

The Legal Status of Children Born Out of Wedlock in Nigeria: Is the Concept of Illegitimacy in Decline?

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ABSTRACT

The legal status of children born out of wedlock has been a core issue in Nigeria. This is due to the conflict of law issues that have arisen with the enactment of section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as altered). The section seeks to protect affected children from disability or deprivation by reason of the circumstances of their birth. Nigeria's legal system rotates on the tripod of common law, statutes and customary law. Ensuring a healthy mix from this legal pluralism especially with respect to legitimacy and legitimation of children born out of wedlock has been despairing. This paper seeks to examine the legal status and rights of children born out of wedlock especially in succession matters and the extent to which section 42(2) of the Constitution has enhanced their legal status. It also examines challenges presented and ponders whether the common law principle of legitimacy is not in decline. It concludes by advocating the customary law position of legitimation as section 42(2) of the Constitution did not after all, abolish the common law principle of legitimacy but merely seeks to protect affected children against any form of disability or deprivation.

Keywords: Wedlock, Legitimacy, Legitimation, Succession, Disability, Deprivation

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Introduction

Over the years, there have been quite a number of children born out of wedlock not only in Nigeria but also in many other societies. Such children, usually referred to as illegitimate² face several challenges especially with respect to succession. There is no gainsaying the fact that their legal status, rights, interests and welfare are very important and need to be protected just as those of children born in lawful marriage or children born within lawful wedlock. The legislature through statutes and the courts have long recognized this need with regards to legitimacy, legitimation and succession. The genesis of this present state of our law, as Itua noted, began with the adoption of the English laws of marriage, which became applicable to Nigeria flowing from her being colonized by the English which resulted in the importation of the English rule of legitimacy.³ The English law of marriage recognizes monogamy while customary law which existed in Nigerian societies before the adoption of English laws on the other hand allows a man to marry as many wives as he can.⁴

The concept of legitimacy generally presumes as legitimate any child born in lawful wedlock. Birth outside lawful wedlock foists upon the child the toga of illegitimacy. Nigerian law also accepts this position. Thus, Section 165 of the Evidence Act, 2011 provides in this regard that:

Without prejudice to section 84 of the Matrimonial Causes Act, where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution of the marriage, the mother remaining unmarried, the court shall presume that the person in question is the legitimate child of that man.

This concept is rooted in common law which considers a child illegitimate if his parents never married, or his parents married after his birth. An illegitimate child at common law was deemed a child of no one, and consequently had no right to inherit. No one other than his or her own issue could also inherit from an illegitimate person. In *Rabiu v*

² In *Oduche v Oduche* (2006) 5 NWLR (Pt. 972) p.102 at Pp. 118 – 119, paras. H – C, the Court of Appeal held that where a child is born during the subsistence of a marriage, the child is presumed to be legitimate. See also Section 165 of the Evidence Act, 2011. This presumption is of course, rebuttable.

³ P. O. Itua, "Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as Amended on the Rights of Inheritance," *Journal of Law and Conflict Resolution* 4(3), (March, 2012): 31- 44

⁴ Reference to customary law in this context is construed to include Islamic Sharia Law.

Amadu,⁵ the Supreme Court per Galadima, JSC noted particularly on the disabilities of a child born out of wedlock as follows:

A child without a traceable father does not command respect and honour in the eyes of the public. He suffers psychological debasement in the society for no just fault of his. This is why legitimacy is viewed with all seriousness ... Paternity is an inalienable right of the child as every child must have a father, and only one father.

The above strict legal position on legitimacy held sway in England and much of the commonwealth except in the United States of America where an illegitimate child was presumed to be the child of his mother and could inherit from her and her relatives, and they from him.⁶ This presumption was however rebuttable if it was proved that the husband was impotent or “beyond the four seas” that is, out of the country.⁷ However, this strict common law position is different under customary law. Under customary law, a child is admitted as legitimate if born in lawful wedlock and/or if born out of wedlock but whose paternity his putative father has acknowledged.

Given the disabilities suffered by children born out of wedlock, the Constitution of the Federal Republic of Nigeria, 1999 (as altered)⁸ in Section 42(2), sought to remedy the situation. The section provides that “no citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstances of his birth.” Based on this Constitutional provision, arguments have been canvassed that this section has in effect, removed the status of illegitimacy from persons who would otherwise have been adjudged to be illegitimate. On the other hand, a contrary argument is that this Constitutional provision did not completely remove the status of illegitimacy of persons born out of wedlock.

Literature on this subject reflects the above contending positions though writers who have argued that s. 42(2) of the Nigerian Constitution has not removed illegitimacy seem to predominate. For example, Izzi and LongJohn have pointed out that the Nigerian Constitution has yet to abolish illegitimacy in the country either through s. 42(2) or any other provision. To them, s. 42(2) has merely removed the disabilities associated with illegitimacy.⁹ In a similar vein, Olomjobi and Onuoha agree that s.42(2) of the Nigerian

⁵ (2013) 1 NWLR (Pt. 1337) p. 36 at p. 48, paras. F – G.

⁶ M. G. Hill, Jr. and S. Emanuel, *Family Law (The Professor Series)*, (New York: Aspen, 1994): 215

⁷ *Ibid.*, at 210

⁸ Cap .C23 Laws of the Federation of Nigeria, 2011

⁹ M. O. Izzi and C. D. LongJohn, “ An Analysis of the Concepts of Legitimacy and Legitimation Under Nigerian Family Law,” *The Journal of Property Law and Contemporary Issues*, 5(1) (2017): 180 - 195

Constitution did not abolish illegitimacy.¹⁰ On the possible solution to illegitimacy, Ajonumah and Dublin-Green on the one hand and Diala both contend that legitimation under customary law is more effective than what s.42(2) of the Constitution offers. This according to these writers is because customary legitimation enables legitimated persons to succeed more wholesomely as beneficiaries from the estates of deceased intestates as if they had been born legitimate.¹¹

It is clear from the above that the debate on the subject of illegitimacy and particularly on whether s.42(2) of the Constitution of Nigeria has abolished it is anything but over. Thus, this paper seeks to add to the body of knowledge on the subject by examining the concept of illegitimacy, legitimation and succession in Nigeria. However, while previous studies on the subject have focused on the import of s.42(2) of the Constitution, this paper particularly looks at judicial attempts at protection of children born out of wedlock against the common law position which appears to be very much alive regardless of the Constitutional provision in s.42(2). Suggestions and recommendations are consequently made with the objective of enhancing the status of persons born out of wedlock.

The Concept of Illegitimacy¹²

The issue of children born out of wedlock or illegitimate children is purely and principally connected with status.¹³ In Nigeria, the concept of legitimacy is very important because of the social stigma that is associated with illegitimacy. As has already been stated above, at common law an illegitimate child was described as *filius nullius*.¹⁴ He was considered as a stranger not only to his father but also to his mother and all other relatives. Thus, he had no legal right to succeed either to his or her father's or mother's

¹⁰ Y. Olomjobi and J. Onuoha, "Public Perception on Illegitimacy and Succession Rights in South Western Nigeria," *SSRN* (2017): 1 – 27. C. Mwalimu in his book *Legitimation in Nigeria Under Ibo Customary Law (Washington DC: Library of Congress, 1982)* whilst looking at s.39 of the 1979 Constitution echoed the same opinion as the above writers.

¹¹ J. A. Ajonumah and O. Dublin-Green, "Paternity, Illegitimacy and Customary Acknowledgment in Nigeria: A Re-Evaluation," *International Journal of Business and Law Research*, 7(2) (April-June, 2019) 112 – 119. See also A. C. Diala, "Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa," *African Human Rights Law Journal*, 14 (2014): 633 – 654.

¹² Hitherto, the term illegitimate child was used for children whose birth was outside wedlock; but that term was progressively viewed as unfairly judgmental thus the expression "out of wedlock" became the preferred reference to such children or persons. Due to the recognition of same sex unions in some jurisdictions, the term "non-marital children" is also used to describe such children.

¹³ E.I.Nwogugu, *Family Law in Nigeria* (Revised Edition, 2006 Heineman Educational Books) at 286

¹⁴ That is, a son of nobody. See *Galloway v. Galloway* (1914) 30 TLR 5 31.

property or even receive maintenance¹⁵ “or other benefits deriving from the status of parents and child”.¹⁶ Such a child or person also had no right to participate in the intestacy of either his father or mother¹⁷.

The Legitimacy Ordinance of 1929¹⁸ however modified the harsh common law position and arguably provided partial remedy to the problem created concerning illegitimacy.¹⁹ Under section 10 of the Ordinance, where the mother of an illegitimate child died intestate after 17 October, 1929 leaving real or personal property, but was not survived by any legitimate child, the illegitimate child or if he was dead, his issue, was entitled to take any interest in the estate to which he or his issue would have been entitled to if he had been born legitimate. Also where an illegitimate person who had not been legitimated dies intestate in respect of all or any of his real or personal property, his mother, if surviving shall be entitled to take any interest in his estate to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.²⁰ The issue of legitimacy of children born in wedlock is discussed in the next part of this paper.

Legitimacy of Children of the Marriage

As has already been stated above, legitimacy of children refers to the incidence of birth of a child within lawful wedlock or as section 165 of the Evidence Act, 2011 provides, within 280 days of the dissolution of the marriage between the child’s mother and father, the mother having remained unmarried. In other words, legitimate children are children of a lawful marriage. According to Kasumu and Salacuse, legitimacy is the status acquired by a person who is born in lawful wedlock, and such a person is regarded as

¹⁵ I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, 1st edition, (Malthouse Press Limited, 2006): 2. Yin and Black make similar claims. See E. T Yin, and J. Black, “The Legal Anthropology of Marriage in Ghana: Presenting Power Dynamics Through Legal Arenas,” *International Journal of Current Research*, 6 [12] (2014), 10696-10704.

¹⁶ Rebecca Probert, *Cretney and Probert’s Principles of Family Law 10th*. Ed, (London: Sweet & Maxwell, 2018): 594.

¹⁷ *Ibid.* at 604, Also see *Adeyemi v. Bamidele* [1968] 1 All N.L.R. 31 at p.37

¹⁸ Now Legitimacy Act, Cap. 103, Laws of Nigeria, 1965.

¹⁹ E.I. Nwogugu, *Family Law in Nigeria* (Revised Edition Heineman Educational Books 2006): 305 noted that under the ordinance, an illegitimate child can only share in his intestate mother’s estate if there is no legitimate child. The implication is that if the mother had a legitimate child, he will certainly take to the exclusion of the illegitimate child. Also, the legitimate issue of the illegitimate child’s mother can displace her illegitimate child.

²⁰ J. S. Coleman, *Nigeria: Background to Nationalism* cited in T.A. Aguda, *The Challenge of the Nigeria Nation. An Examination of Its Legal Development 1960-1985*. (Ibadan: Heinemann Educational Books (Nigeria) Limited, 1985) 1.

legitimate from birth.²¹ Since lawful wedlock includes marriage under the Act as well as customary law, any child born during the subsistence of either of these aforementioned marriages is legitimate.²²

Flowing from the above, marriage is central in determining the legitimacy of children. Marriage on its part is the legal union of spouses as husband and wife, the result of which a family is formed.²³ Under the Marriage Act²⁴ it is only marriages conducted in strict compliance with the Act that are recognized in law as being capable of producing legitimate children.²⁵ The *locus classicus* on this concept is the case of *Hyde v Hyde*²⁶ where Lord Penzance held that "... marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of others." On the basis of this therefore, it is only a lawful marriage that produces a legitimate child or children.²⁷

As to what constitutes a child, the Child Rights Act²⁸ provides an answer. Under section 277 of the Act, a child is defined to mean a person under the age of eighteen years. The same section of the Act further defined a "child of the family" in relation to parties to a marriage to mean a child of both of those parties and or any other child, not being a child who is placed with them as foster parents by a local authority or voluntary organization, but who has been treated by those parties as a child of their family.²⁹ It is humbly submitted that the definition of a child under section 277 of the Act appears to include children born out of wedlock. This is because a child born out of wedlock though not a child who is placed with parties to a marriage could be treated by either of them as a child of the family.³⁰

²¹ A. B. Kasumu & J. W. Salacus, *Nigerian Family Law* (London: Butterworths, 1966): 207.

²² See also *Lawal v. Yunan* [1961] 1 All NLR 254. Note particularly that while this description might include civil partnerships (same sex associations) in the western world, in Nigeria where same sex unions are unlawful, this definition is limited to a heterosexual marriage between men and women only by virtue of the Same Sex (Marriage Prohibition) Act, 2015. In situations of surrogacy, father and mother may exclude the surrogate mother.

²⁴ Cap M6 Laws of the Federation of Nigeria, 2011

²⁵ Note however that this strict definition is being watered down with the increasing recognition of civil partnership arrangements and liberal rights being accorded LGBTs across the world.

²⁶ 1866 L R 1 p& d 130, 133

²⁷ This applies even in cases of adopted children. Liberal approach nowadays seems to suggest that a single woman can legally adopt. That of course, is not the position of the law in Nigeria where an application for adoption is only allowed if presented by a married couple.

²⁸ Cap C50 Laws of the Federation of Nigeria, 2011

²⁹ *Ibid.*

³⁰ In many cases where a putative father has disowned paternity of a child, it is not unheard of for the family to accept such a child and deal with him in all respects as the child of the person disclaiming paternity.

The Law of Illegitimacy

The law of illegitimacy is a common law principle or doctrine laid down in the celebrated case of *Galloway v. Galloway*³¹ wherein the law was stated to the effect that an illegitimate child has no right whatsoever with regard to the property of his parents. He is described as *filius nullius* (a son of nobody). The illegitimate child at common law is a stranger in law not only to his father but also to his mother and all other relatives. He thus, has no legal right to succession to their property, to receive maintenance³² “or other benefits deriving from the status of parent and child.”³³ In addition, such a child has no right to participate in the intestacies of either of his parents.³⁴ Likewise, neither parent of an illegitimate child has a right to succession upon intestacy of such a child. What is more, the illegitimate child also has no right to take on the intestacy of a grandparent or brother or sister³⁵.

Nigeria inherited the Legitimacy Ordinance of 1929 which was reenacted and is now Legitimacy Act, 1965.³⁶ This Act modified the common law position as enunciated above. In *Adeyemi v. Bamidele*³⁷ the Supreme Court highlighted this modification when the Court held that “...legitimacy in England is a different concept to legitimacy in Nigeria.” The Court went on to explain that this is because legitimacy in England was based purely on the common law while it has been toned by statutory flavor in Nigeria. While this is true, it needs pointing out that even in England, the common law principle was modified as far back as 1920 by the Legitimacy Act of 1926³⁸. Before the modification of the common law principle of the law of illegitimacy, the philosophical basis for it was to curb adultery, illicit sex and sexual promiscuity. The law was therefore grounded in piety and morality.

With the enactment of Legitimacy Acts to legitimize hitherto illegitimate children with a view to improving their welfare, right to inheritance and succession to their parent’s estates upon their demise in England, Nigeria and Kenya³⁹ amongst several other countries, can it be said that the common law principle of illegitimacy is not in decline?

³¹ *Galloway v Galloway* (Supra)

³² Ibid.

³³ Ibid.

³⁴ See P. O. Itua, “*Legitimacy, Legitimation and Succession*” 33

³⁵ Ibid.

³⁶ Ibid.

³⁷ [1968] 1 All N.L.R. 31 at p.37

³⁸ Cap 60 Laws of England, 1926

³⁹ Sections 3 and 4 of the Legitimacy Act of Kenya Cap 145 Laws of Kenya, 2012 are instructive here. Available at www.kenyalaw.org Last Accessed 18/5/2021

The next section of this paper will address the attitude of the courts to this attitude issue.

Judicial Protection of Children Born Out of Wedlock

In England, before the enactment of the Legitimacy Act, 1926, the courts administered the common law principle of illegitimacy strictly and excluded affected children from benefiting or sharing from the estates of their supposed parents.⁴⁰ Nigeria inherited this common law principle along with other laws. Even subsequent to the Legitimacy Ordinance, 1929 re-enacted as the Legitimacy Act, 1956, courts in Nigeria were still administering the common law principle of illegitimacy as *Cole v. Akinyele*⁴¹ proves. In that case, the defendant argued that he was entitled to succeed to the property of the deceased to the exclusion of the plaintiffs who were illegitimate children. It was held that the plaintiffs could not benefit from the estate on account of their being born out of wedlock by the deceased's mistress whilst his marriage to the defendant's mother under the Act subsisted. This was in spite of their acknowledgement by their father whilst alive. *Cole v Akinyele* was decided based on the common law principle of illegitimacy which excluded children deemed illegitimate from benefiting or sharing from the estates of their fathers especially where, as in this case, there was a legitimate child who could inherit.

However, in *Ogunmodede v Thomas*⁴² a different outcome occurred. The deceased had married under the Act and had one issue a female called Patience Ajibabi. During the subsistence of the marriage, the deceased had 16 other children from different women. He openly acknowledged these children. His legitimate wife and his daughter Patience also accepted these children, and treated them as co-owners of the estate of the deceased. When Patience died, her husband attempted to claim the property to the exclusion of the other children relying on the case of *Cole v. Akinyele*. His argument was that since the 16 children were born illegitimate and were not capable of being legitimated on the basis of the decision in *Cole v Akinyele*, the deceased's estate therefore passed on to Patience his wife exclusively after her mother's death, and that he being her husband by statutory marriage was entitled to her estate including the deceased estate on her death. The Court rejected this argument and held that the property was a joint property with the other children of the deceased. Consequently, the other 16 children were held to be entitled to their share in the estate of their father. *Ogunmodede's Case* appears distinguishable from *Cole's Case* on account of the

⁴⁰ See *Galloway v Galloway* (Supra)

⁴¹ (1960) 5 F S C c84

⁴² *Ogunmodede v. Thomas*, Supreme Court, FSC 337/1962 (Unreported).

presence of a direct heir and the conduct of the parties involved. It is submitted that the outcome in *Ogunmodede's Case* would have been different if those entitled to inherit under the legitimacy principle had not accepted the children born out of wedlock by their conduct.

In contemporary times, the strict adherence by courts to the common law principle as enunciated in *Cole's Case* has waned though the principle still lurks in the background. The impetus for this change of attitude is traceable first to the Legitimacy Ordinance re-enacted as the Legitimacy Act, 1956 and later Constitutional attempt under s. 39 of the 1979 Constitution to legitimize otherwise illegitimate children; and the courts have accordingly acknowledged the legislative intendment. For example, in *Muajekwu v Ejikeme*⁴³ the Court held that the circumstances of birth of the 1st Respondent who was born out of wedlock cannot be a bar to his proven rights and that he cannot be subjected to any disability or deprivation as regard the acquired portion of his family land.

Earlier in *Salubi v Nwariaku*⁴⁴ the Court of Appeal and the Supreme Court on further appeal held that the children born of the property owner out of wedlock were entitled to share in the estate of their father with the other children of the marriage in equal shares. Later in *Anode v Mmeka*⁴⁵ the Court of Appeal followed the earlier decisions as outlined above and held that the fact of being born out of wedlock has become totally irrelevant in considerations affecting a child. Where there is no father claiming paternity of a child, his legitimacy, custody and rights of inheritance should follow. No child ought to be subjected to any form of disability or deprivation.⁴⁶

It is argued that contemporary law and debate on illegitimacy has eliminated all the disadvantages associated with illegitimacy. That is, an illegitimate child now has the same rights to maintenance and succession as a legitimate child.⁴⁷ However, this is not to say that the contrary argument that the law has not abolished the status of illegitimacy is not nursed or sustained anymore. As a matter of fact, it is contended that the principle was merely toned down but is very much alive and that it was not meant to have practical or legal effect on the existing state of the law regarding the status

⁴³ (2005 NWLR (PT.657) 413

⁴⁴ (2003) 7 NWLR (PT.819) 426 at 456

⁴⁵ (2008) 10 NWLR (PT.1094) 1

⁴⁶ M. Attah, *Family Welfare in Nigeria*, (Benin City: Ambik Press, 2017): 236

⁴⁷ P. O. Itua, "Legitimacy, Legitimation and Succession" 39

and consequences of illegitimacy⁴⁸ The next section of the paper will examine the extent to which this argument is true or not.

Legitimation of Children Born Out of Wedlock

Though illegitimacy presents such negative effects for affected children, the law is not without remedy. Such children can be legitimated. Legitimation is the process by which a child who was born illegitimate acquires legitimate status⁴⁹ In Nigeria, legitimation can be achieved either by the subsequent statutory marriage of the parents of the illegitimate child or through the process of acknowledgement under customary law. Legitimacy by subsequent marriage was first made possible under the provisions of the Legitimacy Act 1929⁵⁰ which applied throughout the country at that time. However, the Legitimacy Act or Laws⁵¹ became a regional subject with the introduction of federalism in Nigeria. Under the aforementioned Act or Laws, where the parents of an illegitimate child marry after the birth of the child, the child becomes legitimate from the date of the marriage. But if the marriage took place before the date of that Act that is, the date the Ordinance came into effect, then the date of legitimation will be the date the Act or law came into effect.

The legal effect of legitimation is that the legitimated child acquires the same status with children born in lawful wedlock. He can effectively participate in the administration of the estate of his parents and also inherit from them.⁵² However, where an illegitimate person died after the commencement of the Act, and before the marriage of his parents which would have legitimated him, his spouse, children and remotest issue living at the date of the marriage of his parents will inherit property and take any interest as if the person had been legitimated⁵³ Under customary law, a child born out of wedlock can be legitimated by acts⁵⁴ of acknowledgement by his putative father. The legal effect of

⁴⁸ I. E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, 1st ed., (Lagos: Malthouse Press Limited, 2006):11

⁴⁹ E. I. Nwogugu, *Family Law in Nigeria* (Revised Edition), (Ibadan: Heinemann Educational Books, 2006): 291

⁵⁰ Ordinance No.27 of 1929.

⁵¹ The various regions inherited and preserved this legislation, which was further inherited by states created from these regions. This explains the uniformity of legislations on legitimacy till this day in Nigeria. See also Legitimacy Act, Cap103 Laws of the Federation of Nigeria, 1956; Cap 62, Laws of the Western Nigeria, 1959; Cap75 Laws of the Eastern Nigeria, 1963; Cap 63, Law of Northern Nigeria, 1963; Legitimacy Act Cap. 88 Laws of Bendel State, 1976 as applicable in Edo State.

35 P. O. Itua, "Legitimacy, Legitimation and Succession" 34 ff

³⁶ This is possible only if the subsequent marriage of his parents would have legitimated the child if he were alive. See I. E. Sagay, *Nigerian Law of Succession* at 4.

⁵⁴ This includes but is not limited to acts such as performance of the naming ceremony by the father as in *Phillips v. Phillips*, 18 NLR 102; paying the mother's maternity bills as was the case in *Savage v. Mcfoy* [1909] Ren.505 and an acknowledgement contained in a letter as was held in *Young v. Young* [1953] W.A.C.A. 19.

acknowledgement was aptly described by Cole, J in *Taylor v. Taylor*⁵⁵ when he held that “the acknowledgement of paternity by the father *ipso facto* legitimizes the children and there could not for the purpose of succession be different degrees of legitimacy”.

In other jurisdictions, acknowledgment of children born out of wedlock is similarly provided for. For example in the United States of America, each of the 50 states has passed one statute or the other providing for the legitimization of children born out of wedlock.⁵⁶ These statutes though divergent in sum recognize:

- All children as the legitimate children of their natural parents;
- The subsequent marriage of an illegitimate child’s natural parents as a method of legitimization;
- The subsequent marriage of an illegitimate child’s natural parents along with some form of acknowledgment of paternity by the natural father as a method of legitimization;
- Acknowledgment by his natural father;
- A declaration by a court of law that a child is legitimate.

In such jurisdictions as the USA where statute has diminished the potency of the principle of illegitimacy, legitimated children are entitled to child support and other benefits. In *Trimble v Gordon*⁵⁷ the court held that the state must provide some method by which out-of-wedlock children can be acknowledged and thus permitted to inherit. Implicit in the holding in this case is the fact that illegitimacy is still a present phenomenon to be grappled with even in the advanced democracies. However, the lesson in the above case for Nigeria and indeed Africa appears to be that conscious steps need to be taken by the legislature to move out of section 42(2) of the Constitution and enact appropriate laws which will give more meaning and impetus to the intendment of the Constitution towards stamping out the phenomenon of illegitimacy in the country. How the 1999 Constitution of Nigeria and statutes provide against disability and deprivation of children born out of wedlock is discussed in the next section of this paper.

⁵⁵ (1960) L.L.R. 286.

⁵⁶ M. G. Hill, Jr. and S. Emanuel, *Family Law* 213

⁵⁷ (1977) 430 U. S. 762

Constitutional and Statutory Provisions on Disability or Deprivation by Reason of the Circumstances of Birth

The Constitution of the Federal Republic of Nigeria, 1999 (as altered) in section 42(2) provides that “no citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstances of his birth”. Flowing from this Constitutional provision, a person is not to be subjected to any form of disability or deprivation merely due to the circumstance of his or her birth. The scope of section 42(2) of the Constitution is wide and so accommodates other forms of discrimination aside from disinheriting children born out of wedlock. There are other forms of discrimination based on gender, for example, in areas of succession in Nigeria. Prior to the enactment of Section 42(2) of the Constitution, one area where gender discrimination was blatant was the disinheritance of female children upon intestacy of their parents under customary law⁵⁸. This prompted the promulgation of other statutes and ratification of conventions in those areas of discrimination. One of those areas of discrimination is sex or gender discrimination.

Consequent upon the above, Article 1 of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) defined discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their status, on a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field.⁵⁹ Article 2 of the Convention which Nigeria is a signatory to states that parties to the Convention are enjoined to condemn any form of discrimination against women. However, there are some factors militating against the elimination of discriminatory practices and rules of succession in Nigeria. One of such factors is public policy. The policy of not declaring some customs as repugnant to natural justice, equity and good conscience appears to be fueling discrimination and disabling some persons from inheriting. The reason is that since some of these practices are merely declared

⁵⁸ This was primarily experienced in virtually all customs of the various societies in Nigeria.

⁵⁹ CEDAW is generally believed to be an international bill of rights for women. It was adopted by the United Nations in 1979 and instituted on 3rd September, 1981 from the Conference held in Beijing, China. So far, 189 countries have ratified it.

repugnant but not criminalized,⁶⁰ they still exist and affected persons are still experiencing discrimination based on such practices.

As a signatory to the Convention, Nigeria is seemingly obligated to fully implement its provisions. Unfortunately, the country is yet to domesticate CEDAW in accordance with the provisions of Section 12(1) of the 1999 Constitution which allows the National Assembly to domesticate treaties and conventions by enacting such treaties or conventions into law. The said Section 12 (1) of the 1999 Constitution provides that “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.” Thus, the failure to domesticate and make CEDAW part of the country’s municipal laws is an aid to practices which fuel discrimination contrary to the provision of section 42(2) of the Constitution.

Another convention dealing with rights to freedom from any form of discrimination apart from CEDAW is the African Charter on Human and Peoples’ Rights (ACHPR). The African Charter has been domesticated and forms part of Nigeria’s municipal laws⁶¹. This Charter advocates the right to property and the right to freedom from any form of discrimination based on sex. Implicit in the provisions of both CEDAW and the African Charter and other regional instruments is the admission that discriminatory practices exist on the continent not just against children born out of wedlock and therefore illegitimate but also women and other categories of persons.⁶² Thus, it is submitted that all discriminatory customary law practices contrary to the provisions of the African Charter in the context of Nigeria, and particularly with respect to the construction of s.42(2) are unconstitutional and by implication void.⁶³

It needs to be pointed out that children are born into and become part of families. Thus, how out-of-wedlock or illegitimate children fare under statutes that regulate the family unit in Nigeria is also important and needs to be examined.

⁶⁰ A. Atsenua, “Custom and Customary Law; Nigerian Courts and Promise for Women’s Right” in L. Chandler, *Contemporary Issues in the Administration of Justice. Essays in Honor of Justice Atinuke Ige* (Ibadan: Rehoboth Publishers, 2001) 344

⁶¹ Cap A9 Laws of the Federation of Nigeria, 2011.

⁶² Albinos for example, face severe discrimination in virtually every country in Africa.

⁶³ V.C. Ikpeze, *Gender Dynamics of Inheritance Rights in Nigeria Need for Women Empowerment* (Lagos: Folmech Printing & Pub. Co. Ltd, 2009):17.

Children Born out of Wedlock and Their Welfare under the Matrimonial Causes Act

Prior to the enactment of section 39(2) of the 1979 Constitution now section 42(2) of Constitution of the Federal Republic of Nigeria, 1999 (as amended) which prohibits disability, deprivation and discrimination on the circumstances of birth, the Matrimonial Causes Act, 1970⁶⁴ defined children of the marriage to include illegitimate children for the purposes of their economic welfare upon dissolution of the marriage.⁶⁵ By section 72 of the Matrimonial Causes Act, the Court is empowered to make an order for settlement of property by the parties to the marriage for the benefit of the children especially in void marriages. The incidence of nullity based on the void nature of the marriage among other grounds would suggest that since there was no marriage, whatever issue from the relationship would naturally foist the toga of illegitimacy on the children and this is what the MCA seeks to avoid. In *Oghoyane v Oghoyane*⁶⁶ the Appellant married the Respondent while still legally married to some other persons and thus did not possess a single status required for a valid contraction of a statutory marriage. The parties had a prenuptial agreement for the sharing of the properties acquired but failed to include the property in dispute. The Court ordered the property to be sold and divided to the parties in equal shares. The Court of Appeal held the arrangement to be equitable. It would have been different if there was an illegitimate child suing for economic welfare, then, the Court would apply equity to favour the illegitimate child.

It must be noted that the provisions of sections 69 and 72 of the Matrimonial Causes Act touching on illegitimacy of children from void marriages and their right to be provided economic welfare only apply to dissolution or nullity of statutory marriages. Worthy of note too is that illegitimate children of cohabiting couples are in law barred from the benefit of the equity of grant of economic welfare to children from such cohabitation.⁶⁷ Thus, the Matrimonial Causes Act in its provision attempted to eliminate the gap between legitimate and illegitimate children for welfare purposes. Whether this has advanced the provision of section 42(2) of the 1999 Constitution which was enacted much later is not clear.

⁶⁴ Section 69, MCA

⁶⁵ *Ibid.*

⁶⁶ (2010) 3 NWLR (Pt. 1182) 564

⁶⁷ In the loose Nigerian context especially bearing in mind the strong influence of customary law on families and children, it is difficult to see how a couple who have cohabited to the knowledge of their families will have children from their cohabitation without more declared illegitimate especially by the family except there are underlying reasons informing such a declaration.

Establishing Paternity of Children Born Out of Wedlock

Where the paternity of a person born out of wedlock becomes in issue, the need to establish his paternity is equally necessary to entitle him or her to any benefit. The courts have been called upon to make pronouncements in this regard in the past. For a child born out of wedlock to establish his paternity for the purposes of sharing in the estate of his father, he must demonstrate by showing a link to the parent claimed to be his father. Once an illegitimate child proves to the court's satisfaction his paternity, the court can protect his welfare and interest in the estate of his parent. Paternity can be proved in a number of ways including by presentation of a birth certificate. The court so held in *Ukeje v Ukeje*⁶⁸ where a birth certificate was tendered in evidence without any evidence in rebuttal. It is submitted that the decision of the Court in *Ukeje's Case* expanded or broadened the law in this area by laying down a principle that paternity can be proved vide birth certificate by a person born out of wedlock.

Another way of proving paternity of an illegitimate Child is by scientific test through deoxyribonucleic acid (DNA) test. This is provided for under section 63 of the Child Rights Act and is done by taking the blood sample of the person whose paternity is in issue and matching it with the blood sample of the putative father or any other person alleged to be the father or mother of that person. Before taking the sample, consent of any person affected must be obtained including the consent of the child if he is up to 16 years. Where the child is mentally incapacitated, the person having his care and the medical practitioner in whose care the child is must consent that taking of the sample will not be prejudicial to the care and treatment of the child⁶⁹.

As to who can order a DNA test, it is the position under Nigerian law that a High Court or Magistrate Court can order for deoxyribonucleic acid (DNA) scientific test in cases where the child seeks to establish paternity or maternity or where there are rival claims to the paternity or maternity of the child⁷⁰. It needs to be noted that where the Court has ordered for DNA test, the requirement of consent from the persons whose samples are to be collected is with respect rendered irrelevant. However, since DNA tests are relatively new in their application in the country and due to corruption, the integrity of the test is questioned as same is susceptible to fraud and manipulation to ascribe a child to a person who is not actually his biological father for gain. Thus, while DNA tests can

⁶⁸ (2014) 1 NWLR (Pt. 1418) 384

⁶⁹ Section 64 of the Child Right's Act, 2003 Also see M. A. Aja-Nwachukwu, "Determination of Paternity of a Child or an Adult in Nigeria: Is there any Justification for the Distinction?" *Journal of Law, Policy and Globalization*, Vol.44 (2015): 115 – 119.

⁷⁰ M. Attah, *Family Welfare Law* 256. Also see *Anozia v Nnani* (2015) 8 NWLR (Pt. 1461) 241

determine the issue of paternity of a child, endemic corruption in Nigeria makes the reliability of the results doubtful. Besides, whether reliable or doubtful, DNA tests do not resolve the issue of legitimacy of children. They only resolve dispute as to who is the biological father or mother of the child. To the extent that they can be isolated, the challenges surrounding legitimacy and legitimation of children born out of wedlock in Nigeria are presented in the next part of this paper.

Challenges facing the legitimacy of children born out of wedlock

Issues surrounding legitimacy and legitimation of children born out of wedlock continue to pose serious moral and legal problems in Nigeria. The continued lack of clarity on the legal status of such children against the backdrop of section 42(2) of the 1999 Constitution has made the position of the law uncertain. It is without doubt that a calm reading of section 42(2) of the Constitution of Federal Republic of Nigeria, 1999⁷¹ (as altered) reveals that the Constitution does not expressly prohibit the envisaged disability or deprivation and discrimination of illegitimate persons born out of lawful wedlock. This has opened the floodgate for so many arguments. While some writers including Izzi and LongJohn argued that the Constitution has not abolished the status of illegitimacy⁷² others writers including Sagay have argued that the law in effect has impliedly prohibited the status of illegitimacy.⁷³ This argument is in itself a challenge to the eradication of the concept of illegitimacy as it demonstrates the fact that a segment of Nigerian society holds tenaciously to the view that children born out of wedlock should indeed be classified as illegitimate. It is evident that this debate will linger on for quite some time while uncertainty as to the status of persons born out of wedlock who wish to take advantage of the said section remains.

Another challenge evident from the conflict of law issues revolving around the legal status of persons born out of wedlock and particularly with respect to the current law on the subject is the inability of such persons to sue and enforce their fundamental right of freedom from any form of disability, deprivation and discrimination on the strength of section 42 (2) of the Constitution of Federal Republic of Nigeria, 1999 (as altered). There appears to be no clear judicial pronouncement from Nigerian courts on this aspect so that it is not clear if it is justiciable at all. In some way, this appears to be a subtle limitation on the law for it not to be expanded or broadened.

⁷¹ Ibid.

⁷² M. O. Izzi and C. D. LongJohn, "Concepts of Legitimacy and Legitimation".

⁷³ I. E Sagay, *Nigerian Law of Succession* 11

Again, in spite of the provisions of section 42(2) of the Constitution of Federal Republic of Nigeria, 1999 (as amended), there exist cultural and religious practices which continue to disable the constitutional provision in this regard and which continue to deprive and discriminate against persons including female children regardless of whether they were born within or out of wedlock. It is indisputable that in some parts of the states that make up Eastern Nigeria, persons alleged to be *Osu* (outcasts) are still being discriminated against in much the same way as persons regarded as illegitimate are. So too is the vexed issue of female children prohibited by customary practices from inheriting from their fathers. The fact that some of these customs have been declared by the courts to be repugnant to natural justice, equity and good conscience has not decimated their applicability in the areas where belief in them holds sway.⁷⁴

Again, as with many policies, there appears to be a palpable lack of awareness and enlightenment on the part of the public as to the rights inherent in the constitution and particularly under section 42(2) of the Constitution on the issue of the status of all children generally and particularly of those born out of wedlock. It is morally reprehensible and illegal to discriminate against a child who had no part or say in the manner he or she was brought into this world. While religious and moral piety are not wrong in themselves, the fault cannot also be ascribed to the man and woman who together brought the child into this world even if they consciously sought to do so. Society must necessarily share in the blame if anyone is to be blamed by refraining from stigmatizing such children.

Finally, and with particular respect to other aspects of disability especially of female children and widows envisaged under section 42(2) of the 1999 Constitution, the failure by Nigeria to domesticate the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in accordance with the provision of Section 12(1) of the 1999 Constitution is a veritable challenge which has not and will not add teeth to the efficacy of this all important constitutional provision whose import is to stamp out all forms of discrimination and put all Nigerian citizens on an equal stand

Suggestions and recommendations

Based on the foregoing analysis and the challenges or problems identified, the following suggestions and recommendations are humbly proffered:

⁷⁴ The *Osu* caste has long been banned and criminalized yet some persons born legitimately are still being ostracized in their societies and shunned contrary to the letter and spirit of section 42(2) of the 1999 Constitution and some other statutes which have expressly banned it.

- i. The text of section 42(2) of the Constitution of Federal Republic of Nigeria, 1999 (as altered) should be amended to expressly prohibit disability or deprivation and discrimination against persons born out of wedlock. As it stands presently, section 42(2) admits of lack of clarity on the legal status of persons born out of wedlock thus providing room for the debate as to whether illegitimacy is abolished or unconstitutional.
- ii. Secondly, we advocate the adoption in Nigeria of the position in the United States of America where all the states have enacted statutes which have outlawed illegitimacy. The world has advanced beyond the common law definition and perception of legitimacy. With the legalization of same sex relationships or civil partnerships as it is known in some other jurisdictions, the debate has moved from the notion of ensuring high moral standards by stamping out promiscuity and other aberrant sexual behavior to greater freedoms of all citizens. Illegitimacy and other limiting characteristic attached to some persons based on the circumstances of their birth will only keep us rooted in the past rather than freeing us to move expeditiously to the future.
- iii. Again, once brought into the world, each person ought to enjoy a constitutional guarantee of equality. Any derogation from this should amount to a breach of a fundamental human right actionable at the instance of the person whose right has been so infringed. Thus, it is recommended that persons whose fundamental right entrenched in section 42(2) of the Constitution of Federal Republic of Nigeria, 1999 (as altered) should have the standing to sue and enforce their fundamental right of freedom from any form of disability, deprivation and discrimination.
- iv. It is also recommended that existing cultural and religious practices which have hitherto disabled, deprived and discriminated against some persons perceived as illegitimate or on the basis of their sex should be completely eliminated as being barbaric, outdated and out of tune in contemporary society. Apart from the isolated judicial pronouncements declaring some of these practices as repugnant to natural justice, equity and good conscience, a concerted enlightenment campaign needs to be mounted to radically cause a shift by all from the negative perceptions regarding the status of persons born out of wedlock and other limiting characteristics.
- v. It is also recommended that the position of the law on legitimacy under English law is rather too strict in the circumstances of Nigerian society. The position under customary law (inclusive of Islamic customary law) which provides more

convenient and liberal methods of legitimation⁷⁵ is to be preferred. The attitude of customary law in this regard is more in tandem with the spirit and letters of section 42(2) of the Constitution which did not abolish the common law principle of legitimacy, but merely seeks to protect affected children against any form of disability or deprivation consequent upon their birth out of wedlock

- vi. Finally, as one of the state parties to the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), Nigeria needs to go a step further to domesticate and enact the provisions of the Convention into an Act in accordance with the provision of Section 12(1) of the 1999 Constitution. This will curb gender discrimination based on sex and thus add impetus to the efficacy of section 42(2) of the 1999 Constitution.

Conclusion

In conclusion, and given the weak nature of the constitutional provision against discrimination under section 42(2) of the 1999 Constitution (as altered) the debate on whether illegitimacy has been dealt a final death blow will most likely continue as the law on the subject has not taken the road yet to its decline. The conflict of law issues regarding legitimacy and the right to succession of such children will still rage on as the legal status of children born out of lawful wedlock remains in the balance or uncertain.

The methods available in law to legitimize children born out of wedlock are, to our minds, inadequate and fraught with challenges. Though modern science through the use of DNA tests can determine paternity of a person even after the alleged father has long passed on, the sheer cost of this test is itself a challenge coupled with the fact that test centers in the country are quite few. This leaves persons claiming child status from their alleged fathers without remedy especially where the alleged father has passed on. The incidences of families coming forward to accept children on behalf of their deceased brothers using whatever indices are few and far between.

In view of the challenges involved, it seems to us that amongst other actions, only an amendment of section 42(2) of the 1999 Constitution to give it more bite and equally giving persons affected the legal right to sue to enforce their right can stem the conflict of law issues, stigma, discrimination and disability suffered by persons born out wedlock.

⁷⁵ Under customary law, the strict legal requirement that acknowledgment of a child born out of wedlock can only be done while the putative father is alive does not always hold as families have been known to acknowledge children belonging to deceased family members even after their death. It is equally not unheard of for children born to a deceased family member by a widow who remained in the family after the demise of her husband to be equally accepted as a child of the family and accorded all rights including succession to the estate of the deceased husband cum "father" of the child.

Until the legislature carries out a wholesome operation on the said section, the law on illegitimacy will remain at the point where it is presently and the debate on whether section 42(2) of the 1999 Constitution of Federal Republic of Nigeria, 1999 (as amended) has abolished illegitimacy will equally rage on.

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