

## NUMERICAL VS. PHYSIQUE OF A CHILD: A SEARCH FOR CONCURRENCE AGE OF MARRIAGE BETWEEN THE SHARIAH AND NIGERIAN LAW

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### ABSTRACT

*Child marriage has generated a lot of argument among scholars and this no doubt culminated in promulgation of law on child right. One of the aims of this law is to prevent child marriage. Others include prevention of sexual abuse and other violent acts. There are divergences in the laws of various states as to marriageable age. The commutative effect of these various laws is that Nigeria as a country has taken a holistic approach to reduce child marriage but the issue is still persistence and it affects the health of children and their live beings. This paper therefore examines the concept of a child, the determinant factors for marriageable age of a child; whether the number or physical appearance is the contemplation of the law; as well as co-relation between child marriage and mortality. In doing this, the paper adopts doctrinal method which involves analysis of primary and secondary data. The paper argues that although child marriage has negative effect on the children, the determination of the word child is different under Shariah, because marriageable age is not*

*based on numerical age alone; the physique of a child also an important feature.*

**Keywords:** *numerical, physique, child, marriage, Shariah*

## **INTRODUCTION**

The issue of child marriage is an age long question even before the enactment of Child Rights Act 2003 (CRA) in Nigeria, because it is a major concern in the protection of children's right. Protection of children's right includes safeguarding anything that can endanger their lives which include child marriage. Child marriage has generated a lot of argument among the contemporary scholars that if a child engaged in marriage in a tender age, it will definitely affect their health and can lead to a shorten life. This, in a way violate the right of a child has enshrined in the 1999 Constitution of the Federal Republic of Nigeria and the CRA. This presumption has been rebutted by the scholars of Shariah who hold the view that the word child must to be determined of which can lead to the marriage. This issue is persistence in Nigeria for instance, 43% of girls are married before their 18<sup>th</sup> birth day, while 17% are married before they attained the age of 15years.<sup>1</sup> The prevalence of child marriage varies widely from one region to another with figures as high as 76% in the North West region and as low as 10% in the South East (*Ibid.*). Therefore, this paper examines the concept of child and the legality of child marriage under the Shariah and Nigerian Law. The paper considers the position of Shariah on the determinant factor of marriageable age; whether it is based on numerical age alone or physical and numerical appearance of the child concerned.

## **CONCEPTUAL ANALYSIS OF 'CHILD' UNDER THE SHARIAH AND NIGERIAN LAW**

The word 'child' has been given certain age limit under Nigerian law. But this limitation is different from one law to the other as far as the determination of the marriageable age in particular and other rights in general are concerned. In any law be it Nigerian law or Shariah, the word 'child' has different meanings in the determination of the concept (Kayode Olatunsho Fayokun, 2015: 5-6). Therefore, the perception is somehow not similar, depending on how it is used in the statute or legislation. It is therefore, pertinent to know who is a child

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<sup>1</sup> UNICEF (2016). "Child Marriage around the world," [www.girls not brides.org](http://www.girls not brides.org)., accessed on 6 December 2016.

before discussing the rights. It is also important to determine the meaning of the word 'child' based on Shariah perception.

## **THE POSITION OF CRA AND NIGERIAN LAWS ON WHO IS A CHILD**

The CRA defines a child as a person who has not attained the age of 18 years.<sup>2</sup> According to the provision of the Convention on the Rights of Child (CRC), the term 'child' represents every human being below the age of 18 years.<sup>3</sup> The Convention on the Rights of Child (CRC) prescribes the age of 18 years as the limit of childhood; however, this prescription is subject to any age prescribed by the state parties to the Convention. Article 1 of the Convention recognizes that the age of majority may be obtained earlier under the laws applicable to the child; the Article thus accommodates the concept of advancement of majority at an earlier age, by allowing for the minimum age to be set under different circumstances balancing the evolving capacities of the child with the state's obligation to provide special protection. In other words, though the CRC has clearly defined a child, it has however made an allowance for disparities in the definition of the age (Akinwumi, 2009: 25-31). Additionally, the African Charter on the Rights and Welfare of Child (ACRWC),<sup>4</sup> also defines a child as a human being below the age of 18 years.<sup>5</sup> It is argued that the reason for the classification of meaning of the word 'child' under the Nigerian socio-cultural context varies widely due to lack of uniformity in the cultural systems (Akwara, Sayibo & Agbo, 2010: 26-33). In some ethnic groups, a boy remains a child until initiated into an age-grade society or until he is old enough to contribute physically and financially to community development. But in some societies, some childhood terminates at puberty (WhyteHabeebIbidapo, 2012: 481-502).

Furthermore, the Nigerian Constitution recognizes the age of 18 as the age of voting.<sup>6</sup> The Marriage Act 1990 on the other hand fixed the age of maturity

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<sup>2</sup> Section 277 of the Child's Rights Act.

<sup>3</sup> Article 1 of CRC.

<sup>4</sup> Adopted in Addis Ababa, Ethiopia on July 1990 and entered into force on 29<sup>th</sup> November 1999.

<sup>5</sup> Article 2.

<sup>6</sup> Section 29 of the 1999 Constitution of Federal Republic of Nigeria provides that, "*full age means 18 years and above...*" Section 2 of the Nigeria Electoral Act equally stipulates 18 years as the age of voting.

at the age of 21 years.<sup>7</sup> According to the Children and Young Person's Act<sup>8</sup> a 'child' means a person under the age of fourteen years, while 'young person' means a person who has attained the age of fourteen years and is under the age of seventeen years.<sup>9</sup> In a similar vein, the Immigration Act 1963 stipulates that any person below 16 years is a minor,<sup>10</sup> whereas the Matrimonial Causes Rules puts the age of majority at 21.<sup>11</sup>

At Common law, the age of majority is fixed at 21 (Sagay, I.E., 1993: 475). In *Labinjo v. Abake*,<sup>12</sup> it was echoed that in Nigeria, the age of 21 is applicable as the age of majority as seen in Common law. Similarly, in *Solo v. State*,<sup>13</sup> the court defined a child as a person who has not attained the age of 14 years by virtue of Section 2(1) of the Criminal Procedure law of Ogun State. The trial judge in his argument opined that anyone who is under 18 years of age is a minor (Read, P.A., 1990: 60).

With respect to the criminal responsibility of a child, the Common law exempts a child under ten years of age from criminal responsibility under the presumption of *doliincapax*.<sup>14</sup> The proof of *actusreus* with *mensrea* regarding the criminal act of such a person is immaterial, because there is no criminal responsibility (Danbazau, A.B., 2007: 337). Beyond that, the criminal responsibility of a child between 10 and 14 years must be backed not only by the elements (Chukkol K.S., 2008: 30)<sup>15</sup> of the crime, but also what is referred to as "mischievous discretion" under the Common law. Therefore, a person above 14 years is presumed to be responsible for his actions as if he is an adult (Danbazau, A.B., 2007: 337).

The Criminal Code provides that a person under the age of seven years is not criminally responsible for any act or omission. A person under the age of 12 years is criminally responsible for an act or omission if it can be proven

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<sup>7</sup> Section 48 of the Marriage Act cap C 218 Laws of the Federation of Nigeria 1990. See also section 18 of the Act.

<sup>8</sup> Enacted in Eastern, Western and Northern Regions of Nigeria.

<sup>9</sup> Article 2 of the Children and Young Persons Act.

<sup>10</sup> Section 37(1) of the Nigeria Immigration Act 1963, CAP II LFN 2004.

<sup>11</sup> Order 1 Rule 4 of the Nigeria Matrimonial Causes Act 1970, CAP M7, and LFN 2004.

<sup>12</sup> *Labinjo v. Abake* [1924] 5 NLR 330 p328.

<sup>13</sup> *Solo v. State* [2005] 2 NWLR Part 937 p460. See also *Onyegbu v. State* [1994] 1 NWLR Part 32

<sup>14</sup> It means not capable of committing an offence.

<sup>15</sup> The elements of a crime are the *mensrea* and the *actusreus*. *Mensrea* is the intention present while committing a crime while *actusreus* is the physical act or the actual act that constitute the offence.

that at the time of doing the act or making the omission he knows that he ought not to do so.<sup>16</sup> The Penal Code has equally exonerated a child from criminal responsibility. It provides thus “No action is an offence which is done by a child under seven years of age, by a child above seven years of age but less than twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.”<sup>17</sup> However, the absence of criminal responsibility for the offence does not remove the child from supervision of the juvenile system; such a child may be dealt under the Children and Young Person’s Act particularly under Part V which deals with care and protection of children (Aliyu I. A., 2010: 451).

At Common law, contracts by a child are voidable at the option of the child. The contracts are classified a contracts binding on the child unless he repudiates them during childhood or within a reasonable time of attaining his majority and contracts which are not binding on the child (*Ibid.*). Therefore, there are contracts however regarded as absolutely binding at Common law and these include among other contracts for necessities and beneficial contracts for service (Akwara, Sayibo & Agbo, 2010: 26-33).

### THE POSITION OF SHARIAH ON WHO IS A CHILD

The word ‘child’ under Islamic law has been given different terms depending on the usage and application in Islamic jurisprudence. The terms include ‘*walad*’, ‘*bint*’, ‘*tiftl*’, ‘*ṣabiy*’ (Ibn Manẓūr, 2008: 92), ‘*mumayyiz*’ and ‘*ghulam*’. ‘*Walad*’ is one of the Arabic terms meaning a child (*Ibid.*: 467). Precisely, it means a male child who has not attained the age of maturity or puberty. The word *walad* is clearly referred to in some verses of the Holy *al-Qur’ān*, for instance:

وَقَالَ الَّذِي اشْتَرَاهُ مِنْ مِصْرَ لِامْرَأَتِهِ أَكْرِمِي مَثْوَاهُ عَسَىٰ أَنْ يَنْفَعَنَا  
أَوْ نَتَّخِذَهُ وَلَدًا

“And the man from Egypt who bought him said to his wife: “Make his stay [with us] honourable; he may well be of use to us, or we may adopt him as a son.”

(Surah Yūsuf, 12: 21)

Other verses of the Holy *al-Qur’ān* points out the word *walad* thus:

<sup>16</sup> Section 30 of the Criminal Code 1958 CAP C38, LFN 2004.

<sup>17</sup> Section 50 of the Penal Code 1960 CAP P3, LFN 2004.

وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِن لَّمْ يَكُن لَّهُنَّ وَلَدٌ

“And you shall inherit one-half of what your wives leave behind, provided they have left no child.”

(Surah al-Nisā’, 4: 12)

يُوصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ

“Allah instructs you concerning your children [i.e. their portions of inheritance]”

(Surah al-Nisā’, 4: 11)

It should be noted that the word *walad* has been extensively used by the Prophet Muhammad in one of his traditions which says:

“Abū Hurayrah narrated that The Messenger of Allah said: “The child is for the bed, and for the fornicator is the stone.”<sup>18</sup>

‘Bint’ is the Arabic word that sometimes used for female child under Islamic law (Ibn Manẓūr, 2008: 497). The *al-Qur’ān* says:

وَمَرْيَمَ ابْنَتَ عِمْرَانَ الَّتِي أَحْصَنَتْ فَرْجَهَا فَنفَخْنَا فِيهِ مِنْ رُوحِنَا

وَصَدَقَتْ بِكَلِمَاتِ رَبِّهَا وَكُتِبَ عَلَيْهَا إِحْسَانُ

“And [the example of] Mary, the daughter of Imran, who Guarded her chastity, so We blew into [her garment] through Our angel [i.e. Gabriel], and she believed in the words of her Lord and His scriptures and was of the devoutly obedient.”

(Surah al-Taḥrīm, 66: 12)

‘Ṣabiy’ has been described as an Arabic word that can be used for an infant from the period of his delivery till he is weaned. It can also be used for a male child before he reaches the age of maturity (Basil, 2008: 66), as it is evidently stated in the following *ḥadīth*:

Ibn ‘Abbas (Allah be pleased with them) reported:

<sup>18</sup> Al-Baqī Muḥammad Fu‘ad (1995). *al-Lu‘lu’ wa al-Marjan fī mā al-Tafaqah ‘alayh al-Shayhā*. Qāhirah: Dār al- Ḥadīth, 108; Sarumi, Isa Abdur-Razaq, Azizah Mohd & Norliah Ibrahim (2019). “A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law,” *IJUM Law Journal*, vol. 27, no. 1, 151-179.

*“A woman lifted up her child and said: Messenger of Allah, would the child be credited with having performed the Hajj? There upon he said: Yes, and there would be a reward for you.”*<sup>19</sup>

*Mumayyiz*’ is an Arabic word which means a child who can make a distinction between right and wrong because of the level of intelligent he has but such a child has not attained the age of maturity (*Ibid.*; Wehr, 1994: 1285). *‘Ghulam*’ is another word that can be used for an adolescent who has not reached the age of maturity (Ibn Manzūr, 2008: 67). The word is also used particularly for a male child till he becomes an adult. The word is referred to in the Holy *al-Qur’ān*, which says:

قَالَ إِنَّمَا أَنَا رَسُولُ رَبِّكِ لِأَهَبَ لَكِ غُلَامًا زَكِيًّا ﴿١٩﴾

*“He said, I am only the messenger of your Lord to give news of a pure boy [i. e. son].”*

(Surah Maryam, 19: 19)

قَالَتْ أَنَّى يَكُونُ لِي غُلَامٌ وَلَمْ يَمَسِّنِي بَشَرٌ وَلَمْ أَكُ بَغِيًّا ﴿٢٠﴾

*“She said how i can have a boy while no man has touched me and I have not been unchaste.”*

(Surah Maryam, 19: 20)

وَجَاءَتْ سَيَّارَةٌ فَأَرْسَلُوا وَارِدَهُمْ فَأَدْلَى دَلْوَهُ. قَالَ يَبْنَشْرَىٰ هَذَا غُلَامٌ وَأَسَرُّهُ بِضَعَّةٍ وَاللَّهُ عَلِيمٌ بِمَا يَعْمَلُونَ ﴿١٩﴾

*“And there came a company of travellers, then they sent their water drawer, and he let down his bucket. He said, Good here is a boy (Gulam). And they concealed him, [taking him] as merchandise, and Allah was Knowing of what they did.”*

(Surah Yūsuf, 12: 19)

*‘Janin*’ is an Arabic word that can be used for a child in the womb of his mother and such child has legal capacity under the Shariah (Basil, 2008: 66). *‘Tifl*’ and *‘ṣabiy*’ are mostly used in Islamic jurisprudence when referring to

<sup>19</sup> Muslim, Abī al-Ḥusayn Muslim Ibn al-Ḥajjāj al-Qushayrī al-Naysabūrī (1998). *Ṣaḥīḥ Muslim*, vol. 2. Riyāḍ: Bayt al-Afkār, 972, no. *ḥadīth* 458.

a child who is yet to attain the age of understanding or maturity. 'Walad' and 'banun' are used for child and children respectively before and after attainment maturity.<sup>20</sup> That is a child continues to be a child of his parent whether or not he has attained maturity (Juwairriyah Badamasiuy, 2009: 33). The word 'tiff' is mentioned and referred to by Allah. The Holy *al-Qur'ān* says:

أَوِ الطِّفْلِ الَّذِينَ لَمْ يَظْهَرُوا عَلَى عَوْرَاتِ النِّسَاءِ

“...or children who have not yet attained knowledge of what is hidden of a woman.....”

(Surah al-Nūr, 24: 31)

It appears from the above literal meaning of child that Shariah has different words that connote the word child. Invariably, this shows the importance and the uniqueness of Shariah and the concern it has in explaining the rights and benefits attributed to the child.

Technically, according to the Shariah the term 'child' refers to someone who has not yet reached the age of puberty (*baligh*) (Zaleha Kamarudin et al., 2010: 95-118). The word *baligh* in this context is described as a child before having experienced wet dream which normally happens after discernment age of *Mumayyiz*- which allows the ability to distinguish what is morally wrong and what is morally right (Mohmed Yaseen, 1995: 1). This position is explained by the *ḥadīth* reported by 'Alī Ibn Abū Ṭālib and 'Ā'ishah which says:

“Three persons who will not be made accountable for their deeds, i.e. one who sleeps until he awakes, a child until he reaches puberty (*baligh*) and an insane until he becomes sane.”<sup>21</sup>

Maturity is determined by the occurrence or appearance of certain signs in a human, such as onset of menstruation, pregnancy, onset of wet dream, changes or hoarseness of voice and growth of pubic hair for males. The jurists are however of the opinion that if these signs do not show up, for the determination of maturity or puberty in order to exercise the right of marriage. They are of the opinion that maturity or puberty can be determined numerically but they differed as to exact age of age of maturity. It is the contention of Imām Abū Ḥanīfah that the puberty of boys are at age 18 while that of girls is at 17 years. His two disciples, Imām Abū Yūsuf and Muḥammad as well as al-Shāfi'ī and Ḥanbalī jurists however set the age of puberty for both boys and girls at 15 years. Al-Shāfi'ī jurists recognize the possibility of menstruation

<sup>20</sup> Surah Āli 'Imrān (3: 14), Surah al-Kahf (18: 46).

<sup>21</sup> Abī Dāwud Sulayman Ibn al-Ash'ath al-Sijistānī al-'Azdī (1979). *Sunan Abī Dāwūd*. Bayrūt: Dār al-Qutub al-'Arabi, Bāb fī Majnūn Yasirq, no. *ḥadīth* 4403.



for females at the age of 9 years which is a sign of maturity too (Kharofah Lalddind, 2004: 56-57). Therefore, Shariah recognises the numerical ways for the determination of puberty but not necessarily 18years has described by the Nigerian Child Right Act.

In Nigeria case of *Yadoma v. Fulata*,<sup>22</sup> the appellant bought a house from one Baba Shehu in the presence of their ward-head. The respondent (child's mother) contended that the boy was too small to sell the house and the sale that took place was done without her consent, hence sale was void. The appellant argued that the vendor was not a boy that was why he bought the house from him. The Shariah Court held that the sale was void because the vendor was a child in the eyes of the Shariah and under the Maliki School of Islamic law maturity for a girl is determined by monthly courses and in the case of a boy, by experiencing the wet dream. Where neither situation happens, maturity will be presumed by attaining the age of 15 years for both sexes (Basil, 2008: 66).

It is argued that because of the uniqueness of the Shariah and its comprehensiveness regarding the maturity of a child, a distinction was made in the determination of the word "child". Unlike CRA, CRC and other conventional laws that have a stable age as to the determination of child maturity, Shariah states the variable that could inform changes. Also there is nexus between Shariah and Arabic language as usual meanings are usually in line technical meanings (Alhirtani, Nahla A.K., 2018: 55-66; Syahnan et al., 2019: 437-445). The language of the *al-Qur'an* is Arabic which has been regarded as the best language and it has proven its uniqueness by having different words for child and its usage add to its suitability (*Ibid.*).

### **Reality and Upshot of Child Marriage: Relaying Some Experiences**

Child marriage means marriage of persons below the age of 18 years (Clark et al., 2006: 88). It is the practise in different parts of Nigeria but more in the northern parts,<sup>23</sup> whereby young girls are given into marriage for various reasons, which include economic, maintenance of family name and maintenance of chastity. Views have been expressed by scholars as to why children's rights are not being protected in this matter. It is established that one of the challenges facing child protection in Africa is poverty (Lachman P, et al., 2002: 587-617). The implication of this is that, it will be difficult to protect children's right where there is abject poverty; hence, parents will use all that is within their disposal for survival. One of the instruments for survival in this perspective is their child/children. Child marriage, child prostitution,

<sup>22</sup> *Yadoma v. Fulata* [1970] NSNLR, 10.

<sup>23</sup> This practice is predominant among Muslim parents.

child labour and other child related ills would be the alternative options for them to tackle the problem of poverty (*Ibid.*; Sossou M. Yogtib J.A., 2008: 1218-1234).<sup>24</sup>

In virtually all Nigerian rural environments, children are generally regarded as assets to parents (Tim S Braimah, 2014: 25). Therefore, children are being used by parents as extra labour for their domestic chores and farmhands. Accordingly, any suggestion that such children should be sent to school is considered as an attempt to rob their parents of the needed assistance the children usually provide. The Act provides: No parent, guardian or any other person shall betroth a child to any person.<sup>25</sup> The recent row in the Nigerian Senate over child marriage is illustrative of this issue (LanreAdedeji, 2015).<sup>26</sup>

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<sup>24</sup> Who in their study outlined various incidents of child marriage, child sexual abuse, child trafficking and neglect of disabled children in the African continent. They concluded that poverty and traditional cultural practices are the main causes of these phenomena.

<sup>25</sup> Section 22(1) of Child's Rights Act 2003.

<sup>26</sup> A shocking agony of children lured into forced marriage are encapsulated in the following scenario: Two girls, Rashida who is 12 years old and her elder sister, Haramu who claims to be 18, were forced to marry husbands they never knew before. Dark-skinned Rashida, says her father had given her and her sister to two different men, who are Nigeriens like her parents, but that it is rather absurd and callous for their father to abort their destiny abruptly without their consent. Their father did not even tell them that he had collected the bride prices from the suitors whom they never knew. Rashida says "We were surprised to see some guests in our residence, who came and took us away to different locations, which they say were our husbands' houses." She stresses that she was surprised to see her parents erecting canopies and hiring chairs on that fateful day. "My father rented canopies and rented chairs, and before we knew what was happening, family, friends and his supposed in-laws were seated and they started eating rice and doing all sorts of things," she states. Rashida adds that the ironic thing about the whole charade was that neither her sister nor herself was invited to the brief ceremony. Another curious twist to the story was that none of the suitors were present at the ceremony. "The whole thing seems funny to me, because my sister and I did not partake in the ceremony. We were inside the room, neither did any of our supposed suitors show up," Rashida recalls. Like sheep being led to the slaughter, which would not utter a word but bleat, Rashida and Haramu amid suppressed sobs, were finally sent forth to their husbands' houses on February 15, 2009, as soon as the ceremony was concluded. The two 'newly-wedded brides' were piloted into two different cars, brought by their in-laws. While Rashida was driven to Agboju, along the Lagos-Badagry Expressway, Haramu was taken to somewhere in Ajah, another part of Lagos.

In Nigeria, due to inconsistencies in legislation and the absence of any stipulation of a minimum age for marriage before the adoption of the 2003 CRA, child marriages continue to take place in many cases as means to preserve chastity. Section 18 of the Marriage Act allows persons under the age of 21 to get married, provided that parental consent is given.<sup>27</sup> It should be noted that the age of marriage is a highly controversial issue and varies from place to place. In the north-west and North Central Nigeria, 14 years is the age of marriage. Also, in the North Central, the age of marriage is between 2<sup>nd</sup> and 3<sup>rd</sup> menstruation, while in the Southern states, it varies from between 16 to 18 years.<sup>28</sup> This can be gathered from the case that occurred in Kano State of Nigeria where a girl of 14 years old, Wasilat Umar was reportedly married off without her consent and all her efforts to refuse the marriage were practically abortive. The girl in an attempt to follow her conscience to relief herself from the marital relationship poisoned the new groom (Umar Sani) to death.<sup>29</sup>

Furthermore, child marriage is described as a marriage below the age of 18 years, before the girl is physically and physiologically ready to shoulder the responsibilities and bear children (Berhane Ras-work, 2007: 22). It establishes that pregnancy- related deaths are the leading cause of mortality in 15-19 year old while girls aged 15 years or under are five times more likely to die than those over 20 (Wodon, 2013: 118). The consequence of child marriage is attributed to immaturity of the brides and they often experience domestic violence and are less likely to act against this abuse. Girls who marry early are also more likely to believe that a man is justified in beating his wife (J.A. Walsker, 2012: 56-86). Child marriage also harms the girl's health, which often results in maternal mortality and morbidity due to early pregnancy. The consequences of child marriage are numerous and these include separation from family and friends, lack of freedom to interact with peers and participate in community activities and decreased opportunity for education (New Wadsenago, 2011: 121-129). Child marriage can also result in bonded labour or enslavement, commercial sexual exploitation and violence against the victim (Smith Daniel Jordan, 2007: 997-1005).

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<sup>27</sup> Order 1, Rule 4 of the Matrimonial Causes Rules defines a child as a person under the age of 21.

<sup>28</sup> Second Periodic Report by Nigeria to the CRC, CRC/C/70/Add.24,17/09/2004 & 46.

<sup>29</sup> AllAfrica (2014). "Nigeria: Why I Poisoned my Groom: Kano Teen Bride," <http://www.nigerianews.com/2014/why-i-poisoned-my-groom-kano-teen-bride.html> ac, accessed on 25 March 2020.

Additionally, child marriage has been condemned by the CRA and it is categorized under the harmful protection practices that adversely affect the health of Nigerian children. No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and of effect whatsoever.<sup>30</sup> The Act further instructs the parents to desist from the act of contracting child marriage for the improvement their health. No parent, guardian or any other person shall betroth a child to any person.<sup>31</sup> A contravention of this section is null and void. The Act imposes a fine to a person who engages in contracting his child out. A person who marries a child, to whom a child is betrothed or who promotes the marriage of a child and who betroths a child commits an offence and is liable on conviction to a fine of N500,000.00 (five hundred thousand Naira) or imprisonment.

Nevertheless, customary position on the issue of child marriage differs and certain parts of the population are still not aware of the negative effects of child marriages could have on girls. In most cases, it limits the opportunities for girls to accede to education, putting them in a disadvantaged position (George O. Obiechina, 2014: 151-175). It is reported that around 36 million Nigeria women and girls are not educated.<sup>32</sup>

Similarly, in Northern Nigeria, where the majority of girls face the prospect of early marriage, this has resulted over the years in large number of cases of Vesico-Vaginal Fistula, a condition caused by giving birth when the cervix is not well- developed (Nwonu, 2014: 120-127). It occurs because the pelvic bones have had insufficient time to develop to cope with child-birth. Corrective operations often require the consent of the spouse, and more often than not the sufferers are abandoned or divorced by their husbands and ostracized by their communities.<sup>33</sup>

### **Legal Regime of Child Marriage under Shariah**

Marriage is a religious duty, moral safeguard as well as a social necessity. It is a social necessity because through marriage, families are established and the

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<sup>30</sup> Section 21 of CRA.

<sup>31</sup> Section 22 (1) of CRA.

<sup>32</sup> It is also worrisome that early marriage can also be detrimental to girl's physical, mental and emotional health. This apart from the fact that it deprives girls from their right to have control over their body and reproductive health as it puts them in a position of complete dependence from their husbands. Pauline Rose (2013). "Spotlight on Nigeria's education crisis". <https://efareport.wordpress.com/2013/09/10/spotlight-on-nigerias-education-crisis/>, accessed on 8 July 2015.

<sup>33</sup> Oxfam (n.d.). "Women and Poverty in Nigeria," [http://www.oxfam.org.uk/what\\_we\\_do/resources.](http://www.oxfam.org.uk/what_we_do/resources.), accessed on 25 March 2020.

family is the fundamental unity of society. Because of its importance, Allah made provision for it in one of the verses of the holy *al-Qur'ān* which says:

فَأَنْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَى وَثُلَاثَ وَرُبْعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً  
 أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعْدِلُوا ﴿٣﴾

*“Then marry such woman as same good to you, two and three and four, but if you fear that you will not do justice (between them) then (marry) only one or what your right possesses; this more proper, that you may not deviate from the right course.”*

(Surah al-Nisā’, 4: 3)

Marriage is *Sunnah* of Prophet Muhammad (SAW) and it is important to the extent that the followers of Prophet Muhammad who are capable should observe and practise. The act of following the foot step of Prophet Muhammad has a lot of rewards. Prophet Muhammad enjoined all the Muslims who are able and capable to get marry. This position is supported by one of the *ḥadīths* narrated by ‘Abd Allāh bin Mas‘ūd:

*“Allah’s messenger SAW said, O young men, those of you who can support a wife should marry, for it (marriage) controls the gaze and preserve one from immorality. And who ever can not (marry) should fast, for it is a means of reducing a sexual desire.”*  
 (al-Bukhārī, 2001: 23)

Child marriage is recognised and permitted under Shariah. This position is supported by one of the verses of the holy *al-Qur'ān* which says:

وَالَّتِي يَسْنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ أُرْتَبِتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ  
 وَالَّتِي لَمْ يَحْضَنْ وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ وَمَنْ يَنْقِ اللَّهُ  
 يَجْعَلْ لَهُ مِنْ أَمْرِهِ يُسْرًا ﴿٤﴾

*“And (as for) those of your women who have despaired of menstruation, if you have a doubt, their prescribed time shall be three months and of those too who have had their courses; and (as for) the pregnant women, their prescribed time is that they lay down their burden..”*

(Surah al-Ṭalāq, 65: 4)

The above verse has to do with children who have not started their menstruation after the demised of their husband. It is the contention of the

*Mufasirun* (Exegetes of the *al-Qur'ān*) that because these children have not experienced menstruation therefore they have to wait for three months. This is the position of the majority of *Mufasirun* (Exegetes of the *al-Qur'ān*) like al-Ṭabarī (1985: 159), al-Jassa (1994: 683), al-Qurṭūbī (2003: 109) and Ibn Kathīr (2000: 109). Therefore, it can be deduced from the contention of the *Mufasirun* (Exegetes of the *al-Qur'ān*) that the child marriage can be entertained. In the same vein, one of the *ḥadīths* of Prophet Muhammad (SAW), allows the child marriage and the *ḥadīth* was narrated by 'Aisha:

*“That the Prophet SAW married her when she was six years old and he consummated the marriage when she was nine years old and she remained for nine years (i.e) till his death.”*<sup>34</sup>

A clear perusal of the above *ḥadīth* indicates that child marriage is not a novel act and in fact it has been practised by Prophet Muhammad SAW. For this reason child marriage does not constitute child abuse, if it is practised the way Prophet Muhammad SAW did it and therefore, it is permissible.

Similarly, the case of Alhaji Ahmed Sanni Yarima, a former Governor of Zamfara state, Nigeria, has demonstrated the existence of child marriage and equally the means (capability and ability) of a party to engage in marriage not alone the child marriage. He married a girl who was between the age of 13 and 14 years from Cairo (Zainab Shinkafi-Bagudu, 2013: 5). He did not consummate the marriage until the girl reached the age of maturity. He was saddled with the responsibility of that girl education as well as made provision for up keeping of the girl and that of her family (Abbo Jimeta, Alhaji Umar Alikali & Amina Nur Alikali, 2008: 140-150).

### **Numerical vs. Physique of a Child**

The CRA defines a child as ‘a person under the age of 18.’<sup>35</sup> Age-based definition is considered as representing the most objective criterion for determining who falls within the framework of child protection policy. This argument however appropriate, may not sound convincing given the various conception of child in Nigeria and other clime. It is certain in Islam that natural phenomena and not only the numerical age is yardstick for marriageable age as numerical age is also recognised. Hence, there is no consensus among *Ulamas* (Muslim scholars) as to the age of majority as far as the maturity is concerned but they agreed that puberty is the end of childhood (al-Kasānī, 1976: 240).

<sup>34</sup> Al-Bukhārī, Abī ‘Abd Allāh Muḥammad Ibn Ismā‘il al-Ju‘fī (2001). *al-Jami‘ al-Musnad al-Sahih*, vol. 5. Lebanon: Dar Tawq al-Najat. Vol. 5. P. 55

<sup>35</sup> Section 277 of the Child’s Rights Act 2003.

The Act seems not to have taken into consideration the differences in natural phenomena before deciding on the age of childhood as below 18. Indeed, there was strong argument when the Second Polish draft on Child's Rights Convention was debated.<sup>36</sup> It was contended that considering the divergent legal and socio-economic traditions of member states of the United Nations as well as variable local adaptations, recourse must be made to accommodate the differences. Based on this development, the draft was then rephrased to accommodate other cultures whose age of majority is lower than that contained in the Polish draft.<sup>37</sup> It is against this background that Mc Goldrick rightly opines that Article 1 does not establish 18 years as the standard age but it allows state party to provide in its national law an age lower than 18 years as age of majority. In a multi-ethnic country like Nigeria,<sup>38</sup> one expects some degree of flexibility in determining the age of majority, since age forms the basis of all other provisions in the Act.<sup>39</sup>

In this perspective, the opinion of Anna Mamalakis Pappas is worthy of consideration when she emphatically maintains that (Pappas A.M., ed., 1983: 125):

*“The outlawing of “child marriages” is far from being a reality: quite a few States have no provision regarding an absolute minimum age for marriage, while several others expressly allow marriage with parental consent, etc, at very young ages, particularly where girls are concerned. Compare Australia, Congo, Egypt, Greece, Kenya with China, Cuba, Israel, Norway, U.K and U.S.A. The United Nations General Assembly Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (G.A Res. 2018 XX. Nov. 1, 1965) provides that the minimum age for marriage “in any case shall not be less than fifteen.”*

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<sup>36</sup> This convention puts 18 years as the age of majority.

<sup>37</sup> Article 1 of the CRC reads “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

<sup>38</sup> Nigeria consists of over 250 ethnic nationalities with diverse cultural and religious orientation.

<sup>39</sup> Perhaps the National Assembly adopts the definition in African Charter on the Rights and Welfare of the Child, an instrument that Nigeria is yet to ratify. Failure to take into account the socio-religious differences raises the issue of enforceability and practicability of the Act.

Islam has played very significant role in freeing children from child abuse, exploitation and any form of brutalities. In one of the traditions of Prophet Muhammad (PBUH), he enjoined Muslims to find better mothers for their children even before they are born. Basically, a child is entitled to a descent name, education, health, right to own property, equal treatment, right to inheritance, recreational activities, etc in Islam.

Child's rights have not had a long history of recognition (M.U. Abubakar, 2007). Children around the world suffer appalling abuses and exploitations from antiquity. Exploitation and authoritarian characterized the societal attitude to children. Parents have absolute control over their children. They have unfettered rights over the child's person, property and earnings, based on the antiquated notion that children are human chattels. This unfettered power of parents over their children extends to the rights to inflict death in certain circumstances. The law does not provide any protection for children subjected to parental cruelty. In essence, it provided positive reinforcement for parental authority in the form of severe sanction to filial recalcitrance, including in some instances even the death penalty.

Conversely, under the Shariah, child marriage is permitted and allowed but the education and health of children must be considered among the factors before the consummation (Juwairriyah Badamasiuy, 2009: 13). It appears that Shariah takes into consideration the different background of various people to arrive at what constitutes maturity and ability to be married. It might be that the climate, economic and social condition of a particular people could make them attain maturity earlier than other people (Ibn Hasm, 2010: 459). Thus, maturity under Shariah does not depend strictly on age but physical, natural development and physiological make-up of the person in question (al-Sarakhsī, 1999: 212).

Similarly, Shariah has allowed marriage of a person under 18 years who has attained maturity partly to prevent social vices that could result from sexual relationship outside the marriage which can be detrimental to society. These vices include high risks in abortion and producing children with untraceable genealogy and doubtful identity. The attainment of marriageable age held by Shariah is supported by the statement of the former Minister of Health, Olikoye Ransome-Kuti, when he was quoted as saying while advocating for need for sexual and reproductive health education for young people in Nigeria (Makinwa, 1992: 67-69):

*“Adolescent sexuality is a reality. Today young people reach physical maturity earlier and marry earlier.”*



On the other hand, among the reasons tendered by the advocates of the prohibition of child marriage prescribed under the CRA is that such child marriage is detrimental to the health of the child such as causing Vesico Vaginal Fistula (VVF) disease.<sup>40</sup> This view needs to be examined. There is no doubt that a young pregnant girl stands the high risk of contracting VVF during child birth if her pelvic has not properly developed (Jaapar et al., 2018: 17-27). This can possibly be avoided by proper medical attention such as aiding the birth by caesarian section or otherwise (Akpan , E.O., 2003: 54). That it is to say that a young pregnant girl can safely deliver her baby with skilled maternity care. But health of the girl child must be paramount and number one factor to be considered in the institution of marriage before consummation. It is important to state that adults also are susceptible to VVVF too (George O. Obiechina, 2014: 151-175). The causes of VVF therefore go beyond child marriage or early marriage to include economic, social status and environment of those who contract the disease and the management of their pregnancy and general health (Adeniyi, Olayinka Oluwakemi, 2017: 45).

It is pertinent to state that the issue of 18 years as marriageable in Nigeria is not and cannot benefit the Muslims. This is because the Child Right Act 2003 was not domesticated in all the states. Not all the state of the federation has adopted the provision of the CRA 2003, hence, its implementation is curtailed and cannot have general application (Nkoyo Toyo, 2006: 1299-1312). Equally, Nigeria is multi-religious country of which the Muslims are allowed to settle the dispute arising from marriage in Islamic court, more so, the Nigerian constitution recognises the Islamic personal law (Oba, A.A., 2008: 17).<sup>41</sup>

## CONCLUSION

In this paper, it is clear that the definition of the world child is the bone of contention that leads to the determination of child marriage. To the Nigerian law, the marriageable age of a child has been pegged to 18years, while the Shariah position is different. Indeed, the contention under the Shariah is that marriageable age is not usually based on numerical age of a child, rather the determinant factor is the developmental stage of girl and boy concerned which could be different between a child and another. It is shown that a girl can marry even if she is below the age of 18 years in as much as she has

<sup>40</sup> Maryam Uwais (2015). "Children Bill not Anti-Islamic," <http://groups.google.com/group/altreligion.islam/msg/b/cata>, accessed on 17 January 2015.

<sup>41</sup> Alkamawa vs Bello. (1998) 6 SCNJ. P12. See also Sections 275-277 of the 1999 Constitution of Federal Republic of Nigeria.

developed physically and mentally. Hence, where this happens, it cannot be interpreted to mean child marriage. Also the boy must be capable mentally, physically and has source of means of livelihood to cater basic need of a wife. Therefore, revisiting the issue of child marriage by taken into consideration the environmental advantage and or otherwise in a child development would most likely constitute a panacea to the spat of child marriage (Tim S Braimah, 2014: 12).

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