

LEGAL PLURALISM: AN EXAMINATION OF CONFLICTING STANDARDS IN STATUTORY, CUSTOMARY AND ISLAMIC LAW MARRIAGE IN NIGERIA*

Abstract

Marriage is one of the most cherished, common and predominant institutions in the life of every individual in a society and Nigeria, a multi-religious country with diverse and various ethnic groups is no exception. The societal structure of Nigeria is complex, diverse and varied. Furthermore, the country practices a plural legal system which consists of the received English law, customary law based on native laws and customs, and Islamic law. Due to this plural legal system, there is an inevitable internal conflict of laws especially in respect of the issue of marriage. Consequent upon the foregoing, this work examines marriage under Islamic law and its conflict with select statutes under Nigerian plural legal jurisprudence. It explores the three legal systems operating in Nigeria, the concept of marriage, statutory marriage and marriage under Islam. It also examines legal issues vis-à-vis polygamy, marriageable age, consent, etc. It further comparatively explore remedies for minor marriages and legal restrictions on polygamy in some select Islamic jurisdictions and concludes that Islamic law legalises human rights violations of girls under the guise of marriage through exposure to sexual abuse and exploitation. The paper suggests viable recommendations such as provision of marriageable age in Nigeria.

Keywords: Conflict, Islamic Law, Marriage, Nigeria, Statutes.

1. Introduction

Nigeria operates a plural legal system and is also a culturally diverse and multi religious nation. The subject of religion is sensitive and complex. Religion plays a special role in the lives of citizens. Majority of Nigerians practice one form of religion or the other. However, Christianity and Islam are the predominant religions, while some people uphold either of the two Abrahamic religions with traditional beliefs. Both religions regulate the lives of people in respect of their worship to God and their dealings with other human beings. Consequently, religion regulates the social interaction of people as regards pertinent issues such as marriage.

Christians celebrate monogamous marriages, while Muslims are permitted to have up to four wives. Furthermore, both Christianity and Islam recognise the importance of children in

* S. Ayooluwa St. Emmanuel, LL.B (Akungba-Akoko), LL.M (Ibadan), B.L, Ph.D (Akungba-Akoko); Sub-Dean, Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State, Nigeria. Email address: simon.stemmanuel@aaua.edu.ng; ayostemmanuel@gmail.com

marriage.¹ Sequel to this fact, both religions provide for guardianship, custody of children, maintenance and education.

The main focus of this paper will be on marriage under Islamic Law, a religion which permits polygamy and also allows the female child to get married to an adult male notwithstanding national laws prohibiting such practices. The paper will also appraise the effect of Islam on marriage and divorce in Nigeria vis-à-vis its conflict with selected extant statutes such as the Constitution of the Federal Republic of Nigeria, Child Rights Act, Marriage Act, Children and Young Persons Law, Matrimonial Causes Act and the Violence against Persons (Prohibition) Act.

2. Nigerian Plural Legal System

A good number of legal systems across the globe have been influenced by others and that of Nigeria is not an exception. Nigeria's legal system is composed of three sources. The first is the received English Law,² which was received into Nigerian legal system as a result of colonisation and by virtue of Ordinance No. 3 of 1863, which introduced English law into the colony of Lagos.

Secondly, there is the Customary Law. This is also known as the indigenous laws of the various ethnic tribes or clans.³ There is no comprehensive definition of customary law. However, it has been defined as 'a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules, which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.'⁴

A judicial definition of customary law is –

customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that customary law is a mirror of the culture of the people. I would say

¹ The Holy Bible, Psalms 127:3-5. In Sunan an-Nasa'i 3227, Book 26, Hadith 32, Prophet Mohammed (SAW) was quoted to have said 'marry a loving woman and fertile woman because I will boast of your great numbers.'

² These consists of Common Law, Doctrines of Equity and Statutes of General Application, which were in force as at 1st January, 1900.

³ T.A. Nwamara, *Customary Law & Practice of Abia, Ebonyi and Imo States of Nigeria and of the Customary Court of Appeal* (Law and Educational Publishers Limited 2010) 49.

⁴ Customary Court Law Cap. 49 Revised Laws of Anambra State 1979, s. 2.

that customary law goes further and import justice to the lives of all those subject to it.⁵

Customary law does not owe its enactment to a sovereign parliament; it has the capacity to adjust to changing circumstances and it must enjoy usage in the particular area of application.⁶ The common law doctrine of judicial notice is applicable to customary law. Certain customs are notorious, obvious or trite that they need not be proved before the courts. A custom may enjoy judicial notice if it has been frequently followed and applied by the courts⁷ or adjudicated upon by a superior court of record.⁸ However, where a custom cannot be established as judicially noticed, it shall be proved as a fact⁹ or established by giving in evidence the opinions of persons who are likely to know of its existence.¹⁰

It should be noted that, courts are mandated to administer customary law along with other sources.¹¹ In *Oppion v Ackinie*,¹² it was held that the continued exercise of the jurisdiction of customary courts was not inconsistent with that of the High Court but that both are co-existent. However, there are three validity tests which a custom must pass through. These are repugnancy doctrine,¹³ incompatibility theory and public policy.

Islamic Law¹⁴ is the third legal system in Nigeria and it is an all embracing system that regulates and guides the life and conduct of Muslims in respect of their rights and duties. The original and primary source of this legal system is the Holy Quran,¹⁵ which is the sacred book of Islamic law containing Allah's revelation to Prophet Mohammed. It is the final authority of both religion and the laws governing all Muslims in their individual and social behaviours.¹⁶ The second source of Islamic law is the *Sunna*. This is the model of behaviour derived from the life and conduct of Prophet Mohammed and it comprises of the collected traditions or hadith of his acts and sayings

⁵ *Oyewunmi v Ogunesan* [1990] 3 NWLR (Pt 137)182 SC, at 207 (*per* Obaseki JSC).

⁶ *Owoniyi v Omotoso* [1965] 1 All NLR 399 (*per* Bairamian FJ).

⁷ *Taiwo v Dosunmu* [1965] 1 All NLR 399 at 404.

⁸ Evidence Act (EA) Cap E14 LFN s. 17.

⁹ EA s. 18(1).

¹⁰ EA s. 8(2); *Odunsi v Ojora* [1961] 1 All NLR 283.

¹¹ Examples are High Court Law, Cap 52, Laws of Lagos State, 1973, s12(1) and s. 26(1).

¹² (Unreported) [1887] cited in N Tobi, *Sources of Nigerian Law* (MIJ Publishers 1996) 8.

¹³ This consists of three components, which are natural justice, equity and good conscience.

¹⁴ Also known as Shariah or Shariah Law.

¹⁵ *Wali v Ibrahim* [1997] 9 NWLR (Pt 519)160 CA.

¹⁶ M.A. Ambali, *The Practice of Muslim Family Law in Nigeria* (3rd edn, Princeton & Associates Publishing Co. Ltd. 2014) 5.

handed down over the years through uninterrupted chain of intermediaries.¹⁷ *Ijma* is the third source of Islamic law. It is the unanimous agreement of Muslim jurists and legal scholars and usually adopted to fill gaps in the Quran or *Sunna* or to explain any discrepancies in their teachings.¹⁸ There are two types of *Ijma*.¹⁹ The first is the consensus of the companions of the Prophet, which was warranted as a result of any problem of Islamic law that arose after the death of the Prophet and both the Quran and *Sunna* are silent on it.²⁰ The second type of *Ijmaa* arises when there is a problem on which the Quran and *Sunna* are silent and there is no precedent in the history of the companions of Prophet Mohammed.²¹ According to Ambali, when such circumstances occur, Muslim Jurists hardly see such problems in the same way.²² The views expressed by them will be influenced by prevailing factors such as the age, background and place of the jurists.²³ The efficiency of this form of *Ijmaa* lasts as long as the conditions prevail.²⁴ The fourth source of Islamic law is the *Qiyas*. It is the permissible juristic analogical reasoning which is employed in situations not covered by the Quran and *Sunna*.²⁵ While *Ijmaa* is the consensus of the opinions of celebrated Muslim jurists, *Qiyas* is their individual opinion.²⁶

3. The Concept of Marriage

The marriage institution is one of the most common and predominant institutions in the life of every individual in a society. It is a universal institution recognised and respected all over the world.²⁷ Marriage is a union of two people living together, sharing each other's joy and woe, cohabiting and procuring children.²⁸ There is no universally accepted definition of marriage because it varies according to different cultures but it is one of the recognised and oldest institutions in the world because it cut across all races, tribes and ethnic groups. Its significance is based on the fact that it is the foundation upon which the society is built.

¹⁷ From 622 A.D; cited in J.O. Asein, *Introduction to Nigerian Legal System* (2nd edn, Ababa Press Ltd, 2005) 118-119.

¹⁸ *Ibid.*

¹⁹ Ambali (n 16) 10.

²⁰ *Ibid.*

²¹ *Ibid* 14.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Asein (n 17) 119.

²⁶ Ambali (n 16) 15.

²⁷ E.I. Nwogugu, *Family Law in Nigeria* (3rd edn, Heinemann Publishers Plc, 2014) 4.

²⁸ Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed, 'Legal and Social Viability of Polygamy: An Analysis' (2011) (4) *Journal of Islam in Asia*, 397-414 at 398.

In Nigeria, statutory marriage²⁹ recognises monogamy, while customary law and Islamic law accept polygamy by marrying as many wives as possible and up to four wives respectively.

Statutory marriage or Act marriage is one contracted in line with the provisions and prerequisites of the Marriage Act, which is the law that administers statutory marriages. It has formal rules for its celebration, formation and dissolution unlike its Islamic counterpart, which may be terminated without recourse to the court. Furthermore, marriages celebrated under the Matrimonial Causes Act guarantees certain rights of a woman such as payment of alimony and sexual rights during and after marriage without discrimination unlike Islamic law marriages.

3.1 Types of Marriages

Various scholars have posits that marriage can be divided into two major forms; monogamous and polygamous marriages.³⁰

3.1.1 Monogamous marriage

This is a form of marriage in which an individual has only one spouse during his or her lifetime or at any one time. It is the voluntary union for life of one man and one woman to the exclusion of all others until divorce or death.³¹ At every point in a monogamous marriage, only one man and one woman is involved. However, serial monogamy is permitted whereby there may be subsequent consecutive marriages by either party provided that only one legal spouse is involved at a particular time.³²

Examples of monogamous marriages are statutory and church marriages. According to Osondu, advantages of monogamous marriage over polygamous marriage include: relative stability and harmonious co-existence in the home; lack of rivalry amongst the wives since there is only one wife and less rivalry amongst the children since they are of the same parents; succession and inheritance problems are minimised because there are fewer children and they are of the same parents and, the quandary of infidelity and broken home are minimal because the spouses will have more time for each other.³³ Osondu opines further that the main disadvantage of this type of

²⁹ This form of marriage is practiced in Nigeria as a result of British colonial rule and is celebrated under the Marriage Act, Cap M6 LFN 2004.

³⁰ A C Osondu, *Modern Nigerian Family Law & Practice* (Printable Publishing Company, 2012) 72; See also Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed (n 28) 399.

³¹ Nwogugu (n 27) 5.

³² *Ibid.*

³³ Osondu (n 30) 77.

marriage is the predicament of barrenness because when the man is sterile or the wife is barren, the couple may not be able to bear children.³⁴

3.1.2 Polygamous marriage

This type of marriage includes more than one partner. When a man is married to more than one wife at a time, it is known as polygyny, while if a woman is married to more than one husband, it is called polyandry.³⁵ Consequently polygamy can be defined as the custom of having more than one wife or husband at a time.³⁶ Examples of this type of marriage are:

- a. Customary marriages – this form of marriage is recognised in the eyes of the law, if it is contracted in accordance with the native law and custom of the particular locality. It is potentially polygamous because it allows a man to marry more than one wife.
- b. Islamic law marriage – this form of marriage is contracted in accordance with the provisions of Islamic law and it is polygamous in nature because it allows a man to marry a minimum of one wife and a maximum of four depending on his financial capabilities and ability to love them equally.
- c. Osondu posits church marriage blessings as a third example. To Osondu, this form of marriage is contracted by members of a religious body or denomination.³⁷ However such marriage is later ratified by the pronouncement of blessings on the couple by a recognised minister or clergyman of such religious denomination or body after the couple have been married under customary law.³⁸ Osondu posits further that, this form of marriage is deemed to be customary marriage in the eyes of the law and potentially polygamous because of its non-compliance with the requirements of the Marriage and Matrimonial Causes Acts.³⁹ According to Nwogugu, church blessing does not constitute a marriage nor does it add anything to an existing civil marriage.⁴⁰

Osondu opines that the main advantage of polygamous marriage is child bearing because if one of the wives is barren, the other wives can bear children for the family.⁴¹ Osondu posits further

³⁴ *Ibid.*

³⁵ Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed (n 28) 399.

³⁶ C. Soanes, S. Hawker and J. Elliot, *Oxford Dictionary of Current English* (4th edn, Oxford University Press Inc., 2006) 695.

³⁷ Osondu (n 30) 73-74.

³⁸ *Ibid*; *Martins v Adenugba* [1946] 18 NLR 63; *Okonkwo v Anazodo* [2005] 6 ANSLR 182.

³⁹ *Ibid.*

⁴⁰ Nwogugu (n 27) 51; *Akparanta v Akparanta* [1972] 2 ECSLR 779, 783.

⁴¹ *Ibid* 75.

that disadvantages of polygamy include poverty (except in the case of those who are extremely rich), broken homes, infidelity, problems of inheritance, spread of sexually transmitted diseases.⁴²

4. Marriage under Islamic Law

Marriage is ordered by Allah for Islamic adherents as a source of happiness and harmony for both spouses and to keep the Muslim populace growing.⁴³ Islam enjoins marriage and strongly detests celibacy because marriage is a means to emotional and sexual satisfaction. That is, it gives room to adherents to satisfy their sexual desire legitimately, thus preventing one from going into any extra-marital relationship which is unequivocally and categorically condemned by Islam.⁴⁴ Marriage is also a mechanism of tension reduction where each of the parties will serve as companion to the other in time of hardship. Furthermore, legitimate offsprings are created.

Marriage is also a form of alliance between families in Islam.⁴⁵ An Islamic marriage involves proposal (offer) also known as *ijab* and acceptance also known as *qabul*, and both must be made at one and the same meeting and time by the qualified parties or guardians who can act for their wards, agreement upon the dowry, signing of marriage contract, which must be expressed in clear and positive terms before two male witnesses and publicising the marriage.⁴⁶

5. Conflict of Islamic Law Marriage with Select Extant Statutes in Nigeria

⁴² *Ibid* 75-76.

⁴³ The Holy Quran in Q30:21 provides that *'and among his signs is that he created for you mates from among yourselves, that you may dwell in tranquility with them, and he has put love and mercy between your hearts; verily in that are signs for those who reflect'*

⁴⁴ Prophet Mohammed was reported to have said that *'O young people! Whoever among you has the ability to marry should marry, for it helps in lowering one's gaze and guarding one's chastity (i.e. it guards one's private parts against immorality)'*; cited in Z.A. Olowo, 'Sustainability of Marriage: Islamic Approach' (2014-2016) (6) *Al-Maslaha Journal of Law and Religion*, 78-86 at 78.

⁴⁵ The Holy Quran in Q25: 54 states that: *'and it is He who has created from water (i.e., semen) a human being and made him (a relative by) lineage and marriage. And ever is your Lord competent (concerning creation).'*

⁴⁶ M. Al-khateeb, 'Islamic Marriage Contracts' (Peaceful Families Projects, Asian & Pacific Islander Institute on Domestic Violence and Battered Women's Justice Project, 2012) 6; cited in S.T. Mohammed-l-Awal, 'Tentative Extraction of Marriageable Age from Islam-Cultural Perspectives' (2014-2016) (6) *Al Maslaha Journal of Law and Religion*, 87 – 98 at 91.

Under this heading, the conflict of Islamic law marriage with select extant statutes such as the Children and Young Persons Law 1946 (CYPL), Child Rights Act 2003 (CRA),⁴⁷ Constitution of the Federal Republic of Nigeria 1999 (CFRN),⁴⁸ Marriage Act 1914 (MA),⁴⁹ Matrimonial Causes Act 1970 (MCA)⁵⁰ and the Violence against Persons Prohibition Act 2015, will be considered:

5.1 Single Status/Polygamy

The concept of statutory marriage is a contract wherein a man and a woman live together as husband and wife in accordance with matrimonial rights and duties. It is a contract to create status and the contract is fulfilled when the parties acquire and live fully in realisation of this status. The Marriage Act⁵¹ provides for celebration of marriages in Nigeria, and the said provisions are only for the celebration of a monogamous marriage between a man and a woman.

The Interpretation Act⁵² defines monogamous marriage as ‘a marriage which is by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.’ It was also described in the old English case of *Hyde v Hyde* as ‘the voluntary union for life of one man and one woman to the exclusion of all others.’⁵³ The facts of the aforementioned case are that, the parties belonged to a religious sect known as Mormons. The marriage between them took place at Salt Lake City in April, 1853 according to the rites and ceremonies of the Mormons and children were born to the marriage. In 1856, the petitioner (husband) went on a mission to the Sandwich Island, leaving the respondent (wife) behind. On arrival in Sandwich Island, he renounced the Mormon faith and preached against it. The Mormon sect excommunicated him in 1856 and declared his wife free to remarry. Petitioner tried in vain to persuade his wife by correspondence to change from the Mormon faith and to leave the Mormon territory but she refused. Instead she remarried the co-respondent. The petitioner (husband) brought a petition for the dissolution of the marriage on the ground of adultery on the part of the wife (respondent). The court found as a fact that at the time the marriage between petitioner and respondent was celebrated, polygamy was part of the Mormon doctrine, and was the common custom in Utah where the marriage was celebrated. It was held

⁴⁷Cap C50 LFN 2004.

⁴⁸ Cap C23 LFN 2004.

⁴⁹ Cap M6 LFN 2004.

⁵⁰ Cap M7 LFN 2004.

⁵¹ S. 3(1)(e).

⁵² Cap I23 LFN 2004, s. 18.

⁵³ [1886] LR IPD 130 (*per* Lord Penzance).

that marriage as understood in Christendom is the voluntary union of life of one man and one woman, to the exclusion of all others. It was further held that a marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not marriage as recognised in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

However, this definition does not apply to marriages contracted under Islamic law, which is prospectively polygamous. Furthermore, single status is a condition precedent for statutory marriage. The Marriage Act provides that no marriage in Nigeria is valid where either of the parties, at the time of the celebration of such marriage, is already married under customary law ***(Islamic law inclusive)***⁵⁴ to any other person than the person with whom such marriage is had.⁵⁵ Consequently, prior existing marriage may constitute basis for entering a caveat.⁵⁶ Contravention of this provision amounts to a criminal offence of bigamy and the offender is liable to imprisonment for seven years and five years imprisonment under the Criminal Code Act and Marriage Act respectively.⁵⁷ This provision was judicially pronounced in the case of *R v Rahman*,⁵⁸ where the court opined that a man who was once monogamously married was guilty of bigamy when he underwent a potentially polygamous ceremony of marriage under Islamic law. Furthermore, the Marriage Act provides that:

whoever having contracted marriage under this Act, or any modification or re-enactment thereof, or under any enactment repealed by this Act, during the continuance of such marriage contracts marriage in accordance with customary law ***(Islamic law inclusive)***,⁵⁹ shall be liable to imprisonment for five years.⁶⁰

⁵⁴ Emphasis added.

⁵⁵ MA s33 (1); *Olawuyi Joseph v Samuel Adegoke & Anor* [1974] Suit No. HOY/24/27 High Court of Western State, Oyo Judicial Division. Judgment delivered on 27/5/1974; cited in A.S. Ogwuche, *Compendium of Laws Under the Nigerian Legal System* (2nd edn, Vol. I, Maiyati Chambers 2008) 736.

⁵⁶ A caveat is an objection raised by any interested or affected person against a proposed statutory marriage. Such caveat maybe entered against issuance of certificate as in line with provisions of the MA s14.

⁵⁷ Criminal Code Act (CCA) Cap C38 Laws of the Federation of Nigeria 2004 s370; MA s35 and s46 and the case of *Lawal-Osula v Lawal-Osula* [1993] 2 NWLR (Pt 274) 158 CA.

⁵⁸ [1949] AER 105 (*per* Streatfield J).

⁵⁹ Emphasis added.

⁶⁰ MA s. 47.

The foregoing provision of the Marriage Act was considered by the court in the case of *R v Princewill*.⁶¹ In that case, the accused contracted a marriage under the marriage ordinance. He was then a Christian but later became a Muslim and went through a form of marriage under Islamic law with another woman while the wife of the first marriage was still alive and the first marriage had not been dissolved. He was charged with an offence of bigamy under section 370 of the Criminal Code. It was held that the first marriage by s370 is monogamous, while the other marriage was void within the meaning of s370 of the Criminal Code because it was invalid by section 35 of the Marriage Ordinance. Consequently, the accused was convicted and sentenced to one month imprisonment with hard labour.

5.2 Marriageable Age

In Nigeria, there are legal contradictions on the issue of child marriage. Consensual sex with girls below minimum age amounts to rape,⁶² while the same act goes unsanctioned under the defence of marriage. The MCA provides for the grounds upon which a marriage may be void, one of which is if either of the parties is below the marriageable age.⁶³ However, there is no provision on what amounts to a marriageable age under the Act. Nwogugu in an earlier work⁶⁴ posits that in the absence of any defined age limit, resort should be made to common law age of marriage.⁶⁵

Shariah does not provide for marriageable age. The Quran is silent on the age of marriage and this has led to various debates on whether Islam opposes setting 18 years old as the marriageable age. Both arguments for and against have been severally justified with different interpretations of the Quran.⁶⁶ Various proponents of the schools of Islamic jurisprudence (*fiqh*), such as Imams Maliki and Hanafi have propounded on marriageable age under Islam. To Maliki, the marriage of

⁶¹ [1963] NRNLR 54.

⁶² The CCA s. 357 provides that 'Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.' In the same vein, the Penal Code Act, Cap 53 LFN Abuja s282(1)(e) states that a man is said to commit rape who, except in the case referred to in subsection (2) of this section, has sexual intercourse with a woman with or without her consent, when she is under fourteen years of age or of unsound mind.

⁶³ S. 3(1)(e).

⁶⁴ E.I. Nwogugu, *Family Law in Nigeria* (Revised Edition, Heinemann Educational Books (Nigeria) Plc, 2001) 139.

⁶⁵ The Common Law makes the age of 12 and 14 years as ages of puberty for girls and boys respectively. However, the National Policy on Population, s. 5(1)(3) intends 18 years to be the age of first marriage.

⁶⁶ E. Anaba, 'Why the Child Rights Bill must be passed into Law' *The Vanguard Newspaper* (Lagos, 16 May 2003) 26.

a child is allowed if the guardian is the father.⁶⁷ Hanafi on the other hand stated that eligibility for marriage comes with the beginning of puberty, the minimum age of which are nine for girls and twelve for boys.⁶⁸ Hanafi proffers further that marriage of a minor boy or girl is lawful whether the minor is a virgin or divorcee provided the guardian is one of the father or grandfather.⁶⁹ In the Salafi School, there are three signs for puberty, which are; reaching the age of puberty for both sexes, experiencing wet dreams by a 9 year old boy or experiencing menstruation by a 9 year old girl.⁷⁰

Islam allows the drafting of marriage contract for future execution especially when one of the parties is a minor.⁷¹ Child marriage is a union between two parties, one or both of which have not attained puberty. Islam allows a father to decide whom his adolescent daughter marries with her consent and also gives the latter, the option of revocation at puberty.⁷² However, this is not so in practice in Nigeria. Prophet Muhammed was said to have written the marriage contract with Aisha when she was six years old and consummated the marriage when she was nine years old.⁷³

In 2010, a former Governor of Zamfara State, Senator Ahmed Sani Yerima,⁷⁴ who was 50 years old, was reported to have married a 13 year old Egyptian girl, who happens to be the daughter of his driver.⁷⁵ This child marriage generated a lot of controversy with a petition calling for an investigation of the alleged marriage signed and delivered to the Senate by a coalition of Nigerian women's groups, academics and activists.⁷⁶ The petition also contained facts that the

⁶⁷ I.A. Doi, *Sharia the Islamic Law* (Taha Publishers, 1984) 142.

⁶⁸ A Father's consent to the marriage of his minor daughter: Feminism and Multiculturalism in Jewish Law, 400; cited in Mohammed-I-Awal (n 46) 97.

⁶⁹ U. Alkali, 'An X-Ray of the Conflicts between the Child's Right Act, 2003 and Islamic Law on Child Marriage and Legitimacy' (2012)(3) *Human Rights Review*, 70-82 at 73-74.

⁷⁰ *The Ship of Salvation: The Principles and Jurisprudence of the School of Al-Imam Al-Shaf'ii*, 9; cited in Mohammed-I-Awal (n46) 96.

⁷¹ Ibn Al-Hashimi, 'Refuting the claim that Prophet Muhammed was a Pedophile (The Islamphobe's Glass House); cited in Mohammed-I-Awal (n46) 87.

⁷² Ambali (n 16).

⁷³ M.M. Khan, 'The Translation of the Meaning of Sahih Al-Bukhari: Arabic-English (Darussalam Publishers and Distributors, Vol. 7, Chapter 39: Giving one's young children in marriage (is permissible) Hadith Number 5133, Riyadh 1997, 57; cited in Mohammed-I-Awal (n 46) 92.

⁷⁴ Under Yerima, Zamfara State officially adopted the Sharia Legal System in 2002. The other Northern States of Niger, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Yobe followed suit respectively.

⁷⁵ Ibijoke Patricia Byron, 'Addressing the Menace of Child Marriage in Nigeria through the Law' [2014] (4) *University of Ibadan Law Journal*, 53-73 at 63.

⁷⁶ Thisday Newspaper, 'Will Senator Yerima's Child Bride lead him to jail? Petition: Yerima marriage to a 13-year-Old Girl' *This Day Newspaper* (Abuja, 27 April 2010); cited in Ogunniran Iyabode, 'Child Bride and Child Sex: Combating Child Marriages in Nigeria' [2011] (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 85-96 at 89.

Senator was in the habit of marrying child brides.⁷⁷ He earlier married a 15 year old girl named Hauwa, the daughter of another of his drivers, as his fourth wife but later divorced her when she was 17 years old and nursing his child in order to marry another wife.⁷⁸ In defending himself, Yerima asserted that he has no regret for his action since it was in accordance with Islamic Law and the 1999 Constitution has given him the right to practice his religion.⁷⁹ According to Ogunniran, it is upsetting that a person of the calibre of Yerima could be involved in such dastardly acts under the guise of religion.⁸⁰

This form of child or adolescent marriage comes with serious negative health consequences on the female child or adolescents, especially on their sexual and reproductive health rights because adolescent brides are denied the right to sexual autonomy as well as face multi-dimensional socio-medical implications.⁸¹ Furthermore, for these under-educated and adolescent girls, sexual intercourse is the likely consequences of their marriages⁸² because they are left with limited or no power to defy the husband's demand and a challenge to his authority will lead to domestic violence in the marriage.

As stated earlier, Islamic law does not provide for the age at which marriage can be contracted. Marriage can be contracted when both parties attain the age of majority, but it is intricate to ascertain the age of majority. However, the CRA⁸³ defines a child to be somebody below the age of 18 years. This legislation prohibits child marriages, because no person under the age of 18 is capable of contracting a valid marriage.⁸⁴ The statute further prohibits the act of child betrothal.⁸⁵

Section 37 of this Act provides that any person who has sexual intercourse with a child (even if she is the person's wife) has committed the offence of rape and liable on conviction to life imprisonment. It is clear from the foregoing provisions of the CRA that, Islamic marriage

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ U.S.A. Jimeta *et al*, 'Marriage in Islamic Law and the case of Ahmad Sani (Yeriman Bankura), 27-28 *ABULJ*, 145; cited in Alkali (n 69).

⁸⁰ Ogunniran (n 76).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ S. 13. This Act is meant to provide for and protect the rights of the Nigerian child. The Act by virtue of the Constitution of the Federal Republic of Nigeria, Laws of the Federation of Nigeria, 2004, s12, domesticates the United Nations Convention on the rights of the child 1989.

⁸⁴ S. 21.

⁸⁵ S. 22.

principles on child betrothal and child marriage and consummation of same, contravene the provisions of that statute. The CYPL of the various states of the Federation also provide that a child is a person under 14 years old, while a young person is someone between the ages of 14 and 17 years,⁸⁶ though the purpose of this age segregation is due to criminal responsibility.

It is clear from the foregoing provisions of the CRA and CYPL that, Islamic marriage principles on child betrothal and child marriage and consummation of same, contravene the provisions of these statutes. According to Obasohan, the cause of child marriage is a combination of cultural and socio-economic factors, which include poverty and sexual perversion of the rich and affluent.⁸⁷ Obasohan states that life threatening poverty compels parents to marry their female children to rich and affluent men in order to secure a living for both parents and children.⁸⁸ Obasohan further states that the appetite for virgins and HIV/AIDS free partners drives some people especially, the rich and affluent, to immorally condescend to catch the girl child young, thus promoting child marriage.⁸⁹ Obasohan⁹⁰ also postulates that the effect of such marriage includes loss of childhood,⁹¹ rights violations,⁹² stigmatisation and abandonment,⁹³ impaired reproductive health⁹⁴ and bleak future.⁹⁵

5.3 *Consent to marry*

Section 3(1)(d) of the Matrimonial Causes Act provides that parties to a marriage must give their real consent to the celebration of the marriage. The consent is not deemed to be real if it was obtained by fraud; the consenting party was mistaken either as to the identity of the other party

⁸⁶ An example is Children and Young Persons Law, Laws of Ogun State of Nigeria, 2006, s2(1). See also Children and Young Persons Law, Laws of Ondo State of Nigeria, 2006, s. 2(1).

⁸⁷ O.J. Obasohan 'Child Marriage in Nigeria: The Legal Perspective' [2015] (2)(1) *BIU Law Journal*, 570-579 at 571.

⁸⁸ *Ibid* 572.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* 573.

⁹¹ Obasohan posits that childhood is easily lost, annihilating educational opportunities and preparation for happy and productive life as they become mothers at early ages; *Ibid* 573.

⁹² Obasohan opines that the right to self-determination is undermined as parents pressure their children to yield to men who are not right for them. Due to immaturity and ignorance the right to negotiate for sex and number of children is compromised; *Ibid* 573.

⁹³ Obasohan postulates that reproductive health impairment often brings shame stigmatisation, divorce and eventual abandonment; *Ibid* 573.

⁹⁴ Obasohan posits that lack of sexual education, often leads to indiscriminate sex, abortion, delivery through caesarean section, child/maternal mortality and exposure to diseases such as STDs, HIV and Vesico Vaginal Fistula (VVF); *Ibid* 573.

⁹⁵ Obasohan states that child marriage is a circle of deception, frustration, slavery, prostitution, quarrels, broken homes, deaths, crime and general dissatisfaction; *Ibid* 573.

or as to the nature of the marriage contract. Furthermore, the consent must not have been obtained under duress or threat as can be seen in the case of *Aiyegbusi v Aiyegbusi*,⁹⁶ where the court voided the statutory marriage between the parties because the petitioner entered into the marriage under duress, having been under the threat of a curse from her father.

Islamic marriage allows a father or guardian to contract a girl child, who is mentally incapable of understanding the marriage contract, in marriage without her consent. Furthermore, under Islamic law marriage, if the guardian of the girl (*wali*) is her father or paternal grandfather, he has the right to force her into marriage even against her proclaimed will, if it is her first marriage.⁹⁷ This was the position in the case of *Yakubu v Paiko*,⁹⁸ where the Kaduna Judicial Division of the Court of appeal held that:

in the Maliki Islamic School of Law, a father has the right to compel his virgin daughter in marriage without her consent, but where he gives her the right to choose between two or more suitors, he has lost his power of **ijbar** and marriage contracted without her consent is invalid.

5.4 *Matrimonial Violence*

The author is of the view that matrimonial violence is governed by the Violence Against Persons (Prohibitions) Act 2015 due to the use of the word ‘private’ in its long title. The long title of the Act reads ‘A Bill for an Act to eliminate violence in private and public life, prohibit all forms of violence against persons and to provide maximum protection and effective remedies for victims and punishment of offenders; and for related matters.’ In addition, the Act’s Explanatory Memorandum states that, ‘This Act prohibits all forms of violence against persons in private and public life, and provides maximum protection and effective remedies for victims and punishment of offenders.’

Furthermore, marriage is recognised as a private right under the Nigerian constitution. The Act defines violence as ‘any act or attempted act, which causes or may cause any person physical,

⁹⁶ [1974] Suit No. 1/238/171 High Court of Western State, Ibadan Judicial Division.

⁹⁷ *Ambali* (n 16) 194-195.

⁹⁸ Suit No. CA/K/805/85 Court of Appeal, Kaduna Judicial Division.

sexual, psychological, verbal, emotional or economic harm whether this occurs in private or public life, in peace time and in conflict situations.’⁹⁹

Islamic law allows the beating of wives in order to correct them.¹⁰⁰ This is an affront to the above-mentioned provisions and constitutional provisions on dignity of human person, which prohibits any form of cruelty or violence against persons.¹⁰¹ According to Fatula,¹⁰² women in statutory marriage unlike their Islamic law marriage counterparts are protected under the Evidence Act against physical abuse. The Evidence Act provides that when a person is charged with inflicting violence on his wife or husband, the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of the person charged.¹⁰³ Fatula propounds that a man could be criminally accountable for using violence on his wife because hitting her presumably falls within the connotation of ‘inflicting violence.’¹⁰⁴

5.5 *Divorce/Dissolution of Marriage*

As stated earlier in the beginning part of this work, Islamic law marriages can be dissolved extrajudicially unlike statutory marriages which can only be dissolved in a court having jurisdiction under the MCA, which is the High Court of any state of the Federation.¹⁰⁵ Islamic law recognises four types of divorce. Divorce can be at the instance of the husband¹⁰⁶ or wife.¹⁰⁷ It can be as a result of the mutual agreement of both spouses¹⁰⁸ or through a judicial process.¹⁰⁹

Under Islamic law marriage, a man can divorce his wife orally with the triple pronouncement of ‘I divorce you’ on any ground and at any time that he deems fit. By these triple pronouncements,

⁹⁹ Violence Against Persons (Prohibition) Act 2015, s. 46.

¹⁰⁰ The Holy Quran, Q4:34 provides that ‘...but those wives from whom you fear arrogance, first advise them; then if they persist, forsake them in bed; and finally, strike them. But if they obey you once more, seek no need against them.’

¹⁰¹ CFRN, 1999, Cap C23, LFN 2004, s. 34(1)(a).

¹⁰² O.A. Fatula, *Feminism, Women, Family and Children’s Law* (SA Printers, 2014) 145.

¹⁰³ Evidence Act 2011, s. 182(1)(c).

¹⁰⁴ Fatula (n. 102)145.

¹⁰⁵ S. 2.

¹⁰⁶ This is called *Talaq* in Arabic and the wife is entitled to compensation from the Husband.

¹⁰⁷ This is called *Khul* in Arabic and the husband is entitled to an element of compensation (return of dowry) from the wife. See the case of *Usman v Usman* [2005] 2 SMC 459.

¹⁰⁸ This is called *Mubaraat* in Arabic and it involves the waiving of existing rights by both parties.

¹⁰⁹ See *Setto v Motsibbe* [2002] 5 NWLR (Pt 762) 121 CA and *Usman v Usman* [2003] 11 NWLR (Pt 830) 109 CA.

divorce is made effective unless it can be proved that it was used in the heat of anger without the intention of ending the marriage.¹¹⁰ However, certain grounds are spelt out by law before a marriage can be dissolved under statutory marriage. Except where divorce proceedings are based on the facts of willful and persistent refusal to consummate, adultery or the commission of rape, sodomy or bestiality, no proceedings for divorce may be instituted within two years of a marriage without leave of court.¹¹¹ Further grounds for dissolution of statutory marriage are refusal to consummate marriage, adultery, desertion, and others.¹¹²

5.6 *Adultery as a Ground for Divorce*

Adultery is one of the grounds for dissolution of marriage under both the received English law and Shariah under the Nigerian plural legal system. However, some aspect of adultery as a ground for dissolution of marriage under Islamic law conflict with the provisions of the MCA. Islamic law marriages can be dissolved extra-judicially without recourse to statutes on the basis of infidelity. This is called *Li'an* in Islam. It means to drive away or keep away.¹¹³ *Li'an* occurs when the husband accuses his wife of adultery but cannot establish the allegation of adultery by producing four eye witnesses of unimpeachable status.¹¹⁴ Upon failure to authenticate this claim, the court resorts to *Li'an* whereby the husband swears by Allah and invoke the curse of Allah on himself (*La'anatul-llah*) the fifth time should he be a liar.¹¹⁵ The wife will be requested to swear four times and invoke the wrath of Allah on herself (*Ghadabul-llah*) the fifth time, should she be a liar.¹¹⁶ After this, they will be divorced irrevocably.

This provision of the Quran is in conflict with the laid down procedure for adultery as a ground for divorce under statutory marriage. The MCA provides that the Court hearing the petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if the petitioner satisfies the court of the fact that since the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.¹¹⁷ However,

¹¹⁰ Fatula (n102) 188.

¹¹¹ MCA s. 30(1) & (2).

¹¹² MCA s. 15(2)(a)-(h). See also the case of *Ekrebe v Ekrebe* [1999] 3 NWLR (Pt. 596) 514 CA (*per* Mohammed JCA).

¹¹³ *Ambali* (n. 16) 290.

¹¹⁴ *Ibid.*

¹¹⁵ The Holy Quran, Q24:6-7.

¹¹⁶ The Holy Quran, Q24:8-9.

¹¹⁷ MCA s. 15(2)(b).

evidence as to adultery must be adduced by a witness who may be a party to the proceedings or called upon by a party to the proceedings.¹¹⁸ Under the Matrimonial Causes Rules, there is no need to swear or invoke curses or wrath to show that the woman has committed adultery. Where the respondent has committed adultery since the marriage but before the filing of the petition, the petitioner must state in his petition that the court shall be asked to make the decree notwithstanding the facts and circumstances set out in his discretion statement.¹¹⁹

6. Lessons from other Jurisdictions

This work will be incomplete and imperfect if lessons from other Islamic jurisdictions, especially where there are also plural legal systems are not suggested for Nigeria. Nigeria has a lot to learn from other Islamic jurisdictions in respect of Islamic marriage conflict with the abovementioned statutes especially on the issues of child marriage and polygamy. In the Indian jurisdiction, the rights of Muslim women to decide for themselves whom to marry are protected under the Law. The father of a Muslim girl cannot contract marriage for his daughter against her will if she is a major. It is settled law that once a girl becomes a major, she has absolute right to contract marriage and this right cannot be exercised by anyone else including the father of the girl.¹²⁰

Furthermore, a woman married under Islamic law is entitled to obtain a decree for the dissolution of the marriage on the ground that she was given in marriage by her father or guardian before she attained the age of 15 or 16 years. She has the freedom and liberty to repudiate the marriage before attaining 18 years of age.¹²¹ This is also applicable in the Pakistani jurisdiction as well.¹²² The repudiation puts an end to the marriage without the aid of any court and where the matter comes to court, the court does not dissolve the marriage by its own act but recognises the termination of the marriage.¹²³

¹¹⁸ MCA s. 85.

¹¹⁹ Matrimonial Causes Rules, Subsidiary Legislation to the MCA Cap M7 Laws of the Federation of Nigeria 2004, Order V, rule 13.

¹²⁰ *Abdul Ahad v Shah Begum* [1997] J.K. 22; *Abubakar v V. Marakkar* [1970] KER 277 – 279.

¹²¹ Indian Dissolution of Muslim Marriage Act 1939 s2(vii); *Abdul Rahim v Aminabai* [1935] I.L.R. 59 Bom 426.

¹²² Pakistan Muslim Family Laws Ordinance 1961 s. 13(b).

¹²³ *Muni v Habib* [1956] PLD (WP) Lah. 403; *Muhammed Bakksh v Crown* [1950] PLD Lah. 203.

In Iraq¹²⁴ and Syria,¹²⁵ a man is not permitted to marry more than one woman without the approval of a Judge (Qadi), who will not give his approval unless he is convinced that the husband can fulfill the following three conditions, that:

- a) he is financially capable of supporting an additional wife;
- b) he will lawfully benefit from such a marriage; and
- c) there is no fear of any unequal treatment of the wives.

Also under Indonesian Law,¹²⁶ the court may grant a man permission to marry a second wife if and only if:

- a) his first wife cannot carry out her conjugal duties;
- b) his wife becomes crippled or terminally ill;
- c) his wife cannot give him children;
- d) his present wife (wives) grant him permission;
- e) his ability to support all his wives and children are certain; and
- f) his ability to be fair to his wives and children is certain.

Furthermore, Tunisia invalidated the practice of polygamy on 1st January 1957 after applying it for generations.¹²⁷ The Tunisian Code of Personal Status of 1956 interprets the Quranic Provision in Chapter IV, Verse 3 as a legal condition which overrules and prohibits polygamy.¹²⁸ This Code provides that any person who is already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 240,000 francs, or both.¹²⁹

The Tunisian government likened polygamy with slavery and stated that such institutions were appropriate during primal generations and not in contemporary times, because it is unfair to human dignity.¹³⁰ The Tunisian government recognises the provisions of the Quran on polygamy and the conditions for such indulgence, which is the equitable treatment and equal love for all wives. However, the government confessed that history and experience has proved that no one is

¹²⁴ Iraqi Law of Personal Status 1959 Article 3.

¹²⁵ Syrian Law of Personal Status, Decree 59, 1953 Article 17.

¹²⁶ Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural and Legal Systems [1975] 23 *The American Journal of Comparative Law* 653, 681; cited in Ogwuche (n 55) 1116.

¹²⁷ Fatula (n102) 185.

¹²⁸ Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed (n28) 407-408.

¹²⁹ The Tunisian Code of Personal Status, 1956, s18.

¹³⁰ Fatula (n102) 185.

capable of treating two or more wives with equity and fairness; hence, the prohibition of polygamy.¹³¹

In the North African country of Morocco, a woman is permitted to specify in her marriage contract that her husband shall not marry an additional wife along with her, and if the husband breaches this stipulation, she will have the right to seek dissolution of the marriage.¹³² According to Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed, this is to guarantee the protection of a wife against unwanted changes in the future.¹³³ The author is of the view that the foregoing are good examples which can be incorporated into Nigerian Islamic jurisprudence through enactment of relevant statutes in order to stop arbitrary child marriages and polygamous practices by Islamic adherents in Nigeria.

6 Conclusion and Recommendations

This paper has examined the conflict of Islamic marriage with select statutes in Nigeria. It is trite that statutory marriage is a product of British colonial rule, which introduced English law into our jurisprudential landscape. England being a Christian country has its concept of marriage derived from Christianity. The conflicts of Islamic marriage as enunciated in this work are caused by the difference in social, economic and political conditions in England and Nigeria. Islamic law marriage permits polygamy while statutory marriage does not but makes bigamy a crime. Polygamy has been condemned by majority of developed countries of the world as a form of human rights abuse, because of attendant effect of domestic abuse and forced marriages; hence, the call for abolition of same in some developing countries.

Although both statutory and Islamic law marriages provide for factors for a valid marriage such as age, consent, etc., Islamic law can be said to legalise human rights violations of under-age children under the guise of marriage. According to Fatula, forced marriages enjoy legal backing under Islamic law as practiced in northern Nigeria and among some Muslim communities in south-west Nigeria.¹³⁴ From the example of Hauwa's marriage to Yerima mentioned in the earlier

¹³¹ *Ibid.*

¹³² The Moroccan Code of Personal Status 1958, s30(1).

¹³³ Abdul Haseeb Ansari and Kyaw Hla Win Md. Hassan Ahmed (n28) 409.

¹³⁴ Fatula (n102) 228.

part of this work, it can be deduced that child marriage as recognised by Islamic law exposes the girl child to sexual abuse and exploitation by her husband and her parents, respectively.

In Nigeria, we have weak and inadequate provisions in our laws. One of such provisions is that of Section 29(4)(b) of the CFRN, which can be said to confer adulthood and legal capacity on the girl child immediately she gets married. Although this provision borders on citizenship matters, the author posits that this clause grants liberty to an adult male to marry an under-age girl.

Furthermore, marriage has undergone regular legal transformations such as abolishing the right of a husband to beat his wife and realisation of female reproductive rights. These have improved the rights of the female spouse and Nigeria should not lag behind in this present age and time.

Consequent upon the foregoing, the author suggests the following recommendations:

1. Marriageable age should be provided in either the Marriage Act or the Matrimonial Causes Act, in order to give effect to the provisions of Section 3 (1) (e) of the Matrimonial Causes Act.
2. The offensive provision of Section 29 (4) (b) of the Nigerian constitution which can be said to confer adulthood and legal capacity on the girl child immediately she gets married should be deleted.
3. There should be progressive interpretation of the Quran, Hadith and Sunnah in line with present day realities.
4. Nigerian child brides who are forced to marry by their father or guardian should repudiate such marriages when they come of age without the aid of the court and that the Sharia courts should be empowered to recognise the termination of such marriages as can be seen from the Indian and Pakistani examples.
5. The provisions from Iraqi, Syrian and Indonesian jurisdictions should be incorporated into Nigerian legal system in order to stop arbitrary customary and Islamic polygamous practices.