A Cursory Glance at the Rights and Status of an Illegitimate Child *Vis-À-Vis* the Effect of Section 42(2) of The 1999 Constitution of the Federal Republic of Nigeria as Amended

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Abstract

The concepts of legitimacy and illegitimacy are important as they determine the rights and status of a child in relation to the society and what he/she is entitled to. It considers children that are tagged illegitimate, the resultant social discrimination and ways of legitimizing them. The issue of legitimacy and illegitimacy alongside inheritance albeit sensitive issues, are issues that are of great concern in our laws and ones that need to be addressed firmly to prevent discrimination of any kind. The constitution of the Federal Republic of Nigeria in Section 42(2) has tried to resolve the issue of discrimination, but it has been asserted that the words of that provision is not only not firm but also not completely inclusive. These issues are that which this paper seeks to address and throw more light on.

Keywords*:* Legitimacy, Illegitimate, Rights, Constitution, Nigeria

Introduction

This provision of the Constitution is generally believed to be an attempt to remove any disability or deprivation attached to the circumstances of one's birth. In history and before the inception of the 1999 Constitution of the Federal Republic of Nigeria as amended, the rule propounded in the case of *Cole v Akinyele*[1] by the Supreme Court that a child born outside wedlock during the subsistence of a valid statutory marriage was illegitimate and could

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[1] (1960) 5 FSC 84 at 101

not succeed to the estate of the deceased natural father was the law. Furthermore, it was trite then that an illegitimate child could not inherit his mother's property if the mother had other legitimate children and were in the distribution of property according to seniority, he ranks as if he had been born on the date he became legitimated. However, the law was given a human face on October 1975 when the original draft of the Constitution drafting committee specifically stated that 'no citizen of Nigeria shall be the subject of discrimination merely on the ground that he was born out of wedlock.' This was stipulated in section 35(3) of the draft Constitution. This provision indeed stirred the hornet's nest within the committee members and a demand was put out for its deletion from the draft. Women groups, religious bodies and individuals argued that such a provision would give a wrong impression to a non-Nigerian that illegitimacy was the order of the day in the country and it would equally aid promiscuity and a damning consequence on the marriage institution in Nigeria. Expectedly, this section was later set aside by the draft Constitution committee who replaced same with what became section 39(2) of the 1979 Constitution and presently section 42(2) of the 1999 Constitution which states thus:

> *No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth*.

The members of the constituent assembly who proposed the present provision of section 42(2) supported this proposal as follows:

> *There is no doubt that all of us have no choice nor were we given an option as to who would be our parents before we were born. If we were given the option, I am sure that there will be none of us who would prefer to be borne by wretched parents, to be born of slaves or even by prostitutes. We would prefer to be borne by people who are legally married. This amendment is saying that on no*

> *account should a person be discriminated against merely by reason of the circumstances of his birth.*[2]

Thus, while the Constitution Drafting Committee (CDC) draft was limited to the narrow ground of birth out of wedlock, the relevant section of the constitution, section 42(2) deals with a wider basis of circumstances of one's birth, even as it includes birth out of wedlock, it is not restricted to it. These are three major component phrases of this aforementioned subsection and they read in parts:

a. No citizen of Nigeria
b. Shall be subjected to any 'disability' or deprivation
c. Merely by reason of circumstance of his birth

The purport of this provision is that non-Nigerians are not entitled to benefit from this section of the grund-norm. The word disability here refers to the taking away from a person a power or right, that is, disqualification. Deprivation on the other hand refers to being stripped or disqualified from enjoyment or benefits. Flowing from the above, deprivation or disability cannot arise out of infancy, bankruptcy etc but strictly by the circumstance of one's birth and nothing else.

2. Status of Illegitimacy in Nigeria *vis-à-vis* the coming into force of Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

The interpretation of the above stated section will be of great concern to many people with regards to the position of an illegitimate child. The controversy generated is as to whether it has aided into extinction the status of illegitimacy and bringing into fore the treating of every child the same way no matter the circumstance of his birth or merely removed the disabilities and deprivation associated with the circumstance of one's birth.

Accordingly, the first view which is liberal in approach as clearly shown in *Olulode v Ovisou*[3] is that section 42(2) has totally

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[2] Aghiemien J O, Proceedings of the Constituent Assembly (Official Report) Volume 111, p. 2346, Columns 7664-7665; Federal Ministry of Information, Printing Division, Lagos

[3] *Suit No M/133/81 (Unreported) High Court of Lagos State, Ikeja Division; November 27, 1981*

abolished the status of illegitimacy in Nigeria in that the provision has eliminated all the disadvantages associated with illegitimacy and the circumstances of one's birth. The court in that case stated that section 42(2) abolished the status of illegitimacy by ensuring that no one was discriminated against in Nigeria merely by reason of the circumstances of his birth and that as such, illegitimacy as a status ceased to exist after the coming into effect of that section of the constitution. This rightfully means that the concept of discrimination that leads to illegitimacy has been scraped under the Nigerian law. If this is accepted as correct, the purport is that all our statutory and customary laws with respect to the status of an illegitimate child would become null and void and of no legal effect. Examples include the various legitimacy laws, succession laws, section 165 of the Evidence Act[4] which deals with the presumption of legitimacy and section 38(2) of the Matrimonial Causes Act[5]which deals with the effect of the decree of nullity on illegitimacy. Moreso, customary laws which distinguish between legitimate and illegitimate children would have no legal effect anymore because, section 1(3) of the Constitution makes all these laws void because the section proclaims the supremacy of the Constitution and had declared any law that is inconsistent to its provisions to be void to the extent of its inconsistency.

The second view seems more restrictive as expressed by Williams J in *Kehinde Da Costa & Ors v Juliana Fasehun & Ors* [6] that the provision of section 42(2) has no effect on the existing law in any manner and that this was a lost opportunity of an innovation in the law. The court relied on *Cole v Akinyele*[7] and refused to allow children born outside a monogamous wedlock any share in their father's estate on the ground that they were illegitimate by virtue of the circumstances of their birth and that it would be contrary to public policy to legitimize them and as such, section 42(2) did not give them any right of inheritance. This does not seem to be inferred as the right spirit of the provision of section 42(2). Writers believe

4 Laws of the Federation, 2010
5 Cap M7, Laws of the Federation, 2010
6 Suit No M/150/80 (Unreported) Lagos State High Court, 22 May, 1980
7 Ibid

that the modern provision of section 42(2) of the Constitution though not explicitly contained therein, has nonetheless given the so-called illegitimate child more rights as can be inferred therein. Nwogugu noted as follows that section 42(2) did not abolish the status of illegitimacy in Nigeria as it encapsulated it into 'the circumstances of one's birth.' Thus, it merely ameliorated that status by removing the disabilities and deprivations attached to the circumstances of one's birth while still remaining silent on the term 'illegitimacy' and drawing no distinctions therein.[8] The net effect of that provision is that all persons will henceforth enjoy the same rights regardless of how they were conceived or birthed. It may however be relevant to still determine whether a person is born legitimate or not even though in most cases, the status of illegitimacy succeeds more in punishing the innocent child than the father and mother since most times when such an issue comes up, the father might already be deceased. If the purpose of the law is initially to prevent promiscuity from the status of illegitimacy, it will only end up punishing a person who had no choice in being born under a particular circumstance and this should not be the case. Be that as it may, without prejudice to previous laws relating to the issue, section 42(2) was submitted to only have removed the disabilities and deprivations which a child born out of wedlock suffers and not to actually abolish the concept of illegitimacy and also, apart from the other disabilities and deprivations which the illegitimate children may suffer, the prohibition on the succession is removed.

Succession matters arising from this angle have been put to rest by the court decision in *Salubi v Nwariaku*[9] where Akintan JCA held thus:

> *Since the coming into force of the 1979 Constitution, the term illegitimate children used to describe children born out of wedlock has been rendered illegal and unconstitutional…..that children born out of wedlock are not entitled to benefit from the estate of their acknowledged father who died intestate amounts to subjecting them to a disability or*

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8 E N Nwogugu, *Family Law in Nigeria*, (3rd Ed. HEBN Publishers Nig) p 309

9 (1997) 5NWLR (Pt. 505) 442/(2003) 7NWLR (Pt.819) 426

> *deprivation merely by reason of the circumstances of their being born out of wedlock which is exactly what section of the constitution is aimed at preventing.*

This was a welcome development on the status of illegitimacy. Unfortunately, the Constitution did not render illegal and unconstitutional the term 'illegitimacy' as held by the court nor explicitly state anything as regards legitimation and the attendant succession issues, but merely prescribed that no person should be placed at a disadvantage by reason of the circumstances of their birth. The case however rightly decides that if an illegitimate child is not acknowledged by its natural father, he cannot claim to be entitled to share in his father's intestate estate. It has been inferred that on the basis of the provisions of the Constitution, there is nothing like the term 'illegitimacy'.

3. Constitutional Guarantee

That the Constitution of the Federal Republic of Nigeria guarantees that no person should be discriminated against by reason of the circumstances of their birth is no longer in doubt. Section 42(2) of the Constitution sets out in bold and clear terms that: No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstance of his birth. The effect of this provision is as Sagay puts it that 'once a child born out of wedlock is acknowledged by the father of the family, then he becomes a legitimate child from birth.[10] In my view, section 42(2) of the Constitution must always been seen and regarded as a guarantee that whatever the situation is that a Nigeria citizen finds himself, he must not be subjected to disabilities and deprivations and obviously this includes the denial of succession and inheritance rights, which other citizens do not experience and that he must find legitimacy somewhere in the society.[11] Much can be said about the vibrancy and

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[10] Sagay I, *Nigerian Law of Succession, Principles, Cases, Statutes and Commentaries* (Malthouse Law Books, 2006) p.16

[11] In a situation where such a person is unable to locate and establish his paternity and legitimacy, he will fall back to his mother's estate as in the case of *Ben Enwonwu v Spira* (1965) 2 All NLR 233

humanism of section 42(2) for to concern those who are not in any way responsible for their existence in this world to the garb of discrimination, deprivation or even tagged illegitimate for the rest of their lives speaks ill and wicked of humanity. Olagunu JCA in *Mojekwu v Ejikeme*[12] captured the position in the modern Nigerian society and its revulsion for illegitimate offspring when he said 'a person cannot be cast away from the society because he was born out of wedlock. A safety net assures the assimilation and ascription of the personal law of such person into that of the mother on the principle of the *Ben Enwonwu case*.' Earlier in the same judgment, Fabiyi JCA had expressed a similar view in the following words: 'the custody of any child born out of wedlock follows that of the mother in the absence of any person claiming custody of the child on the basis of being the natural father….. This must be so since the child must belong to a family and should not be rendered homeless for a situation he did not create.'

4. Attitude and Disposition of the Courts

What can be gleaned so far can be said to be enough to convince anyone that the Nigerian Judiciary is active and progressive in its approach to this issue. This is most encouraging. However, in order to fully appreciate the extent of the position of the courts here, the writers are of the opinion that two landmark decisions, one emanating from the Supreme Court and the other from the Court of Appeal must be given close scrutiny in this paper.

a. ***Salubi v Nwariaku:*** Hardly can issues bordering on succession and inheritance rights in Nigeria be discussed today without reference to this case. Before this there had been two conflicting decisions of the High Court, one firmly in favor of conferring legitimacy on an offspring born out of wedlock as seen in *Olulode v Oviosu*[13] and the other taking a contrary view as seen in the case of *Kehinde Da Costa & Ors v Juliana Fasehun & Ors*.[14] The view in the *Olulode case* was the one taken by the Court of Appeal in the *Salubi case* and accepted by the Supreme Court. Apart from

12 (2005) 5 NWLR (Pt 657) 400
13 Ibid
14 Ibid

exposing the misconception held in some judicial quarters concerning the law applicable to the distribution of estate upon intestacy, it settled, one would imagine, once and for all, the question of the inclusion of offspring born out of wedlock as beneficiaries in the distribution of the estate of the deceased upon intestacy. The trial court had earlier held that the two children begotten from irregular associations were not qualified to benefit from the estate since they were illegitimate. This was quickly rejected by the Court of Appeal while relying on section 39(2) of the 1979 Constitution now section 42(2) of the 1999 Constitution as amended. In the opinion of this court, to deny them the right of inheritance in the estate of their acknowledged father was tantamount to subjecting them to the very disability and deprivation frowned upon by the Constitution. The Supreme Court agreed with their conclusion. The court even went to the extent to hold that 'the decision in *Cole v Akinyele* is no longer law.' Ige JCA in his supporting judgment stated that 'one can take it that by implication, the rather obnoxious principle in *Cole v Akinyele* that a person cannot legitimize by acknowledgment an offspring born out of wedlock during the subsistence of a statutory marriage is now discredited and no longer applicable in view of section 42(2)…..' This has further been buttressed by the cases of *Okonkwo v Okonkwo*[15] and *Motoh v Motoh*[16] where it has been stated by the Court categorically that by virtue of the distinct provisions of the Constitution, children born out of wedlock but whose paternity was acknowledged by the putative father, have equal share with the children of the marriage and ought not to be discriminated against by virtue of the circumstances of their birth.

b. ***Mojekwu v Ejikeme:*** The decision of the Court of Appeal here which came before the *Salubi's case* is equally weighty and robust in its insistence and conclusion that legitimacy cannot be denied the appellants in the circumstances in which they found themselves. The court had simply reasoned that the appellants, who were by-products of a customary practice of *'Nrachi'*, could not be abandoned without legitimacy and also without rights of inheritance in their great grand

[15] (2014) 17 NWLR (Pt. 1435) 18 CA
[16] (2011) 16 NWLR (Pt. 1274) 474 CA

father's estate. Although the 1st and 2nd appellants were born out of wedlock by the deceased intestate's granddaughters, there was a blood relationship between them and their great grandfather. Based on the established fact that the said deceased intestate had during his lifetime acknowledged and accepted his grand daughters who were also born out of wedlock in the search for a male progeny to prevent the extinction of the deceased intestate's lineage, they acquired a right of succession and inheritance in his estate, a right which they are entitled to transmit to their offspring, the 1st and 2nd appellants. In conclusion, the court held that the fact of their being born out of wedlock is immaterial in view of section 39(2) of the 1979 constitution now section 42(2) of the 1999 constitution as amended. The reasoning of the court in this case it is submitted cannot be faulted. The conclusion in our view is right and accords with section 42(2) of the constitution. This is because the deceased intestate's granddaughters were legitimized by his acknowledgement following their birth out of wedlock. This act conferred on them legitimate status and a right of inheritance in their grandfather's estate which in turn can be transmitted or transferred to their offspring the 1st and 2nd appellants, notwithstanding the fact that they too were born out of wedlock. To deny both the granddaughters and their offspring, all conceived and born outside wedlock, would be unconstitutional as it would amount to subjecting them to disability or deprivation because of the circumstances of their birth. Again as was evident in the *Salubi's case*, there was also a blood relationship between the owner of the estate (deceased intestate) and the persons claiming a right of inheritance to it. It was noted that the blood relationship was a direct one between the deceased intestate and the two children sired by him outside marriage. *Mojekwu's case* however, presents an entirely different picture as it is a bit more complicated. The relationship there could be described as both direct and indirect. There was a direct relationship between the deceased intestate and his daughter who gave birth to his two granddaughters outside marriage. There was also an indirect blood relationship between the deceased intestate and the claimants to his estate, namely his granddaughters and their two sons, both born outside wedlock. In so far as the deceased intestate was not the natural father but only the grand and

great grandfather respectively, it is submitted that their blood relationship is indirect but that does not in any way diminish the status and capacity in the estate of the deceased intestate.

We have only gone to this extent in order to show that the absence of a blood relationship could be a bar to a claim of legitimacy in a family as strangers cannot be legitimated by acknowledgement as the law stands. However, we cannot rule out the possibility of this happening under customary law as some customary practices recognize that persons, though unrelated by blood can nevertheless, be assimilated into the family to prevent the extinction of a lineage. Such customs however, run the risk of being caught by the repugnancy test. It should therefore be clear that a guarantee of legitimacy come what may, even by the constitution, is not a license for one without any form of blood connection direct or indirect, to seek legitimacy and its attendant rights in a family estate. It is on this premise that our attention now shifts to the situation where for one reason or the other, a person is unable to establish a claim of legitimacy in a family. The factor of blood relationships more than anything else has made the question of legitimacy a recurring issue in our courts.

5. Bar to Claim of Legitimacy

i. Absence of Blood Relationship

Case law is clear that it is only the father of a person born out of wedlock who can perform the act of acknowledgement on him by accepting him into his family. In so doing, it confers legitimacy on the person concerned through legitimation. This process cures the defect which the person concerned had at birth, namely, the absence of a valid and lawful marriage between his parents. It therefore follows that an act of acknowledgement, in order to qualify as valid legitimation must be performed on a person having a blood relationship, direct or indirect with the other, namely the father. To drive home the position of the law here, reference must now be made to the Supreme Court case of *Chinweze v Masi*.[17] In that case the apex court held that the appellants who were born by the surviving

[17] (1989) 1 NWLR (Pt. 97) 254

spouse of the deceased intestate long after the death of the latter and not being his natural offspring nor legitimated by 'other means', were not his heirs and have no right of succession and inheritance to his estate. The argument that the appellants were all born in the deceased intestate's household and that they grew up to identify the deceased intestate's property as their own to the knowledge and consent of the only surviving child of the marriage between the deceased intestate and his wife, found no favor in the court. It must now be clear and well established in our law that absence of blood relationship between a person (owner and founder of an estate) and another seeking legitimacy and a right of succession and inheritance to the owner's estate constitutes a bar to such claim. It cannot be otherwise until there is recognition of such claims on other grounds.

In the case of *Emordi v Emordi*,[18] this issue as regards legitimacy was poignantly echoed where the respondents claimed as heirs to the deceased intestate's properties in the absence of any blood relationship whatsoever. Unlike the *Chinweze's case*, the respondents here were all born during the lifetime of the deceased intestate and also during the pendency of the marriage between the deceased intestate and their mother. But as their mother would later testify in an undefended divorce proceeding, the deceased intestate was not their natural father even though he provided for their upkeep until death. Based on this devastating piece of evidence, the Court of Appeal held that the respondents were not the legitimate offspring of the deceased intestate and as such, has no right of succession to his estate. In coming to its conclusion, the court had reasoned that the presumption of legitimacy that was in the respondents' favor at birth based on the existence of a valid marriage between their mother and the deceased intestate, was rebutted by the unchallenged evidence of childlessness in the marriage on account of the deceased intestate's impotence. Thus, is it not clear once again that in some instances like in the above judgment that the absence of a blood relationship between the deceased intestate and the respondents was the crucial factor that defeated the respondent's claim to legitimacy and with it a

[18] Unreported Appeal No CAF/1681/2007, Judgment delivered on 14th March 2013

right of inheritance in the deceased intestate's estate? The answer is surely in the affirmative, although this is not always the case.

ii. ***Invalid Adoption***

Adoption provides another means of legitimation and although it was not widely embraced in the past owing to varying levels of aversion to it by cultural beliefs and practices, it is now gaining ground. However, to think that the process simply involves picking up babies at the motherless homes or paying cash for an unwanted infant or toddler without more is sorely mistaken. Adoption involves stringent legal requirements which must be satisfied for it to be valid in law. It is not enough that the person sought to be adopted is accepted and recognized by the intending adopter. The adoption order must be registered under the Adoption Law applicable in that jurisdiction.[19] Failure to do so could have dire consequences on a claim of legitimacy and inheritance. This can be seen in the words of Uwaifo JSC in the case of *Olaiya v Olaiya*[20] where he said 'no one will lightly permit a stranger to claim his or her lineage and inheritance unless through entitlement by blood or genuine adoption.

From all that has been stated above in this paper, it is obviously evidently clear that other than legitimacy acquired at birth, and which is only a presumption,[21] legitimacy can be subsequently acquired through the process of legitimation by acts of acknowledgement or a valid adoption. The question which this paper further expounds is whether such acts can be performed on a person who do not have any blood ties with the other party (the owner of the estate) but seek or claim legitimacy in the estate relying on acts as estoppel. Put differently, can legitimacy be acquired through legitimation by the process of acknowledgement based on acts constituting estoppel? That this issue may continue to come before the Court for determination cannot be ruled out. It was heartedly argued in *Chinweze's case* that the sole surviving daughter of the deceased intestate was estopped from denying the rights of the

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[19] See Adoption Law, Cap 5, Laws of Lagos State; Adoption Law Cap 6, Laws of *Anambra* State, 1991

[20] (2002) 12 NWLR (Pt. 782) P. 676

[21] The presumption could be rebutted as seen in the *Emordi's Case* (*Ibid)*

appellants as co-beneficiaries of the estate. The short answer given in response to this argument by Oputa JSC was that even if she was estopped from denying the appellants rights to her father's estate, the appellants had not proved that they were legitimate heirs to the deceased intestate who never knew them.

It certainly will be interesting to see how the courts react and would continue to react to this poser. The writers are of the opinion that a line of argument showing that a person well aware of the fact that there is no blood connection between himself and another, but proceeds voluntarily to accept and assimilate that other person into his household and family during his lifetime by acts evidently and unequivocally pointing towards that direction, for example, upkeep and maintenance, to the extent that the person so accepted believes that he is a legitimate heir to the other party is indeed persuasive. Such being the case, the party would be estopped from denying contrary. The respondents in the *Emordi's case* could have done so but were rather fixated in their belief and insistence that they could bulldoze their way through what turned out to be an impossible route, namely legitimacy at birth. If this line of reasoning had been explored and properly pleaded, those pieces of evidence which included payment of school fees and provision for their welfare as well as participation in the funeral rites of the deceased intestate where they collected a purse for the deceased family, tending to show that the deceased intestate accepted them into his family in the absence of any blood relationship whatsoever could in our submission, have found some weight and credibility to support legitimation by acknowledgment founded or based on conscience. The deceased intestate or his estate would then be prevented from denying the claimants legitimacy. In effect a declaration by the Court conferring legitimacy on this untested ground would cure what a valid adoption would have done but failed to do so.

6. Conclusion

Much as one has tried in this paper to limit the discussion to the current position of the law on legitimacy in Nigeria, questions have continued and will continue to emerge on the circumstances in which legitimacy ought to be acquired or denied in our law.

Emordi's case as we have shown in this analysis has unwittingly opened the door for a debate on whether to accord or extend recognition to acquisition of legitimacy by estoppel in the absence of a blood relationship. This as the law stands today, it would appear to be a just solution in circumstances where although there are no blood ties between the parties and no prior established rights, but a compelling case can be made. Jurists may well argue that the issue is worth exploring and a decision in the affirmative returned given the position of section 42 of the amended Constitution. Others may equally retort that the Constitution and its guarantees against illegitimate status, never intended to impose someone on another and thus create a new class of beneficiaries against the will and desire of estate owners. For us here, will extending the frontiers of legitimacy to include acquisition by estoppel enhance justice in some cases or will it be a recipe for chaos in our succession and inheritance laws? Whatever may be the merits and demerits of the debate on this issue, we have not heard the last of it and our court rooms will continue to resonate with legitimacy disputes for some time to come. Where the pendulum of secession swings is anybody's guess.

7. Recommendation

It is recommended that when and where there is a further Constitutional amendment, section 42(2) should be made to state in clear terms its abolishment of the concept of illegitimacy and its appurtenances to avoid the diverging sides and opinions on this issue and the fact that people who do not see it as clear cut could infer that the Constitution did not make any clear-cut statement to that effect.