Law, Religion and the Family in Africa

Edited by
M. Christian Green
Faith Kabata

15 CHILD MARRIAGE: DOES THE NIGERIAN CONSTITUTION CONSPIRE WITH ISLAMIC LAW IN NIGERIA?

Muyiwa Adigun¹

INTRODUCTION

Child marriage is most commonly defined as the marriage of a person below the age of 18.² This is also the position under Section 21 of the Child's Rights Act 2003 in Nigeria as it criminalises marriage below 18.³ In this way, child marriage can be distinguished from early marriage. A person who married at exactly eighteen can be said to have married early. However, the person's marriage cannot be regarded as child marriage. Also, the definition implies that child marriage involves male and female persons. Thus, boys can be parties to child marriage in the same way girls are married as children, although girls are much more affected. For example, in Niger, 77% of women within the range of 20 and 49 years were married before 18 years compared with men in the same age bracket, whose percentage was 5%.⁴ Child marriage amongst girls is mostly found in South Asia and sub-Saharan Africa.⁵

Nigeria is amongst the top twenty countries with the highest rate of child marriage in the world.⁶ While child marriage is found in many ethnic groups in Nigeria, it is most predominant in the northern part of Nigeria.⁷ Generally in Nigeria, about 20% of girls are married by 15, while about 40% are married by 18. However, amongst the predominantly Muslim Hausa-Fulani of the North West and the North East regions of Nigeria, 48% of girls are married by 15 while 78% are married by 18. While the average age of marriage in Nigeria is 17 years, average age of marriage for girls is a little over 11 years in Kebbi State and about 15 years in most other parts of Northern Nigeria.⁸ Amongst the Yoruba people of the South West region of Nigeria, who are made up of Christians and Muslims, child marriages are no longer arranged. Similarly, the practice has considerably declined amongst the Igbo people of the South East part of Nigeria, where the people are largely Christian.⁹

1 Senior Lecturer, Faculty of Law, University of Ibadan, Ibadan, Nigeria.

2 Wodon Q. 2015. "Islamic Law, Women's Rights, and State Law: The Cases of Female Genital Cutting and Child Marriage", *The Review of Faith and International Affairs* 13(3):81, 87.

3 Child's Rights Act 2003, Cap. C50, Laws of the Federation (LFN) 2004.

4 United Nations Children's Fund (UNICEF). 2014. *Ending Child Marriage: Progress and Prospects*. New York: UNICEF.

5 UNICEF, *Ending Child Marriage*.

6 International Centre for Research on Women. 2006. "Child Marriage around the World". Washington, DC: ICRW.

7 Adedokun O, Adeyemi O and Dauda C. 2016. "Child Marriage and Maternal Health Risks among Young Mothers in Gombi, Adamawa State, Nigeria: Implications for Mortality, Entitlements and Freedoms", *African Health Science* 16(4):986.

8 Adedokun, Adeyemi and Dauda, "Child Marriage and Maternal Health Risks", 986.

9 Adedokun, Adeyemi and Dauda, "Child Marriage and Maternal Health Risks", 986.

Child marriage is a fundamental violation of human rights and constitutes health hazards to girls.¹⁰ The consequences of child marriage include high rate of maternal and child mortality, susceptibility to sexually transmitted diseases, the inability to acquire education and domestic violence.¹¹ In a nutshell, child marriage has negative impact on the right of girls to health, life, education, personal integrity and dignity.¹² Because of this, child marriage has been considered a human rights crisis for girls.¹³ Hence, there has been a call for global action.¹⁴

In spite of this, some Nigerian Muslims who engage in child marriage rely on the *hadith*, that is, the practice of the Prophet of Islam, to justify the practice in Nigeria. They claim that the Prophet of Islam (SAWS) married his wife Ayesha at the age of nine. An interesting case is that of a Senator of the Federal Republic of Nigeria, Sani Yerima, who was alleged to have married an Egyptian girl of 13 years, not in Egypt, but in Nigeria. Although Yerima denied that she was 13 years of age, nonetheless the marriage sparked a controversy and was considered an outrage.¹⁵ While it can be argued that Islamic law is subject to and superseded by the supremacy of the Nigerian Constitution,¹⁶ Section 29 of the Constitution of the Federal Republic of Nigeria 1999 also tends to support child marriage. It stipulates that “any woman who is married shall be of full age.” With this provision, it appears that marriage confers majority instead of majority qualifying one for marriage. Since the word “woman” is used, it implies that boys are excluded, while girls, who are indeed most affected by child marriage, can get married. Similarly, the federal government is precluded from regulating Islamic law marriage under Item 61 of the Exclusive Legislative List of the Nigerian Constitution.¹⁷ The Exclusive Legislative List is a list of matters upon which only the federal government in Nigeria can legislate upon. This implies that only states within the Nigerian Federation can regulate the marriage. It is therefore understandable while some commentators on Yerima’s marriage stated that Section 29 of the Nigerian Constitution implicitly endorses child marriage.¹⁸ It is also understandable that Yerima could have blocked all attempts to amend the clause as alleged.¹⁹

10 Mwambene L and Mawodza O. 2017. “Children’s Rights Standards and Child Marriage in Malawi”, *African Studies Quarterly* 17(3):21-22.

11 Mwambene and Mawodza, “Children’s Rights Standards and Child Marriage”, 22.

12 Mwambene and Mawodza, “Children’s Rights Standards and Child Marriage”, 22.

13 Mwambene and Mawodza, “Children’s Rights Standards and Child Marriage”, 22.

14 International Planned Parenthood Federation. 2007. *Ending Child Marriage: A Guide for Global Policy Action*. London: International Planned Parenthood Federation, 26-30.

15 Hirsch A. 2013. “Nigerian Senator Who ‘Married Girl of 13’ Accused of Breaking Child Rights Act”, *The Guardian*, 25 July.

16 Constitution of the Federal Republic of Nigeria, 1999 (CFRN), s 1.

17 The Exclusive Legislative List is written into the CFRN. It is attached as the Second Schedule amongst various other schedules. Item 61 of the Exclusive Legislative List pertains to the regulation of Islamic and customary law.

18 Hirsch, “Nigerian Senator Who ‘Married Girl of 13’”.

19 Hirsch, “Nigerian Senator Who ‘Married Girl of 13’”.

15. Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?

If Section 29 of the Nigerian Constitution permits child marriage while Islamic law also allows it, the question is: Does the Nigerian Constitution conspire with Islamic law to permit child marriage in Nigeria? This study is divided into five parts. The first part introduces the study. The second part examines child marriage under the Nigerian Constitution. The third part discusses child marriage under Islamic law. The fourth part seeks to answer the question of whether the Nigerian Constitution and Islamic law conspire to permit child marriage in Nigeria. The fifth part concludes the study.

CHILD MARRIAGE UNDER THE NIGERIAN CONSTITUTION

Before discussing child marriage under the Nigerian Constitution, it is pertinent to first discuss the Nigerian legal system.

The Nigerian legal system

Nigeria has a federal constitution, known as Constitution of the Federal Republic of Nigeria 1999.²⁰ Nigeria is made up of the federal government and 36 states.²¹ Its capital is the Federal Capital Territory located in Abuja.²² The Constitution is supreme and its provisions are binding “on all authorities and persons throughout the Federal Republic of Nigeria.”²³ The Nigerian Constitution 1999 recognises the doctrine of separation of powers²⁴ and provides for the executive,²⁵ the legislature²⁶ and the judiciary.²⁷ These three arms are recognised at both the federal and

20 CFRN, s 2(2). On the Nigerian Constitution, see the following: Nwabueze BO. 1964. *Constitutional Law of the Nigerian Republic*. London: Butterworths; Nwabueze BO. 1974. *Presidentialism in Common West Africa*. London: C Hurst & Co; Nwabueze BO. 1982. *The Presidential Constitution of Nigeria*. London: C Hurst & Co; Akande JO. 2000. *Introduction to the 1999 Nigerian Constitution*. Lagos: MIJ Professional Publishers Ltd; Aguda OO. 2000. *Understanding the Nigerian Constitution of 1999*. Lagos: MIJ Professional Publishers Ltd; Mowoe KM. 2008. *Constitutional Law in Nigeria*. Ibadan: Malthouse Press Ltd.

21 CFRN, ss 2(2) and 3(1).

22 CFRN, ss 2(2) and 3(1).

23 CFRN, s 1(1).

24 *Abraham Adesanya v President, Federal Republic of Nigeria* (1981) 5 SC 69; (1981) All NLR 1. On the doctrine of separation of powers in respect of the Nigerian Constitution 1999, see Iluyomade BO and Eka BU. 1992. *Cases and Materials on Administrative Law in Nigeria*. Second Edition. Ile-Ife: Obafemi Awolowo Press Ltd, 7-32; Oluyede PAO. 2001. *Constitutional Law in Nigeria*. [1992] Reprint Edition. Ibadan: Evans Brothers (Nigeria Publishers), 75-77; Ceazar DOW. 2009. “The Doctrine of Separation of Powers under the Nigerian Constitution: A Critical Overview”. Online at: <https://bit.ly/3HgB9km> [Accessed 30 September 2021].

25 CFRN, s 4.

26 CFRN, s 5.

27 CFRN, s 6.

state levels.²⁸ At the federal level, the legislative power is vested in the National Assembly.²⁹ It is made up of the Senate and the House of Representatives.³⁰ Only the National Assembly can legislate on matters within the Exclusive Legislative List, including the “formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto”, which is listed in Item 61.³¹ The National Assembly shares legislative power with states on matters in the Concurrent List.³² Similarly, it also shares legislative power with the states on “fundamental objectives and directive principles of state policy”.³³ Although, fundamental objectives are generally not justiciable,³⁴ they can be made justiciable by being enacted into law.³⁵ In *Attorney-General Ondo v Attorney-General Federation*,³⁶ the Supreme Court of Nigeria held that “fundamental objectives and directive principles of state policy” can be legislated upon by the federal government. In this case, the federal government enacted the Independent Corrupt Practices and other Offences Commission Act.³⁷ The Act was meant to curb corruption in Nigeria. Ondo State Government challenged the competence of the National Assembly to enact the Act. The Supreme Court of Nigeria, in reaching its decision, relied on Section 15(5) and Item 60 of the Exclusive Legislative List under the Nigerian Constitution. Section 15(5) stipulates that “The State shall abolish all corrupt practices and abuse of power.” Under Item 60(a), the National Assembly is empowered to legislate on “The establishment and regulation of authorities for the Federation or any part thereof ... to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.” The Supreme Court of Nigeria held that the Act was constitutional in light of these provisions. The Court stated further that the word “State” as used in the provision includes the Federal, State and Local Governments. In addition, in *Attorney-General Lagos v Attorney-General Federation*,³⁸ the Supreme Court of Nigeria held that the legislative competence of the National Assembly was not limited to matters in the Exclusive and Concurrent Legislative Lists. This holding reinforces the decision of that Court in *Attorney-General Ondo*.

²⁸ CFRN, ss 4, 5 and 6.

²⁹ CFRN, s 4(1) and Part I, Second Schedule.

³⁰ CFRN, s 4(1) and Part I, Second Schedule.

³¹ CFRN, s 4(2).

³² CFRN, Part II, Second Schedule.

³³ *Attorney-General Ondo v Attorney-General Federation* [2002] 9 NWLR (Pt 772) 222; *Attorney-General Lagos v Attorney-General Federation* [2003] FWLR (Pt 168) 909.

³⁴ CFRN, s 6(6).

³⁵ *Attorney-General Ondo v Attorney-General Federation* [2002] 9 NWLR (Pt 772) 222.

³⁶ *Attorney-General Ondo v Attorney-General Federation* [2002] 9 NWLR (Pt 772) 222.

³⁷ Independent Corrupt Practices and other Offences Commission [Act No. 5 of 2000] Cap. C31, Laws of the Federation of Nigeria (LFN) 2004.

³⁸ *Attorney-General Lagos v Attorney-General Federation* [2003] FWLR (Pt 168) 909.

15. Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?

At the state level, the legislative power is vested in the House of Assembly of the State.³⁹ The House of Assembly of a State can legislate only on matters within the Concurrent Legislative List⁴⁰ and on those matters that are residual.⁴¹ Residual matters are matters which are not listed in both the Exclusive Legislative List and the Concurrent Legislative List,⁴² excluding fundamental human rights in Chapter IV and fundamental objectives in Chapter II of the Nigerian Constitution. If there is conflict between the “law” enacted by the National Assembly and the “Law” enacted by the House of Assembly of a state, the “law” enacted by the National Assembly prevails.⁴³ This understanding of the Nigerian legal system is a necessary preface to understanding child marriage under the Nigerian Constitution.

Child marriage under Section 29 of the Nigerian Constitution

In the Nigerian Constitution, Section 29(4)(b) stipulates that “any woman who is married shall be deemed to be of full age.” Section 29(4)(a) stipulates that “full age” means the age of eighteen years and above. As previously noted, what these provisions tend to suggest is that if a girl below the age of 18 years is married, the girl will be deemed to be of 18 years of age. These provisions tend to imply that the Nigerian Constitution permits the child marriage of a girl. But does the Nigerian Constitution 1999 really permit child marriage?

It is worth noting, first of all, that a word assumes its meaning in the company of other words. This is what is called contextual interpretation.⁴⁴ In this respect, Section 29(4)(a) and 29(4)(b) are provisions under the constitutional provision on citizenship. As a matter of fact, the part under which the provisions come up is titled “citizenship”.⁴⁵ The implication is that these provisions will be interpreted within

39 CFRN, s 4(6).

40 CFRN, s 4(4)(a) and Part II, Second Schedule.

41 CFRN, s 4(7).

42 CFRN, s 4(7).

43 CFRN, s 4(5). In Nigeria, there is a difference between “law” and “Law”. Law with a small letter, “law”, includes “Acts” of the National Assembly and other federal laws. Law with a capital letter “Law”, is the proper name for the statute enacted by the state. On the importance of this difference, see Adigun M. 2019. “The Status of Customary International Law under the Nigerian Legal System”, *Commonwealth Law Bulletin* 45(1):115-156.

44 Burrows A. 2018. *Thinking About Statutes: Interpretation, Interaction, Improvement*. Cambridge: Cambridge University Press, 5. See generally Barack A. 2005. *Purposive Interpretation in Law*. Princeton: Princeton University Press; Goldsworthy J (ed). 2006. *Interpreting Constitutions: A Comparative Study*. Oxford: Oxford University Press.

45 On citizenship, see Matias G. 2016. *Citizenship as a Human Right: The Fundamental Right to a Specific Citizenship*. London: Palgrave Macmillan; Balibar É. 2015. *Citizenship*. Malden: Polity Press; Isin EF and Nyers P (eds). 2014. *Routledge Handbook of Global Citizenship Studies*. Abingdon: Routledge; Bellamy R. 2008. *Citizenship: A Very Short Introduction*. Oxford: Oxford University Press; Kymlicka W and Norman W. 2000. *Citizenship in Diverse Societies*. Oxford: Oxford University Press; Isin EF and Wood PK. 1999. *Citizenship and Identity*. London: Sage Publications.

the context of citizenship. Although, under the Interpretation Act in Nigeria,⁴⁶ heads in a statute are not aids to statutory construction,⁴⁷ nonetheless “citizenship” as a head can be relied upon in this instance. The reason is that the words “citizenship” and “citizen” are also used in the constitutional provisions under it, in addition to “citizenship” being used as a head. In fact, the word “citizenship” is used seven times while the word “citizen” or “citizens” is used 18 times. The Nigerian Constitution recognises three categories of citizenship. They are citizenship by birth,⁴⁸ citizenship by registration⁴⁹ and citizenship by naturalisation.⁵⁰ Citizenship by registration applies to any woman who is or has been married to a citizen of Nigeria,⁵¹ or every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.⁵²

Apart from these categories of citizenship, dual citizenship is also recognised. This is contained in Section 28 of the Nigerian Constitution. Section 28(1) stipulates that “Subject to other provisions of this section, a person shall forfeit forthwith his Nigerian citizenship if, not being a citizen of Nigeria by birth, he acquires or retains the citizenship or nationality of a country, other than Nigeria, of which he is not a citizen by birth.” What this provision implies is that a Nigerian citizen who acquires their citizenship by birth can combine citizenship of another country with that of Nigeria and it does not matter how citizenship of that other country is acquired. Also, it implies that a Nigerian citizen who acquires Nigerian citizenship by registration or naturalisation can combine the citizenship of another country with that of Nigeria, if the citizenship of the other country is acquired by birth. But, where the citizenship of that other country is acquired by other means than by birth, then such a Nigerian citizen will lose their Nigerian citizenship. For example, if someone became a Nigerian because she was married to a Nigerian and the person became the citizen of Germany by naturalisation, such a person will forfeit Nigerian citizenship. The reason is that Nigerian citizenship was acquired by registration while that of Germany was acquired by naturalisation. But the person will not lose Nigerian citizenship if she acquired the citizenship of Germany by birth, say, through one of the parents. Section 28(2) reinforces Section 28(1) by stipulating that if any person wants to acquire Nigerian citizenship by registration or naturalisation, but such a person has the citizenship of another country which was obtained not by birth, then the person will be registered or granted Nigerian citizenship on the condition that the citizenship of that other country is renounced within five months from the date of registration or grant. In the above example,

46 Interpretation Act, Cap. I23, Laws of the Federation of Nigeria (LFN) 2004.

47 Interpretation Act, s 3(2). However, under the Interpretation Act 1957 (South Africa), heads and marginal notes are not excluded as aids to statutory construction.

48 CFRN, s 25.

49 CFRN, s 26.

50 CFRN, s 27.

51 CFRN, s 26(2)(a).

52 CFRN, s 26(2)(b).

15. Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?

if the person who had acquired the citizenship of Germany by naturalisation now decides to acquire Nigerian citizenship by registration having been married to a Nigerian, such a person would be granted Nigerian citizenship on the condition that she would have to renounce the citizenship of Germany.

Apart from the fact that Section 28 of the Nigerian Constitution recognises dual citizenship, it also recognises instances where a person who acquires Nigerian citizenship by registration or naturalisation can lose Nigerian citizenship when that person combines the citizenship of another country with that of Nigeria. Unlike Section 28, Section 29 of the Nigerian Constitution provides for instances when a Nigerian who acquires Nigerian citizenship by birth can lose Nigerian citizenship when that person acquires the citizenship of another country or combines the citizenship of another country with that of Nigeria.

Section 29(1) stipulates that any citizen of Nigeria of full age who wishes to renounce their Nigerian citizenship “shall” make a declaration in the prescribed manner for the renunciation. Two things are implied here. First, it is a matter of obligation for such a Nigerian to declare. This is because of the use of the word “shall”. Secondly, the renunciation has to be voluntary and must be clear. The use of the words expressive of a wish or declaration justifies this inference. This sharply contrasts with Section 28 where the person who acquires Nigerian citizenship through registration or naturalisation “forfeits” Nigerian citizenship “forthwith”. Evidence that the person has acquired the citizenship of another country through other means than by birth automatically triggers renunciation and there is no need for any express declaration. Once the declaration is made, the President is obligated to register. This is because of the use of the word “shall”.⁵³ Once it is registered, the person then ceases to be a Nigerian citizen.⁵⁴ However, the President “may” withhold registering the declaration if the declaration is made at a time when Nigeria is physically involved in a war,⁵⁵ or if the President thinks registering it will be contrary to public policy.⁵⁶ The rationale behind the provision that the President may withhold registration when Nigeria is at war is understandable. This is because the person may want to avoid military service. With respect to public policy, it can be reasoned that the President may withhold registration if that person may become stateless. Statelessness can indeed form an instance of public policy consideration.⁵⁷

53 CFRN, s 29(2).

54 CFRN, s 29(2).

55 CFRN, s 29(3)(a).

56 CFRN, s 29(3)(b).

57 On statelessness, see Siegelberg ML. 2020. *Statelessness: A Modern History*. Cambridge, MA: Harvard University Press; Dedek H and Praagh SV (eds). 2015. *Stateless Law: Evolving Boundaries of a Discipline*. Abingdon: Routledge; Edwards A and Van Waas L (eds). 2014. *Nationality and Statelessness under International Law*. Cambridge: Cambridge University Press; Coventry Peace House. 2008. *Statelessness: The Quiet Torture of Belonging Nowhere*. Coventry: Coventry Peace House.

At this point, Sections 29(4)(a) and 29(4)(b) can be appreciated as different or distinguished. Section 29(4)(a) begins with “For the purposes of subsection 1 of this section.” The section being referred to is Section 29 while the subsection is Subsection 1. As previously noted, Section 29 provides for instances where a Nigerian who acquires citizenship by birth may lose that citizenship if that person acquires the citizenship of another country or combines Nigerian citizenship with that of another country. Section 29(1) stipulates that “Any citizen of Nigeria of full age who wishes to renounce his Nigerian citizenship shall make a declaration in the prescribed manner for the renunciation”. After this provision, Section 29(4)(a) states that “‘full age’ means the age of eighteen years and above, while Section 29(4)(b) states that “any woman who is married shall be deemed to be of full age”. Therefore, it can be argued that a woman who is married but who is less than 18 years must have been married and by virtue of that marriage must have acquired dual citizenship and that she is deemed to be of full age for the sole purpose of renunciation and nothing more.

Section 28 has to be read jointly with Section 29 because the recognition of dual citizenship under Section 28 brings about the provision on renunciation under Section 29. The implication is that a Nigerian woman who does not have dual citizenship cannot renounce under Sections 29(1) and 29(4)(b). If she does not have dual citizenship, she can renounce under Sections 29(1), 29(2) and 29(4)(a). In this respect, she must be 18 years of age and she does not necessarily need to have been married to a foreigner. It is worth mentioning that Section 29(4)(a) also applies to men.

However, it can be argued that renunciation under Section 29 can stand on its own whether there is dual citizenship or not. In addition, it can be argued that Section 29(4)(a) does not require dual citizenship before renunciation and that there is no basis to think Section 29(4)(b) requires dual citizenship. These arguments can be adequately met. If one considers the chronological flow between Section 28 and Section 29 as enunciated above, it is most persuasive that Section 29 flows from Section 28. Nonetheless, the argument that Section 29 on renunciation flows from Section 28 on dual citizenship can be sustained on an added ground. The current Nigerian Constitution of 1999 is the first constitution in Nigeria’s history that recognises dual citizenship. Previous constitutions in Nigeria outright prohibited it, and in those constitutions, there was no provision on renunciation identical with what exists today under the Nigerian Constitution of 1999.

Section 12 of the Constitution of the Federation of Nigeria 1960, for example, prohibited dual citizenship. It stipulated that “Any person who, upon his attainment of the age of twenty-one years, was a citizen of Nigeria, and also a citizen of some country other than Nigeria shall cease to be a citizen of Nigeria upon his attainment of the age of twenty-two years ... unless he has renounced his citizenship of that other country.” What this implies is that if in 1960 someone was a Nigerian of 21 years of age and that person was also a citizen of Germany, that person would have to renounce her German citizenship. It was insignificant whether the German

15. *Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?*

citizenship was acquired by birth or any other means. The section stated further that “where a person cannot renounce his citizenship of the other country under the law of that country he may instead make such declaration concerning that citizenship as may be prescribed by Parliament”. What this indicates is that if the Nigerian who also had German citizenship could not renounce German citizenship because in Germany no German could renounce German citizenship under German law, the person would have to renounce German citizenship under Nigerian law by following procedure laid down by the law-making organ in Nigeria.

Section 13 of the Constitution of the Federal Republic of Nigeria 1963 also prohibited dual citizenship and it was identically worded as that of Section 12 of the previous Constitution of the Federation of Nigeria 1960. Section 26(1) of the Constitution of the Federal Republic of Nigeria 1979 stipulated that “a person shall forfeit forthwith his Nigerian citizenship if he acquires or retains the citizenship or nationality of a country other than Nigeria”. In fact, a citizen of Nigeria by birth who acquired the citizenship of another country shall forfeit his Nigerian citizenship,⁵⁸ while a person who sought to become a Nigerian citizen by registration or naturalisation but who had the citizenship of another country shall be registered or granted naturalisation on the condition that the citizenship of another country shall be forfeited within 12 months starting from the date of registration or the grant of naturalisation.⁵⁹ Under this provision, someone who already had Nigerian citizenship would have it forfeited immediately if the person acquired the citizenship of say Germany. It was insignificant how German citizenship was acquired, even if it was acquired by birth. Where this person already had German citizenship but now decides to acquire Nigerian citizenship because she was married to a Nigerian, the person would be granted Nigerian citizenship on the condition that the German citizenship would be renounced within 12 months of having been granted. Even though the person would acquire Nigerian citizenship by registration while the German citizenship had already been acquired by birth, Nigerian citizenship by registration was still considered stronger and would be made to trump that of Germany.

One may be tempted to inquire why the Nigerian Constitution of 1999 took a different course from previous constitutions. This is difficult to know, because the Nigerian Constitution of 1999 was imposed by the military, and there is no record of deliberations from which to draw. Nonetheless, it can be reasonably inferred that the change was motivated by internationalism or transnationalism and the inevitable possibility that some Nigerians would have to marry foreigners.

What the foregoing shows is that renunciation under Section 29 flows from dual citizenship under Section 28 of the Nigerian Constitution. With respect to the argument that Section 29(4)(a) does not require dual citizenship before renunciation, two arguments are probable. The first is to say that once a Nigerian has not acquired the citizenship of another country, such a Nigerian cannot renounce Nigerian citizenship in all instances. While this argument may be startling, it appears to

⁵⁸ CFRN, s 26(3).

⁵⁹ CFRN, s 26(2).

accord with the provisions under previous constitutions. This is because, apart from the instance where a Nigerian would forfeit their citizenship having acquired the citizenship of another country, no other instance is recognised. In fact, as startling as it appears, it makes sense in light of the harrowing experience of statelessness. The second argument is to say that Section 29(4)(a) is actually meant for renunciation on account of dual citizenship but that it can accommodate instances where there is no dual citizenship. To the extent that Section 29(4)(a) addresses instances of dual citizenship, its link with Section 28 is firmly established even if instances where there are no dual citizenship can be accommodated or subsumed within it.

Having stated thus, it becomes imperative to examine instances where Sections 29(4)(a) and 29(4)(b) will apply. Suppose that a Nigeria man travelled abroad and fell in love with a woman in the country he went to. The woman he fell in love with was a citizen of that country by birth. In that country, a woman could get married below the age of 18 years and the Nigerian man and the foreign woman married each other. It is worth mentioning that there are many countries across the globe where a woman can get married below 18. Even in countries where a woman cannot, as a general rule, get married below 18, some still have exceptions including the provision that parents can consent to the marriage of a woman below 18.⁶⁰ After the marriage, the woman acquired Nigerian citizenship by registration. Later, the woman and the man divorced and the woman decided to renounce Nigerian citizenship. This woman cannot renounce under Section 28 of the Nigerian Constitution, because she can combine Nigerian citizenship with that of the country where she has acquired that citizenship by birth. She can only renounce Nigerian citizenship under Section 29. If she is already 18 years at the time she wants to renounce, she will renounce Nigerian citizenship under Section 29(4)(a). However, if she is still less than 18 years at the time she wants to renounce, she will renounce under Section 29(4)(b).

Suppose that a Nigerian woman falls in love with another man from another country and marries that man in his country. In the country of the man, a woman below the age of 18 years can get married. Once she is married, she becomes a citizen of her husband's country. However, suppose the law of her husband's country does not permit dual citizenship. For this woman to be able to participate fully in the political life of her husband's country, she may have to renounce Nigerian citizenship. For this reason, even though she was below the age of 18 when she married her husband in his country, which was permitted in that country but not in Nigeria, she will be deemed to be of legal age in Nigeria under Section 29(4)(b) for the purpose of being able to renounce her Nigerian citizenship.

There could be several other scenarios, since human relationships manifest in different forms. But what is common between the first scenario and the second scenario is that the law of a foreign country permits a woman to get married before the age of 18 years. In fact, in the second scenario, if the Nigerian Constitution

60 Arthur M and others. 2017. "Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities", *Journal of Women, Politics & Policy* 39(1):51-74.

15. Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?

does not permit such a Nigerian woman to renounce on the basis that she should not have married a foreigner when she was less than 18 years, then the Nigerian woman will suffer if she is unable to participate fully in the political life of her husband's country. There is no doubt that citizenship confers certain privileges that non-citizens are not entitled to. Thus, in a nutshell, Section 29 of the Nigerian Constitution does not permit child marriage in Nigeria. Having examined this, the next issue is to examine Item 61 of the Exclusive Legislative List in relation to the legislative competence of the National Assembly.

Child marriage with respect to Item 61 of the Exclusive Legislative List

As previously stated, under the Nigerian Constitution, the Federal Republic of Nigeria is empowered to legislate for Nigeria on Exclusive Legislative List through the National Assembly.⁶¹ The National Assembly can also legislate on Concurrent Legislative List. The National Assembly shares this power with the Houses of Assembly of each of the states within the Nigerian Federation.⁶² Matters that are not in the Exclusive and Concurrent Legislative Lists are generally considered residual matters apart from human rights under Chapter IV of the Nigerian Constitution and the "fundamental objectives and directive principles of state policy" under Chapter II of the same Constitution. Residual matters are legislated upon by the states within the Nigerian Federation.

Similarly, as previously noted, under Item 61 of the Exclusive Legislative List, the Federal Republic of Nigeria is empowered to legislate on the "formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto". What this implies is that only states can legislate on Islamic law and customary law marriages, and if Islamic law and customary law marriages permit child marriage, the federal government is helpless.⁶³ It appears that the federal government can only watch and hope the state governments will act rightly. At best, the federal government can persuade the states to act rightly. In fact, it can be argued that the Nigerian Constitution permits child marriage to the extent that it allows states to legislate solely on Islamic and customary law marriages. This is because, when states legislate to allow a child below the age of 18 years to get married under Islamic law or customary law, they can claim to acquire their competence under the Nigerian Constitution as a residual matter reinforced by Item 61 of the Exclusive Legislative List. Even if they do not legislate directly but tacitly allow a child to get married under Islamic and customary law marriages, their tacit approval can be claimed to have gleaned from the Nigerian Constitution.

61 CFRN, ss 4(1) and 4(2).

62 CFRN, ss 4(4)(a) and 4(7)(b).

63 See Braimah TS. 2014. "Child Marriage in Northern Nigeria: Section 61 of Part 1 of the 1999 Constitution and the Protection of Children against Child Marriage", *African Human Rights Law Journal* 14:475. However, see Nwauche ES. 2015. "Child Marriage in Nigeria: (Il) legal and (Un) constitutional?", *African Human Rights Law Journal* 15(2):421.

From another perspective, it can be argued that if Section 29 of the Nigerian Constitution permits child marriage of a girl, states cannot legislate to the contrary, even if they can legislate on Islamic law and customary law marriages. In this respect, not only is the federal government that is helpless upon the child marriage of a girl, but state governments are also helpless, since they cannot legislate contrary to the provision of the Nigerian Constitution. However, as previously established, Section 29 of the Nigerian Constitution does not permit child marriage of a girl. Therefore, state governments are not helpless.

While the federal government cannot legislate on Islamic law and customary law marriages, it can legislate to protect children from exploitation and to provide for their moral welfare. In Chapter II, under fundamental objectives of the Nigerian Constitution of 1999, Section 17(3)(f) stipulates that the State shall direct its policy towards ensuring that “children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect.” The argument that can be advanced against this provision is that it is not justiciable.⁶⁴ However, as previously noted, it can be made justiciable by being enacted into law. At this point, the Child’s Rights Act 2003 becomes apposite.⁶⁵ Section 21 of the Act stipulates 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.” Section 22(1) adds that “No parent, guardian or any other person shall betroth a child to any person” criminalises child marriage and child betrothal by stipulating that any person who engages in it commits an offence punishable with fine or imprisonment or both. Since the Federal Government can legislate on “fundamental objectives and directive principles of state policy” for the federation or any part thereof, the above provisions of the Child’s Rights Act 2003 apply to the whole of Nigeria and any state law inconsistent with it is a nullity by virtue of Section 4(5) of the Nigerian Constitution, which provides for the supremacy of federal law over the law of the state. Since federal law is superior to state law, and state law is superior to Islamic law or customary law, then federal law is superior to Islamic and customary law.⁶⁶

In light of the preceding analysis, while the federal government cannot legislate on Islamic law and customary law marriages, it can legislate to protect the child from exploitation and provide for their moral welfare and that the Child’s Rights Act 2003 can be regarded as a statute validly enacted by the federal government⁶⁷ and whose provisions prohibit child marriage in Nigeria.

64 CFRN, s 6(6)(c); Nwauche, “Child Marriage in Nigeria”, 424.

65 Child’s Rights Act 2003.

66 Asein JO, *Introduction to the Nigerian Legal System*. Second Edition. Lagos: Ababa Press, 134-136.

67 On the competence of the Federal Republic of Nigeria to enact the Child Rights Act, see Adigun M. 2019. “The Implementation of the Convention on the Rights of the Child in Nigeria”, *Public Law* 3:476-494.

CHILD MARRIAGE UNDER ISLAMIC LAW

As previously noted, child marriage under Islamic law has been traced to the *hadith* in which the Prophet of Islam (SAWS) was reported to have married his wife Ayesha at the age of nine and that prior to that time she had been betrothed to him at the age of six.⁶⁸ In fact, it was claimed that Ayesha was only interested in her dolls when she was married to the Prophet (SAWS).⁶⁹ The idea of a nine-year-old girl getting married may seem appalling to someone in the twentieth century. However, while this is understandable it was nothing out of place at that time.⁷⁰ That the age of marriage is 18 today is a product of the efforts put up by human rights activists.⁷¹ Therefore, without any undue emotion, the issue is: Was Ayesha actually nine years of age at the time she was married to the Prophet?

Available pieces of evidence show that the *hadith* reporting the age of Ayesha at nine when she was married to the Prophet (SAWS) is suspect at best and grossly unreliable at worst. First, Hisham ibn 'Urwah was credited with the report in Medina. He ostensibly relied on his father. He lived the first 71 years of his life in Medina. But, strangely, he alone from Medina reported the incidence of the Prophet's marriage to Ayesha at the age of nine and there was no one else in spite of the fact that one of his Medinan pupils was Malik ibn Anas, the founder of the Maliki school of Islamic law. After Hisham left Medina, he went to Iraq and it was from Iraq that the report about Ayesha's age started.⁷² Second, Malik ibn Anas was said to have objected to those narratives of Hisham reported by the people of Iraq.⁷³ Third, it was reported that when Hisham was old, he suffered from memory loss, implying that when he was in Iraq he could no longer adequately recall events.⁷⁴ Fourth, Al-Tabari stated that Ayesha was six years when she was betrothed to the Prophet (SAWS) and that she started living with the Prophet when she was nine. He also stated that Abu Bakr who was Ayesha's father gave birth to Ayesha and her three other siblings during the pre-Islamic era. The pre-Islamic era was pre-610 CE. Ayesha's betrothal was 620 CE while her marriage was 623/624 CE. If Ayesha was born during pre-Islamic era, she must have been around thirteen or fourteen years of age when she married the Prophet (SAWS). The implication is that Al-Tabari contradicted himself.⁷⁵

68 Sahih Muslim, Hadith No. 3309.

69 Sahih Muslim, Hadith No. 3311.

70 Barlas A. 2002. "*Believing Women*" in *Islam: Unreading Patriarchal Interpretations of the Qur'ān*. Austin: University of Texas Press, 126.

71 Barlas "*Believing Women*" in *Islam*, 126.

72 Shanavas TO. 2009. "Was Ayesha a Six-Year-Old-Bride? The Ancient Myth Exposed", in Yuksel E (ed). *Critical Thinkers for Islamic Reform: A Collection of Articles from Contemporary Thinkers on Islam*. Brainbow Press, 25. See also Barlas, "*Believing Women*" in *Islam*, 125-127.

73 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 25.

74 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 25.

75 Shanavas "Was Ayesha a Six-Year-Old-Bride?", 25-26; Barlas, "*Believing Women*" in *Islam*, 126.

Fifth, Ibn Hajar stated that Fatima, the daughter of the Prophet (SAWS) was born at the time when the Ka'bah was rebuilt and that the Prophet was thirty-five years of age. He also stated that Fatima was five years older than Ayesha. If Ibn Jabar was right, it means that at the time Ayesha was born, the Prophet was forty years of age. It is not in dispute that the Prophet married Ayesha at the age of fifty-two. The implication is that Ayesha was likely to be twelve years of age when she married the Prophet.⁷⁶ Sixth, Asma was an elder sister to Ayesha, and she was believed to be 10 years older. She was reported to have died at the age of 100 years in 73 or 74 AH.⁷⁷ This means that at the time of Hijrah, she must have been 27 or 28 years of age. Since Ayesha was 10 years younger than Asma, Ayesha must have been 17 or 18 years. It was not in doubt that Ayesha started living with the Prophet two or three years after Hijrah. This means that she started living with the Prophet at 19 or 20 years.⁷⁸ Seventh, in the Battles of Uhud and Badr, children below 15 years of age were not allowed to participate. However, there was evidence that Ayesha participated. This implies that at least, she was more than 15 years when she married the Prophet.⁷⁹

Seventh, Chapter 54 of the Quran, known as Surat al-Qamar (The Moon) was revealed to the Prophet eight years before Hijrah. This indicates that it was revealed 614 CE. If Ayesha was nine years old when she married the Prophet in 623 or 624 CE, she must have been a newborn infant (*sibyah* in Arabic) at the time Surat al-Qamar was revealed. However, it was reported that Ayesha claimed she was a young girl (*jariyah* in Arabic) when Surat al-Qamar was revealed. Therefore, Ayesha, as a *jariyah* and not *sibyah* when Surat al-Qamar was revealed, must have been between 6 and 13 years and must have been between 14 and 21 years when she married the Prophet.⁸⁰ Eighth, Ahmad ibn Hanbal reported that after Khadijah, the first wife of the Prophet (SAWS) died, Khaulah, an influential Arab Muslim female companion of the Prophet, visited the Prophet and advised him to take another wife. The Prophet then asked her if she had any one in mind. She then replied that the Prophet could marry a virgin (*bikr* in Arabic) or a woman who had married before (*thayyib* in Arabic). When the Prophet inquired of her further about the person she had in mind, she then mentioned Ayesha. As previously noted, the Arabic word for a young girl is *jariyah*, since *jariyah* was not used to describe Ayesha, then *bikr* must have meant a young lady who has never had any sexual experience. This tends to suggest that at the time Ayesha married the Prophet, she was already a young woman and not a girl of nine years old.⁸¹

76 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 26.

77 AH means After Hijrah. Hijrah means migration. The migration being referred to is the migration of the Prophet of Islam from Mecca to Medina.

78 Shanavas "Was Ayesha a Six-Year-Old-Bride?", 26-27; Barlas, "Believing Women" in Islam, 126.

79 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 27.

80 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 28.

81 Shanavas, "Was Ayesha a Six-Year-Old-Bride?", 28.

15. Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?

In light of the foregoing, it is most likely that at the time Ayesha married the Prophet (SAWS), she was between 13 and 21 years of age. Therefore, the figure of an old man marrying an innocent girl is least probable. In fact, Islamic law scholar Edip Yüksel has argued that it was a deliberate ploy to justify the libidinous excesses of kings and the wealthy, in spite of the Quranic injunctions forbidding lewdness.⁸² If one considers other *hadith* which described Ayesha as a person who had had good knowledge of Arabic poetry and an understanding of Arabic-Islamic ethics at the time of her marriage, in contradistinction to a girl who was only interested in dolls, she was most probably a young woman of not less than eighteen years.⁸³

Since this *hadith* does not appear to be credible, the position of the Quran with respect to the age of marriage is worthy of being examined. In Quran surah 4 verse 6, it is stated as follows:

Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them; but consume it not wastefully; nor in haste against their growing up. If the guardian is well off, let him claim no remuneration. But, if he is poor, let him have for himself what is just and reasonable. When you release their property to them, take witnesses in their presence: But all-sufficient.⁸⁴

The above stipulation of the Quran reflects two things. First, sound judgment and puberty are the two criteria to determine majority. With this, it can be argued that a child of nine years of age is not likely to be capable of exercising sound judgment and may not have exhibited the features of maturity. This, arguably, accounts for the position maintained by some Islamic scholars, who maintain that a child, whether male or female, who has not reached the age of puberty should not get married in all circumstances.⁸⁵ Secondly, the Quran is silent on the age of majority which in this context can be said to be the age at which someone can get married. While it can be argued that the silence of the Quran on the age at which a person can get married can be relied upon to justify child marriage, the same can be relied upon to argue that the age can be fixed, as long as the person can display sound judgment and maturity at that age.

In the northern part of Nigeria (where child marriage is more predominant) the Maliki school is the prevailing form of Islamic law.⁸⁶ This makes the age at which a person can get married relevant. In the Maliki school of Islamic law, a person

82 See Yüksel E. 2009. *Manifesto for Islamic Reform*. Brainbow Press, 18-19. Quran 4:24; Quran 5:6.

83 Barlas, "Believing Women" in Islam", 126.

84 Quran 4:6 (Yusuf Ali translation).

85 Japaar NH and others. 2018. "Educational Right for Underage Spouse from Shariah Perspective", in Hashim NM and others (eds). *Proceedings of the 3rd International Halal Conference (INHAC 2016)*. Singapore: Springer, 20.

86 Anderson JND. 2008. *Islamic Law in Africa*. Abingdon: Routledge, 172; Asein, *Introduction to the Nigerian Legal System*, 118. On the Maliki school, see Doi AI. 1984. *Shariah: The Islamic Law*. London: Ta Ha Publishers, 93-103.

may marry at the age of 17,⁸⁷ but it is permissible for the parent or the guardian to give the hand of their daughter in marriage below that age.⁸⁸ However, such a child has the option of repudiating the marriage.⁸⁹ It is noteworthy that consent is a requirement for a valid marriage in Islamic law.⁹⁰ Since the Maliki school puts the age of marriage at 17, it can be argued that there is no basis for anyone in the northern part of Nigeria to marry a girl below that age. However, it can be countered that since a parent or guardian can give the hand of their daughter in marriage even if she is below 17 years, marriage below that age is permitted under Maliki school as long as a parents or guardian has consented.

The position of the Maliki school can be said to be at best a matter of custom or acceptable practice of the era. This is customary law known as '*urf*'.⁹¹ The reason is that the Quran does not fix a specific age for marriage. Similarly, the *hadith* does not stipulate a specific age and the narrative in respect of Ayesha is unreliable. Furthermore, there is no *ijma* (consensus) amongst the schools of Islamic law with respect to the age of marriage. The Shafi'i school, for example, fixes the age of marriage at 15 for both sexes.⁹² With respect to *qiyas*, there is nothing to show that the age chosen by any of the schools is informed by any analogical reasoning. In any event, such *qiyas* can be said to be informed by '*urf*'. The point that the direction taken by *qiyas* can be informed by '*urf*' has been firmly established.⁹³

DOES THE NIGERIAN CONSTITUTION CONSPIRE WITH ISLAMIC LAW?

Having examined the position of the Constitution of the Federal Republic of Nigeria 1999 and that of Islamic law on child marriage, I now propose an answer to the earlier posed question: Does the Nigerian Constitution conspire with Islamic law to permit child marriage in Nigeria? The notion of conspiracy suggests the existence of two entities that jointly agree on doing something sinister. In this instance, to

87 Büchler A and Schlatter C. 2013. "Marriage Age in Islamic and Contemporary Muslim Family Laws: A Comparative Survey", *Electronic Journal of Islamic and Middle Eastern Law* 1:37, 47.

88 Büchler and Schlatter, "Marriage Age in Islamic and Contemporary Muslim Family Laws", 41.

89 Ibn Abbas reported, "A girl came to the Messenger of Allah, and she reported that her father had forced her to marry without her consent. The Messenger of Allah gave her the choice between accepting the marriage or invalidating it." See Sodiq Y. 2017. *A History of the Application of Islamic Law in Nigeria*. Cham: Springer International Publishing, 82.

90 Sodiq, *A History of the Application of Islamic Law in Nigeria*, 82-83.

91 On '*urf*' in Islamic law, see Shabana A. 2010. *Custom in Islamic Law and Legal Theory: The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition*. New York: Palgrave Macmillan.

92 Büchler and Schlatter, "Marriage Age in Islamic and Contemporary Muslim Family Laws", 47.

93 Shabana, *Custom in Islamic Law and Legal Theory*; Shah SS. 2009. "Rethinking Islamic Law: Conceptual Premises and Strategic Framework", *Shariah Law Reports* 4:51, 60-61.

15. *Child marriage: Does the Nigerian Constitution conspire with Islamic law ...?*

establish conspiracy, the Nigerian Constitution and Islamic law must have together recognised child marriage. Against the backdrop of the preceding analysis, the Nigerian Constitution does not provide for the practice of child marriage in Nigeria. Section 29(4)(b) only recognises marriage conducted by a woman below the age of 18 outside Nigeria for the purpose of renouncing Nigerian citizenship and nothing more. Therefore, if the Egyptian married by Yerima in Nigeria was truly 13 years of age, the marriage would have been unconstitutional. If he truly blocked constitutional amendment, his effort must have been on the misconception that Section 29 supports child marriage. It would have been a different position entirely if the Egyptian had been married in Egypt and she wished to renounce Nigerian citizenship after having acquired it.

Since conspiracy requires two entities in a joint enterprise, the point that Section 29 of the Nigerian Constitution 1999 does not support child marriage implies that there is no conspiracy. With respect to Islamic law, for any person to get married the person must be capable of exercising sound judgment and reach puberty. To the extent that a person cannot exhibit this feature at an age less than 18, Islamic law does not recognise child marriage. Also, to the extent that consent is required for a marriage to be valid in Islamic law, child marriage is un-Islamic since a child could not have validly consented. However, it can be argued that Islamic law, as customarily interpreted in Nigeria, permits child marriage. Since the Nigerian Constitution is superior to Islamic law as customarily interpreted, the practice of child marriage is unconstitutional. The unconstitutionality is predicated on Sections 21, 22 and 23 of the Child's Rights Act 2003, which prohibit child marriage and whose validity is rooted in the Nigerian Constitution.

CONCLUSION

This study has examined child marriage in Nigeria and raised the question of whether the Nigerian Constitution and Islamic law as customarily interpreted conspire to permit child marriage. The study finds that child marriage is practised in Nigeria and that it is most prevalent in the northern part of Nigeria. It also finds that both boys and girls can be married as children, but girls are much more negatively affected by the practice. Thus, child marriage violates the girl's right to health, life and human dignity. The Nigerian Constitution only recognises marriage of a Nigerian woman below 18 outside Nigeria for the purpose of renouncing Nigerian citizenship and nothing more. With respect to Islamic law, child marriage is also not permitted, although no specific age of marriage is fixed. Since the Nigerian Constitution does not permit child marriage, it is concluded that there is no conspiracy. However, Islamic law as customarily interpreted permits child marriage but is unconstitutional by virtue of Child's Rights Act 2003, whose validity is firmly established under the Nigerian Constitution.