) would be subject to the tests of validity to be enforceable, child marriage may not be as easy to strike down when weighed against the contemporary global sense of justice as Fayokun posits. Also, it is not clear what contemporary global sense of justice that Fayokun refers to, as his assertion is not substantiated by any analysis of this point. Nonetheless, it is imperative to examine the concept of customs and its relations with the principle of natural justice.

With respect to the repugnancy test, a custom would be unenforceable where it is found to be repugnant to natural justice, equity, and good conscience. As Lord Evershed observed in *Abott v. Sullivan*[411],

> *the principles of natural justice are easy to proclaim, but their extent is far less easy to ascertain.*

[409] Kayode Olatunbosun Fayokun, (n 249).
[410] Ibid 465.
[411] (1952) 1 KB 189, 195.

Underscoring this observation is the fact that the repugnancy test has not been defined in any Nigerian statute (other than the requirement that a custom should not be repugnant to natural justice, equity, and good conscience) and Nigerian courts have not provided a clear-cut criterion to determine the repugnancy of a custom. The closest to a criterion that exists in case law is that the custom must not be "barbaric."[412] In *Edet v. Essien,*[413] the court held that a tradition that stripped a legitimate father and mother of their children because of non-refund of dowry was "archaic" and "barbaric". In that case, the appellant was married to his wife under native law and custom. His wife left him and went to live with the respondent. Two children were born of the union between the respondent and the wife. The respondent did not pay the appellant the money which the appellant had paid in dowry on the wife. The appellant therefore claimed that the children were his. Allowing the appellant to claim the children of another man only because the other man deprived the appellant of his wife without paying dowry was contrary to natural justice, equity, and good conscience, the court concluded.

Also, in *Nzekwu v. Nzekwu,*[414] the Supreme Court held that the Onitsha tradition that an 'Okpala' has the right to transfer a dead person's property during the lifetime of his widow is a 'barbarous and uncivilized custom' that should be viewed as offensive to justice and good conscience and hence inappropriate.[415] Therefore, it should be noted that the test of whether a custom is barbaric is, therefore, applied on a case-by-case basis.

[412] See *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* [1931] AC 662, 673. See also *Laoye v. Oyetunde* [1944] AC 170.
[413] (1932) 11 NLR 47
[414] (1989) 2 NWLR (Pt. 104) 373
[415] Ibid 396, paras. B-C

Another straightforward criterion is that the custom must not be contrary to written law. In *Muojekwu v. Ejikeme,*[416] the Court of Appeal held that:

> *In the determination of whether a customary law is repugnant to natural justice or incompatible with any written law, the standard is not the principles of English law. In other words, it is not fair to conclude that a custom is repugnant to natural justice because it is inconsistent or contrary to English Law, in the sense of the English common law or English statute. On the contrary, the courts must have an inward look by considering Nigerian jurisprudence.*[417]

The court was of the opinion that Nigerian customs can only be held to be repugnant if it is contrary to any written law in Nigeria. This would mean Nigerian statutes. Therefore, one may say that customs may not be repugnant even if they are contrary to international conventions or instruments unless such conventions or instruments have been domesticated[418] into Nigerian laws.

The question of whether a particular custom is repugnant is a matter of law and not fact.[419] The Supreme Court in *Okonkwo v. Okagbue*[420] noted that

> *A custom which is not linked with any crime and has not been declared repugnant through the action of any interested party who has been affected by it will continue to have a legal force being a*

[416] (2000) 5 NWLR (Pt. 657) 402

[417] Ibid. 431, paras. A-B

[418] By domestication, it means that these international conventions must have been passed by the National Assembly through the procedures provided in section 12 of the 1999 Constitution (as amended)

[419] *Peenok Ltd. v. Hotel Presidential Ltd.* (1982) S.C. l; *Okonkwo v. Okagbue* (1994) 9 NWLR (Pt. 368) 301 at p. 321

[420] (1994) 9 NWLR (Pt. 368) 301

> *manifestation of the inner consciousness of those who give their consent to its application. However, once a custom is challenged in a court of law by anyone who is interested or adversely affected by its application as a call has been made to examine whether it offends natural justice, the courts would pursue such complaint diligently in order to establish whether the custom is inconsistent with the principles of sound reason and good conscience*.[421]

Another point to note is that 'natural justice', 'equity', and 'good conscience' seems to mean one and the same thing in the context of the repugnancy doctrine. As the Supreme Court in *Okonkwo v. Okagbue*, expressed that 'equity' in its broad sense, as used in the 'repugnancy doctrine' is equivalent to the meaning of 'natural justice' and embraces almost all, if not all, the concept of 'good conscience'. To quote the court:

> *The phrase "repugnant to natural justice, equity, and good conscience" has not been interpreted disjunctively by the courts. "Equity" in its broad sense, as used in the repugnancy doctrine is equivalent to the meaning of "natural justice" and embraces almost all, if not all, the concept of "good conscience." Equity is not used in its technical sense but in its broad sense. Also, natural justice is not used in its modern technical sense but is synonymous with natural law.*[422]

[421] Ibid 345

[422] Ibid 322

When it comes to the repugnancy principle and customary law, it implies there are rules in place that establish the standards to which customary law must adhere before it is accepted and even enforced by the courts.[423] Current legislation in Nigeria expressly recognizes this idea, which is included in the proviso to Section 18(3) of the Evidence Act. Simply expressed, the provision consists of the tests that local law and customs must pass or be submitted to before they may be accepted and recognized by the courts and enforced by them. It has even gone so far as to broaden the criterion by stating that local law and custom must not be in conflict with public policy, which has been described as 'an unruly horse'[424] that may otherwise pull a person away from the rule of law.

The phrase 'public policy' refers to the views that are now dominant in a society on the circumstances essential to maintain its wellbeing, with anything considered to be against public policy if it is widely seen to be detrimental to the public interest.[425] Public policy, on the other hand, is not a static and unchanging entity. In order to be effective, it must fluctuate in response to the current conditions. [426] As a result, new heads of public policy are created, and existing heads are modified.

Policy is a fluid concept that shifts and changes depending on the conditions of the moment.[427] A behaviour that was acceptable a century ago may today be labelled heresy, and vice versa. As a consequence, since custom is not a static idea, public policy notices should be updated to reflect

[423] *Ojiogu v. Ojiogu* (2010) 9 NWLR (Pt. 1198) 1

[424] *Oyewunmi Ajagungbade III v. Ogunsesan* (n. 320)

[425] *Total (Nig.) Plc v. Ajayi* (2004) 3 NWLR (Pt. 860) 270 where the court stated in p293: The aim of the principle of public policy is to protect public interest. Thus, applying the principle, a court would not uphold whatever is injurious to the public welfare, or is against the public good; See also *Macaulay v. R.Z.B. of Austria* (1999) 4 NWLR (Pt. 600) 599

[426] *Okonkwo v. Okagbue* (n. 353)

[427] N Yalmanov, 'Public Policy and Policy-Making', *Culture, Personality, Society in the Conditions of Digitalization: Methodology and Experience of Empirical Research Conference*, vol. 2020 (KnE Social Sciences 2021).

changes in society. For instance, over the years, most cultures were quite patriarchal in nature and generally discriminated against females and women. Nonetheless, this situation is changing as society has positively progressed to a phase where gender equality and equity is not just a theoretical cannon but a practical necessity that promotes inclusive growth and development of the society. In the Nigerian case of *Asika v. Atuanya*,[428\] the Court of Appeal held that a custom that disentitles women from inheriting their fathers' property is repugnant because it goes against the provisions of the Nigerian constitution which prohibits discrimination. In that case, the respondent argued that since the appellants are women, they were not entitled to inherit their father's land under Onitsha custom. The Appellate body found this to be uncivilised and against both Nigerian, regional, and international legal instruments which protected and guaranteed the equal rights of men and women.[429] The court, per Denton-West, J.C.A, reiterated the progressive view and disposition of the courts in the following words:

> *However, it is my humble view that the constitutional provisions (sections 17, 21, 42, and 43 of the 1999 Constitution) earlier mentioned in my judgment apply in situations where if a custom tends to discriminate against a particular section of the populace, that custom even if not subject to litigation should not be allowed to prevail since it is against the tenets of the Constitution of the Federal Republic of Nigeria, 1999. Any custom or culture that does not enhance the human dignity of man or woman is inconsistent with the fundamental objectives of the Constitution and should therefore not*

[428] (2008) 17 NWLR (Pt. 1117) 484

[429] Ibid. p. 512-513; The court referred to Article 7, African Charter on Human and Peoples' Rights, Article 16 of the 1948 Universal Declaration of Human Rights, and Article 2(7) of the United Nations (UN) 1979 Convention on the Elimination of all Forms of Discrimination Against Women

> *be allowed. I, therefore, with respect, call on the Nigerian state to protect, preserve, or promote only the Nigeria culture, which enhance human dignity and discard all cultures that are discriminatory and intolerable as repugnant to natural justice, equity, and good conscience.*[430]

Furthermore, according to the courts in different circumstances, a value assessment by the court is necessary when deciding whether a local custom is contrary to public policy, repugnant to natural justice, equity, and moral conscience. However, this must objectively conform to current mores, objectives, expectations, and sensitivities of our country's people, as well as consensus ideals in the civilised global society with which we are all related and share. The fact that we are a member of that community and cannot separate ourselves from its principles should not be overlooked. It is necessary to consider the existing socioeconomic situations, as well as the experiences and perspectives of the public. After all, custom is not the same as standard.

Finally, it should be observed that a court's pronouncement that a certain custom is repugnant to natural justice, equity, and good conscience does not necessarily mean that such customary law is unlawful, since the practice may continue freely after the Judge's judgment. The courts' only reasonable option in such a situation is to refuse to enforce the customary law in question, which they have done in the past as a matter of course. Recently, decisions of the apex court in Nigeria have dealt precisely with the repugnant issue and preserved the fundamental rights of women in its judicial pronouncements and had consistently upheld as repugnant to the provisions of our law which limits the exercise of fundamental constitutional rights provisions as reasonably justifiable

[430] Ibid 518

in a democratic society which Nigeria is now consciously trying to establish firmly in its body polity. Today, Nigerian women have aspired to all available positions and have not been discriminated against.

As a general rule, the law provided that the courts would enforce the compliance of native laws and customs to the extent that they have not been modified or suspended by law. The case of *Laoye v. Oyetunde*[431] is an example of this. In accordance with several pieces of legislation,[432] the courts are entitled to enforce indigenous laws and traditions wherever they are appropriate.

To add to the already brittle weighing scale of the repugnancy test, it also does not help that there is not exactly a 'global' conscience against which the practice of child marriage (being marriage to a person below the age of 18, in the context of Fayokun's argument)[433] can be easily established as being barbaric. The chances of establishing such a claim are slim in light of the fact that Islamic law (as will be explained in detail, later in this chapter and further in chapter four) is, in principle, not accommodating of child marriage – the bone of contention is the maturity threshold at which a 'child' becomes an adult. The position of Islamic personal law is that puberty is that threshold.[434] Also, even internationally, a strong claim can hardly be made that there is a global consensus as to the age of 18. For instance, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Convention on Consent)[435] does not provide a minimum age for marriage.

[431] (1944) A.C. 170

[432] for instance, provisions of the various High Court Laws

[433] Kayode Olatunbosun Fayokun (n 249) 462.

[434] Abdullah bin Muhammad bin Saleh, (n. 342); Shamin Asghari, (n. 88).

[435] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 10 December 1962, entered into force 9 December 1964) 521 UNTS 231; The CRC is often lauded as the most comprehensive human rights instrument for the protection of the rights of children, yet it fails to clearly indicate where it stands on marriage. It does not include any specific provision on the issue and does not directly require States Parties to take any action in this respect; see Angela Melchiorre, 'A Minimum Common Denominator? Minimum Ages for Marriage

Further, assuming without conceding that there exists a 'contemporary global sense of justice' against which marriage of a person below 18 can be found to be repugnant to natural justice, equity and good conscience, it is doubtful that the court would necessarily apply such a standard. The courts have been reluctant to displace established customs by the mere fact of their being incompatible with modern rules or rules applicable in other societies. The case of *Dawodu v. Danmole*[436] illustrates this point. In that case, the appeal before the Judicial Committee of the Privy Council was concerned with an unhappy family dispute between the children of Suberu Dawodu who died in September 1940. The deceased had four wives and nine children. A wife, Morinatu, had one child only; a daughter. Another wife, Raliatu, had two children: a daughter and a son. The other two wives, Moriamo and Osenatu, each had three children. The substantial question was whether certain rents arising from a property of the deceased should be divided according to the *idi-igi* custom of succession which required the property of the deceased to be distributed among his children per stirpes (*idi-igi* i.e., into four parts, according to the number of wives of the deceased) rather than per capita (*ori-ojori* i.e. per person, into nine parts, according to the number of children). Adopting the *idi-igi* custom by dividing into fourths would materially the wives with fewer children while adopting the *ori-ojori* custom by dividing into ninths would materially favour the children of the other wives.

The learned trial judge, after hearing evidence, found that division into fourths (*idi-igi*) was in accordance with native law and custom. The learned judge then referred to section 17 of the then Supreme Court Ordinance which made native law and custom applicable to such circumstances 'if the native law and custom is not repugnant to natural justice, equity and good conscience.' He,

Reported under the Convention on the Rights of the Child' *Submission on Child, Early and Forced Marriage Women's Human Rights and Gender Section OHCHR* <www.ohchr.org/documents/issues/women/wrgs/forcedmarriage/ngo/angelamelchiorre.pdf> accessed January 25, 2021.

[436] (1958) 3 FSC 46; (1962) 1 All NLR 702 (PC); [1962] 1 W.L.R. 1053

therefore, proceeded to consider whether the condition cited in the section was applicable. In holding that the *idi-igi* custom was repugnant to natural justice, equity, and good conscience, the learned judge held as follows:

> *The idea…behind the old rule was that each wife who had a child was given no cause for jealousy as it was understood that the number of wives would determine the distribution of the properties of the intestate. Under the rule, an only child of a wife got the same share as many children of another wife, with the result that the children did not get equal shares of their father's estate.* ***This does not agree with the modern idea that the basis of distribution is the number of the children of the intestate****, which assures equal shares to all the children.*[437]

The learned trial judge accordingly made an order for the division of the rent into ninths. From this judgment, the plaintiffs appealed to the Federal Supreme Court[438] which proceeded to hear further evidence and found as a fact that the relevant native law and custom was (as the trial judge had found) for division into fourths (i.e. *idi-igi*) with the important qualification that where there was a dispute the family head was empowered to decide which of the two methods should be adopted, and that his decision was final. However, contrary to the view of the learned trial judge, the Federal Supreme Court held that such native law and custom was not contrary to natural justice, equity, or good conscience. They accordingly reversed the judgement of the trial judge and made

[437] Privy Council Appeal No. 13 of 1960 <www.bailii.org/uk/cases/UKPC/1962/1962_20.pdf> accessed 5 January 2022 (emphasis mine)

[438] (1958) 3 FSC 46; The Federal Supreme Court was, at the time, not Nigeria's apex appellate court. Judgements of the Federal Supreme Court were appealable to the Judicial Committee of the Privy Council.

an order for the division of the rents into fourths. It is from this decision that the defendants appealed to the Judicial Committee of the Privy Council.

This case clearly illustrates that the courts will not lightly displace local customs merely because they differ from modern notions of natural justice.

The Judicial Committee of the Privy Council (the highest court of appeal for Nigeria at the time) rejected the trial judge's view that custom was inconsistent with the modern idea of equality among the children of the deceased. The Privy Council agreed instead with the Federal Supreme Court's view holding as follows:

> *In their Lordships' opinion the principles of natural justice, equity, and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy. Their Lordships are not therefore satisfied that Idi-Igi, proved and found to be still in full force and effect in Lagos, ought not fairly and equitably to be applied to the estate of one who left children by his four wives.*[439]

On the other hand, in *Re Effiong Okon Atta,*[440] a custom whereby the former owner of a slave was entitled to administer the personal estate of the slave after the death of the slave was held to be repugnant. Also, in *Mojekwu v Mojekwu,*[441]a custom by which a man was allowed to inherit the

[439] Privy Council Appeal No. 13 of 1960 ,4-5
[440] (1930) 10 NLR 65.
[441] (1997) 7 NWLR (Pt. 512) 283

property of his late brother because the surviving wife had no son was held to be discriminatory and to be repugnant to natural justice, equity, and good conscience.

Therefore, while the argument can be made that child marriage under the various customs (Islamic or customary) is repugnant to natural justice, equity, and good conscience, the considerations explained above would constitute formidable hurdles by reason of which the practice may not be so 'easily struck down' based on the repugnancy test principle.

The public policy test is subject to a standard no less brittle and vague than of the repugnancy test. Asiedu-Akrofi posits that

> *[a]s the test of public policy is open-textured and wide enough to include the repugnancy test, it is arguable that cases under the repugnancy doctrine could also be said to be cases involving the test of public policy.*[442]

He submits further that public policy may include anything that offends the sensibilities of the society. This would appear consistent with case law on the point. For instance, in *Merigbe v. Egbu,*[443] a custom that allowed two women to marry each other was labelled an act against public policy. According to various studies, it was found that same-sex marriages offend the sensibilities of a vast majority of the Nigerian society.[444] The pertinent question is: can a strong argument be made that the marriage of under 18 years old persons offend the sensibilities of the Nigerian

[442] Derek Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37(3) The American Journal of Comparative Law 571, 581

[443] (1976) 3 SC 23.

[444] As indicated by the enactment of the Same Sex Marriage (Prohibition) Act 2013 – Ngozi Chukwu, 'The Nigeria Same Sex Marriage (Prohibition) Act, 2013 and the Concepts of Justice, Law and Morality' (2018) 7 *AFRREV LALIGENS: An International Journal of Language, Literature and Gender Studies* 24; Magaji Chiroma and Awwal Ilyasu Magashi, 'Same-Sex Marriage versus Human Rights: The Legality of the 'Anti-Gay & Lesbian Law' in Nigeria' (2015) 4 *International Law Research* 11.

society to such a degree sufficient for a court to find that the custom is contrary to public policy? It would appear not given the prevalence of the practice in the northern part of the country.

The second flaw in Fayokun's argument stems from an often-missed nuance in the nature of the two 'validity tests' analysed above by reason of which his use of the phrase 'struck down' may be somewhat misleading or, at best, exaggerated. As the Supreme Court (Nigeria's highest appellate court) held in *Okonkwo v Okagbue*:[445]

> *A declaration by the courts that a particular custom is repugnant to natural justice, equity, and good conscience, does not necessarily imply that such customary law is illegal, for sometimes the practice goes on publicly after the judges' decision. In such a case, all that the courts can legitimately do, and have done, is to refuse to enforce the customary law in question.*

The important nuance here is that a custom found to be 'repugnant to natural justice, equity or good conscience, or to be contrary to public policy', is not struck down in the sense of an order to desist or a declaration that it is illegal. Rather, the consequence is merely that the courts will refrain from enforcing it. Therefore, even if the practice of child marriage were found to be repugnant to natural justice, equity, or good conscience, or to be contrary to public policy, the practice may continue notwithstanding such a judicial pronouncement.

This position would appear consistent with the provisions of the statutes which provide for the validity tests in the first place. For instance, the High Court Law provides:

[445] (1994) 9 NWLR 301

> The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to….[446]

And the Evidence Act provides that a custom 'shall not be enforced as law if it is contrary to public policy…'[447] Neither of these laws requires a pronouncement for the cessation of the offending custom. They merely require the court to refrain from enforcing such custom.

Having established this, in all fairness to Fayokun, the above nuance does not apply to the incompatibility test for the simple reason that a custom that is contrary to applicable law is, by implication, illegal or unlawful. However, while this premise is true in principle, its practical usefulness in the context of the child marriage is doubtful. Logically, for a custom to be contrary to applicable law, there must be a valid law against which the custom is applied. Said law certainly cannot be the CRA in States where the Act is yet to be adopted by the local legislature. It is, however, pertinent to consider the extent to which the practice of child marriage can be said to be incompatible with the fundamental human rights guaranteed under the Nigerian constitution. This is examined in the analysis in chapter four below.

### *3.3.3 Child Marriage, Islamic Law, and the Prohibition of State Religion*

A pertinent feature of the Nigerian legal and governmental system is the prohibition against the formation of a state religion. Section 10 of the 1999 Constitution declares:

> The Government of the Federation or of a State shall not adopt any religion as State Religion.

[446] Section 34(1), High Court Law of Northern Nigeria

[447] Section 18(3), Evidence Act 2011

This restriction has been claimed to be violated by the practice of underage marriage. As a starting point for this argument, Fayokun differentiates between two types of Islamic law applications in Nigeria: personal law and territorial law. In native communities where Islamic law has been integrated into the *corpus juris*, it is considered as part of customary law.[448] He asserts that, as personal law, Islamic law may be easily struck down under the validity tests.[449] The merits of this assertion have been analysed in the preceding section. It is with Fayokun's second application of Islamic law that this part of the investigation/research is concerned with – Islamic law as applied through territorial jurisdiction

Fayokun contends that the issue is more complicated when Islamic law is applied as territorial law, citing the ratification of the Sharia Code into law by the Zamfara State House of Assembly in December 1999, with several other northern states following suit. He claims that, for such governments, Islamic law probably works as full-fledged territorial law, and that it would be difficult to utilise the 'repugnancy clause' for any regulation under the code that is not just a norm of customary law.[450] Against this premise, he asserts that recourse must therefore be had to the "provisions of the Constitution as the only framework for testing the legality or validity of the rules of Sharia territorial law". One of the constitutional provisions he claims can be relied upon in this regard is Section 10. According to Fayokun:

> *The continued practice of child marriage under Islamic law (a practice which flagrantly denies the girl child the exercise of her guaranteed rights to self-determination) definitely comes into direct*

[448] Kayode Olatunbosun Fayokun (n. 249) 465.
[449] Ibid.
[450] Ibid. 466.

*conflict with Sections 10, 38, and 42 of the Constitution and has to be challenged as such before the superior courts in Nigeria.*[451]

Sections 38 and 42 form part of the human rights regime of the 1999 Constitution and Fayokun's argument in relation to those sections will be analysed later in this chapter in the part of the discourse relating to the Nigerian human rights framework. The analysis here will focus on Fayokun's assertion that the practice of child marriage under Islamic law comes into direct conflict with Section 10.

By logical inference, the implication of Fayokun's argument is as follows: The adoption of the Sharia code violates Section 10; therefore, the practice of child marriage as permitted under Islamic law violates Section 10. While the conclusion in this argument would appear desirable to the goal of ending the practice of child marriage in Nigeria, two discernible flaws in the argument render this conclusion untenable. First, the argument is misleading in that it leads one to assume erroneously that the Sharia Codes referred to as having adopted Sharia as 'full blown territorial law' in the northern states invariably also introduced or sanctioned the practice of child marriage. This is not the purport or effect of the Sharia Codes. In fact, the Sharia Code is 'The Sharia Penal Code Law' (as the code is titled in most of the states that have adopted it)[452] which deals exclusively with crimes and punishments[453] and does not apply to non-Muslims.[454] The code does

[451] Ibid.

[452] For the harmonised Sharia Penal Code produced by the Centre for Islamic Legal Studies of Ahmadu Bello University, Zaria (annotated to show variations among the Sharia Penal Codes of ten of the Sharia States), see Philip Ostien, 'Nigeria's Sharia Penal Codes' in Philip Ostien (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Spectrum Books 2007), pp 3-21

[453] Rudolph Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria: New Challenges for the Muslims of the North', *Shari'a, Justice and Legal Order (Egyptian and Islamic Law: Selected Essays)* (Brill 2001).

[454] Section 3 of the Sharia Penal Code Law, Law No. 10 of 2000, Zamfara State.

not deal with issues of personal law such as marriage under Islamic law which had long been a part of the customary law regime prevalent in the northern States.

Second, due to the first error identified above, Fayokun's argument muddles up the following two very distinct issues, resulting in a knotty fallacy: (i) Whether the practice of child marriage under Islamic law conflicts with Section 10; and (ii) Whether the adoption of the Sharia penal code system conflicts with Section 10. For the avoidance of doubt, the contention here is not that the Sharia codes are justified or consistent with Section 10 of the 1999 Constitution (and indeed there are strong grounds to argue that the codes violate Section 10);[455] rather, this argument is that since the penal codes do not deal with the issue of child marriage, a finding that the codes are, or are not, in violation of Section 10 would be of no consequence for the validity or invalidity of the familial practice of child marriage in light of Section 10.

After disentangling the aforementioned distinct issues, it is necessary to address why Nigeria does not adhere to international child marriage rules and norms by establishing whether child marriage under Islamic law violates Section 10 of the 1999 Constitution. In answering the question of whether the practice of child marriage under Islamic law conflicts with section 10 of the 1999 Constitution, one must take cognisance of a very important consideration in the history of the Nigerian legal system, discussed earlier, to the effect that Shariah law is the customary law of most parts of northern Nigeria. Indeed, even Fayokun agrees with this premise when he notes that

[455] Rudolph Peters (n. 389) 32.

> *As personal law, Islamic law is treated as part of customary law applicable in those native communities where it has been assimilated into the corpus juris.*[456]

Therefore, having established that child marriage under Islamic law is practiced as customary law in Nigeria only among Muslims who have so adopted it as their custom, there is hardly any basis to support the assertion that the practice of child marriage under Islamic law conflicts with section 10 of the 1999 Constitution.

On the basis of the above premises (including the analysis in section 3.2.2 above), it is contended that Islamic law's practice of child marriage does not violate Section 10 of the Constitution. Notwithstanding, there are grounds to argue that the practice directly conflicts with some constitutional provisions containing the Bill of Rights, as will be examined in Chapter 4.

### *3.3.4 Federalism in Nigeria and the Nature of the Nigerian Constitution*

Section 1(1) and (3) of the 1999 Constitution provide as follows:

> (1) This Constitution is supreme, and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> …

[456] Fayokun (n. 345) 465

> (3) 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.

According to the preceding provisions, a critical component of the Nigerian legal system is the constitution's supremacy. This is in contrast to the British legal system, which is governed by the theory of legislative supremacy. This key characteristic of the Nigerian legal system must be kept in mind in order to properly comprehend the weight of constitutional provisions and the repercussions for the CRA and other child marriage-related legislation in Nigeria.

In the Nigerian federal legal structure, which is enshrined in the Nigerian constitution, as will be examined shortly, there is a conflicting interplay of the autonomy of the regional or state governments with the supremacy of the federal or national government. Federalism in Nigeria organises the country within the structure of a federal government and thirty-six state governments of the federation.[457] As will be explained below, all these states are autonomous and equal, and the federal government is autonomous. The legislative competencies of these two tiers of government are delineated in the constitution, with the implication that matters excluded from the legislative competence of the federal government will, if legislated upon, have no legal effect in the states. Nigeria's federal arrangement is one of the barriers to implementing the CRA. The CRA exemplifies the problem with this dynamic, as will be seen later in this chapter.

[457] J Isawa Elaigwu, *The Politics of Federalism in Nigeria* (Adonis & Abbey Publishers Ltd 2007

### *3.3.5 The Nigerian Legislature*

The legislative branch, the National Assembly, which is modelled after the United States Congress, is a bicameral body, requiring a bill to be passed by both houses of the National Assembly – the Senate and the House of Representatives. There are 109 members of the Senate and 360 members of the House of Representatives.[458] At the state level is a unicameral legislature called a House of Assembly. The number of seats in the Houses of Assembly of the 36 states ranges from twenty-four to forty members, depending on the particular state's population.[459]

The Federal Capital Territory has the status of a state, save for the fact that the federal government governs it. Consequently, in addition to performing legislative functions for the federal tier, the National Assembly also acts as the legislature regarding the Federal Capital Territory.

The members of the National Assembly and the states' Houses of Assembly are elected directly by eligible voters in their districts.[460]

## 3.4 The Constitutional Legislative Lists Formulation as an Impediment to Ending Child Marriage in Nigeria

This section discusses the 'legislative lists' associated with Nigeria's federal structure and other pertinent formulations in the Nigerian constitution that impede Nigeria's efforts to end child marriage. The impediment posed by the 'legislative lists' is illustrated using the Child's Rights Act, 2003, one of Nigeria's significant efforts to comply with international law norms and requirements on child rights generally and child marriage, in particular. The stronghold of the

[458] Sections 48 and 49, 1999 Constitution
[459] Ibid Section 91.
[460] Ibid

legislative lists is further emphasised by demonstrating how it holds sway even in the context of treaty formulation. However, a silver lining is identified in the form of a possible re-enactment of the CRA through the treaty domestication procedure as a possible option for scaling the hurdles to compliance.

### *3.4.1 The 'Legislative Lists' Formulation*

To fully appreciate the weight of the 'legislative lists' formulation, one must always bear in mind the constitutional supremacy feature discussed earlier. The Nigerian constitution is supreme, with the effect that its provisions prevail over any legislation, law, or system of laws, and any law inconsistent with the provisions of the constitution is void.[461]

In the 1999 Constitution, law-making functions are categorized into three legislative lists: the exclusive list, the concurrent list, and the residual list.[462]

#### *3.4.1.1 The Exclusive Legislative List*

The legislative mandate of the National Assembly to make laws for the peace, order, and good governance of the federation relates to matters set out in the list contained in Part 1 of the Second Schedule of the 1999 Constitution.[463] The list is known as the 'exclusive legislative list' because only the National Assembly can legislate upon the matters therein, to the exclusion of the states. To this end, Section 4(3) of the 1999 Constitution provides:

[461] Section 1(1) and (3), 1999 Constitution

[462] Section 4

[463] Section 4(2)

> (3) The power of the National Assembly to make laws for the peace, order, and good government of the Federation concerning any matter included in the Exclusive Legislative List shall save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.

Any legislation over such matters by a House of Assembly of a state would be null and void and of no effect whatsoever.[464] The exclusive list includes matters of a national nature, such as the accounts of the federation's government and its offices, courts, and authorities; arms, ammunition, and explosives; aviation; banks, banking, bills of exchange, and promissory notes; citizenship, naturalization, and aliens; state formation; currency, coinage, and legal tender; customs and excise duties; and defense and matrimonial matters (excluding those contracted under customary or Islamic law).[465]

Children's rights are not included in the Exclusive Legislative List, thus, taking the CRA out of the exclusive legislative competence of the National Assembly. To understand why this is the case, one must consider the list in light of other constitutional provisions. Chapter IV (sections 33 - 46) of the 1999 Constitution already provides for the fundamental human rights of Nigerians, as will be examined in the next section of this chapter. Since Nigerian children are human beings and citizens of Nigeria, it can be argued that the drafters of the constitution had no reason to include children's rights on the list since that might be superfluous. Nwauche appears to subscribe to this view when he argues that:

[464] Section 4(3)

[465] Part I, Second Schedule of 1999 Constitution (as amended)

> *Even though the 1999 Constitution describes the subjects of its protection as 'individual' in section 34 and 'citizen' in sections 41 and 42, the rest of the Bill of Rights uses the term 'person' in such a way that the words 'individual' and 'person' mean the same thing. It is obvious that children are contemplated as 'individuals' and 'persons'.* [466]

Although he made this argument in a different context,[467] it is submitted that this premise is no less apt to explain why the constitution's drafters might have decided not to include children's rights on the Exclusive Legislative List. However, the drafters might have been mistaken in their assumption that Chapter IV would be sufficient to address children's rights, warranting the evaluation in the next section of this chapter examining the human rights framework relevant to child marriage.

Apart from the lack of child rights from the Exclusive Legislative List, the important issue raised by the formation of 'legislative lists' in the context of child marriage seems to be the substance of item 61 of the list. The text of Exclusive Legislative List item 61 is as follows:

> The formation, annulment, and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto.

[466] Enyinna S Nwauche, (n. 94)

[467] Nwauche expressed this view to buttress his opposition to the assertion that the protection of children in Nigeria appears entirely statutory and the suggestion that the Bill of Rights of the 1999 Constitution does not specifically protect children. His argument in this context is analysed in the next section of this chapter.

As Fayokun points out, item 61 essentially exempts the federal legislature from the legal prerequisites of marriage under Islamic and customary law.[468] Additionally, Braimah argues that when a person marries a child under Islamic law in Northern Nigeria and thus violates the CRA, such a person cannot be prosecuted 'because the federal government would be interfering with an Islamic marriage and would be violating item 61 of the 1999 Constitution.'[469]

Braimah and Fayokun are both correct in their articulation of the implications of item 61. To appreciate the implication from another dimension, consider, for instance, that the Federal Government intended to domesticate the requirement for a minimum age of consent for the entire federation through the 'marriages' item; it can only do so concerning marriages contracted under an Act passed by the National Assembly. It cannot do so concerning marriages contracted under Islamic and customary laws. The Matrimonial Causes Act and Marriage Act provide a good illustration of this point. In Nigeria, due to the pluralistic nature of the legal system, as explained earlier, a person is free to choose to contract a marriage under the Marriage Act (commonly known as Marriage under the Act), customary law, or Islamic law. While the Marriage Act (and the related Matrimonial Causes Act)[470] enshrines the international law standard of free and full consent and provide, as a general rule, a minimum age for marriage, the National Assembly lacks the legislative competence to impose these standards on persons who choose to contract marriages under Islamic law or customary law.

In light of the foregoing, it is submitted that item 61 of the 1999 Constitution not only constitutes an unqualified recognition of Islamic and customary law marriages, it also constitutes an indirect

[468] Kayode Olatunbosun Fayokun, (n. 249) 464.

[469] Tim S Braimah, (n. 83).

[470] Section 18, Marriage Act, Cap M6 LFN 2004 and Section 3(1)(e), Matrimonial Causes Act, Cap M7 LFN 2004, s 3(1)(e).

constitutional sanction of legal regimes permitting child marriage, intended or unintended. This, in the context of this research, is the 'legislative lists' problem.

It may be argued that the effect of item 61 in perpetuating the practice of child marriage was unintended and that the carve-out of customary law and Islamic law marriages was necessary to accommodate the heterogeneous nature of the pre-colonial legal systems of the various ethnic groups in Nigeria and the pluralistic nature of the Nigerian legal system, as explained earlier in this chapter. In other words, child marriage is simply a 'collateral damage' of a measure to recognise Nigeria's pluralistic legal system. However, such a claim would be dubious when one does a conjunctive reading of the entire Constitution through the lenses of a cynic. There appears to be a level of consonance between specific constitutional provisions impacting the legitimacy of child marriage. For instance, concerning the right of a Nigerian citizen of full age to renounce her Nigerian citizenship, the constitution provides that 'any woman who is married shall be deemed to be of full age.'[471] In light of such attribution of adulthood to every married female (including children) in the constitution (albeit in respect of a different matter), it is not unlikely that the carve-out of Islamic and customary law marriages in Item 61 of the Exclusive Legislative List might have been intended by the drafters of the constitution to preserve child marriage as a traditional practice.

#### *3.4.1.2 The Concurrent Legislative List*

Along with matters within its exclusive jurisdiction, the National Assembly is entitled to act on matters affecting the states of the federation, which are more clearly defined in part II of the Second

[471] Section 29(4), 1999 Constitution (as amended)

Schedule of the 1999 Constitution's 'concurrent legislative list.'[472] This means that both the National Assembly and a State House of Assembly can legislate upon some issues provided for in the Concurrent Legislative List.

To this end, Section 4(4) of the 1999 Constitution provides:

> (4) In addition, and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have the power to make laws with respect to the following matters, that is to say: -
>
> (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
>
> (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

The power of the states to make laws in respect of matters included in the concurrent legislative list is exercised jointly with the National Assembly, and where the National Assembly makes laws in respect to these matters, it binds the states, and the states cannot legislate on those items unless to cover specific areas not contemplated by the federal law.[473] Thus, the doctrine of covering the field posits that where the National Assembly has legislated on any of the items on the concurrent

[472] Section 4(4)(a), Ibid.

[473] Ibid

legislative list, the state government may not legislate on such items, and in the event it does, the law must not be inconsistent with that made by the National Assembly.[474]

Items listed out to which the National and State Houses of Assembly may make laws do not include matters about children. The implication is that the National Assembly lacks the legislative competence to legislate, for the federation, on matters regulating the rights and welfare of children. At the same time, the State Houses of Assembly have such legislative competence for reasons explained below (Residual Legislative List). On the other hand, if, hypothetically, the Concurrent Legislative List contained such matters, then the CRA would apply in the whole federation, and the state legislatures would only be able to legislative on aspects of child's rights not contemplated by the CRA.

The possible reasons for the omission of child's rights, considered in the context of the Exclusive Legislative List above, also apply to the Concurrent Legislative List.

#### *3.4.1.3 Residual Legislative List*

The 1999 Constitution does not expressly provide a 'Residual Legislative List.' However, by a conjunctive and implied reading of its provisions, any subject matter included in neither the exclusive list nor the concurrent list falls within the residual list and is reserved solely for the Houses of Assembly of the states. Section 7 of the 1999 Constitution provides as follows:

[474] Section 4(5), 1999 Constitution

> The House of Assembly of a State shall have the power to make laws for the peace, order, and good government of the State or any part thereof with respect to the following matters, that is to say: -
>
> (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
>
> (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto;
>
> (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution

In paragraph (a), the reference to '*any matter not included in the Exclusive Legislative List…*' would confer, by implication, legislative competence on the Houses of Assembly of the States in respect of any other (residual) matter not included in the Exclusive Legislative List. There is a consensus in the literature that this effect is the case.[475]

Since the subject matter of children's rights is not included in either the exclusive or concurrent lists of the Constitution, it is clearly an example of a residual matter. Consequently, the National Assembly cannot legislate over such matters for the federation. It can, however, legislate over

[475] See Enyinna S Nwauche, (n. 94), 422; See also Daniel Ogunniyi, 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children' (2018) 62 Journal of African Law 447.

residual list matters for the FCT. This is legally possible because Section 299(a) of the 1999 Constitution (as amended) states that:

> The provisions of this Constitution shall apply to the Federal Capital Territory, Abuja as if it were one of the States of the Federation; and accordingly -
>
> (a) all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and the courts of a State shall, respectively, vest in the National Assembly, the President of the Federation, and in the courts which by the foregoing provisions are courts established for the Federal Capital Territory, Abuja;

Thus, the CRA is only applicable to the Federal Capital Territory of Nigeria alone.

### *3.4.2 The Child's Rights Act as an Illustration of the 'Legislative Lists' Problem*

The Child's Rights Act[476] illustrates the problem posed by the 'legislative lists' formulation. Before the enactment of the CRA, other laws protecting the rights of children were in force. However, these laws were inadequate because they either contained varying definitions of who a 'child' is or did not adequately spell out the rights of the child or the means for enforcing those rights of the child by the child him/herself. For instance, the Children and Young Persons Act[477]

[476] Cap C50 Laws of the Federation of Nigeria 2004 (CRA).

[477] Chapter 31 in the revised laws of Nigeria, 1948

and Infants Relief Act were hitherto the enactment on child rights, dedicated to protecting children in Nigeria, but the CRA became the only legislation that provided comprehensive sections on children's rights.[478] In order to protect the rights of children, a law was required that addressed all of the issues pertaining to children in a single act and also streamlined the rights of children in accordance with the Convention on the Rights of the Child as well as other international and regional instruments on the protection of the rights of children.

The CRA was faced with resistance before it was enacted. IRIN reported that on 30 October 2002, the House of Representatives voted to reject the CRA.[479] The main objection raised by the House of Representatives bordered on a provision that set 18 years as the minimum age for marriage. In their arguments, the opponents contended that this law was incompatible with religious and cultural traditions in different sections of the nation, particularly in areas where women are given in marriage at a younger age.[480]

Following the initial rejection of the Child's Rights Bill by the Nigerian legislature, many national and international nongovernmental organizations (NGOs) and other sectors of civil society in Nigeria expressed their dissatisfaction with the decision, prompting the legislators to reconsider their decision to oppose the Bill. The Bill was reintroduced into the National Assembly via the efforts of former President Olusegun Obasanjo, who was in office at the time. Finally, the National

[478] Paul Y Mbaya, Charas Madu Tella and Raphael Audu Adole, 'The Processes of Law Making in a Presidential System of Government: The Nigerian Experience' (2013) 9 Asian Social Science. See also N.A Iguh and O. Nosike, 'An Examination of the Child Rights Protection and Corporal Punishment in Nigeria' (2011) 2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 97, 99 .

[479] Integrated Regional Information Networks (IRIN), 'Nigeria: IRIN Focus on the Challenge of Enforcing Children's Rights – Nigeria' (*ReliefWeb*October 12, 2002) <https://reliefweb.int/report/nigeria/nigeria-irin-focus-challenge-enforcing-childrens-rights> accessed 4 April, 2021; See also Olayinka Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003' (2010) 37, 38 International Journal of Legal Information .

[480] Olayinka Akinwumi, (n. 479)

Assembly enacted a bill into law in July 2003, and the legislation went into effect in September 2003 after receiving the president's approval.[481]

The CRA sought to establish the rights and welfare of children in Nigeria as encapsulated in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Act prohibits the early marriage of children and betrothal, irrespective of the circumstances. The Act expressly provides in section 21 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 and of no effect whatsoever.' Additionally, Section 22 of the CRA 2003 provides that:

> (1) No parent, guardian, or any other person shall betroth a child to any person.
>
> (2) A betrothal in contravention of subsection (1) of this section is null and void.

It goes further to provide the punishments in the following words:

> A person - (a) who marries a child; or (b) to whom a child is betrothed; or (c) who promotes the marriage of a child, or (d) who betroths a child, commits an offence and is liable on conviction to a fine of N500,000; or imprisonment for a term of five years or to both such fine and imprisonment.[482]

[481] E.E.O Alemika and others, *Rights of the Child in Nigeria: Report on the Implementation of the Convention on the Rights of the Child by Nigeria* (World Organisation Against Torture 2005).

[482] Section 23, CRA

The CRA is the only legislation in Nigeria that has met the benchmark on the age of marriage set by international laws on child marriage by prohibiting the marriage of persons under the age of 18 years.[483] However, despite its good features, the Act did not apply in most parts of the federation; it only applied in the FCT because that was the only territory the National Assembly could legislate over residual list matters. As explained earlier under the 'legislative lists' formulation, the National Assembly can only validly legislate over matters listed in the Exclusive Legislative List or Concurrent Legislative List. As child's rights or other matters relating to children are not listed, the National Assembly could only exercise its residual legislative list competence to make the CRA apply in the FCT. Consequently, for the CRA to apply in other states of the federation, it had to be domesticated by the House of the Assembly of the relevant state.

Nwauche points out that no state of the federation is required to adopt the Convention on the Rights of Indigenous Peoples (CRA), and those that have done so have done so at their own will.[484] As long as child rights remains a residual list matter, the Federal Government cannot mandate the Act's adoption in these 9 States. Hence, the problem created by the 'constitutional lists' formulation constitutes an impediment to efforts to end child marriage in Nigeria.

Nwauche observes that the formulation of legislative lists, as a result of which states are not obligated to adopt the model CRA passed by the National Assembly, presents a unique challenge in the domestication of treaties in Nigeria, where there is a divergence between federal and state legislation.[485] He is correct in this assumption since, for example, despite the fact that Katsina state's Child Protection Bill was signed into law in December 2020, the legislation does not prevent

[483] Olaitan Olusegun and Amos Idowu (n. 286)
[484] Enyinna S Nwauche (n. 94) 423
[485] Ibid.

underage marriage despite the fact that the law defines a child as a person under the age of 18 for all other reasons.[486] Instead, it requires counselling by parents to evaluate the development of their children before marrying them off. Also, the first section provides that Sharia law will take precedence if any matter in the new law concerning a Muslim child goes against the religious law.[487] Since the Katsina state law does not prohibit child marriage or betrothal, Katsina state is regarded in this work as having not domesticated the CRA related to child marriage.

Another illustration of Nwauche's point is Jigawa's state. Before it repealed its child protection law in 2012,[488] the law prohibited child marriage but defined a child as a person below the age of puberty, to be determined by the court according to the circumstances of each case.[489] However, another illustration is the child's rights law of Akwa Ibom (as a state in the southern part of Nigeria) which defines a child as a person under 16 years of age.[490]

There are no records of discussions or debates about the domestication of the CRA in the northern states where it is yet to be domesticated. However, it has been asserted that the primary reason for the unacceptance of the CRA in these Northern States is that its interpretation conflicts with the traditional teachings of Islam.[491] This assertion would appear correct in light of the reported reasons for the initial objections faced at the National Assembly, in 2002, prior to the enactment

[486] Abubakar Ahmadu Maishanu, 'Masari Signs Katsina Child Protection Bill Allowing Underage Marriage' *Premium Times* (January 11, 2021) <www.premiumtimesng.com/regional/nwest/436183-masari-signs-katsina-child-protection-bill-allowing-underage-marriage.html>accessed 12 August, 2021.

[487] Ibid.

[488] The law was repealed supposedly due to inadequate input from citizens, ambiguous sections that needed explanations and an irregularity in the procedure for its domestication in that the bill was signed into law by the then secretary to the state government instead of the governor. See Abubakar Ahmadu Maishanu, 'Eight Years After, Jigawa Assembly Reintroduces Repealed Child Protection Law' (*Premium Times* September 8, 2020) <www.premiumtimesng.com/regional/nwest/413198-eight-years-after-jigawa-assembly-reintroduces-repealed-child-protection-law.html> accessed 4 August, 2021.

[489] Enyinna S Nwauche, (n. 94) 428.

[490] UN Committee on the Rights of the Child (CRC), 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations - Nigeria, 21 June 2010, CRC/C/NGA/CO/3-4' (United Nations 2010) </www.refworld.org/docid/4efb2c612.html>. accessed 4 August, 2021.

[491] C Offiong and Daniel E Gberevbie (n. 320)

of the CRA. The CRA and the conventions it sought to domesticate were said to be 'against Islamic values.'[492] Also, the main objection raised by the House of Representatives bordered on a provision that set 18 years as the minimum age for marriage.[493] Therefore, it would appear that the traditional teachings of Islam and Islamic values referred to in the aforementioned objections is the criterion for the marriages of the children as prescribed by the traditional teachings of Islam which does not give a minimum age for marriage.[494] According to Sharia law, a girl attains adulthood when she attains puberty, which usually occurs at the age of 13-15 years, or younger in some cases.[495]

Further, the perception that the child marriage prohibition in the CRA is contrary to Islam is illustrated in the case of Ahmed Yerima as highlighted earlier.

Citing Yerima's case, Braimah asserts that item 61 of the Exclusive Legislative List 'renders the CRA useless.'[496] Nwauche rebuts this assumption by arguing that Braimah's statement incorrectly indicates that children's protection in Nigeria is solely statutory, ignoring the protection granted to children by Chapter IV of the 1999 Constitution's Bill of Rights.[497] In other words, he contends that there are legal bases under Chapter IV of the 1999 Constitution for defeating the practice of child marriage in Nigeria. The merit of Nwauche's contention is analysed in Chapter 4 of this research and, on the basis of the said analysis, this researcher submits that there is no sufficient protection under the Nigerian human rights framework in Chapter IV of the 1999 Constitution by

[492] Integrated Regional Information Networks (IRIN) (n. 415)

[493] Ibid.

[494] Abdullah bin Muhammad bin Saleh (n. 342)

[495] Irini Ibrahim, Faridah Hussain, and Norazlina Abdul Aziz, 'The Child Bride: Rights under the Civil and Shariah Law' (2012) 38 Procedia - Social and Behavioral Sciences 51.

[496] Tim S Braimah( n. 83) 485.

[497] Enyinna S Nwauche, (n. 94) 424.

virtue of which the practice of child marriage can be defeated in states where the CRA has not been domesticated.

On the other hand, Braimah asserts further that:

> *While Ahmed Yerima is in contravention of the CRA because his marriage is alleged to have taken place in Nigeria's capital Abuja, he cannot be prosecuted because the federal government would be in contravention of Part 1 Section 61 [sic] of the 1999 Constitution. Consequently, it is as a result of this constitutional provision that it is illegal and difficult to prosecute Ahmed Yerima for his violation of section 21 of the CRA.*

While Braimah's assertion would be correct in the case of a marriage contracted in a state where the CRA is not in force, it is erroneous in the case of a marriage contracted in Nigeria's capital city. Braimah incorrectly argues that the restriction imposed by item 61 of the Exclusive Legislative List on customary and Islamic law marriages applies to the National Assembly in all situations. This is not the case. As previously stated, Section 299(a) of the 1999 Constitution confers legislative authority on the National Assembly to make laws for the FCT in respect of matters on the residual list (i.e., matters not included in either the Exclusive Legislative List or the Concurrent Legislative List), which is distinct from its legislative authority to make laws for the federation. The carve-out in item 61 of the Exclusive Legislative List simply indicates that the National Assembly cannot pass legislation for the federation relating to weddings governed by customary or Islamic law. Given their exclusion from the Exclusive Legislative List, it follows that they have been relegated to the residual list (since they are also not included in the Concurrent

Legislative List). Given their exclusion from the residual list, the National Assembly, like state legislatures, has the authority to act on customary and Islamic law marriages solely in the FCT. Braimah's reasoning glosses over this issue. Based on these premises, it is wrong to assert that a prosecution of Yerima for his marriage to a child in the FCT (in violation of the CRA which is in force in the FCT) would be in contravention of item 61 of the Exclusive Legislative List.

It is agreed, however, that in states where the CRA has not been domesticated, item 61 of the Exclusive Legislative List creates a loophole in the legal framework for the protection of children and acts as a legal barrier to ending child marriage in Nigeria.

### *3.4.3 Impact of Nigerian Legal System on the Application of the Child Rights Act*

This is an accumulative effect of the system of law-making, the nature of federalism practiced in Nigeria, and the wordings of the constitution of the Federal Republic of Nigeria all contributing to the inability to ensure nationwide application of the Child Rights Act in Nigeria. A dire consequence of these effects is that a person under Islamic law in Northern Nigeria who marries a female child under the age of 18 and in contravention of the Child's Rights Act cannot be prosecuted for infringement on the rights of the child. The reason for this is elicited from analysis of the Nigerian legal system as seen above and they are as follows:

***(a) Wordings of the Constitution which recognises religious marriages***: Part 1, Item 61 of the constitutional exclusive legislative list which provides that the National Assembly can only make laws regarding *'the formation, annulment, and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto'.* This implies that legislature-enacted marriage rules do not apply to and have no authority over customary and Islamic weddings, but only to marriages done in

accordance with the Act. Thus, if a person marries a kid under Islamic or customary law, which is a breach of section 21 of the CRA, the federal government cannot prosecute him since the prosecution would constitute a violation of part 1, item 61 of the constitution. What the Child Protective Act provides is irrelevant since the Nigerian constitution, which is the ultimate law of the nation, takes precedence. Refer to the instance of Yerima, which was previously discussed in this work.[498]

***(b) Jurisdictional limitation and nationwide unenforceability of the Child Rights Act due to Constitutional construction***: enforceability of the Child Rights Act is limited to States that adopt it at their discretion as against Nationwide application of a domesticated International Instrument as can be seen in the domestication of the African Charter through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Any State legislature which is in conflict with the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is null and void and of no effect.[499]

Children and child-related issues are excluded from the Exclusive and Concurrent Legislative lists, making them a 'residual' matter for the states. Under section 4(7)(a) and (b) of the 1999 Constitution cited above, legislation on any matter about the child -its rights and welfare, falls under the exclusive preserve of the State Houses of Assemblies which could decide, without federal intervention, on what child rights are, how they are exercised, enforced, and enjoyed by the subjects of such rights. This Constitutional construction has created leeway for States' religion-

[498] *JFS Inv. Ltd. v. Brawal Line Ltd.* (2010) 18 NWLR (Pt. 1225) 495; *Harka Air Serv. Nig. Ltd. v. Keazor* (2011) 13 NWLR (Pt. 1264) 320

[499] Ayeni, 'The Impact of the African Charter and Women's Protocol in Nigeria' in Victor Oluwasina Ayeni (ed), *The Impact of the African Charter and the Maputo Protocol in Selected African States* (Pretoria University Law Press 2016) 121.

based personal law to be effective in determining what rights accrue to a child in different states of the federation.

It has been argued and this research agrees, that incidental legislation on a residual matter without direct relation to a main federal subject matter is restricted to the Federal Capital Territory in its application and not binding on the states in their legislative exercise, as was stated clearly in the case of *Balewa v Doherty*[500] In other words, the Child Rights Act applies as state legislation to the Federal Capital Territory only.[501]

In *Fawehinmi v Babangida,*[502] the court had acknowledged that the federal authority lacks the constitutional powers to make laws in the areas that are outside of its legislative competence, that is by implication, residual issues left for the State Assembly. Similarly, the Supreme Court also stated that the National Assembly is not allowed to confer authority or power on the federal government on matters in the residual list.[503] This reveals that the federal government is compelled to remain silent over the items included in the residual list.

As the Supreme Court has interpreted the constitution, it would be unconstitutional for the National Assembly to legislate on 'residual matters'. The policymakers and courts declare that every residual legislative authority concerning state government councils is vested in the House of Assembly and is subject to the Constitution.[504] The federal government cannot compel the state

[500] [1963] UKPC 19.

[501] Usang Maria Assim, 'Why the Child's Rights Act Still Doesn't Apply throughout Nigeria' (*The Conversation*September 24, 2020) <https://theconversation.com/why-the-childs-rights-act-still-doesnt-apply-throughout-nigeria-145345> accessed 23 July, 2021.

[502] (2003) 12 WRN 1, 30-31; (2003) 3 NWLR (Pt. 808) 604

[503] *A.-G., Ondo State v. A.-G., Fed.* (2002) 9 NWLR (Pt. 772) 222; A.-G., *Abia State v. A.-G., Fed.* (2006) 16 NWLR (Pt. 1005) 265; Paul Obo Idornigie, 'The Doctrine of 'Covering the Field' and Arbitration Laws in Nigeria' (2000) 66 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 193.

[504] Blessing Anya, 'The Exclusive Legislative List and the Concurrent Legislative List - a Case for Restructuring or Constitutional Defect?' (*Mondaq* November 28, 2021) <www.mondaq.com/nigeria/constitutional-administrative-law/1135644/the-exclusive-legislative-list-and-the-concurrent-legislative-list--a-case-for-restructuring-or-constitutional-defect-> accessed 4 January, 2022; Joseph Onyekwere, 'It's Unconstitutional for National Assembly to Legislate on Residual List' (*The Guardian Nigeria* September 12, 2017) <https://guardian.ng/features/law/its-unconstitutional-for-national-assembly-to-legislate-on-residual-list/> accessed 5 January, 2022.

government to adopt the Child Rights Act 2003 as the issues about children are categorised under the residual list. Consequently, in the cases of child marriage or the minimum age of marriage, state governments stimulate the legal issues and justify the act regarding their state legislation.[505] The Listing system in the Constitutional framework of Nigeria is the reason legal advisors and lawmakers are less likely to interfere in such matters and remain detached.[506] On the issue of child marriage, state governments in Northern Nigeria are more likely to adhere to their laws.

The decision-making of the federation entertains less the appearance of coalition-building to fulfil the categorical demands of its constitution. Consequently, the federal government has to compromise on several points, including the Child Marriage Act 1990.[507] Therefore, the division of authority and powers between federation and states stresses centrifugal forces and provides extensive autonomy to states. Under this condition, if a policymaker issues notice to states advising the adoption of federal laws, such notice is bound to witness challenges from the state government who tend to challenge the validity of the laws enacted by the National Assembly in respect of matters in the residual list. [508] In cases of such conflicts, the Supreme Court is compelled to favour the state government, as the items are not included in the Concurrent and Exclusive Lists but reside as a matter of the state. This is why such a bill is more likely to remain pending. Several times, these bills have gone through public hearings while the stakeholders and lawyers consider the bill inappropriate. If in the public hearing, it has been justified that the issues of the bill are within the legislative competence of the National Assembly, then, the bill does not infringe on any enacted

[505] Blessing Anya, (n. 504).

[506] Luqman Saka and Adebola Rafiu Bakare, 'The Nigerian House of Representatives, 1999–2016' in Joseph Yinka Fashagba, Ola-Rotimi Matthew Ajayi and Chiedo Nwankwor (eds), *The Nigerian National Assembly* (Springer 2019).

[507] Solomon Ebobrah and Felix Eboibi, 'Federalism and the Challenge of Applying International Human Rights Law against Child Marriage in Africa' (2017) 61 Journal of African Law 333.

[508] Joseph Onyekwere (n. 504)

law in Nigeria.[509] However, where the bill encroaches on the legislative jurisdiction of the states, even the executives of the federal government declare such a bill unimplementable nationwide.

In this regard, House[510] mentions that for making laws regarding the items included in the residual list, lawmakers need to make suitable amendments to the constitution. For instance, the constitution would have to be changed to list the issues under either the concurrent list or exclusive legislative list before making such an amendment. Nevertheless, as the Supreme Court has interpreted it is unconstitutional for the national assembly to amend residual matters,[511]then entities from legal advisers to lawmakers are less likely to pay attention to its legislations. It has been found that the National Assembly could pass a law either changing a verdict of a competent jurisdiction court (such as the apex court or Supreme Court) or nullifying, the law amending, or nullifying must be according to the state laws. Under Section 1(1) of the 1999 constitution, the constitutional supremacy and the corresponding nullity of laws are not consistent in positive and clear terms. This means that the state government and Federal government upheld the legislation of the state government against the National Assembly grounded on the fact that the state government must have the vires for enacting the stated law. The issues that are in the legislative competence of the state government cannot be altered in the 1999 constitution.[512] In these cases, the authority of the National Assembly to amend the Act regarding child rights without altering the constitution would be considered as an exercise of power in futility. Amendment of the residual list by the federal government would be unconstitutional. It has been acknowledged by the Supreme Court of Nigeria.[513] Hence, it is a prominent challenge that makes the implementation of

[509] Ibid

[510] Freedom House, *Freedom in the World 2017 - Nigeria* (Freedom House 2017).

[511] A.-G., Ondo State v. A.-G., Fed. (n. 437)

[512] Ibid.

[513] *A.-G., Lagos State v. A.-G., Fed.* (2013) 16 NWLR (Pt. 1380) 249

the Child Rights Act 2003 in the different states of Nigeria problematic. Every state favours its traditional legislation and practices, religious guidance, and culture when it comes to marriage. Thus, without altering the Constitution, it is challenging to see how effective the law can be. Items in the residual lists are open to being challenged in court.[514] Subsequently, the court and policymakers remain silent to preserve their sovereignty and sustain its territorial and state integrity.

In the absence of a Constitutional amendment can the provision of the constitution empowering the National Assembly to make laws in the residual list in section 12(4) avail the Child Rights Acts? Section 12 empowers the National Assembly to enact laws on the residual list where the House of Assembly is unable to perform its function. The section reads:

> (4) At any time when any House of Assembly of a State is unable to perform its functions because of the situation prevailing in that State, the National Assembly may make such laws for the peace, order, and good government of that State with respect to matters on which a House of Assembly may make laws as may appear to the National Assembly to be necessary or expedient until the House of Assembly can resume its functions; and any such laws enacted by the National Assembly pursuant to this section shall have effect as if they were laws enacted by the House of Assembly of the State

The principal words in the section are 'necessary and expedient'. The interpretation of child welfare to be 'necessary and expedient' falls within the powers of the courts and calls for judicial

[514] Joseph Onyekwere (n 504).

activism on the part of the judiciary arm of government in Nigeria. In the absence of any judicial precedent to this effect (as is currently the case), the section does not avail the Child Rights Act.

The legislative list system and the acceptance of religious or customary marriages make state adoption of the Child Rights Act discretionary, allowing religious-based personal laws to take priority. No Federation state is obligated to embrace the CRA. Domestic legislation affecting children (that is not on the exclusive legislative list) needs the assent of a majority of the State Houses of Assembly.[515] Even after the Act is domesticated, each of the 36 States must incorporate it into their domestic laws in order for it to be enforceable within that state. In the absence of any such adoption, the Child Rights Act may not be enforced in such a state, thus, enabling the incidence of child marriage based on already existing religious-based personal laws.

To cure the problem caused by the constitutional lists as discussed in this chapter, the 1999 Constitution would almost certainly need to be amended to a great extent. In the alternative, the Legislature may consider the possibility of re-enacting the CRA as treaty this time around under Section 12 of the 1999 Constitution, rather than as an Act for the FCT. These options/recommendations will be extensively discussed and analysed in Chapter 8 of this research.

### 3.5 Summary of the Chapter

This chapter set out to answer the research question: what legal and constitutional formulations impact Nigeria's ability to comply with international laws and norms on child marriage? The

[515] See section 4(2) of the 1999 Constitution.

chapter challenged the issue of legal pluralism, a feature of Nigeria's legal system that constitutes a significant hurdle to Nigeria's efforts to comply with international norms on child marriage.

In determining the extent to which Nigerian laws meet international law standards on child marriage, this chapter examined the pre-colonial history of Nigeria's legal system and the existing Constitutional framework of Nigeria. The chapter further overviewed the Child Rights Act 2003. This includes the structure of the Act, provisions of the Act on child marriage, and limitations of the Act, which includes inadequate deterrent system provision; lack of rehabilitation provisions for survivors and victims of child marriage; conflict with existing laws in Nigeria; coverage in states that have not ratified the Act; lack of jurisdiction over child marriages conducted under Islamic and customary law and lack of general acceptance in all states of the federation. The major limitation of lack of acceptance in the Northern States in the federation is hinged on the contradiction of the Act with provisions of religion-based personal laws enforced in the Northern States.

The Chapter contended that Nigeria's constitutional structure does not foster an atmosphere conducive for the CRA's efficacy in decreasing child marriage. The chapter finds that, in light of Nigeria's constitutional framework, international human rights confront two significant impediments. To begin, the constitution requires that foreign treaties be domesticated and approved by the federal government before they have legal effect in the country. Additionally, when the treaty includes an issue within the states' legislative competence, the federal act must be approved by a majority of the states' Houses of Assembly; otherwise, each state must implement the treaty independently. This demonstrates the legal challenges experienced in domesticating international treaties on women's and children's rights in the country, as well as the differences in the legislation of different nations.

Additionally, the chapter identified the constitutional design of 'legislative lists' as a significant impediment to compliance. Through the CRA, it demonstrated how the 'legislative lists' have allowed the majority of northern states to oppose the treaty's complete adoption. Additionally, the chapter revealed another manifestation of the 'legislative lists' problem: where the treaty involves a matter within the states' legislative competence, the federal act must be ratified by a majority of the states' Houses of Assembly; otherwise, the treaty must be enacted separately by each state.

The federal government cannot force state governments to implement the Child Rights Act 2003 since child-related concerns are classified as residual list. As a result, whether it comes to child marriage or the minimum age for marriage, state governments generate legal debates and explain their state laws.[516] This chapter concludes that constitutional amendment is necessary to ensure that child marriage is applicable to Northern states and to eradicate child marriage in Nigeria. In the absence of constitutional amendment, the chapter proposes re-enacting the CRA under section 12 of the constitution by examining prevailing realities that did not exist at the time the Act was passed. These amendment options will be discussed in detail under the recommendations section of the final chapter.

[516] Usang Maria Assim (n 501)

# CHAPTER 4: HUMAN RIGHTS IMPLICATION OF THE PREVALENCE OF CHILD MARRIAGE IN NIGERIA

## 4.1 Introduction

The previous chapter provides an extensive analysis of the Nigerian legal framework and how the bottlenecks within the legal system continue to impact on the wide application of the Child Rights Act, 2003. practice of child and early marriage hinders the development of the child bride and violates the human rights of the affected girls in Nigeria. Building upon that analysis, it is pertinent to consider whether, and to what extent, there are existing grounds within Nigeria's human rights framework to challenge the practice of child marriage. Therefore, this chapter will provide an overview of the Nigerian human rights framework relevant to child marriage and provide an analysis of the balance of rights implicated in a challenge to the practice of child marriage. Some of these rights are contained in the 1999 constitution while the others are in ratified documents because they are non-justiciable under the constitution. This chapter will argue that although Nigeria has an existing human rights framework, it is not adequate to meet the legal needs of the Nigerian child.

## 4.2 Human Rights-Based Approach to Ending Child Marriage

Child marriage is a breach of human rights and is prohibited by several international treaties and other instruments. The Global Programme to End Child Marriage's key results indicates that the program views child marriage as a violation of human rights and a symptom of gender discrimination.[517] It further reveals that the programme was designed with a Human Rights-Based

[517] UNFPA-UNICEF (n. 27)

Approach (HRBA) to social change, aiming to influence positive gender norms, while remaining culturally sensitive.[518] Understanding the HRBA is expedient to understanding the Global Programme to end child marriage and how the Nigerian government can adopt the program in plans, policies, and programmes to end child marriage in the country.

The HRBA is one of the six guiding principles of the United Nations Sustainable Development Cooperation Framework.[519] The HRBA has been described in the UN Sustainable Development Cooperation Framework[520] as 'a conceptual framework for the process of sustainable development that is normatively based on international human rights standards and principles and operationally directed to promoting and protecting human rights.'[521] In an HRBA, rights holders are identified as well as the obligations of the corresponding duty-bearers being state and non-state actors.

Fundamental Human Rights in the Nigerian constitution are enshrined in Chapter IV.[522] This includes the right to life, dignity of the human person, personal liberty, fair hearing, privacy, freedom of thought, conscience, and religion, freedom of expression, freedom to assemble freely, freedom to move freely throughout Nigeria and reside in any part, freedom from discrimination, freedom to own and acquire properties in any part of Nigeria.[523]

Economic, Social, and Cultural (ECOSOC) rights represent a broader spectrum of rights not embodied in the 1999 Constitution. However, These ECOSOC rights are localised into the Nigerian laws through the domestication of the African Charter by enacting the African Charter

[518] Ibid.

[519] UN SDG, *United Nations Sustainable Development Cooperation Framework Guidance* (United Nations 2019) <https://unsdg.un.org/sites/default/files/2019-10/UN-Cooperation-Framework-Internal-Guidance-Final-June-2019_1.pdf> accessed 29 May, 2021.

[520] Ibid.

[521] Ibid.

[522] 1999 Constitution.

[523] Ibid Sections 33 to Sections 44

on Human and Peoples' Rights (Ratification and Enforcement) Act.[524] This Act contains economic, social, and cultural rights, including Article 18 which provides thus:

> The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.[525]

The Convention also provides for the right to education.[526] These rights of a child are jeopardized by child marriage, emphasizing the need for the comprehensive approach included in the HRBA's strategy for ending child marriage. Under the HRBA, human rights principles influence all aspects of programming to stop child marriage, including planning, designing, and implementing (equality and non-discrimination, participation, and accountability).[527]

Core components in applying the HRBA are as follows:

### *4.2.1ndivisibility*

All rights are interrelated and indivisible.[528] Thus, a breach of one right translates to a breach of other rights. The practice of child marriage takes away the ability of the girl child to enjoy all other rights accruable to her as a child and as a person including the right to education, sexual and reproductive health rights, and the right to dignity of the human person. An HRBA provides a

[524] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, No. 2 of 1983, Cap A9, Laws of the Federation of Nigeria 2004.

[525] Ibid Article 18

[526] Ibid Article 17

[527] Ibid.

[528] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights [UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135]

holistic approach to tackling child marriages as is applicable in the Global programme whereby thematic convergence programming is adopted to ensure coordination and across sectors, departments, ministries, and agencies to build linkages between child marriage and other related rights and issues, such as education, sexual and reproductive health, child protection, prevention of gender-based violence (GBV) and humanitarian response.[529] To end child marriage in Nigeria through an HRBA, no rights of a child or sector has to act in isolation. All relevant sectors and stakeholders in Nigeria working together to achieve an end to child marriage. Such sectors include the health sector, education sector, judicial sector, the information sector and the religious sector as these all have key roles of public and policy influence to play in achieving an end to child marriage in Nigeria.

### *4.2.2 Equality and Non-discrimination*

This is a core principle of the HRBA to ending child marriage. It is about leaving no one behind. Equality and non-discrimination are focal themes and approaches in the Global Program to end Child Marriage.[530] All individuals are equal as human beings and are entitled to their human rights without discrimination along such lines as race, colour, sex, ethnicity, age, language, religion, political or opinions, national or social origin, disability, property, birth, or another status.[531] Child marriage is discrimination against the girl child on grounds of sex/gender. An HRBA is expedient to eliminating inequalities and discrimination because it targets social inequalities and underlying

[529] UNFPA-UNICEF, Technical Note on Convergent Programming' (UNFPA-UNICEF 2020) <www.unfpa.org/sites/default/files/resource-pdf/GP-2020-Technical-Note-Convergent-Programming.pdf> accessed 25 February, 2021.

[530] This section is largely informed from UNFPA-UNICEF, 'Leaving No One Behind: Technical Note of the Global Programme to End Child Marriage' (UNFPA-UNICEF 2020) <www.unfpa.org/sites/default/files/resource-pdf/GPECM_Child-marriage-leaving-no-one-behind_October2020.pdf> accessed 25 February, 2021.

[531] Universal Declaration of Human Rights, 1948. In Article I and 2. < eng.pdf (ohchr.org)> Accessed 13 January 2021. See also ICPD Programme of Action, Principle 1. See also Section 42 of the Constitution of Federal Republic of Nigeria, 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions are not made subject'. See Article 18 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, No. 2 of 1983.

power relations that lead to exclusion such as poverty, income inequality, systemic discrimination, and marginalisation.[532]

The expected outcome in compliance with the principle of inequality and non-discrimination to end child marriage in Nigeria is to make transformational changes in laws and policies governing human rights that empower marginalised people, in this case, the girl-child.

### *4.2.3 Participation and Inclusion*

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which derives its powers from the 1999 Constitution states that 'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives' per provisions of the law.[533] Every individual and all persons have the right to participate actively, freely, and meaningfully in policies and programs that promote the realisation of human rights and basic freedoms. The Global program adheres to HRBA by ensuring that girls are engaged and involved in decision-making that affects them.[534] This includes giving them a voice to express their opinions and perspectives, define the issues and contribute to the design of potential solutions to gender-based discrimination and other human rights challenges.

### *4.2.4 Accountability*

International human rights conventions place an obligation on state parties to respect, preserve, and fulfill their peoples' human rights. Failure to comply with any of these three requirements is a

[532] UNFPA, 'Guidance Note for Applying a Human Rights-Based Approach to Programming in UNFPA' (UNFPA 2020) <www.unfpa.org/sites/default/files/pub-pdf/2020_HRBA_guidance.pdf> accessed 25 February, 2021.

[533] Article 13, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act

[534] UNFPA-UNICEF ( n 520. )

breach of such rights. States are required under the commitment to respect to abstain from interfering with the enjoyment of rights. The commitment to protect obligates states to prevent third-party infringement of such rights. States are required to adopt adequate legislative, administrative, financial, and judicial steps to ensure the full fulfillment of such rights.[535] The HRBA supports accountability to all stakeholders. The Global Programme adopts this approach and notes that the implementation is crucial at national and subnational levels.[536]

### 4.3 Overview of the Nigerian Human Rights Framework Relevant to Child Marriage

In Nigeria, human rights are protected primarily within the framework of the 1999 Constitution and, since its domestication, the African Charter on Human and Peoples' Rights. The Bill of Rights contained in the 1999 Constitution can be grouped into two classes: a collection of non-justiciable rights in Chapter II of the Constitution expressed as part of the fundamental objectives and directive principles of state policy ('Chapter II Rights') and the fundamental rights contained in chapter IV ('Chapter IV Rights').

The Chapter II Rights are stated in the form of governmental duties, some of which are relevant to child marriage, including the duty of the government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels[537] and the duty to direct policy towards ensuring that children and young persons are protected against any exploitation whatsoever.[538] However, these rights are of no legal consequence because they are non-justiciable

[535] Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights. < Maastricht Guidelines.pdf (hlrn.org)> accessed 13 January 2021.

[536] UNFPA-UNICEF (n. 520); see also UNFPA (n. 520)

[537] Section 18(1), 1999 Constitution

[538] Section 17(3)(f).

by virtue of the provision of Section 6(6)(c) of the 1999 Constitution which provides that the judicial powers vested in the courts established by the constitution:

> 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.

For this reason, the Chapter II Rights will not be examined in the analysis in this part of the chapter.

The Chapter IV Rights, on the other hand, are justiciable and include the right to life,[539] right to dignity of human persons,[540] right to personal liberty,[541] right to fair hearing,[542] right to private and family life,[543] right to freedom of thought, conscience and religion,[544] right to freedom of expression and the press,[545] right to peaceful assembly and association,[546] right to freedom of movement,[547] right to freedom from discrimination,[548] and the right to acquire and own immovable property.[549] However, as will be discussed further below, not all these rights are pertinent to the child marriage issue.

[539] Section 33.
[540] Section 34.
[541] Section 35.
[542] Section 36.
[543] Section 37.
[544] Section 38.
[545] Section 39.
[546] Section 40.
[547] Section 41.
[548] Section 42.
[549] Section 43.

The African Charter on Human and Peoples' Rights[550] (African Charter) was domesticated in Nigeria through the enactment of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[551] Article 1 of the African Charter Act provides as follows:

> As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.

The African Charter provides for some rights pertinent to child marriage (such as the right to the free practice of religion)[552] which are more robustly provided in the Chapter IV Rights. In respect of such rights, the analysis in this chapter will refer to the Chapter IV Rights rather than the African Charter. However, the African Charter also provides for a right, pertinent to child marriage, which is not contained in the Chapter IV Rights. The right is provided in Article 18 which provides that:

> the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

[550] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) https://www.refworld.org/docid/3ae6b3630.html accessed 6 September 2021.

[551] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act

[552] Article 8, African Charter on Human and Peoples' Rights

This right will be considered for analysis later in this chapter. In the interim, when assessing the human rights framework in the context of the analysis below, it is imperative to clarify the hierarchy of laws containing human rights provisions. As explained earlier in this chapter, the Nigerian constitution is supreme and prevails over all other laws. In the specific context of the constitution vis-à-vis the African Charter and other laws, the Supreme Court clarified the hierarchy in *Abacha v Fawehinmi*[553] as follows:

> By Cap. 10 the African Charter is now part of the laws of Nigeria, and like all other laws the Courts must uphold it. No doubt Cap. 10 is a statue with an international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree with their Lordships of the Court below that the Charter possesses 'a greater vigour and strength' than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegbrouwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government from removing it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute to be necessarily affected by

[553] Abacha V Fawehinmi (2000) 6 NWLR (Pt. 660) 228

the mere fact that it violates the African Charter or any other treaty, for that matter.

Therefore, the hierarchy is clear. The constitution will prevail over the African Charter Act. The African Charter Act will prevail over other Nigerian statutes without affecting their validity. It follows, of course, that the rights in the constitution, the rights in the African Charter (having been adopted by virtue of the African Charter Act) and the provisions of other Nigerian statutes will follow this hierarchy.

## 4.4 The Balance of Rights Implicated in the Practice of Child Marriage in Nigeria

### *4.4.1 Situating Child Marriage in the Nigerian Human Rights Legal Framework*

As elaborated in chapter three of this research work, the constitutional 'legislative lists' formulation is a major reason for the current impasse in achieving a full-scale domestication of the CRA. However, the tone of the discourse in the literature would suggest that there is no formidable, legal avenue in the constitution or other aspect of the Nigerian legal system that can be explored to end the practice of child marriage in Nigeria. Contrary to this assumption, it has been argued that the Nigerian human rights framework provides an underexplored avenue for achieving this objective. In other words, the case is not as hopeless as it would seem. To put this in proper context, let's start by analysing two antithetical positions.

Braimah stated that since the federal government has no influence over customary or Islamic marriages but only over legal marriages (as defined in item 61 of the Exclusive Legislative List), the federal government has no authority over child marriage –

> Part 1 Section 61 [sic] of the 1999 Constitution renders the CRA useless, as the 1999 Constitution serves as the supreme law of the land in Nigeria, overriding all other legislation[554]

Nwauche observes that the above assertion wrongly implies that the protection of children in Nigeria is entirely statutory, disregarding the protection afforded children under Chapter IV of the 1999 Constitution.[555] He refutes this assumption by arguing that there is in fact a child's rights protection regime in the 1999 Constitution. As a premise for this, he points out that the text relating to protected rights in Nigeria's Constitution uses the words 'person', 'individual', and 'citizen' in various instances in referring to the beneficiaries of the legal right, with the effect that all persons in Nigeria, including children, are beneficiaries of the rights contained therein.[556] He supports this by observing that, for instance, there is no special mention of 'women' in the Nigerian Constitution, yet it would appear absurd to say that only men are entitled to the rights therein.[557] Against these premises, he finds that children are first and foremost individuals and that imagining that they are not protected by the 1999 Constitution would violate all established constitutional interpretation principles and would pander to technicalities.[558] He continues by stating that it is difficult to imagine children being without protection in governments that have not ratified the CRA, since their protection is guaranteed by the constitution.[559]

The logic of Nwauche's argument is difficult to reject, and our study supports that reasoning. This perspective is bolstered by Nigerian case law's predilection for the literal rule in interpreting clear

[554] Tim S Braimah (n. 83) 485.
[555] Enyinna S Nwauche (n. 94)424.
[556] Ibid.
[557] Ibid.
[558] Ibid.
[559] Ibid 426.

language in the constitution. The Supreme Court has maintained that if the Constitution's wording is unequivocal and clear, it must be accorded its plain and obvious interpretation. In *Ishola v. Ajiboye,*[560] the Supreme Court put it thus:

> *The words of a Constitution may not be ignored as meaningless. In construing a Constitution some meaning or effect should be given to all the words or language used therein if it is possible to do so in conformity with the intention of the framers. If the language used is clear and unambiguous its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written. Unless the context suggests otherwise, words are to be given their natural, obvious, or ordinary meaning.*[561]

As will be seen from the wordings of the constitutional provisions setting out the relevant human rights, there is nothing in their context to suggest that the word 'person', 'individual', or 'citizen' is to be interpreted to exclude children. It follows, therefore, that Nwauche is right in his assertion that the Bill of Rights in Chapter IV of the 1999 Constitution is also a children's bill of rights. If this is the case, it becomes pertinent to examine the relevant human rights provisions to ascertain the extent, if any, to which they provide a viable avenue to end the practice of child marriage in Nigeria.

The rights to be examined are rights contained in Chapter IV of the 1999 Constitution as well as rights contained in the African Charter on Human and People's Rights (Ratification and

[560] (1994) 6 NWLR (Pt.352) 506

[561] The Supreme Court further affirmed this position in *Abegunde v. OSHA* (2015) 8 NWLR (Pt. 1461) 314 SC; (2015) LPELR-24588 (SC

Enforcement) Act.[562] The provisions of this Act have full force of law in Nigeria and shall be given effect and applied by all authorities and persons exercising legislative, executive, and judicial powers in Nigeria.[563]

The justiciability of the rights in this Act has been recognised by the courts in *Ogugu v. State.*[564] In that case, the jurisdiction of the court was questioned on the basis of an original fundamental human rights question being brought before the court. It was argued that the rights enshrined in the ACHPR Act are independent of the fundamental human rights contained in the Constitution, and neither the Charter nor the Act domesticating it made any provision for its enforcement procedures by our courts; therefore, the court should fill the gap created by the absence of enforcement process in the African Charter by assuming jurisdiction.

Bello C.J.N. (as he then was) held:

> *However, I am unable to agree … that because neither the African Charter nor its Ratification and Enforcement Act has made a special provision … for the enforcement of its human and peoples' rights within a domestic jurisdiction, there is a lacuna in our laws for the enforcement of these rights. Since the charter has become part of our domestic laws, the enforcement of its provision like all our other laws falls within the judicial powers of the court as provided by the Constitution and all other laws relating thereto.*

[562] Preamble to the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria, 1990.

[563] Ibid Article 1

[564] (1994) 9 NWLR (Pt. 366) 1

### *4.4.2 Constitution-Based Human Rights that Impact Child Marriage*

As will be examined below, assertions have been made in the literature that the practice of child marriage conflicts with the provisions of the Constitution. However, little attempt has been made to substantiate the broad claims about the constitutional rights infringed by the practice of child marriage in Nigeria. It is submitted that, for the human rights argument to put up a formidable fight against the practice of child marriage, it must put its best foot forward. The strategy certainly should not be to present a bouquet of rights that would crumble under scrutiny and be exposed as bogus claims when tested. Therefore, before embarking on a balance of rights analysis, it is imperative to examine the specific human rights in question with the objective of separating the wheat from the chaff.

Fayokun asserts that the continued practice of child marriage under Islamic law 'definitely comes into direct conflict with Sections 10, 38, and 42.'[565] His assertion with respect to Section 10 (prohibition of state religion) has already been analysed in the earlier part of this chapter. His assertion with respect to Section 38 (right to freedom of thought, conscience, and religion) and Section 42 (right to freedom from discrimination) will be examined shortly.

After establishing that the constitution applies to children, Nwauche goes on to propose five more rights. Nwauche asserts five rights: the right to human dignity, the right to personal liberty, the right to private and family life, the right of the girl child to peaceful assembly and association, and the right to receive child protection as stipulated in international declarations and conventions.[566]

[565] Fayokun (n. 345) 466.

[566] Enyinna S Nwauche, (n. 94) 426.

The viability of each of the rights contained in Chapter IV of the Constitution of Federal Republic of Nigeria as candidates for contending with the Islamic law practice of child marriage will now be examined.

#### *4.4.2.1 Right to Dignity of human persons*

Section 34(1) of the 1999 Constitution provides as follows:

> (1) Every individual is entitled to respect for the dignity of his person, and accordingly -
>
> (a) no person shall be subject to torture or to inhuman or degrading treatment;
>
> (b) no person shall he held in slavery or servitude; and
>
> (c) no person shall be required to perform forced compulsory labour.

Subsection (2) goes on to provide that certain legitimate forms of labour, such as in the armed forces, law enforcement, or labour compelled by a court order, do not amount to 'forced and compulsory labour.'

Nwauche asserts that:

> *[g]iven the widespread evidence of the effects of child marriage, there is no doubt that a Nigerian court would readily find that child*

*marriage is contrary to the right to freedom from inhuman and degrading treatment.*[567]

While Nwauche's observation on the problems of early marriage is correct, this researcher is reluctant to agree with his assertion that the court would necessarily find that early or child marriage infringes upon the right to dignity of human persons. As earlier established, the position of Nigerian case law is that constitutional provisions will be interpreted, according to the ordinary meaning of the text, unless the context suggests otherwise.

Section 34(1) prohibits torture, inhuman or degrading treatment, slavery, servitude, and forced or compulsory labour. Nowhere in the text or context of this provision can it be reasonably implied that the drafters intended to include child marriage in the scope of the prohibition. Unsurprisingly, case law on this provision typically relates to claims against the government or law enforcement agencies for acts prohibited in the instrument,[568] and this researcher is not aware of any case law where the right has been extended to defeat the practice of child marriage. For the avoidance of doubt, however, the dissent here is not that child marriage cannot be challenged under Section 34(1) merely because it has never been done. Instead, the argument is that nowhere in the text and context of this provision support such a claim.

Of course, the claim can be made that a child being less mature, physically, mentally, and emotionally, would be less able to defend herself against the attempt by an adult to torture, enslave or compel labour. However, the usefulness of such a claim is doubtful. The general susceptibility of children to being victims of inhuman or degrading treatment can hardly be the basis for creating

[567] Enyinna S Nwauche, (n. 94) 427.

[568] See, for instance, *Mogaji & Ors. v. Board of Custom & Excise* (1982) 3 SC 552

a presumption that the mere existence or practice of 'child marriage' infringes the prohibition against inhuman or degrading treatment. Otherwise, one might as well argue that every marriage involving a dominant partner (as would stereotypically be the case with the husband in a marriage) infringes Section 34(1), which would, of course, be an absurd argument.

Surprisingly, Nwauche does not establish his claim with any legal or jurisprudential ground on which a court may be persuaded to leap from the explicit wordings of Section 34(1) to determine that child marriage is in violation of the right to be free from inhuman or degrading treatment. For the foregoing reasons, it is submitted that the right to dignity of human persons is not a viable candidate for defeating the practice of child marriage.

#### *4.4.2.2 Right to personal liberty*

Section 35(1) provides for the right to personal liberty as follows:

> (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law -
>
> > (a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
> >
> > (b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;

(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

***(d) in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare;***

(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or

(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto:

Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence

Subsections (2) – (7) go on to provide requirements and conditions for arrest and detention.

Curiously, Section 35 has not received much attention in the literature on child marriage in Nigeria. Even Nwauche who observes that 'section 35(1) protects the personal liberty of the girl child'[569] says no more about this right in his work. Perhaps, the dearth of attention to this right as a candidate for defeating child marriage is because a larger part of the text in Section 35 relates to arrest, detention, execution of court orders, and similar matters. It would appear, however, that the right to personal liberty goes beyond friction with law enforcement.

To appreciate the argument in this regard, it is necessary to reiterate the general rule established by Nigerian case law on the interpretation of constitutional provisions that words are to be given their natural, obvious, or ordinary meaning unless the context suggests otherwise. The Cambridge English Dictionary defines the word 'liberty' as 'the freedom to live as you wish or go where you want.'[570] Merriam-Webster defines it as 'the power to do as one pleases' or 'the power to do or choose what you want.'[571] These meanings obviously connote the right to exercise consent. By the ordinary meaning of the word liberty, child marriage which involves the absence of choice or consent by the child in question would violate the right to personal liberty.

Another aspect of the text would also support the interpretation that personal liberty means what the dictionaries say it means. Section 35(1)(d) permits a curtailment of liberty within the bounds of the law '*in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare.*' This aspect of the provision would also refute any suggestion that Section 35 was intended to apply only to matters relating to arrest, detention, or execution of court orders. More importantly, from the exception allowing limited curtailment of the liberty of a child

[569] Enyinna S Nwauche, (n. 94) 428

[570] Cambridge University Press, *Cambridge English Dictionary* (Cambridge University Press 2021) <https://dictionary.cambridge.org/dictionary/english/liberty> accessed 8 September 2021.

[571] Merriam-Webster, *Learner's Dictionary* (Merriam-Webster 2021) <https://www.learnersdictionary.com/definition/liberty> accessed 8 September 2021.

for the purpose of education, it is reasonable to infer that if the constitution had intended to curtail the liberty of children in deference to customary law regimes permitting child marriage, Section 35 would have provided for such an exception in a similar manner as the exception for education is expressed.

Further, there is at least one known Nigerian case where the right to personal liberty was interpreted to include marriage. In *Adewole v. Jakande*,[572] it was the judgment of the court that the closure of private schools by the Lagos State government is a violation of the personal liberty of parents to train their children where and how they deem fit. The court particularly stated that:

> *Personal liberty' means privileges, immunities, or rights enjoyed by prescription or by grant. It denotes not merely freedom from bodily restraint, but rights to contact, to have an occupation, to acquire knowledge, **to marry**, have a home, children, to worship, enjoy and have privileges recognized at law for the happiness of free men.*[573]

There is no gainsaying that the right to marry implies the right not to marry or the right to choose whom or whom not to marry.

Based on the foregoing premises, it is submitted that the right to personal liberty is a viable candidate for defeating the practice of child marriage. It will, therefore, be considered in the balance of rights analysis later in this chapter. However, it is perhaps pertinent to mention a limitation of the right to personal liberty as a candidate for defeating child marriage. While the right can be argued to preclude acts of betrothal and other forced marriage practices that deprive

[572] [1981] 1 NCLR 262, 278 (HC Lagos)
[573] Ibid. 278.

the child of consent or freedom to choose, it can hardly be argued that a 'child' who freely consents to marriage has been deprived of her right to personal liberty. In other words, the right may not avail against child marriage involving the child's consent since she would, in fact, have exercised her personal liberty and there is no basis in section 35 to support any inference that a child who freely chooses has been deprived of her personal liberty simply because she is a child or because she is less than eighteen.

#### *4.4.2.3 Right to private and family life*

Section 37 states rather succinctly that:

> The privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communications is hereby guaranteed and protected.

Ironically, the content of the provision is not as useful to the child marriage problem as the section title 'right to…family life' leads one to hope. Adopting a literal interpretation, it would be easier to leap to the conclusion that child marriage infringes Section 37 from a pedestal of 'right to…family life' than from a pedestal of the 'privacy of citizens, their homes, correspondence…'

As with his claim with respect to Section 35, Nwauche says no more about Section 37 than his assertion that 'Section 37 protects the right to private and family life of the girl child.' In this case, however, it would appear that there is in fact no basis for substantiation of the assertion, at least not in any known case law. A review of the literature shows the application of privacy rights in Section 37 to diverse issues such as the privacy of places of residence, correspondence, communication, right to reject medical treatment, breach of confidence, data protection, searches

and seizures and illegally obtained evidence, and abortion.[574] While this is in itself not reason enough to disqualify Section 37 as a candidate right, it should be disqualified by the absence of any lever in the text of Section 37 which can be deployed to advance an argument that Section 37 protects the girl child against child marriage.

Therefore, it is submitted that the right to family or private life is not a viable candidate for defeating the practice of child marriage. However, on the flip side, it has been suggested that this right could be used as a shield in defence of criminal prosecution for child marriage.[575] This right will, therefore, be considered in the balance of rights analysis below as a possible 'shield right' supporting the practice of child marriage.

#### *4.4.2.4 Right to Freedom of Thought, conscience, and Religion*

Section 38 provides for the right to freedom of thought, conscience, and religion. Section 38(1) provides that:[576]

> Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief, and freedom (either alone or in community with others, and in public

[574] Adedeji Adekunle and Irekpitan Okukpon, 'The Right to Privacy and Law Enforcement: Lessons for the Nigerian Judiciary' (2017) 7 International Data Privacy Law 202; See also, Enyinna S Nwauche, 'The Right to Privacy in Nigeria' in Enyinna S Nwauche (ed), *Review of Nigerian Law and Practice. Vol. 1(1)* (Centre for African Legal Studies 2007) <www.nigerianlawguru.com/articles/constitutional%20law/THE%20RIGHT%20TO%20PRIVACY%20IN%20NIGERIA.pdf> accessed January 24, 2021; Paradigm Initiative and Privacy International, 'Stakeholder Report Universal Periodic Review 31st Session - Nigeria: The Right to Privacy in Nigeria' (Paradigm Initiative and Privacy International 2018) <https://privacyinternational.org/sites/default/files/2018-05/UPR_The%20Right%20to%20Privacy_Nigeria.pdf> accessed January 24, 2021; Yinka Olomojobi, 'Right to Privacy in Nigeria' [2017] SSRN Electronic Journal 1 <https://ssrn.com/abstract=3062603> accessed January 23, 2021.

[575] Enyinna S Nwauche( n. 94) 428.

[576] Section 38(2) – (4) goes on to provide for the exercise of the right in the context of religious instruction, and education institutions, and to exclude secret societies from the ambit of the protection.

> or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance.

Due to the clear fact that child marriage is predominantly entrenched in Islamic religious traditions in Nigeria, Section 38(1) is at the centre of the child marriage controversy, which will be investigated in the study of the rights balance. However, Section 38(1)'s provision of freedom of opinion, conscience, and religion is sometimes used to justify (rather than condemn) child marriage. In this section of the debate, the essential issue is whether the right may be used as a competing right (of the child) in order to fight the practice of child marriage.

Fayokun asserts that the continued practice of child marriage under Islamic law definitely comes into direct conflict with Section 38 of the constitution.[577] He, however, provides no basis or premise for his assertion. In assessing this assertion, one must consider, hypothetically, in what instance the right to religious freedom can be cited to protect a child from child marriage. Since Islamic law permits the practice, the only plausible scenario appears to be where the victim of the practice is a non-Muslim. Assuming that this is conceptually valid, the utility of such an argument is minimal since, in the typical case of child marriage in the northern States of Nigeria, the child is almost invariably a Muslim. For this reason, the right to freedom of thought, conscience and religion is not considered in this thesis as a viable candidate for defeating the practice of child marriage. The right will, however, be considered in the balance of rights analysis below as a 'shield right' supporting the practice of child marriage.

[577] Fayokun (n. 345), 466.

#### *4.4.2.5 Right to peaceful assembly and association*

Section 40 of the 1999 Constitution provides that:

> [e]very person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

This right has also been asserted as protecting children from child marriage, without any reference to a legal or jurisprudential basis for the assertion.[578] A review of the literature and case law shows no application of this right to the context of marriage, with the application of the right typically relating to political contexts. Perhaps, relying on the literal interpretation of the words 'associate with other persons,' an argument can be made that marriage is a form of 'association' with another person. An opposing argument, of course, would be that such an interpretation would be taking the word 'associate' out of context since considered holistically, the section appears to have been intended to deal with political associations and interest groups.

Based on the foregoing it is doubtful whether the right to peaceful assembly and association can be applied to defeat the practice of child marriage. It would be a weak claim, at best. For this reason, the right is not considered a candidate for the balance analysis.

[578] Enyinna S Nwauche, (n. 94), 426.

#### *4.4.2.6 Right to freedom from discrimination*

Section 42(1) of the 1999 Constitution states as follows:[579]

> (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, ***sex***, religion or political opinion shall not, by reason only that he is such a person: -
>
> (a) be subjected either expressly by, ***or in the practical application of, any law in force in Nigeria*** or any executive or administrative action of the government, to ***disabilities or restrictions*** to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
>
> (b) be accorded either expressly by, ***or in the practical application of, any law in force in Nigeria*** or any such executive or administrative action, any ***privilege or advantage*** that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

[579] Subsection (2) provides for freedom from discrimination on the basis of the circumstances of birth, while Subsection (3) excludes the right in relation to recruitment to the armed forces, law enforcement or similar state institutions.

> (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth

In interpreting this provision in the context of customs that discriminate on the basis of gender, it was held in *Uke v Iro*[580] that a custom that precluded a woman from giving evidence in land matters was unconstitutional because it discriminated against women. Similarly, in *Mojekwu v Mojekwu,*[581]a custom by which a man was allowed to inherit the property of his late brother because the surviving wife had no son was held to be discriminator and to be 'repugnant to natural justice, equity and good conscience.'

Based on the foregoing authorities, as well as a literal interpretation of the provision of section 42(1), there are formidable grounds to argue that the practice of child marriage as permitted under Islamic law or any other customary law is discriminatory against women. In particular, one can rely on the words highlighted in the provision of Section 42(1)(a) above to assert that the 'practical application of Islamic law (being a law in force in Nigeria) is discriminatory because it imposes restrictions or disadvantages on the girl child by reason of her sex. Females are invariably the victims of the practice of child marriage. Male children are not subjected to the restrictions or disadvantages associated with child marriage. If child brides were male, they would not be compelled to get married so early. Consistent with this reasoning, it can be argued also on the basis of Section 42(1)(b) that male children are given privileges of which female children are deprived.

[580] [2002] FWLR (Pt. 129) 1453, 1459.

[581] (1997) 7 NWLR (Pt. 512) 283

Based on the foregoing premises, it is submitted that the right to freedom from discrimination is a viable candidate for defeating the practice of child marriage. It will, therefore, be considered in the balance of rights analysis later in this chapter.

### *4.4.3 Rights contained in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which impact Child Marriage*

#### *4.4.3.1 Right to Receive the Protection Stipulated in International Declarations and Conventions*

Article 18(3) of the African Charter, as domesticated by the African Charter Act, provides as follows:

> The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The first part of this provision seeks to guarantee freedom from discrimination. As the provision of Section 42 more fully covers this field, the conclusion reached in the earlier analysis of that provision applies here as well; that the right to freedom from discrimination is a viable candidate for defeating the practice of child marriage, and it will be considered in the balance of rights analysis later in this chapter.

However, the second part of the provision of Article 18(3) of the African Charter warrants careful examination. A first possible interpretation of this provision is that it seeks to make child rights protection in treaties and conventions apply in Nigeria, without the need for the domestication of

the treaties and conventions providing for such rights. Nwauche supports this view, claiming that there is no legal reason why this clause cannot be utilized to safeguard children in Nigeria since Nigerian courts have ruled that the African Charter Act supersedes national law. In order to properly assess the merit of the argument, one must again consider the Supreme Court's pronouncement in *Abacha v Fawehinmi,*[582] cited earlier in this chapter, to the effect that although the African Charter Act will prevail over other Nigerian statutes, the constitution will prevail over the African Charter Act.

This hierarchy is critical in deciding whether or whether Article 18(3) of the African Charter Act protects Nigerian children against child marriage. Consistent with the theory of constitutional supremacy, Section 1(3) specifies that if any other legislation conflicts with the Constitution's provisions, the Constitution's provisions will be deemed superior, and the other law will be declared invalid to the extent of the contradiction. Additionally, it should be noted that the African Charter is 'any other law' in this case since the African Charter Act domesticated it. It is necessary to assess if any provision of the 1999 Constitution contradicts the intent of Article 18(3).

One provision readily comes to mind – Section 12(1) which provides that 'no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.' By this provision, treaties and conventions that have not been enacted into law by the National Assembly cannot force law in Nigeria. Article 18(3) of the African Charter seeks to achieve precisely what is precluded here. For this reason, where the first interpretation is adopted, Article 18(3) will be declared null and void for being inconsistent with Section 12(1) of the 1999 Constitution.

[582] Abacha's case (n. 553) 258.

An alternative interpretation of Article 18(3) is that, rather than seeking to make the treaties and conventions apply directly in Nigeria, it requires the Nigerian government to take steps to domesticate those treaties. The merit of this interpretation is that it would not be inconsistent with the provision of Section 12(1) and can, therefore, stand. The demerit of this interpretation is that it is of limited practical usefulness since it would not apply to immediately defeat the practice of child marriage. It would only apply to require the government to try harder to achieve full domestication of the CRA in Nigeria.

In summary, by the first interpretation, Article 18(3) would be null and void for being inconsistent with Section 12(1) of the 1999 Constitution. By the second interpretation, Article 18(3) would remain valid but cannot be applied directly to defeat the practice of child marriage until the CRA is fully domesticated. In light of this, Article 18(3) is not a viable candidate for defeating the practice of child marriage.

#### *4.4.3.2 Right to Health*

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act states that everyone has the right to the best possible physical and mental health, and states parties are obligated to take the necessary steps to protect their citizens' health rights and ensure that they receive medical care when they are ill.[583] This right is also recognized in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which recognizes women's right to sexual and reproductive health, including the right to control their fertility, the right to choose whether or not to have children, the number of children, and the spacing of children, the right to contraception and family planning, and the right to be protected against sexually

[583] Article 16, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

transmitted infections, including HIV/AIDS.[584,585] The right to health is also protected by the International Covenant of Economic, Social, and Cultural Rights, which affirms everyone's right to the best possible bodily and mental health in Article 12 of the Covenant.[586] The treaty required States Parties to make the necessary efforts to prevent stillbirths and infant mortality while also ensuring the child's healthy growth.[587]

Suffice to note that health is not recognised as a human right in the Nigerian Constitution. The provision for health in the Nigerian Constitution is contained in Chapter II as a directive principle of state policy, to the effect that the state shall direct its policies to ensure that there are adequate medical and health facilities for all persons.[588] The provisions of Chapter II are not subject to the jurisdiction of the court.[589] The section provides that the judicial powers vested in the Nigerian judiciary do not extend to issues or questions as to whether any act or omission or judicial decision conforms with the fundamental objectives and directive principles of state policy.[590] By the foregoing, the draftsmen ended up imposing duties and responsibilities on the government to provide medical and health facilities with one hand, and with the other hand withdrawing the right of the citizens to seek compliance with these duties and responsibilities.

The Child Rights Act specifically recognised and encapsulated the child's right to health as it states that every child shall have the "best attainable state of physical, mental, and spiritual health".[591]

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[584] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. <37077-treaty-charter_on_rights_of_women_in_africa.pdf (au.int)> accessed on 27 December 2020.

[585] Ibid Article 14.

[586] OHCHR, International Covenant on Economic, Social and Cultural Rights <OHCHR | International Covenant on Economic, Social and Cultural Rights> accessed 28 December 2020. See also Article 14 of the African Charter on the Rights and Welfare of the Child. < Microsoft Word - For children & youth - African Charter articles in full.docx (unicef.org) > accessed on 29 December 2020

[587] Ibid

[588] Section 17(3)(d), 1999 Constitution

[589] Ibid Section 6(6)(c)

[590] Ibid.

[591] Section 13, Child Rights Act

The prevalence of child marriage exposes the child bride to sexually transmitted diseases, obstetric fistulas, death during childbirth, and cervical cancer,[592] thus denying her the right to enjoy the highest attainable standard of health. When girls are exposed to marriage at an early age, the imbalance of power takes away the autonomy of choice on decisions regarding her health and wellbeing due to power dynamics in favour of her husband, thereby jeopardizing the health of the child bride.

Contrary to the widespread belief that early marriage serves the purpose of curbing promiscuity thereby safeguarding young girls from contracting HIV/AIDS, research shows that early marriage puts child brides in more danger of contracting HIV/AIDS than their unmarried counterparts.[593] The most prominent reasons for this include – low socioeconomic status, unprotected sexual intercourse with a husband who had several sex partners, and poor access to healthcare.[594] In Delta State Nigeria, research shows that 50 percent of married girls are more likely to be exposed to HIV in comparison with unmarried girls.[595] Similarly, in Lagos-Nigeria, the risk is 59 percent higher in girls who got married early. In all these cases, the infection had been transmitted to the girls from their husbands who already have multiple wives. Other sexually transmitted infections (STIs) to which the Child bride is exposed; include gonorrhoea, Chlamydia, and simplex virus type 2.[596]

[592] Yvette Efevbera and others, 'Girl Child Marriage as a Risk Factor for Early Childhood Development and Stunting' (2017) 185 Social Science & Medicine 91.

[593] Laura Dean and others, 'He Is Suitable for Her, of course, He Is Our Relative': A Qualitative Exploration of the Drivers and Implications of Child Marriage in Gezira State, Sudan' (2019) 4 BMJ Global Health.

[594] Marcy J Robles, 'Child Marriage and the Failure of International Law: A Comparison of American, Indian, and Canadian Domestic Policies" (2018) 18 International and Comparative Law Review 105. See also Susan B Schaffnit, Mark Urassa, and David W Lawson, 'Child Marriage' in Context: Exploring Local Attitudes towards Early Marriage in Rural Tanzania' (2019) 27 Sexual and Reproductive Health Matters 93.

[595] Laura Dean and others ( n. 593).

[596] Murli Desai and Sheetal Goel, 'Child Rights to Prevention of Child Marriage,' *Rights-based Direct Practice with Children* (Springer 2018), pp. 299-322; See also Arthur van Coller, Child Marriage – Acceptance by Association' (2017) 31 International Journal of Law, Policy and the Family 363; Marcy J Robles, n. 550.

Other adverse health effects to which the child bride is exposed include stillbirth and maternal mortality and morbidity. Childbearing by young girls is more likely to cause maternal and infant, and obstetric fistulas.[597] According to statistics, postpartum haemorrhage, malaria, obstructed labour, eclampsia, and HIV infection are all 5 times more likely to kill a girl between the ages of 10 and 14.[598] UNICEF reports that over 70,000 girls die every year due to labour pain because their bodies are not biologically prepared for it.[599] Younger and immature mothers are at 35 percent to 55 percent higher threat of delivering a low birth weight or preterm child in comparison to mature mothers (older than 19 years).[600] The mortality rate of an infant born to these younger mothers is 60 percent higher in comparison to mothers older than 19 years.[601] Further studies have revealed that even after survival in the first year, their children at the age of 5 years, have a higher mortality rate.[602] Poor nutrition and lack of access to reproductive and social services constitute a higher threat to infectious illness, than emotional and physical immaturity.

#### *4.4.3.3 Right to Education*

Child marriage reduces the likelihood of young girls completing their secondary education,[603] thereby impinging the girl child's right of access to education. The Nigerian Constitution does not recognize education as a human right. The Nigerian Constitution has a provision for education in

[597] Susan Lee-Rife and Michelle J Hindin , 'Interventions to Prevent Child Marriage Among Young People in Low- and Middle-Income Countries: A Systematic Review of the Published and Gray Literature' (2016) 59 Journal of Adolescent Health 16; See also Nurul Ilmi Idrus, 'Ready or Not, Be Prepared!': Marital Status, the State and Consequences of Child Marriage in East Tomoni, Luwu Timur, South Sulawesi'" in Mies Grijns and others (eds), *Marrying Young in Indonesia: Voices, Laws and Practices.* (Yayasan Pustaka Obor Indonesia 2019), p. 79.

[598] UNFPA, *Girlhood, Not Motherhood: Preventing Adolescent Pregnancy* (United Nations Population Fund 2015) <https://www.unfpa.org/sites/default/files/pub-pdf/Girlhood_not_motherhood_final_web.pdf> accessed 15 February 2020

[599] UNICEF, *Progress for Children (No. 7): A Report Card on Maternal Mortality* (UNICEF 2008) <https://www.unicef.org/media/86471/file/Progress_for_Children-No._7_Lo-Res_082008.pdf>accessed 15 February 2020

[600] Patricia A Cavazos-Rehg and others, 'Maternal Age and Risk of Labor and Delivery Complications' (2014) 19 Maternal and Child Health Journal 1202; Caroline HD Fall and others, 'Association between Maternal Age at Childbirth and Child and Adult Outcomes in the Offspring: A Prospective Study in Five Low-Income and Middle-Income Countries (COHORTS Collaboration)' (2015) 3 The Lancet Global Health.

[601] Ibid.

[602] Ibid.

[603] Annah V Bengesai, Lateef B Amusa, and Felix Makonye, 'The Impact of Girl Child Marriage on the Completion of the First Cycle of Secondary Education in Zimbabwe: A Propensity Score Analysis' (2021) 16 PLoS ONE.

Chapter II as a directive principle of state policy, stating that the government must direct its policy toward guaranteeing equitable and appropriate educational opportunities at all levels.[604] However, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which derives its powers from the Constitution recognises the right to education. The document provides thus:

> Every individual shall have the right to education.

Furthermore, the Child's Rights Act which also derives its powers from the Constitution provides that:

> Every child has the right to free, compulsory, and universal basic education, and it shall be the duty of the Government in Nigeria to provide such education.[605]

The African Charter on the Rights and Welfare of the Child in Article 11 provides that every child has the right to an education, to develop his or her personality, talents, and mental and physical abilities to their fullest potential. The right to education extends to the preservation and strengthening of positive African morals, traditional values, and cultures. The convention requires Governments to take special measures regarding the girl child to ensure equal access to education for all sections of the community.

Child marriage impedes a child bride's ability to continue schooling due to the onset of the responsibility of motherhood and policies that make it difficult for pregnant girls to continue

[604] Section 18, 1999 Constitution

[605] Section 13, CRA

attending school. Keeping the female child in school, on the other hand, decreases the probability of her marrying at a young age, with each year of secondary education reducing the risk of marrying before the age of 18 by five percentage points or more in many nations.[606]

In the UNFPA-UNICEF Global Programme to End Child Marriage, ensuring the right to education of adolescent girls and boys has been a crucial component in raising the age of marriage. Education allows children and young people to make their own decisions about their future and to marry only when they want to; education combats discrimination and helps to ensure that the child is at the centre of educational laws and policies; education provides parents with options other than marriage for securing a future for their children.[607]

#### *4.4.3.4 Freedom from Violence and Sexual Abuse*

The Protocol on the Rights of Women in Africa to the African Charter on Human and People's Rights establishes a more comprehensive provision on women's rights to be safeguarded from all types of violence. The convention ensures that every woman's right to dignity is respected and protected from all types of abuse, notably sexual and verbal assault.[608] It went even further under the rights to life, integrity, and security of a person to ensure that every woman is protected from all sorts of abuse, including unwanted or forced sex, whether the assault occurs in private or in public.[609] State Parties are required under the Convention to identify the causes of violence against women and to take reasonable measures to prevent and eradicate it.[610]

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[606] The World Bank, 'Educating Girls, Ending Child Marriage'. (August 24 2017). < Educating Girls, Ending Child Marriage (worldbank.org) >Accessed on 30 December, 2020.

[607] UNFPA-UNICEF, (n. 520)

[608] Article 3(4), Protocol on the Rights of Women in Africa to the African Charter on Human and People's Right

[609] Ibid Article 4

[610] Ibid.

The right to dignity of the child is protected under Section 11 of the CRA, which provides that no child must be subjected to physical, mental, or emotional harm, abuse, neglect, or maltreatment, including sexual abuse; torture; or cruel or humiliating treatment or punishment, according to the clause. Forced or underage marriage was recognized as a type of sexual exploitation and abuse in General Comment 13, in which the Committee on the Rights of the Child defined sexual exploitation and abuse.[611] According to UNICEF, girl children who marry before 18 are more likely to experience domestic violence than their peers who marry later.[612] Due to the age gap and uneven balance of power in the marriage, child brides are at a considerably higher risk of domestic and sexual abuse from their husbands than older and more educated women. Young girls are exposed to coerced and reluctant sexual interactions that are sanctioned by society, leaving them with no route or process for restitution for activities that would be deemed crimes if perpetrated outside of marriage. Intimate partner violence, which encompasses physical, sexual, emotional, and psychological abuse as well as controlling behaviours, occurs mostly between the ages of adolescence and early adulthood and occurs largely in the setting of marriage or cohabitation.[613]

[611] UN Committee on the Rights of the Child (CRC), 'General Comment No. 13 (2011): The Right of the Child to Freedom from All Forms of Violence. CRC/C/GC/13' (United Nations 2011) <https://www2.ohchr.org/english/bodies/crc/docs/crc.c.gc.13_en.pdf> accessed January 24, 2021 – Para. 25(d): Sexual abuse and exploitation includes:

> '(a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity;
>
> (b) The use of children in commercial sexual exploitation; and
>
> (c) The use of children in audio or visual images of child sexual abuse;
>
> (d) Child prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking (within and between countries) and sale of children for sexual purposes and forced marriage. Many children experience sexual victimization which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitative and traumatic.'

[612] UNICEF, *Early Marriage: A Harmful Traditional Practice* (UNICEF 2005) <https://factsforlife.org/pdf/Early_Marriage_12.lo.pdf> accessed 28 June, 2021.

[613] World Health Organization and London School of Hygiene and Tropical Medicine, *Preventing Intimate Partner and Sexual Violence against Women: Taking Action and Generating Evidence* (World Health Organization 2010) <www.who.int/violence_injury_prevention/publications/violence/9789241564007_eng.pdf> accessed 12 January, 2021.

Marriage of children and adolescents under the age of 18 may be considered a form of commercial sexual exploitation in some situations, according to ECPAT International, where the children are exploited for sexual purposes in return for commodities or remuneration in cash or kind. [614]

#### *4.4.3.5 Right to Consensual Marriage*

Sections 21 and 22 of the CRA proscribes child marriage and the betrothal of a child. Section 21 of the CRA provides 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 and of no effect whatsoever'. A requirement of marriage within the tenants of human rights is that consent between the parties to the marriage is free, full, and informed consent as enshrined in the Universal Declaration of Human Rights in 1948.[615] This fundamental requirement is further enshrined in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights[616] and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages as earlier cited in this work which provides that measures should be taken to ensure that marriages are contracted consensually, such as a public declaration of consent in the presence of the competent authority and the presence of witnesses.[617] Regionally, the Women's Protocol to the African Charter[618] specifically requires a minimum age of 18.

Child marriage is synonymous with forced marriage as the child bride is not up to the required minimum age of marriage and therefore cannot give full, free, and informed consent.[619] In the

[614] Quentin Wodon and others, 'Economic Impacts of Child Marriage: Global Synthesis Report' (The World Bank and International Centre for Research on Women 2017)

[615] Article 16 (2), Universal Declaration of Human Rights.

[616] Article 23(3), ICCPR; Article 10(1), ICESCR; Article 23(4) of the ICCPR further provides for 'equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.'

[617] Articles 1, 2, 3, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

[618] Article 6(a), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[619] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, n. 1, para. 20.

absence of free and full consent, as is the case obtainable in child marriage, child marriage can be likened to slavery in which the girl child is subjected to a lifetime of human rights violation and impediment of personal development. The special rapporteur on contemporary forms of slavery has drawn links between child marriage and slavery, pointing out that States are obliged to prohibit and eliminate slavery as a non-derogable and fundamental principle of international law. Forms of slavery that have been identified are traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery-like conditions, domestic servitude, sexual slavery, and servile forms of marriage. There is no denying that several husbands or in-laws maltreat child brides.[620] For instance, a child-wife is compelled to engage in household tasks that are highly tedious for her tender age. A report from the UN reveals that domestic violence is more practised against young-married girls in Nigeria.[621]

All sorts of forced marriage are analogous to slavery, according to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, since they lead a spouse to lose all of her rights in the relationship. A woman's parents, guardians, relatives, or any other person or group cannot force her into marriage. A woman's husband, family, or tribe cannot sell her for money or other goods, and he cannot sell her when he dies. This is a breach of the UN Convention on the Rights of the Child. However, the notion that forced and early marriages constitute types of slavery and, therefore, servile union has faded through time.[622]

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[620] Emelyne Calimoutou, Yuantao Liu, and Beverley Mbu, *Compendium of International and National Legal Frameworks on Child Marriage* (World Bank 2016) <http://hdl.handle.net/10986/26762> accessed 21 May, 2021.

[621] Lucia Hanmer and Marina Elefante, The Role of Identification in Ending Child Marriage (World Bank Publication) 2016 https://chooser.crossref.org/?doi=10.1596%2F25184 accessed 23 May 2021

[622] UN Human Rights Council, 'Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, Gulnara Shahinian. A/HRC/15/20' (United Nations 2010) </www.ohchr.org/Documents/Issues/Slavery/SR/A.HRC.15.20_en.pdf> accessed 21 January, 2021.

In Nigeria, for instance, where exceptions are made for marriage below the national minimum age in some states based on religious practices, the girl child in such a state is deprived of her right to autonomy as she is forced into the union of marriage without her full, free and informed consent.

### 4.4.4 The Balance of Rights: 'Candidate Rights' and the CRA vs 'Shield Rights' and the Islamic Law Practice of Child Marriage[623]

Based on the foregoing analysis in this chapter, for ease of understanding, what the researcher has classified as 'candidate rights and shield rights' will be considered in the balance of rights implicated in child marriage. The rights to (i) personal liberty and (ii) freedom from discrimination, as guaranteed in the 1999 Constitution, will be considered as 'candidate rights' for defeating the practice of child marriage in Nigeria. The rights to (i) private and family life and (ii) freedom of thought, conscience, and religion, as guaranteed in the 1999 Constitution, will be considered as 'shield rights' likely to be invoked in support of the practice of child marriage in Nigeria.

An important provision of the constitution that Nigerian courts are bound to apply in balancing competing rights is Section 45(1) of the 1999 Constitution which provides as follows:

> '(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

[623] The terms 'Candidate Rights' and 'Shield Rights' were coined by the researcher for ease of categorisation and analysis.

(b) for the purpose of protecting the rights and freedom of other persons.'

Section 45(1) permits derogation from the rights guaranteed under Section 37 (private and family life), section 38 (freedom of thought, conscience, and religion), section 39 (freedom of expression and the press), section 40 (peaceful assembly and association) and section 41 (freedom of movement), where such derogation is on account of a law that is reasonably justifiable in a democratic society to protect any of the interests in paragraphs (a) and (b).

According to this clause, although the CRA's prohibition of child marriage interferes with a Muslim's freedom to practice child marriage as his religion authorizes, where there is a conflict between law and religion in regard to children, the best interests of the child shall take precedence.[624] He goes on to say that while considering a child's interests, the child's emotional, physical, and psychological well-being should be taken into account.[625] On the premise of Section 45, Fayokun also contends that child marriage may be justified as a constitutional constraint on religious freedom.[626]

The researcher is inclined to agree with Braimah and Fayokun. The emotional, physical, and psychological wellbeing of the child can be argued to be accommodated in the 'public health' ground in section 45(1)(a). Perhaps, more importantly, the 'candidate rights' to personal liberty and freedom from discrimination can be relied upon, on the basis of section 45(1)(b), as justifying

[624] Tim S Braimah, (n. 83) 482.
[625] Ibid.
[626] Fayokun (n. 345) 465.

the statutory prohibition of child marriage as a derogation from the 'shield rights' to freedom of thought, conscience and religion and private and family life.

Further supporting the above position is the approach favoured by Nigerian courts in determining whether a law is 'reasonably justifiable' to warrant a derogation from the rights in sections 37 – 41 (which include the shield rights). Ukhuegbe observes that whenever a legislation is impugned as not being reasonably justifiable to warrant a derogation from the rights, the courts almost always favour the legislation over those rights.[627] The court alluded to this tendency in *Director of Public Prosecutions v. Chike Obi*[628] where it observed that the sheer fact that a statute was passed with the agreement of the legislature, which represents the people, was enough to invoke judicial restraint. Nwabueze explains that the primary reason for this tendency seems to be the inherited common law attitude towards the judicial function; it is an attitude that requires literalness and analytical positivism in the interpretation of the law, enforces a narrowness of attitude towards the questions presented for decision and discourages creative activism.[629]

Another factor that might influence whether the pendulum swings in favour of the rights purported to be derogated from or the law seeking to derogate from them is the issue of who has the onus of proving that a law is or is not 'reasonably justifiable.' Nwabueze expresses the view that the opening statement in section 45, '[n]othing in this section shall invalidate any law ...' seems to cast the onus on the person challenging human rights abridging law to show that it is not reasonably justifiable.[630] This research work agrees with this view because the alternative would connote that

[627] Solomon Ukhuegbe, 'Human Rights Discourses in Nigeria across Time: Trajectory, Successes, and Potentials for Canadian-Nigerian Engagement' (2017) 4 The Transnational Human Rights Review.

[628] [1961] 1 All NLR (Pt. 2) 186.

[629] Ben Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (C Hurst & Co 1977), p. 310.

[630] Ben Nwabueze, *A Constitutional History of Nigeria* (Longman 1982); See also Basil Ugochukwu, 'Balancing, Proportionality, and Human Rights Adjudication in Comparative Context: Lessons for Nigeria' (2014) 1 The Transnational Human Rights Review 1 <https://digitalcommons.osgoode.yorku.ca/thr/vol1/iss1/1/> accessed 3 May, 2021.

the validity (and, therefore, enforceability) of laws must be proven before the law can have the force of law. Such an outcome is likely to undermine the authority of the legislature.

Interestingly, the aforementioned tendency of Nigerian courts to favour the law over the rights in the context of section 45(1) of the 1999 Constitution is the subject of criticism in the literature, including in the works of the scholars cited above with the preference being for the courts to favour the rights in 37 – 41 over a law seeking to curtail them. However, it would appear that in the case of the CRA, this state of affairs is favourable since it makes it unlikely that the CRA will be successfully challenged in Nigerian courts as derogating from the 'shield rights' of freedom of religion and the right to private and family life.

The foregoing part of the discourse has considered the balance in the instance of a contest between the CRA and the 'shield rights'. It is also pertinent to consider a contest between the 'candidate rights' and the 'shield rights'. This contest will be important in states where the CRA is yet to be domesticated. In the absence of legislation curtailing the 'shield rights' by prohibiting child marriage, the only recourse for defeating the practice of child marriage would be to invoke the constitutional rights of the child, with the 'candidate rights' having been established earlier in this chapter as the viable candidates for such a contest. For instance, the practice of child marriage may be challenged for infringing a child's right to personal liberty, and it may be argued further that the said child's right to personal liberty defeats the competing 'shield right' to freedom of religion of the husband of the child.

Nwauche points out that resolving a conflict between opposing constitutional rights is not simple and that it would need a proportionality analysis in which Nigerian courts assess the contradictory

interests of the child and the spouse.[631] Since section 45(1) only applies to law vs rights contests (rather than a right v. right contest), and since the constitution makes no provision for resolving a contest between competing constitutional rights, the researcher is inclined to agree that the courts would have to consider the circumstances of each case.

In Nigeria, there is no case law establishing a hierarchy of constitutional rights that might provide more structure and consistency for the courts in balancing competing constitutional rights. This research work proposes as a possible approach that the court may infer from section 45(1) that, by including the rights in sections 37 – 41 among rights that may be derogated from and excluding the other rights, the drafters of the constitution imply the inferiority of the rights in sections 37 – 41 to the other rights. The logic of this argument would be that the drafters considered the other rights too grave to permit a derogation by law in general circumstances, and, for this reason, those rights should rank higher in the hierarchy. Where the court accepts this argument, the 'candidate rights' (personal liberty and freedom from discrimination) would necessarily defeat the 'shield rights' (freedom of religion and right to private and family life) in which case the practice of child marriage would fall with the shield.

In summary, the balance of rights analysis above reveals that in states where the CRA has been domesticated, it cannot quickly be challenged by a claim that it infringes the right to freedom of religion or the right to private and family life. However, in states where the CRA has not been domesticated, there is no sufficient basis for a declaration that child marriage practices generally infringe the 'candidate rights' (to personal liberty and freedom from discrimination). The courts would likely balance the competing rights on a case-by-case basis.

[631] Enyinna S Nwauche,( n. 94) 428.

Therefore, it would appear that there is no sufficient protection under the Nigerian human rights framework by virtue of which the practice of child marriage can be defeated in states where the CRA has not been domesticated.

## 4.5 Summary of the Chapter

In investigating what legal and constitutional formulations impact Nigeria's ability to comply with international laws and norms on child marriage, this chapter examined whether, and to what extent, there are existing grounds within Nigeria's human rights framework to challenge the practice of child marriage.

The Human Rights Based Approach, which is one of the six guiding principles of the United Nations Sustainable Development Cooperation Framework, was addressed in this chapter. The chapter addressed different human rights that pertain to child marriage, including the Fundamental Human Rights in the Nigerian Constitution as established in Chapter IV and the ECOSOC rights, which reflect a more extensive range of rights not incorporated in the Nigerian Constitution.

In this chapter the balance of rights was also analysed, and it was evident that in states where the CRA has not been domesticated, there is no sufficient basis for a declaration that child marriage practices generally infringe the 'candidate rights' (to personal liberty and freedom from discrimination). When the courts are faced with such legal issues, it would likely balance the competing rights on a case-by-case basis.

The chapter came to a succinct conclusion that although Nigeria has an established human rights framework, it however does not provide vulnerable children with adequate protection from the

practice of underage marriage, especially in places where the Child Rights Act 2003 has not been domesticated.

# CHAPTER 5: THE AFRICAN UNION MECHANISMS FOR ENDING CHILD MARRIAGE AND NIGERIA

## 5.1 Introduction

The last two chapters have succinctly done an analysis of the Nigerian legal and human rights framework and where it stands in meeting the international standards on ending child marriage. This chapter moves its discourse to the regional human rights framework which Nigeria is a part of. It will analyse the African Union (AU) regulatory framework and Nigeria's compliance with her obligations under the African Union mechanisms to end child marriage. The argument on the role of the African Union in child rights protection as considered in this chapter will bring to the fore regulatory framework of regional instruments such as the African Charter on the Rights and Welfare of the Child 1990,[632] and the Convention on the Rights of the Child. This chapter will further appraise the Member State review, Civil Society Forum, and how they engage with the question of child marriage.

Finally, this chapter will argue that the special mechanisms of the AU have proved to be effective in combating child marriages and these mechanisms, if adopted by Nigeria, will bring about improved results.

## 5.2 The African Union Regulatory Framework

The OAU was founded in May 25, 1963, in Addis Ababa, Ethiopia, when the OAU Charter was signed. [633]. At the extraordinary OAU Summit in Sirte, Libya on 2 March 2001, heads of State

[632] African Charter on the Rights and Welfare of the Child <https://au.int/en/treaties/african-charter-rights-and-welfare-child> accessed 10 August 2020

[633] Fordham Wara, 'Bibliographical Pathfinder: African System for the Protection and Promotion of Human Rights' (*University of Minnesota Human Rights Library* 2002)

declared the establishment of the African Union and by 9 July 2001, the *Constitutive Act* of the African Union had been signed by all OAU member states and ratified by fifty-one countries. Virtually all African states are members of the OAU/AU.[634] The AU takes account of the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), and the African Charter on Human and Peoples' Rights (ACHPR).

The African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and, People's Rights on the Rights of Women in Africa are two regional treaties that deal specifically with child marriage in Africa. However, only a few African countries have changed their policies in response to early marriage clauses in international and regional treaties.[635] Warner stated that the implementation of these international and regional conventions throughout Africa has been rather piecemeal.[636] The majority of these conventions have been signed and ratified by many African countries; nevertheless, implementation of the duties imposed by these conventions is at best limited. So far, 32 African countries have made marriage compulsory at the age of 18 or older.[637] However, despite legislation setting the minimum age for marriage, child, early and forced marriage continues to be prevalent throughout African countries. However, 14 out of 20 countries with the highest rates of child marriages are African countries. [638]

[634] Ibid.

[635] The Children's Act, section 24; see also PLAN. 'Protecting children from harmful practices in plural legal systems, (2012) <https://planinternational.org/files/global/publications/protection/protecting-children-from-harmful-practices-in-plural-legal-systems> accessed 15 November 2013

[636] Elizabeth Warner, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls' (2004) 12 Journal of Gender, Social Policy & the Law 233 at 254

[637] The African Child Policy Forum, 'In the Best Interests of the Child: Harmonizing Laws in West and Central Africa' (The African Child Policy Forum 2011)

[638] ibid

### *5.2.1 The African Charter on Human and People's Rights*

The African Charter, also known as the Banjul Charter, was adopted by the Organization of African Unity in Nairobi, Kenya, on June 27, 1981. Fifty-three countries are parties to the Charter. The Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted the guiding human rights document for the system- the African Charter on Human and People's Rights which came into force in 1986. According to Warner, although Nigeria is a signatory to this Charter, the compliance with the provision of the charter has been made subject to local laws and customs and in so far as local circumstances permit.[639] The most distinctive feature of the Charter is its recognition of collective rights.[640] Article 6 of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa states that no marriage can take place without both parties' free and informed consent, and states must enact appropriate national legislative measures to ensure that women can marry at the age of 18.[641]

Article 1 of the Convention defines violence as:

> any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.[642]

In 2008, the Special Court for Sierra Leone in *Prosecutor v. Brima et al*,[643] in its findings on the alleged crime of forced marriage held: 'the crime of 'other inhumane acts' exists as a residual

[639] Elizabeth Warner (n 636) 264

[640] Article 21(2), African Charter on the Rights and Welfare of the Child.

[641] 2003 Protocol to the African Charter on Human and Peoples' Rights

[642] UN Human Rights Council, 'Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, Gulnara Shahinian. [Addendum]. A/HRC/21/41/Add.1' (United Nations 2012) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/149/40/PDF/G1214940.pdf?OpenElement>.accessed 15 November 2023

[643] SCSL-2004-16-A

category in order not to unduly restrict the Statute's application about crimes against humanity. 'Forced marriage' as an 'other inhumane act' must therefore involve conduct not otherwise subsumed by other crimes enumerated under Article 2 of the Statute.[644]

At the Motion for Acquittal Stage, the Trial Chamber found that there was *prima facie* evidence of a non-sexual nature relating to the abduction of women and girls forced to submit to 'marital' relationships and to perform various conjugal duties. Having now examined the whole of the evidence in the case, the Trial Chamber by a majority is not satisfied that the evidence adduced by the Prosecution is capable of establishing the elements of a non-sexual crime of 'forced marriage' independent of the crime of sexual slavery under Article 2(g) of the Statute.

Sexual slavery is a specific form of slavery. The prohibition against slavery is a customary norm of international law and the establishment of enslavement as a crime against humanity is firmly entrenched. Thus, slavery for the purpose of sexual abuse is a *jus cogens* prohibition in the same manner as slavery for the purpose of physical labour.[645]

It concluded that forced marriage might also include one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, and abduction. The Court noted that the crime of forced marriage was not exclusively, or predominantly, sexual, and as such, was not fully encompassed by the crime of sexual slavery. The women who testified in the case described the forced marriages as having encompassed a series of violations, including abduction, forced labour, deprivations of liberty, corporal punishment, assault, and sexual violence.

[644] Ibid

[645] Ibid Para 703-706

### *5.2.2 The African Charter on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (ACRWC) is a regional human rights treaty adopted in 1990 and came into force in 1999. It sets out rights and defines principles for the status of children. The ACRWC can be a powerful tool to hold governments accountable for ending child marriage. This charter defines the rights and responsibilities of a child and mandates protection of the girl child from harmful cultural practices such as child marriage. Under Article 21(2) of the Charter, explicitly states that:

> "Child marriage and the betrothal of girls and boys shall be prohibited' and that 'effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years."

The United Nations could borrow from the African Union in terms of language. a comparison could be seen in the ACRWC (charter) and CRC (convention). Both documents define a child as any human being below the age of eighteen years. However, the CRC creates a loophole for states to continue the practice of child marriage by including a proviso that reads thus, *"...unless, under the law applicable to the child, a majority is attained earlier."*[646] This allows for local interpretation of childhood. However, the African Charter on Rights and Welfare of the Child unequivocally leaves no space for local interpretations.[647] Twum-Danso has criticized the Charter for adopting a more rigid concept of childhood that does not match the African continent's childhood structure.[648] Franklin further points out that the definition of everyone under 18 years

[646] Article 1, CRC.

[647] Jones Adu-Gyamfi and F Keating, 'Convergence and Divergence between the UN Convention on the Rights of the Children and the African Charter on the Rights and Welfare of the Child' (2013) 3 Sacha Journal of Human Rights 47.

[648] 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.

as a child 'obscures the inherent diversity of childhood and attempts to establish a false uniformity of needs and rights for a heterogeneous group.'[649] This research is of the stance that the wording of the ACRWC places the rights and well-being of the child above any communal rights that may result in harmful practices that are likely to infringe on a child's rights.

### *5.2.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa states that, no marriage is to take place without the free and full consent of both parties and requires States to enact appropriate national legislative measures to guarantee that the minimum age of marriage for women is to be 18 years.[650]

This protocol, according to Mujuzi, 'is the main instrument in which the African Commission on Human and Peoples' Rights (the African Commission) could be said to have formulated and laid down principles and rules aimed at solving legal problems relating to women's rights and freedoms, and upon which African Governments may base their legislation that may in one way or another affect women's rights, thus fulfilling its mandate under Article 45(1)(b) of the African Charter.'[651] Nsibirwa, while analysing the Draft Protocol, stated that the Protocol pays attention to establishing equality within the marriage union, and such is aimed at consent to marriage, rights governing property, and responsibilities for children, among others.[652] He stated that child marriages are

[649] Bob Franklin, 'The Case for Children's Rights" in Bob Franklin (ed), *The Handbook of Children's Rights: Comparative Policy and Practice* (Routledge 1995).

[650] This is also known as the Maputo protocol 2003, Article 6.

[651] JD Mujuzi, 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations' (2010) 12 Law, Democracy & Development.

[652] Martin Semalulu Nsibirwa, 'A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 African Human Rights Law Journal (AHRLJ) 40.

prohibited under the draft protocol as they were under the African Charter on the Rights and Welfare of the Child (African Children's Charter).[653]

### 5.3 Special Mechanisms

To combat child marriage in African countries, the AU has established mechanisms within its systems to end child marriage actively.[654] Prominently, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child (African Children Committee) stand out as dedicated human rights supervisory bodies established and empowered by African states to monitor, recommend and/or trigger sanctions for non-implementation of rights.[655] Together with the established African Commission, these institutions are funded by the states through the AU, extending the enforcement regime of the African Human Right system (AHRS).[656]

On the 29th of May 2014, during the fourth African Union Conference of Ministers of Social Development, the African Union also launched a campaign to abolish child marriage in Africa, which was officially launched on the same day. Initially planned for two years, from 2014-2016, the campaign would focus on ten high-burden countries[657] with the goal of enhancing the implementation of related African Union policy and legal instruments, such as the African Youth Charter, which serves as the focal point of the African Union Second Decade on Education (2006-

[653] Ibid.

[654] Gaffney-Rhys, Ruth. 'International law as an instrument to combat child marriage.' (2011) 3 The international journal of human rights 359-373. see also Raj, Anita, Emma Jackson, and Serena Dunham. 'Girl child marriage: A persistent global women's health and human rights violation.'(2018) Global Perspectives on Women's Sexual and Reproductive Health Across the Lifecourse, 3-19; See also Anozie, Miriam Chinyere, Millicent Ele, and Elizabeth Ijeamaka Anika. 'The legal, medical and social implications of child marriage in Nigeria' (2018) 2 International Journal of Law, Policy and the Family 119-139.

[655] Raj, Anita, Emma Jackson, and Serena Dunham. (n 654)

[656] Ibid.

[657] Review of the African Union Campaign to End Child Marriage <https://www.unicef.org/media/104106/file/Child-Marriage-AU-Campaign-2018.pdf> accessed 12 October 2023

2015); the African Union Social Policy Framework (2009); and the African Governance Item (African Governance Item) (2009). Given the socio-economic and cultural context in which child marriage occurs, the project will also aim to accelerate and reenergize the movement to end child marriage by:

(a) supporting policy action in the protection and promotion of human rights, with a particular focus on violence against girls and women and the promotion of gender equitable social norms and promoting gender equity in social norms and practices through a variety of means.

(b) raising awareness of and participation in efforts to stop child marriage throughout the continent.

(c) eliminating roadblocks and bottlenecks in the administration of justice

(d) increasing the ability of non-state actors to engage in evidence-based policy advocacy, notably through enhancing the role of young leadership using new media technologies, as well as monitoring and evaluation.[658]

As a result of AU's interventions, a common position on ending child marriage was adopted by the African Union Member States.[659] The African Common Position on Ending Child Marriage encourages states to develop comprehensive action plans to end child marriage, which should include enacting and enforcing legislation that sets the minimum age of marriage at 18.[660]

[658]African Union, 'Campaign To End Child Marriage In Africa, Call For Action' (2013) <https://au.int/sites/default/files/pages/32905-file-campaign_to_end_child_marriage_in_africa_call_for_action-_english.pdf> accessed 15 November 2022

[659] UNICEF, 'Review of the African Union Campaign to End Child Marriage' (2018) <https://www.unicef.org/media/104106/file/Child-Marriage-AU-Campaign-2018.pdf> accessed 15 November 2022

[660] Girls Not Brides, 'African Union extends campaign to end child marriage until 2017'(2015) <https://www.girlsnotbrides.org/articles/african-union-extends-campaign-to-end-child-marriage-until-2017/> accessed 15 November 2022

In addition, the African Union held the African Girls' Summit on Ending Child Marriage in Zambia, which was organized by the African Union. A high-level gathering of AU Member States' first ladies, representatives from United Nations agencies, women and girls' organizations from around the world, and representatives from civil society organizations will convene at the Summit to share experiences and best practices, as well as to secure and renew commitments from governments. This includes ensuring that members of the Girls Not Brides campaign (who are members of the campaign's technical committee, which provides technical and strategic support) are aware of the latest campaign developments and are able to engage with the African Union and governments as partners in the implementation of the campaign. Women and girls who are members of Girls Not Brides are encouraged to contact their respective governments in countries where the campaign has been launched in order to guarantee that the campaign's objectives are met in conjunction with civil society.

The African Union appointed a Goodwill Ambassador for Ending Child Marriage, and the campaign was integrated into the work of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which appointed an African Union Special Rapporteur for Investigating Special Cases of Child Marriage to investigate specific cases of child marriage in Africa.

As part of the Global Programme to Accelerate Action to End Child Marriage 2016–2019, the African Union campaign is aligned with the United Nations Population Fund – United Nations Children's Fund (UNFPA – UNICEF), which was developed to accelerate action to end child marriage in at least 12 high-prevalence countries around the world, eight of which are in sub-Saharan Africa.

Among the campaign's significant accomplishments are the following:

1. The campaign has established a place and a platform for African leaders to participate in dialogue about the issue of child marriage, and it has gained the backing of all but four of the target nations.

2. As a result of the campaign, child marriage has been placed on the agenda of important African Union organizations, such as the Peace and Security Council.

3. Despite a lack of adequate resources, the campaign has garnered dedication and excitement from a wide range of partners to lend their support to it. As a result of the campaign, there have been significant gains in the pan-African policy and normative framework for ending child marriage, including the adoption of the African Common Position on the African Union's Campaign to End Child Marriage in Africa, among other things.

4. Significant progress has been made at national levels particularly in Nigeria, from the reform of law to the development of costed national strategies to stop child marriage.

5. The campaign has directly contributed to the expansion of the evidence base to support programming to end child marriage, particularly in the areas of country-specific and thematic research, such as research on child marriage and adolescent pregnancy, harmful traditional practices, and economic development, among other areas.

### *5.3.1 African Commission on Human and People's Rights (ACHPR)*

African Commission on Human and People's Rights (ACHPR) is a judicial body established by the African Charter on Human and Peoples' Rights[661] with the mandate to promote and protect human rights across the African continent, including Nigeria.[662] It is also the commission's responsibility to interpret the African Charter on Human and People's Rights. African Commission considers violation complaints from individuals on the provision of the African Charter. However, as child marriage is a significant violation of its rights, the African Commission is also involved in examining the infringement, structuring, and accepting action programmes towards promoting human rights.[663] In the 32nd ordinary session of the Assembly of the AU, it has been viewed that the African Commission has set an effective communication system to get first-hand information on the infringement of child rights.[664] However, it is unfortunate to state that the commission has failed to form such a communication channel with Nigeria because of its weak and fragile infrastructure.[665] Addaney et al. argues that as the African Commission relies heavily on the regional government facility, it does not have a profound authority or power for the complete enforcement of its provision related to child's rights.[666] Several times, the African Commission has sent drafts and proposals to the National Assembly of Nigeria to intimate them of the chain of

[661] Article 30-45 of the Charter established the Commission on Human and Peoples' Rights and charged it with the task of promoting, protecting and interpreting the rights in the Charter and performing any other tasks assigned to it by the OAU's Assembly of Heads of State and Government. The AU's Constitutive Act's Article 3(h) outlining the objectives of the new African Union states that one of the objectives of the Union shall be to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.' The AU, therefore, inherited the African Charter on Human and Peoples' Rights and the Commission on Human and Peoples Rights that the Charter's arts. 30-45 established.

[662] Soliman, Hussein Hassan, Nagwa Ibrahim Alsharqawi, and Mustafa Ahmed Younis. 'Is tourism marriage of young girls in Egypt a form of child sexual abuse? A family exploitation perspective.' (2018) 27 Journal of child sexual abuse 122

[663] Ibid 171

[664] African Union, 'Key Decisions of the 32nd Ordinary Session of the Assembly of the African Union (February 2019).

[665] ibid

[666]Addaney, Michael, and Onuora-OgunoAzubike. 'Education as a Contrivance to Ending Child Marriage in Africa: Perspective from Nigeria and Uganda.' (2017) 9 Amsterdam LF 110.

command but still, it has failed to achieve considerable outcomes regarding child marriage.[667] A report shows that Nigeria has the highest rate of child marriage across Africa.[668]

African Commission emphasizes ensuring basic rights provisions and treaties in the aspect of child marriage. According to Article 33(1) of the African Charter, every individual has a right to life. This article states that no one would be deprived of his life intentionally.[669] Research shows that when a girl is forced into marriage, she commences procreation before the complete development of her reproductive organs.[670] This predisposes her to labour complications that could lead to maternal mortality. Sadly, this is still extremely common in Nigeria, regardless of the risk to the child.[671] Thus, it is argued that the occurrence of death in this manner is a breach of the right to life. Mukombachotoargues that the wake of maternal mortality due to underage pregnancy stops young Nigerian girls from enjoying their lives, and this is another breach of human rights. [672] Under these circumstances, Onoyasesuggests that for Nigeria to prevent unintentional loss of lives, it is crucial to criminalise child marriage.[673]

Furthermore, section 11 of the Child Rights Act 2003 considers dignity as a fundamental human right.[674] The section provides:

[667]Ebobrah, Solomon, and Felix Eboibi. 'Federalism and the Challenge of Applying International Human Rights Law Against Child Marriage in Africa.' (2017) 61 Journal of African Law 333.

[668]Ibid

[669]Sinai, Irit, JabulaniNyenwa, and OlugbengaOguntunde. 'Programmatic implications of unmet need for contraception among men and young married women in northern Nigeria.' (2018) 9 Open access journal of contraception 81.

[670]Ibid

[671]Akram, Aqsa. 'Effect of Child Marriage and Other Socioeconomic Correlates on Domestic Violence: An Analysis of Developing Countries in Middle East, Africa and South Asia.' (PhD thesis., COMSATS University Islamabad, Lahore Campus., 2019)

[672]Mukombachoto, Tapiwanashe. 'The best interests of the child in cultural and religious practices in respect of child marriages.' (Ph.D thesis., North-West University (South Africa), Potchefstroom Campus, 2016)

[673]Onoyase, Anna. 'Causes of Child Marriage and Its Effects on the Child in Jigawa State, North-West Nigeria: Implications for Counselling.' (2020) 8 Journal of Education and Training Studies 50.

[674]Sarumi, RofiahOlolade, Olumuyiwa Temitope Fasuyi, and Obianuju E. Okeke-Uzodike. 'Transcending Ethnic and Religious Barriers in Decision-Making: A Case of a Muslim Women Civil Organisation in Nigeria.' (2019) 9 Frontiers in psychology 2693.

> Every child is entitled to respect for the 'dignity of his person and accordingly, no child shall- (a) Be subjected to physical, mental or emotional injury abuse, neglect, or maltreatment, including sexual abuse…[675]

In addition, the section states that an individual may not be subjected to inhuman, degrading treatment, or torture. These individuals may not be held in servitude or slavery.[676] In this stance of dignity, women must have a say in choosing their life partners. In contrast, early marriage rejects the rights of girls to make sound decisions regarding their choice of life partner or sexual well-being.[677] It means that compelling or enforcing girls into marriage without taking their consent is degrading. Indeed, it is painful and undesirable to pressurise a girl into marriage, especially to a man who is much older than her.

Taking the leading case *Uzoukwu v. Ezeonu II*,[678] It has been found that Nigerian girls were being tortured after being married. With reference to international human rights, mental torture in the form of mental worry or agony may result in degrading treatment. Analysing the evidence, it has been discovered that degrading treatment carries components of lowering the character, position, and value of an individual, or societal status. Unfortunately, in Nigeria, it is crucial to withdraw girls from schools after marriage to evidence that the aspiration of girls is not as vital as that of boys, because boys are permitted to continue their education even after the marriage.[679] This

[675] Section 11 CRA

[676]Ibid paragraph (b) and (c) ; see also Onoyase, Anna. 'Causes of Child Marriage and Its Effects on the Child in Jigawa State, North-West Nigeria: Implications for Counselling.' (2020) 8 Journal of Education and Training Studies 50-57.

[677] Degani, Paola, and Cristina Ghanem. 'How Does the European Union Talk about Migrant Women and Religion? A Critical Discourse Analysis of the Agenda on Migration of the European Union and the Case Study of Nigerian Women.' (2019) 10 Religions 27.

[678] (1991) 6 NWLR (Pt. 200) 708 ; also cited and discussed in Walker, J. A., Hashim, Y., & Oranye, N. (2019) 14 Impact of Muslim opinion leaders' training of healthcare providers on the uptake of MNCH services in Northern Nigeria. Global public health, 200-213.

[679] Ibid. 76

discrimination against women is a breach of Articles 17 and 24 of the African Charter on Human and Peoples Rights. Article 17 provides inter alia that '*Every individual shall have the right to education.'* The combined effect of the provisions of article 17 and 24 grants rights to education in a satisfactory and favourable atmosphere, providing an opportunity for full career development.[680]

### *5.3.2 Special Rapporteur on the Rights of Women in Africa*

Another important mechanism established by the African Union with respect to the crux of this thesis is the *Special Rapporteur on the Rights of Women in Africa* which is usually presented at the Ordinary Session of the African Commission on Human and Peoples Rights. The Inter-Activity Report of May-October 2016 by Hon. Commissioner Lucy Asuagbor presented at the 59th Ordinary Session of the African Commission on Human and Peoples' Rights[681] provides some valuable recommendations. Among the recommendations are: Attaining equality between women and men by eliminating all forms of discrimination against women are fundamental human rights and values embedded in the African Charter and most especially, the Maputo Protocol which is the flagship document on women's rights on our continent; The African Charter prohibits discrimination in its Article 2, on any grounds, including sex, and Article 18 specifically mentions the obligation of African States to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'. The Maputo Protocol is a watershed moment in the campaign for African women's rights. Despite the fact that international and regional instruments safeguard

[680] Emelyne Calimoutou, Yuantao Liu and Beverley Mbu, *Compendium of International and National Legal Frameworks on Child Marriage* (World Bank 2016)

[681] Lucy Asuagbor Inter-Session Activity Report of Hon. Commissioner Lucy Asuagbor *Special Rapporteur on the Rights of Women in Africa.*

women's rights, women continue to confront discrimination based on their age, ethnicity, nationality, religion, health status, marital status, education, disability, and socioeconomic status, among other factors. Women's rights are exploited in a variety of ways, including violence against women, early marriages, traditional traditions, a lack of education, and so on.[682]

According to Julienne Ondziel-Gnelenga's report,[683] at the Federal level, the Government, in cognizance of the cultural and religious disparities on the status of women, adopted a programme known as the National Women Policy, aimed at catering to the needs of women in all fields of life throughout the Federal Republic. Bodies such as Commissions on Women's Affairs at the Federal level are assigned with the task of implementing this policy for the benefit of women.[684] The report went further to assert that the legal age for marriage is when one attains the age of maturity, but in Northern as well as Southern Nigeria, forced and early marriages exist, leading to pregnancies that could jeopardize the life of both mother and child.[685] In terms of women's rights under Sharia law, her report stated that the majority of cases contradict international and regional norms to which Nigeria is a signatory, such as the Universal Declaration of Human Rights, the Pact on Civil and Political Rights, the Pact on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the African Charter on Human and Political Rights..[686] Part of the Report's recommendations to the Federal Government was 'The Government is also called upon to ensure that the application of 'SHARIA' does not constitute an impediment to the promotion and protection of women's rights'.[687] While one of the

[682] Ibid

[683]Julienne Ondziel-Gnelenga Activity Report of Commissioners < www.achpr.org/public/Document/file/English/achpr29_misrep_specmec_women_nigeria_2001_eng.pdf > accessed 20 November 2021

[684] Ibid

[685] Ibid

[686] Ibid

[687] Ibid

recommendations to the ACHPR was to organise and conduct at least one mission per year to Nigeria to assess the country's numerous problems, particularly the legal duality between the federal level and the federated states, as well as to call on NGOs to provide information on the state of women's rights in all states, both north and south..'[688]

### 5.4 Nigeria's Efforts to meet Regional Obligations on Child Marriage

Nigeria has made a number of attempts to meet their obligations at the regional level. This includes Nigeria ratifying the African Charter on the Rights and Welfare of the Child, in 2001. The Convention in Article 21 proscribed child marriage. Nigeria has also ratified the African Charter on Human and People's Rights on the Rights of Women in Africa. In addition, Nigeria is participating in several programmes to end child marriage. These programmes include:

1. African Union Campaign to End Child Marriage in Africa[689]: Nigeria launched this campaign in 2016, to accelerate the end of child marriage in the country.

2. As an Economic Community of West African States (ECOWAS) member State, Nigeria adopted the Strategic Framework for Strengthening National Child Protection Systems, where Nigeria, alongside the other West African countries, agreed to strengthen their legislation and take concrete measures to protect children from violence, abuse, and exploitation.[690]

[688] Ibid

[689] African Union, Campaign to end Child Marriage in Africa: Call to Action <African Union Campaign to End Child Marriage in Africa> Accessed 19 December, 2020.

[690] ECOWAS, Technical meeting on the operationalisation of the ECOWAS child protection framework commences. (2018) < Technical meeting on the operationalisation of the ECOWAS child protection framework commences | Economic Community of West African States(ECOWAS) > Accessed 19 December, 2020.

However, in spite of Nigeria's ratification of these AU mechanisms for ending child marriage and participation in several programmes to end Child Marriage anchored on the African Union's framework, in researching for this thesis, not much was garnered to show the extent to which Nigeria has implemented these mechanisms.

## 5.5 Summary of the Chapter

Both international and regional treaties are unanimous that child, early or forced marriage is a violation of human and child rights, as such, further initiatives are being taken to end this practice. This chapter made an analysis of the political sphere of the African Union and how they engage with the question of child marriage. The chapter went on to highlight regional instruments and mechanisms through which member states like Nigeria are held accountable for its obligation to end child marriage. This research argues that the African Union provides a very suitable framework for Nigeria to engage with to meet its human rights obligations on ending child marriage. This chapter clearly articulated that Nigeria has largely ratified these frameworks set out by the AU, but has not demonstrated the will to implement them and this is crux of this research.

# CHAPTER 6: THE UN MECHANISMS FOR ENDING CHILD MARRIAGE AND NIGERIA

## 6.1 Introduction

Moving from the regional (AU) mechanisms, this thesis will now examine the mechanisms put in place by the United Nations framework for countries to meet up with their international obligations. It has been established in chapter three of this research that in Nigeria, the National Assembly can give effect to any treaty entered into by the federal government by domesticating such a treaty; until it is domesticated, the Nigerian courts cannot enforce such a treaty. Also, this research has revealed that in addition to the United Nations Convention on the Rights of the Child (CRC), Nigeria is a signatory to several instruments guaranteeing children's rights and prohibiting the practice of child marriage. These multiple treaties create a binding obligation on Nigeria to ensure the implementation of these treaties. Despite being a signatory to these treaties, steps taken to end child marriage in Nigeria have not curbed the problem effectively.

This chapter will analyse the regulatory framework of the United Nations on child marriage and UN instruments and bodies that affect the rights of children, such as the CRC, Convention for the Elimination of All Forms of Discrimination Against Women, (CEDAW),[691] Universal Declaration of Human Rights 1948 (UDHR),[692] the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,[693] Special Rapporteur on Contemporary Forms of Slavery, amongst others.

[691]Convention on the Elimination of all Forms of Discrimination Against Women <www.un.org/womenwatch/daw/cedaw/committee.htm> Accessed 10 August 2020.

[692] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights/> Accessed 10 August 2020.

[693]Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVI-3&chapter=16&lang=en> Accessed 10 August 2020.

This chapter further appraises the UN special procedures, including the Universal Periodic Review and the optional protocols, and how these have been effective in combating child marriages globally. Expedient to this discourse is Nigeria's International obligations in line with UN special procedures related to child marriage and the protection of the rights of children generally.[694] This chapter argues that despite being a signatory to international treaties that provide safeguards against child/early/forced marriages, Nigeria either by omission or commission, has not signed and adopted the Optional Protocols, which among other things, establishes a review mechanism or adds a procedure for the operation or enforcement of a treaty.[695] This causes a setback to the enforcement of these treaties by the international community as Nigeria cannot be sanctioned wherein it defaults. This has led to the continuous practice of child marriage, as no effective sanction or repercussions exist to curb it in Nigeria.

## 6.2 The Convention on the Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage

This Convention requires state parties to enact legislation establishing a minimum age for marriage and stipulating that anyone under this age may legally enter into no marriage unless competent authority has granted a dispensation for serious reasons in the interests of the intended spouses. The Convention urges parties to prohibit girls under the age of puberty from marrying and compels states to set a minimum age for marriage.[696]Article 1 of the Convention provides *inter alia* that;

[694] United Nations, 'Universal Periodic Review – Nigeria' <www.ohchr.org/EN/HRBodies/UPR/Pages/NGindex.aspx> Accessed 10 August 2020.

[695] UNICEF, 'Strengthening the Convention on the Rights of the Child: Optional Protocols' <www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols> Accessed 10 August 2020.

[696] Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964.

> (a) No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person....as prescribed by law.
>
> (b) State Parties to the convention shall specify a minimum age for marriage ('not less than 15 years' according to the non–binding recommendation accompanying this Convention). No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses…

While it is quite true that there are variations in marital practices in different countries because of the difference in cultures, if an international treaty must achieve the purpose of curbing child marriage, it must be definite and precise as to the age of marital consent. Leaving the same at the discretion of state parties will make the instrument less effective as priority will still be given to the cultural practices prevailing in the state. Like the CRC, this convention also avoided defining the age of a child, and the reason for this could be the same as what we have in Nigeria - Cultural variation and the seeming need to please the nations represented. This research observes that the failure of the Convention to specify a minimum age constitutes a barrier to the enforcement of the convention's provision to achieve its purpose as the minimum marriageable age is left at the discretion of the state party. The state party may as well specify an age below eighteen. Nigeria

has since been a signatory to the Convention, but its provisions have created no binding obligation for the country to set its minimum age for marital consent at 18 years. [697]

## 6.3 The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956

The Supplementary Convention, to which Nigeria is signatory, equates any marriage that is forced upon a girl or woman by her family or guardians as similar to slavery[698] and requires the state party to eliminate it. The Convention in Article 1(c) specifically provides that State Parties should take necessary legislative and other measures to bring about a complete abolition of:

> Any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or kind to her parents, guardian, family or any other person or group….

One of the elements of child marriage is that it is often without the full consent of the parties. Furthermore, since the practice of marriage often involves the payment of bride price in Nigerian communities, parental consent is given precedence to the consent of the parties. Walker observed that parents are less likely to withhold consent after the payment of huge sums as bride price and will be willing to compel their children into marriage to sustain relationships with the affluent.[699]

[697] Godwin E Bassey, Pius E Akpan and Okon J Umoh, 'An Assessment of the Effectiveness of Open Market Operations Instrument of Monetary Policy Management in Nigeria' (2018) 9 Journal of Economics and Sustainable Development 120.

[698] Article 1(c) (i) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, 1956.

[699] Judith-Ann Walker, Building Resilience and Resistance to Child, Early, and Forced Marriage through Acquiring Skills: Findings from Implementation Research in Nigeria,' Global Economy & Development: Working Paper 129 (Brookings Institution 2019)

## 6.4 International Convention on Civil and Political Rights (ICCPR)

The Political Covenant's Human Rights Committee has issued general remarks that have established interpretations of its substantive clauses. Article 3, which requires governments to ensure that all individuals have access to the rights established in the Political Covenant, is interpreted as putting a positive obligation on states to address sex discrimination, according to General Comment 4/13.[700] This positive obligation requires states to take affirmative action in addition to taking measures to safeguard women, such as enacting laws.[701]. It also makes states responsible for gathering data on the role of women in their jurisdiction in order to assess whether extra steps are required to be taken.[702] Article 23 of the ICCPR provides for the right of men and women of marriageable age to marry. It also states that no marriage shall be entered into without the free and full consent of the intending spouse. The Human Rights Committee's General Comment 28 elaborates on the obligation of the State in terms of equality of rights between men and women. It states:

> Inequality in the enjoyment of rights by women is deeply embedded in tradition, history, and culture, including religious attitudes. States parties should ensure that traditional, historical, religious, and cultural attitudes are not used to justify violations of women's right to equality before the law and equal enjoyment of all Covenant rights.[703]

[700] HRC, General Comment No. 28, Article 3 (The equality of rights between men and women) HRI/GEN/1/Rev.9 (Vol 1)
[701] Ibid
[702] U.N.GAOR, 36th Sess., Annex 7, U.N. Doc. A/36/40 (1981).
[703] Ibid

Abiodun et al. argue that sex discrimination is still prevalent in Nigeria because pre-eminence has been given to cultural practices hence child marriage keeps being on the increase.[704]

## 6.5 The Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences

The Special Rapporteur on Contemporary forms of slavery has drawn parallels between child marriage and slavery, stating that slavery is a non-derogable and fundamental norm of international law that states must ban and remove.[705] The rapporteur identified several contemporary forms of slavery such as traditional slavery, forced labour, debt bondage, serfdom, children working in slavery or slavery-like conditions, domestic servitude, sexual slavery, and servile forms of marriage.[706] According to ECPAT International, the marriage of children and adolescents under the age of 18 can under certain circumstances be considered a form of commercial sexual exploitation when the child is used for sexual purposes in exchange for goods or payment in cash or kind. Wodon et al., in a similar vein, assert that child marriage is a vital aspect of slavery in the modern form.[707] There is no denying that several husbands or in-laws conduct maltreatment with young girls as they have been titled a wife.[708] For instance, a child-wife is compelled to engage in household tasks that are incredibly tedious for her tender age. A report from the UN reveals that domestic violence is more practised against young-married girls in Nigeria.[709]

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[704] Temitope Francis Abiodun, Marcus Temitayo Akinlade and Olanrewaju Abdulwasii Oladejo, (n. 234).

[705] OHCHR, Special Rapporteur on contemporary forms of slavery, including its causes and consequences, electronically accessed on <www.ohchr.org/en/issues/slavery/srslavery/pages/srslaveryindex.aspx> last accessed 3rd June, 2021.

[706] Ibid.

[707] Quentin Wodon and others (n. 614).

[708] Emelyne Calimoutou, Yuantao Liu and Beverley Mbu (n. 680).

[709] Lucia Hanmer and Marina Elefante, (n. 51)

Furthermore, all forms of forced marriage are defined as practices similar to slavery under the Supplementary Convention on Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which reduces a spouse to a person over whom any or all of the powers attaching to the right of ownership are exercised.[710] The provisions of the Convention prohibiting forced and early marriages have been restated and strengthened by international law.[711]

Under international human rights law, a child cannot provide informed consent to a marriage.[712] As a result, the marriage is considered forced and comes under the Convention's definition of slavery-like acts. The Convention and international human rights law demand that the minimum age for marriage be set, with 18 years being the preferred minimum age. The Special Rapporteur acknowledges that the minimum age for marriage in several countries is less than 18 years.[713] She also recognizes that, in some countries, exceptions are made for marriage below the national minimum age. The Special Rapporteur strongly urges that rigorous measures be taken in such situations to ensure that the rights of the child are in no way violated by marriage.[714]

In addition, the Supplementary Slavery Convention prohibits any institution or practice in which a woman is promised or given in marriage without the right to refuse for a consideration in money or kind to her parents, guardian, family, or any other person or group; a woman's husband, his family, or clan, has the right to transfer her to another person for value received or otherwise; or a

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710 Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956 Entry into force: 30 April 1957, in accordance with article 13. Electronically available at www.ohchr.org/en/professionalinterest/pages/supplementaryconventionabolitionofslavery.aspx last accessed 3rd June, 2021.

711 UN Human Rights Council, (n. 578)

712 Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; also, OHCHR, Article 6, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

713 UN Human Rights Council, (n. 578)

714 Ibid.

woman is liable to be inherited by another after her husband's death. The research of Onebune et al. points out that the practice of wife inheritance is common among the Igbo tribe of Eastern Nigeria.[715] This practice is most common in young wives who have no sustainable livelihoods, and this is a predominant factor in child brides. Forced early marriage is expressly forbidden by the Convention. Article 1(d) requires States Parties to abolish any institution or practice in which a child or young person under the age of 18 is handed to another person, whether for remuneration or not, with the intent of exploitation of the child or young person or his labour. To address the issue of forced and early marriages, states parties are required to prescribe, where applicable, reasonable minimum marriage ages, and to encourage the use of facilities where both parties to a marriage may freely express their agreement in the presence of a competent civil official.

## 6.6 Treaty Monitoring Bodies of the UN

The nine UN international human rights conventions (as will be discussed in the subsequent chapter) have a corresponding treaty monitoring body through which the work on human rights as contained in the treaty is carried out. They are known as committees, and they are responsible for overseeing state parties' implementation of each treaty. Following a periodic reporting process, each committee evaluates states' compliance with the treaty and issues concluding observations. Treaty monitoring committees also produce 'General Comments' or 'General Recommendations,' which serve as authoritative interpretations of treaty provisions and advise implementation of the treaty. Individual complaints of human rights breaches are also received by some committees, which they adjudicate to see if a state has broken the treaty.

[715] Jude IfeanyiChukwu Onebunne and Emmanuela Odoh, 'Critically Questioning the Nigerian Version of Child's Right Brouhaha' (2018) 3 Journal of Moral Education in Africa <https://journals.ezenwaohaetorc.org/index.php/JMEA/article/view/348>.

### *6.6.1 Human Rights Committee*

The Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights and its optional protocols. State party reports, general remarks on thematic issues connected to the Covenant, and individual complaints are the three primary sorts of issues reviewed by the Human Rights Committee. Interstate complaints may also be considered.

### *6.6.2 United Nations Committee on the Rights of the Child (UNCRC)*

The UN General Assembly enacted the Convention on the Rights of the Child in 1989, and this committee was formed as a result.[716] It is comprised of 18 independent experts who oversee the implementation of the Convention on the Rights of the Child by States Parties.[717] The UNCRC is also responsible for monitoring the implementation of two Optional Protocols to the Convention, on the involvement of children in armed conflict (OPAC) and the sale of children, child prostitution, and child pornography (OPSC).[718]

Child marriage is an increasing threat to children's fundamental human rights and protection, as outlined in the Convention on the Rights of the Child (CRC), and it stymies many countries' growth. The CRC does not explicitly mention child marriage, but it does state that all appropriate measures should be taken to 'abolish traditional practices prejudicial to the health of children[719] and references other child rights related to child marriage, such as the right to freedom of expression and protection from all forms of abuse, among other rights. According to the CRC, a

[716] https://www.unicef.org/child-rights-convention accessed on 7th January 2022.

[717] Committee on the Rights of the Child < www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> accessed 7 January 2022

[718] Ibid

[719] The Convention on the Rights of the Child, Article 24(3).

'child' is "anyone below the age of 18 unless, under the law applicable to the child, a majority is attained earlier".[720]

According to Okpalaobi and Ekwueme, Nigeria, as a state party to the CRC, formally commits to safeguarding the rights set out therein.[721] The authors stated that in taking commendable steps to ensure the provisions of the CRC are implemented through policymaking and strengthening of institutions, a National Commission for Women was created, which later became the Ministry of Women Affairs and Youth Development.[722]

The CRC has often voiced concern that the continued practise of child, early and forced marriage degrades girls' position and dignity,[723] harms their health, development, and full enjoyment of their rights, and exposes them to early pregnancy.[724] "Early marriage and pregnancy are key factors in health problems connected to sexual and reproductive health, including HIV/AIDS,"[725] according to General Comment 4 of the CRC. In a joint General Comment, the UNCRC and the CEDAW linked early and forced child marriage to higher-than-average maternal morbidity and mortality rates, a lack of decision-making power, higher rates of school dropouts, an increased risk of domestic violence, and restrictions on the right to freedom of movement.[726]

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720 The Convention on the Rights of the Child, Article 1.

721 BN Okpalaobi and CO Ekwueme, 'United Nations Convention on the Rights of a Child: Implementation of Legal and Administrative Measures in Nigeria' (2015) 6 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 120

722 Ibid.

723 World Health Organisation, *Emergency Contraception: A Guide for Service Delivery* (World Health Organisation 1998), p.7. <https://apps.who.int/iris/handle/10665/64123>

724 Ibid

725 See Citizen's Petition, Food and Drug Administration, Department of Health and Human Services, Petition to make EC available OTC (Feb. 14, 2001) at 3. (The petition was filed by the American Public Health Association, the American Medical Women's Association, the Reproductive Health Professionals, the National Asian Women's Health Organisations, the National Black Women's Health Project, the National Family Planning and Reproductive Health Association, the Planned Parenthood Federation of America, the Reproductive Health Technologies Project, and 58 other organizations by their counsel, the Centre for Reproductive Rights), available at http://bixbycenter.ucsf.edu/publications/files/ECwithoutPrescript_2008,pdf.

726 Liz C Creel and Rebecca J Perry, 'Improving the Quality of Reproductive Health Care for Young People,' *New Perspectives on Quality of Care Brief* (Population Reference Bureau and Population Council 2003)

Gender-based violence can also take the shape of child, early, or forced marriage.[727] The CRC obligates state parties to:

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[728]

The Committee on Economic, Social, and Cultural Rights (CESCR) clarifies in General Comment No. 22 that states must implement and enforce laws prohibiting all types of gender-based violence, including a child, early, and forced marriage.[729] In 1995, the CRC urged Nigeria to examine the consistency of customary laws with the CRC's values, particularly in child marriage.[730] On its part, Nigeria has yet to properly implement this instruction, as no important legislation barring child marriage exists in the country. For example, in the Working Group's most recent annual report, Nigerian customary and Shariah laws were still cited as a severe hindrance to the Campaign to End Child Marriage in Nigeria and a National Strategy to End Child Marriage in Nigeria.

As long as there is no legislation (written law) prohibiting child marriage, it would be difficult for the enforcement agencies, human rights defenders and the courts to declare child marriage under customary law unlawfully and enforce the child's rights against compulsory marriage.

<https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=2671&context=departments_sbsr-rh>. Accessed 20 December 2021

727 María Barcons Campmajó, 'Forced Marriages in Europe: A Form of Gender-Based Violence and Violation of Human Rights' (2020) 14 The Age of Human Rights Journal 1.

728 Article 4, Convention on the Rights of the Child; UN Committee on the Rights of the Child (CRC), n. 567

729 UN Human Rights Committee, n. 207, para. 18.

730 UN Committee on the Rights of the Child (CRC), 'UN Committee on the Rights of the Child: State Party Report: Nigeria CRC/C/8/Add.26' (United Nations 1995), para.26 <www.refworld.org/docid/3ac6aeec14.html>

Nonetheless, it is essential to note that the CRC and CEDAW Committees recently reiterated recommendations that State Parties amend or adopt laws setting the legal minimum age of marriage to 18.[731]

The CRC Committee strongly urged that the CRA be included in Nigeria's concurrent list of laws in its third and fourth periodic reports.[732] As suggested by the Special Rapporteur on freedom of religion or belief, this would ensure that all federal and state laws, including religious and customary law, are in full accordance with the Convention on the Rights of the Child. In response, the Committee suggested that existing legislation and positive law be thoroughly reviewed. It also urged all states to adopt the CRA as quickly as possible. Another suggestion was to sustain and expand the Convention and CRA awareness-raising efforts in those States. Aside from getting all the states to adopt the CRA, the CRC Committee also hoped that the definition of a child, particularly with the age, in the states' laws would be consistent with the CRA and the international conventions.[733] For instance, it was observed that the definition of the child in some legislation domesticating the Child Rights Act at the state level sets the age at 16 years for Akwa-Ibom state) or defines the child not by age but by 'puberty' like the Jigawa state legislation, reportedly for the purposes of early marriages. It was therefore hoped that the definition of the child in legislation domesticating the Child Rights Act at the state level is in full compliance with that of the

731 Megan Arthur and others, Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities'(2017) 39 Journal of Women, Politics & Policy 51.

732 UN Committee on the Rights of the Child (CRC), (n. 426) 2.

733 Ibid. p. 6, paras. 26-27

Convention. This suggestion was followed by some of the new states that domesticated the CRA like Enugu[734] and Ekiti[735] states.

### *6.6.3 The Committee on the Elimination of all Forms of Discrimination against Women*

The Convention on the Elimination of Discrimination Against Women (CEDAW) is the most important and comprehensive human rights convention on the subject. It is the principal modern instrument on women's rights, having been adopted by the UN General Assembly on December 18, 1979.[736] As a result, it has been dubbed the "definitive international legal instrument" requiring respect and observance of women's human rights. It became an international treaty on September 3, 1981, after the twenty-first country approved it in accordance with Article 27 of the Convention. The CEDAW is a landmark treaty and the most important normative instrument aimed at achieving equal rights for women around the world. The Nigerian government accepted the Convention without reservations in 1985, signed the Optional Protocol in 2000, and ratified it in 2004. The CEDAW is an international standard-setting treaty that affirms the universality of the principles of equality between men and women and provides for steps to be taken. It calls for the passage of legislation preventing discrimination against women at the national level.[737]

Article 16 of CEDAW requires states to ensure that men and women have the same freedom to choose a spouse and to enter into marriage only with their free and informed agreement.[738] Even

[734] Section 2, Child's Rights and Responsibility Law 2016

[735] Section 2, Child's Rights Law 2012

[736] U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008);

[737] Lucia Hanmer and Marina Elefante, (n. 51).

[738] Article 16, Convention on the Elimination of All Forms of Discrimination against Women

in plural legal systems that include both customary and statutory laws, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child have both emphasised the importance of additional legal safeguards to protect the right of all individuals to freely enter into marriage.[739]

It's also worth noting that, according to Article 16, paragraph 2 of CEDAW, "the betrothal and marriage of a child should have no legal effect." Furthermore, both the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women have expressed concern about the continued occurrence of child marriage and have advised state parties to implement the prohibition. Child marriage has also been identified by the Committee on the Elimination of Discrimination Against Women and the Committee Against Torture as a harmful practice that causes physical, mental, or sexual harm or suffering, with both short and long-term consequences, and has a negative impact on children.[740]

Articles 2 and 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and Article 2 of the Supplementary Convention on the Abolition of Slavery oblige States parties to set legislative measures to set a minimum age for marriage.[741] The Committees on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child has recommended that state parties eliminate exceptions to the minimum age of marriage for girls and boys, with or without parental consent, and establish a minimum age of

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[739] UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations' (United Nations 1994) <https://www.refworld.org/docid/48abd52c0.html> at paras. 36-37,

[740] Ibid.

[741] Savitri Goonesekere and Rangita De Silva-De Alwis, Women's and Children's Rights in a Human Rights Based Approach to Development, *Division of Policy and Planning: Working Paper* (UNICEF 2005), p. 14. <www.wcwonline.org/pdf/asia2007conf/Women%27s%20and%20Children%27s%20Rights%20in%20a%20Human%20Rights%20Based%20Approach.pdf>.accessed 20 January 2021

marriage of 18 years for girls and boys.[742] The Committee on Economic, Social, and Cultural Rights has also suggested that states raise and equalise the minimum age for boys and girls to marry.[743]

The Committees on the Rights of the Child and the Elimination of Discrimination Against Women, along with the Special Representative of the Secretary-General on Violence Against Children, the Working Group on the issue of discrimination against women in law and practice, and four other special procedures mandate holders, issued a joint statement in 2012 calling on States to raise the age of marriage to 18 years for both girls and boys without exception.[744]

According to the Human Rights Committee, the age of marriage should be such that each spouse can offer her or his free and full personal consent under legal conditions. [745]

States should guarantee that the minimum age corresponds with international standards and take proactive measures to prevent girls from marrying too young. As discussed in the next section, several regional human rights accords have similarly required States to take legislative and other steps to establish an 18-year-old marriage age.

States are required to register births and marriages by the Committee on the Elimination of Discrimination Against Women and other treaty bodies to facilitate monitoring of the marriage age and support the effective implementation and enforcement of laws governing the minimum age of marriage.[746] States are urged to create free, universal, and accessible national civil

[742] Ibid.

[743] UN Committee on Economic, Social and Cultural Rights (CESCR), UN Committee on Economic, Social and Cultural Rights: Concluding Observations of the Mexico. E/C.12/MEX/CO/4' (United Nations 2006), para. 40 <https://www.refworld.org/docid/45377fa20.html>.accessed 20 January 2021

[744] Ibid

[745] Temitope Francis Abiodun, Marcus Temitayo Akinlade and Olanrewaju Abdulwasii Oladejo,( n. 234)

[746] Article 16, CEDAW

registration for all children's births and ensure that a competent body registers all marriages to meet this commitment.[747] Furthermore, every child has the right to be registered at birth, according to Article 7 of the Convention on the Rights of the Child. Despite this, UNICEF reports that approximately 230 million children under the age of five have never had their births recorded adequately worldwide.[748] In Nigeria, only 30 percent of children under the age of 5 have had their births registered.[749] The report indicates that Nigeria has not sufficiently complied with the provision of the Convention for the Elimination of all forms of discrimination against women.

Wodon et al.[750] posits that Women and girls are disproportionately affected by early and forced marriage, which is now commonly recognised as a form of gender-based discrimination. Several international human rights instruments address the rights to equality and non-discrimination.[751] Forced and child marriage has been described as a manifestation of discrimination against women and girls, a violation of their rights, and a barrier to the girl child's full enjoyment of her rights by both the Committees on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child.[752] They went on to say that the practice is maintained by long-standing negative norms and conventional views that discriminate against women or position them in subservient roles to men, as well as by women's stereotypical roles in society.[753] Even though

[747] To date, the CEDAW Committee has referred to harmful practices in nine of its General Recommendations, including GR No. 3 (1987) on the implementation of article 5 of the Convention, GR No. 14 (1990) on female genital mutilation, GR No. 19 (1992) on violence against women, GR No. 21 (1994) on equality in marriage and family relations, GR No. 24 (1999) on women and health, GR No. 25 (2004) on temporary special measures, GR No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, GR No. 29 (2013) on economic consequences of marriage, family relations and their dissolution as well as GR No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations. In its General Comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment and in GC No. 13 (2011) on the right of the child to freedom from all forms of violence, the CRC Committee provides a non-exhaustive list of harmful practices.

[748]UNICEF, Impact Evaluation: Birth Registration in Nigeria 2012-2016' (UNICEF 2019), p. 2 <www.unicef.org/nigeria/media/2236/file/Nigeria-%20Birth%20Registration.pdf> accessed 10 November 2021

[749] Ibid. p. 3.

[750]Quentin Wodon and others, (n. 614)

[751] Ibid.

[752] UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, n. 1; UN Committee on the Elimination of Discrimination Against Women (CEDAW), n. 710

[753] Ibid.

Nigeria is a state party to the CEDAW, having signed and ratified it, total compliance with the provision of the CEDAW has not been achieved. For instance, as stated above, the convention requires every state party to register the birth of every child to enable it to monitor and prevent child marriage. In Nigeria, however, a report by UNICEF indicated that only 5 percent of childbirths are registered, and the government has not set in place state machinery to achieve this goal.[754] Also, while commending Nigeria for enacting the Violence Against Persons Prohibition Act 2015, in compliance with the Convention for the Elimination of all Forms of Discriminations Against Women, the Special Working Group noted that this legislation, along with the Child right Act, which raised the age for marital consent to 18, is not applicable in some states in Nigeria, as such, more needs to be done in the aspect of child marriage.[755]

## 6.7 Optional Protocols

The Convention on the Rights of the Child (CRC) is supplemented by three Optional Protocols; one addresses the sale of children, child prostitution, and child pornography.[756] The second addresses, the involvement of children in armed conflict;[757] and the Third Optional Protocol of 2011 which deals with individual complaints mechanism.[758] The UN Convention on the Rights of the Child's Third Optional Protocol established a complaints mechanism for the abuse of children's rights. It allows people to file complaints with the Committee on the Rights of the Child (CRC) about violations of individual rights under the Convention or the two Optional Protocols agreed to

[754] UNICEF (n. 719).

[755] UN Committee on the Rights of the Child (CRC), 'Implementation of the Convention on the Rights of the Child: List of Issues Related to the Consideration of the 3rd and 4th Periodic Reports of Nigeria (CRC/C/NGA/3-4).' (United Nations 2010) <https://www.refworld.org/publisher,CRC,,NGA,513749952,0.html> accessed 10 August 2020; UN Committee on the Rights of the Child (CRC), 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention (Concluding Observations: Nigeria). CRC/C/NGA/Q/3-4' (United Nations 2010); UN Human Rights Council, n. 182

[756]UNICEF, 'Strengthening the Convention on the Rights of the Child: Optional Protocols' <www.unicef.org/child-rights-convention/strengthening-convention-optional-protocols> Accessed 10th August 2020.

[757] Ibid

[758] Annual Reports of the Special Rapporteur on the sale of children, child prostitution and child pornography,

in 2000, such as child sales, child prostitution, and child involvement in armed conflicts. On February 28, 2012, the third protocol was made available for signing and ratification. Nigeria, on the other hand, has not signed or ratified the third optional protocol, although having signed and ratified the first two.[759]

The Protocol gives children who have exhausted all legal avenues in their own countries the possibility of applying to the Committee. It means children can fully exercise their rights and are empowered to have access to international human rights bodies in the same way adults are under several other human rights treaties.[760] This Protocol allows the Committee on the Rights of the Child to hear complaints that a child's rights have been violated. Children from countries that ratify the Protocol can use the treaty to seek justice if the national legal system has not been able to provide a remedy for the violation.[761]

The Committee can receive complaints from children, groups of children, or their representatives against any State that has ratified the Protocol. The Committee is also able to launch investigations into the grave or systematic violations of child's rights and States can bring complaints against each other if they accept this protocol.[762] However, it is worthy to note that as Nigeria has not signed the protocol, children in Nigeria cannot have direct access to complain in case of a violation of their rights. This constitutes a clog in the enforcement of children's rights in Nigeria.

[759] United Nations, 'Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en> assessed 3 June 2020

[760] United Nations, 'Key UN body can now hear complaints from children whose rights have been violated <.https://news.un.org/en/story/2014/01/459632-key-un-body-can-now-hear-complaints-children-whose-rights-have-been-violated#.UujAp_u1K72> assessed 3 June 2020

[761] ibid

[762] Article 13

Furthermore, Oluwakemi et al. commented that the protocol raises understanding among children, young persons, and others about their rights and how they can complain against its breach, including a complaint and inquiry procedure. In the same vein, their research also states that the CRC and its optional protocols address issues relating to child marriage before 18 years old, Female Genital Mutilation, withdrawal of children from educational institutes for any commercial purpose, scarification and child marriage, and exploitation of children, the children of Almajirai[763] and abuse.[764]

The third Optional Protocol also allows a person or group of individuals to file a complaint in their name.[765] The option of legal representation during the proceedings considers the unique situation where a violation of a child's rights may involve individuals who are unable to complain about their own due to their age. This provision also allows a complaint to be submitted on behalf of children who cannot assert their right to complain, either due to the unique nature of the rights violation or their particular situation. The prevailing cases of child rights violations in Nigeria occur to children who cannot lodge complaints because of their age and illiteracy.[766] These children, however, will not be able to access remedy for the violation of their rights as Nigeria is not a State party to the protocol. De Beco commented that the Optional Protocol, despite this provision for representative complaints, also does not specify who can file a complaint on behalf of a child. Proposals to limit the right of representation to legal representatives appointed by the respective domestic legal system were rejected – and rightfully so.[767] This would have meant that

[763] children on the traditional Qur'anic education system

[764] Bolanle Oluwakemi Eniola and Benson Oluwakayode Omoleye, 'Baby Making Factories and the Reproductive Health Rights of Women in Nigeria' (2018) 72 Journal of Law, Policy and Globalization 22, 28

[765] Art. 5, para. 2 OP; Rule 13, para. 2 Rules of Procedure OP

[766] Olayinka Modupe Onayemi and Adeyinka Abedeen Aderinto, 'Child Adoption Investigation in Nigeria: Challenges and Options' (2017) 15 The Nigerian Journal of Sociology and Anthropology 87.

[767] G de Beco, 'The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?' (2013) 13 Human Rights Law Review 367.

a child's right to file a complaint would have been severely restricted by domestic legislation; additionally, the child's interests are not always aligned with those of his or her parents or legal representatives. As a result, efforts to assure the legal protection of the children implicated would have been severely hampered. As a result, the Optional Protocol specifies that any representation must be in the child's best interests and that it is only permitted with the child's express agreement. In the case of significant or systematic abuses of rights guaranteed by the Convention and the Optional Protocols by a signatory State, Article 13 of the Optional Protocol provides an investigative procedure permitting the Committee to act on its initiative. The signatory states can nullify the Committee's power by making a declaration to that effect.[768]

Another notable provision of the protocol is Article 15, which provides for external assistance to countries to comply with the provisions of the UNCRC and its optional protocols. Article 15 provides thus:

> 1. The Committee may transmit, with the consent of the State party concerned, to United Nations specialized agencies, funds, and programmes and other competent bodies its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance, together with the State party's observations and suggestions, if any, on these views or recommendations.
>
> 2. The Committee may also bring to the attention of such bodies, with the consent of the State party concerned, any matter arising

[768] Article 13, Para. 7

> out of communications considered under the present Protocol that may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting State parties in achieving progress in the implementation of the rights recognized in the Convention and/or the Optional Protocols thereto.

## 6.8 The Universal Periodic Review (UPR) and its regime in Nigeria

After replacing the Commission on Human Rights, the Human Rights Council established the Universal Periodic Review, a new method for regularly examining each United Nations Member State's human rights record.[769] Nigeria is a crucial member of nine Human Rights Treaties of the United Nations, including the Convention for the Rights of the Child [770]. As Nigeria enacted the CRA in 2003, it is expected to submit periodic reports on the development and progress recorded after implementing the CRA 2003 in the state.

In the first cycle of the UPR in 2009, the Working Group of the Human Rights Council welcomed the measures taken by Nigeria to reform its laws and Acts related to children to bring them in line with the demands of the CRC. [771] The committee also accepted that Nigeria is facing challenges in the proper implementation of the CRA 2003 because of its longstanding religious and ethnic strife as well as economic obstacles, including heavy debt burden and poverty, which have impeded development to the complete realisation of rights of children enshrined in the CRA provision.

[769] Christina Szurlej, 'Universal Periodic Review: A Step in the Right Direction?' (PhD Thesis, Middlesex University 2013).

[770] African Union, *Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities* (African Union 2010) .

[771] Omoniyi Adesoji Olubunmi, 'Relative Effectiveness of Problem Solving Approach and Vee Mapping on Students' Performance in Chemistry in Secondary Schools in Ondo State, Nigeria' (2017) 3 European Journal of Education Studies 769.

In the First Cycle Report, Nigeria's National Human Rights Commission (NHRC) also stated that gender-based violence, particularly domestic violence, is a problem in Nigeria and that low reporting levels are due to law enforcement officers and the court system's poor response. Rape and other sexual assaults, human trafficking, and cultural practices (Child marriage, Female Genital Mutilation, detrimental widowhood rituals, etc.) are all continuing problems in Nigeria, according to the NHRC. [772]

The Committee on the Rights of the Child (CRC) urged Nigeria to ratify the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, as well as the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children, in 2010.[773] Nigeria also indicated in 2012, in response to the Committee on the Elimination of Discrimination Against Women's (CEDAW) final conclusions, that the Convention had yet to be implemented into national law, but that consultation attempts to do so were ongoing.[774] CEDAW suggested in a follow-up letter to the report mentioned above in 2013 that the Gender and Equal Opportunities Bill encompass all aspects of the Convention.[775] Implementation of the Nigerian Law Reform Commission's (NLRC) recommendations, including deleting sections 55 of the Northern Nigerian Penal Code, section 55 of Chapter 198 of Nigeria's 1990 Labour Act, and section 360 of the Criminal Code;[776] including repealing the fourth paragraph of section 29 of the Constitution.[777]

[772] NHRC, p.1. Human Rights Council Working Group on the Universal Periodic Review Fourth session Geneva, 2-13 February 2009

[773] UN Committee on the Rights of the Child (CRC), (n. 426), paras. 53 and 87.

[774] UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. A/HRC/13/39/Add.6' (United Nations 2010) <www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.39.Add%206_EFS.pdf>, para. 62. Accessed 5 August 2013

[775] Letter dated 19 March 2013 from CEDAW to the Permanent Mission of Nigeria in Geneva, p. 2, <www2.ohchr.org/english/bodies/cedaw/docs/CEDAWfollow-up_Nigeria.pdf> accessed 5 August 2013).

[776] Letter dated 19 March 2013 from CEDAW to the Permanent Mission of Nigeria in Geneva, p. 3 <www2.ohchr.org/english/bodies/cedaw/docs/CEDAWfollow-up_Nigeria.pdf accessed 5 August 2013.

[777] Ibid

However, in the third Cycle, no report was made on the above recommendations by the Nigerian government to the working group. In addition, the CRC voiced concern in the second review that the Child Rights Act had not yet been enacted in the majority of Nigeria's northern states (CRA). It was suggested that the CRA be added to the list of laws to be reviewed during the constitutional review process in Nigeria. Nigeria reported that 24 of the 36 states and the Federal Capital Territory have enacted the CRA as a follow-up to CEDAW's concluding observations and that efforts were still underway to persuade the remaining 12 states to do so. [778] Since this report, only one more state has passed the CRA, bringing 27 states. In a similar vein, CEDAW recommended the effective implementation of the CRA. CRC recommended that Nigeria ensure that all laws at federal and state levels, including religious and customary law, were in full compliance with the Convention and recommended that Nigeria adopt the bill to establish a Child Rights Agency with a coordinating mandate on child's rights.[779]

In its report to the working group in the second cycle of the UPR in 2013, Nigeria supported suggestions to resolve child marriage by determining the legal age for marriage. Nevertheless, being a member of the Economic Community of West African States (ECOWAS), the state has incorporated the '*Strategic Framework for Strengthening National Child Protection System*' in which they have prioritised the protection of children from marriage. In the Universal Periodic Review (UPR),[780] it is concluded that the adoption process is prolonged due to the existence of customary and religious laws; therefore, the state has failed to comply with the significant provision of CRA. Moreover, there is an insufficient resource and coordination channel to

[778] UN Committee on the Rights of the Child (CRC) (n. 426), paras. 14-15.

[779] Ibid.

[780] Jude Ifeanyi Chukwu Onebunne and Emmanuela Odoh, 9n. 746)

domesticate the CRA in the region. This is limiting the power of authority to monitor the compliance of CRA 2003.[781]

Furthermore, it has also been viewed in the second periodic report of the UN that Nigeria lacks economic resources to allocate a budget for the promotion and protection of child rights related to early marriage.[782] The UN has also noticed that the insufficient up-to-date and extensive statistical national information retrieving system for data monitoring, evaluation, and analyses[783] has affected the evaluation process of the legislative framework on the protection of the rights of children in Nigeria as the state has failed to measure the effectiveness of compliance or non-compliance. Unfortunately, this ineffectiveness has made the children more vulnerable.[784] More importantly, the report explicitly mentioned inadequate information on measures and strategies utilised to control or prevent the prevalence of abuse, neglect, ill-treatment, and violence of children, along with the promotion of conflict resolution in every state of Nigeria.[785]

Some of the recommendations of the UPR on early and child marriages include:

a) Take further measures to implement the 2010 recommendations by the Committee on the Rights of the Child, especially related to the domestication of the CRC; the right of the child to education, nutrition and health, and protecting girls from early marriage;

[781] Felix Daniel Nzarga, 'Appraisal of Human Right Non Governmental Organizations (NGOs) in Nigeria' (2014) 28 Journal of Law, policy and Globalization

[782] UN Human Rights Council (n. 182)

[783] Ibid 38

[784] Ibe Okegbe Ifeakandu, 'Child Trafficking and Rights Violations: Examination of Child Protection under International and Nigeria Legal Provisions' (2019) 10 Beijing Law Review 1078.

[785] UN Human Rights Council, (n. 182); see also Wilson Ola Diriwari, 'Efficacy of the Legal Frameworks for Child Protection in Nigeria' (PhD Thesis Brunnel University 2017).

b) Ensure more effective protection of children and better promotion of their well-being in every dimension, particularly concerning trafficking and sexual exploitation, excisions, early marriages, and forced labour;

c) Continue to work in favour of women's rights, including the fight against early marriages, to respect the rights of widows, to eradicate female genital mutilation, and to respect sexual and reproductive rights;

d) Adopt measures to address the high rate of early marriages among girls in the northern states of Nigeria, including a review of legislation permitting the marriage of those under 18 years of age and undertaking awareness-raising programmes on the negative implications of early marriage, among others.[786]

The state party report for the third cycle found that Nigeria had made little progress, particularly in implementing the preceding Review's recommendations. The Committee on the Elimination of Discrimination Against Women noted that Nigeria's federal structure, which established a three-tiered system of governance at the national, state, and local levels, posed challenges in incorporating the CEDAW into the national legal order.[787] Referring to the relevant recommendations from the previous review, the United Nations country team stated that According to the UN country team, Nigeria had implemented some of its treaty obligations by enacting the Anti-Torture Act (2017), the Compulsory Treatment and Care for Victims of Gunshot Wounds Act (2017), the Trafficking in Persons (Prohibition) Law Enforcement and

[786] UN Human Rights Council, (n. 163)

[787] UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Nigeria. CEDAW/C/NGA/CO/7-8'(United Nations 2017) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/NGA/CO/7-8&Lang=En>, para. 9.accessed 20 August 2022

Administration Act (2015), the Administration of Criminal Justice Act (2015), and the Violence against Persons (Prohibition) Act (2015). (2015). The country team deemed the proposals partially implemented.[788]

The Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on the sale of children, child pornography, and child prostitution, and on contemporary forms of slavery, including their causes and consequences, stated that Nigeria should ensure that the Child Rights Act is implemented across all the states of the federation.[789]

## 6.9 Summary of Chapter

This chapter has appraised the UN mechanism for monitoring the implementation of human rights treaties of its member states which includes the Universal Periodic Review and the optional protocols, and how these have been effective in combating child marriages globally. Expedient to this discourse is Nigeria's International obligations.[790] In the third cycle, the Nations Periodic Review of the UN reveals that Nigeria is a crucial member of nine Human Rights Treaties of the United Nations including the Convention for the Rights of the Child.

The CEDAW highlighted during the Third Periodic Review session that a significant gap in the work being done on child marriage in Nigeria is an acute lack of evaluation and follow-up to child marriage-related programs, activities, policies, and studies, both by governments and civil

[788] United Nations country team submission, p. 2, referring to UN Human Rights Council, (n. 163) para. 135

[789] UN Human Rights Council (n. 189); also in UN Human Rights Council; Report of the Special Rapporteurs on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, on the Sale of Children, Child Prostitution and Child Pornography and on Contemporary Forms of Slavery, Including Its Causes and Consequences on Their Joint Visit to Nigeria. A/HRC/32/32/Add.2' (United Nations 2016) <https://www.refworld.org/docid/576172674.html>, para. 90(a). accessed 20 August 2020

[790] UN Human Rights Council, (n. 163)

society. It is difficult to analyse the effectiveness and outcome of activities such as awareness campaigns, surveys, and studies since many times no findings are assessed or reported, and there is no follow-up to evaluate the program's influence on the child. This involves a statistical study (how many children were assisted or reached as a result of the programme) as well as an examination of the short- and long-term consequences on the child's well-being. The chapter observed that the UN mechanism does not consider States with dual systems of government, and thus does not provide sufficient engagement through which Nigeria can be held accountable to their international obligations under the United Nations system. Thus, while Nigeria has ratified relevant international and regional human rights instruments regarding child marriage, it has failed to ratify the third Optional Protocol to the CRC thereby exempting itself from sanction in the event of default. The chapter argues and concludes that with the UN mechanisms currently in place, Nigeria can only meet up with obligations on ending child marriage by adopting the Optional Protocols.

# CHAPTER 7: EVALUATION OF NIGERIA'S COMPLIANCE WITH ITS INTERNATIONAL OBLIGATIONS ON CHILD MARRIAGE

## 7.1 Introduction

In the previous chapter, this research analysed the UN regulatory framework and Nigeria's obligation under it. This chapter go on to analyse the concept of the Good Faith Principle in international law and critically evaluate the application of the principle in the context of Nigeria's obligation to end child marriage. It explores the legal framework surrounding child marriage and the principle of good faith while comparing the legal provisions therein with the realities on the ground. Thus, this chapter argues that there are discrepancies between the law as it stands and its implementation in Nigeria.

In the previous chapters of this thesis,[791] Nigeria's constitution was identified as one of the major obstacles to the total elimination of child marriage in Nigeria. Accordingly, the constitution provides for the domestication of all treaties to which Nigeria is a party to before it can have the force of law in Nigeria.[792] This invariably implies that Nigeria is a dualist state and ratified treaties do not automatically have the force of law. Under international law, states are obligated to act in good faith and fulfil their treaty obligations. As noted earlier in this thesis, Nigeria, as a signatory to international conventions and with a constitutional commitment to protect children, has implemented legal measures to address child marriage. However, the effectiveness of these laws often falls short due to discrepancies between legal theory and the practical application of the law.

[791] Chapters 3, and 4
[792] See section 12 of the 1999 Constitution of Nigeria. (This is the dualist status which has been discussed in chapter 3 )

In addition, this chapter will analyse Nigeria's compliance with its international obligations on child marriage, with focus on the United Nations (UN) treaties and other regional treaties. Nigeria's compliance with its international obligations on child marriage is indeed a matter of concern, particularly when evaluated against the Sustainable Development Goals (SDGs) and the doctrine of good faith in international law. The chapter critically assesses the effectiveness of both the Millennium Development Goals (MDGs) and the subsequent Sustainable Development Goals (SDGs) in addressing child marriage in Nigeria. This chapter argues that while the MDGs and SDGs have played a significant role in raising awareness about child marriage and advocating for its eradication, significant challenges still need to be overcome to achieve tangible progress in this area. The chapter further examines how Nigeria can adapt and learn from the Sustainable Development Goals (SDGs) through the United Nations Global Program to address the issue of child marriage.

### 7.2 The Law in Theory and the Law in Practice: The Principle of Good Faith

As King John proclaimed in Magna Carta, "Both we and the barons have sworn that all this shall be observed in good faith and without deceit."[793]

As a 'general principle', good faith forms part of the sources of international law.[794] Although many legal instruments make reference to good faith, none has successfully attempted to define it. As in the words of Justice Stewart of the US Supreme Court, who stated "I shall not today attempt to define [it]...But I know it when I see it",[795] so is good faith principle.

[793] Magna Carta 1215 < https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/ > accessed 20 August 2023

[794] Steven Reinhold (2) UCL Journal of Law and Jurisprudence 2013, 40-63 Bonn Research Paper on Public International Law No. 2/2013

[795] Jacobellis v State of Ohio 378 US 184, 197 (1964) (Supreme Court, per J Stewart)

Good faith as one of the general legal principles imposes moral behavioural standards of honesty, loyalty, and reasonableness in social and legal relationships. According to Talya Uçaryılmaz "Before gaining its legal character in classical Roman law, bona fides or good faith had been understood as one's commitment to his/her own words, fidelity and honesty while symbolizing tacitum in pectore numen: The virtue of loyalty existing in the internal world of the human beings."[796]

Objectively, the good faith principle is used in contractual relationships to relax the rigidity of the common law. But it has also found a place as a principle of international law. The relationships between states are largely contractual as these relationships are created consensually and established by treaties/conventions and other legal documents creating rights and obligations between states. Talya Uçaryılmaz in explaining the rationale for the criteria of good faith stated that

> "…since it is a concept that is sufficiently ambiguous to be applied not only in civil law but also in international law, certain criteria must be specified. Historically, the criteria are determined in the light of the studies of post-glossator jurists which were also the starting point of lawyers such as Grotius and Vasquez who theorized the idea of international law. **The fundamental elements of bona fides are honesty, loyalty, and reasonableness."**

[796] Talya Uçaryılmaz, "The Principle of Good Faith In Public International Law", Oxford Institute of European and Comparative Law Bilkent University Faculty of Law P.3 http://dx.doi.org/10.18543/ed-68(1)-2020pp43-59 Assessed 28 July 2023

### *7.2.1 Good faith in municipal law*

Good faith is a principle derived from man's relationship with one another mostly from contractual relationship. In international law, good faith is applied to ensure that the obligations created by treaties and covenants are not breached. However, in municipal law good faith can be applied to hold government or citizens accountable to one another.

As noted by Tayla, "In the realm of international law, it requires to adopt a standard of behaviour, stressing fidelity to treaties, proportionality and prohibition of the abuse of power for different actors." In the same vein under municipal law, good faith requires to adopt a standard of behaviour, stressing fidelity to the social pact, proportionality, and prohibition of the abuse of power for different actors. This can be understood from the concept of social contracts.

Social contract theory is a key theory used to explore questions about the relationship between citizens and their country's government; obligations of current generations towards future generations; and the shape of public interest obligations of private organizations. It helps to identify the broad content of these obligations.[797]The philosophical concept of social contracts refers to the idea that individuals willingly surrender some of their individual rights and freedoms in exchange for protection and benefits provided by the government or society as a whole.[798] It is postulated "that all men are made by nature to be equals, therefore no one has a natural right to

[797] Stanford Encyclopaedia of Philosophy ; see also Lemmens T, Ghimire KM, Perehudoff K, he Social Contract and Human Rights Bases for Promoting Access to Effective, Novel, High-Priced Medicines [Internet] Oslo Medicines Initiative Technical Report , 2022
[798] Stanford Encyclopaedia of Philosophy, Contemporary Approaches to the Social Contract (20121) < https://plato.stanford.edu/entries/contractarianism-contemporary/ > last accessed 7 August 2023 ; Major philosophers such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau expounded this theory

govern others, and therefore the only justified authority is the authority that is generated out of agreements or covenants."[799]

Also, according to the Internet encyclopaedia of philosophies, in explaining Rousseau beliefs, "The most basic covenant, the social pact, is the agreement to come together and form a people, a collectivity, which by definition is more than and different from a mere aggregation of individual interests and wills."

The principle of social contracts can be attributed to the relationship between government and citizens by determining the moral and political obligations which both parties have towards each other. The principle works by creating a mutual agreement the government and the citizens who have implicitly or explicitly agreed to a set of standards and rules that govern their behaviour; The government upholding the rights and freedoms of its citizens and providing essential services such as security, infrastructure, and public welfare; Citizens fulfilling their obligations to obey the law, pay taxes and participate in democratic processes. By fulfilling these obligations, citizens contribute to the functioning and stability of society.

The social contract also establishes a balance of power between the government and citizens. While citizens surrender some of their freedoms and submit to the authority of the government, they retain certain rights and liberties that the government must respect. Where a government goes beyond its authority or fails to fulfil its obligations, it can be regarded as breaking the social contract. Overall, the principle of social contracts provides a framework for the relationship between government and citizens, emphasizing mutual obligations, rights, and responsibilities. It helps maintain social order, ensure fairness, and protect the interests of both parties involved.

[799] Internet encyclopaedia of Philosophy, <https://iep.utm.edu/soc-cont/> assessed on the 7 August 2023

To clarify the idea of the Social Contract Theory, Frederick Rauscher recommends five variables into which contractual approaches may be analysed, namely: (1) the nature of the contractual act; (2) the parties to the act; (3) what the parties are agreeing to; (4) the reasoning that leads to the agreement; (5) what the agreement is supposed to show.[800]

In the light of the premise above, this research argues that the principles of good faith which is an important concept in contract law can be applied in social contracts. The contracting parties being the government and its citizens must carry out their obligations in good faith by holding their ends of the social contract and not being an obstacle to the success of the other party in performing their end of the contract or from reaping the benefits of the agreed-upon contract.
The same elements of good faith which are honesty, loyalty and reasonableness should apply in upholding obligations under the social contract.

Applying this principle to Nigeria's obligation in municipal laws, the 1999 constitution is the social pact. The preamble of the constitution reads thus:

> We the people of the Federal Republic of Nigeria, Having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, **international co-operation and understanding**; and **to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country**, on the

[800] Frederick Rauscher, 'Kant's Social and Political Philosophy', in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2012)

> principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people. Do hereby make, enact and give to ourselves the following Constitution..[801]

This preamble shows the purpose of the Constitution and demonstrates that the constitution is the social pact which creates a relationship between the government and the people. The emboldened phrases illustrate that the intent of the constitution amongst other things, makes Nigeria dedicated to international cooperation and understanding, which ensures Nigeria's obligation to international law, as well as Nigeria's obligations towards her citizens under municipal law.

Chapter 2 and chapter 4 of the 1999 constitution establishes the obligation of government to the people of Nigeria. However, the governments duty to the people contained under section 15 of the 1999 Constitution found in chapter 2 thereof as explained earlier has been termed as non-justiciable. This non-justiciable clause is contrary to the maxim *ubi jus ubi remedium*.[802] By adding the non-justiciable clause to that chapter of the constitution, this research argues that the rights of the citizens which the government is obligated to protect seem to be eroded and watered down. Also, by removing the enforcement of these obligations, these obligations are now reduced to mere privileges (using the concept of jural correlatives). It is also argued that the non-justiciable clause shows bad faith from the makers of the constitution and contradicts the purpose of the constitution as found in the preamble that establishes the social pact. It also shows bad faith and deceit as it is inconsistent with the term "shall" used in every section of that chapter which presupposes the provision of chapter 2 of the constitution should be a mandatory obligation to which there should be a corresponding right.

[801] Emphasis mine
[802] Ubi jus ibi remedium is a Latin legal maxim that translates to "where there is a right, there is a remedy." It encapsulates the principle that when a legal right is violated, the law provides a corresponding remedy or relief to the aggrieved party.

Notwithstanding this non-justiciable clause, it is argued that child rights which involves protection from early marriage can be enforced and guaranteed under chapter 4 of the Nigerian constitution, African Charter on Human and People's Rights as well as the Child Rights Act in states where it is applicable. Thus, a combined reading of the preamble alongside the chapter 4 of the Nigerian Constitution (which deals with fundamental human rights) can be used to hold Nigeria to its obligations in good faith as it relates to child marriage.

### *7.2.2 Good faith in international law*

As earlier stated, principle of good faith in international law is a fundamental principle that governs the conduct of states and other international actors.[803] It requires them to act honestly, sincerely, and without any intention to deceive or undermine the rights and obligations of other states.[804] Good faith is granted a prominent character in international treaty relations and international economic relations. According to Talya Uçaryılmaz "The reason why good faith is and should be the basis of international legal relations is its essence in natural law."[805]

The principle of good faith is enshrined in Article 26 of the Vienna Convention on the Law of Treaties (VCLT).[806] According to this provision, *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."[807] This inherently means that on the international scene, States are obliged to fulfil their treaty obligations in a *bona fide* manner and refrain from any acts that would impair the rights of other States under the treaty.

[803] Gardiner, Richard B. 'Good faith and international law: A reply to Álvarez.' (1990) 84 The American Journal of International Law, 830-836
[804] Ibid
[805] Talya Uçaryılmaz (n 796)
[806] Vienna Convention on the Law of Treaties (1969)
[807] Ibid Art. 16

Alverez argues that the principle of good faith extends to all aspects of international relations, including negotiations, diplomatic relations, and general state conduct.[808] Gardiner argues that the principle requires states to be honest, cooperative, and respectful towards each other in order to maintain peaceful and mutually beneficial relations.[809]

The International Court of Justice (ICJ) has consistently recognized and applied the principle of good faith in its jurisprudence. In the case of *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain),*[810] the ICJ stated that

> *...the principle of good faith is a general principle, which underlies and regulates the creation and performance of legal obligations and governs the relations between the parties to any agreement.*

In a similar vein, Crawford stated that the principle of good faith in international law revolves around the idea that countries should abide by the obligations and commitments they have undertaken under international treaties and agreements.[811] In the case of child marriage laws in Nigeria, the principle of good faith would require the Nigerian government to honour its international obligations and take all necessary measures to prevent and eliminate child marriages.

As noted in chapters 5 and 6, Nigeria is a signatory to several international treaties and agreements that explicitly condemn child marriage, such as the Convention on the Rights of the Child (CRC)

[808] Alvarez, José E. 'Judging the conduct of nations: A reply to Professor Gardiner.' (1990) 84 The American Journal of International Law,822-830
[809] Gardiner, Richard (n 803)
[810] International Court of Justice. (1970). Barcelona Traction, Light and Power Company, Limited (Belgium v Spain). Judgment of 5 February 1970. Reports of Judgments, Advisory Opinions and Orders, 1970, p. 32.
[811] Crawford, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press, 2002)

and the African Charter on the Rights and Welfare of the Child (ACRWC). These treaties impose legal obligations on Nigeria to protect children from all forms of harm, including child marriage.

By ratifying these treaties, Nigeria has committed itself to implementing and enforcing laws and policies that are in line with the provisions of these agreements. In this context, the principle of good faith requires the Nigerian government to act diligently and in good faith to prevent and eradicate child marriages within its jurisdiction. If Nigeria fails to effectively prohibit child marriages or takes insufficient measures to address this issue, it would be considered a violation of the principle of good faith in international law. This could lead to potential consequences, such as reputational damage, loss of credibility, and possible legal challenges from other States or international organizations.

As highlighted by Hadi, the concept of "good faith" implies that Nigeria should genuinely and actively work towards the elimination of child marriage.[812] International treaties such as the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) emphasize the importance of acting in good faith to protect children's rights, including the right to be free from child marriage.[813] Hadi further argues that the Good Faith Principle requires Nigeria to adopt effective measures to prevent child marriage, protect child brides, and provide access to justice for victims of child marriage.[814] This involves enacting and enforcing relevant legislation that criminalizes child marriage, establishes age limits for marriage, and provides remedial measures. Nigeria must also allocate adequate resources for the

[812] Hadi, A., Abderrazek, A., & Makhlouf, E.. When tradition goes astray: the socio-cultural drivers of child marriage in Nigeria. (2020) 17 Sexuality Research and Social Policy Journal of NSRC 495-508
[813] ibid
[814] Ibid

implementation of these measures and ensure collaboration among relevant stakeholders including government agencies, civil society organizations, and community leaders.

It is worthy to note that good faith principle, not being an explicit rule of international law, sets a limit on the sovereignty of states. According to Steven Reinhold "The principle of good faith therefore acts not as a source of rights or obligations, but more as a means of guiding the exercise of those rights or obligations."[815]

In the North Atlantic Coast Fisheries Case (*Great Britain v United States of America*)[816], the Permanent Court of Arbitration (PCA) held that:

> According to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate at will concerning the subject matter of the treaty, and limiting the exercise of sovereignty of the State bound by a treaty with respect to that subject matter to such acts as are consistent with the treaty.

Thus, application of the good faith principle is based upon the principle of legitimate expectations. According to Halil Rahman "States may legitimately expect other states to act in a certain way. The principle of legitimate expectations provides a strong guideline to states in terms of how to operate on the international stage"[817]

### *7.2.3 Principles of Monism and Dualism and their Effect on Child Marriage in Nigeria.*

The principles of monism and dualism are two theories that explain the relationship between international law and domestic law. Monism suggests that international law and domestic law are

[815] Steven Reinhold (n 794)
[816] The North Atlantic Coast Fisheries Case (Great Britain v United States of America) (Award) [1910] XI RIAA 169, para 188.
[817] Halil Rahman Basaran. 'The Principle of Good Faith in International Law' (2021) 51 Hong Kong law journal 601

a single legal system, where both are applied and enforced simultaneously.[818] In contrast, dualism asserts that these two legal systems are separate entities and require specific incorporation into domestic law before they can be enforced.[819]

Where a country adheres to the monist approach, it means that international law, particularly treaties and conventions addressing domestic issues such as child marriage, automatically becomes part of domestic law.[820] Thus, the obligation to respect international human rights norms and standards, such as the prohibition of child marriage, would be directly applicable and enforceable. The country would be legally bound to implement and enforce laws that prevent and address child marriage in its domestic legal system, in accordance with its obligations under international law.[821]

On the other hand, where a country follows the dualist approach, international treaties, and conventions, including those addressing child marriage, must be expressly incorporated into domestic law through legislation or constitutional provisions to become enforceable domestically. In the case of Nigeria, by the operation of section 12 of the Nigerian Constitution,[822] Nigeria is not automatically bound by international obligations unless it has explicitly adopted them through domestic processes. Therefore, the implementation and enforcement of laws addressing child marriage in Nigeria would depend on whether the country has specifically domesticated international obligations through legislation or other legal mechanisms.

The effect of these principles on child marriage in Nigeria can be seen as a complex issue. Although Nigeria has ratified various international and regional instruments that prohibit child

[818] Nijmann, Janne, and Andre Nollkaemper, eds. *New Perspectives on the Divide between National and International Law*. Oxford: (Oxford University Press, 2007)
[819] Ferrari-Bravo, Luigi. 'International and Municipal Law: The Complementarity of Legal Systems.' In The Structure and Process of International Law. Edited by R. S. J. Macdonald and Douglas M. Johnston, 715–744. (Dordrecht, The Netherlands: Martinus Nijhoff, 1983)
[820] Ibid
[821] Nijmann, Janne, and Andre Nollkaemper, (n 818)
[822] 1999 (as amended)

marriage, such as the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), the effectiveness of their implementation depends on the domestication of these treaties through domestic legislation.[823] Therefore, this thesis argues that understanding Nigeria's legal framework regarding child marriage necessitates an examination of the incorporation of international obligations into domestic law. The absence of specific legislation or constitutional provisions that clearly ban child marriage and provide for its consequences may hinder the effective implementation and enforcement of laws against child marriage.[824] Although Nigeria has domesticated the CRC, through the Child Rights Act, 2003, this thesis has argued[825] that because of the federal nature of the Nigerian constitution and the inclusion of the subject child rights in the concurrent legislative list, the implementation of the CRC is still very challenging as a result of the non-domestication of the Child Rights Act, 2003 by some northern states.

## 7.3 United Nations Programs to Accelerate End To Child Marriage

### *7.3.1 Millennium Development Goals (MDGs) and Child Marriage in Nigeria*

UNICEF's Gender Action Plan (2018-2021) identified ending child marriage as one of five corporate priorities[826]. United Nations Millennium Declaration[827] in 2000 led to the adoption of

[823] Olugbenga-Bello, A. I., Adeoye, O. A., Adeomi, A. A., & Solanke, A. O. 'Prevalence and determinants of teenage pregnancy in Nigeria: a review.' (2015) 15 (4) African Health Sciences, 1106

[824] Akinyemi, A. I., Owoaje, E. T., & Ige, O. K. 'Factors associated with child marriage among currently married women in Nigeria: evidence from the 2013 Nigeria Demographic and Health Survey.' (2018) 18 (1) BMC Public Health, 1

[825] See chapter 2, and chapter 3

[826] UNICEF, *UNICEF Gender Action Plan (GAP) 2018–2021* (UNICEF 2018) <www.datocms-assets.com/30196/1601998378-genderactionplanbrochure-web.pdf>.accessed 11 December 2020

[827] OHCHR, United Nations Millennium Declaration, General Assembly Resolution 55/2 of 8 September 2000 < OHCHR | United Nations Millennium Declaration > accessed 11 December 2020.

the Millennium Development Goals (MDGs). The Millennium Development Goals (MDGs) were a set of eight goals established by the United Nations in 2000 to address global development challenges. [828] These MDGs which are targeted at gender inclusion and women empowerment includes in a nutshell: MDG 1, to eradicate extreme poverty and hunger; MDG 2, to achieve universal primary education; MDG 3, to promote gender equality and empower women; MDG 4, to reduce child mortality; MDG 5, to improve maternal health; MDG 6, to combat HIV/AIDS, malaria and other diseases; MDG 7, to ensure environmental sustainability; and MDG 8, to establish a global partnership for development such as poverty and gender inequality.[829] Of particular relevance to child marriage are two goals: Goal 3 and Goal 5.

***Goal 3*** **- Promote gender equality and empower women**.[830] This goal aimed to eliminate gender disparities in education, employment, and political participation. It seeks to ensure women's equal access to resources, opportunities, and decision-making positions. By addressing aspects of gender inequality, this goal indirectly aimed to reduce child marriage, as it is often driven by the perception that girls are lesser beings who ought to be married off early.[831] While child marriage was not explicitly mentioned in the MDGs, the focus on gender equality and women's empowerment created a conducive environment for discussions and interventions around child marriage. Several countries, including Nigeria, developed national strategies and action plans to address child marriage.[832] However, despite efforts to achieve this goal, child marriage remains a prevalent issue in Nigeria.[833]

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[828] United Nations Development Programme (UNDP) 'The Millennium Development Goals Report' (2015). <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf> accessed 20 July 2020

[829] UN Women, 'MDG Momentum, Gender and Progress towards Meeting the MDGs' (*UN Women*) <www.unwomen.org/en/news/in-focus/mdg-momentum>.accessed August 28, 2021

[830] United Nations Development Programme (UNDP (n 828)

[831] Ibid

[832] Tunde A. and Babalola S. 'Understanding the Socio-Cultural Factors that Contribute to Child Marriage in Nigeria.' (2021) 13 (2) African Social Science Review, 87

[833] Ibid

***Goal 5*** **- Improve maternal health:** This goal aimed to improve reproductive health and reduce maternal mortality rates.[834] As discussed in chapter 3 of this thesis, child marriage is closely linked to early childbirth, resulting in health risks for both mother and child. Achieving this goal required addressing child marriage to ensure that girls have the opportunity to delay pregnancy and childbirth until they are physically, mentally, and emotionally ready.[835]

Other MDGs which are had indirect bearing on child marriage, gender inclusion and women empowerment includes in a nutshell: MDG 1, to eradicate extreme poverty and hunger; MDG 2, to achieve universal primary education; MDG 4, to reduce child mortality; MDG 6, to combat HIV/AIDS, malaria and other diseases; and MDG 8, to establish a global partnership for development[836]

However, the shortcoming of the MDGs as relates gender inequality and women empowerment is that the MDGs fail to address the 'structural causes of gender inequality (including addressing issues such as violence against women, unpaid care work, limited control over assets and property, and unequal participation in private and public decision-making), thus missing opportunities to fully address gender-based discrimination.'[837] For example, the targets and indicators did not fully capture the broader declaration. MDG 3 is an excellent example, since it promotes gender equality and empowers women. The target for MDG 3 is primarily intended to 'eliminate gender disparities in primary and secondary education', while the indicator includes the ratios of girls to boys in primary, secondary, and tertiary education; the share of women in wage employment in non-

[834] United Nations Development Programme (UNDP). (n 828)
[835] Tunde A. and Babalola S. (n 832)
[836] UN Women (n 829)
[837] UN Women, 'A Transformative Stand-Alone Goal on Achieving Gender Equality, Women's Rights and Women's Empowerment: Imperatives and Key Components' (UN Women 2013) <www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/10/UNWomen_post2015_positionpaper_English_final_web%20pdf.pdf> accessed August 28, 2021.

agricultural sectors; and the proportion of women in national legislatures.[838] This approach does not address other undermining factors of inequality such as social perspectives and practices on forced and early marriages, male child preference, FGM, sexual and reproductive health rights among others.

In Nigeria, the MDGs played a crucial role in raising awareness about child marriage and advocating for its eradication. The government, civil society organizations, and international agencies collaborated to develop policies and programs aimed at ending child marriage.[839] For example, in 2003, Nigeria launched the National Gender Policy, which recognized child marriage as a violation of human rights and committed to addressing the practice.[840]

Additionally, Tunde argues that the MDGs led to increased investment in education and health, which indirectly contributed to addressing child marriage in Nigeria Particularly the west and in the east.[841] As more girls gained access to education and health services, they were empowered to make informed decisions and delay marriage.[842] This research however argues that, the impact of the MDGs on curbing child marriage in Nigeria was limited due to various challenges. Firstly, the absence of specific targets and indicators related to child marriage made it difficult to measure progress accurately. While Goal 3 aimed to promote gender equality, there was no specific mention of child marriage or age of marriage in the goal or its targets. Secondly, the focus on gender equality at a broader level did not adequately address the root causes of child marriage such as poverty, cultural and religious factors and other variables as discussed in chapter 2 of this thesis. The practice of child marriage is deeply entrenched in cultural and societal norms, which require

[838] UN Women (n 94)

[839] Nwonu, Christopher Okafor and Ifidon Oyakhiromen, 'Nigeria and Child Marriage: Legal Issues, Complications, Implications, Prospects and Solutions' (2014) 29 Journal of Law, Policy and Globalization 120.

[840] Ibid

[841] Tunde A. and Babalola S (n 832)

[842] Ibid

targeted strategies and interventions to bring about lasting change. Lastly, the MDGs lacked strong accountability mechanisms to ensure implementation and monitoring of goals related to child marriage.[843] This lack of accountability made it challenging to hold governments and other stakeholders accountable for their efforts to address child marriage.[844]

This approach gap has resulted in strategies that have not been wholesome in addressing inequality and women empowerment as human rights-based issues affected by traditions, norms, and perspectives in the society which contributes to inequalities and disempowerment. The effect of this is of dire consequences as can be elicited from the result of the UN-led Post-2015 Inequalities Consultation which stated that 'by not devoting sufficient attention to inequalities, the MDGs may have contributed to a relative neglect of marginalized groups and to widening social and economic inequalities.'[845]

### *7.3.2 Sustainable Development Goals (SDGs) and Child Marriage*

To address this approach gap and to build upon the concluding MDGs, the Member States of the United Nations at the Conference on Sustainable Development (Rio+20)[846] launched a process to develop the Sustainable Development Goals (SDGs). The Sustainable Development Goals (SDGs) were created in 2015 to span fifteen years. The SDGs are made up of seventeen goals one of which to achieve gender equality and empower all women is the Fifth Goal.[847] Among the SDGs' targets is 5.3, which calls for the abolition of all harmful practices, including child, early, and forced

[843]Federal Ministry of Women Affairs and Social Development, Nigeria. 'National Strategy to End Child Marriage in Nigeria 2016-2021.(2019) < https://evawngonigeria.files.wordpress.com/2019/06/national-strategic-framework-for-ending-child-marriage-in-nigeria.pdf > accessed 23 February 2021

[844] Ibid

[845] Ibid., p. 6.

[846] United Nations, 'United Nations Conference on Sustainable Development, Rio+20' <United Nations Conference on Sustainable Development (Rio+20)> accessed 11 December 2020.

[847] United Nations, 'The 17 Goals' (United Nations 2015) <https://sdgs.un.org/goals> accessed 23 February 2021.

marriage, as well as female genital mutilation.[848] The performance indicator for child marriage is the percentage of women aged 20-24 who were married or in a partnership prior to the ages of 15 and 18.[849] Other indicators as agreed on by UNICEF and its partners are

1. Spousal age difference;
2. Percentage of girls 15 to 19 years of age currently married or in a union;
3. Percentage of ever-married women who were directly involved in the choice of their first husband or partner;
4. Percentage of women currently in a polygynous union, by age groups.

The SDGs which are currently in effect built upon the MDGs and address their shortcomings by tackling the underlying determinants of gender inequality. The target captures harmful practices that reinforce inequalities such as female genital mutilation, child marriage, and forced marriage. The indicators serve as yardsticks for assessing progress toward the eradication of these harmful practices.

In line with SDGs target 5.3 to eradicate every harmful practice and promote the rights of women and girls globally, the UNFPA and UNICEF launched the Global Programme. The Programme seeks to achieve SDG target 5.3 by increasing global knowledge of the problem and political commitment to end child marriage and FGM; supporting States to implement appropriate laws and policies; supporting the community-level transformation of social norms and practices; empowering girls and women to exercise and express their rights; increasing access to quality

[848] Ibid.
[849] Ibid.

prevention, protection, and care services; increasing government ownership over relevant programmes and efforts; strengthening data collection and analysis.[850]

The Global Programme was launched in 2016[851] after an inception phase from 2014-2015. It was structured to run as a 15-year program (2016–2030) with the first phase beginning in 2016, the second phase will run from 2020–2023 and the third and final phase from 2024-2030. The Global Programme was launched in 12 target countries that are home to almost 300 million of the world's 650 million girls and women who were married as children.[852] Although based on the criteria discussed further below, Nigeria was not selected as one of the pioneer target countries for the Global programme , Nigeria has been included in the second phase and is currently receiving technical support provided by the Global Programme Support Unit and Regional colleagues for the Action for Adolescent Girls initiative funded by Canada[853].

The explicit mention of child marriage in the SDGs reflects a growing recognition of the importance of addressing this issue. Thus, the SDGs offer a more comprehensive framework for addressing child marriage. They take a multidimensional approach, recognizing that child marriage is not just an issue of gender inequality but also involves economic, social, and cultural factors.[854] This holistic approach is essential for addressing the complex drivers of child marriage.

Nigeria has made some effort to align its national strategies with the SDGs. The National Strategy to End Child Marriage launched in 2016, reflects the SDG target of eliminating child marriage by

[850] UNICEF, 'Harmful Practices' (UNICEF 2018) <www.unicef.org/protection/harmful-practices> accessed February 23, 2021.

[851] UNICEF, 'Child Protection' (UNICEF 2019) <www.unicef.org/child-protection> accessed February 23, 2021; UNFPA-UNICEF, 'UNFPA-UNICEF, 'Global Programme to End Child Marriage Phase I Country Profiles' (2016-2019)' (UNFPA-UNICEF 2016); The Programme is supported by Governments of Belgium, Canada, Italy, the Netherlands, Norway, and UK, the European Union and Zonta International.

[852] UNFPA-UNICEF( n. 850).; these countries are Uganda, Mozambique, Ethiopia, and Zambia in East and Southern Africa; Sierra Leone, Niger, Ghana, and Burkina Faso in West and Central Africa; Yemen in the Middle East and North Africa; and Bangladesh, India, and Nepal in South Asia

[853] UNFPA-UNICEF( n. 27) 21.

[854] Ibid

2030.[855] The strategy outlines key actions to address child marriage, including strengthening legal frameworks, promoting girls' education, and raising awareness about the harmful consequences of child marriage.[856] Nigeria also joined the End Violence Against Children Campaign: This is a worldwide collaboration to stop violence against children that the UN Secretary-General started in July 2016. The collaboration program's thematic emphasis was on SDG goal 16.2: eradicating all kinds of violence against children. Nigeria serves as a trailblazer for this Partnership.[857]

As seen in previous chapters, however, despite these efforts, progress in eliminating child marriage in Nigeria remains slow.[858] Several challenges persist, hindering the effective implementation of the SDG target on child marriage. Firstly, the weak enforcement of existing laws and policies continues to undermine efforts to address child marriage. While Nigeria has laws that prohibit child marriage, they are not effectively enforced, allowing the practice to persist.[859]

Secondly, the lack of education and economic opportunities for girls exacerbates the risk of child marriage.[860] Poverty and limited educational opportunities contribute to families' decisions to marry off their daughters at a young age.[861] Addressing the underlying inequalities and barriers to education and economic empowerment is crucial for eliminating child marriage.

Lastly, pervasive cultural and societal norms continue to normalize child marriage in many communities, especially in northern Nigeria.[862] Changing these deeply ingrained norms requires

[855]UNFPA-UNICEF, 'UNFPA-UNICEF Global Programme to Accelerate Action to End Child Marriage: Phase I Evaluation Summary' (UNFPA-UNICEF 2019), <www.unicef.org/sites/default/files/2019-06/GP-2019-Evaluation-Summary-English.pdf> accessed 21 February, 2021
[856]. Ouedraogo D. 'Child Marriage in Sub-Saharan Africa: A Scoping Review of Its Prevalence, Determinants, and Consequences.' (2020) 14 Child and Adolescent Psychiatry and Mental Health,1-12. https://capmh.biomedcentral.com/articles/10.1186/s13034-020-00347-6 accessed 3 February 2021
[857] End Violence Against Children, 'Nigeria' <www.end-violence.org/impact/countries/nigeria> accessed February 23, 2021.
[858] See the discussion on barriers to ending child marriage in Nigeria in chapter 2
[859] Federal Republic of Nigeria, *Implementation of the SDGs: A National Voluntary Review* (Federal Republic of Nigeria 2017)
[860] Addaney M and Azubike O-O, 'Education as a Contrivance to Ending Child Marriage in Africa: Perspectives from Nigeria and Uganda' (2017) 9 Amsterdam Law Forum 110
[861] Ibid
[862] Akinwumi O, "Legal Impediments on the Practical Implementation of the Child Right Act 2003" (2010) 37 International Journal of Legal Information https://scholarship.law.cornell.edu/ijli/vol37/iss3/10/ accessed July 31, 2023

sustained community engagement and involvement, which can be challenging to achieve in a short time frame.

### *7.3.3 UNFPA-UNICEF Global Program*

The UNFPA and UNICEF are two of the most important UN agencies concerned with women's and children's welfare. The United Nations Population Fund (UNFPA) is the UN's agency for sexual and reproductive health. This organ gives people access to a variety of sexual and reproductive health services, such as voluntary family planning, maternal health care, and sexuality education.[863] The UNFPA is working to eradicate child marriage throughout the world as part of its efforts to reduce gender-based violence and harmful behaviours. Generally, UNICEF is the UN agency responsible for protecting children's rights.

In line with SDGs target 5.3 to eradicate every harmful practice and promote the rights of women and girls globally, the UNFPA and UNICEF launched the Global Programme. The Programme seeks to achieve SDG target 5.3 by increasing global knowledge of the problem and political commitment to end child marriage and FGM; supporting States to implement appropriate laws and policies; supporting the community-level transformation of social norms and practices; empowering girls and women to exercise and express their rights; increasing access to quality prevention, protection, and care services; increasing government ownership over relevant programmes and efforts; strengthening data collection and analysis.

[863] UNFPA, 'About Us' (UNFPA.2018) <www.unfpa.org/about-us> accessed February 23, 2021.

The Global Programme was launched in 2016 after an inception phase from 2014-2015. It was structured as a 15-year program (2016–2030) with the first phase beginning in 2016.

**Phase 1:**

The Programme's Phase I lasted between 2016–2019. During this time the focus was on building critical institutions and systems in selected locations and countries to deliver high-quality services and opportunities for a good number of adolescent girls has yielded outstanding outcomes so far. Its objective has been to educate and mobilize a critical mass of families and communities to promote anti-child marriage attitudes, behaviours, and standards.

**Phase II:**

The second phase will run from 2020–2023. The purpose is to accelerate progress already made in in the first phase by increasing investments in and providing support for both unmarried and married adolescent girls; involving the main stakeholders (including young people as change agents) to initiate shift towards positive gender norms, including the right to choose when and whom to marry; by increasing political support, resources, and gender-responsive policies and frameworks; and by encouraging compliance with applicable laws, including international humanitarian law. ,.

**Phase III:**

This is the final stage of the Programme which is expected to run from 2024-2030. The goal in this phase is for a substantially bigger percentage of adolescent girls to be able to live their childhoods completely free of the threat of marriage. Girls should be able to make better informed choices about their futures in terms of education, career, relationships, sexuality, and family planning, among other things.

As previously mentioned, the Global Programme advocates for young girls' rights to avoid early marriage and childbearing and empowers them to pursue their dreams via education and other options. The Global Programme assists families in developing positive attitudes, enables girls to take charge of their own destinies, and develops the services that enable them to do so. It also tackles the underlying factors that contribute to child marriage by pushing for laws and policies that safeguard girls' rights while emphasizing the critical role of comprehensive statistics in informing such policies.

The Global Programme was launched in 12 target countries that are home to almost 300 million of the world's 650 million girls and women who were married as children.[864] Although based on the criteria discussed further below, Nigeria was not selected as one of the pioneer target countries for the Global programme , Nigeria has been included in the second phase and is currently receiving technical support provided by the Global Programme Support Unit and Regional colleagues for the Action for Adolescent Girls initiative funded by Canada[865].

Since the program's inception it has reached over 12 million girls with life skills training and school attendance assistance.[866]. Over 105 million individuals, including influential community

[864] UNFPA-UNICEF; these countries are Uganda, Mozambique, Ethiopia, and Zambia in East and Southern Africa; Sierra Leone, Niger, Ghana, and Burkina Faso in West and Central Africa; Yemen in the Middle East and North Africa; and Bangladesh, India, and Nepal in South Asia

[865] UNFPA-UNICEF 21.

[866] UNFPA-UNICEF, 'Global Programme to End Child Marriage: Phase II Programme Document (2020–2023)' (UNFPA-UNICEF 2019) 15 <www.unicef.org/media/65336/file/GP-2020-Phase-II-Programme-Document.pdf> accessed February 20, 2021.

members, have also participated in conversation and communication initiatives in favour of teenage girls or other attempts to eliminate child marriage.

Through an integrative and gender-transformative strategy, the Global Programme sought for teenage girls to grow up free of the threat or consequences of marriage before the age of majority, as well as to widen their life alternatives beyond child marriage and early childbirth. Based on of a variety of reports, It may be stated that the program contributed significantly to the fulfilment of SDG 5, which seeks to promote gender equality and empower all women and girls. It has also contributed significantly to the fulfilment of SDG goal 5.3, which calls for the abolition of all harmful practices, including female genital mutilation, early marriage, forced marriage and child marriage.

In tackling child marriage, the Global Programme used a contextualized approach. It handles peer-age and age-disparate marriages and unions, forced and self-initiated marriage and unions, age-disparate marriages and unions, and peer-age and official marriage and informal unions, depending on the subnational setting. The tactics used to address various kinds of child marriage may range from country to country or area to region, and different combinations of interventions may be required in each case. National offices will develop specialized measures to fight the many forms of child marriage that exist today throughout the contextualization of the global theory of change. This study will include an examination of the causes and consequences of child marriage, an assessment of areas of disproportionality, and an acknowledgment of the impact of various intersecting injustices on particular groups of girls and women.

In 2017, experts emphasized the need of multiple legal frameworks to handle issues such as forced marriage and child marriage. However, even while it was unanimously acknowledged that a worldwide emphasis on the adoption of laws prohibiting child marriage was a desirable idea, there

were persistent obstacles in implementing child marriage legislation in diverse legal systems. The passage of legislation that apply to all females, regardless of their personal or religious status, was cited as being essential in bridging the gap between variations in marriage regulations across different legal systems.

As part of its global strategy, the Global Programme acknowledges and condemns additional instances of discriminatory societal and gender standards, as well as associated actions, which are often connected to child marriage. Women and girls are particularly vulnerable to violence, as is their intimate partner violence, sexual exploitation, boy preference and gender-biased sex selection, sexually transmitted infections (such as HIV), female genital cutting, initiation rites, transactional sex, human trafficking, early pregnancy, and marriage-related migration, . This is addressed by the Global Programme in cases where they are connected to child marriage, either as causes of child marriage or as direct consequences of child marriage and early partnerships. To abolish any of these expressions of social and gender inequality, on the other hand, is beyond the scope of the Global Programme.

**The Global Programme Strategies applied in Phase 1**

The general approach of the programme to end early marriage is the contextualized approach: The programme's strategies and mechanisms differ according to the peculiar structure of each of the target countries which may include religious and cultural norms in place, poverty rates, and fertility rates. Each target country develops its unique approaches to deal with different forms of early marriage taking into consideration the peculiar indices of child marriage in the country which include causes of child marriage and areas traversing disparities on some groups of women and girls.

The five main strategies adopted in Phase I of the Global programme are as outlined:

1. **Building the skills and knowledge of girls at risk of child marriage**: this strategy involves empowerment of girls in danger of child marriage through access to education, improvement in quality of education available, and livelihood enhancement and assistance to economically disempowered and out of schoolgirls and their families across the target countries. For example, in Bangladesh, the programme mobilized currently in-school and out-of-school adolescent girls (including boys in conservative districts such as Bhola) into adolescent clubs to provide them with leadership, life-skills development, and peer education training, focused on the prevention of child marriage. For example, in Burkina Faso, door-to-door consultations were held to find girls who were at risk of being married when they were young. Then, the girls were moved into adolescent clubs and sent to life skills classes. Girls at risk of child marriage in junior secondary school also got scholarships to keep them in school and keep them from getting married until they were adults. The Global Programme helped make this happen.

**2. Strengthening the systems that deliver services to adolescent girls** – It does this by making health, education, and safety services easier to get and better. These things include giving people access to water and sanitation and setting up guidelines for training on gender-sensitive and adolescent-friendly services.

3. **Foster an Enabling Legal and Policy Framework**: In this case, National Schemes are used to target vulnerable girls in the area where the program is taking place and help them get jobs and money to stay in school. The first phase of the program was successful because of the way

the program worked to improve the law and policy to stop child marriage. An example of country evidence is Bangladesh, where the government of Bangladesh passed the 2017 Child Marriage Restraint Act with the help of the Global Program. This law sets the minimum age of marriage at 18 for girls and 21 for boys. Also noteworthy is Uganda where its national legislation and policy frameworks developed and implemented were made in alignment with international standards. Uganda's Children's Act (2016) was also reviewed, and the minimum legal age of marriage set at 18. The country further developed a national child policy which provides a National Framework for Ministries, Departments and Agencies (MDAs) to plan and deliver interventions that address every area of children's rights (HIV/AIDS; teenage pregnancy and maternal health; violence against children; alcohol and substance abuse; education enrolment and retention; education achievement; child marriage; child participation; economic empowerment). Further progress achieved through this method is the inclusion of child marriage in their District Development Plans by 40 district local governments, with 15 having budget lines for child protection issues, including child marriage.

In its 2016 Progress Report, UNFPA-UNICEF noted that many countries' laws do not comply with international and regional commitments due to its legal system's pluralist nature. There are explicit conflicts between civil/common law and customary law in other instances. Nonetheless, efforts towards addressing inconsistencies among applicable bodies of law concerning child, early and forced marriage were undertaken by the UNFPA-UNICEF Global Programme, such as the comparative reviews of civil and common law with customary law in Nepal and Sierra Leone.

It should be further noted that the UNFPA-UNICEF Global Programme has had some successes in legal and policy changes in some of the target countries throughout its Phase II also. For

instance, in Nepal, the Children's Act was passed in September 2018, and this law criminalizes child marriage in the country; it was enacted in September 2018.

4. **Supporting households in demonstrating positive attitudes towards adolescent girls**: Among other things, scholarships, and assistance for the needs of girls and their families at risk of child marriage are part of this effort to help them become more economically empowered. Support in demonstrating a positive attitude towards girls extends to educating and engaging parents and community members on the dangers of danger norms that reinforce discrimination against the girl child. Through the multimedia campaign, stakeholder consultation, and focused group consultations, the focus has been expanded from girls to the community members and parents. Men and boys are also consulted and engaged with, being key influencers in the target to end child marriage. In Ghana, for example, thousands of men and boys from all over the country were asked to help find structural inequalities in their own communities.

National Multimedia Campaign: #Raisethebeat4ECM/ Dhol Campaign was launched in Bangladesh. It was meant to teach people about the dangers and injustice of child marriage. More than 190 million people have seen, heard, or used social media about this campaign, which has spread across all three major media platforms. Another programme that proved very successful in Bangladesh is the complementary multisectoral entertainment-education drama-series titled 'Icchedana' ('On the Wings of Wishes'), which was successfully launched to address the well-being and empowerment issues of adolescents. The campaign engages adolescents and their parents through entertainment. The first season of this adolescent-focused drama series completed broadcast on five TV channels and state-owned radio and reached more than 50 million people, including engagement of 10 million through social media.

This strategy is also applied in Burkina Faso through door-to-door stakeholder engagement and large-scale communication and sensitization campaigns, e.g., the national campaign ‘Ne m’appelez pas Madame’ (Don’t call me Madam), over 10 million people have been educated on the dangers of child marriage. In Ethiopia, the approach adopted under this strategy was training and mobilization of more than 2000 religious leaders who in turn reached out to community members with educational messages on the dangers and injustice of child marriage. Field-level monitoring results and the level of increase in reporting cases of child marriage show the effectiveness of this method that the communities in the target areas significantly changed their attitudes towards child marriage and providing support to girls’ education.

Uganda developed a comprehensive communication for development (C4D) strategy to guide girls’ empowerment interventions and address harmful social norms and parental care practices towards girls. This C4D strategy helps people use C4D approaches at different levels (individual, family, community, institutional, and policy) to make sure everyone is included, change social norms and attitudes, improve skills, empower and change behaviour, and get positive results for adolescent girls. It also helps people get more access to social services and support.

5. **Generating and using robust data to inform programmes and policies relating to adolescent girls** : Phase I of the Global Program, according to its report, set the stage for the next generation of research by creating contextualized knowledge on causes and outcomes and disseminating it to relevant parties across countries. This set the stage for the next generation of research. In this way, some of the program's actions have shown that they may be able to give countries and other partners the information they need to expand or advocate for the same things in other countries. The Global Program helps make changes in law that are based on evidence-

based interventions in the education, health, and child protection sectors. This helps to address the complexity of child marriage and its long-term effects.

During Phase I, the Global Program and its partners worked hard to make sure that the minimum age of marriage for adolescent girls was in line with international standards in a number of focus countries (e.g., Bangladesh, Mozambique, and Nepal). They also worked to make sure that civil/common law and customary law were in line with each other. Aside from that, the Global Programme advocated for improvements to discriminatory legislation that restricts the rights of teenage females (e.g., Mozambique revoked the law which transferred pregnant adolescent girls into night schools).

Another project commissioned by Mozambique was a mapping and review of the implementation of the country's national child marriage strategy (2016–2019), which assisted the Global Programme in identifying gaps in which services were not being strengthened and economic opportunities were not being created. This allowed steps to be made that resulted in improved multisectoral cooperation to prevent and treat child marriage and child sexual exploitation and abuse.

To ensure that existing laws were validated, the government of Sierra Leone commissioned a validation exercise, which resulted in a set of recommendations, which were then used by the Law Reform Commission to draft and hold public consultative meetings on a bill titled 'The Prohibition of Child Marriage' in 2018. Among other things, this bill would provide the groundwork for the universal and thorough ban of child marriage in the nation and the establishment of particular measures to protect and empower vulnerable young girls. Unfortunately, despite the passage of three years, the Bill has not yet received legislative approval from Parliament.

In Nigeria, the Global Programme commissioned independent research on the lessons learned, outcomes obtained, and promising practices implemented as part of its Phase I of the Global Programme in the nation and other West African countries, which was completed in December 2019. It was based on the research findings that Phase II of the Global Programme and additional child marriage prevention measures in the area were designed.

**Strategy for Phase II of the Global Programme.**

The UNFPA-UNICEF Global Programme to end Child Marriage: Phase II (2020–2023) Programme Document outlines the framework and articulates the content of Phase II of the Global Programme to end Child Marriage.

Strategies being adopted in the Global programme Phase II are to:

1. Enhance sustainability and impact of child marriage programmes;
2. Strengthen governance to prevent child marriage, including fostering an enabling legal and policy environment, among others;
3. Promote a supportive and gender equal environment;
4. Create and expand opportunities for the empowerment of adolescent girls, and
5. Build partnerships.

In this second phase, the Global Programme is still operational in the 12 countries it was originally set up to help. As part of a plan to end child marriage, this phase will build on what has already been done and speed up the process. In addition, it will also focus on both unmarried and married adolescent girls. The 12 target countries will keep getting a lot of help from the U.S., including money, technical help and oversight, South-South meetings, and knowledge management.

**Legal Status of the UN Sustainable Development Goals**

A common challenge faced by policy makers in implementing and enforcing the provisions of SDG is whether the SDG is a moral or legal concept. What determines if a concept has a moral and legal character depends on the extent of its salience as well as its ability to influence policy and legal decision making. The SDG being a global concern and a concept which the members of the United Nations have committed to, can be said to have some measure of salience. This research has also illustrated instances where the SDG through the Global Program has been able to influence policy and legal decision making. However, while the SDGs are nice to have, it is always left to the member states who are sovereign to determine what rules them. The United Nations on its website equally stated thus:

> The Sustainable Development Goals (SDGs) are not legally binding.
> Nevertheless, countries are expected to take ownership and establish a national framework for achieving the 17 Goals.
> Implementation and success will rely on countries' own sustainable development policies, plans and programmes.[867]

Sustainable development is not a treaty in itself nor a rule of law as to create rights and obligations between states that are legally enforceable. It is at best a soft law or a mere principle of law. The legal status of sustainable development goals leaves implementation to the political will of any government. Unlike treaties, where failure to domesticate can deny member states from enjoying some rights and privileges in the international arena, failure to implement or poor implementation of SDG may not deny a state from any privileges and implementation is left to the whims and caprice of the State. In reality, this leaves room for gaps in the implementation of the SDGs. With

[867] United Nations, 'The Sustainable Development Agenda' <https://www.un.org/sustainabledevelopment/development-agenda/#:~:text=Are%20the%20Sustainable%20Development%20Goals,SDGs)%20are%20not%20legally%20binding> . Assessed on the 28 July 2023

regards to Child Marriage in Nigeria, as argued in chapter 3 of this thesis, the federal system of government in operation in Nigeria stands as a stumbling block to the achievement of the SDGs by year 2030. Furthermore, because the SDGs are mere principles or soft law, it cannot be enforced except in areas where Nigeria has enacted the relevant laws.

### 7.4. Nigeria's Obligation to International Charters and Treaties

There are several international conventions that prohibit child marriage, either directly, or indirectly by prohibiting discrimination against girls or the carrying out of harmful traditional practices against children. This section will examine these treaties/conventions and how Nigeria has practically engaged with the relevant provisions relating to child marriage.

#### *The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964*

The 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages is the first binding UN treaty that prohibits forced and early marriages and requires states parties to eliminate the marriage of girls under the age of puberty, to stipulate a minimum age of marriage and to establish measures for the registration of all marriages.[868] Only 10 Commonwealth member states are party to this convention.[869] Nigeria has not till date, ratified this this convention and thus has not engaged with neither does it have any binding obligation arising therefrom.

[868] Convention on Consent to Marriage, Minimum age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) vol 521, 231
[869] Ibid

***The United Nations Convention on the right of the Child (UNCRC)[870]***

UNCRC is the most comprehensive international instrument that provides a comprehensive protection framework for children. It consists of 54 Articles that set out children's rights and how governments should work together to make them available to all children. Under the terms of the convention, governments are required to meet children's basic needs and help them reach their full potential. Central to this is the acknowledgment that every child has basic fundamental rights. These include among others, the right to:

- Life, survival and development
- Protection from violence, abuse or neglect
- An education that enables children to fulfil their potential

Nigeria has ratified and domesticated this treaty in the Child Rights Act, 2003. Both the Nigeria's Child Rights Act, 2003 and the United Nations Convention on the Rights of the Child share the common objectives of promoting and protecting the rights and well-being of children.[871] The Child Rights Act addresses issues such as survival, development, protection, education, and participation, albeit with some variations in specific provisions to the UNCRC.

While the Child Rights Act in Nigeria incorporates many provisions from the UNCRC, it also includes some additional measures specific to the Nigeria's context. For example, the Act

[870] The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November, 1989. It entered into force 2 September 1990, in accordance with article 49

[871] See section 1, 2 of the Child Rights Act. See also the preamble to the United Nations Convention on the right of the Child (UNCRC)

addresses cultural practices and customs that may be harmful to children, reflecting Nigeria's efforts to tackle these issues within its own cultural framework.

This research argues that while Nigeria has taken significant steps to engage with the UNCRC through the CRC, the challenges posed by the federal structure of Nigeria extensively discussed in chapter 3 of this research continues to hamper on its full implementation. These challenges affect domestication of the international standards outlined by the UNCRC into national law and the enforcement of these laws at the grassroots level. It is important for Nigeria to continue improving implementation mechanisms and raising awareness about child rights to ensure effective protection for its children.

***Universal Declaration of Human Rights (UDHR)***

Nigeria's compliance with the Universal Declaration of Human Rights (UDHR) regarding child marriage has been a topic of concern. The UDHR is a significant international human rights instrument that affirms the inherent dignity and equal rights of all individuals.[872] According to the UDHR, everyone has the right to freely marry and found a family, and marriage should be entered into only with the free and full consent of the intending spouses.[873] Child marriage, as defined in chapter 1 of this thesis involves the marriage of a person below the age of 18, violates these principles as it often involves marriage without the free and full consent of the child. This research argues that, even where a child gives consent to a marriage, the child is incapable of giving consent

[872] Universal Declaration of Human Rights (UDHR): Article 7
[873] Ibid Article 16

because such a child has not attained sufficient maturity to understand the full implications and consequence of such consent.

As discussed in chapter 3, the legal age of marriage in Nigeria is 18 for both males and females, but states have the power to pass laws that allow marriage below this age with parental consent. This provision has resulted in discrepancies across states, creating loopholes that perpetuate child marriage.

In 2013, Nigeria adopted the Violence Against Persons (Prohibition) Act (VAPP Act), which criminalizes child marriage and provides punishment for offenders.[874] However, the implementation and enforcement of the law remain a challenge in some regions. Customary and religious practices often prevail over the law, leading to the continuation of child marriage. Moreover, poverty, limited access to education, cultural norms, and gender discrimination contribute to the persistence of child marriage in Nigeria. These systemic issues demand comprehensive solutions including poverty alleviation programs, educational opportunities, awareness campaigns, and capacity-building initiatives for law enforcement agencies.

### *African Charter on Human and Peoples' Rights*

Nigeria's compliance with the African Charter on Human and Peoples' Rights regarding child marriage will be analysed by examining the relevant provisions of the Charter, Nigeria's legal framework, and empirical data on the prevalence of child marriage in the country. The African Charter on Human and Peoples' Rights, ratified by Nigeria in 1983, contains several provisions

[874] Violence Against Persons (Prohibition) Act (VAPP Act) 2013

that Nigeria should adhere to in order to comply with the Charter's principles regarding child marriage.

Article 2 of the Charter guarantees the right to equality and prohibits discrimination on the grounds of sex, among other factors.[875] This research argues that child marriage, which disproportionately affects girls, infringes upon their rights and is in violation of the Charter.

Under Article 4, every individual has the right to respect for their life, integrity, and security of person.[876] Child marriage often exposes young girls to physical, emotional, and sexual abuse, thereby violating this provision.

In addition, Article 21 guarantees the rights of peoples to freely and fully participate in the cultural life of their choice.[877] While child marriage is deeply rooted in some cultures and traditions in Nigeria, the Charter does not condone harmful practices that violate human rights, including the right to free and full consent to marriage.

The Child Rights Act 2003 expressly prohibits child marriage by setting the legal age of marriage at 18 years for both boys and girls. However as discussed earlier, this legislation is not uniformly implemented across all Nigerian states, as some states have not adopted or effectively enforced it. This lack of uniformity undermines Nigeria's compliance with the Charter. Empirical data indicates that child marriage remains a significant problem in Nigeria. According to UNICEF's 2017 data, Nigeria has the highest prevalence of child marriage in West Africa, with 44% of Nigerian girls married before the age of 18.[878] This data suggests that Nigeria is not effectively enforcing the provisions of the Charter in relation to child marriage.

[875] See Article 2 African Charter on Human and Peoples' Rights
[876] Ibid Article 4
[877] Ibid
[878] UNICEF Nigeria, 'Child Protection' <https://www.unicef.org/nigeria/what-we-do/child-protection> accessed 13 June 2022

Even though Nigeria is signatory to and has ratified the African Charter on Human and Peoples' Rights, its compliance and engagement with the Charter's provisions regarding child marriage is very limited. The country's legal framework does not sufficiently protect girls from child marriage, and there are significant challenges in enforcement across the Nigerian states.[879] The prevalence of child marriage in Nigeria further indicates a need for stronger commitment and implementation of measures to address this violation of human rights.

***The African Charter on the Rights and Welfare of the Child (ACRWC)***

The African Charter on the Rights and Welfare of the Child (ACRWC) specifically addresses the rights and well-being of children and imposes obligations on State Parties to promote and protect these rights. Article 21 of the ACRWC specifically states that child marriage should be prohibited, and State Parties should take legislative measures to ensure the minimum age for marriage is 18 years.[880]

However, it has been argued that Nigeria's compliance with the African Charter is undermined by cultural and religious practices that perpetuate child marriage.[881] Some communities view child marriage as a norm, influenced by socio-economic factors and traditional beliefs.[882] These cultural practices often take precedence over legal protections, resulting in a continued violation of children's rights.

[879] Olugbenga-Bello, A. I., Adeoye, O. A., Adeomi, A. A., & Solanke, A. O. 'Prevalence and determinants of teenage pregnancy in Nigeria: a review.' (2015) 15 (4) African Health Sciences 1106-1116
[880] The African Charter on the Rights and Welfare of the Child (ACRWC)
[881] Gasana, J. M., & Muula, A. S. 'What is the impact of child marriage on maternal and neonatal outcomes in sub-Saharan Africa?' (2015) 25 (4) Ethiopian journal of health sciences, 337-346.
[882] Ibid

Also, the lack of robust enforcement mechanisms, weak law enforcement, and a justice system that may not prioritize cases of child marriage contribute to the persistence of this issue. All these challenges and blockages continue to minimise Nigeria's efforts to engage with the ACRWC to end child marriage. There is a need for increased awareness campaigns, community engagement, and capacity-building initiatives to address this problem effectively.

***UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)***

The CEDAW provides that the minimum age for marriage should not be lower than the age of majority[883] and forbids discrimination between men and women in this respect. While the age of majority varies between countries, UN treaty bodies and agencies recommend the minimum age of majority should be 18 years old, to align with the definition of the child in Article 1 of the UN Convention on the Rights of the Child. CEDAW is also explicit in its guarantee of the right to free and full consent to marriage.[884] In recognition of the fact that children do not have the legal capacity to consent to marriage, CEDAW also provides that the betrothal and marriage of a child shall have no legal effect.[885]

Most Commonwealth countries including Nigeria, have ratified CEDAW, although many continue to maintain reservations relating to marriage and personal laws, which is widely seen as being inconsistent with the object and purpose of the Convention. This is because many violations of the human rights of women and girls occur in the sphere of personal law and family life and directly impact all other rights.[886] Nigeria however clearly did not maintain any reservation on any of these

[883] Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) vol 1249, 13, art 16(1)(b)
[884] Ibid
[885] Ibid Art 16
[886] See the status of ratification and reservations of UN human rights treaties here: UN Treaty Collection, 'Multilateral Treaties Deposited with the Secretary-General'< https://treaties.un.org/pag> accessed 14 August 2023

provisions thereby creating a binding obligation on the country to fully domesticate and apply the CEDAW. This has not been the case in Nigeria.

In fulfilling some its obligations arising under the CEDAW and particularly article 16(2) of the CEDAW which provides that the betrothal and marriage of a child shall have no legal effect and parties to CEDAW must take action to ensure a minimum age for marriage and the compulsory registration of marriage, Nigeria's Child Right Act contains provisions which criminalises the betrothal of children.[887] This is also in line with one of the recommendations of the committee.[888] The CEDAW Committee monitors implementation of Convention rights by all state parties through a periodic review process, during which the Committee makes observations and recommendations to states on measures needed to improve implementation. It also issues General Recommendations to give general guidance to states parties on specific thematic issues relating to proper implementation of the Convention. Thus, in other to determine the extent of Nigeria's compliance with its international obligation arising from the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), it is imperative to analyse the periodic review of Nigeria.

### *7.4.1 Summary of Nigeria's Third Periodic Report on Child Rights and Marriage*

The nation's report indicated that, in furtherance of its international obligations and recommendations from the second cycle, Nigeria has taken further steps to ensure the protection of the child. The government domesticated the Convention on the Rights of the Child as the Child Rights Act and 27 states have so far domesticated the Act. Nigeria enacted the Child Rights Act

[887] See section 20 of the Child Rights Act, 2003
[888] Committee on the Elimination of all forms of Discrimination Against Women, 'General Comment No 21: Equality in Marriage and Family Relations' (1994) UN Doc A/49/38

(Enforcement Procedures) Rules, 2015 for the enforcement of child rights in the Family Courts. Other interventions being implemented by the Government to ensure the protection of the rights of the child include:

(a) The Home-Grown School Feeding Program (HGSFP) – The program is aimed at increasing the enrolment and completion rate at the primary school level. Currently, 5.5 million primary school pupils are beneficiaries. The program has also resulted in improving nutrition and health of the pupils;[889]

(b) The 'Year of Action to End Violence against Children in Nigeria' 2015-2016;[890]

(c) The Launch of a Campaign to End Child Marriage in Nigeria and a National Strategy to End Child Marriage in Nigeria 2017-2021.[891]

The national review draws attention towards the human rights violence against young girls, along with the impunity which makes it possible. With the help of the Special Rapporteur, this has successfully been adopted by a number of states who were prohibiting the implementation of the CRA 2003.[892] The national review stresses the two significant areas including child marriage and genital mutilation. Due to international treaties, Nigeria remains concerned about the consistency

[889] Affiong Imeh Imeh and Oto-Obong Johnson Ekpo, 'Executing Strategic Initiatives in the Management of Home School Feeding Programme: Imperative for National Development' (2017) 1 International Journal of Innovation in Educational Management 1-11

[890] Ibid.

[891] Ibid. see also recommendation 35 in UN Human Rights Council (n. 188)

[892] Natalie Florea Hudson, *Gender, Human Security and the United Nations* (Routledge, 2010)

of the social acceptance and practices of such ill practices in the country. The insufficient and ineffective mechanism in the implementation was due to its internal issues such as religious extremists, influential and corrupt politicians, and poverty, resulting in the increased rate of child marriage.

Again, some of the national blockages to the successful implementation of the spirit of the CRC were highlighted:

1. **Nigeria's federal structure**: Nigeria mainstreamed the provisions of the Convention on the Rights of the Child into national legislation with the Child's Rights Act of 2003. Twenty-five states of the Federal Republic of Nigeria had adopted the law, and the remaining 11 have failed to adopt the CRA 2003 on grounds of contradiction to religion-based personal laws, and this resolution as has been pointed out in this work is enabled by the constitutional framework of Nigeria which makes child marriage an issue which falls out of federal government jurisdiction.[893]

2. **Lack of data:** lack of data on the status of children in Nigeria hinders efforts to implement the CRA. As part of this effort, a National Situation Assessment and Analysis on Orphans and Vulnerable Children had been conducted and the country now had the statistics to facilitate a coordinated response to the phenomenon of orphans and vulnerable children.[894]

[893] UN Committee on the Rights of the Child

[894] Ibid

### *7.4.2 Summary of Stakeholders' Submissions on the Nation's Review*

According to JS15, Nigeria had failed to overcome archaic behaviours that inhibited gender equality, discrimination began even before a girl's birth. [895] The education of boys had been prioritized over that of girls and girls were denied the right to inherit property.[896] Referring to relevant supported recommendations from the previous review, JS1[897] stated that in 2015, the laws on gender-based violence had been consolidated into the Violence against Persons (Prohibition) Act, 2015, which broadly covers physical, psychological, economic, and sexual violence, including rape, as well as harmful traditional practices.[898] As noted in the preceding chapters, the Act is only in force in the federal capital, while several states did not have specific laws prohibiting sexual and gender-based violence. Moreover, Section 55 of the Penal Code, which was in force in the North, specifically allowed husbands to discipline their wives.[899] Hopefully, with the passage of the Violence against Person Act by the National Assembly, this latter legislation would ordinarily repeal or modify the older law.[900]

Referring to relevant supported recommendations from the previous review, Women Consortium of Nigeria, Lagos, Nigeria, and ECPAT International, Bangkok, Thailand (Joint Submission 4); stated that of the 36 states, only 27 had enacted the Child Rights Act, 2003, which had been enacted at the federal level to integrate the provisions of Convention on the Rights of the Child into the

[895] The World Council of Churches, the Christian Council of Nigeria (CCN), the CCN Institute of Church and Society Ibadan, the CCN Institute of Church and Society Jos, Methodist Church Nigeria, Ecumenical Disability Advocates

[896] JS15, p. 2. JS15 made recommendations (p. 15).

[897] Centre for Reproductive Rights, Legal Defence and Assistance Project, and Women Advocates Research and Documentation Centre, New York, United States of America (Joint Submission 1)

[898] JS1, para. 19 and endnote 80, referring to UN Human Rights Council, n. 163, paras. 135.94 (Canada), para. 135.97 (Maldives) and para. 135.98 (Philippines).

[899] JS1 made recommendations (p. 7); See also JS16, p. 9. JS16 made recommendations

[900] *N.S.P.M.C. Ltd, v. Adekoye* (2003) 16 NWLR (Pt. 845) 128; *Trade Bank Plc v. L.I.L.G.C.* (2003) 3 NWLR (Pt. 806) 11; *Akintokun v. L.P.D.C.* (2014) 13 NWLR (Pt. 1423) 1

national legislative framework.[901] JS4 noted that the Department of Child Development, which was responsible for defending children's rights, and the National Agency for the Prohibition of Trafficking in Persons lacked personnel and financial resources, citing a relevant endorsed recommendation from the previous evaluation..[902]

JS12[903] clearly expressed concern about the high rates of child marriage and the need to address the underlying factors that contributed to early marriage.[904] Also, JS16[905] pointed out that state legislation on the minimum age of marriage varied from state to state. Partnership for Justice, Lagos, Nigeria, stated that in the Niger Delta there had been a huge challenge to implement legislation prohibiting child labour.[906] A perusal of both submissions reveals that Nigeria is lacking in its international obligation and that key stakeholders need to do more if it plans to meet the target of eliminating child marriage by 2030.

Factors that need to be taken into consideration in the formulation of a constitutional framework that would enable Nigeria to meet up with international obligations on child marriage are as follows:

[901] JS4, paras 23 and 24, referring to UN Human Rights Council, n. 163, para. 135.83 (Montenegro), 135.86 (Poland) and para. 135.115 (Belgium); See also JS13, para. 13, referring to UN Human Rights Council, n. 163, para. 135.94 (Canada)

[902] Ibid

[903] Lawyers Alert, Makurdi, Benue State, Nigeria; and Southern Africa Litigation Centre, Johannesburg, South Africa (Joint Submission 12)

[904] JS12, para. 3.4, JS12 made a recommendation (p. 5).

[905] Women's International League for Peace and Freedom, Geneva, Switzerland, presenting the submission on behalf of Arike Foundation, Dorothy Njemanze Foundation, Federation of Muslim Women Association of Nigeria, Initiative for Sustainable Peace, West Africa Network for Peacebuilding, Women's International League for Peace and Freedom – Nigeria, Women's Right Advancement and Protection Alternative, Women for Skill Acquisition Development and Leadership Organization (Joint Submission 16);

[906] PJ, p. 4.

(a) **Plural nature and size of the country:** Nigeria's multi-ethnic, multi-cultural, and multi-religious background makes it challenging to harmonize perspectives, tactics, and programs for promoting and protecting child rights;[907]

(b) **Existing Legal System:** Nigerian law is a mix of customary law, received English law, legislation, and Sharia law. The majority of Nigerians follow and are bound by customary and Islamic personal law. These laws affect marriage, inheritance, and traditional powers. Some customary rules violate human rights. After a lengthy period of growing public knowledge of tolerance, liberal disposition on customary affairs, and respect laws and constitutional measures targeted at cultural transformation, the intended result would be achieved.[908]

(c) **Difficulties in breaking through an entrenched mindset on harmful traditional practices affecting the human rights of women and children**.[909]

### *7.4.3 Ratification of International Treaties*

As seen in preceding analysis and arguments, Nigeria has ratified numerous human rights treaties that impose obligations on the authorities to respect, protect, and fulfil the human rights of children

[907] Ibid para 98
[908] Ibid
[909] Ibid

without any form of discrimination.[910] International treaties and acts merely bind those states and countries that signed and ratified them.[911]

International treaties are formal agreements between contracting state parties with the goal of binding the parties to the agreement legally. Their legal status is defined by international law and is formalized into a single or several legal instruments. They might be bilateral or multilateral and typically reached after a series of discussions among member states are concluded. To be bound by a treaty by signing it, exchanging treaty-making instruments with another state, ratifying it, accepting it, giving it approval, or acceding to it are all acceptable methods of expressing consent under Article 11 of the Vienna Convention. If both parties agree, any other method may be used to express consent. As a result, if treaties or agreements involve more than one nation, it may be necessary to go through the process of both signing and ratifying the agreement. The additional provision of Article 26 states that once a treaty has been ratified, a state becomes subject to legal duties under international law immediately. It is required to comply with all the duties imposed by a treaty and, in most cases, cannot evade them without providing a compelling reason. For example, a State cannot argue on the fact that its domestic law precludes it from complying with international treaty duties as an excuse for failing to meet its responsibilities under international treaties.[912] When a state anticipates that its domestic law will prevent it from complying with the treaty's requirements but still wishes to ratify the treaty — perhaps because it meets the requirements in most other areas or because it intends to amend domestic law in the future — the proper course is to ratify the treaty with a reservation to that treaty.[913] To be on the safe side, a

[910] Sharmeen Ahmed, Accountability of International NGOs: Human Rights Violations in Healthcare Provision in Developing Countries and the Effectiveness of Current Measures' (2018) 22 Annual Survey of International & Comparative Law 33.

[911] Leonardo Baccini and Johannes Urpelainen, 'Before Ratification: Understanding the Timing of International Treaty Effects on Domestic Policies' (2013) 58 International Studies Quarterly 29.

[912] Article 27, Vienna Convention

[913] Articles 19-23

state should delay the ratification of a treaty until its domestic laws and policies comply with international legal standards.

The fundamental — and, in many cases, the most significant — prerequisite for ratifying an international human rights pact is that the treaty's provisions be given domestic force in the host country. The most successful method of implementing international human rights treaties is through their implementation at the state level. Individuals – the significant beneficiaries of international human rights treaties — must pursue their rights at home if a state does not respect the treaty in its domestic laws.

The extent to which domestic legislation will be required for each treaty will be determined by whether the state's legal system allows for ratified treaties to have direct legal effect, the nature of the obligations imposed by the treaty, and the current state of a country's human rights framework, among other considerations. For example, when it comes to applying or implementing treaties in the country, Nigeria adheres to the dualist school of thought. This means that international conventions or treaties are not self-enforcing under Nigeria's municipal legal system, even though the country is a signatory to the conventions or treaties in question. However, to be effective, they must first be adopted by the National Assembly as part of the country's municipal laws before they can be implemented. A comprehensive mechanism for converting an international convention or treaty into a Nigerian municipal law is laid forth in Sections 12(1), (2), and (3) of the 1999 Constitution (as amended). The following are the provisions of the section:

> 12. (1) No treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

> (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

In the case of *Abacha v. Fawehinmi*,[914] the Supreme Court of Nigeria stated that an international treaty entered into by the Government of Nigeria does not become binding until it is incorporated into law by the National Assembly.[915]

Also, the court opined that an international treaty has no legal effect unless it is enacted into law by the National Assembly and that the terms of an international treaty are not justiciable in Nigerian courts until they are enacted into law by the National Assembly.[916] In the same decision, the Supreme Court defined the position of a treaty established as a legitimate law in Nigeria by holding that, despite its "international flavour," such a treaty is subject to the Nigerian constitution and can be repealed just like any other piece of legislation.[917]

When implementing an Act to implement a treaty ratified by Nigeria, the National Assembly does not need to consult the states if the treaty's subject matter falls within the federal government's exclusive legislative competence as defined in the Second Schedule, Part I of the 1999

[914] Abacha's case (n. 553)
[915] Ibid. 288
[916] Ibid.
[917] Ibid. 301

Constitution. The National Assembly may also pass an Act to transform a treaty with subject matter that falls within the scope of the Concurrent Legislative List contained in Section II of the Second Schedule of Part II of the 1999 Constitution. However, such legislation is not applicable in any state other than the Federal Capital Territory of Nigeria unless all the states have ratified the treaty.

When read together, this is the net effect of sections 12(2) and (3) of the 1999 Constitution (as amended). Although subsection (2) empowers the National Assembly to enact laws "with regard to topics not included in the Exclusive Legislative List for the purpose of executing a treaty," it implies that the authority extends to making laws with respect to matters on the Concurrent Legislative List and matters that are otherwise residual for the states and not included on the exclusive or concurrent lists. Since subsection (3) requires the approval of any legislation passed by the National Assembly pursuant to subsection (2), it follows that if the law is not ratified by the Houses of Assembly of the states, the law is rendered inoperable because article 3 prevents its enactment in the first instance.

These provisions are intended to ensure that state legislatures, which would otherwise have exclusive legislative authority over residual matters and share legislative authority with the National Assembly over matters listed on the Concurrent Legislative List, have a say in implementing treaties that will have an impact on their respective states. On the other hand, this clause represents a plausible snag in the National Assembly's efforts to domesticate treaties because obtaining approval from a majority of 'all' of the States Houses of Assembly is virtually difficult.

In general, treaties between Nigeria and other subjects of international law do not become domestic laws unless and until they are officially domesticated, that is, converted into laws by the National

Assembly, which takes place every five years. However, the National Assembly has demonstrated little interest in carrying out this crucial constitutional duty throughout the years, as evidenced by the fact that most treaties to which Nigeria is a party have not been domesticated. If the people of the countries that have signed international treaties do not recognize the value of the agreements, the treaties will remain only legal instruments. While ratifying a treaty within the international community's framework is essential, it is even more critical for a sovereign state to incorporate the treaty into its domestic legal system, integrate it into its national standard, and declare its domestic law. As pointed out earlier, numerous treaties have not been domesticated many years after their ratification. Moreover, as a result, the Nigerian legal system has been deprived of the necessary support and complementarity that it should have derived from those treaties that have been ratified but not yet domesticated.

In the case of *Cameroon v. Nigeria*[918]. The International Court of Justice (ICJ) did not accept the argument that the Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified. Thus, while in international practice, a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it entirely up to States which procedure they want to follow.'[919] Therefore, referring to the Maroua Declaration, the ICJ rejected the argument of Nigeria that a treaty was invalid and nonbinding according to international law as it was merely signed by the

[918] Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v Nigeria, Judgment, Preliminary Objections, [1998] ICJ Rep 275, ICGJ 64 (ICJ 1998), 11th June 1998, United Nations [UN]; International Court of Justice [ICJ] , par. 264.

[919] Ibid

Nigerian head but not ratified at the time by parliament or any other government process.[920] The ICJ held that the treaty was valid and came into effect as soon as the Head of State signed it.[921]

Grace et al. argue that any treaty related to child rights must be ratified and domesticated by the National Assembly.[922] As the issue of child marriage is included in the residual legislative list of Nigeria, the National Assembly cannot ratify it without having recourse to the Houses of Assemblies of the states.[923] Precedence has shown that the Northern Islamic states will not agree to this. This blockage limits the extent to which the House of Assembly of the States can influence the implementation of the CRA. This, in turn, limits the ability of the National Assembly to ratify and domesticate the treaty related to child's rights for the country.

Concerning the Vienna Convention on the law of treaties, a federal or central government has a lawful tendency to conclude treaties validly and to ratify treaties on behalf of its state governments. Article 2 of the Convention provides:

> ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty[924]

[920] Ibid

[921] Ibid Par 265

[922] Grace Nkiruka Ele, Brian O Ogbonna, M. Ochei Uche and Valentine Odili, 'Assessment of National Health Insurance Scheme's (NHIS) Effectiveness in a Tertiary Teaching Hospital in Southeast Nigeria' (2017) 13 Journal of Advances in Medical and Pharmaceutical Sciences 1.

[923] Felix Daniel Nzarga,( n. 781)

[924] Vienna Convention on the Law of Treaties Article 2; The Convention goes further to state:

> In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government, and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited; (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Thus, the researcher argues that it is clear the Convention intends to ensure a wholehearted implementation and domestication of the treaty by the State party. However, the cosmetic approach of Nigeria's legislature in adopting the Convention as an Act of the National Assembly does not reflect the spirit of the Convention.

As stated in Chapter 3, legislative powers are neatly divided between National and State Assemblies. The exclusive legislative list contains a list of items such as arms, aviation, census, citizenship, implementation of treaties relating to matters on the exclusive legislative list, etc.,[925] that only the National Assembly may legislate on. The concurrent legislative list contains items on which both the National and State Assemblies may legislate.[926] Matters that do not fall within these two lists are considered to be within the residual legislative list.[927]

By virtue of Item 31 of the exclusive legislative list falls within the purview of the exclusive legislative list. This means that only the National Assembly is empowered to domesticate treaties on matters on the exclusive list. In other words, a treaty affecting a matter in the exclusive legislative list will come into force in Nigeria with the enactment of the National Assembly.

However, if the matter falls within the concurrent or residual list, the treaty also requires the approval of the majority of the State Houses of Assembly. In this vein, Section 12(2) and (3) of the 1999 Constitution provide as follows:

[925] Section 4(3); Schedule II Part 1, 1999 Constitution (as amended)
[926] Section 4(4) & (7); Schedule II Part 2, Ibid.
[927] Ibid

> (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.

Women, children, and human rights are not included in the exclusive and concurrent lists; placing them under the residual list.[928] It follows, therefore, from sub-section 3, that no law passed by the National Assembly concerning the implementation of a treaty dealing with women or children will apply to all states of the federation in Nigeria automatically. It will require the approval of at least 23 State Houses of Assembly.

This is why the Child's Rights Act, though domesticated by the National Assembly, is not applicable in any other state outside the Federal Capital Territory, and State Houses of Assembly are now being called upon to pass the law in their various states. Adam examines that the provision constitutes a considerable clog in the National Assembly and domestication of treaties as to secure ratification of every State House of Assembly is impossible when it comes to early marriage or protection of children.[929] Umaret al. discovered that there are complex international legal problems in Nigeria that oppose international law implementation.[930]

[928] Section 4(7)(a) and (b), 1999 Constitution

[929] Ibraheem Salisu Adam, 'An Empirical Investigation of the Efficiency, Effectiveness, and Economy of the Nigerian National Petroleum Corporation's Management of Nigeria's Upstream Petroleum Sector' (Ph.D. Thesis, Robert Gordon University 2020).

[930] I Umar, RS Samsudin and M Mohamed, 'Appraising the Effectiveness of Economic and Financial Crimes Commission (EFCC) in Tackling Public Sector Corruption in Nigeria' (2017) 7 Journal of Advanced Research in Business and Management Studies 1.

Under the flaws in the ratification of international laws, Olubunmi et al. recommend a watering down of this ratification process for passing and enacting bills related to children into law.[931] Courts of Nigeria could have recourse to treaties that are still ratified by the federal government because it assists in interpreting the CRA.[932] After signing any treaty, it is because it would be a prime responsibility to refrain from any act that could defeat the purpose or object of the treaty. It is another infringement of international law by Nigeria as its legal pluralism poses resistance to the effective implementation of the CRA 2003,[933] as discussed in Chapter 2. Such infringement can be gleaned from the case of *Abacha v. Fawehinmi*[934] which raised a clash between the African Charter and Nigerian domestic laws. In this case, the appellant was arrested and detained by the respondents representing the then-military government in the country. The appellant challenged his detention by suing in the Federal High Court. The respondents raised a preliminary objection arguing that the jurisdiction of the Court to hear the case had been ousted by the State Security (Detention of Persons) Decree[935] and Constitution (Suspension and Modification) Decree.[936] The appellant contended that the Court had jurisdiction to hear the case. He relied on the provisions of the African Charter, which have been enacted locally in Nigeria as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[937] The Charter forbids arbitrary arrests and detention and gives any person so detained a right of access to the court.[938] The Supreme Court was called upon to determine the status of the African Charter, whether it was inferior to Military

[931] Omoniyi Adesoji Olubunmi, (n. 762)

[932] Dauda Salihu and Muhammad Chutiyami, 'Trends of Child Trafficking Situation in Nigeria and a Way Forward' (2016) 6 Research on Humanities and Social Sciences 31

[933] Talent Mano, 'A Critical Evaluation of the Effectiveness of International Joint Ventures in Enhancing Performance of an Entity: A Case of RSC-Steelforce (Pvt) Ltd' (Bachelor Dissertation, Midlands State University 2018) <http://ir.msu.ac.zw:8080/xmlui/handle/11408/3689>.accessed 2 February 2023

[934] Abacha's case (n. 553)

[935] Decree No 2 of 1984, as amended.

[936] Decree No 107 of 1993

[937] Cap 10 Laws of the Federation of Nigeria, 1990.

[938] See Article 7, African Charter

Decrees, the court held that the provision of Decrees and domestic laws are superior to the charter and thus, breached its international obligations. It follows therefore that; Nigerian courts will be ready to give priority to domestic laws over international treaties protecting the rights of the child because it will not incur any liability for breaching its international obligations.

### *7.4.4 Ratification of the Optional Protocols*

The 3 optional protocols available under the Convention on the Rights of the Child (CRC) have been discussed extensively in chapter 6. While it is evident that Nigeria requires external assistance in combating child marriage and providing protection for children generally, it has not made way for external assistance by the non-adoption of the third Optional Protocol. The Article allows the committee to make recommendations for financial and technical assistance to a State party to effectively comply with the provision of the Convention on the Right of the Child and its Optional Protocols. However, it should be noted that going by the provision of Article 15(1) and (2), the authority of the Committee to seek external assistance on behalf of a country is mainly discretionary and subject to the consent of State parties. So, where a State party gives no consent, the mechanism put in place by the Convention and its Optional Protocols in addressing child rights violations is rendered helpless. Nigeria's failure to sign or ratify the third Optional Protocol deprives children in Nigeria, or interest groups, of direct access to file a complaint or have a complaint filed on their behalf before the CRC in case of a violation of their right not to be subjected to child marriage. It also deprives Nigeria of the benefit of the provision allowing the CRC to take steps to procure such external assistance as the country may require to help end child marriage.

## 7.5 Summary of Chapter

In this chapter, this research explored a plethora of issues as regards Nigeria's compliance with its obligations towards ending child marriage. It was reiterated that Nigeria is a dualist state and ratified treaties do not automatically have the force of law in Nigeria. Thus, Nigeria is not automatically bound by international laws it has signed up to unless it has explicitly adopted them through its domestic processes. Therefore, the implementation and enforcement of laws addressing child marriage in Nigeria would depend on whether the country has specifically domesticated international obligations through legislation or other legal mechanisms. In analysing Nigeria's compliance, the principle of good faith was employed, and it was evident that there are glaring discrepancies between the law and its implementation.

Again, looking at Nigeria through the lens of principle of good faith, it was shown that it has made efforts to align its national strategies with the SDGs, and it has joined the End Violence Against Children Campaign since 2016. Nigeria has also ratified treaties like the CRC, and ACRWC. Yet, the weak enforcement of laws and ineffective implementation of the SDG's target on child marriage has made all its efforts done in good faith to be of very low impact. Thus, in this chapter it has been elucidated that the law as it is in theory is a far cry from what is obtainable in practice in Nigeria.

It is obvious that Nigeria does not lack the needed laws to combat Child marriage. In fact, this research maintains that Nigeria has the more than enough laws within its legal framework to fight child marriage. However, it is not enough to have these laws or ratify them in good faith. There is a desperate need for Nigeria to take action against Child Marriage, in a way that moves beyond legislation to setting up effective structures that yield an impact that can be measured and built on.

This makes it necessary for Nigeria to pay attention to the obligations outlined in this chapter and take moves toward strengthening the implementation of its legislation to eradicate child marriage.

The various UN programs (MDGs, SDGs and the Global Program) were analysed side by side with the extent to which Nigeria has engaged with them vis-à-vis how these programs have impacted the country. It was also noted that even though these programs do not have a binding effect on any country and can at best be regarded as soft or persuasive instruments of change, they can still affect policy change.

# CHAPTER 8: CONCLUSION AND RECOMMENDATION

## 8.1 Overview of the Thesis

This thesis has examined extensively the issue of child marriage in Nigeria, the problems associated with child marriage as it relates to the Nigerian child, the concerns raised by the sociocultural and religious barriers that hamper the efforts to end child marriage; the Nigerian legal framework and the extent to which it preserves child marriage. It further analysed the AU and UN mechanisms for ending child marriage and the degree to which Nigeria has been engaging with these mechanisms. In the preceding chapter, it has questioned and analysed Nigeria's compliance with its international obligations on child marriage against the backdrop of the law in theory and the law in practice.

The main aim of the thesis was to evaluate the extent of Nigeria's compliance with international law requirements to end child marriage. The basic research question and sub-questions were formulated as follows:

A. *To what extent does the Nigerian Constitution and the Federal System of government in place in Nigeria impact child marriage in Nigeria?"*

i. To what extent is Nigerian law in compliance with international laws and norms on child marriage and why?

ii. How can the international initiatives of the United Nations and the African Union, help to contribute to Nigeria ending the practice of child marriage?

In this concluding chapter, there will be a summary of the research findings and how these findings address the research questions. The answers given provide justification to question if Nigeria's legal system as it is today is suitable to end child marriage and the problems associated with it.

In addition, this chapter makes workable recommendations on how the international perspectives examined in the course of the research can be applied to reform Nigerian law with the goal of ending child marriage in focus.

## 8.2 Summary of Findings on The First Research Question –

### *To What Extent Does The Nigerian Constitution And Federal System Of Government In Nigeria Impact Child Marriage In Nigeria?*

It is necessary to remind us that Nigeria's constitution is supreme, with the effect that its provisions prevail over any legislation, law, or system of laws, and any law which is inconsistent with the provisions of the constitution is void.[939]

Against the backdrop of this premise, three major hurdles extensively analysed in Chapter 3, embedded in Nigeria's constitution, stand in the way of Nigeria's efforts to comply with international norms on child marriage. The first relates to the 'constitutional lists' formulation associated with the country's federal structure and its implication for legislation over child rights. The second relates to the constitution's recognition of marriage under customary law and Islamic law and, more importantly, its non-interference with the imperfections of these personal law

[939] Section 1, 1999 Constitution

regimes. The third relates to the sanctity of the 'constitutional lists' even in the context of treaty domestication.

The implication of the current constitutional formulation described above is that there is an indirect constitutional sanction of legal regimes permitting child marriage, albeit unintended. Even more disturbing is that a conjunctive reading of the entire constitution, with the lenses of a cynic, may support the argument that this effect is not unintended. For instance, with respect to the right of a Nigerian citizen of full age to renounce her Nigerian citizenship, the constitution provides that 'any woman who is married shall be deemed to be of full age.'[940] In light of such attribution of adulthood to every married female (including children) in the constitution (albeit in respect of a different matter), it is not unlikely that the carve-out of Islamic and Customary law marriages in Item 61 of the Exclusive Legislative List might have been intended by the drafters of the constitution to preserve child marriage as a traditional practice.

### 8.3 Summary of Findings on the Second Research Question –

***To what extent is Nigerian law in compliance with international laws and norms on child marriage?***

Based on the analysis in chapters 5, 6 and 7, the rules and norms of international law pertinent to child marriage are set out in the following international treaties, charters and declarations within the UN and AU frameworks – ICESCR, ICCPR, CEDAW, CRC, CRPD, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child. As analysed, a common thread through most of these

[940] Section 29(4), 1999 Constitution

treaties is the requirement for marriage to have the free and full consent of both parties, which is an element lacking in child marriage. Again, as drawn out in chapters 5 and 6, Nigeria has ratified all but one of the key international instruments earlier identified, indicating at least an intention or a will to end child marriage, a step in the right direction.

However, while Nigeria has been engaging in several positive ways, the country still falls short of international laws and norms on child marriage, including the requirements of treaties ratified by the Nigerian government.

The analysis in chapters five and six reveals that Nigeria falls short of three major, discernible sets of standards of international law relating to child marriage.

The first standard is the requirement to specify a minimum age for marriage and to prohibit child marriage and betrothal. This is a requirement of CEDAW and the AU treaties (the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child).[941] As noted earlier, Nigeria has attempted to meet this requirement by enacting the CRA 2003 which specifies the minimum age of 18 for marriage and penalises the betrothal of any person below the minimum age. However, while this would appear, superficially, to satisfy the requirements of the treaties, it does not fully satisfy the requirements in reality.

As extensively discussed in Chapter 3, as a result of Nigeria's federal structure and constitutional configuration, the CRA is only applicable, by default, in the Federal Capital Territory (just one of the 37 geo-political divisions of Nigeria) because the enacting authority (the National Assembly)

[941] CEDAW Article 16; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 6(b); and African Charter on the Rights and Welfare of the Child art 12(2).

only has competence to legislate on matters of child rights relating to the Federal Capital Territory. By virtue of Nigeria's constitutional structure, the CRA would not apply to the other 36 States until the State legislatures (Houses of Assembly) enact the law for their respective States. This state of affairs is largely attributable to deeply rooted religious influences analysed in Chapter 2.

Upon a cursory reading of the foregoing, one may inadvertently imagine that, since the majority of the States in Nigeria have adopted the CRA, Nigeria is in substantial compliance. However, such a conclusion might prove erroneous for the very important reason that the practice of child marriage (even before the enactment of the CRA) is and has always been, prevalent in the northern States which are yet to enact the law in their jurisdictions. Consequently, children in the remaining 9 States that have not domesticated the CRA remain exposed, unprotected by the provisions of the Act. Therefore, Nigeria still falls short of the requirements of CEDAW and the aforementioned AU treaties to specify a minimum age for marriage, and to prohibit child marriage and betrothal.

The second standard that Nigeria continues to fall short of is the requirement for marriage to be entered into only with the free and full consent of the intending spouses. This is a requirement of the UDHR, ICESCR, CEDAW, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[942] Nigeria's constitution recognises marriage under the Marriage Act, customary law marriage, and Islamic law marriage.[943] While the Marriage Act[944] (and the related Matrimonial Causes Act[945]) enshrines the international law standard of free and full consent, this standard is not expressly guaranteed under customary law and Islamic law as practiced in Nigeria. In particular, the flexible yardstick for consent and adulthood required for

[942] UDHR art 16, para 2; ICESCR art 10(1); CEDAW art 16; and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 6(a).

[943] See Constitution of the Federal Republic of Nigeria, 1999 (as amended), Second Schedule, Part 1, Item 61.

[944] Marriage Act, Cap M6 LFN 2004, Section 18.

[945] Matrimonial Causes Act, Cap M7 LFN 2004, Section 3(1)(e).

marriage under Islamic law as practised in Nigeria falls short of the international law requirement to specify a minimum age for marriage, require full and free consent, and prohibit child marriage and betrothal. Also, the indirect constitutional sanction of legal regimes permitting child marriage (exacerbated by the attribution of adulthood to every married female albeit in respect of a different matter) serves to frustrate efforts to bring Nigeria in compliance with international law standards.

This state of affairs has dire consequences for children and women in Nigeria, especially in the North West and North East of Nigeria, where 68 per cent and 57 per cent of women aged 20-49 were married before the age of 18.[946] Child marriage limits economic opportunities for child brides, significantly restricting and on many occasions, thwarting their ability to remain in school to complete their education, and within the home of child brides, there are elevated risks of domestic violence.[947] In addition, according to data by UNFPA-UNICEF, child brides are more likely to become pregnant before their bodies are physically mature, increasing the risk of age and pregnancy-related complications, and maternal and new born mortality and morbidity. Other dangers child brides face includes lack of access to sexual and reproductive health rights, inability to negotiate safer sexual practices, deciding whether to have children and how to space them and making informed choices about their sexual and reproductive health.

### 8.4 Findings on the Third Research Question-

***How can the international initiatives of the UN and AU help Nigeria to end child marriage?***

Based on the analyses in chapters 5, 6 and 7, this research has found that mechanisms abound within the UN and AU systems that can be used to ameliorate the difficulties posed by the current

[946] Girls Not Brides, 'Nigeria' <Nigeria - Child Marriage Around The World. Girls Not Brides> accessed 18 December 2020.
[947] UNFPA-UNICEF (n. 7) 3

state of Nigerian law impacting child marriage in achieving target 5.3 of the SDGs: *Eliminate all harmful practices, such as child, early and forced marriage, and female genital mutilation by 2030.*

As highlighted in chapter 6, the various UN international human rights conventions have a corresponding treaty monitoring body through which the work on human rights as contained in the treaty is carried out. Treaty monitoring bodies also develop 'General Comments' or 'General Recommendations', which guide implementation of the treaty and authoritative interpretations of treaty provisions. Some committees also receive individual complaints of human rights violations, which they adjudicate to determine if a state has violated the treaty. For example, the third Optional Protocol provides the option of submitting a complaint in the name of an individual or group of individuals,[948] accommodating situations where a violation of a child's rights may involve individuals who cannot lodge a complaint due to either their age, illiteracy, or other limitations.

Nigeria having signed and ratified the first two optional protocols but refusing to either sign nor ratify the third Optional Protocol[949] means that children in Nigeria cannot have direct access to file a complaint or have a complaint filed on their behalf before the CRC in case of a violation of their rights. This constitutes a clog in the enforcement of children's rights in Nigeria. Also, by failing to ratify this Optional Protocol, Nigeria cannot benefit from the provision allowing the CRC to take steps to procure such external assistance as the country may require to help end child marriage.

[948] Ibid Article 5

[949] OHCHR, 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org/> accessed 4 July 2021.

Also, we have The Special Procedures of the Human Rights Council[950] are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.[951] They monitor the human rights situation in countries through visits, act on complaints of alleged human rights violations by sending communications; conduct thematic studies and organise expert consultations; contribute to the development of international human rights standards; engage in advocacy and raise public awareness, and provide advice for technical cooperation to Governments.

Any individual, group, civil society actor, or national human rights body can submit information to the Special Procedures mandate holders, whether direct or indirect victims of the alleged violations. Submissions need to be an accurate account of the alleged violation, and information may be submitted using an online submission tool.[952] Unlike with complaints received by the CRC according to the third Optional Protocol to the CRC, information can be received, and communications issued irrespective of whether an alleged victim has exhausted domestic remedies and whether the concerned stakeholder has ratified international or regional human rights instruments.

On 25 October 2013, Nigeria extended a standing invitation to the Special Procedures.[953] A standing invitation is an open invitation extended by a government to all special thematic procedures, implying that the State will always accept requests to visit from all special procedures.

[950] The Human Rights Council is an inter-governmental body within the United Nations system, comprising 47 UN member states, responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.

[951] OHCHR, 'Special Procedures of the Human Rights Council' <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> accessed 17 July 2021.; They are non-paid and elected for 3-year mandates that can be reconducted for another three years. The experts report annually to the Human Rights Council, and the majority of the mandates also report to the General Assembly

[952] The online submission tool is available at <spsubmission.ohchr.org> accessed 17 July 2021.

[953] OHCHR, 'Standing Invitations' <https://spinternet.ohchr.org/StandingInvitations.aspx> accessed 17 July 2021.

In light of this, the Special Procedures can be used to mount pressure and hold Nigeria accountable to its commitments to end child marriage.

Other mechanisms already discussed in chapters 5 , 6 and 7 of this thesis that can prove useful to Nigeria in its quest to end child marriage include the following : The Committee on the Elimination of Discrimination Against Women, Universal Periodic Review, The Human Rights Committee, The UNFPA-UNICEF Global Programme, African Commission on Human and Peoples' Rights and its Special Mechanisms, Special Rapporteur on the Rights of Women in Africa, African Court on Human and Peoples' Rights[954] and African Committee of Experts on the Rights and Welfare of the Child.

## 8.5 Recommendations

Two premises are clear from all the foregoing analysis and findings:

1. The Nigerian federal government and the international community agree in principle that there should be an end to child marriage, hence the attempt by Nigeria to comply by enacting the CRA.

2. Despite the aforementioned agreement and attempt, there remains a gap between intention and reality, hence the persisting noncompliance by Nigeria with international

[954] The African Court on Human and Peoples Rights will be succeeded by an African Court of Justice and Human Rights, once the Protocol on the Statute of the African Court of Justice and Human Rights comes into force. The Protocol provides for the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.

norms, as summarised in the findings on the first research question. This further buttresses the fact that the law in theory is not the same as is obtainable in practice.

In light of the premises identified above, it is not enough to recommend 'the implementation of the UN and AU mechanisms.' A workable solution must propose 'how' this can be done given Nigeria's peculiar context with the hurdle posed by the 'constitutional lists' and the religious perspectives underpinning it, both of which have frustrated past efforts to end child marriage in Nigeria. In order words, a workable answer must be holistic.

This research posits that such a workable solution should be **four-pronged**, comprising four elements that must be applied complementarily. Although a couple of the elements are weightier than others, neglecting any one element will result in an outcome not much different from the current reality. However, the elements do not necessarily have to be adopted chronologically; they can be adopted simultaneously.

These four complementary elements as follows:

A. Activation, operationalization and implementation of the UN and AU Mechanisms;

B. Scaling the constitutional obstacles;

C. Persuasive engagement with the religious perspectives, and

D. Strengthening existing institutions.

***Activation, Operationalization and Implementation of the UN and AU Mechanisms***

The UN and AU mechanisms identified above will prove very useful in helping Nigeria end child marriage. These relevant UN and AU mechanisms as a matter of urgency should be 'activated', 'operationalized' and 'implemented' in order to hold Nigeria accountable to its commitments to end child marriage. In particular:

**Activation**: Two notable mechanisms are yet to be 'activated' by Nigeria in order to increase the government's impetus to end child marriage. First is the (third) Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure which gives children who have exhausted all legal avenues in their own countries the possibility of applying to the CRC. Nigeria's failure to sign or ratify this Optional Protocol deprives children in Nigeria, or interests' groups, direct access to file a complaint or have a complaint filed on their behalf before the CRC in case of a violation of their right not to be subjected to child marriage. It also deprives Nigeria of the benefit of the provision allowing the CRC take steps to procure such external assistance as the country may require to help end child marriage.

Second mechanism is the declaration pursuant to Article 5(3) and Article 34(6) of the African Court Protocol which would entitle relevant NGOs with observer status before the Commission, and individuals, to institute cases directly before the African Court on Human and Peoples' Rights. NGOs and individuals are more likely than State parties to file cases before the African Court to demand an end to child marriage in Nigeria. Therefore, Nigeria needs to be pressured by NGOs and interest groups to activate these rights by making the declaration and joining the league of the seven other countries who have made the declaration. However, it is not unlikely that in making the declaration, Nigeria may adopt Tanzania's approach and qualify the declaration with the requirement that all domestic legal remedies must be exhausted, and that the constitution of Nigeria must be adhered to.

The activation of these two mechanisms is achievable because, Nigeria's antecedents (in ratifying majority of the human rights treaties, enacting the CRA, ratifying other Optional Protocols etc.) show the Federal Government's amenability to commit to higher standards unlike some of the constituent state governments within the country. NGOs (who would be the beneficiaries of such activation) should mount pressure on the Nigerian government to activate these two mechanisms in order to unlock a chain reaction that will eventually lead to an end to child marriage in Nigeria.

**Operationalization**: This research recommends that the mechanisms which are already activated but under-utilised should be put to work. These mechanisms include the Special Procedures of the Human Rights Council and the special mechanisms of the African Commission (both of which are currently open to NGOs, child rights groups, individuals, and others). Going by the findings of this research, they have remained underexplored. These need to be applied more by NGOs and child right interest groups by engaging them to file complaints against the practice of child marriage in Nigeria as a human rights violation.

**Implementation**: This research argues that the recommendations given by UN and AU bodies need to be taken by the Nigerian government to end child marriage. These notable recommendations include the CRC's recommendation that Nigeria's laws be reviewed and updated to be in full compliance with the CRC; the UPR recommendation that Nigeria provide for the overall applicability of the CRA by ensuring that the twelve remaining northern states; the recommendation of the Special Rapporteur on the Rights of Women in Africa that Nigeria should ensure that the application of Shariah law does not constitute an impediment to the promotion and

protection of women's rights; and the Global Programme's strategy to foster an enabling legal and policy environment towards ending child marriage.

However, the limitation of the Implementation strategy is that most of the mechanisms do not recommend 'how' to achieve these laudable objectives. The exception is perhaps the Global Programme which gives insights on how to achieve these, leveraging experiences in other countries such as Bangladesh and Uganda. Thus, to foster an enabling legal and policy environment these mechanisms should be implemented by adopting the complementary recommendations in (i) – (v) below.

(i) ***Scaling the constitutional obstacles***: Efforts should be made to scale the constitutional and legal hurdles which have frustrated past efforts to end child marriage in Nigeria by adopting three options. First, a bill may be proposed seeking to amend the constitution by including child marriage and other child right issues in the Exclusive Legislative List (with the aim of extending the applicability of the CRA to all states in the federation). Second, a bill may be proposed seeking to amend the constitution by defining the minimum age for marriage as 18 and prohibiting child marriage and betrothal. A third alternative would be to re-enact the CRA as a bill seeking to domesticate a treaty pursuant to Section 12 of the constitution, leveraging the support already achieved in 27 states of the federation. These options will be discussed in detail in 8.5.1 and 8.5.2.

(ii) ***Persuasive engagement with the religious perspectives***: These persuasive engagements should be carried out with religious institutions and influencers with a view to persuading them to reform their stance on child marriage by agreeing to outlaw

it. Such engagements should appeal to Islamic law perspectives and authorities in other climes which have renounced child marriage, including the Al Azhar mosque and the Al Azhar University. This sort of engagement is relevant for two reasons. First, it would ease the achievement of *scaling the constitutional obstacles* as highlighted in (i) above. Second is that, even if the UN and AU mechanisms are activated and operationalised and the constitutional hurdles are scaled, the implementation and enforcement of the then compliant law and frameworks at the grass root cannot yield positive results without persuasive engagement with the religious institutions and perspectives that have hitherto impeded efforts to end child marriage in Nigeria. In engaging with the religious perspective, an appeal must be made not by reference to international law standards which would be perceived by the institutions in question as 'Western' and, therefore, likely to be rejected. Rather, an appeal must be made to less-conservative Islamic law perspectives in other climes.

The notion of child marriage is an issue confronting both secular and religious scholars today and attempts are being made to reconcile both religious texts and human rights instruments. Relatively recent developments have proven that Islamic law is not as inherently rigid as one might presume. According to Andrea Buchler and Christina Schlatter, Islamic law is inherently suited to reform. Many efforts are being made to re-read classical Islamic law and de-rigidize it. A growing global movement of scholars is rereading the fundamental and canonical Islamic writings in order to develop a perspective that does not essentialize or subject Islamic law to a generalising

construction. Re-energization of Islamic philosophy is the goal of this movement.[955] They went further to assert that: 'Major changes in Islamic societies, partly because Western ways of life and Western science were beginning to infiltrate the Islamic world, prompted new, reform-oriented hermeneutic interpretation of religious source texts.

For instance, there is a group of Islamic scholars of the school of thought that opposition to change is unwise and counterproductive especially if Muslims are to be active participants in the modern world. [956] They seek to present Islam in a way that suits people living in the modern period, but do not go as far as significantly altering traditionally held Islamic ideas, institutions and values. There is yet another group who want to re-present Islam by questioning key aspects of the tradition, ignoring what is not relevant to this modern period, while emphasizing what is relevant and attempting to remain faithful to the immutable Qurånic ethos, objectives and values.[957] This reveals there is ample room for making persuasive arguments against child marriage relying to Islamic authorities.

The Al Azhar mosque, popularly regarded as one of the highest authorities in Sunni Islam issued a Fatwa against child marriage wherein it stated that:

> Marriage in Islam is based on the consent of both parties, particularly the young woman. Such consent requires the young

[955] Andrea Büchler and Christina Schlatter, (n. 226)

[956] Abdullah Saeed,( n. 270).

[957] Fazlur Rahman, (n. 274), pp. 3–10; Farid Esack, (n. 274) 49–81.

> woman to have reached the age of maturity and reason so that her consent is validly given, [958]

The Al Azhar University also issued a publication in collaboration with UNICEF where it also denounced child marriage and declared it doesn't conform with the Islamic principles.[959]They agreed that the 'definition of childhood should apply to humans up to the age of 18 years.[960] They stated that Islam has nothing to do with child marriage.[961] In other words, early marriage is not an 'iron cast' rule in Islam as there are no known Islamic principles to support it.

These 'progressive' perspectives can be leveraged in engaging with the religious perspectives holding on to child marriage in Nigeria. Such engagements should first aim to persuade the most influential of Islamic clerics and scholars in the northern states of Nigeria. There is need for studies on the socio-cultural peculiarities of the various sub-schools of Islamic thought prevalent in various parts of Nigeria, to inform a more detailed strategy for implementing such engagements.

(iv) ***Strengthening existing institutions:*** When analysing what ways Nigeria is engaging to meet its obligations to end child marriage, it is evident that a number of human rights institutions are working to promote human rights objectives, including an end to child marriage. The institutions include the National Child Rights Implementation Committee, State Child Rights Implementation Committee and Local Government

[958] Ruth Maclean, (n. 242)
[959] Al-Azhar University and UNICEF, (n. 253).
[960] Ibid.
[961] Ibid.

Child Rights Implementation Committee, the Ministry of Women Affairs and Social Development, and the National Human Rights Commission. This research has argued and shown that the efforts of these institutions have been somewhat undermined by the constitutional and legal barriers that continue to frustrate efforts to end child marriage. These existing human rights institutions in Nigeria should be strengthened through increased by strategic funding, capacity development and infrastructure expansion and upgrade to better equip them to implement and enforce laws against child marriage in Nigeria.

The four recommendations above should be adopted as complementary elements of a unified strategy for ending child marriage in Nigeria.

(v) Finally, further studies should be conducted, in the domain of the social sciences, on the socio-cultural peculiarities of the various sub-schools of Islamic thought prevalent in various parts of Nigeria, to inform a more detailed strategy for implementing the engagements recommended in (iii) above. Financial and technical support for such studies should be sought from the CRC and other human rights institutions, as well as NGOs.

### *8.5.1 Options for the Amendment of the 1999 Constitution*

To cure the constitutional lists problem discussed extensively in Chapter 3, this research strongly recommends that the 1999 Constitution should be amended. It is necessary to recall that for any

proposed amendment to be successful the following provisions of the Constitution, Section 9(1), (2), and (3) of the Constitution must be complied with:

> (1) The National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution.
>
> (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the **votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States**.
>
> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of **not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States**.[962]

An Act of the National Assembly would have to be passed and approved by a vote of not less than a two-thirds majority of all members of the National Assembly (i.e., the federal legislature) in each

[962] Emphasis mine

House, as well as by resolution of the Houses of Assembly of not less than a two-thirds majority in each of the 36 States, in order to be validly passed and approved.[963]

A pertinent issue with respect of the amendment of the 1999 Constitution to bring Nigeria in compliance with international norms on child marriage relates to what specific provisions should be amended. Three distinguishable options can be explored.

The first option would be to amend Item 61 of the Exclusive Legislative List by expunging the carve out for Customary and Islamic law marriages. Currently, the said provision provides as follows:

> The formation, annulment, and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto.

It is my humble opinion, the said provisions should be amended as thus:

> The formation, annulment and dissolution of marriages **other than marriages under Islamic law and Customary law** including **marriages under Islamic and Customary law and** matrimonial causes relating thereto.[964]

The merit of this option is that it would remove the struck-out matters from the ambit of the residual list and give the National Assembly legislative competence over all marriage matters, including child marriage. The consequence would be that the provisions of the CRA which fix the minimum

[963] Section 9, 1999 Constitution

[964] Emphasis mine

age for marriage as 18 and prohibit child marriage and betrothal would be applicable to the whole federation including the northern states which have failed to domesticate the Act.

The drawback of this option is that it is highly unlikely to be achievable for two practical reasons. First, although the approvals of the legislatures of two-thirds of the states may be achievable given that 27 states (a little more than two-thirds of 36 states) have now adopted the CRA, the proposed amendment would impact aspects of Customary and Islamic marriage other than child marriage which the states may not be as amenable to cede to the federal government. For this reason, even the approvals of the 27 states cannot be assumed. Second, the requirement to obtain votes of not less than two-thirds majority of all the members of both Houses of the National Assembly is quite a tall hurdle given the diversity of interests with 109 members of Senate and 360 members of the House of Representatives. Again, as with the state legislators, even federal legislators who supported the CRA may oppose such am amendment given its impact on aspects of Customary and Islamic marriage other than child marriage.

A second option would be to expressly include child marriage and other child right issues in the Exclusive Legislative List with the effect that the CRA can be made to apply to the entire federation. This option stands a better chance of succeeding than the first option because federal and state legislators (especially in the 27 states that have adopted the CRA) who are not opposed to the CRA are likely to approve the amendment since it does not disturb other aspects of Islamic and Customary law marriages which do not impact children. The two-thirds requirement is more achievable in this case.

A third option would be to expressly provide and define the minimum age for marriage as 18 and prohibit child marriage in substantive part of the constitution. This way, no law can be made by

the federal or state legislature contrary to such a constitutional provision. The chances of this option succeeding are similar to the first. However, a limitation of this option is that, while it would achieve the objectives which are the focus of this thesis, it would not address other child right issues beyond child marriage as the second option would.

In light of the considerations discussed above, this thesis does not recommend the first option. However, any of the other two options may be explored, as well as the option discussed below which would not require an amendment.

### *8.5.2 Option for a Re-enactment of the CRA based on Section 12*

A fourth option would not involve an amendment to the constitution at all. It would involve attempting to re-domesticate the CRA, through Section 12 of the constitution this time. By virtue of section 12 of the constitution, in order to domesticate a treaty and make if binding on the entire federation or any part thereof, the National Assembly would need to pass a bill to that effect (i.e. by simple majority) and in addition obtain the ratification of '*a majority of all the House of Assembly in the Federation.* '[965]As there is no case law interpreting this portion of the provision, the literal interpretation should be used as is the default approach of Nigerian courts in interpreting the constitution and statutes. A literal interpretation would mean that if 19 out of the 13 Houses of Assemblies ratify such a bill, it would meet the aforementioned requirement in Section 12(3). Given that, 27 states have now adopted the CRA, this fourth option appears to be the most promising.

[965] Sections 12(2) and (3), 1999 Constitution (as amended)

It may be pertinent to ask, therefore, why this route wasn't taken at the time the CRA was being passed in 2003. The simple answer is that those were different times. The adoption of the CRA by the 27 states did not occur at the same time. It was achieved in the course of a period of over a decade since 2003 when the Act was passed. It took that long to bring the 27 states 'up to speed' on the necessity to adopt the child rights in question. The CRA would most likely not have been passed in 2003 had it been as a Section 12 bill. However, since the 27 states have now been brought up to speed, it would be worth attempting to re-enact the CRA now as a Section 12 bill. This would bring Nigeria in compliance with its international commitments to end child marriage as far as domestic law is concerned. Of course, even then it would still be necessary to apply the other three complementary elements involving the activation and operationalization of the UN and AU mechanisms, engaging with religious perspectives, and strengthening of institutions.

In light of the considerations discussed above, this research does not recommend the first option. However, any of the other three options may be explored for optimum results.

This research also agrees with some of the recommendations made to Nigeria in the first Cycle Report of the Working Group on the Universal Periodic Review include the following:[966]

> 1. Fast-track the process of accession to human rights instruments to which Nigeria is not a party yet, wherever possible.

[966] UN Human Rights Council (n. 175)

2. Accelerate the process of passing into law the various rights-based bills before the National Assembly in order to provide a broader scope of protection for vulnerable members of society, especially women, children, and the disabled;

3. Continue to strengthen its human rights institutions and develop further measures to ensure the effective implementation of its mandates.

4. Continue the actions aimed at raising awareness among religious and customary leaders[967]

5. Repeal all laws that allow violence and discrimination against women to persist and ensure that women who are victims of discrimination and violence have access to the protection of their rights and justice;

6. Intensify efforts in guaranteeing women's rights, including by implementing CEDAW observations to this end, and strengthen measures to fight against the practice of Female Genital Mutilation (FGM);

7. Pursue the full implementation of its expressed commitment to prohibit all forms of violence against women, and to prevent illegal trafficking of women and girls, and consider in this regard, among others, the recommendations of the United Nations treaty bodies.

This research also aligns with some of the recommendations made to Nigeria in the second Cycle Report of the Working Group on the Universal Periodic Review. They include the following:[968]

[967] Ibid

[968] UN Human Rights Council, (n. 182)

1. Sign and ratify the Optional Protocol to the ICESCR and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

2. Continue the process of ratifying international human rights instruments that it is not yet a party to.

3. Ensure the enactment of the bill on the Convention on Elimination of All Forms of Discrimination against Women (CEDAW).

4. Incorporate in national legislation the international human rights legal instruments to which Nigeria has acceded.

5. Take further measures to implement the 2010 recommendations by the Committee on the Rights of the Child, especially related to the domestication of the CRC; the right of the child to education, nutrition, and health, and protecting girls from early marriage.

6. Take further measures to implement the 2010 recommendations by the Committee on the Rights of the Child, especially related to the domestication of the CRC; the right of the child to education, nutrition, and health, and protecting girls from early marriage.

7. Introduce laws against female genital mutilation in all states, takes steps to ensure access to justice for women who are victims of violence; and that the Violence Against Persons (Prohibition) Bill is passed by the Senate.

8. Continue to strengthen the regime for the protection of the rights of the child by the obligations under the Convention on the Rights of the Child.

This research further adopts the succinct recommendations made by the Working Group of the third Cycle Report on the Universal Periodic Review. These recommendations include the following[969]:

1. Ratify the Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

2. Consider ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and domesticating already ratified conventions.

3. Ratify the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights.

1. Ratify the Optional Protocol to the Convention on the Rights of the Child on a communications procedure and ensure its full implementation.

2. Prioritize the full and effective implementation and reinforcement of international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women by using domestic mechanisms, including the Violence Against Persons (Prohibition) Act.

3. Ensure that the law on the rights of the child and the law prohibiting violence against persons are adopted and enforced in all states.

[969] UN Human Rights Council, (n. 189)

4. Adopt and enforce the Child Rights Act in all states.

5. Provide for the overall applicability of the Child Rights Act 2003 by ensuring that the remaining states in the country adopt the law without delay.

6. Strengthen the rights of women and girls, notably by enforcing across all the territory the 2015 law banning all forms of violence against them.

7. Adopt the necessary legislative and political measures so that the 12 northern states adopt the law on the rights of children that puts into practice the prohibition of early and forced marriages.

It is observed that Nigeria had taken some of the recommendations of the 1st and 2nd Cycle Report of the UPR such as the enactment of the Violence Against Persons (Prohibition) Act 2015. However, Nigeria is yet to implement any of the recommendations in the third cycle report. The research strongly urges Nigeria to take necessary steps to adopt and implement all the recommendations given in every cycle. This will go a long way in ensuring it meets its international obligations towards ending child marriage as well as bridge the gap between the law in theory and law in practice with regards to protecting the vulnerable Nigerian child.

## 8.6 Conclusion

Nigeria's journey to ending child marriage has been an exceptionally long and windy one. On the driver's seat, this research has shown that the federal government has made some commendable attempts to comply with international law requirements, including passing the CRA and

establishing institutions whose mandates gear toward ending child marriage. However, it is argued that constitutional complications, underpinned by deeply rooted religious perspectives, continue to thwart efforts to end child marriage in the northern part of Nigeria most affected by the familial practice.

As the law stands today, Nigeria remains non-compliant with its international law obligations to end the practice of child marriage. The flexible yardstick for consent and adulthood required for marriage under Islamic law as practiced in most parts of the northern states in Nigeria falls short of the international law requirement to specify a minimum age for marriage, require full and free consent, and to prohibit child marriage and betrothal. This state of affairs has dire consequences for children and women in Nigeria.

This thesis has found that effective mechanisms exist within the UN and AU systems that can be utilized to assist Nigeria in ending child marriage and complying with its international law obligations in this regard. As part of its contribution to knowledge, this thesis concludes that for Nigeria to make meaningful progress in the ending child marriage, it needs to adopt the recommended four-pronged strategy through which the potentials of the UN and AU mechanisms can be optimised towards ending child marriage in Nigeria. They include activation, operationalization and implementation of the UN and AU Mechanisms; scaling the constitutional obstacles; Persuasive engagement with the religious perspectives and strengthening existing institutions. To meet up with its international obligations to end child marriage, this thesis argues that it is not enough to focus on strengthening the legal institutions, amending the constitution or even creating new laws. Thus, it is important that these recommendations go hand in hand given the peculiar ethnic and religious setting within Nigeria.

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