FINDING HARMONY IN THE DISCORDANT LEGAL REGIMES IN NIGERIA ON MINIMUM AGE OF MARRIAGE FOR THE GIRL CHILD

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1. INTRODUCTION:

Ahmed Sani Yerima, a senator of the Federal Republic of Nigeria representing Zamfara[1] West Senatorial seat in the Senate of the Federal Republic of Nigeria was in the news in March 2010. He was alleged[2] to have married a 13 year old Egyptian girl at the National Mosque Abuja sometime in March 2010. The incident, as expected, generated massive objection from women's rights activists with calls[3] that the Senator be prosecuted for breaching provisions of a Nigerian law[4].

However this incident highlights a more serious problem: the problem of minimum age of marriage for the girl child[5] in Nigeria. This is because marriage of the girl child at early stage in life has far-reaching health, social, economic, and political implications for the girl and her society. It truncates a girl's childhood, creates grave physical and psychological health risks, and robs her of nationally and internationally recognized human rights[6].

Although Nigeria has a host of laws some of which of have tried to lay down the minimum age[7] any girl child must attain before being married, these law add to the confusion as to the minimum age of marriage for the girl child because of their divergent position[8] on this issue. This article intends to find harmony in this seeming confusion in the position of the laws by examining and comparing the key laws in this area to see if there are possible areas of interface.

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1 A State in North West of Nigeria.

2 As we shall see shortly, the Senator denied that the girl was 13 years although he did divulge the age of the girl.

3 For instance, Women's Rights activists called for prosecution of Senator Yerima, the National Assembly set up committees to "investigate" the allegation against Senator Yerima while many Nigerians, both in the print and electronic media, castigated Senator Yerima for his actions although most of the criticisms were based on moral grounds.

4 Sections 21 and 23 of the Child's Rights Act.

5 International legal instruments like Convention on the Rights of the Child (C.R.C) define persons under eighteen years as children.

6 Nawal M. Nour, Health Consequences of Child Marriage in Africa in Emerging Infectious Diseases wwwnc.cdc.gov/eid/article/12/11/06-0510-articles.htm (accessed 27/12/2012)

7 Or stage of physiological development.

8 And sometimes conflicting positions.

Suggestions will also be made on ways of attaining harmony amidst the varying positions of the laws on this issue.

2. EXTENT OF PROBLEM OF GIRL CHILD MARRIAGES IN NIGERIA:

According to UNICEF 39 percent of female children in Nigeria were married before age of maturity from 2000 to 2009.[9] Nationwide, 20 percent of girls were married by age 15, and 40 percent were married by age 18[10]. For instance, In Kebbi State, Northern Nigeria, the average age of marriage for girls is just over 11 years, against a national average of 17[11]. On average, about two out of five girls will be married before their 18th birthday[12]. While child marriage is common in Nigeria, prevalence is highest in North West (76%), followed by North East (68%), North Central (35%),South South (18%), South West (17%), and South East (10%)[13]. It is projected that if the present trend continues, 4,615,000 of the young girls born between 2005 and 2010 will be married/in union before age 18 by 2030. This projection shows an increase of 64% from the 2010 estimate of married girls[14].

There are lots of problems associated with this practice. First, the girl child, and in most cases the unborn baby, is usually exposed to several health and life-threatening problems due mainly to increased risk arising from their premature[15] foray into marriage. These risks may take the form of premature labour, low birth rate and higher chances that the newborn babies will not live. There are also the serious medical complications of Vesico-Vagina Fistula (VVF) and Rectum Vagina Fistula (RVF). These conditions are said[16] to affect about 150,000 women. About 80-90 percent of them are estimated[17] to have been divorced by their husbands.

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9 www.unicef.org/protection/51929_58008.html.

10 Population Council Report of August 2004.

11 Westoff, Charles F (1992) "Age at Marriage, Age at First Birth and Fertility in Africa" World Bank Technical Report No. 169, The World Bank, Washington D.C. cited in "Early Marriage: Child Spouses" Innocenti Digest No.7 March 2001.p 5

12 UNFPA Child Marriages Profile Nigeria www.devinfo.info/mdg 5b/profiles/files/profiles/en/4/child marriage_county_profile_AFRNGA_Nigeria.pdf. (assessed 27/12/2012)

13 *Ibid.*

14 *Ibid.*

15 "Premature" in the sense that they are not sufficiently physiologically developed to meet the demands of marriage in many aspects including constant conjugal activities of marriage and the natural fall out of such activities which is the bearing of children.

16 Iyabode Ogunniran, *Child Bride and Child Sex: Combating Child Marriages in Nigeria*, African Journal Online, www.ajol.info/index.php/naujilij/articles

17 *Ibid.*

Child marriages also deny children of school age their right to the education for their personal development, preparation for adulthood and effective contribution to the future well-being of their family and society[18].

3. LEGAL FRAMEWORK REGULATING GIRL CHILD MARRIAGE IN NIGERIA:

3.1 MARRIAGE ACT:

The Marriage Act[19] does not expressly provide for the minimum age of marriage. However, before the Registrar of Marriages issues a certificate or license authorising a marriage under the Act, he must have been satisfied by affidavit that, among other things, each of the parties to the intended marriage (not being a widower or widow) is twenty one years old, or that if he or she is under that age, a written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, must be produced or annexed to such affidavit[20]. Where there be no parent or guardian of such party residing in Nigeria and capable of consenting to the marriage, the Governor, a judge of a High Court of a State or Federal Capital Territory or any officer of or above the grade of assistant secretary may consent, in writing, to such marriage taking place upon being satisfied after due inquiry that the marriage is a proper one[21].

3.2 ISLAMIC LAW POSITION:

Islamic law came into Nigeria by means of *jihad* and even predates English law principles[22] in Nigeria particularly the area that forms the present Northern part of Nigeria[23]. This situation continued after the 1914 amalgamation[24].

Islamic or Moslem law is regarded as a variant of customary law[25] and was recognised as such in the body of Nigerian laws[26]. However there is a trend now to declassify it as such by some Supreme Court Justices in a

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18 *Ibid.*

19 Cap. M6 Laws of the Federation of Nigeria 2010.

20 Sections 11(1) (b) and 18 of the Marriage Act

21 Section 20 of the Marriage Act.

22 Principles of Common law, Equity and Received English Statutes otherwise known as "Statute of General Application"

23 John Ademola Yakubu, The Dialectics of the Sharia Imbroglio in Nigeria, (Ibadan, Demyaxs Law Books, 2003) p. 1

24 *Ibid*

25 It is regarded as "received customary law" introduced into Nigeria as part of Islam. See Obilade, The Nigerian Legal System, (Ibadan, Spectrum Books Limited, 2005) p. 83.

26 See for instance Section 2 of the High Court Laws of Northern Nigeria 1963.

number of decisions. For instance, in **Alkamawa v. Bello & Anor**[27], where the issue centred on the interpretation of the Islamic law principle of right of pre-emption (*Shufah*). Wali J.S.C of the Supreme Court reasoned that,

> Islamic law is not same as customary law as it does not belong to any particular tribe. It is a complete system of **universal law**[28], more certain and permanent and more universal than the English common law[29]

The facts of case are that the appellant, Alhaji Ila Alkamawa, had acquired as part of his estate the house of his deceased neighbour, Magajin Rafi Sokoto Bello. The deceased had in his life time entrusted the house to the Appellant. After the death of Sokoto Bello, one of his heirs, Hassan Bello offered to sell the house to the Appellant at price but the Appellant considered the price to be too high. Hassan Bello later sold the house to one Alhaji Malami Yaro. Irked by the sale of the house by Hassan Bello, the appellant filed a suit at the Area Court claiming the right to repurchase the house at the same price it was sold to Malami Yaro by exercising his right of *Shufah* as a next door neighbour.

The Area Court gave judgment in his favour. On appeal, the High Court set aside the decision of the Area Court and ordered for a retrial. On further appeal and cross-appeal to the Court of Appeal, the Court affirmed the sale of the house by Bello to Yaro. The appellant therefore appealed against this decision to the Supreme Court.

The issue at the Supreme Court was whether the appellant having admitted being a next door neighbour to the house in dispute, has any right of pre-emption (*Shufah)* to repurchase the house of Sokoto Bello from Malami Yaro on the same price he bought it from Hassan Bello compulsorily under the relevant and applicable Islamic law?[30]

The Supreme Court[31] dismissed the appeal. The Court reasoned that the Area Courts Edict[32] defines "Muslim personal law" as meaning same

27 (1998) 8 N.W.L.R (Pt 561) 173.
28 Emphasis supplied.
29 (1998) 8 N.W.L.R (Pt 561) 173 at 182.
30 (1998) 8 N.W.L.R (Pt 561) 173 at 179.
31 By a unanimous decision.
32 No. 21 of 1967.

thing as in the provisions of Sharia Court of Appeal Law[33] and by the provisions of Sharia Court of Appeal Law "Muslim law" means "Muslim law of Maliki school…" Thus the Court applying the interpretation of the Maliki School rejected the appellant's claim. As noted by Wali J.S.C who read the lead judgment,

> Reading all the provisions of the Laws referred to above, it can easily be discerned that the applicable Muslim law in Area Courts is the Islamic law of the Maliki school, from the time of establishments of these courts (both before and after the colonisation of the area today being referred to as Northern States of Nigeria and up to today) has been the applicable law in the courts. So on the principle of notoriety the law has gained acceptance and recognition by both the inferior and the superior courts in this country that judicial notice of it can be taken[34]

However scholars like Ayesha Imam feels that it is "common myths" to regard Muslim law as a divine unchangeable law or as being divine and eternal which makes it a single unitary system where all the provisions are applied in the same way by all good Muslims throughout the world[35]. The approach of some States in Northern Nigeria like Kano, in this regard, is to elevate Islamic law[36] to status of statutory law[37].

Sharia law[38] is recognised by the Constitution of the Federal Republic of Nigeria as amended. The initial provisions of the Constitution were to recognise a right of appeal from the decisions of Sharia Court of Appeal to the Federal Supreme Court[39]. These provisions essentially recognised Sharia at the Federal level in Nigeria[40]. The provisions in the 1979, and subsequently 1999, were more elaborate. Specifically it provides for a Sharia Court of Appeal of the Federal Capital Territory, Abuja[41] and

33 Cap. 22 Vol.III Laws of Northern Nigeria.

34 (1998) 8 N.W.L.R (Pt 561) 173 at 182.

35 *Women's Rights in Muslim Law (Sharia)* in The Place of Women Under Sharia, (Lagos, Constitutional Rights Project, July 2000) pp.23- 26.

36 Muslim laws

37 See 29 (3) of Kano State Sharia Courts Law 2000. This measure appears to be aimed at defeating the provisions of Nigerian law which placed legislations higher than customary laws and gave the former superiority in a situation where the provisions of the laws in both orders conflict. See for instance section 34 (1) of High Court Law No.8 of Northern Nigeria 1955.

38 A technical name for Islamic or Muslim laws.

39 Section 112 of the Constitution of the Federation of Nigeria 1960 and section 119 (1) of the Constitution of the Federal Republic of Nigeria 1963.

40 John Ademola Yakubu, *Op Cit*., p. 9.

41 Section 260(1) of the Constitution of the Federal Republic of Nigeria 1999.

Sharia Court of Appeal for "any State that requires it"[42]. The jurisdiction of the Sharia Court of Appeal in the Federal Capital Territory, Abuja and "any State that requires it" in addition to such other jurisdiction that may be conferred by an Act of the National Assembly, extends to such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law[43]. The Islamic personal law referred to are:

(a) any question of Islamic law personal law regarding marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding marriage , including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;

(c) any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;

(d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or

(e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine the case in accordance with Islamic personal law, any other question[44].

An essential ingredient of a valid Islamic marriage, especially of the Maliki School that dominates in Nigeria, is the principle of *Waliyi* (Guardian) that is, a person who can give a girl or woman away in marriage. Normally, a woman strictly speaking has no right of choice of husband at first marriage, since her father has a legal right to exercise what is known as the power of *Ijbar* that is, choice of husband for his daughter. *Ijbar* is not supposed to be exercised where the girl has reached the age of maturity or of puberty. Even where the father has exercised the power *Ijbar*, when the girl reaches the age of maturity or of

42 Section 275 (1) of the Constitution of the Federal Republic of Nigeria 1999

43 Sections 262 (1) and 277 (1) of the Constitution of the Federal Republic of Nigeria 1999.

44 Sections 262 (2) and 277 (2) of the Constitution of the Federal Republic of Nigeria 1999.

puberty, she could under the principle of *Hibaril Bulug* (literally, "Option of Puberty") decide on whether or not to continue with the marriage[45].

From this, we can infer that a girl can, under Islamic law be married even before puberty[46]. It has been suggested that this practice was observed by Prophet Mohammed who married his third wife Nana Aisha[47] as a 9 year old or at most as a teenager[48]. It is, however, argued that although the Prophet might have married his wife when she was still tender, he only consummated the marriage after she attained puberty[49]. It is therefore not seriously disputed that Islam does not abhor marriage of girls of tender age provided that the necessary consent, from the father or guardian, is obtained[50].

3.3 CUSTOMARY LAW POSITION:

There are several tribes in Nigeria[51]. Most of these tribes have their own unique custom. Consequently, there are several customary laws, unique to each tribe, governing customary marriages, and invariably child marriages. It is important to note at this stage that customary law marriages are recognised by the laws in Nigeria[52]. Apart from the acknowledged fact[53] that our customary laws are generally unwritten, there are certain essential broad requirements for valid customary law marriages - capacity, bride-price and celebration of marriage[54]. In respect of minimum age as a capacity for contracting a valid customary law marriage, it has been posited that most systems of customary law in Nigeria do not prescribe any minimum age for the solemnization of

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45 Umaru Abdullahi, *The Influence of Customs upon Marriage under Islamic Law in the far Northern States of Nigeria* in T.O. Elias (ed.) African Indigenous Laws: Proceedings of Workshop (Nsukka, Institute of African Studies University of Nigeria, 1974) p.123.

46 Being capable of procreation.

47 Safiya I. Dantiye, "**Yerima's Marriage and the Grand Hypocrisy of our Time**" in *Daily Trust* May 14, 2010p. 34.

48 Disu Kamor, **"On the Issue of Early Marriage"**, ThisDay, May 23, 2010,p. 24. Indeed, Senator Yerima was said to have cited the example of the Prophet's marriage as an exculpating ground for his action.

49 Maryam Uwais, **Child Marriage: Yerima's on His Own,** ThisDay newspaper, Tuesday May 4, 2010 pp. viii to x.

50 It is argued that marriage to girls who are yet to attain puberty is only permissible but not an injunction in Islamic law. *Ibid*

51 It is estimated that there are more than two hundred and fifty tribes in Nigeria. See en.wikipedia.org/wiki/Nigeria

52 See for instance Section 12 (2) of the Enugu State Customary Courts Law (Cap. 32) Laws of Enugu State 2004 (as amended in 2011) which gives Customary Courts unlimited jurisdiction over matrimonial cases in respect marriages conducted under customary law. Indeed, some legislations in the defunct Regions of Nigeria and currently in some States of Nigeria, were made specifically to address some thorny issues that arose from customary law marriages such as issue of bride price. For instance see Limitation of Dowry Law (Cap. 76) Laws of Eastern Nigeria 1963.

53 See Obilade, *op cit*, p.83

54 E.I. Nwogugu, Family Law in Nigeria, (Revised Edition), Ibadan, Heinemann Educational Books (Nigeria) Plc, 1990, p.43- 58.

customary law marriage. This apparent lacuna is blamed for the high incident of marriage of underage[55] girl children. Despite this lacuna, it is suggested that customary law marriages do not in fact take place until the child has attained the age of puberty[56]. It has been argued that the usual practice is that even if a girl is married before she attains puberty she would not have to reside with her husband until she develops physically enough to live with her husband[57]. It may be important to point out that some States in the Eastern and present South- South[58] part of Nigeria have[59] tried to temper this perceived lacuna in the requirements of customary law marriages through legislation[60].

3.4 THE INTERVENTION OF THE CHILD'S RIGHTS ACT

Although the Child's Rights Act was enacted by the National Assembly and signed into law on 31 July 2003 by the then President of the Federal Republic of Nigeria, its applicability to the entire States in Nigeria has been dogged by constitutional problems. Prominent among these is that most of the subjects[61] covered by the Act are not within the precincts of the National Assembly to legislate on but rather rests with the State Houses of Assembly[62]. This development has rendered the Act impotent in terms of protecting the rights and interest of most Nigerian children[63]. The solution being adopted by several States in Nigeria, apparently to circumvent the obvious constitutional quagmire the Act is enmeshed in is to have their State Houses of Assembly enact the Act in the shape of a Child's Rights Law applicable in such State. Several States in Nigeria have followed this route.

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55 Used here to refer to children who are less than 18 years.

56 E.I, Nwogugu, *Op Cit*, p. 43.

57 I.P. Enemo, Basic Principles of Family Law in Nigeria, Ibadan, Spectrum Books Limited, 2008, p.75

58 Which formed the defunct Eastern Region of Nigeria.

59 The defunct Eastern Region of Nigeria had a law, Age of Marriage Law (Cap. 6) Laws of Eastern Nigeria 1963.

60 See for instance section 3 (1) of Customary Marriages (Special Provisions) Law (Cap. 33) Laws of Enugu State 2004; section 3 Reproductive Right of Women Law No. 7 of Anambra State 2005; Section 3 Harmful Practices against Women and Children No.10 of Ebonyi State, Girl Child Marriage and Female Circumstance Law No.2 of Cross River 2000, section 2 Age of Customary Law Marriages Law (Cap. A5) Laws of Bayelsa State 2006.

61 For instance Tort, Contract, Adoption, Guardianship, Wardship etc.

62 These areas are often referred to as the "Residual matters". These are usually subjects not in the "Exclusive Legislative List" which the National Assembly alone can make laws in accordance with section 4 (3) of the Constitution of the Federal Republic of Nigeria 1999 and "Concurrent Legislative List"which the National Assembly is empowered to make laws concurrently with the State Houses of Assembly in accordance with 4 (4) (a) and 4 (7) (b) of the Constitution of the Federal Republic of Nigeria 1999.

63 Indeed some States in Northern Nigeria view the contents of the Act altogether as being "Un -Islamic" and therefore they have indicated that they would not re-enact its provisions in their domain.

Nigeria is a Federation consisting of thirty-six States and a Federal Capital Territory[64]. Each of the thirty-six States has a House of Assembly[65]. However, the Federal Capital Territory[66] does not have a House of Assembly because it is not classified as a State of the Federal Republic of Nigeria. Consequently, the laws[67] made by the National Assembly directly apply to the Federal Capital Territory[68]. One of such laws is the Child's Rights Act[69]. Against this backdrop, the Child's Rights Act[70] applies to Abuja, the Federal Capital Territory, without any modification.

Section 21 of the Child's Rights Act provides that,

> *No person under the age of 18[71] years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever*[72]

Section 23 went on to provide that "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 ₦ 500, 000; or imprisonment for a term of five years or to both such fine and imprisonment".

4. RECONCILING THE CONFLICT IN THE MINIMUM AGE OF MARRIAGE OF GIRL CHILDREN IN NIGERIA:

4.1 PROVISIONS OF MARRIAGE ACT AND CHILD'S RIGHTS ACT

The pertinent issue now is how to reconcile the apparent conflict between the provisions in the various laws regulating minimum age of marriage in Nigeria with respect to the girl children. As we earlier noted, the Marriage Act provides for 21 year as the requisite age of marriage.

64 See section 3 of the Constitution of the Federal Republic of Nigeria 1999.
65 As provided for in section 90 of the Federal Republic of Nigeria 1999.
66 Abuja.
67 Technically called "Acts" of the National Assembly.
68 In furtherance of the National Assembly's power to make law for the peace, order and good governance of Nigeria or *"any part thereof"* as provided for in section 4 (1) – (3) of the Constitution of the Federal Republic of Nigeria 1999.
69 Which we have seen is dogged by serious constitutional problems that make it inapplicable to States in Nigeria without the need to enact them as State laws.
70 The version signed by President Olusegun Obasanjo on 31 July 2003.
71 Section 277 of the Child's Right Act defines "Child" as a person under the age of 18 years.
72 Section 21 of the Child's Right Act. (Emphasis supplied)

Although younger persons may marry, they must obtain requisite written consent[73] before such marriages are permitted to take place.

The position of the Marriage Act is in conflict with the position of the Child Rights Act[74] which prohibits children under the age of 18 years from marrying[75]. This is also in conflict with the position under customary law marriages and Islamic law marriages both of which are recognised in the 1999 Constitution of the Federal Republic of Nigeria. Both customary law and Islamic law marriages agree that females of pre –pubescent ages could marry although consummation of such marriages may be postponed until puberty.

How, then, do we reconcile this apparent difference between the provision of the Marriage Act and the provision of the Child's Rights Act in respect of marriage of female children? The Marriage Act suggests that female children can get married even if they are less than 21 years provided consent is obtained from specified persons. The import of this to our discourse is that any female of less than 18 years may still marry under the Marriage Act provided consent is obtained from those specified under this Act. The provisions of the Child's Right Act are emphatic in outlawing of marriage of children who are under 18 years. It even goes further to prescribe punishment for perpetrators of such acts. There is therefore an obvious conflict in the Marriage Act and Child's Right Act provisions in respect of child marriages. The most plausible answer out of these divergent provisions of the two Acts is to regard the provisions of the Child's Right Act as a latter provision which has impliedly repealed the provision of the Marriage Act as regards the lower age limit within which a person can contract a valid marriage under the Act under the doctrine of implied repeal.

The doctrine of implied repeal applies where provisions in two different enactments are or seem to be in conflict. In such a situation, the second or latter enactment is deemed to have repealed the first or former enactment[76]. However, the "repeal" will be only to the extent of the former enactment's conflict with the latter enactment[77]. It is worthy to

73 From the parents or guardian or Governor of aState or judge of the High Court of a State or FCT or any officer above the grade of assistant secretary.

74 And also some Child's Right Laws of the various States in Nigeria.

75 Section 21 of the Child's Rights Act.

76 See Barry & 2 Ors. V. Eric & 3 Ors. (1998) 8 N.W.L.R (Pt. 562) 404 at 416; C.C.B (Nig.) Plc & Anor. v. Ozobu (1998) 3 N.W.L.R (Pt. 541) 290 at 309.; Olu of Warri & 3 Ors. v. Kperegbeyi & 2 Ors. (1994) a N.W.L.R (Pt. 339) 416 at 438-439.

77 See Adegoke A. Olarenwaju, *Repeals of Legislations*, NIJLD Vol. 1, No. 1 (2012) 138.

note that repeal is implied when a new law contain provision contrary to or irreconcilable with those of the former[78]. The effect of this later provision of the Child's Rights Act is that the minimum age of marriages under the Marriage Act now is effectively18 years.

4.2 PROVISIONS OF CHILD'S RIGHTS ACT AND CUSTOMARY LAW

The colonialists recognised the importance of customary laws in complementing their own British laws that were imposed on the "conquered" Nigerian territory but only in so far these laws scaled the "validity" hurdle. The "validity" hurdle was usually incorporated in the laws that established the courts and were essentially directives to the courts to recognise only customary laws that were not repugnant to natural justice, equity and good conscience or incompatible with any law in force[79]. Similar provisions survived the colonial era and are now found in the High Court laws of the various States in Nigeria. For instance, section 17 (2) of the High Court Law (Cap. 92) Laws of Enugu State 2004 provides,

> No person shall be deprived of the benefit of customary law except when any such customary law is repugnant to natural justice, equity and good conscience or *incompatible either directly or by its implication with any written law*[80] from time to time in force in the State.

The implication of this sort of provision to our discourse is that where our customary laws allow female children of any age to marry, it is now tempered by legislations such as Child's Right Act of 2003 which forbids children who are less than 18 years from getting married.

4.3 PROVISIONS OF CHILD'S RIGHTS ACT AND ISLAMIC LAW

The earlier position in Nigeria has been to regard Islamic law or Moslem Law as a variant of customary law[81]. However, as we have seen this position has been questioned by the Supreme Court in a number of decisions[82]. However, it is worthy that the comments of the Supreme Court were only tangential to issues before the court. In other words, the

78 *Ibid.*

79 See section 12 (1) of the High Court Law , Western Region of Nigeria Laws (Cap. 44) 1959.

80 Emphasis supplied.

81. See A.O. Obilade, *Op Cit*, p.83, A.E.W. Park, The Sources of Nigerian Law , Sweet & Maxwell, 1963, P. 66

82 Usman v. Umaru (1992) 7 N.W.L.R (Pt.254) 377; Alkamawa v. Bello (Supra)

comments of the Supreme Court were *obiter dicta* and not the *rationes decidendi* [83] of the Court's judgment.

The implication of this to our discourse is there is no binding decision of the Supreme Court removing Islamic law from the category of customary law. To this end, Islamic law should still be regarded as a variant of customary law and therefore its provisions cannot override that of any legislation where a conflict exists between its provisions and Islamic law provisions[84]. It is consequently suggested that the provisions of Child's Right Act on the minimum age of marriage should supersede that of Islamic law provisions on the minimum age of marriage in respect of the girl child in Nigeria.

4.4 PROVISIONS OF CHILD'S RIGHTS ACT AND CHILD'S RIGHTS LAWS OF VARIOUS STATES IN NIGERIA

As we pointed out earlier, the Child's Right Act ran into troubled waters as soon as it was enacted. This position has led most States in Nigeria to enact their own law dealing with issues relating to the right of children in Nigeria. Although most of the States that have so far enacted their own laws on the rights of children basically kept faith[85] with the provision of the parent Act[86] ,the question that would bother us is what if these States decide to tamper with the provisions of the parent Act and lower the minimum age of marriage of the girl child to less than eighteen years? Issues of formation, annulment and dissolution of marriages other than marriages under Islamic and Customary law are in the Exclusive Legislative List[87] . The implication of this is that it is only the National Assembly that can make a law in respect to the formation of a marriage

83 Generally agreed to be the reasons for a court's judgment or decision which other lower court are bound to follow when faced with similar fact and which a court of coordinate jurisdiction is persuaded to follow. Clarifying on this concept of *obiter dictum* a Nigerian Supreme Court Justice, Achike J.S.C blessed memory, explained. It is common place that an obiter dictum is an expression of opinion made in giving a judgment by the judge but not necessary to his decision and accordingly cannot form part of the judgement

84 This would be applicable where the provisions of Islamic law have not been legislated on as was done in Kano State with respect to some Islamic law principles. It is also important to note that scholars such as M.T. Ladan has argued that by making separate and distinct provisions for the administration of both Islamic and customary laws, the Nigerian Constitution has recognized them as distinct and separate laws. Consequently, any statutory law that purports to abrogate the distinction made between the two laws becomes null and void to the extent of its inconsistency with the constitution (Introduction to Jurisprudence: Classical and Islamic (Lagos, Malthouse Press Limited, 2006) p.300 – 301.

85 See for instance sections 24- 26 of the Ebonyi State Child Rights and Related Matters Law 003 of 2010 which is identical to the provisions of sections 21-23 of the Child's Rights Act.

86 Child's Right Act.

87 Item 61 of Schedule 1 of the Constitution of the Federal Republic of Nigeria 1999 as amended.

which is not Islamic and Customary law marriage. Making laws in respect of formation of non- Islamic and Customary law marriages necessarily includes making laws to cover the age of the parties to such marriage. This matter is therefore the exclusive preserve of the National Assembly and no State House of Assembly can make any law to override any Act of the National Assembly in this matter[88]. Therefore, no State of House of Assembly[89] can enact laws to reduce the minimum age of marriage as it relates to the girl child to less than eighteen years as provided[90] in the Child's Rights Act except in cases of customary law marriages and Islamic law marriages[91]. Such legislations, where made, will be ultra vires.

4.5 PROVISIONS OF CHILD'S RIGHTS ACT AND LAWS OF SOME STATES DEALING WITH THE MINIMUM AGE OF MARRIAGE UNDER CUSTOMARY LAW

Section 3 (1) of the Age of Marriage Law of Eastern Nigeria 1963[92]made marriages contracted under customary law[93] by a person under the age of sixteen years void. This Law relates to marriages under customary law or Islamic law which the National Assembly are not empowered to legislate. Provisions of the Child's Right Act cannot therefore override the provisions of the Age of Marriage Law on the minimum age of marriage of the girl child.

It is however worthy to note that the Laws of many States that make up Eastern Nigeria have all omitted this Law although similar provisions are incorporated in other legislations[94].

4.6 EFFECT OF ELEVATING ISLAMIC LAW PRINCIPLES TO THE STATUS OF LEGISLATION ON MINIMUM AGE OF MARRIAGE FOR THE GIRL CHILD.

88 Section 4 (3) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

89 Even when enacting Child's Rights Law.

90 Section 21 of the Child's Rights Act.

91 Many States in Eastern and South- South part of Nigeria have legislated on the minimum age of marriage in respect of customary law marriages.

92 (Cap. 6) Laws of Eastern Nigeria 1963 which applied to Abia, Anambra, Akwa Ibom, Bayelsa, Cross Rivers, Ebonyi, Enugu, Imo and Rivers States (States that make up the former Eastern Region of Nigeria)

93 Section 2 of this Law made it applicable to only Customary law marriages.

94 See for instance section 3 (1) of Customary marriages (Special Provisions) Law (Cap.33) Laws of Enugu State 2004; section 3 Reproductive Right of Women Law No. 7 of Anambra State 2005; Section 3 Harmful Practices against Women and Children No.10 of Ebonyi State, Girl Child Marriage and Female Circumstance Law No.2 of Cross River 2000, section 2 Age of Customary Law Marriages Law (Cap. A5) Laws of Bayelsa State 2006.

As we noted, section 29(3) of the Kano State Sharia Court Law 2000 elevated Islamic laws to the status of legislation or statutory law. The effect of this is that Islamic law will no longer, in view of this position, be subjected to losing its efficacy if its provisions conflict with that of an existing legislation on this issue. In relation to our discourse, it implies that the position of Islamic law on the minimum age of marriage of the girl child will govern marriages formed under Islamic law in Kano State[95] irrespective of the provisions of any Child's Rights law in respect of this issue[96].

5. PROVISIONS OF INTERNATIONAL TREATIES AS A GUIDE

There are several international treaties with provisions dealing with the minimum age of marriage. Nigeria has ratified some of these treaties. For instance, the Optional Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa[97] provides that State parties enact appropriate national legislative measures to guarantee that the minimum age of marriage for women shall be 18 years[98]. In addition, the OAU Charter on the Rights and Welfare of the Child[99] provides that State parties shall prohibit child marriages and the betrothal of girls and boys. The Charter also mandates State parties to take effective action, including legislations, to specify that the minimum age of marriage shall be eighteen years and also make registration of all marriages in an official registry compulsory[100].

6. CONCLUSION:

We have seen in this article that the position of the law on the minimum age of marriage for the girl child in Nigeria is far from certain. The Marriage Act, which is a key legislation in this area, places the minimum age at twenty- one years although individuals who are younger than twenty one years can marry with consent of parents, guardian or specified government officials.

Another key legislation in this area, Child's Rights Act, places the minimum age at eighteen years without any room for variation. Customary laws and Islamic laws appear to agree that the minimum

95 And other States of the Federation which have similar provision in their laws.

96 We have argued in this discourse that although the Child's Rights Act may have exceeded the legislative competence of the National Assembly in some areas, however in the area of marriages that are not Islamic law marriages or Customary law marriages the provisions of the Act shall supersede that of any other previous Federal or State legislation on this issue.

97 This treaty came into force on 25 November 2005. Nigeria ratified this treaty on 16 December 2004.

98 Article 6 (b).

99 This treaty came into force on 29 November 1999. Nigeria ratified this treaty on 27 July 2001.

100 Article XXI (2)

period of marriage for the girl child should be from the period of puberty although there are evidence that pre-pubescent marriages are not strictly forbidden under these system. A further dimension appears to have been introduced with the legislation of customary law position on marriages in States of Eastern Nigeria with most of the legislations placing limits to the age within which to a female girl child can be allowed to marry. However, the provisions of the legislations on customary laws in these States are by no means uniform. While some States place the minimum age at eighteen years others prefer sixteen years. Also in some States in Northern Nigeria, Islamic law principles, including those dealing with the area of this discourse; have been compiled and converted into legislations. All these added to the problem of finding a uniform minimum age of marriage for the girl child in Nigeria. I have attempted, in this work, to reconcile the positions of the laws in respect of this issue but, I suspect, it is without overwhelming success.

The problem militating against the complete reconciliation of the various positions of the law can be traced to the conflict and tension existing between three legal orders[101] that make up Nigerian legal system. A simple solution to this conflict, which will lead to a complete reconciliation of the various positions, will be to expand the powers of the National Assembly in this area by amending Item 61 of Schedule 1 of the Constitution of the Federal Republic of Nigeria 1999 to include customary marriages and Islamic marriages. The effect of this will be to eliminate the dichotomy between the provisions of these three legal orders in this area. The envisaged amendment of Item 61 of Schedule 1 of the Constitution of the Federal Republic of Nigeria 1999 may read thus,

> The formation, annulment and dissolution of marriages including marriages under Islamic law and Customary law

In addition, we should borrow a leaf from a country that has an almost overwhelming Muslim majority population, the Arab Republic of Egypt. This country has demonstrated that there is nothing sacrosanct about "amending" the interpretation of the Islamic law principles on marriage to suit the exigencies of the twenty- first century and to curb the scourge of underage marriage of girl children.[102]

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101 Legislations (mainly consisting of English law principles), customary laws and Islamic laws.

102 Article 2 of the Constitution of the Arab Republic of Egypt proclaims that, "Islam is the religion of the State and Arabic official language. Islamic jurisprudence is the principal source of legislation. (http//:www.uam.es/otroscentros/media/egypt/Egyptian.htm (accessed on 7/6/2010) Egyptian Parliament approved a law in 2008 banning marriage of both female and male under 18 years. Previously, Egyptian girls were allowed to be legally married at the age of 16.

As we have shown in this discourse, there is very little advantage[103] derived from allowing the girl child to marry before the age of adulthood[104]. Rather there are loads of problems and disadvantages, both for the girl child and the society, that trail this practice. It is time we harmonise[105] our laws on the minimum age of marriage of the girl child in other to enable us to effectively tackle this blight in our society.

(http//:www.ea.thtimes.org/articles/show/210856,egypts_parliament_bans_female_circumcsion_marriage_under_18.html.(accessed on 7/6/2010)

103 Except to satisfy the rare sexual preference of some adult males.

104 Now recognized globally to be 18 years.

105 It is suggested that the minimum age of marriage be pegged at 18 years for all marriages contrary to the current dichotomy of separating the legal regime regulating these marriages which have seen some States in the Eastern part of Nigeria like Enugu State and Bayelsa State limit the minimum age of marriage under customary law to 16 years.