

**LEGITIMACY OF CHILDREN IN NIGERIA: AN APPRAISAL OF THE  
IMPACT OF SECTION 42(2) OF THE 1999 CONSTITUTION**

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**FEBRUARY,2025.**

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**BEING A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY  
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DEGREE OF BACHELOR OF LAWS (LL. B) OF THE UNIVERSITY OF  
BENIN, BENIN CITY.**

**FEBRUARY 2025.**

**CERTIFICATION**

I, **Amina Omome MUKAILA**, with Matriculation Number **LAW1906211** do hereby certify that, apart from the references made to other person's works, which have been duly credited, this entire project work is the product of my personal research and that this project has neither in whole nor in part been presented elsewhere for any other degree.

---

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## **APPROVAL**

We certify that this project was written and completed by **Amina Omome MUKAILA**, with Matriculation Number **LAW1906211**, in partial fulfilment of the requirements for the award of the degree of Bachelor of Laws (LL. B)

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AND DATE**

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## **DEDICATION**

I dedicate this long essay to my sister, Hafsat Mukaila for being a spark of inspiration.

## **ACKNOWLEDGEMENT**

As I reflect on my LLB journey and the completion of this project, I am filled with immense gratitude, a sense of fulfillment, and appreciation for the amazing individuals who have supported me every step of the way. This journey is truly a remarkable testament to the power of resilience, hard work, and the unfettered support of loved ones.

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## **ABSTRACT**

This project examines the legitimacy of children under Nigerian law with a specific focus on section 42(2) of the 1999 Constitution. section 42(2) seeks to prevent discrimination based on the birth status of individuals, including children born out of wedlock. despite this constitutional safeguard, the provision remains inadequate in effectively protecting the rights of such children, particularly in matters related to inheritance. this project critically analyzes how the existing constitutional framework fails to fully address the pervasive societal and legal biases against children born outside of marriage through a detailed appraisal of section 42(2) alongside relevant legal precedents, this work explores the ongoing challenges faced by out-of-wedlock children in securing equal inheritance rights the study ultimately argues for the need to strengthen legal protections and amend the constitutional provisions to ensure true equality and non-discrimination for all children, irrespective of their birth status.

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background to the Study

Prior to the coming into force of section 39(2) of the Constitution of the Federal Republic of Nigeria 1979,<sup>1</sup> there have been divergent and conflicting views on the decency and propriety of acknowledging children born outside wedlock so as to give them equal opportunity and right in the sharing and distribution of the estate of the deceased.<sup>2</sup> Some Court decisions expressed the view that acknowledgment of the paternity of children born outside wedlock is against public policy as it reinforces promiscuity. However, the other and better view which tilts toward the intendment of section 42(2) of the Constitution suggest that an innocent child should not be denied rights that ordinarily would have accrued to him if not for the actions of the parents.<sup>3</sup> Chianu, aligns well with this better view and stated that; “in recent times, judges have come to realize that there is no legal or moral justification to visit the sins of parents on innocent children”.<sup>4</sup> The ethical consideration of not punishing the innocent weighs against the objection based on presumed societal drive to ensure that sexual immorality is stemmed. In similar vein, Nwogugu, stated that the attitudes to illegitimacy should change, such that children do not have to pay for the mistakes made by their parents.<sup>5</sup> There is no foundation for the view that recognition of the claims of illegitimate children encourages immorality or indecency, the law should incline to provide for the support of all children, placing them all on an equal footing.

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<sup>1</sup> Now Section 42(2) CFRN 1999.

<sup>2</sup> A.C Collins, “Broadening the Interpretation of Section 42(2) of the 1999 Constitution Vis-a-Vis the Right to Succession under Nigerian Customary Laws”, *International Journal of Law*, (2021) Vol7, Issue , 160-166.

<sup>3</sup> Ibid.

<sup>4</sup> Emeka Chianu, *Law of Succession*, (New System Press Ltd 2019) 244.

<sup>5</sup> Ibid.

Nwogugu, also expressed his view on the decision of the Court in *Cole v Akinyele*<sup>6</sup> that to deny the 1<sup>st</sup> appellant the status of legitimacy on ground of public policy opined that public policy will not be outraged if the child born during the subsistence of the statutory marriage is legitimated by acknowledgment or the subsequent marriage of the parents under customary law.<sup>7</sup> Apart from the decision held in *Cole v Akinyele*,<sup>8</sup> there are also a plethora of cases where the Court upheld the legitimate status of the party and in some other cases where it denied parties the status of legitimacy. In *Re Adadevoh*,<sup>9</sup> the Court refused to grant the children of the concubines the status of legitimacy on the ground that it will offend public policy even when it was proved that the paternity of the children was acknowledged. In *Alake v Pratt*,<sup>10</sup> the trial Court considered it contrary to public policy for the out of wedlock children to inherit as they could not be placed on the same footing as in-wedlock children. The refusal of Courts to accord the status of legitimacy on certain illegitimate persons in spite of satisfactory evidence clarifying the paternity of such persons tend to be discriminatory. However, this sort of discrimination led to the enactment of section 42(2) of the 1999 Constitution.

Collins opines that: the provision of the Constitution has mitigated and stood up for illegitimate persons who had gone through untold hardship as a result of the sins of their parents. The unique effect of section 42(2) of the Constitution is that although there can be a descriptive distinction between children who are products of a lawful wedlock and children born out of wedlock, there is no legal distinction between the two classes of children based on the fact that section 42(2) of the Constitution specifically precludes discrimination on the frail basis that a person was born out of

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<sup>6</sup> (1960) 5 FSC 84.

<sup>7</sup> Nwogugu E.I, "Legitimacy in Nigerian Law" *Journal of African Law* (1964) 8(2).

<sup>8</sup> Ibid .

<sup>9</sup> (1951) 13 WACA 304, 310.

<sup>10</sup> (1955) 15 WACA 20.

wedlock<sup>11</sup>. Apart from illegitimate persons, daughters of a man who died intestate have benefited from the provision of section 42(2). In the landmark case of *Ukeje v Ukeje*,<sup>12</sup> the decision was in relation to proof of paternity of a daughter. On the 27<sup>th</sup> day of December 1981, Lazarus Ogbonnaya Ukeje a native of Umuahia in Imo state died intestate. He had real property in Lagos State and for most of his life was resident in Lagos State. The 1<sup>st</sup> appellant (the widow/ wife) got married to the deceased on the 13<sup>th</sup> of December 1956. There are four children of the marriage, the respondent is one of the four. She was born in 1952, her birth certificate dated a month after her birth; her parents did not marry until 1956. Upon the intestate death of the propositus, Lazarus Ogbonnaga Ukeje, his widow and first son obtained letters of administration to administer his estate. Dissatisfied with the administration of the estate, the claimant sued the 1<sup>st</sup> and 2<sup>nd</sup> appellants (mother and son) for a declaration that she was the propositus's daughter, that the letters of administration be revoked, an account of all monies and properties in their possession and a fresh letters of administration should be granted to her and the 2<sup>nd</sup> appellant. The entire argument turned on whether she was Lazarus Ogbonnaga Ukeje's daughter. The High Court, Court of Appeal and Supreme Court held that on account of the birth certificate she tendered it was clearly stated that LOU was her father. The SC held that by virtue of section 42(2), any customary law which tends to suggest that a female child cannot inherit her father's property is unconstitutional, null and void.

In *Okafor v Isitorh & Anor*,<sup>13</sup> the Court of Appeal held that any custom or arrangements that enables inheritance of the estate of a deceased by his male children to the exclusion of the female children or that entitles such male children to eject the female children from their family home contravenes section 42 of the Constitution. In

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<sup>11</sup> Collins,(note 4)

<sup>12</sup> (2014) 11 NWLR (pt 1418) 384.

<sup>13</sup> (2015) LPELR- 25892 (CA).

the case of *Timothy v Oforka*,<sup>14</sup> the Court of Appeal held that the Oraifite custom which forbade women from dealing in properties was unconstitutional. In *Asika v Atuanya*,<sup>15</sup> the Court held that the appellants who were female children were entitled to have a share in the property in dispute.

It is commendable how the Nigerian Courts judiciously use the provision of section 42(2) to fetter the disadvantages and enhance the inheritance right of illegitimate persons. However, the interpretation from judicial authorities as well as the one discussed above is that there is a condition precedent to the protection provided by section 42(2), thus restricting the interpretation of the provision. For instance, in cases where a child is not acknowledged by their putative father, or where paternity is uncertain due to a void statutory marriage or a customary marriage that was not entered into alongside a valid statutory marriage. A shortcoming in the position of those who seek to use section 42 to alleviate the disadvantaged situation of out of wedlock children is that a child cannot hoist himself on a man as his father. A person can be legitimate (a) if his parents are lawfully married, or (b) his paternity is acknowledged.<sup>16</sup> If a person is unable to prove any of these how can section 42 elevate him to the status of a legitimate child so that he can inherit from his unproved father? Where a man fails to assert paternity over an out of wedlock child by acknowledgment, he remains illegitimate.<sup>17</sup>

It can be deduced from judicial authorities, that the provisions of section 42(2) does not have a blanket application which means that before an illegitimate person whose succession right is threatened as a result of the circumstances of his birth can enjoy the advantage or protection of section 42(2) of the Constitution, the person must prove

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<sup>14</sup> (2007) LPELR-8195 (CA); (2008) 9 NWLR (pt 109) 204.

<sup>15</sup> (2013) LPELR-20895 (SC); (2013) 14 NWLR (pt 1375) 510.

<sup>16</sup> Chianu, (note 4) 262.

<sup>17</sup> Chianu, (note 4) 262.

with satisfactory evidence that the deceased whose estate he wants to inherit from is his father.

## **1.2 Statement of Problem**

The concept of legitimacy in Nigerian law is crucial as it determines a child's legal status and rights. Historically, English Common Law viewed children born out of wedlock as *filus nullius* (no one's child), denying them familial and legal rights. This doctrine, however, has been challenged and modified in various jurisdictions, including Nigeria.

section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria prohibits discrimination based on circumstances of birth. This provision has been interpreted by some legal scholars as effectively abolishing the concept of illegitimacy in Nigeria. They argue that it guarantees equal rights to all children, regardless of their parents' marital status.

However, other legal experts contend that the provision has not completely eradicated the concept of illegitimacy. They argue that while the Constitution prohibits discrimination, it does not automatically establish paternity or grant inheritance rights to children born out of wedlock. In many cases, the determination of paternity and inheritance rights still relies on traditional customs and practices, which may discriminate against children born outside of marriage.

The practical implications of this legal ambiguity are significant. Children born out of wedlock may face challenges in establishing their legal identity, inheriting property, and accessing social services. Additionally, the stigma associated with illegitimacy can have lasting social and psychological consequences.

To address these issues, it is essential to further clarify the legal status of children born out of wedlock and to ensure that they have equal access to their rights and

entitlements. This may involve legislative reforms, judicial decisions, and social awareness campaigns to promote non-discriminatory attitudes towards children born outside of marriage.

Essentially, this study seeks to assess and examine the impact of section 42(2) of the 1999 Constitution in legitimacy. The impact of section 42(2) in enhancing the succession rights and status of out of wedlock children and whether this provision has successfully eliminated the concept of illegitimacy in Nigeria.

The study answers to the following research questions;

1. Can legislative reform or judicial action aid in eliminating the concept of illegitimacy in Nigeria?
2. Are there any moral justification to the concept of illegitimacy?
3. Is there a need to broaden the interpretation of section 42(2) of the CFRN 1999?

### **1.3 Aim and Objectives**

The aim of the study is to analyze the impact of section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria on the concept of legitimacy in Nigeria, with specific focus on the rights and status of children born out of wedlock.

The objectives of this study are as follows:

- I. to critically examine the provisions of section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria regarding the rights of children born out of wedlock.
- II. to assess the practical impact of section 42(2) in addressing discrimination and eliminating the concept of illegitimacy in Nigeria.
- III. to analyze judicial interpretations of section 42(2) and evaluate how Courts have applied this provision to protect children born out of wedlock.

- IV. to identify the legal, cultural, and societal factors that continue to perpetuate the concept of illegitimacy despite constitutional protections.
- V. to propose legal reforms and policy recommendations for eliminating the concept of illegitimacy and ensuring equal rights for all children under Nigerian law.

#### **1.4 Significance of the Study**

The study is significant as it critically examines the impact of section 42(2) of the 1999 Constitution on the concept of legitimacy, with particular focus on the rights and status of children born out of wedlock. By assessing the sufficiency of this constitutional provision, the study highlights gaps in the legal framework that perpetuate the stigmatization and discrimination of children deemed “illegitimate.” This is essential for fostering equality and promoting the protection of fundamental human rights in Nigeria, as guaranteed under the Constitution.

The study contributes to legal scholarship by providing an in-depth analysis of the inadequacies in Nigerian law concerning legitimacy. It explores the legal, social, and cultural implications of retaining the concept of illegitimacy, offering insights that can inform legislative reforms. Furthermore, the research bridges the gap between constitutional provisions and their practical implementation, shedding light on areas where judicial interpretation and enforcement can be strengthened.

In addition, the study serves as a resource for policymakers, legislators, and legal practitioners by offering practical recommendations for the elimination of the concept of illegitimacy in Nigeria. These recommendations aim to ensure that all children, regardless of the status of their birth, are treated equally under the law and in society. By proposing legal reforms, the study supports efforts to uphold human dignity,

reduce discrimination, and align Nigeria's legal system with international human rights standards.

Finally, the study is valuable to academics and students of law, as it adds to existing literature on constitutional law and human rights in Nigeria. It also provides a foundation for further studies on legitimacy, children's rights, and related societal issues, encouraging continued discourse on achieving legal and social justice for all individuals.

### **1.5 Scope and Limitation of the Study**

The study focuses on analyzing the impact of section 42(2) of the 1999 Constitution on the concept of legitimacy, particularly with regard to the rights and status of children born out of wedlock. The study aims to examine the constitutional provision, its legal implications, and the extent to which it addresses and eliminates the construct of illegitimacy in Nigeria. Key areas of focus include relevant statutes, judicial decisions, and legal principles that define and interpret legitimacy under Nigerian law. The scope of the study extends to analyzing the historical and contemporary perspectives on illegitimacy in Nigeria, exploring the practical effects of section 42(2) on the rights of children born outside wedlock, and identifying any gaps in its implementation. Comparative insights will be drawn from selected legal systems where significant reforms have been implemented to address similar issues. Furthermore, the study will recommend legal reforms and practical measures to eliminate the stigma and discrimination associated with illegitimacy, ensuring equality under the law.

However, the study acknowledges certain limitations. First, the evolving nature of Nigerian jurisprudence and the possibility of legislative amendments during or after the study, which could impact the findings. Another limitation includes access to

certain unpublished judicial decisions or legal materials which pose constraints on the depth of case analysis. However, efforts were made to get published judicial decisions and legal materials. Despite these limitations, the study strives to provide valuable insights into the effectiveness of section 42(2) in addressing the issue of illegitimacy and to propose practical solutions for legal and societal reforms in Nigeria.

## **1.6 Research/Methodology**

The study uses the doctrinal and analytical research methodology to examine the impact of section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria on the concept of legitimacy, particularly regarding the rights and status of children born out of wedlock.

The doctrinal approach involves an in-depth analysis of primary legal sources, including the Constitution, statutes, judicial decisions, case laws, and other relevant legal instruments. In addition, the research incorporates secondary sources, such as books, journal articles, scholarly papers, reports, and other published works, to provide broader perspectives on the subject. These sources will help contextualize the historical development, societal perceptions, and legal treatment of illegitimacy in Nigeria. Comparative insights may also be drawn from other jurisdictions to highlight best practices and legal reforms that could inform recommendations for the Nigerian legal system.

The analytical aspect of the research focuses on evaluating the gaps and limitations in section 42(2), its practical implementation, and its effectiveness in eliminating the stigma and discrimination associated with illegitimacy. By critically assessing the existing legal framework, this study aims to identify areas for improvement and propose practical solutions for achieving equality under the law.

The study adopts a doctrinal and analytical approach, relying on primary legal sources such as the Constitution, statutes, case laws, and legal reports. Secondary sources, including scholarly literature, journal articles, and other published works, are also examined to provide a comprehensive understanding of the subject.

## CHAPTER TWO

### LITERATURE REVIEW

#### 2.1 Conceptual Clarification

It is imperative to define some key terms; legitimacy, illegitimacy, legitimation, paternity, propositus and succession.

**Legitimacy:** Legitimacy refers to the status of a person who is born within a lawful marriage or who acquires that status by later action of the parents.<sup>18</sup>

**Illegitimacy:** Illegitimacy refers to the status of a person who is born outside a lawful marriage and who is not later legitimated by the parents.<sup>19</sup>

**Legitimation:** Legitimation is the act or process of authoritatively declaring a person legitimate, especially a child whose parentage has been unclear.<sup>20</sup>

**Paternity:** Paternity refers to the quality, state, or condition of being a father, especially a biological one; fatherhood. Essentially, it is establishing that someone is the parent of a specific child.<sup>21</sup>

**Propositus:** A term used in civil law to refer to a person from whom descent is traced or whose rights or obligations are in question. It can also be called *persona proposita* and is used in plural as *propositi*. For example, in a legal case involving inheritance, the *propositus* would be the person from whom the inheritance is being traced.<sup>22</sup>

**Succession:** Succession refers to the act or process of a person becoming beneficially entitled to a property interest of a deceased person. Similarly, succession denotes the transmission of rights and obligations of the deceased to the heirs.<sup>23</sup>

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<sup>18</sup> The Black's Law Dictionary 11<sup>th</sup> Edition (Bryan A. Garner).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> < <https://www.Isd.law> > accessed on 8 December 2024.

<sup>23</sup> The Black's Law Dictionary 11<sup>th</sup> Edition (Bryan A. Garner).

## 2.2 Theoretical Framework

Scholars have proposed various approaches and theories regarding the concept of out-of-wedlock births or illegitimacy. Through these perspectives, authors and researchers aim to explore, expand, and refine the views and opinions expressed to better understand the issue of illegitimacy. It must be noted that to appreciate opinions and views expressed about the concept of illegitimacy, case laws on the subject matter are relevant. There are two approaches the Courts attach or rationalize their decision on they are either; the public policy theory or the protectionist approach theory. The study will attempt to carefully examine these theories in turn.

Public policy can be generally defined as a system of laws, regulatory measures, courses of action and funding priorities concerning a given topic promulgated by a government or its representatives.<sup>24</sup> In *Richard v Mellish*, Burrough J. referred to public policy as an unruly horse which once astride it, you will not know where it will lead you. Under English law, the principle of public policy will be invoked in the following circumstance:

(1) Where the English concept of morality is contravened. For instance, the Court will refuse to enforce a contract that promotes sexual immorality. In *Re Adadevoh*<sup>25</sup> it was stated that upholding the claim of children born out of wedlock would offend public policy which encourages promiscuous intercourse. In *Pearce v Brooks*<sup>26</sup> the defendant, a prostitute, was sued by the plaintiffs, coach-builders or the hire of a brougham. There was no evidence that the plaintiffs looked expressly to the proceeds of the defendant's prostitution for payment, but the jury found that they knew her to be a prostitute and supplied the brougham with a knowledge that it would be as it was used

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<sup>24</sup> Dean G. Kilpatrick, National Violence Against Women Prevention Research Center, Medical University of South Carolina (2000). < <https://www.musc.edu> > accessed 23 October 2024.

<sup>25</sup> (1951) 13 WACA 304.

<sup>26</sup> (1866) LR 1 Ex 213.

by her as a part of her display to attract men. The question before the Court was whether the plaintiff knew the brougham was hired to enable the defendant to pursue her calling.

Thus, when a Court determines an issue relating to the concept of illegitimacy and rationalizes it's decision based on the public policy theory the Court is not concerning itself with the protection of the rights, maintenance or interest of the putative child. Rather the Court is rationalizing its decision based on public morality which would be allowing out-of-wedlock children or persons enjoy the same status and rights as persons born in lawful wedlock will amount to exalting or reinforcing promiscuity in the society thus, this will be contrary to public policy or morality.

In the case of *Alake v Pratt*<sup>27</sup> the issue for determination was whether an intestate's out-of-wedlock children were entitled to share in his estate together with his children who were the issue of a statutory marriage. The trial judge found that by Yoruba Law the out-of-wedlock children who were acknowledged by their father were legitimate and could share equally with their in-wedlock half-siblings. However, he considered it contrary to public policy for the out-of-wedlock children to inherit as they could not be placed on the same footing as in-wedlock children.<sup>28</sup> It would be otherwise, he said, if all the children were born without marriage in which case all would inherit equally. He was influenced by an obiter in Verity CJ's Judgment in *Re Adadevoh*<sup>29</sup> to the effect that upholding the claim of children born out of wedlock would offend public policy which encourages promiscuous intercourse. However, the dictum was circumscribed and the claim of the out-of-wedlock children was upheld<sup>30</sup>.

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<sup>27</sup> (1955) 15 WACA 20.

<sup>28</sup> Chianu, (note 4) 234.

<sup>29</sup> (1951) 13 WACA 304.

<sup>30</sup> Chianu, (note 4) 234.

In the case of *Motoh v Motoh*<sup>31</sup> the deceased married the respondent's mother and conducted a church ceremony in a licensed place of worship and a certificate of marriage was issued. The deceased during the subsistence of the church ceremony had a sexual relationship with the claimant's mother who gave birth to the claimant. The claimant upon the demise of the deceased brought an action for the Court to allow him share in the estate of the deceased. The Court of Appeal, Aboki JCA (as he then was) declared the church ceremony a statutory marriage and he declared the marriage with the claimant's mother as an unlawful union as it infringed the Marriage Act. He held the claimants illegitimate as he failed to prove that his father acknowledged his paternity.<sup>32</sup>

In the case of *Salubi v Salubi*<sup>33</sup> X and Y were married under the Act in 1939. There were two children of the marriage which are the appellant and the 1<sup>st</sup> respondent. X had two other children out-of-wedlock by two different women. Upon his death, letters of administration were granted to the appellant and Y in 1985. However, Y was ineffective due to age and ill health. Dissatisfied with the manner of administration by the appellant, the 1<sup>st</sup> respondent brought an action to set aside the letters of administration and for an order that the probate registrar effect distribution of the estate to all beneficiaries. Granting the reliefs, the trial Court applied the provisions of section 36 of the Marriage Act and went on to distribute X's estate in favor of Y, X and the two children of the marriage (the appellant and the 1<sup>st</sup> respondent). The trial Court held that the two children of the marriage born out of wedlock were illegitimate and were not entitled to share in the distribution of X's estate. The decision of the trial

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<sup>31</sup> (2011) 16 NWLR (Pt.1274) 474.

<sup>32</sup> Chianu, (note 4) 264.

<sup>33</sup> (2003) 7 NWLR (Pt. 819) 456.

Court was overruled on appeal. The trial Court based its decision on the public policy theory.

From the above decisions of the Courts, it is clear that the Courts based or rationalized their decision on the public policy theory which is allowing out-of-wedlock children or persons to enjoy the same status and rights as persons born in lawful wedlock will amount to exalting or reinforcing promiscuity in the society which is contrary to public policy or morality.

Protectionism is the practice of following protectionist trade policies. A protectionist trade policy allows the government of a Country to promote domestic producers, and thereby boost the domestic production of goods and services by imposing tariffs or otherwise limiting foreign goods and services in the marketplace.<sup>34</sup> Protectionism refers to government policies that restrict international trade to help domestic industries<sup>35</sup>. In the context of the subject matter of this study, protectionist refers to when the Courts decide to reinforce the rights and welfare of an out-of-wedlock child. Some judicial decisions that reflect this theory will be discussed herein and the provision of section 42(2) of the Constitution is used as a shield to protect the rights and welfare of the out-of-wedlock children.

In *Okoli V Okoli*,<sup>36</sup> the plaintiff asserted that the land in dispute was allotted to the 1<sup>st</sup> defendant by him as a customary tenant and having denied his title was liable to forfeit his right to the land. The 1<sup>st</sup> defendant alleged he was allotted the land by his uncle who was the family head sometime in 1950 wherein he built two houses on the

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<sup>34</sup> CFI Team, Protectionism (2015 to 2024) < <http://corporatefinanceinstitute.com> > Accessed on 24 October 2024

<sup>35</sup> The Investopedia Team, Protectionism: Examples and Types of Trade Protections (2024) < <http://www.investopedia.com> > Accessed on 24 October 2024.

<sup>36</sup> (2003) 8 NWLR (Pt. 783) 89.

land in 1951 and 1993. He was a product of Nrachi<sup>37</sup> custom. The trial Court found that the claims of the plaintiff were not proved. On appeal, the issue that arose was whether to regard the 1<sup>st</sup> defendant as a son of the plaintiff's father would entitle him to the land. It was argued on behalf of the 1<sup>st</sup> defendant that by section 42(2) of the Constitution, the circumstance of the birth of the 1<sup>st</sup> defendant should not bar him from his proven rights. Fabiyi JSC (as He then was) upheld this argument and the Court of Appeal after reviewing the case of *Muojekwu v Ejikeme*<sup>38</sup> further held that: The circumstance of birth of the 1<sup>st</sup> defendant/respondent ... cannot be a bar to his legal rights ... custody of a child born out-of-wedlock follows that of his mother ... they cannot be subjected to disability and deprivation ... to render him homeless ... he can employ the provisions of the Constitution as a shield from being discriminated against or subjected to disability and deprivation...

In the case of *Anode v Mmeka*<sup>39</sup> the plaintiff sought a declaration to be exclusively entitled to inherit the property of X his maternal grandfather as a sole surviving child. X died without any surviving issue or child. The plaintiff claimed that X left his mother at home to rear children to avoid the extinction of his family, allowed under their custom. X's son who died without a biological issue adopted him as his son. He was therefore entitled to inherit the property of X. The trial Court held that: the plaintiff's mother begat the plaintiff while living unmarried in her maiden home. The trial judge stated that he is aware of the principle in *Muojekwu v Ejikeme*<sup>40</sup> ... where a custom of leaving a woman in her maiden to procreate was held promiscuous, obnoxious, inconsistent with public policy ... but the rejection of the custom is one thing and the acceptance of the product of that custom is a different thing ... a child

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<sup>37</sup> A custom which allows a female to produce a male heir or successor for her father to save the lineage from extinction.

<sup>38</sup> (2000) 5 NWLR (Pt 6570) 413.

<sup>39</sup> (2008) 10 NWLR (Pt 1094) 1.

<sup>40</sup> (2008) 10 NWLR (Pt 1094) 1.

is never thrown away with badly polluted water ... whatever view I take of the custom will not have anything to do with ... the plaintiff as a human being ... who is merely but a product of that custom.

On further appeal to the Court of Appeal, the Court had this to say: ... Plaintiff was born out-of-wedlock ... in her maiden's home ... it is settled ... law that ... custody of a child born out-of-wedlock follows that of his mother in the absence of anybody should not be abandoned and left homeless for a situation he never creates... by section 42(2) of the Constitution, a citizen shall not be subjected to any form of disabilities ... the fact that the respondent was born out-of-wedlock is irrelevant and cannot militate against him in inheriting the estate of his maternal grandfather.<sup>41</sup>

The three plaintiffs in *Taylor v Taylor*<sup>42</sup> were the same blood siblings born out-of-wedlock, two of them before their father married the defendant under the Marriage Act. The defendant conceded that her husband acknowledged the paternity of the plaintiffs. For some 13 years after the death of the deceased husband, the defendant collected and appropriated the rent of the house that the deceased husband left behind. In this action, the plaintiffs sought a true and accurate account of all monies the defendant received as rent. Coker J noted that for succession, there were no degrees of legitimacy. He held for the children as they were legitimized by the fact that their father acknowledged their paternity. The defendant was awarded one-third of the estate and the children were to share the balance equally.

From the above decisions of the Courts, it is clear that the Courts based their decision on the protectionist approach theory. The Courts agreed that the fact that they were born out-of-wedlock should not be a reason to bar them from their inheritance rights,

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<sup>41</sup>( 2008) 10 NWLR (Pt 1094) 1 .

<sup>42</sup> (1960) Lagos LR 286.

the Courts utilized the provisions of section 42(2) of the Constitution in protecting the rights and welfare of these out-of-wedlock persons.

In conclusion, from the aforementioned cases it is obvious that there was a discrepancy in the decisions of the Court when approached with the subject matter of out-of-wedlock children and they were based on either the public policy theory or protectionist approach theory. Although, it is doubtful that the Courts would fail to hold in favor of an out-of-wedlock child especially if acknowledged by the putative father.

### **2.2.1 Historical Foundation**

Nigeria was colonized by Britain hence English Law has a great influence in the Country's legal system. The Nigerian Legal System is made up of English Common Law, Statutes and Customary Law. The concept of illegitimacy is rooted in English Common Law which the Nigerian Legal System adopted when it received English Law.

Hitherto, the common law position is that a child is regarded as "illegitimate" If born out-of-lawful wedlock hence such a child will not be entitled to inheritance rights, maintenance, rights and privileges emanating from the relationship of child and parents.

However, the Legitimacy Ordinance of 1929, modified this strict and harsh common law position and arguably provided partial remedy to the problem created concerning illegitimacy.<sup>43</sup> 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

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<sup>43</sup> Achi & Akaunde, (note 43).

issue would have been entitled to if he had been born legitimate.<sup>44</sup> 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.<sup>45</sup>

On the contrary, under Nigerian customary Law, the paternity of a child is not tied to the marriage of the father and mother. For instance, a child may be regarded as legitimate even though the natural parents are not married to each other and the person to whom the child is legitimate is not his natural father. In Igbo custom, for instance, a man who has no male child may persuade one of his daughters to stay behind and not marry.<sup>46</sup> The purpose of such an arrangement is for her to produce a male successor for her father and thereby save the lineage from threatened extinction; this is a cultural practice known as Nrachi. Thus, any child she bears while remaining with her parents is considered the legitimate child of her father at birth. Any male child so produced has full rights of succession to the grandfather's land and title.<sup>47</sup>

From the above discussion, it would be right to conclude that the concept of illegitimacy is a common law concept that gained access to the Nigerian legal system as a result of receiving English law.<sup>48</sup> It seems that the legal disadvantages of illegitimacy are indeed not as great in Nigerian customary law as they used to be in Western where under English common law, any child born out of wedlock is

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<sup>44</sup> Achi & Akaaunde ( note 43).

<sup>45</sup> Achi & Akaaunde ( note 43).

<sup>46</sup> E.I Nwogugu, *Family Law in Nigeria*, (Third Edition, HEBN Publishers Plc 2014) 304.

<sup>47</sup> Nwogugu( note 46) 304.

<sup>48</sup> Jessica A. Ajonumah & Ogechi Dublin-Green, Paternity, Illegitimacy and Customary Acknowledgement in Nigeria: A Re-Evaluation, *International Journal of Business & Law Research* (2019) 7(2): 112-119.

deemed illegitimate until the contrary is proved, as marriage was a substratum to acquiring any legitimacy status.<sup>49</sup>

### 2.3 Literature Overview

In Nigeria, the discussion around legitimacy and illegitimacy is shaped by a variety of scholarly works that delve into legal, cultural and social dimensions. A literature review of legitimacy and illegitimacy in Nigeria reveals significant contributions from multiple researchers in academic books and journal publications that explore the complexities of these concepts in Nigerian society.

According to Chianu, a shortcoming in the position of those who seek to use section 42 to alleviate the disadvantaged situation of out-of-wedlock children is that a child cannot hoist himself on a man as his father.<sup>50</sup> A person can be legitimate (a) if his parent were lawfully married, or (b) if his paternity is acknowledged. If a person is unable to prove any of these how can section 42 elevate him to the status of a legitimate child so that he can inherit from his unproved father? Where a man fails to assert paternity over an out-of-wedlock child by acknowledgment, he remains illegitimate.<sup>51</sup> In *Douglas v Douglas*,<sup>52</sup> the plaintiff sued to share the land in dispute with the defendants on account that they are of the same family. The defendants proved that the plaintiff's father did not marry his mother according to ijaw law iya (big bride price) marriage. Nor was he adopted or acknowledged as a member of the father's family as he spent all his life in his maternal grandfather's compound.<sup>53</sup> His claim that he was adopted into the family of the defendants was unavailing in the face of evidence that he resided with his maternal grandfather even up to the time of the suit. Ogebe JCA (as he then was) remarked that the argument regarding section 42 of

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<sup>49</sup> Ajonumah & Dublin-Green (note 48)

<sup>50</sup> Chianu, (note 4) 262.

<sup>51</sup> Ibid.

<sup>52</sup> (2001) 11 NWLR (pt.723) 55.

<sup>53</sup> (2001) 11 NWLR (pt.723) 55.

the CFRN 1999 on the right to freedom from discrimination on account of circumstances of birth went to nothingness as the plaintiff was obliged first to prove that he is a member of the defendant's family.<sup>54</sup>

The concept of a bastard child is inoperative in Nigeria as section 42(2) of the Constitution unequivocally provides that no citizen of Nigeria should be subjected to any disability or deprivation merely because of the circumstances of his birth. This provision was applied in *Olulode v Oviosu*<sup>55</sup> where the court held that the purpose of section 39(2) of the 1979 constitution, now section 42(2), is to abolish the status of illegitimacy and treat every Nigerian citizen whether born within wedlock or outside wedlock as having equal rights.<sup>56</sup>

There are several other studies pertaining to the impact of section 42(2) of the Constitution in eliminating the concept of illegitimacy in Nigeria. This has led to various literature and sparked arguments. There are two different arguments on the effect of section 42(2) of the Constitution. It has been argued that the provision has abolished the concept of illegitimacy in Nigeria, while some other writers have argued that the Constitution has not eliminated or abolished the concept of illegitimacy.

Sagay is of the opinion that the law in effect has implicitly prohibited the status of illegitimacy.<sup>57</sup> Attah has stated that it is without a doubt that a calm reading of section 42(2) of the Constitution reveals that the Constitution does not expressly prohibit the envisaged disability or deprivation and discrimination of illegitimate persons born out-of-wedlock.<sup>58</sup> Achi and Japheth, have asserted that the issues surrounding the legitimacy and legitimation of children born out of wedlock continue to pose serious

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<sup>54</sup> (2001) 11 NWLR (pt.723) 55.

<sup>55</sup> Suit No. M/133/81(Unreported) High Court of Lagos State Ikeja 1981.

<sup>56</sup> Afolabi S.A, Aboderin L.O, Aboderin D.I, Overview of the Concepts of Legitimacy and Legitimation under the Nigerian Laws, *Journal of Advanced Research and Multidisciplinary Studies* (2023) vol 3 issue 2(pp 58- 68).

<sup>57</sup> I.E Sagay, *Nigerian Law of Succession*, 11.

<sup>58</sup> M. Attah, *Family Welfare Law* , 256.

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) CFRN 1999 has made the position of the law uncertain and section 42(2) of the Constitution does not expressly prohibit the envisaged disability or deprivation and discrimination of illegitimate persons born out-of-wedlock.<sup>59</sup> In spite of the provisions of section 42(2) of the Constitution 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.<sup>60</sup> It is indisputable that in some parts of the States that make up eastern Nigeria, persons alleged to be Osu(outcast) are still being discriminated against in much the same way as persons regarded as illegitimate are.<sup>61</sup>

Furthermore, Itua, concludes that it is apparent that once a father acknowledges the paternity of a child, that child becomes legitimate irrespective of the fact that the child was born out of lawful wedlock.<sup>62</sup> But the problem becomes more complicated when the father refuses to acknowledge the paternity of the child in his lifetime. On his demise, the child will find it impossible to participate in the distribution of his putative father's estate because he will be considered by other children of the deceased or by his family members as a total stranger.<sup>63</sup> Such a child will remain for all intent and purposes an illegitimate child. Consequently, it is submitted section 42 has only eliminated the status of illegitimacy from our statute books to the extent that the putative father acknowledges the paternity of the child. But where such an

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<sup>59</sup> Achi & Akaaunde( note43).

<sup>60</sup> Ibid.

<sup>61</sup> Achi & Akaaunde( note43).

<sup>62</sup> P.O Itua, Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigerians amended on the Rights of Inheritance.

<sup>63</sup> Ibid.

acknowledgment is refused.<sup>64</sup> The child remains an illegitimate child thus, confines the views of those who still believe the concept of illegitimacy has not been eliminated from our society.<sup>65</sup>

Izzi and Long John have argued that the Nigerian Constitution has yet to abolish illegitimacy in the Country either through section 42(2) of the Constitution or any other provision. According to them, section 42(2) has merely removed the disabilities associated with illegitimacy.<sup>66</sup> While Olomjobi and Onuoha, hold the view that section 42(2) of the constitution did not abolish illegitimacy.<sup>67</sup>

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<sup>64</sup> Itua (note 62).

<sup>65</sup> Ibid.

<sup>66</sup> M.O Izzi & C.D LongJohn, “An Analysis of the Concepts of Legitimacy and Legitimation Under Nigerian Family Law”, *The Journal of Property Law and Contemporary Issues* (2017) 5(1) 180-195.

<sup>67</sup> Y. Olomjobi & J.Onuoha, “Public Perception on Illegitimacy and Succession Rights in South Western Nigeria” *SSRN* (2017) 1-27.

## CHAPTER THREE

### LEGAL AND INSTITUTIONAL FRAMEWORKS OF ILLEGITIMACY IN NIGERIA

#### **3.1 The English Common Law Position on Illegitimate Children prior to Legitimacy Act of 1926.**

At common law, an illegitimate person was referred to as “*filius nullius*”.<sup>68</sup> The law was about paternity which was relevant to the succession of estate and monarch. It was also, a moral issue as a result of the church’s stance on fidelity in marriage and reinforcing celibacy outside marriage, the moral taint was so strong that the law penalized the mother and child. The child had no name; could inherit no one; he had no relatives except of course those who descended from him.

These harsh laws persisted until the Legitimacy Act of 1926 modified this common law position. Section 1 of the Act, provides for legitimation by subsequent marriage of the parents. Essentially, where the parents of an illegitimate person marry or have married one another whether before or after the commencement of the Act, the marriage shall render that illegitimate person, if living, legitimate.<sup>69</sup>

#### **3.1.1 Moral Justification for Legitimate Children**

For centuries in England and other places, out-of-wedlock children faced several stigma, and social and economic disadvantages reflected in law.<sup>70</sup> These laws reflected the fear that the existence of illegitimate children threatened the system of inheritance, title and status through the paternal line which created the social order.<sup>71</sup>

In England, these laws were amended in 1926 and finally abolished in 1987.<sup>72</sup>

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<sup>68</sup> No one’s child.

<sup>69</sup> Legitimacy Act 1926.

<sup>70</sup> Kate Gibson, *Soft Power and Stigma: Illegitimate Children and the History of Parliament*, *History of Parliament* (2023).

<sup>71</sup> Gibson (note 70)

<sup>72</sup> Ibid.

Out-of-wedlock pregnancy was considered a severe issue in early times for several reasons. First, the issue of out-of-wedlock pregnancy is that it is linked to a deeply ingrained idea of female honor and discrimination against men and women for their sexual behavior.<sup>73</sup> In some places of the world, the stigma attached remains. There is a possibility that unmarried parents of children born outside of wedlock experienced guilt and shame but in the early days women were the primary victims held accountable and disgraced.<sup>74</sup> The physical toll of pregnancy and childbirth fell on women who bore the brunt of the load, the emotional issues of whether to open and conceal the pregnancy and birth. Some women who were not able to remove the humiliation by marrying the child's father or concealing the unlawful nature of the sexual act were forced to abandon the child. Women had to deal with the practical and daily implications of having an out-of-wedlock child, the shame associated with being an unmarried parent and the stigmatization of their offspring who were labeled a bastard; the views regarding unwed motherhood were usually negative.<sup>75</sup>

Secondly, poverty and child abandonment powered by unwed motherhood led to serious financial burdens for churches, poor relief organizations and urban governments which handled the upkeep of illegitimate children and assisted impoverished unmarried mothers.<sup>76</sup> Due to the financial strain of being an unmarried mother, local governments were compelled to enact legislation prohibiting fornication, punishing and convicting unmarried women.<sup>77</sup> In the seventeenth century, women

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<sup>73</sup> V. D Heijden, A. Schmidt, G. Vermeesch, Illegitimate Parenthood in Early Modern Europe, *The History of the Family* (2021) Vol 26(1).

<sup>74</sup> Ibid .

<sup>75</sup> Ibid.

<sup>76</sup> V. D Heijden, A. Schmidt, G. Vermeesch (note 73).

<sup>77</sup> Ibid.

accused of fornication with illegitimate children faced harsher punishment in contrast to women accused of fornication without illegitimate children.<sup>78</sup>

Finally, conflicts over property, inheritance and family interests were linked to illegitimacy.<sup>79</sup> Although both Catholics and Protestants required parental approval for marital formation, the principle of consensual marriage and the conjugal practice that emerged from it conflicted with family strategies, couples who exchanged marriage vows followed by sexual relations without their parent's permission violated religious and civil law beginning in the sixteenth century, risking the birth of an out-of-wedlock child.<sup>80</sup> Parents of males from wealthy households, would not allow their sons to enter such a marriage, as it would jeopardize the transfer of family property.<sup>81</sup>

### **3.2 The Nigerian Customary Law Position with respect to Illegitimate Children**

So many authors have opined that the concepts of marriage, paternity and legitimacy customs illegitimacy is not a result of the absence of marriage between the parents. Parents remain unmarried yet their children remain legitimate.<sup>82</sup>

Under Nigerian customary law, a person/child may be regarded as legitimate irrespective of the fact that to whom the child is legitimate is not his biological father.<sup>83</sup> For instance, the Igbo custom of Nrachi which allows a man who has no male child to convince his daughter or one of his daughters to stay behind and not get married in order to raise children for him. The crux of such an arrangement is to produce a male child for the father in order to inherit the father's estate. The case of *Muojekwu v Ejikeme*<sup>84</sup> seems to be the first case where the Nrachi custom was discussed at the Court of Appeal. The original landowner, B, died survived by a

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<sup>78</sup> V. D Heijden, A. Schmidt, G. Vermeesch (note 73).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> V. D Heijden, A. Schmidt, G. Vermeesch (note 73).

<sup>82</sup> Nwogugu, (note 46) 304.

<sup>83</sup> Ibid

<sup>84</sup> (2000) 5 NWLR (pt 657)402,CA.

widow and two daughters. The first daughter died unmarried and childless; the second had two out-of-wedlock daughters during her father's lifetime. One of the granddaughters gave birth to two daughters and a son. B's widow, children and grandchildren resided in his property until the grandchildren's paternal cousins distributed their possession on account that Nrachi was not performed on B's surviving daughter who begat the grandchildren, the present plaintiffs. The trial Court held that B's lineage went extinct when his first daughter on whom Nrachi was performed died childlessly, and Nrachi was not performed on the surviving daughter, none of her children could inherit. However, the Court of Appeal reversed this decision, it held that inheritance was by blood and the plaintiffs, as B's grandchildren had a better title to the land than B's nephews.

The plaintiff in *Anode v Mmeka*<sup>85</sup> was the grandson of the man who acquired the property. As the man had no son, he performed Nrachi ceremony on his daughter who begat the plaintiff. When the defendant, the plaintiff's uncle, disturbed his possession of the original landowner's land the plaintiff sued him for declaration of right of occupancy over the property. He prevailed as the defendant failed in his bid to nullify the Nrachi ceremony; his effort to prove that there was a marriage between the plaintiff's mother and his biological father was fruitless. The Court of Appeal condemned the Nrachi custom as contrary to public morals but held that it would be unfair to disinherit the plaintiff for what the Court considered as the transgression of his mother and maternal grandfather.<sup>86</sup>

Similarly, where a widow remains in her late husband's family without remarrying and her marriage with her late husband is not formally dissolved, any child she bears

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<sup>85</sup> (2008) 10 NWLR (pt 1094).

<sup>86</sup> Chianu, (note 4) 192.

post humously is regarded as the legitimate child of the late husband at birth<sup>87</sup>. This custom was judicially approved in the case of *Nwaribe v President Oru District Court & Anor*<sup>88</sup>, as not being contrary to natural justice and equity. In that case, the husband of Oyibo died and she continued to live in the matrimonial home in the family of the deceased. She became pregnant by the applicant, Nwaribe, while still living there, but before delivery she left to stay with her people. Subsequently, she filed an action in the Customary Court for a formal divorce. The Court held that her marriage to the deceased, Obiora, was not dissolved by death in 1952 and awarded Oyibo's child to the brother of the deceased. Although the applicant did not participate in the Customary Court proceedings, he challenged the decision of the Court as being contrary to natural justice and equity. The learned judge Egbuna J, distinguished the case from that of *Edet v Essien*<sup>89</sup> on the ground that in the case under consideration Oyibo continued to reside in her late husband's house after his death and became pregnant while staying there and there was no question of a claim to the child on the basis that the late husband was not refunded the dowry, as in the case of *Edet v Essien*.<sup>90</sup> The learned judge also argued that, the applicant did not appear to contest the issue of the custody of the child in the customary proceedings, he was aware and admitted in his affidavit that by the custom of his locality that the child was that of Oyibo's deceased husband.<sup>91</sup>

In the same vein, among the indigenous people of Ogoni, an ethnic group in Rivers State there is a practice or custom called the Biake custom.<sup>92</sup> The word Biake loosely

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<sup>87</sup> Nwogugu, (note 46) 304.

<sup>88</sup> (1964) 8 ENLR 24.

<sup>89</sup> (1932) 11 NLR 47.

<sup>90</sup> (1932) 11 NLR 47.

<sup>91</sup> Nwogugu, (note 46) 304.

<sup>92</sup> B. S Deezia, Mothers but not Wives: The Biake Custom and it's Implications on the Ogoni Contemporary Society, *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* (2024) Vol(13) No(1) Pg 49.

translates to ‘to remain or be retained at home or in the family’.<sup>93</sup> The Biake custom refers to where a woman is not given out for marriage but is legitimately retained at home or in the family to raise children for the family of her parent for the purpose of continuing the family lineage where there is a threat of extinction of the lineage.<sup>94</sup>

The Biake custom, which operates throughout Ogoni is a compulsory practice, particularly in households where the parents have no male children, and all their progeny are female. In this case, to ensure continuity of the father’s name, family and lineage, the first daughter or any of the female daughters(the first, middle or last daughter) must be retained in the family.<sup>95</sup> Before traditional ceremonies and rituals are performed, the girl to be retained in the family must meet her father’s desire; being energetic, brave and good at domestic work etc. It is important to note that children from Biake belong to the girl’s or woman’s family.<sup>96</sup>

The main aim of establishing the Biake practice is to avoid family extinction because family continuity is very important to the Ogoni people. Essentially this practice called Biake restrains certain women from marrying. Under this practice or custom, where a man fancies a woman or girl on whom traditional ceremonies and rituals have been carried out on for the purpose of being retained at home as a Biake, he would inform the parents or relations of the woman or girl of his intention to co-habit with her.<sup>97</sup> When the family accepts the man’s request he would be required to provide some customary items to the family. Any male child born from the Biake practice is recognized and deemed the biological son of the girl’s family with every rights and privileges; inheritance, maintenance etc.<sup>98</sup>

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<sup>93</sup> Deezia, (note 92) .

<sup>94</sup> Ibid.

<sup>95</sup> Deezia, (note 92) .

<sup>96</sup> Deezia, (note 92) .

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

### 3.3 Legitimacy of Children of Void and Voidable Statutory Marriage

A void marriage is a marriage that has never been in existence, the grounds on which a marriage may be void includes the existence of a lawful marriage; prohibited degrees of affinity or consanguinity; celebration of marriage under false names. Such marriage is *void ab initio* and the parties to such marriage have not acquired the status of a husband and wife.<sup>99</sup> On the other hand, a voidable marriage is a marriage that is okay while it is subsisting but may be nullified at the instance of one or both of the parties owing to the existence of a defect. The grounds on which a marriage maybe voidable includes incapacity to consummate a marriage; venereal disease; pregnancy of the wife by a person other than the husband; unsoundness of mind, mental disorder, epilepsy.<sup>100</sup> A voidable marriage cannot be brought to an end by a party to it, it can only be nullified by a court of competent jurisdiction while a void marriage can be brought to an end by a party to it without a formal court order.<sup>101</sup>

Ordinarily, any child born of a void statutory marriage is illegitimate.<sup>102</sup> This situation may sometimes work hardship, for instance, where the parties reasonably believed that their marriage was valid.<sup>103</sup> In some countries, children of such marriages are regarded as legitimate.<sup>104</sup> The position is not clear cut in Nigeria where the void marriage is celebrated under the statute, it is customary for Nigerians who desire to contract a marriage to be married under customary law before contracting a statutory marriage.<sup>105</sup> Where the statutory marriage is void, the customary law marriage remains valid and a child is conceived after the statutory marriage, the child will be

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<sup>99</sup> Nwogugu, (note 46) 141.

<sup>100</sup> Nwogugu, (note 46) 141.

<sup>101</sup> Ibid.

<sup>102</sup> Nwogugu, (note 46) 306.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Afolabi S.A, Aboderin L.O, Aboderin , (note 56).

legitimate as a result of the subsisting and valid customary law marriage.<sup>106</sup> In the absence of preceding contention, there is no provision of Nigerian law whereby a child of a void statutory marriage may be regarded as legitimate.<sup>107</sup>

By section 2(1) of the English Legitimacy Act 1959, for instance, the child of a void marriage is considered legitimate if at the time of the act of intercourse resulting in it's birth (or at the time of the celebration of the marriage if later), both or either of the parents reasonably believed that the marriage was valid. A similar provision in Nigerian law, it is submitted, will go a long way to alleviate the hardships of a void marriage.<sup>108</sup>

At common law, a decree of nullity in respect of a voidable statutory marriage has a retrospective effect thereby bastardizing the children of the marriage. But a major change has been effected in this respect by the Matrimonial Causes Act. By section 38(1) of the Matrimonial Causes Act, a decree of nullity in respect of a voidable marriage is effective only from the date on which the decree becomes absolute. Moreover, the decree of nullity does not render illegitimate a child of the parties born since, or legitimated during, the marriage.<sup>109</sup>

### **3.4 Presumption of Legitimacy under Statutory Law and Customary Law**

At common law, a person/child born in lawful wedlock is presumed to be legitimate until the contrary is proved. Also there is a presumption of legitimacy in favour of a person born in lawful wedlock under statutory law, section 165 of the Evidence Act 2011 provides for the presumption of legitimacy.

The aforementioned section provides that:

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<sup>106</sup> Afolabi S.A, Aboderin L.O, Aboderin , (note 56).

<sup>107</sup> Ibid.

<sup>108</sup> Nwogugu, (note 46) 306.

<sup>109</sup> Nwogugu, (note 46) 304.

‘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 280 days after the dissolution of the marriage, the mother remaining unmarried the court shall presume that the person in question is the legitimate child of that man’.<sup>110</sup>

But section 84 of the Matrimonial Causes Act provides for evidence of non-access and this provision provides that:

‘notwithstanding any rule of law, in proceedings under this Act either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, but shall not be compellable to give such evidence if it would show that a child born to the wife during the marriage was illegitimate’.

In essence by section 84 of Matrimonial Causes Act, both of the parties to the marriage can give evidence to prove non access or that the parties did not have sexual relations with each other at any material time. Consequently the presumption of legitimacy provided for in section 165 of the Evidence Act is a rebuttable presumption by virtue of section 84 of the Matrimonial Causes Act but the spouses are not compellable to give such evidence if it will bastardize the child born to the wife during the subsistence of the marriage.

In the case of *Egwunwoke v Egwunwoke*,<sup>111</sup> the respondent to a petition for divorce applied for an order of Court compelling her husband to bear the reasonable financial obligation of educating a child of the marriage. The husband objected on the ground that the child was an offspring of adulterous association between his wife and the co-respondent. The child was of secondary school age and had lived with the wife and husband up until the time of the petition. The Court held against the husband. Until

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<sup>110</sup> Section 165 of the Evidence Act 2011.

<sup>111</sup> (1966) NMLR 147.

the contrary is proved where a child is born in-wedlock,intercourse is presumed to have taken place between the couple resulting to the birth of the child.

In the case of *Rone- Orugboh v Rone- Orugboh*,<sup>112</sup> after two and a half years of a childless marriage the wife left the matrimonial home. Four years later the husband petitioned for divorce on account of living apart for three years. In the wife's response to the petition, the wife asked for maintenance of a child she had about 15 months after she left the matrimonial home. Her story was that she left the matrimonial home much later than the date her husband allege and they had intercourse 11 months prior to the birth of the child. She testified that the gestation period was unusually long. The Court held that in the absence of a blood test to dislodge the presumption that the husband was responsible for the pregnancy (the child was his).

In the English case of *Francis v Francis*<sup>113</sup> the wife committed adultery and confessed this to the husband. Thereafter they resumed sexual intercourse, the husband using contraceptives. Later a child was born, the wife accepted the probability that the child was not for her husband and registered him in her name leaving out the name of her husband. It was held that the evidence was not sufficient to rebut the legitimacy of the child as he was born in lawful wedlock.

The presumption was also applied in *Ezekiel v Alabi*<sup>114</sup> the evidence pointed to the fact that the second defendant performed betrothal ceremonies when the first defendant was only six. In July 1956 the first defendant fell pregnant so in November 1956 a full native law marriage ceremony was performed. Evidently, some time before November 1956, the plaintiff and the first defendant had intercourse and this emboldened him to lay complaint with the social welfare department to determine the child's paternity, the report of the doctor which the department obtained was

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<sup>112</sup> (1973) 4 UILR(pt. 1) 120.

<sup>113</sup> (1959) 3 All ER 206.

<sup>114</sup> (1964) 2 All NLR 43.

inconclusive, whereupon the plaintiff approached the high court for a declaration that he was the father of the child and for the rectification of the register of births to show him as the father. He failed as he was unable to discharge the heavy burden the law placed on him.

The wife in *Oduche v Oduche*<sup>115</sup> left the matrimonial home with the three children of the union about ten years into the marriage. She changed the children's surname from her husband's first to her maiden name and later to another man's whom she claimed actually impregnated her as her husband was impotent. The Court of Appeal affirmed the decision of the trial Court which declared the children her husband's. Rhode-Vivour JCA(as he then was) was unsparing in condemning the wife's action in changing the children's surname several times.

Under customary law, a child born during the subsistence of a customary law marriage is presumed legitimate. In plethora of cases the issue before the courts is usually intertwined with that of custody.

Some systems of custody law presume a child legitimate at birth even though born after the dissolution of the marriage and the repayment of bride price. Under Igbirra customary law, for instance, any child born within ten calendar months of a divorce is regarded as the legitimate child of the former husband even though he may not possibly be the father of the child.<sup>116</sup>

In *Mariyama v Sadiku Ejo*,<sup>117</sup> a lady's petition to divorce X, her husband, succeeded but he sued to have the court declare that a child born within ten months of the divorce was his. The wife testified that the last intercourse she had with X was four months before her petition for divorce while he countered that even though the lady left the matrimonial home for her mother's residence during the suit, they had

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<sup>115</sup> (2006) 5 NWLR (pt. 972) 102.

<sup>116</sup> Nwogugu, (note 46)307.

<sup>117</sup> (1961) NRNLR 81.

intercourse four days before the petition for divorce. As soon as the lady obtained divorce, she married another man and gave birth shortly thereafter. The High Court reversed the decision of the trial Court which blindly applied the presumption of paternity in favour of X. First, even though the parties were Muslims, the High Court opted to apply Igbirra law because the conduct of the parties during the proceedings suggested that Muslim law enforces a 90-day (or three menstrual circles) period of chastity against a divorced lady before she remarries, the object being to detect any pregnancy which would be deemed to be attributable to her former husband.<sup>118</sup> Igbirra law is that any child born within ten months of a divorce is attributable to her former husband. Out of concern for the welfare of the neonate temporary custody is given to the mother for a few years after which he returns to his father. The Court evaluated the testimonies with diligence and concluded that in the face of the evidence before it, X had no intercourse with his wife for a period of 15 months decision before the birth of the child and so he could not have been the father.<sup>119</sup>

In *Ezekiel v Alabi*,<sup>120</sup> it was held that where evidence of lawful marriage exists the court will not inquire into whether it is the husband or wife's lover that is the father of the child born in lawful wedlock and conceived during marital cohabitation.

In *Lawal v Younan*,<sup>121</sup> It was held that customary law marriages are by law legal and the children of such marriage are legitimate.

In Nigeria, Islamic law is on the same pedestal as customary law, thus, we shall discuss the presumption of legitimacy at Islamic law. Under Islamic law a legitimate child is one considered to be born within a valid marriage and such a child will be entitled to inheritance and guardianship according to the Islamic prescribed rules

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<sup>118</sup> Chianu, (note 4) 223.

<sup>119</sup> Chianu,, (note 4) 223.

<sup>120</sup> Ibid.

<sup>121</sup> (1961) WNLR 1197.

while an illegitimate child will be excluded from these rights. The following are the presumptions of legitimacy in Islamic law:

1. A child born within six months of a marriage is presumed to be illegitimate. On the contrary, when a child is born six months after the marriage the child is presumed legitimate.<sup>122</sup>
2. A child born within ten months of a dissolution of a marriage is presumed to be legitimate.<sup>123</sup>
3. By acknowledgment of paternity (iqrar-e-nasab). This is where the legitimacy of a child is in question and the father acknowledges or accepts the child as his own, in such case, the child will be presumed to be legitimate.<sup>124</sup> In the case of *S. Amanullah Hussain v Rajamma*,<sup>125</sup> the plaintiff filed a suit against the defendant Rajamma, wife of the deceased, on grounds that she was only a maid(servant) of the deceased and she was living in the same house with him. She was not legally wedded as a wife nor is the second defendant his son. The Court held that the marriage can be established by indirect proofs that can be by presumption drawn from certain factors. It may be presumed from prolonged cohabitation or acknowledgment of legitimacy in favor of a child.

The following conditions are necessary to satisfy acknowledgment:

1. Acknowledgment must be made by an adult of sane mind.<sup>126</sup>
2. A marriage between the acknowledged person and the mother of the person is to be proved.<sup>127</sup>

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<sup>122</sup> Rachel Sethia, Legitimacy and Parentage under Muslim Law (2024) <<https://blog.ipleaders.in>> Accessed on December 2024.

<sup>123</sup> Ibid.

<sup>124</sup> Sethia, (note 122).

<sup>125</sup> (1977)

<sup>126</sup> Sethia, (note 122).

<sup>127</sup> Ibid .

3. The child being acknowledged shall not be known to be the child of another person.<sup>128</sup>

4. The intention behind the acknowledgment shall be to achieve legitimacy.<sup>129</sup>

### **3.5 Methods and Means of Legitimizing a Child**

#### **3.5.1 Legitimacy by Law**

Legitimacy by law was made possible by the enactment of the Legitimacy Act of 1926 which was later re-enacted as the Legitimacy Act of 1929 to suit local conditions.<sup>130</sup> The Legitimacy Act 1929 applied then to the whole Country. With the introduction of federalism in Nigeria, legitimacy became a matter under the legislative competence of the regional government. State governments have preserved the original enactment without alteration and this has caused uniformity in State laws on legitimacy.<sup>131</sup>

By section 3(1) of the Lagos State Legitimacy Law, “where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this law, the marriage shall if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria, render that person if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens”.<sup>132</sup>

The operation of section 3(1) is based on some condition precedent. The first condition is that the parents of the illegitimate person must have subsequently married each other. The marriage must be statutory or monogamous and not by customary law. The second condition is that the father of the illegitimate person must be domiciled in a state in Nigeria at the time of the celebration of the marriage. The third condition is

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<sup>128</sup> Sethia, (note 112).

<sup>129</sup> Ibid.

<sup>130</sup> Nwogugu, (note 46) 310.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

that it is necessary for the person who is being legitimated to be alive at the date of the celebration of the marriage.<sup>133</sup> The legal implication of the subsequent statutory or monogamous marriage of the parents is to make the illegitimate person legitimate from the commencement of the law or from the date of the marriage whichever occurs last. Hence, if the marriage occurs before the commencement of the law, the illegitimate person will become legitimate from the date of the law, where the marriage occurs after the commencement of the law he becomes legitimate from the date of the marriage.<sup>134</sup>

Significantly, there is no requirement that the parents of the illegitimate person must not be married to some other persons at the time the child is conceived or born. The absence of such a requirement was a deliberate decision of the lawmakers. Consequently, the child of an adulterous union may be legitimated by the subsequent marriage of its parents by the Legitimacy Law.<sup>135</sup>

Section 9(1) of the Lagos State Legitimacy Law, makes provision for a situation where the father of an illegitimate person was domiciled in a foreign country. If at the time of the birth of the illegitimate person, his father is domiciled in country x, the law of which does not permit legitimation per subsequent marriage matrimonium, but at the time of his marriage to the mother of the illegitimate he was domiciled in country Y, by the law of which such legitimation is recognized, the illegitimate person will be recognized as legitimated in Nigeria. His legitimation will be by the subsequent marriage and takes effect from the commencement of the Legitimacy Law or the date of the marriage whichever happens last.<sup>136</sup>

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<sup>133</sup> Nwogugu, (note 46) 311.

<sup>134</sup> Ibid.

<sup>135</sup> Nwogugu, (note 46) 311.

<sup>136</sup> Ibid.

By section 7 of the Lagos State Legitimacy Law, where an illegitimate person dies after the commencement of the Legitimacy Act but before the marriage of his parents, leaving a spouse and children. If the deceased would have been legitimated by the marriage of his parents, which occurs during the life of his wife and children, the latter will be entitled to any interest in the property as if the deceased has been born legitimate on the date of such marriage.<sup>137</sup>

A person legitimated by the subsequent marriage of his parent has the same rights in terms of maintenance and support as a person born legitimate as well as a valid claim to allowance, damages and compensation arising from the negligence of another person under the Fatal Accident Statutes. The implication of legitimation is to enable the legitimated person to take an interest in the property from the date of the legitimation as if he had been born legitimate.

### **3.5.2 Legitimacy by Customary Acknowledgment**

An illegitimate person can be legitimated by acknowledgment. This refers to where the putative father recognises the paternity of the person or child, this method of legitimizing a child does not require the valid marriage of the parents.

To constitute acknowledgment, the act or conduct of the illegitimate child's natural father must be such as to indicate or establish his acceptance of the child's paternity. The act or conduct does not need to be formal. Informal acts may, in appropriate circumstances, be enough.<sup>138</sup>

#### **A) Acts that Constitute Acknowledgment:**

For acknowledgment to constitute legitimation, it must be a continuous act and not just one isolated act. But since it is a matter of evidence to be decided upon surrounding circumstances, it may be stated that acknowledgment which remains

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<sup>137</sup> Nwogugu, (note 46) 136.

<sup>138</sup> Nwogugu, (note 46) 313.

customary, is relevant and constitutes the same without recourse to a succession of events, continuous acts of acknowledgment or expressions of love on either side.<sup>139</sup> Depending on the facts of the case, singular acts of acknowledgment may constitute acknowledgment even where the parties have not set eyes on each other or part ways after the acceptance of paternity. Where the putative father dies before the birth of the child, the deceased putative father must have made an act or acts of acknowledgment at the time of conception during his lifetime. The act or acts may be done by a third party or the putative father personally, what is relevant is that the putative father is of sound mind at the time of accepting paternity and he expresses the same. Legitimacy by customary acknowledgment is open to everyone irrespective of whether a monogamous or polygamous system of marriage is contracted.<sup>140</sup> Acts that would constitute acknowledgment include- an oral or written admission, unequivocal conducts showing acceptance such as performing the naming ceremony, attending child dedication, writing letters to the child's mother, constant visits to the mother and child, taking photos with the mother and child, providing financial assistance to the child, writing a letter to the kinsmen or traditional rulers acknowledging the child, paying the child's school fees, where the birth certificate of the child is in the name of the natural father etc. All these acts are *prima facie* evidence of acknowledgment in the absence of contrary evidence.<sup>141</sup>

*Phillip v Phillip*,<sup>142</sup> it was stated that informal acts may constitute acknowledgment. It was held that the performance of a customary naming ceremony eight days after the birth of a child is ample evidence of acknowledgment.<sup>143</sup>

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<sup>139</sup> Ajonumah & Dublin-Green, (note 48).

<sup>140</sup> Ibid.

<sup>141</sup> Ajonumah & Dublin-Green, (note 48).

<sup>142</sup> (1946) 18 NLR 102.

<sup>143</sup> Ibid.

In *Akerele v Balogun*,<sup>144</sup> it was contended in defence, that the performance of the naming ceremony of the illegitimate child by his natural father outside his house was not proof that he did not accept paternity. The court did not express any view on this contention but it has been submitted that the view is not valid.<sup>145</sup>

In *Young v Young*,<sup>146</sup> it was held that the baptism certificate bearing the natural father's name cannot be regarded as an admission of paternity by him. The reasons for this decision were that evidence was not adduced to explain the circumstances in which the baptism certificate was issued or who gave the details contained in it to link it to the parentage of the child otherwise it may have constituted sufficient admission of paternity.<sup>147</sup>

In *Abisogun v Abisogun*,<sup>148</sup> an admission of paternity in a letter addressed to the chief registrar of the Supreme Court of Nigeria was held to be sufficient admission of paternity.

In *Shashie & ors v Salako & Anor*,<sup>149</sup> the judge concluded that there was no evidence of a rule of legitimation by acknowledgment under TIV customary law. However, the contrary was concluded in the case of *Jirigho v Anamali*,<sup>150</sup> concerning Kwale customary law.

#### B) Who can Acknowledge?

It is a trite principle that only the natural father of an illegitimate person has the exclusive right to acknowledge, the mother of such child has no corresponding right. The right to acknowledge an otherwise illegitimate child is personally attached to the natural father and cannot therefore be exercised by a third person on his behalf.

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<sup>144</sup> [1953] WACA Cyclostyled Judgements (April - May 1953).

<sup>145</sup> Nwogugu, (note 46) 313.

<sup>146</sup> [1953] WACA Cyclostyled Judgments.

<sup>147</sup> Nwogugu, (note 46) 313.

<sup>148</sup> (1963) 1 All NLR 237.

<sup>149</sup> (1976) 1 NMLR 160.

<sup>150</sup> (1958) WRNLR 195.

Consequently, if on the father's death, a relative or his family acknowledges the paternity of a child, the act will have no legal consequence.<sup>151</sup> In the case of *Savage v McFoy*,<sup>152</sup> one of the questions before the Court was whether the right of acknowledgment is reserved to fathers subject to customary law only. In this case, the Court held that the alleged customary law marriage between a Nigerian lady resident in Lagos and a Sierra Leonean resident in Lagos was void. The marriage was not valid by the law of McFoy's domicile of origin but McFoy on his death left some children from his association whose paternity he acknowledged. The court held that by the Yoruba customary law principle of acknowledgment, the children were legitimate and therefore entitled to share in the distribution of the deceased estate. It has been humbly submitted that the decision is wrong in principle.<sup>153</sup> The Court was inconsistent in declaring the marriage void because McFoy was not subject to customary law and in another breath applied customary law principles or rules to legitimate the children of his association with the Lagos lady.<sup>154</sup>

#### C) Time of Acknowledgement:

It is important to establish the time at which the right to acknowledge may be exercised. Must a father acknowledge his child only during his lifetime or the lifetime of the child? Is it necessary that the act or conduct of acknowledgment be made public during the lifetime of the father?<sup>155</sup>

Where a person during his lifetime in a letter to 'J' accepted the paternity of a child and 'J' kept the information to himself but made the letter public only after the death of the deceased person.<sup>156</sup> It is suggested that the letter is sufficient proof of

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<sup>151</sup> Nwogugu, (note 46) 314.

<sup>152</sup> (1909) Renner Report 508.

<sup>153</sup> Nwogugu, (note 46) 314.

<sup>154</sup> Nwogugu, (note 46) 314.

<sup>155</sup> Nwogugu, (note 46) 315.

<sup>156</sup> Ibid.

acknowledgment notwithstanding that it was made public after the death of the deceased. Where a letter of acknowledgment is made or addressed to 'J' was not sent to him but was discovered in the deceased's documents after his death. In the absence of other acts or acts of acknowledgment by the deceased, it is doubtful that such a document or letter would constitute sufficient evidence of acknowledgment.<sup>157</sup>

Where a father acknowledges the paternity of an unborn child but dies before the birth of the child. The question is would such a child be considered legitimated by acknowledgment? In the case of *Oladele & ors v Akinshola & ors*<sup>158</sup>, the deceased died as a result of a motor accident allegedly caused by the defendant's negligence. The plaintiff claimed compensation under the Western Nigeria Tort Law as the wives and children respectively of the deceased. It was alleged that the deceased married three wives and children respectively of the deceased. The Court found that this particular woman was not married to the deceased but held that the question of acknowledgment did not arise as the child was born after the death of the natural father. There are strong reasons in support of this decision. The acknowledgment of pregnancy may be an imperfect act because on the birth of the child, the purported father may, if still alive, realize that he made a mistake - the child may resemble someone else, medical tests may show that he is not the father or facts may come to light before or at the birth which shows conclusively that someone else is the father - in which case he may ultimately refuse to accept the child as his. The inchoate act of acknowledgment of pregnancy must be perfected by the formal acceptance of the child at birth by his natural father. It is this latter act that carries the full legal effect of

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<sup>157</sup> Nwogugu, (note 46) 315.

<sup>158</sup> Suit No. AB/7/63(unreported) Abeokuta High Court.

acknowledgment under customary law. Thus, if the purported father of the child dies before his birth, the better view is to hold that there was no legal acknowledgment.<sup>159</sup> Acknowledgment establishes the child's right to inherit from and succeed the father, The child may have the last name of either parent and the child's name will not affect the child's legal status or succession and inheritance. By implication, acknowledgment grants equal rights of succession enjoyed by other children to an otherwise illegitimate child.<sup>160</sup> The deceased in the case of *Cole v Akinyele*,<sup>161</sup> acknowledged the two out-of-wedlock children.

### **3.5.3 Legitimacy by Estoppel**

There are grounds to formulate a principle that where a child is born out of wedlock and his sibling born in wedlock deals with him as a child of the same father, the child born in wedlock should be estopped from denying the former's right to share in the distribution of their father's estate. A person is not allowed to mislead another into believing in a state of affairs and then turn around to say to that person's disadvantage that the state of affairs represented does not exist.<sup>162</sup>

To be sure, a party who seeks to prove that he is a member of the family by estoppel on account that legitimate members of the family have represented to him to that end by conduct should show more than occasional acts of kindness. None may make a capital of one or two acts of gratuitous donations to found a claim to a right to inherit.<sup>163</sup> In *Asiata v Goncallo*,<sup>164</sup> after contracting a Christian marriage, the propositus contracted Mohammedan marriage with another lady. The first wife did not object and after the propositus's death she acquiesced in dealings with the estate

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<sup>159</sup> (1909) Renner Report 508.

<sup>160</sup> Nwogugu, (note 46) 315.

<sup>161</sup> [1960] SCNLR 192, 5 FSC 84; [1960] NSCC 48.

<sup>162</sup> Chianu, (note 4) 254.

<sup>163</sup> Ibid.

<sup>164</sup> (1900) 1 NLR 41.

by her children and the children of the second wife. Sir Brandford Griffith stated that in such circumstances the first wife was deemed to have conceded that the second wife and her children had equal right to inherit the estate.<sup>165</sup>

In *Osho v Phillips*,<sup>166</sup> the argument that the defendants were estopped from challenging the legitimacy of the plaintiffs after distributing personalty to them and inviting them to several family meetings over three decades was dismissed by the SC. The plaintiffs were out of wedlock out of wedlock children while the propositus had the defendants from a statutory marriage wife. It has been humbly submitted that Madarikan JSC, failed to pointedly address the issue of estoppel. Evidence that the defendants and their mother showed the plaintiffs love and affection and for decades during and after their father's death they lived harmoniously as members of one family made no impression on the Court.<sup>167</sup>

In *Chinweze v Masi*,<sup>168</sup> after the owner of the house property in the case died, his widow produced seven sons in his name. When a dispute arose between the sons and X, their half-sibling, the only child of the marriage between the owner of the house property and the mother of the eight children, X sold the property without the consent of the seven of seven sons. In this suit, the sons asked the Court to declare that X was a *trustee de son tort* and an injunction that would bar her from doing anything that would offend their interest in the house. Since they could not trace the title through their mother whose interest was determined upon her death, they sought to go through the path of estoppel, on account of their long undisturbed possession of the house. The Supreme Court held that on the fact that the ingredients of estoppel were non-existent. As it turned out, X, who was the first defendant, took no active part in the proceedings;

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<sup>165</sup> Chianu, (note 4) 254.

<sup>166</sup> (1973) 3 UILR (pt III) 316, [1972] NSCC 172.

<sup>167</sup> Chianu, (note 4) 254.

<sup>168</sup> [1989] 1 NSCC 194, (1989) 1 NWLR (pt 97) 254.

the legal tussle was with the purchaser and he could not be estopped in any manner. Even against X, the plaintiffs had no place to stand on. Oputa JSC(as he then was) held that estoppel is not a rule of substantive law in the sense of declaring a right. It is rather a rule of evidence ... Estoppel is part of the law of evidence. It is no other than a bar to testimony. It merely prevents the person estopped from denying the existence of a fact... An estoppel gives no title to which is the subject matter of the estoppel.<sup>169</sup> Where in-wedlock children continue to accord their half-siblings begotten before or after the marriage whether out-of-wedlock - due recognition say, a year or more after their father's death they should be considered as having acquiesced in the reality that their half- siblings have a right to inherit. Such positive acts as permitting them to remain in the family house, participating in funeral, allowing them to obtain letters of administration, or enabling them to have a share of the estate should be held as creating in the half- siblings legitimate expectation from which the in-wedlock children should not resile<sup>170</sup>. The man of the house who perhaps constituted restraint to the in-wedlock children's protest having left the scene of death, should be estopped if they fail to promptly challenge the 'stranger' children's right to inherit.<sup>171</sup>

### **3.6 The Role of Deoxyribonucleic Acid in Ascertaining Paternity**

Deoxyribonucleic Acid is a self-replicating material that is in every living organism. In the simplest words, it is a carrier of all genetic information. It contains the instructions needed for organisms to develop, grow, survive and reproduce.<sup>172</sup> It is one long molecule that contains our genetic 'code' or 'recipe'. This recipe is the starting

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<sup>169</sup> Chianu, (note 4) 255.

<sup>170</sup> Chianu, (note 4) 257.

<sup>171</sup> Ibid .

<sup>172</sup> Oludayo Ayeni, DeoxyriboNucleic Acid (DNA) Evidence under Nigerian Law (2022) <<http://sabilaw.org>> accessed 5 December 2024.

point for our development but DNA's interaction with outside influences such as our lifestyle, environment and nutrition ultimately form the human being.<sup>173</sup>

The concept of 'the DNA test' was first discovered in 1869 by a Swiss researcher called Friedrich Miescher who was initially trying to study the composition of lymphoid cells (white blood cells) rather he isolated a new molecule he called nuclein (DNA with proteins) from a cell nucleus. He was the first to define DNA as a different molecule. In 1984, Alec Jeffreys discovered the technique of genetic fingerprinting in a laboratory in the Department of Genetics at the University of Leicester. The introduction of DNA evidence and its use by law enforcement agencies was pioneered by Sir Alec Jeffreys.<sup>174</sup> It has been extremely successful for testing in crime scenes, predisposition to disease and paternity tests. Dr Alec Jeffreys made genetic fingerprinting available to the public. In 1986 DNA was first used in a criminal investigation by Dr. Jeffreys. The investigation used genetic fingerprinting in a case of two rapes and murders that had happened in 1983 and 1986. These crimes happened in a small town called Leicestershire, which is in the United Kingdom. They collected fingerprints and connected them with semen stains collected from where the raping and murders were located. Then in 1987, DNA evidence was first used in the United States on a Florida rapist man, Tommie Lee Andrews. After using DNA evidence in his case, he was sentenced to 22 years in prison for the crime of rape.<sup>175</sup>

The provisions of the Evidence Act 2011(as amended) provide the foundation for the admissibility of DNA evidence in Nigerian courts. According to section 67 of the Evidence Act 2011, witness opinions are not admissible; however, sections 68-76 of the Act allow for exceptions, particularly section 68 of the Evidence Act states that:

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<sup>173</sup> Ayeni, (note 172).

<sup>174</sup> Ibid.

<sup>175</sup> Ayeni, (note 172).

‘when the court has to form an opinion upon a point of foreign law, customary law, or custom or science or art or as to the identity of handwriting or finger impressions, opinions upon that point of persons specially skilled in such foreign law, customary law or customs or science or art or in questions as to the identity of handwriting or finger of impressions are admissible’. In *Shell Petroleum Development Co (Nig) Ltd v. Tiebo*<sup>176</sup> the Court held that in determining whether a person is an expert, the question is: is he peritus, is he skilled, has he an adequate knowledge<sup>177</sup>. In the instant case, the conclusion and finding that Exhibit E was produced by an expert was justifiable in law and within the provisions of section 57 of the Evidence Act.<sup>178</sup>

The Courts have recognized the use of DNA tests as a means of ascertaining the paternity of a child when a child’s paternity is in contention. In *Olayinka v Adeparusi & Anor*<sup>179</sup> the Court of Appeal held that the paternity of the disputed *res* has not been determined, anybody can be awarded custody of a child but the most important thing is that if a party is claiming paternity it is trite that a Court of law should be allowed to determine same on proof of evidence relating to paternity, which could only be done by referral for a DNA test of the parties involved. After such test, the Court must declare the actual father of the child in dispute, in consonance with the evidence at its disposal.

In *Ibeabuchi v Ibeabuchi*<sup>180</sup> the Court of Appeal noted that by the combined effect of section 165 of the Evidence Act and section 84 of the Matrimonial Causes Act, a legal presumption is also created in respect of the legitimacy of a child. This position was also confirmed recently in *Idahosa v Idahosa*<sup>181</sup> where the Supreme Court held inter

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<sup>176</sup> (1996) 4 NWLR (pt. 445) 657.

<sup>177</sup> Ibid .

<sup>178</sup> Ibid .

<sup>179</sup> (2011) LPELR-8691 (CA).

<sup>180</sup> (2016) LPELR-41268 (CA).

<sup>181</sup> (2020) 6 NWLR (pt. 1720) 254 SC.

alia that; any person born during the continuance of a valid marriage shall be presumed to be a child of that man. The burden of proving otherwise rests with the party alleging the contrary.<sup>182</sup> Under Nigerian law, evidence to dislodge paternity requires proof beyond a reasonable doubt. Under section 165 of the Evidence Act, any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after the dissolution of the marriage, the mother remaining unmarried, shall be presumed to be a child of the man.

section 63 of the Child's Rights Act 2003 governs the taking and use of DNA tests in Nigeria by providing that in a civil proceeding where the paternity/ maternity of a person is to be determined by the Courts, either of the parties to the suit can apply for the administration of scientific tests, including blood tests and DNA tests to ascertain the parentage of such person.<sup>183</sup>

Where a person is a minor (under the age of 18) and his paternity needs to be ascertain, the Court can grant an Order to conduct a DNA test in the interest of the child to determine where the child belongs. In *Tony Anozia v Okwunwa Nnani & Ignatius Nnani*<sup>184</sup> the Court held that where a person is a minor (not mature adult) and his paternity is in issue, the Court can Order the conduct of DNA test in the overall interest of the child to ascertain where he belongs.<sup>185</sup> However, that is not the situation in the instant case where the appellant had a duty to establish his claim on the 2<sup>nd</sup> respondent, independently and to produce such evidence to the Court. In a situation, where there is an election to undertake a DNA test, to establish his claim it was up to the appellant to go for it on his own and/or with the respondents to do so, without

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<sup>182</sup> Ayeni, (note 172).

<sup>183</sup> Ayeni, (note 172).

<sup>184</sup> (2015) 8 NWLR (pt. 1461) 241.

<sup>185</sup> Ayeni, (note 172)

resorting to the coercive powers of the Court, to compel his adversary to supply him with the possible evidence needed to prove his case.

Notwithstanding that the right to ascertain paternity existing in Nigeria it is important to understand that there are some conditions precedent surrounding the application for a paternity test which must be adhered. They include the following:

A) Filing an Application in Court: this entails filing a motion in Court which should be supported by an affidavit stating the reasons for the paternity test. The application or motion is to be filed at the family Court division of the State

B) Hearing of the Application and Order of Court: the Court will review the application and after considering the facts and evidence before it, may grant an Order if it finds that it is in the best interest of the child and reasonable. The Court may also suggest where the test will be conducted.

C) Collecting the DNA Samples: this involves collecting DNA samples from the putative father and child to send them for analysis at the laboratory, the results are sealed and given to the Court directly.

D) Disclosing the Results: this involves the result being disclosed in Court which will inform the Court's final decision.<sup>186</sup>

However, it is imperative to note that where the concerned person is an adult the Court cannot make an Order for a DNA test to be carried out where the adult person does not consent. No Court has authority to compel any person to submit to a blood test. Indeed no Court has jurisdiction to compel a litigant's opponent at law to submit to medical examination to bolster the former's claim.<sup>187</sup> Notwithstanding, the provision of section 63(1) of the Child Right Act 2003 a Court is not empowered to compel a person to take a DNA test to ascertain whether or not he is the father of a

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<sup>186</sup> Ayeni, (note 172).

<sup>187</sup> Chianu, (note 4) 227.

child, however, the refusal of a person to take the test may be an indication that the person is suspect. Essentially the role of DNA in ascertaining paternity is partially helpful as the Court cannot use its coercive powers to compel a person to take a DNA test where a party does not consent.

**CHAPTER FOUR**

**SOCIETAL AND LEGAL CHALLENGES IN ELIMINATING  
ILLEGITIMACY IN NIGERIA**

Notwithstanding the constitutional provisions such as section 42(2) of the 1999 Constitution aimed at addressing discrimination, children born out of wedlock continue to face stigma and marginalization. The chapter is structured to assess these challenges thoroughly, beginning with an analysis of the legislative and judicial shortcomings. It then investigates the influence of cultural and religious traditions, as well as the pervasive social stigma, in sustaining discriminatory practices. Furthermore, the chapter highlights the intersection of legal and societal factors, demonstrating how they collectively undermine efforts to achieve equality.

**4.1 Legal Challenges**

This section examines the legal hurdles in eliminating the concept of illegitimacy in Nigeria, focusing on legislative inadequacies, judicial enforcement, and institutional barriers. Despite the constitutional provisions intended to protect the rights of children born out of wedlock, several legal challenges hinder the effective elimination of illegitimacy and its associated discrimination.

**4.1.1 Inadequacies in Legislative Provisions**

Despite the constitutional protection offered by section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria,<sup>188</sup> which prohibits discrimination based on birth status, the legislative provisions in Nigeria remain insufficient in fully addressing the concept of illegitimacy.<sup>189</sup> It has been argued that the provision of section 42(2) is somewhat vague and lacks the specificity needed to ensure the comprehensive

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<sup>188</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>189</sup> Achi & Akaaunde, (note 43).

protection of children born out of wedlock across various legal and social spheres.<sup>190</sup>

While the provision seeks to eliminate discrimination, its scope is limited, and there are no specific laws that guarantee the full legal rights of children born outside marriage, particularly in areas such as inheritance, custody, and recognition.<sup>191</sup>

For instance, while section 42(2)<sup>192</sup> prohibits discrimination, it does not provide for a clear framework or enforcement mechanisms for addressing situations where children born out of wedlock face discrimination in daily life or in specific legal processes.<sup>193</sup>

There is a lack of specific legislation that mandates equal treatment of children regardless of the status of their birth.<sup>194</sup> This gap in the legal framework means that children born out of wedlock may still be denied the same opportunities and protections accorded to children born within marriage, leaving them vulnerable to discrimination in areas such as education, healthcare, and inheritance.<sup>195</sup>

Moreover, there are also gaps in family law that fail to challenge the societal perceptions of illegitimacy. For example, the Nigerian laws on inheritance still reflect a preference for children born within wedlock, and the rights of children born outside marriage are often subject to the will or discretion of the parents.<sup>196</sup> This disparity reflects the failure or inability of the legislative system to fully dismantle the concept of illegitimacy.<sup>197</sup>

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<sup>190</sup> G.D Christopher, "A Critical Analysis of the Legal and Institutional Frameworks for the Protection of the Right of the Child in Nigeria," *SSRN* (2023) 4581396.

<sup>191</sup> C.N Nkemakonam, "Human Identity: Child Rights and the Legal Framework for Marriage in Nigeria," *Marriage & Family Review* (2015) 51(4) 305-336.

<sup>192</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>193</sup> Nkemakonam, (note 191).

<sup>194</sup> F. Anyogu & E. Okika, "Marginalization and Discrimination in Nigeria: A Legal Pointer to the Dictates of the 1999 Constitution of Nigeria", *Nnamdi Azikiwe University Journal of Private and Property Law* (2024) 1(2) 29-42.

<sup>195</sup> Nkemakonam, (note 191).

<sup>196</sup> Owasanoye Bolaj, "The Regulation of Child Custody and Access in Nigeria," *Family Law Quarterly* (2005) 39(2) 405-428.

<sup>197</sup> *Ibid.*

Inadequate legal provisions in Nigeria, therefore, contribute to the persistence of the concept of illegitimacy, as children born out of wedlock continue to face disadvantages that their counterparts in legally recognized marriages do not.<sup>198</sup> Legislative reform is, therefore, crucial to closing these gaps, ensuring that the legal framework aligns with the constitutional commitment to equality and non-discrimination. Without further legislative action, the full elimination of the concept of illegitimacy in Nigeria remains unlikely.<sup>199</sup>

#### **4.1.2 Judicial Enforcement and Interpretations**

Judicial enforcement of section 42(2) of the 1999 Constitution,<sup>200</sup> which prohibits discrimination based on status of birth, has faced significant challenges in Nigeria. While the constitutional provision offers protection against discrimination for children born out of wedlock, its enforcement or interpretation by the judiciary has often been inconsistent and shaped by societal attitudes toward illegitimacy.<sup>201</sup> This inconsistency in judicial enforcement and interpretation has led to uneven outcomes in cases involving children born outside of marriage, undermining the full realisation of their rights.<sup>202</sup>

One of the key issues with judicial enforcement is the lack of a uniform approach to the interpretation of the constitutional provision. Courts have, at times, upheld the rights of children born out of wedlock, but there is no clear and consistent judicial stance on the meaning and scope of "discrimination" in relation to illegitimacy.<sup>203</sup> For example, some Courts may interpret section 42(2) as offering broad protection against all forms of discrimination, while others may limit its application to specific contexts

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<sup>198</sup> A.E Adegbite, *The Child Care System under the Customary Law of the Yoruba People in Southwestern Nigeria* (LLM Dissertation Faculty of Law University of Ibadan 2018).

<sup>199</sup> Nkemakonam, (note 191).

<sup>200</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>201</sup> A.E Anekwe, "Legal Framework for the Dissolution of Marriage in Nigeria: Prospects, Challenges and the Way Forward." *Challenges and the Way Forward* (2024).

<sup>202</sup> Anekwe, (note 201).

<sup>203</sup> K. Anifalaje, "Comparative trends in the status and rights of the illegitimate child." (2013).

or fail to recognise its relevance in cases involving inheritance or custody rights.<sup>204</sup>

This variability in judicial interpretation can leave children born out of wedlock vulnerable to unequal treatment, as their rights are not always consistently protected.

Furthermore, judges in Nigeria are not immune to the societal biases and prejudices that continue to stigmatize children born outside marriage.<sup>205</sup> These societal attitudes can influence judicial decisions, particularly in family law cases where traditional views on family structure and legitimacy often prevail.<sup>206</sup> In some cases, Courts may be reluctant to grant full rights to children born out of wedlock, influenced by deep-seated beliefs about the importance of marriage and the traditional family unit. Such biases can affect the decisions made regarding custody, inheritance, and other legal matters, often to the detriment of children born outside of marriage.<sup>207</sup>

In addition, judicial enforcement of constitutional protections for children born out of wedlock is often hindered by a lack of clear legal standards and guidelines. Without specific legal provisions and precedents that unequivocally define the rights of these children, judges are left to navigate cases based on limited statutory guidance and personal interpretations. This lack of clarity can result in uneven enforcement of rights and can perpetuate the inequality that section 42(2)<sup>208</sup> seeks to address.

The judicial enforcement and interpretation of section 42(2)<sup>209</sup> remain critical obstacles in eliminating the concept of illegitimacy in Nigeria. While there have been

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<sup>204</sup> M.E Adjami, "African courts, international law, and comparative case law: Chimera or emerging human rights jurisprudence." *Mich. J. Int'l L.* 24 (2002) 103.

<sup>205</sup> Tolulope Eboka, *Understanding the Practice of Girl Marriage in Northern Nigeria from the Perspectives of Key Decision-Makers*, <[http://nectar.northampton.ac.uk/13092/1/Tolulope\\_Eboka\\_2017\\_Understanding\\_the\\_Practice\\_of\\_Girl\\_Marriage\\_in\\_Northern\\_Nigeria\\_from\\_the\\_Perspectives\\_of\\_Key\\_Decision\\_Makers.pdf](http://nectar.northampton.ac.uk/13092/1/Tolulope_Eboka_2017_Understanding_the_Practice_of_Girl_Marriage_in_Northern_Nigeria_from_the_Perspectives_of_Key_Decision_Makers.pdf)> Accessed on 29 December 2024.

<sup>206</sup> M. K. Imam-Tamim, "Impact of globalisation on domestic family law: Multi-tiered marriage in Nigeria as a case study." *The Journal of Legal Pluralism and Unofficial Law* (2016) 48 (2) 256-272.

<sup>207</sup> C.N Nkemakonam, *Family and Succession Law in Nigeria* (Kluwer Law International B.V 2022) 1-536.

<sup>208</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>209</sup> Ibid.

some positive rulings, the inconsistency in judicial approaches, the influence of societal biases, and the absence of clear legal frameworks have contributed to a lack of uniform protection for children born out of wedlock. To ensure the effective enforcement of constitutional rights, a more consistent and proactive judicial approach is necessary, along with clearer legal guidance to eliminate discrimination and ensure equal treatment for all children.

#### **4.2 Institutional Barriers**

Institutional barriers play a significant role in perpetuating the concept of illegitimacy in Nigeria, hindering the effective implementation of section 42(2) of the 1999 Constitution,<sup>210</sup> which seeks to eliminate discrimination based on the status of birth.<sup>211</sup> These barriers often manifest in the legal, social, and administrative systems that should be responsible for upholding the rights of children born out of wedlock.<sup>212</sup> While the constitutional provision aims to safeguard these children's rights, various institutions—such as government agencies, legal institutions, and social organizations—face challenges that prevent the full realisation of these protections.<sup>213</sup> One major institutional barrier is the lack of adequate awareness and training within legal and social institutions about the rights of children born out of wedlock.<sup>214</sup> Law enforcement agencies, social workers, and even legal professionals may not always be fully equipped with the knowledge to recognize and challenge discriminatory practices against such children. This gap in understanding can lead to negligence or

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<sup>210</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>211</sup> Okegbola, Racheal M. "Electoral Legitimacy and Gender Representation Barriers; Theories and Practices in Nigeria," <[https://www.texilajournal.com/thumbs/article/Academic\\_Research\\_vol10\\_issue4\\_Article\\_17.pdf](https://www.texilajournal.com/thumbs/article/Academic_Research_vol10_issue4_Article_17.pdf)> Accessed on 29 December 2024.

<sup>212</sup> Nkemakonam, (note 191).

<sup>213</sup> Emmanuel Enweonwu, *International Law and the End of Child Marriage: A Case Study of Nigeria* (Doctoral thesis Birmingham City University 2024).

<sup>214</sup> Christopher, (note 190).

poor enforcement of the constitutional provision.<sup>215</sup> For example, in court proceedings, judges and lawyers might still be influenced by traditional notions of legitimacy, despite the legal protections provided by section 42(2). As a result, children born out of wedlock may face unequal treatment in areas like inheritance, custody, and access to social services.<sup>216</sup>

Also, many public institutions in Nigeria, including those that handle vital records, education, and healthcare, still perpetuate discriminatory practices against children born outside of marriage.<sup>217</sup> Birth registration process, for instance, may sometimes be biased, with children born out of wedlock facing difficulties in having their births formally recognized. This lack of proper registration can lead to challenges in accessing basic rights, such as education and healthcare, thereby reinforcing the social stigma associated with illegitimacy. Without institutional reform to ensure that all children are treated equally, irrespective of their birth status, the elimination of illegitimacy remains an elusive goal.<sup>218</sup>

Additionally, the lack of coordination among various government agencies that deal with family law, child welfare, and human rights can further obstruct the elimination of the illegitimacy concept.<sup>219</sup> For instance, the judiciary, law enforcement, and child protection agencies may not work in tandem to create a unified approach toward protecting the rights of children born out of wedlock. This fragmented approach leads

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<sup>215</sup> Wilson Ola Diriwari, *Efficacy of the Legal Frameworks for Child Protection in Nigeria* ( Doctoral thesis Brunel University London 2017).

<sup>216</sup> Christopher, (note 190).

<sup>217</sup> C. Oduenyi, J. Banerjee, O. Adetiloye & Ors, "Gender Discrimination as a Barrier to High-Quality Maternal and Newborn Health Care in Nigeria: Findings from a Cross-Sectional Quality of Care Assessment". *BMC Health Services Research* (2021) 21 1-15.

<sup>218</sup> Nkemakonam, (note 191).

<sup>219</sup> C. E Onwuka, *Parental Factors as Predictors of Child's Rights Act Acceptance and compliance Among Parents in Ibadan, Nigeria* (LLM Dissertation Faculty of Education University of Ibadan 2018).

to inefficiencies in addressing the legal and social issues faced by these children, and may inadvertently allow discriminatory practices to persist.<sup>220</sup>

It is noteworthy that institutional barriers are significant obstacles to the realisation of the constitutional guarantee against discrimination for children born out of wedlock. These barriers are entrenched in the lack of awareness, training, and coordination among key institutions, as well as in discriminatory practices embedded within the administrative processes. To eliminate the concept of illegitimacy, there is an urgent need for institutional reform, including training for legal and social service providers, improved access to public services for children born outside marriage, and better coordination across governmental bodies to ensure the full enforcement of section 42(2) of the 1999 Constitution.<sup>221</sup>

### **4.3 Cultural and Societal Challenges**

The elimination of the concept of illegitimacy in Nigeria faces substantial cultural and societal challenges, which are deeply ingrained in the fabric of Nigerian society. Despite constitutional protections, cultural norms, religious influences, and social stigma continue to perpetuate the marginalization of children born out of wedlock. These factors not only hinder the effective application of section 42(2) of the 1999 Constitution but also contribute to the persistence of discriminatory attitudes toward these children, affecting their social status, rights, and opportunities.

#### **4.3.1 Cultural Norms and Traditions**

In Nigeria, cultural norms and traditions play a significant role in shaping the societal perception of children born out of wedlock. These norms are deeply rooted in the diverse ethnic groups across the country, where marriage is often regarded as a

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<sup>220</sup> Nkemakonam, (note 191).

<sup>221</sup> The 1999 Constitution of the Federal Republic of Nigeria .

fundamental institution for the legitimacy of children.<sup>222</sup> Traditional beliefs dictate that children born within the bounds of marriage are recognized as legitimate, while those born outside this institution may face stigmatization and exclusion from certain social privileges.<sup>223</sup>

Marriage is seen as a vital social contract that not only binds a couple but also affirms the legitimacy of their offspring.<sup>224</sup> In many Nigerian cultures, a child's social status is directly linked to their parents' marital status. As such, children born outside of wedlock are frequently regarded as a source of dishonour to their families and communities. This perception can result in negative societal attitudes, where children born out of wedlock are often denied the same respect, opportunities, and inheritance rights as their legitimate counterparts.<sup>225</sup>

In rural areas, where traditional values are more dominant, the concept of illegitimacy is particularly pervasive. Families may go to great lengths to avoid the stigma associated with bearing children outside of marriage, even if it means denying or marginalizing these children.<sup>226</sup> Furthermore, many of these cultural norms are passed down through generations, perpetuating the marginalization of children born out of wedlock. These deep-seated beliefs often create societal pressure to conform, thereby hindering efforts to challenge the discriminatory status of such children.<sup>227</sup> The persistence of these traditions contributes significantly to the difficulties faced in eliminating the concept of illegitimacy, despite the legal protections offered under the Nigerian Constitution.

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<sup>222</sup> An-Na'im Abdullahi Ahmed, "Religious Norms and Family Law: Is it Legal or Normative Pluralism?," *Emory Int'l L. Rev* (2011) 25 785.

<sup>223</sup> Nkemakonam, (note 191).

<sup>224</sup> Nkemakonam, (note 191).

<sup>225</sup> Ritgak A. Dimka & Simon L. Dein, "The work of a woman is to give birth to children: Cultural constructions of infertility in Nigeria," *African journal of reproductive health* (2013) 17(2) 102-117.

<sup>226</sup> S.T Osemwegie, "Privileging the voices of Nigerian children: A phenomenological study of their lived experiences following the loss of loved ones to stigmatized death", Capella University (2010).

<sup>227</sup> Nkemakonam, (note 191).

To address this challenge, there is a need for continuous cultural reformation and awareness. Initiatives aimed at changing public attitudes, coupled with legal provisions, could help to shift the perception of legitimacy and reduce the social stigma attached to children born outside of marriage.

### 4.3.2 Religious Influences

Religious beliefs and practices are significant factors influencing the perception of children born out of wedlock in Nigeria. The major religions in the Country are Islam and Christianity which often emphasize the sanctity of marriage, and this in turn shapes societal attitudes towards legitimacy.<sup>228</sup> In both Islamic and Christian teachings, marriage is viewed as a sacred union, and the legitimacy of children is often linked to the marital status of the parents. These religious principles can perpetuate the social stigma associated with children born outside of wedlock.<sup>229</sup>

In Islam, marriage is considered a legal and moral contract, and the legitimacy of children is closely tied to this institution. Islamic law typically recognizes children born within marriage as legitimate, and children born out of wedlock, often referred to as "illegitimate," may face social marginalization.<sup>230</sup> While Islamic law provides for the rights of children born outside marriage, cultural practices sometimes overshadow these provisions, leaving such children vulnerable to societal discrimination.<sup>231</sup>

Christianity in Nigeria similarly places a strong emphasis on marriage, viewing it as divinely ordained. The Bible teaches that sexual relations and childbearing should

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<sup>228</sup> Modestus Chiedozie Adimekwe, "Legal, Social and Religious Perspectives on the Status of Human Rights in Nigeria". *The Impact of Religion, Personality, Values and Worldviews on Attitudes Towards Human Rights: An Empirical-theological Study Among Nigerian Youth*. Cham: Springer Nature Switzerland (2024) 49-234.

<sup>229</sup> Ibid.

<sup>230</sup> Abdulrahman Manswab & Saliu Ishola Abdullahi, "Fundamentals of Valid Marriage in Islamic Law: An Evaluation of Muslim Practices in Nigeria," *Journal of Islamic Review* (2018) 18(2) 285-313.

<sup>231</sup> A. Baihaki & D. D Heniarti, "Analysis of Philosophical, Sociological and Juridical Basis Protection of Civil Rights of Children Born Outside of Marriage in Indonesia," *INJOSER* (2024) 2(8) 2187-2209.

occur within the bounds of marriage. Children born outside of marriage are often regarded as having been born in sin or as the product of moral failure, leading to stigmatization.<sup>232</sup> Religious communities sometimes reinforce this view by labeling children born out of wedlock as "illegitimate," thereby contributing to the broader social notion of illegitimacy.

Religious leaders, who hold significant sway over the beliefs and practices of their congregations, often play a key role in shaping public attitudes towards children born outside of marriage.<sup>233</sup> Their sermons, teachings, and community actions may reinforce traditional norms that regard children born out of wedlock as less worthy or deserving of full social integration. While some progressive religious voices advocate for greater inclusivity and the de-stigmatization of children born outside of marriage, many conservative religious groups continue to uphold the idea that marriage is the only proper context for childbirth, thereby perpetuating the concept of illegitimacy.<sup>234</sup> In a country as religiously diverse as Nigeria, these religious views are crucial in understanding the challenges to eliminating the concept of illegitimacy. The deeply ingrained religious values that associate legitimacy with marital status create societal resistance to change, even in the face of constitutional protections.

### **4.3.3 Social Stigma and Discrimination**

Social stigma and discrimination are pervasive challenges that contribute significantly to the persistence of the concept of illegitimacy in Nigeria. Despite constitutional protections and legal reforms aimed at ensuring equality, children born out of wedlock continue to face societal marginalization and stigma.<sup>235</sup> The stigma

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<sup>232</sup> Louis M. Epstein, *Marriage Laws in the Bible and the Talmud* ( Brill 2020).

<sup>233</sup> Enweonwu, (note 213).

<sup>234</sup> Nkemakonam, (note 191).

<sup>235</sup> Ibid.

associated with illegitimacy is deeply ingrained in Nigerian society and is perpetuated through various social interactions, cultural practices, and community norms.<sup>236</sup>

The social stigma surrounding children born outside of marriage is often linked to the perception of these children as a deviation from the ideal family structure.<sup>237</sup> In many communities, there is a strong social expectation that children should be born within the confines of marriage, which is seen as the proper and morally acceptable context for procreation.<sup>238</sup> As a result, children born outside of wedlock are often viewed as "different" or "illegitimate," leading to their exclusion from certain social and cultural opportunities.

This stigma can manifest in various ways. For instance, children born out of wedlock may be denied the same social privileges, such as inheritance rights, access to family name, and participation in family events.<sup>239</sup> In educational settings, these children may face bullying or exclusion from peers, further contributing to their sense of isolation and inferiority. The negative societal attitudes can also affect the psychological well-being of the children, as they internalize the belief that they are inferior or less deserving of respect and opportunities.<sup>240</sup>

Moreover, the discrimination faced by these children often extends to their mothers, who may also be stigmatized for bearing children outside of marriage. In many Nigerian communities, unmarried women who give birth are viewed with disdain or regarded as having breached social norms. This societal judgment reinforces the

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<sup>236</sup> Nkemakonam, (note 191).

<sup>237</sup> Ibid.

<sup>238</sup> Nkemakonam, (note 191).

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

stigma surrounding illegitimacy, as the women themselves may be seen as morally or culturally inferior.<sup>241</sup>

The persistence of social stigma and discrimination is compounded by the lack of public awareness and education regarding the constitutional rights of children born out of wedlock.<sup>242</sup> Many Nigerians continue to operate under traditional and cultural assumptions, unaware of the legal framework that guarantees equality and non-discrimination for all children, irrespective of their parents' marital status. As a result, the social marginalization of children born outside marriage continues, even in the face of legal protections.<sup>243</sup>

#### **4.4 Intersection of Legal and Societal Factors**

The intersection of legal and societal factors plays a crucial role in shaping the ongoing challenges to eliminating the concept of illegitimacy in Nigeria. While legal protections, such as those outlined in section 42(2) of the 1999 Constitution,<sup>244</sup> aim to safeguard the rights of children born out of wedlock, societal norms and deeply ingrained cultural practices often undermine these legal provisions. The tension between the law and societal attitudes highlights the complexity of addressing illegitimacy in Nigeria, as changes in the law alone are insufficient without corresponding shifts in social attitudes and practices.

On the legal side, section 42(2) of the 1999 Constitution<sup>245</sup> guarantees the rights of all citizens, regardless of the marital status of their parents. However, the application of these rights is often hindered by societal beliefs that continue to equate legitimacy

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<sup>241</sup> Kingsley Omote Mrabure & Anire Omonoseh, "Recognizing the Inalienable Reproductive Health Rights of Women in Nigeria. Customary and Sharia Law as Hindrances: The Way Forward." *Commonwealth Law Review Journal* (2022) 8 239-253.

<sup>242</sup> Enweonwu, (note 213).

<sup>243</sup> Ibid.

<sup>244</sup> The 1999 Constitution of the Federal Republic of Nigeria.

<sup>245</sup> Enweonwu, (note 213).

with the institution of marriage.<sup>246</sup> Legal reforms designed to ensure equality may be undermined if they are not accompanied by efforts to challenge and change societal norms that view children born out of wedlock as lesser or less deserving of full social recognition.<sup>247</sup>

Moreover, the role of the Courts in interpreting and enforcing these legal provisions is significantly influenced by societal attitudes. While Courts may recognize the legal rights of children born outside of marriage, they may also be influenced by prevailing societal views that reinforce the concept of illegitimacy.<sup>248</sup> This creates a disconnect between the law's intentions and its practical implementation. Judges, in some cases, may be swayed by cultural expectations and personal biases, which can result in inconsistent application of the law and a failure to fully protect the rights of children born out of wedlock.<sup>249</sup>

Additionally, the legal system itself, including law enforcement agencies and institutions tasked with upholding rights, may be influenced by societal attitudes toward legitimacy. For instance, social workers, legal practitioners, and even family Courts may inadvertently reinforce societal norms by failing to fully support the integration of children born out of wedlock into the broader social fabric.<sup>250</sup> This can be seen in cases where such children face challenges in securing inheritance rights, access to family names, or other social privileges, despite the legal recognition of their rights.

The intersection of legal and societal factors also presents an opportunity for positive change. Legal reforms, if implemented effectively and accompanied by public

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<sup>246</sup> Itua, (note 62).

<sup>247</sup> V. E. Onuoha & Michael Attah, "The Right to Inherit: Illegitimacy and Constitutional Liberation in Nigeria—Just a Legal Shield?." *Journal of Social Welfare and Family Law* (2014) 36 (3) 226-240.

<sup>248</sup> Achi & Akaaunde, (note 43).

<sup>249</sup> Achi & Akaaunde, (note 43).

<sup>250</sup> Itua, (note 62).

awareness campaigns, can serve as catalysts for changing societal perceptions.<sup>251</sup> The law has the potential to reshape societal attitudes by affirming the rights of children born out of wedlock and providing legal frameworks that promote their inclusion. However, this requires collaboration between legal institutions, policymakers, and societal actors, including religious and community leaders, to create an environment where the legal recognition of all children, regardless of the status of their birth, is fully embraced.<sup>252</sup>

Ultimately, the successful elimination of the concept of illegitimacy in Nigeria requires a holistic approach that addresses both legal and societal factors. Legal provisions must be robustly enforced and supported by widespread public education campaigns aimed at challenging the social stigma and discrimination faced by children born out of wedlock. Only through this intersection of legal reforms and societal change can the concept of illegitimacy be truly eradicated, ensuring that all children in Nigeria are accorded equal rights and opportunities.

#### **4.5 Comparative Perspectives**

In examining the challenges surrounding the concept of illegitimacy in Nigeria, it is instructive to consider how other Countries have approached similar issues, especially in relation to the rights of children born out of wedlock. A comparative analysis can provide valuable insights into the effectiveness of different legal frameworks and societal approaches, offering potential solutions that could be adapted to the Nigerian context.

Globally, many Countries have undergone significant legal and social changes to eliminate the distinction between legitimate and illegitimate children, ensuring that all

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<sup>251</sup> Onuoha & Attah, (note 247).

<sup>252</sup> Ibid.

children, regardless of their birth status, enjoy equal rights.<sup>253</sup> For instance, several Western Countries have enacted laws that guarantee inheritance, social security benefits, and parental rights for children born outside of marriage.<sup>254</sup> These legal reforms are often supported by comprehensive social policies aimed at reducing stigma and discrimination, such as public awareness campaigns and educational programs. Countries such as Sweden, Denmark, and the United Kingdom have moved beyond the traditional distinctions between legitimate and illegitimate children, with laws that recognize the equality of all children in both family law and broader societal contexts.<sup>255</sup>

In Sweden, for example, the introduction of same sex marriage laws and a strong commitment to child welfare have led to a societal shift, where the concept of illegitimacy is largely obsolete.<sup>256</sup> The Swedish legal system ensures that children born outside of wedlock are treated equally, particularly in terms of inheritance and custody.<sup>257</sup> This comprehensive legal recognition is reinforced by societal attitudes that do not stigmatize children based on the marital status of their parents.

Similarly, in the United Kingdom, the concept of illegitimacy was abolished in the 20th century through various legislative reforms, including the Family Law Reform Act 1987.<sup>258</sup> This law eliminated the distinction between legitimate and illegitimate children in terms of inheritance, parental rights, and access to social benefits. Over time, the United Kingdom has built a social framework that supports the integration of

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<sup>253</sup> Geraldine Van Bueren, "The International Law on the Rights of the Child." *Martinus Nijhoff Publishers* (2021) 35.

<sup>254</sup> Douglas NeJaime, "The Nature of Parenthood." *The Yale Law Journal* (2017) 2260-2381.

<sup>255</sup> Geraldine Van Bueren, (note 253).

<sup>256</sup> Darren Rosenblum, "Unsex Mothering: Toward a New Culture of Parenting," *Harv. JL & Gender* (2012) 35 57.

<sup>257</sup> Maarit Jänterä-Jareborg, Margareta Brattström & Lisa Marie Eriksson, "National report: Sweden," *University of Uppsala*, <disponivel em <http://ceflonline.net/wpcontent/uploads/Sweden-Parental-Responsibilities.Pdf>> (2015).

<sup>258</sup> Mary Ann Glendon, "The Transformation of Family Law: State, Law, and Family in the United States and Western Europe," *University of Chicago Press* (1989).

children born out of wedlock, aiming to eliminate stigma and ensure that all children have equal access to opportunities, irrespective of their parents' marital status.<sup>259</sup>

In contrast, Countries with strong religious or traditional values, such as some African nations for instance Angola and Kenya, may still face significant challenges in changing societal attitudes toward children born out of wedlock.<sup>260</sup> In these contexts, cultural and religious beliefs about family structure can hinder legal progress. However, there have been notable efforts in some African countries, such as South Africa, where constitutional provisions and decisions of Courts have sought to eliminate discriminatory practices and promote equality for all children.<sup>261</sup> South Africa's Constitution, which guarantees equality and prohibits discrimination on various grounds, has influenced the Country's approach to family law, including the recognition of the rights of children born outside of marriage.<sup>262</sup>

While these examples provide valuable lessons, they also highlight the unique challenges Nigeria faces. The deep-rooted cultural and religious norms in Nigeria regarding the sanctity of marriage and the stigma attached to children born outside of wedlock present significant barriers to change. Thus, Nigeria may benefit from a tailored approach that combines legal reform with targeted societal interventions, considering both the legal and cultural complexities specific to Nigerian society.

The comparative perspectives underscore the importance of a multi-faceted approach that combines strong legal protections, effective enforcement, and efforts to change societal attitudes. Lessons from Countries that have successfully eliminated the

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<sup>259</sup> Lisa Forman Cody, "The Politics of Illegitimacy in an Age of Reform: Women, Reproduction, and Political Economy in England's New Poor Law of 1834," *Journal of Women's History* (2000) 11(4) 131-156.

<sup>260</sup> John C. Caldwell & Pat Caldwell, "The Cultural Context of High Fertility in Sub-Saharan Africa," *Population and development review* (1987) 13 409-437.

<sup>261</sup> Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on some Current Challenges and Future Prospects." *Buffalo Law Review* (2011) 59 1007.

<sup>262</sup> Brenda Oppermann, "The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States." *Hastings Women's LJ* (2006) 17 65.

concept of illegitimacy can guide Nigeria's path forward, offering strategies for overcoming legal, cultural, and social barriers to ensuring equality for all children.

## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summary of Findings

The study critically analyzed the impact of section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria on the concept of illegitimacy, focusing on the rights and status of children born out of wedlock. The findings of the study indicate the following:

- I. that although section 42(2) provides constitutional protection against discrimination based on birth status, its practical implementation has been insufficient in fully addressing the issue. Despite the legal recognition of equal rights for all children, legislative and institutional shortcomings continue to perpetuate discrimination;
- II. the study revealed that the provision does not explicitly eliminate all forms of legal distinctions between legitimate and illegitimate children, leaving gaps that are often exploited in legal proceedings. Judicial interpretations of section 42(2) have varied, with some Courts failing to adequately enforce the constitutional guarantee of equality, thus allowing discriminatory practices to persist in certain cases;
- III. culturally, deeply ingrained social norms and religious beliefs contribute to the continued stigmatization of children born outside of marriage, influencing public perceptions and legal interpretations. This social stigma often results in discriminatory treatment, which further exacerbates the challenges faced by children born out of wedlock, particularly in areas such as inheritance, legitimacy, and access to certain rights.

#### 5.2 Recommendations

To address the challenges related to the concept of illegitimacy and ensure equal rights for children born out of wedlock in Nigeria, the study recommends as follows:

- i. enact laws that would give practical effect to the provisions of section 42 (2) of the 1999 Constitution;
- ii. engaging public enlightenment campaigns to sensitive citizens about the negative impact of illegitimacy.
- iii. strengthening the relevant institutions such as social welfare agencies, family courts, and child protection services to ensure that the rights of all children are protected in practice.
- iv. interrogating and engaging religious and opinion leaders to assist in the fight against the stigma associated with children born out of wedlock through teachings programmes focusing on the importance of children's rights and equality.

### **5.3 Contribution to Knowledge**

The study contributes to the body of knowledge as follows:

- (i) That in order to be able to realise the intendment of section 42(2) of the 1999 Constitution, it is imperative that a legal framework with a national spread be enacted to make the enforcement of the constitutional provision potent and compelling.

### **5.4 Areas for Future Study**

While the study has provided a detailed examination of the impact of section 42(2) of the 1999 Constitution on the concept of illegitimacy in Nigeria, there are several key areas that warrant further research. These areas could expand upon the findings and offer deeper insights into the complexities of the issue.

One important area for future study is the impact of legal reforms on societal change. While this study has explored the legal framework surrounding children born out of wedlock, further research could investigate whether legal reforms aimed at eliminating the concept of illegitimacy result in significant changes in societal perceptions. Specifically, it could explore whether shifts in legal language and rights protection have a

corresponding effect on the attitudes of Nigerian citizens, particularly in rural areas where traditional practices are more entrenched. This research could also assess how these changes influence public policy, social services, and the treatment of children born outside of marriage.

Another promising direction for future research is the relationship between children's legal status and access to welfare services. The study has primarily focused on the legal and social aspects of legitimacy, but further research could examine how the recognition of children born out of wedlock influences their access to education, healthcare, and social security. Investigating whether children classified as "illegitimate" face challenges in accessing these basic services could offer valuable insights into how legal reforms intersect with practical, everyday realities for these children.

The role of customary and religious law in shaping societal attitudes toward children born out of wedlock is another key area for further exploration. The study has highlighted the legal perspectives on illegitimacy, but Nigeria's cultural diversity means that customary and religious laws continue to play a significant role in shaping how children's birth status is perceived. Future research could compare how different ethnic groups and religious communities in Nigeria interpret section 42(2) and the broader concept of legitimacy, and whether these interpretations align with statutory law or conflict with it. A deeper understanding of these tensions could provide valuable recommendations for harmonizing legal protections with traditional practices.

Judicial interpretation and consistency in court decisions is also an area for further research. Although this study touched upon the role of the judiciary, a more comprehensive analysis of judicial decisions regarding section 42(2) would provide greater insight into how Courts are interpreting the constitutional provision in relation to children born out of wedlock. Research could focus on the consistency (or lack thereof)

in Court rulings, especially in cases involving the inheritance rights, custody, or recognition of children born outside of marriage. Such research could contribute to better understanding the effectiveness of the judiciary in upholding constitutional protections for these children.

An interdisciplinary approach to addressing the stigma surrounding children born out of wedlock could also provide new insights. Future studies could combine legal, psychological, and sociological perspectives to explore how stigma affects the lives of these children and their families. Research could examine how legal reforms and societal attitudes intersect, focusing on how law can collaborate with mental health services, social support systems, and education to reduce the impact of stigma and discrimination. This could lead to the development of comprehensive strategies to better integrate children born out of wedlock into Nigerian society.

Finally, a global comparative analysis could prove valuable in identifying lessons from other Countries that have successfully addressed the issue of illegitimacy. Research could explore how international best practices have been implemented in other legal systems to eliminate the concept of illegitimacy and protect children's rights. Comparing Nigeria's progress with that of other nations may reveal innovative legal, cultural, and policy strategies that could be adapted to the Nigerian context.

In conclusion, while this study has made significant contributions to understanding the impact of section 42(2) in eliminating the concept of illegitimacy, the suggested areas for future study offer valuable opportunities to further explore and address the multifaceted challenges surrounding this issue. By examining these areas, researchers can contribute to a deeper understanding of how to protect the rights of all children, regardless of their birth status, and further strengthen legal protections against discrimination in Nigeria.

## **5.5 Conclusion**

The study has critically examined the impact of section 42(2) of the 1999 Constitution on the concept of illegitimacy, with a focus on the rights, status and inheritance of children born out of wedlock. It has addressed the constitutional and legal frameworks, analyzed societal and cultural challenges, and evaluated the role of judicial interpretations in enforcing the provision. Through this analysis, the study has highlighted both the progress made and the persistent barriers that continue to affect the full realization of equality for children born outside of marriage in Nigeria.

It is hoped that the challenges suffered by children born out of wedlock in Nigeria particular respect to disinheriting them from the estate of their supposed fathers may no longer be the case if the legal regime of section 42(2) of the 1999 Constitution is given full effect. This can be achieved through institutional reforms more particularly in the change of the attitudes of the Courts in interpreting the laws.

Notwithstanding, these challenges, the study has demonstrated that legal reform and societal change are crucial for eliminating the concept of illegitimacy. The constitutional provision, though an important step, must be accompanied by robust legal reforms, societal education, and judicial consistency. These efforts should aim at reducing discrimination, ensuring equal access to opportunities and services, and fostering an inclusive environment where all children, regardless of their birth status, are recognized and protected under the law.

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