



A CRITICAL EVALUATION OF THE LEGITIMACY OF THE CHILD IN NIGERIA

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ABSTRACT

Children play very vital roles in any family and community. They are regarded as constituting a minority group whose interest is to be protected. Unfortunately, there are some structures within the society which make one child to have more privileges in the family and larger society over another child. In Nigeria, the status of the child is usually based on the circumstances of the birth of the child. The concept of legitimacy is a vital part of human existence. It is so important to the society such that it determines the status of the child. While a legitimate child is conferred with rights and privileges which include succession, on the other hand, any child that is determined to be illegitimate is denied of these rights. The discrimination continues except such child is legitimated either by subsequent marriage of the parents or by the acknowledgment of the paternity of such child by the father. The stigma never stops. The only way the Statute provides for legitimation of an illegitimate child is by subsequent marriage. This practice undermines the provisions of section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which explicitly prohibits the discrimination of any person based on the circumstance of his or her birth. However, there are various methods by which a child can be said to be legitimate outside of natural conception by the parents. This article examined the nature of legitimacy in Nigeria with a view to highlighting the problems and challenges of legitimacy of the child and proffer possible suggestions as to eradicating illegitimacy in our legal lexicon.; This article contributes to the call for a look into how the status of 'illegitimacy' can be totally wiped out both in the law and in the society. Thus, according children legitimacy, irrespective of how they are given birth to.

Keywords: Child, Marriage, Stigmatisation, Discrimination, Legitimacy, Legitimation.

INTRODUCTION

Children, especially in Africa are seen as a great asset to the family. They are referred to as a hope and future.¹ It is believed that a child will continue the lineage of the family. Therefore,

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bearing children is very important to every family in Nigeria. Even till this day, the Yoruba tribe refers to a woman who is unable bear a child of her own as ‘*agan*’ (meaning ‘barren’). She is treated with disdain and is usually an object of ridicule. Due to societal influence and cultural beliefs, naturally birthing a child means so much to the average African family. The significance of legitimate children cannot be overemphasised as the family sees them as those that will continue with their bloodline. Osondu² pointed out the importance of the question when it pertains to the paternity of a child because it affects them when it comes to the issue of succession and maintenance and further reiterating the provision of Common law which defines a legitimate child as ‘a child born or begotten in lawful wedlock’.³ He stated further that a child can be referred to as legitimate where there is a lawful marriage between their parents. He added that lawful marriage can be under customary law or Islamic law, and not just under the English law.⁴

The special focus on the legitimacy of a child in Nigeria arising in various types of marriages is motivated by the overriding rights of children and their best interest in our society. First, they are human beings and their fundamental right should not be traded for any reason. Secondly, it is often said that the healthy development of children is crucial to the future well-being of any society. The issue of the prevalence of stigmatization of children supposedly born out of wedlock after some form of paternity dispute has also increased the concern of stakeholders on the subject matter.

The concept of legitimacy of a child is very important when considering the status of the child as it affects the rights and interest of such child. The interest of the stigmatised child is usually downplayed, and this is why even Assisted Reproductive Technology (ART) as a way of producing legitimate children is not appreciated by the society as it is in developed western countries because the public opinion is so weighty that we tend to hinge the public opinion as a benchmark on what is acceptable in the society. It is argued that the societal attitude of looking down on children classified as illegitimate outweighs the relief such a child ought to bring to the parents. So much weight should not be attached to public opinion solely. This is due to the fact that it cannot be totally relied on, its. Hobart referred to public opinion as an ‘unruly horse’ that should not be relied on.⁵

¹ T.U Onyemachi ‘Children, Status, and the Law in Nigeria’ [2012] (4)(3a) *African Journal Online*<https://www.ajol.info/index.php/afrrrev/article/view/60201> accessed in June 2023.

² A.C. Osondu, *Modern Nigerian Family Law & Practice* (Printable Publishing Company 2012) 5.

³ s 38 (1) of the English Matrimonial Causes Act of 1970.

⁴ Osondu (n2).

⁵ C.J. Hobart in *Enderby Town v. Football Association* [1971] CH. 591.



The term ‘legitimacy’ which is derived from the word ‘legitimate’ can be defined as the status of an individual person who is born within a lawful marriage.⁶ In Nigeria, the concept of Legitimacy of a child is regulated on by two major systems of law. The received Common Law of England which is applicable in Nigeria as well as various cultural practices amongst ethnic groups which are so called Customary laws.⁷

Legitimacy can be said to be a status gotten by a person who is born in a lawful wedlock.⁸ A child can be termed legitimate in a situation where such a child is born in a lawful wedlock. The case of *Shaw v. Gould*⁹ shows that Legitimacy under the Common Law states that a child can be said to be born legitimate if both parents were married at the time of his birth. Furthermore, the term ‘lawful wedlock’ is not restricted only to marriage under the Marriage Act but also to customary law marriage which includes the moslem marriage, and are recognised to be legal.¹⁰ From the definitions given above, it is obvious that legitimacy of a child is solely tied to marriage between the father and mother of the child. Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that ‘No citizen of Nigeria should be subjected to any disability or deprivation merely by reason of the circumstances of his birth.’¹¹ This provision has been able to clearly establish that the term ‘illegitimate’ is frowned at. There are instances where children are given birth to outside the conventional case of the man and woman coming together to give birth to a child. This study highlights some different ways by which a child can be given birth to outside the conventional way which involves the husband and wife.

NATURE OF LEGITIMACY.

Marriage is sacred and upheld by laws, cultures, customs, religions and social standards. It is satisfactory for every man to know his offspring without any form of doubt as it gives a huge amount of satisfaction. However, it is easier for the women to know how many offspring she has than for the man.

Marriage includes marriage under the Act (Statutory marriage), under the customary law as well as under the Moslem/ Islamic law. The concept of legitimacy was initially recognised under Christian marriage in Nigeria and was only restricted to those that

⁶ B.A Garner, Black’s Law Dictionary, (Thompson Reuters, 2014).

⁷ A.G Karibi-Whyte ‘Selected Essays on Legitimacy Succession and Will’ (1st edn Nigerian Library Cataloguing in Publication Data 2010).

⁸ E.I Nwogugu, *Family Law in Nigeria* (3rdedn, HEBN Publishers Plc 2014) 307.

⁹ (1866) ILR, 247.

¹⁰ Obilade, *Nigerian Legal System*, (1979), 83.

¹¹ Sec 42(2) Constitution of the Federal Republic of Nigeria 1999 (as amended).

contracted the Christian marriage. Thus, Griffith J in *Cole v. Cole*¹² stated that: ‘a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to Native Law.’ This is to say that the issue of the marital status of a couple was hinged on whether the marriage was a Christian marriage. However, it is beyond that now. The definition of what a lawful marriage in Nigeria is broader than just marriage contracted under the Christian marriage. It also includes customary marriages. It was held in *Lawal v. Younan*¹³ that a child is legitimate if he/she is born in lawful wedlock. It was further stated that lawful marriage was not only restricted to only marriage under the Act but also under the customary law as well as Islamic law.¹⁴

Under the Islamic law, marriage is the ground upon which family relationship is built, where a child is born outside wedlock, the child would be referred to as illegitimate. The Sharia legal system does not recognize the man who had an affair outside wedlock with the child’s mother as the father. However, if the illicit relation is established, the issue will shift to the confines of Islamic Law and the procedure for imposition of the appropriate sanctions.¹⁵ Karibi-Whyte on the issue of presumption of legitimacy, stated that when it comes to the issue of legitimacy, the law leans in support of it, he stated further that where there is a birth of a child in a lawful marriage, such child is automatically presumed to be legitimate.¹⁶ Legitimacy of a child in Nigeria is so vital such that it is based on the validity of the marriage of the parent either at the conception of the child or at birth.¹⁷

Legitimacy of a child in Nigeria plays a key role in determining the status of the child. It is very important because it ascertains whether the child forms the integral part of the family and if such a child is entitled to benefit from the estate of his father or not.¹⁸ The legitimacy of the child determines the right to maintain the property of the father, custody rights, as well as a share in the extended family or community land. It is against this backdrop that the mother of the child will do all within her powers to ensure that the child, when born out of wedlock is accepted by the father and such acceptance transmitted to the larger family. This will help to remove the stigmatization associated with it.

¹² (1898) NLR 15.

¹³ (1961) WNLR 197.

¹⁴ See *Lawal v. Younan* (1961) WNLR 197.

¹⁵ *Ustaz v. Abdullahi* (2015) LPELR-40740(CA).

¹⁶ A.G. Karibi- Whyte. ‘Legitimacy, Succession & Wills’ (Nigerian Library Cataloguing in Publication Data 2010) 180.

¹⁷ A.C Osondu, ‘*Modern Nigerian Family Law and Practice*’ (Printable Publishing Company, 202)8.

¹⁸ M.O. Izzi and C.D. LongJohn ‘An Analysis of the Concept of Legitimacy and Legitimation Under Nigerian Family Law’ [2017] (5)(1) *The Journal of Property Law and Contemporary issues* < https://www.researchgate.net/publication/332291041_AN_ANALYSIS_OF_THE_CONCEPTS_OF_LEGITIMACY_AND_LEGITIMATION_UNDER_NIGERIAN_FAMILY_LAW> accessed in January 2023.



There is usually a lot of stigmas attached to any child that is referred to as an illegitimate, or cannot be traced to a father, particularly in Nigeria even when the Nigerian Constitution prohibits it¹⁹ The legitimacy status can be said to have done more harm than good, because it only becomes an advantage for a child that is recognised as legitimate. Once it is discovered that the child is illegitimate, the life of the child automatically changes and the unfortunate thing is that the stigma never really goes away especially in Nigeria where bloodline is a determinant, even where the parent have done the needful by making the child legitimate, especially when the legitimation is merely by acknowledgment under the customary law. Nwogugu explains the fact that legitimation is only necessary, where there is an issue of illegitimacy, a legitimate child does not need to be legitimated,²⁰ He pointed out that it is only the natural father of an illegitimate child that has the exclusive right of legitimation by acknowledgment.²¹ He further argued that acknowledgment cannot be done on behalf of the father by anyone including relatives or family member. He also states that a child that is legitimated is entitled to succeed to his late father's property upon death of the father intestate, subject to the relevant laws on administration of estates. That is to say that rights and entitlement come after acknowledgment of the child. He concluded by stating that a child can participate in the distribution of the natural father's estate as provided for under section 42(2) of the Constitution.²² In the instance where a child is born and the father of a child has his own structured family with children, there is always a challenge of adjusting such 'illegitimate' child to the circle of the family. The child, more often than not, is treated differently, and the 'outcast' stigma attached never really goes away.

LEGITIMACY OF CHILDREN UNDER CUSTOMARY LAW IN NIGERIA

It is generally presumed under customary law, a child that is born in a subsisting marriage is legitimate. This presumption is not only applicable where the parents are living together alone but also in the instance where they are living apart whilst there is still a valid marriage. This presumption also exists in a circumstance where the marriage has already been dissolved. For example, under the Igbirra customary law, it is presumed that where a child is born within ten months of divorce, the child belongs to the husband.²³ It was held that the presumption is irrebuttable even where it was proven that the ex-husband was not the father

¹⁹ See Section 42(2), Constitution of the Federal Republic of Nigeria 1999 (as amended).

²⁰ Nwogugu (n8).

²¹ *ibid*, 314.

²² *ibid*, 319.

²³ *Mariyama v. Sadiku Ejo* (1961) NRNLR 81.



of the child. The Court also held while approving the validity of the customary law, that the principle should be rebuttable if natural justice is to be done. In some parts of the Igbo tribe (Eastern part of Nigeria), a father may persuade any one of his female daughters to stay behind and give birth to children that will be heirs in his house in situations where there are no male children in the house. These children given birth to will be referred to as the legitimate children at birth of the father to the woman that stays behind. Some parts of the Yoruba tribe specifically the Akoko, the Oka people of Ondo State (southern Nigeria) also practice this. It is worthy of note that under customary law, the child of a void or voidable marriage is regarded as illegitimate.²⁴ It is also important to note that, where a child is referred to as illegitimate under the Igbo customary law, mere acknowledgement of the child by the father does not confer legitimate status on the child, unlike under other tribes such as the Yoruba, or Igbirra. In the case of *Olulode v. Oviosu*²⁵, the learned judge confirmed the principle applied in *Bamgbose v. Daniel*²⁶ that there is no issue of illegitimacy in Yoruba land once the father accepted the paternity of the child.

Under Islamic law, any child between unmarried parents is regarded as a ‘bastard.’ The law on legitimacy is based on a maxim, ‘*al walad lil firash*’, meaning (The son belongs to the married bed).²⁷ In other words, a child is said to be legitimate when conceived in holy wedlock. Islamic law baseS legitimacy of a child solely on marriage, mere acknowledgment of the child does not bestow legitimate status on the child as legitimization is completely outlawed, and so the child is not entitled to inherit from his father.²⁸ Various customs and traditions always find a way to trace a father to any child that is given birth to; that is by marriage or by acknowledgment of the father such that where the father figure is not known the child will not be regarded as a legitimate child. It is to this end that some instances where children are born outside of the conventionally recognised ones which involves marriage or acknowledgment and is regarded as legitimate will be discussed.

TYPES OF LEGITIMACY

This part of the article seeks to examine some other methods through which a child can be said to be born legitimately irrespective of the fact that the child is born outside of the conventional method.

²⁴ Nwogugu E.I, Family Law in Nigeria (3rd edn, HEBN Publishers Plc 2014) 306.

²⁵ Unreported High Court of Lagos State, Ikeja Division 27/11/1981. Suit No M/133/81.

²⁶ (1946)18 NLR @88.

²⁷ A. Hussain. ‘The Islamic Law of Succession’ (Riyadh, Darussalam Global Leader in Islamic Books 2005).

²⁸ *Rabiu v. Amadu* (2003) 5NWLR (Pt 813)343 at 350.



Children born by women

There are certain circumstances where a child can be said to be borne by women, some of which include; children born by unmarried women, children born by widows, children born from a woman-to-woman marriage, among others. These three will be briefly discussed.

1. Children born out of wedlock: In recent times there have been women who are unmarried by choice and thereby decide to create a family, independent of any man being part of the family. It is often common among women who are generally referred to as powerful and ambitious women. Although the law is silent on this aspect, it however does not render the child illegitimate.²⁹ The unmarried woman usually gets pregnant for men with whom they share the understanding that the father of the child would not be a part of the life of the child.

Another way in which an unmarried woman can be said to give birth to a legitimate child is where a daughter is made to stay behind in her father's house without marrying and bear children in order to keep the name of her father, especially where she bears a male child for his father's lineage. The child given birth to by the daughter becomes a legitimate child of her father and is recognised in the community as such. This action is very common within some parts of the Igbo tribe³⁰ such as in Anambra (eastern part of Nigeria). Also, in another instance, it is customary that a child remains a legitimate child of his or her mother until the dowry of the mother is paid by the father of the child. We can say that the children given birth to in the forms discussed above can be referred to as legitimate.

2. Children born by widows: Under some customs and traditions in Nigeria, where the wife dies, the marriage is automatically terminated. However, in the instance where the husband dies, the marriage does not necessarily have to be terminated. The woman may choose to stay in her husband's family or may choose to go back to her father's house.³¹ Where the widow chooses to stay in her husband's house, she may be 'inherited' by the brother or a relative of the late husband and the child that is birthed by the relative automatically becomes the legitimate child of the late husband.

²⁹ See Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁰ P.O. Azuakor. 'The Women's Place in Family Inheritance in Igboland: A Rational and Legal Critique'[2021](1)(1)NJSC;75 <chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/file:///C:/Users/Downloads/10.Vol.1+paper+10+The+Women%E2%80%99s+Place+in+Family+Inheritance+in+Igboland+by+Azuakor+Paul+Okwukwu+PhD.pdf> accessed in August 2023.

³¹ K.S. Ebeku. 'The Legal Status of Nigerian Children Born by a Widow: Chinweze v. <https://www.semanticscholar.org/paper/The-Legal-Status-of-Nigerian-Children-Born-by-A-v.-Ebeku/3a3b9f1baa5d2087752b156453faa014f9e4fb66>> accessed in April 2023.

This is common in some Yoruba cultures. Although in the case of *Chinweze v. Masi*³² the Supreme Court condemned this custom as contrary to the course of nature for a dead man to procreate children.

3. Woman-to-woman marriage: It is customarily acceptable that a barren woman can marry another woman for herself, in order to bear children on her behalf for her husband. Such a child becomes a legitimate child of the barren woman and her husband. It is worthy of note that the child is only legitimate if the husband to the woman that marries the new wife for her husband is the biological father. This act is much in existence. It is very common among the very wealthy and influential women in that society.³³ The marriage is basically for procreation. It is worthy of note that not all customs embrace this method of procreation, it is however recognised among the Igbo tribe (eastern part of Nigeria) as well as the Kalabari tribe (an Ijaw sub-group in the Niger Delta of Nigeria).³⁴ The law sees it as repugnant to natural justice and good conscience as in *Nwodo & Anor v. Nwodo*³⁵ where the 1st appellant's mother was married to another woman, in order to procreate for a deceased man that has died fifteen years ago. In order to continue the family lineage of the late husband, a practice which is highly recognised under the Awka custom (of the Igbo tribe), the Court held that the said custom of woman-to-woman marriage is obnoxious, offensive, repugnant and an abominable traditional practice which should be confined to the past. When considering children born by women under this circumstance in Nigeria, the legitimacy of the child is still attached to the so-called husband of the woman that marries the woman. The biological mother has no place in that family structure and is not protected. It also does not protect the sanctity of marriage, the woman in this marriage may be treated as a surrogate with no rights nor privileges. She is not treated as a member of the family and cannot lay claim to the child in question. The child in question is a legitimate child of the husband, whilst the biological mother is left in the background because in Africa, the child generally belongs to the father. The child still has to be attached to a male figure which is the father of the child or say the husband of the woman that pays the bride price of the new wife.

³² (1989) 1 NWLR 97 @ 254.

³³ *Meribe v. Egbu* (1976) NSCC 181.

³⁴ E. Uchendu. 'Woman -to -Woman Marriage In Igboland <
https://www.academia.edu/25514704/Woman_Woman_Marriage_in_Igboland> accessed in July 2023.

³⁵ (2018)LPELR-43948(CA).



Unfortunately, in recent times, children born by women, especially unmarried women by choice are fast rising in Nigeria. Although, it can be said that there are some psychological implications that results from raising a child without the father's involvement, there might also be stigmas attached especially in a patrilineal society, it however does not negate the legitimacy of the child in Nigeria.³⁶

Children born from Surrogate Agreement

Due to the rate of infertility in the world, a lot of attention has been drawn to Assisted Reproductive Technology (ART) to which surrogacy is a method and is being embraced all over the world, Nigeria inclusive. It became widely embraced due to the widespread pressure from family members and the society at large. Surrogate arrangement has become so recognised that many countries have enacted legislation to regulate surrogacy. Unfortunately, In Nigeria, there is no law that expressly prohibits surrogacy in Nigeria. It is, however, not legally acknowledged.³⁷

There are two types of surrogacy agreements which are the Traditional or Partial surrogacy and the Gestational or Full surrogacy. Gestational surrogacy most times does not usually pose challenges as it is an established fact that both the egg and the sperm used to form the embryo of the child belong to the commissioning parents of the child. There are various laws in place that guides surrogacy agreement and are binding on them in developed countries, which is not so in Nigeria, as the only law that can be used to enforce agreement made with regards to surrogacy is the private individual contract agreement between the parties involved that may have been made prior to the procedure.

Generally speaking, the child from a surrogate agreement can be said to be legitimate. However, the legitimacy may be disputed in the circumstance of traditional surrogacy, especially where the surrogate mother wants to lay legal claim to the child. This is because there are no regulatory laws in place to tackle disputes that may arise between the surrogate mother and the commissioning mother and there is no legally recognized contractual backing

³⁶ See section 42(2). Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁷ M.Izzi and J.P. Edeki-Etibuhro. 'An Appraisal of Challenges Affecting the Practice of Surrogacy in Nigeria' [2023](17)(1) Journal of Jurisprudence, International Law and Contemporary Legal Issues; 168 < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.rsujilclijournal.com/wp-content/uploads/2023/04/A14-Izzi-Mabel-AN-APPRAISAL-OF-CHALLENGES-AFFECTING.pdf> accessed in August 2023.

except the private contracts between the parties where the rights and duties in a contractual agreement are explicitly defined.³⁸

It is worthy of note that the Nigerian Law Reform Commission³⁹ recommends that where a child is born under surrogacy arrangement, the commissioning parents need to adopt such child formally in order to lay a legal claim on the child. Surrogacy has made a noticeable progress in the level of acceptance in the society especially in enlightened people in the country. However due to the various cultures and Nigeria, it is quite difficult to accept the child of a surrogate agreement as legitimate. It has not been able to erase the undue societal stigmatisation that might be attached to the child. The Surrogate mothers especially in traditional surrogacy sometimes find it difficult to detach from the bond that is shared between her and the baby, and hence often find it difficult to give up her maternal status and maternal rights over the child she carried in her womb for several months just like the bible rightly questions, ‘can a mother forget her nursing child? Can she feel no love for the child she has borne?’⁴⁰ The tussle between the commissioning parent and the surrogate mother can by extension have a negative implication on the child, as the society might question the legitimacy of the child to the intended parents. One of the rights a child is to enjoy includes the rights to non-discrimination as provided under the constitution.⁴¹ The only way to remedy this is for the Nigerian government to ensure that there are laws to regulate the peculiarities associated with the acceptance of the children born from a surrogate agreement.⁴² It should however be noted that, a child, born to the parents via surrogacy arrangement cannot be said to be illegitimate.

Children from Sperm Donors

Sperm donation is a form of Assisted Reproductive Technology known as artificial insemination. It is usually common where the husband of a woman has a medical condition causing the inability to fertilize eggs, or in a situation where a single mother decides to want children hereby resorting to sperm donors.

³⁸ O.S. Adelakun, ‘The Concept of Surrogacy in Nigeria: Issues, Prospects and Challenges [2018](18) *African Human Rights Law Journal* 620.

³⁹ Law Reform Commission ‘Reform of Nigerian Family Law’ III 15.

⁴⁰ The Holy Bible, the Book of Isaiah, Chapter 49:15, (New Living Translation).

⁴¹ n (36) ... See O.O. Oluwaseyi and O. Oladimeji. ‘Surrogacy agreements and Rights of Children in Nigeria and South Africa’. [2021](42)(1) *Obiter* < http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532021000100002> accessed in August 2023.

⁴² E.M. Akpambang, M. Amujo-Akomolafe ‘Legal Position on Surrogacy Arrangements in Nigeria and Some Selected Jurisdictions’ [2020] (7)(3) *IJRHS* (31) < [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.ijrhs.org/papers/v7-i3/3.pdf](http://www.ijrhs.org/papers/v7-i3/3.pdf)> accessed in July 2023.



Nigeria is silent on the issues that concern artificial insemination. The only way to handle the issue of legitimacy is to come by way of the presumption of legitimacy under the Evidence Act⁴³ in order to prove the legitimacy of the child by showing that the couple were legally married and there was consent with regards to the procedure. Sperm donation in Nigeria, by an unknown donor is not really advisable in Nigeria as there are no laws that regulate or govern it. Anonymity in sperm donation for artificial insemination is a very common practice in Nigeria. Experts have warned that where the government fails to regulate clinics involved with sperm donation, it might, in the nearest future, lead to incest⁴⁴. Children from sperm donations do not automatically enjoy legitimacy except the parent goes through the process of adoption. Determination of the legitimacy of a child can sometimes be a challenge where the sperm donors want to lay claim to the child. This is why it is very important for there to be a contractual agreement between the parties involved. Furthermore, the conservativeness of the Nigerian society to paternity of a child may cause attaching the legitimacy status of the child on the sperm donor, and thereby illegitimate status on the child with the intended parent. In order to legally recognise the child as legitimate, it is expedient to adopt the child, thereby making the child legitimate.

EFFECT OF SECTION 42(2) OF THE 1999 CONSTITUTION (AS AMENDED) ON ILLEGITIMACY

Section 42(2) of the 1999 Constitution provides that ‘No citizen shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.’ From this provision, a person which includes a child, is not subjected to any form of disability or deprivation merely because of the circumstance of his birth. The forms of discrimination that a child experiences merely because of his ‘illegitimate’ status are so numerous that they cannot be exhausted. The legal effect of section 42(2) of the Constitution on the status of illegitimacy in Nigeria has brought about two schools of thought. One is of the view that Section 42(2) abolished the status of illegitimacy. It is argued that the Constitution has been able to abolish the status of illegitimacy In *Olulode v. Oviolu*,⁴⁵ the court held the view that the predecessor of section 42(2) of the constitution abolished the status of illegitimacy in Nigeria. It is seen as a link to the total putting off of the concept of illegitimacy. Superior

⁴³ Evidence Act 2011, s 165 .

⁴⁴ The Guardian Newspaper ‘Sperm Donor’s Nightmare:’ Have I Fathered 500 Children Already?’ (7 January 2017)< <https://guardian.ng/saturday-magazine/cover/sperm-donors-nightmare-have-i-fathered-500-children-already/>> accessed in July 2023.

⁴⁵ Suit No. M/133/81(unreported), High Court of Lagos State, Ikeja, November 27, 1981.; E.I Nwogugu, *Family Law in Nigeria* (3rdedn, HEBN Publishers Plc 2014) 309.



courts are advised to accept this section for cases that concern the issue of illegitimacy and discrimination for a better justice for children regarded as illegitimate children.

Another view is that Section 42(2) has not been able to abolish the status of illegitimacy. This is because there has been no clear term where it is stated clearly in the provision to show that the constituent assembly intended to do away with the status.⁴⁶ It may suffice to say that section 42(2) has been able to deal with the right of freedom from discrimination. While Izzi and LongJohn argued that the provision of the constitution has not abolished the status of illegitimacy⁴⁷, some other writers including Sagay argued that that the law has been able to effectively abolish the status of illegitimacy⁴⁸ It is argued that one of the leading factors affecting the complete elimination of all forms of discriminatory practices in Nigeria is public policy. Many of these practices were merely declared under the law as repugnant to natural justice, equity and good conscience but never criminalized⁴⁹ to serve as a deterrent against further occurrence. Furthermore, Section 42(2) of the constitution, although has been able to point out its view on discrimination showing the way forward, it is important to note that we cannot deny the fact that the court acknowledges the provision of the constitution in its judgment. For example in the case of *Mojekwu v. Ejikeme*,⁵⁰ 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 regards the required portion of his family land. Also, in *Salubi v. Nwariaku*⁵¹, it was held that the children born out of wedlock by the owner of property in dispute were entitled to share in the estate of their father with the other children of the marriage in equal shares. However, this in my opinion does not mean that the constitution has totally abolished the status of illegitimacy. It merely reduced it. We can, however, not deny the fact that it is still in existence.

There are several Conventions such as African Charter on Human and People's Rights, African Charter on the Rights and Welfare of the Child, and many others to which

⁴⁶ Suit No M/150/80 (unreported), Lagos State High Court, 22 May 1980.; Ibid 309.

⁴⁷ M.O. Izzi and C.D. LongJohn 'An Analysis of the Concept of Legitimacy and Legitimation Under Nigerian Family Law' [2017] (5)(1)*The Journal of Property Law and Contemporary issues* <https://www.researchgate.net/publication/332291041_AN_ANALYSIS_OF_THE_CONCEPTS_OF_LEGITIMACY_AND_LEGITIMATION_UNDER_NIGERIAN_FAMILY_LAW> accessed in January 2023.

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

⁴⁹ A. Atensua. 'Custom and Customary Law; Nigerian Courts and Promise for Women's Right' in L. Chandler 'Contemporary Issues in the Administration of Justice. Essays in Honour of Justice Atinuke Ige (Rehoboth Publishers, 2001) 344.

⁵⁰ (2005) NWLR (Pt.657)413.

⁵¹ (2003) 7 NWLR (Pt. 819) 426 at 456.



Nigeria is a signatory, many of these laws prohibit discrimination, however it cannot be enforced due to the fact that the conventions are not domesticated into our municipal laws to aid its enforceability. This can be seen as a serious setback. It is to this end pointed out that all customary law practices that are discriminatory and contrary to the provision of Section 42(2) of the constitution, ought to be held as unconstitutional and by implication void.

CONCLUSION AND RECOMMENDATIONS

From the foregoing, it is evident that the world is evolving, and there are changes even when it concerns definition of family patterns. Many women either by choice or by series of heartbreaks decide to have a family wherein they have children without any male figure. This new trend obviously might have a terrible impact on the traditional definition of marriage,⁵² but the child should not be the one to bear the consequence. As much as there should be respect for various cultures and traditions, there should be laws that stand out with well spelt out provisions against discrimination based on the circumstance of the birth of the children. As much as the cultures, religions and customs of people are respected, there should be a level of enlightenment that will be given to the general public about the various laws which must be adhered to.

The Constitution has been able to make its stand known that it frowns against any form of discrimination, the main issue that affects the status of children born by women, children born from surrogate agreement, sperm donors are simply public policy. Many societies stuck in their customs and traditions refuse to regard some children as legitimate despite the provisions of the Constitution making them legitimate. It is worthy of note that authors have identified gaps in the national laws that prohibit the discrimination of the Nigerian child merely by reason of the circumstance of the birth of such child, and in order for this to be achieved, there has to be measures put in place to make the child is accepted by the society as all children are legitimate irrespective of the circumstance of their birth, which could be through a surrogate mother, sperm donor, or by natural fathers who are not lawfully married to the mother of the child and so on.

It is recommended that there should be subsidiary laws that enforce the protection of the interest of children irrespective of how they are given birth to, and these laws should supersede the various customs and traditions, as these customs and tradition, most times, have a high influence on public policies. Furthermore, there are no laws that regulate surrogacy, or

⁵² See *Hyde v. Hyde & Woodmansee* (1886) LR 1 PD 130.



sperm donation. For instance, and there is a saying that ‘when there is no law, abuse of a thing is inevitable’. Therefore, laws should be created to guide these methods of Assisted Reproductive Technologies so as to guarantee its acceptance and those that are repugnant to natural justice equity and good conscience (woman-to-woman marriage for example) should be abolished in its entirety.

Conclusively, the judiciary should embrace Section 42(2) of the Nigerian Constitution as a platform for cases that concern the issue of illegitimacy and discrimination of children born outside of wedlock. The Customary Courts in Nigeria should embrace this section of the Constitution in their judgment or more importantly copy the equitable rules of our statutory laws introduced by the legitimacy Act that makes children that are born out of wedlock to be legitimate.