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Broadening the interpretation of section 42(2) of the 1999 constitution vis-a-vis the right to succession under Nigerian customary laws

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Abstract
Over the years, the provision of section 42 (2) of the 1999 Constitution of the Federal Republic of Nigeria which its origin can be traced to section 39 (2) of the 1979 Constitution had intervened and offered succor to certain individuals who for reasons of some circumstances surrounding their birth were marginalised, disparaged, denied and deprived of certain benefits. Under some Nigerian customary laws, the gender and the legitimacy status of an individual is crucial and critical in determining the respect, input and influence a person may wield in the community. This gender and legitimacy status is also key and a determinant factor in defining a person's right to succession. The import of section 42 (2) is to remove those perceived impediments, disabilities or deprivation associated with a person because of the circumstances of such person's birth. This paper appraises the extent to which the Nigerian Courts have interpreted and applied this constitutional provision in line with Nigerian native law and customs and also makes a strong case for the extension of the protection offered by section 42 (2) to certain categories of persons who by the restrictive interpretation of the section by the Courts are being precluded from this shield provided by Section 42 (2).

Keywords: legitimacy, rape, woman to woman marriage, levirate marriage, surrogate marriage, illegitimate child, discrimination, succession

Introduction

Nigeria has over two hundred and fifty different ethnic groups and amongst these ethnic groups the distribution of a deceased estate is chiefly based on customary dogmas of inheritance and succession of property. Unlike what is obtainable under native law and customs, the law of inheritance and succession under the statutes is predictable, specified and settled while under native law and custom its provisions are disparate and largely unsettled. This disparities may be attributed to the diverse cultural practices amongst these multifarious ethnic groups in Nigeria [1]. Under the Nigerian native law and customs, there are basically two systems of inheritance descent, namely; patrilineal and matrilineal systems. Under the patrilineal arrangement, inheritance is through the father's lineage while under the matrilineal, succession is feasible via the mother's roots [2]. Under the Nigerian cultural milieu, certain categories of persons have been disinherited and subjugated on the basis of sex and legitimacy status. For instance, customary law marriages have been the major impetus for depriving women and female children from inheriting from their parents or husbands. In addition, an average Nigerian woman whether a wife or daughter is enveloped by discriminatory customary practices which most time strip her of her property rights [3]. This sorry situation of these women is worsened by the prevalence of primogeniture which provides that upon the death of the head of the family/owner of the property, his property is inherited by the eldest surviving male either partially or exclusively to the exclusion of other members of the family. Under the Nigerian Native law and custom, this right exercised by the eldest surviving male/female [4] is automatic and is premised on seniority. Only the father, as the owner and creator of the family property has the unreserved right to deprive the eldest son of this right [5] by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence or educational qualifications [6].

Apart from the female folks, the male counterparts are not spared most especially when their legitimacy status is in dispute and this is can be attributed to the fact that the right to succession under Nigerian native law and custom is most times anchored on the legitimacy status of a person. Thus, while a legitimate child is entitled to inherit, an illegitimate child is precluded from the partitioning of the estate. The advent of Section 39(2) of the 1979 Constitution has provided succor and relief to these categories of persons. This said Section was also given recognition by the 1999 Constitution of the Federal Republic of Nigeria under Section 42(2). This said provision provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth. The import of the section is that the female child or a widow who ordinarily ought not to inherit under native law and custom on basis of sex has been salvaged by the provisions of this section. Similarly, an illegitimate child who for circumstances surrounding his birth is precluded from inheriting under native law and custom can bank on the said provisions and join in the partitioning of the estate. Although it can be argued that the provision did not remove the status of illegitimacy but rather it made it feasible for a person to be entitled to all the rights accruing to a legitimate person notwithstanding his illegitimate status [7]. This paper in the succeeding paragraphs while examining the extent of the application of this restorative and redeeming provision

of the Constitution by the Nigerian courts, will advocate for a wider and more purposive interpretation so as to protect other categories of vulnerable persons.

Extent of the application of section 42 (2)

Prior to the coming into force of S 39(2) of the 1979 Constitution [8], there have been divergent and conflicting views on decency and propriety of acknowledging children born outside wedlock so as to give them the same footing in sharing and distribution of the Estate of the deceased. Some judgment as we shall see expressed the view that acknowledgement of the paternity of children born outside wedlock is against public policy as it emboldens promiscuity. The other and better view which tilts towards the intendment of Section 42(2) of the 1999 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 [9]. *Chianu* [10] aligning with this better view had this to say:

In time Judges realised that there is no legal or moral justification to visit the sins of parents on innocent children. 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 the same vein, *Nwogugu* [11] expressing his view on the decision of the Court in *Cole v. Akinyele* [12] to deny the 1st Appellant the status of legitimacy on ground of public policy opined that public policy will not be more outraged if the child born during the subsistence of the statutory marriage is legitimated by acknowledgement or the subsequent marriage of the parents under Customary Law [13]. Apart from the decision reached in *Cole v Akinyele* [14] there are also myriads of other instances where the Court upheld the legitimate status of the party (ies) and in other instances the court denied the party (ies) their legitimate status. For instance in *Re Sarah Adadevoh* [15], the Court refused to grant status of legitimacy to the children of the concubines on ground that it will offend public policy despite the fact that their paternity were acknowledged by their late putative father. The trial Court in *Alake v. Pratt* [16], considered it contrary to public policy to place children born outside lawful wedlock on the same pedestal as legitimate children on basis of acknowledgement. These refusals by the court to accord legitimacy status to certain illegitimate individuals even in the face of cogent evidence showing that the paternity of the child was acknowledged by the putative father before his death chiefly contributed to the enactment of section 39 (2) of the 1979 Constitution which is in *pari materia* with section 42 (2) of the extant Constitution. This constitutional provision had stood up for the innocent child who had to go through untold hardship as a result of the action of his lewd and lecherous father or mother [17]. The unique effect of S 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 S 42(2) specifically precludes discrimination on the frail basis that a person was born out of wedlock [18]. Apart from illegitimate children, another class of persons who have benefited from the intervention of Section 42 (2) 1999 Constitution, are the daughters of a man who died intestate most especially where the distribution of his estate is to be conducted under native law and custom. In *Okafor v. Isitorh & Anor* [19], the Court of Appeal held that any custom or arrangement 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 from their family home is a contravention of Section 42 of the 1999 Constitution. Relatedly, the same Court in *Timothy v. Oforka* [20], held that the Oraifite custom which forbade women from dealing in properties was unconstitutional. In *Asika v. Atuanya* [21], the Court held that the Appellants who were female children were entitled to have a share in the property in dispute. Worthy of mention is the landmark decision of the Supreme Court in *Ukeje v. Ukeje* [22]. wherein the Court found that by virtue of S 42 (2) of the 1999 Constitution of the Federal Republic of Nigeria (As Amended), any customary law which tends to suggests that a female child cannot inherit the property of her father is not only unconstitutional but also null and void [23]. Finally in *Ogbuli & Anor. v. Ogbuli & Anor* [24], the Court of Appeal was faced with the task of determining the validity of the Onitsha native law and custom relied upon by the Respondent which forbids female children from the inheritance of landed property of their father. The Court allowing the appeal opined thus:

We need not travel all the way to Beijing to know that some of our customs are not consistent with our civilized world in which we all live today, including the Appellants. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although, the scientific world disagrees with divine truth, I believe the God the creator of human beings is also the final authority of who should be made female or male. Accordingly, for a custom or Customary Law to discriminate against a particular sex is, to say the least an affront on Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the custom is repugnant to national justice, equity and good conscience [25].

Also on the list of those who have benefited from the protection of section 42 (2) are barren widows and widows who gave birth to only female children. In the past, a widow without a male issue only had possessory right over her late husband's property and can only deal otherwise with the consent of the late husband's family [26]. But in *Anekwe v. Nweke* [27]; the Respondent who had six daughters and no son claimed for declaration of the title of the land in dispute. The Appellant's defence was that under Awka native law and custom a married woman without a male issue cannot contest title to land of her late husband with the male members of her late husband's family. Upholding the widow's proprietary right, the Supreme Court intoned thus:

I hasten to add at this point that the custom and practices of Awka people upon which the Appellants have relied for their counter claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st Century, societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the women folk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of God instituted gender differential should be punitively and decisively dealt with … For a wife of a man to be thrown out of her matrimonial home, where

she had lived all her life with her late husband and children, by her late husband's brother on the ground that she had no male child, is indeed very barbaric, wronging and flesh skinning [28].

Amplifying the Scope of section 42 (2) of the 1999 constitution of the federal republic of Nigeria (As amended)

while extoling and commending the Nigerian Courts for the judicious use of section 42 (2) towards the emancipation and liberation of women (daughters, widows and spinsters) and illegitimate children from the fetters associated with their right to succession under native law and custom, it appears that from the interpretations evidenced in some judicial authorities, a condition precedent is attached to the enjoyment of this protection offered by section 42 (2), thereby giving the said constitutional provision a restrictive interpretation. It also appears that some class of illegitimate children and children of some specific arrangements which the courts have declared invalid are the ones affected by this restrictive interpretation. For instance, the courts have declared invalid any arrangement between a woman and a fellow woman in the guise of marriage and the products of this arrangement as we shall see in some judicial authorities were denied the right to inheritance on the basis that they failed to show that they are children of the deceased.

Thus, it can be deduced from these judicial authorities as we shall see, that the provisions of section 42 (2) does not have a blanket application which implies that before a person whose right to succession is being threatened by virtue of circumstances of his birth can be allowed to enjoy the protection afforded by section 42 (2), such person must first show by cogent evidence that the deceased whose estate is about to be partitioned is his/her father or mother. The germane question which this paper intends to consider is whether it can be said that the addition of a condition to the enjoyment of the protection offered by the said section as shown in the judicial interpretations by both the Nigerian trial and appellate courts is consistent with the intention of the makers of the legislation. This paper answers the question in the negative on the basis that the intention of the draftsperson or the purpose for which that particular section which borders on the right to freedom from discrimination was enacted to offer protection to certain persons who are disadvantaged for some reasons which they did not contribute to.

Thus, it is submitted that if a purposive approach to interpretation is to be adopted by the courts, a wider meaning which will yield a better result would be given to section 42 (2). Purposive rule of interpretation was defined in *PDP v. Mohammed & Ors* [29] as a style of interpretation wherein the court is not expected to give an interpretation that would defeat the intention and purpose of the law makers, but rather the court should adopt a holistic approach and interpret the provisions dealing with a subject matter together to get the true intention of the law makers. Similarly, in *Marwa & Ors v Nyako & Ors* [30], the apex Court while stating what the purposive rule of interpretation entails opined thus:

Under the Constitution this Court has no power to make laws, therefore its primary responsibility in the area of interpretation is basically - to identify the purpose which the framers of the Constitution sought to achieve. On finding that purpose, a meaning which is in accord with that purpose must be given to the words of the Statute. The Courts must never in interpreting the provision of the Constitution give a contrary meaning to that which was intended by the legislature. This rule of interpretation is now referred to as the purposive approach. By way of emphasis, the objective of the purposive approach is to give effect to the legislative purpose of the enactment by interpretation of the words to accord with such purpose. The words in a Constitution must bear their ordinary grammatical meaning when the intention of the maker of the Constitution is clear and can be captured at a glance of the language. After all, the law of statutory interpretation is clear that Courts invoke their interpretative jurisdiction to vindicate the intention of the law makers. The Courts cannot plant their judicial mind or thoughts [31].

For instance, situation may arise where a rape victim after the rape incident decides to deliver the child that was conceived during the rape incident and such child grows up without any form of acknowledgment from his maternal grandfather as his son. Bearing in mind that one of the conditions attached to the enjoyment of the protection offered by section 42 (2) is that the party relying on the provision must first show by cogent evidence that the deceased is his father before he can be allowed to inherit under native law and custom from his estate and failure to do so he is expected to trace his root to his biological father before section 42 (2) can come to his rescue, can it be said that the intention of draftsperson has been realized if such child is disinherited on the basis that he was unable to show that the deceased acknowledged him as a son or that he failed to identify his biological father.

Also if Mrs. A (childless) upon the death of her husband marries a fellow woman for purposes of procreation and to maintain her late husband's lineage, bearing in mind the condition attached to the enjoyment of section 42 (2), will it not amount to a restrictive interpretation of section 42 (2) if the products of such invalid arrangement are disinherited on the basis of an arrangement they were never a party to. The relevant question now is what role did the innocent children play in the creation of the void union or is it a case of the parents have eaten sour grapes and the children's' teeth are set on edge [32]. It is submitted that for the realization of the intention of the draftsperson a wider interpretation to section 42 (2) should be adopted. However, it is pertinent to state that the contention of this paper is not to overstretch the meaning of section 42 (2) to create a situation where a person born into a particular family will argue that it was the circumstances of birth that made him a member of that particular family and for more elucidations, the succeeding paragraphs of this paper will look at the categories of persons whom this paper is advocating for.

Children of rape victims

The incessant menace of rape occurrences in modern Nigeria is certainly worrisome to the society including academic, legal, religious, medical and political circles of the day. Rape is like a cankerworm which seems to be thriving and is deepening its roots by the day in the Nigerian society. This frightening report with its resultant stigma which appear frequently on the national dailies cuts across all age brackets in the society [33]. Rape is a forcible sexual intercourse with a girl or a woman without her giving consent to it or with her consent if the consent is obtained by force or by means of threat of intimidation of any kind or by fear or harm or by means of false and fraudulent

representation as to the nature of the act [34]. Rape is an offence of basic intent and is also committed by a man who induces a married woman to have sexual intercourse with him by impersonating her husband [35]. Generally, the rape victims undergoes double suffering, first by the violence they endure and by the failure of the law enforcement agencies to bring the culprits to justice. There seems to be a culture of silence surrounding rape in Nigeria. The social stigma associated with rape across the globe forces female victims in Nigeria to conceal incidents of rape in order to save themselves from shame and ignominy [36].

This decision to conceal the rape incident may in cases where the rape incident resulted in pregnancy be amalgamated with a decision to conceal and hide the identity of the father from the child. Also in situations where the victim is willing to reveal the identity of the father to the resultant child, this decision to reveal maybe hampered by the inability to ascertain the father. The germane question then is if the victim's family refuses or fails to acknowledge the paternity of the resultant product of the rape incident and the child on his own part fails to trace his biological father or even if there is a chance to trace his father, refuses to associate with him, what happens to his right to partake in the partitioning of the estate of his maternal grandfather. One may argue that whatever accrues to his mother as a biological child of the family can be transferred to him but what happens if his mother pre-deceases her own father and his right to inherit is being challenged by other legitimate children of the family.

It is submitted that in cases like this, provisions of section 42 (2) should be interpreted in such a manner that a product of rape who cannot trace his biological father and has been rejected by his maternal family should be allowed to inherit from his maternal home especially in cases of intestacy and succession under native law and custom. Another category of persons to be treated under this sub-heading are children of spinsters whose paternity were not acknowledged by their maternal family/grandfather. These persons are most times taken care of by the share of the estate that accrues to their biological mother [37]. However, if the such spinster (daughter) is disinherited or predeceases her father (Posthumous child's grandfather) it is the stance of this paper that such child should be protected adequately under section 42(2) especially when the identity of his biological father cannot be ascertained.

Products of woman to woman marriage (Surrogate Marriage)

Woman to woman marriage had been documented in more than 30 African Populations including the Yoruba and Ibo of West Africa, the Nuer of Sudan, the Lovedu, Zulu and Sotho of South Africa and Kukuyi and Nandi of East Africa [38]. Although, it is referred to as a woman to woman relationship, it does not involve sexual relationship between the couple. Rather it connotes a traditional way of legalizing what ordinarily would have amounted to the birth of illegitimate children who traditionally would have been denied inheritance. In other words, the female husband is an improvised sociological father to the resulting offspring. The children belong to her lineage and hold inheritance right accordingly [39]. Therefore, woman to woman marriage were not actually contracted in response to sexual emotions or attractions between the couple but simply an instrument for the preservation or extension of patriarchy and its traditions [40].

Indeed, while the Ibo of Southern of Nigeria engage in female to female marriage to preserve the lineage of the patriarch, the Yoruba of the South Western Nigeria most times employed it to keep a loving and faithful widow who desires to stay with her in-laws even where there are no males in the family to keep her. In this case, the widow is acquired by any of the serving female relations of the late husband. Unlike the Ibo situation, the woman is not allowed to engage in any sexual relationship within or outside. Typically, in the Ibo setting, the arrangement involves two women undergoing formal marriage rites, the requisite bride price is paid by one party as obtainable in a heterosexual marriage. The woman who pays the bride price of the other woman becomes the sociological husband. The female husband thus assumes the role of a sociological father of the resulting offspring. The children belong to her lineage and not to their biological father(s). They belong to the patrilineal *Obi* and have inheritance right accordingly. To this end, concept of female husband was an instrument for the preservation and extension of patriarchy and its tradition [41].

In *Nwodo & Anor. v. Nwodo* [42], the Appellant's claim to the land in dispute was founded on a woman to woman marriage and claim to a father who died 15 years before he was born. The 1st Appellant's mother was married by another woman (Keziah) who was an adopted wife of the deceased who inherited her from his own father upon his father's death. The Court dismissing the appeal held that to allow a married woman such leverage/power to marry or bring another woman into the marital home of her late husband many years after the death of the said husband and arrange for the strange relationship between the woman and other men to produce a child (son) in the name of the late husband for the alleged purpose of continuity of the family line of the late husband, is absurd, immoral and an unnatural/strange mode of procreation most especially where the ulterior motive of the strange arrangement is to corner and possess the family property of the deceased [43]. The 1st Appellant's attempt to seek refuge under S 42(2) of the 1999 Constitution was unheeded to by the Court; according to the Court the provision cannot be applicable to the 1st Appellant because he is not even a biological son of the father he claimed which would have linked him with the family name. This paper is in accord with the decision of the court to declare the union between the first Appellant's mother and the wife of the deceased invalid. This paper also is in agreement with the decision of the court to declare invalid the purported alienation without recourse to the female children of the deceased. However, it is submitted that the 1st appellant although a product of an invalid marriage can still be depicted as a legitimate child by virtue of section 42 (2). This humble submission is anchored on the singular fact that disinheriting the 1st Appellant because of a disability he is experiencing as a result of circumstances surrounding his birth will amount to a restrictive interpretation of section 42 (2) because the 1st Appellant was not privy to the arrangement that brought him to life. It is of importance to point out that the position taken by this paper is in conformity by the statement of the Customary Court of Appeal in the instant case when it opined thus in respect of the dictates of section 42 (2) as it pertains to the legitimacy status of the 1st Appellant:

In the appeal under consideration, the 1st

Defendant/Respondent was born in 1962, and he claimed that his father was Ubaegbulem who died in 1947. This is biologically impossible. Following the Supreme Court decisions (supra), I find that 1st Defendant Respondent had no right, whatsoever, to alienate the said Ala Ama Ejiogu in dispute to the 2nd Defendant/Respondent. I am unable to understand why 1st Defendant/Respondent did not tell the Court who his biological father was, which made his denial of Alpheus Nwodo as his father suspicious. However, in view of the provisions of Section 42 (2) of the Constitution of the Federal Republic of Nigeria 1999, I cannot declare 1st Defendant/Respondent illegitimate. But that does not mean that he has the right to sell any family land without the consent of the Appellant The crux of this appeal is the question of alienation of Ala Ama Ejiogu to the 2nd Respondent by the 1st Respondent. (Emphasis Supplied)

From the statement of the appellate Court, it can be garnered that although the Court conceded that it was biologically impossible for the 1st Appellant (1st Defendant/1st Respondent at the trial court and Customary Court of appeal respectively) to be born several years after the death of his supposed father, the Court however broadened its interpretation of section 42 (2) by not declaring the 1st Appellant illegitimate. Thus if the restrictive interpretation which imposes on a person the condition to first show that the deceased is his father was put into consideration, maybe a different result may be arrived at. In *Obi v. Ugbor* [44], the Court of Appeal in its obiter stated that if the Appellant was a product of the union between *Nweke* and *Mgbeafor*, (woman to woman marriage /Surrogate marriage) he still cannot inherit on grounds that the union that brought him to life is repugnant to natural justice. Thus, the Appellant would have been disinherited as a result of a disability caused by circumstances surrounding his birth which he never contributed to [45].

Posthumous children

A posthumous child is one given birth to after the demise the of the father. It may be that the child was conceived during the life time of the man but was delivered after the death of the man and in this situation, because such child was given birth to within a reasonable time after the death of the man, the legitimacy status of such child may not be challenged. Its legitimacy may also not be challenged if the woman's body change due to the pregnancy was conspicuous before the death of the man. The second category of posthumous children are those born several years after the death of the man or those born outside the permitted gestation period [46]. The third category of posthumous children under the Nigerian native law and custom are products of levirate marriages [47].

While the first category of posthumous children and those posthumous children gotten as a result of levirate marriages are adequately provided for under native law and custom [48], the first category of posthumous children in some cases face adverse challenge to their legitimacy status. This challenge is traced to the fact these children are given birth to several years after the death of the man which makes it biologically impossible that the deceased sired those children. Also, products of certain invalid arrangements suffer these hostilities from their supposed family members.

Instances of these invalid arrangements may include where a woman either marries another woman in the name of a dead man [49], or where a barren woman married another woman in her own name on the understanding that the products of the arrangement will continue to bear the name of the deceased [50]. This hostility towards this first category of posthumous children played out in the case of *Afam Okeke v. Helen Okeke* [51], the Appellant challenged the authority of the Respondent to inherit the Estate of Late Simon Okeke who according to the Appellant was his father. Evidence adduced, showed that the Late Simon Okeke during the subsistence of his statutory marriage that yielded two daughters married his mistress (Appellant's mother). However, Appellant was born 5 years after the death of Simon Okeke. Dismissing the Appellant's claim against the Respondent (one of the two female children of the statutory marriage of Late Simon Okeke), the Court held thus:

A custom which enables a child born and fathered by another man to claim and inherit the property of a man who had died before he was conceived by his mother and to disinherit the man's biological child because she is a female is certainly inconsistent with sound reasoning. It is repugnant to natural justice, equity and good conscience. It is an affront to the natural order of human life [52].

The Appellant's main contention was that he was been prevented from inheriting the estate of late Simon Okeke because of the circumstances of his birth having been born five years after the death of Simon Okeke. This contention which was based on the provisions of section 42 (2) was also dismissed on the ground that he cannot rely on the said provision because he has not proved that he is the son of Late Simon Okeke. In a similar case of *Ojukwu v. Agupusi & Anor* [53], the Appellant (the deceased's brother) maintained an action against the wife of his elder brother and his posthumous children which were born long after the death of the deceased. Although the Court held that the Appellant failed to show that the posthumous children were fathered by the 1st Respondent and not his brother, the Court still held that the custom of Nnewi people which allows wives of deceased husbands to have posthumous children for their late husbands is not only repugnant to natural justice, equity and good conscience but contrary to public morality and policy in that it encourages prostitution and promiscuity [54].

It is a common fact that a good number of these posthumous children are conceived via unusual way which includes their mother keeping many sexual partners at the same time and this unscrupulous attitude may make it quite impossible for the mother to pinpoint who actually impregnated her. So if the child is denied the right to inherit on the basis of being a product of an invalid marriage, what will become of such child if his biological family also rejects him on the basis that his biological father did not acknowledge him before his death? This paper enjoins the Courts to interpret and construe the provisions of section 42 (2) to offer the protection to such a child whenever he seeks refuge under the section. It is not the intention of these paper to trivialize the immorality associated with woman to woman marriage rather the objective of the paper is to appeal for a wider interpretation of section 42 (2) to offer protection to the vulnerable members of our society and for the provision to live up to its main objective which is to protect a Nigerian citizen from discrimination. What other worse form of discrimination can be suffered by a person who is rejected by both his supposed family and his biological family.

Conclusion

The provisions of section 42 (2) no doubt came as a messiah to liberate and ameliorate the untold hardship being passed through by Nigerian citizens when their right to inheritance is being subjected to the dictates of native law and custom. Without the intervention of this provision of the 1999 Constitution, certain categories of persons like the female child, widows (barren and those with only female children), illegitimate children etc. are always disinherited whenever the partitioning of an estate is to be governed by Customary Law. This paper has examined the extent of the application of this provisions by Nigerian Courts. This paper is of the view that the ambit and scope of the protection offered by the provision of section 42 (2) can be enlarged if a more purposive and enlarged interpretation is adopted by the court to extend this protection to persons like children of rape victims, posthumous children and products of surrogate marriages.

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15. (1951) 13 WACA 804.
16. (19550 15 WACA 20.
17. See C.C Ani *Supra* (n.7), 89.
18. *Ibid*. See also *Salibu v. Nwariaku*, (2003) LPELR -2998 (SC); (2003) 7 NWLR (Pt.819) 426 where the Supreme Court per *Ayoola JSC* stated that the Court of Appeal was right in holding that the trial Court had jurisdiction to entertain the claim before it and most importantly that the two issues born out of wedlock are entitled in equal share with the two other issues of the marriage of the deceased.
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25. Ibid. at p. 33, paras. B-E, Per Sanusi JCA.
26. See Nezianya v. Okagbue (1963) LPELR-15467 (SC); (1963) 1 ANLR 352, 354. See also Nzekwu & Ors v. Nzekwu & Ors (1989) LPELR-2139 (SC); (1989) 2 NWLR (Pt. 104)373; (1989) 3 SC (Pt. 2) 76.
27. (2014) LPELR-22697 (SC); (2014) 4 SC (Pt. 111) 65; (2014) 9 NWLR (Pt. 1412) 393; (2014) ALL FWLR (Pt. 739) 1154.
28. Ibid. at p. 36, paras. B-G, Per Ogunbiyi JSC. See also Mojekwu v. Iwuchukwu (2004) LPELR-1903 (SC); (2004) 11 NWLR (Pt. 883) 196; (2004) 4 SC (Pt. II) 1; (2005) 1 FWLR (Pt. 249) 982 which affirmed Mojekwu v. Mojekwu (1997) 7 NWLR (Pt. 512) 283.
29. (2015) LPELR-40859 (CA).
30. (2012) LPELR-7837 (SC).
31. See also *Zakirai v. Muhammad & ORS* (2015) LPELR-40387 (CA). *Uwaokop v. UBA PLC* (2013) LPELR-22622 (CA). *Ohanenye & ORS v. Ohanenye & Sons Ltd & Anor* (2016) LPELR-40458 (CA). *Abubakar & Ors v. Yar'adua & Ors* (2008) LPELR-51 (SC); (2008) 19 NWLR (Pt. 1120), 1
32. Jeremiah 31:29, the Holy Bible, New International Version, Zondervan Grand Rapids, Michigan 49530, USA, p 439. See also *Okonkwo v. Okagbue* (1994) 9 NWLR (Pt 308) 301. See also *Mgbodu v. Mgbodu* (2018) LPELR-43770 (CA) where the Court of appeal while articulating its findings posed a pertinent rhetorical question as thus: Why should a child be put at a disadvantage because of the conduct of a randy father and a promiscuous mother? It would be unconscionable therefore, to disinherit such a child from partaking in the father's estate. I too have no difficult at all, in agreeing with his Lordships decision that the Appellant, being a son of the deceased Gregory Mgbodu is eminently entitled to a share in the estate of his father to whom he came into the world. Hence, the Appellant is entitled to share equally with the Respondent in the estate of their late father, the Late Gregory Mgbodu.
33. Achunike HC, Kitause RH. 'Rape Epidemic in Nigeria: Cases, Causes, Consequences and Responses to the Pandemic'. International Journal of Research in Applied Natural and Social Science,2014:2(1):31.
34. See Lucky v. State (2016) LPELR-40541 (SC); (2016) 13 NWLR (Pt 1527) 128; (2016) ALL FWLR (Pt. 857) 567. Idi v. State (2017) LPELR-42587 (SC); (2018) 4 NWLR (Pt. 1610) 359. Terver v. State (2015) LPELR-24787 (CA). Onoyiwa v. State (2018) LPELR-44255 (CA).

35. See LB, Curzon, Dictionary of Law Fifth Edition (London: Financial Times Management,1998), 312.
36. Chiazor IA *et al* 'Taming the Rape Scourge: Issues and Action'. Journal of Gender and Behaviour,2016:14(3):7775.
37. See *Igbozurike v. Onuador* (2015) LPELR-25530 (CA). Under the Nrachi custom the right to inherit of children of spinsters are also guaranteed. Under this custom, a man who gave birth to daughters only has an option to perform the *Nrachi* ceremony on one of his daughters with the understanding that the daughter will remain unmarried and give birth to a son. The outcome of the ceremony is that the daughter acquires proprietary rights over the estate of her father which in turn devolves on any son begotten by the daughter. See also *Nwabuekwe v. Muo* (2016) LPELR-40956 (CA). *Mark v. Ironu* (2019) LPELR-47026 (CA).
38. Murray SO, Roscoe. W; Boys – Wives and Female Husbands: Studies of Africa Homo Sexuality (New York: St. Martin's Press, 1998), 255.
39. Ibid.
40. See Meribe v. Egwu (1976) LPELR-1861 (SC); (1976) ANLR 216. See Also Okonkwo v. Okagbue (1994) 9 NWLR (Pt. 308) 301 where the apex Court Per Ogundare JSC stated that it would be in the interest of justice to let the children know who their true father is and not to allow them live for the rest of their live under the myth that they are children of a man who had died many decades before they were born.
41. Nwoko KC. Female Husbands in Igbo Land; South East Nigeria, Journal of Pan African Studies, 2012 5(1), p. 78.
42. (2018) LPELR-43948 (CA).
43. Ibid at p. 23-24, paras. F-A, Per Mbaba JCA.
44. (2018) LPELR-44420 (CA).
45. See also Motoh v. Motoh (2010) LPELR-8643 (CA); (2011) 16 NWLR (Pt. 1274) 474, where the 1st Respondent was denied legitimacy status on the frail basis that he failed to show by cogent evidence that the deceased married his mother under native law and custom. Ani (n.7) at P.3, argued that the holding of the Court of Appeal to the effect that the Respondent is not the son of Jeremiah in law and hence not entitled to partake in the partitioning of the estate does not reflect the philosophy of the provisions of S 42(2) of the 1999 Constitution of the Federal Republic of Nigeria. He contended that the Court of Appeal was wrong to have premised the right of the respondent to inherit on the validity of the marriage of his mother and the deceased and according to him all the Respondent needed to show was that he was the son of Late Jeremiah Motoh whether as a legitimate or an illegitimate son to enable him partake in the administration of the deceased estate and not to prove that he was a product of a valid marriage. He concluded by saying that one of the purpose of Section 42 (2) of the 1999 Constitution is to give a person a status that the circumstance of his birth has denied or deprived him.
46. Under the Evidence Act, the permitted period of gestation for the presumption of paternity is 280 days while under Islamic Law, the minimum period is six months while maximum is five years. See also *Tanimu v. Kura* (2017) LPELR-43097 (CA).
47. Levirate marriage was part of ancient Hebrew Law. The term is coined from the Latin word *Levir* which means brother-in-law. Levirate is common when a man dies without a male child and the widow is expected to make an effort to bear a male child that will continue the deceased's line through one of her brother-in-laws. See C.C. Ani (n.7) P. 108. See also *Ojiogu v. Ojiogu* (2010) LPELR-2377 (SC); (2010) 9 NWLR (Pt. 1198) 1. See also O.A.F Anedo, Obiefuna: Cause for Different Marriages among the Igbo in Nigeria, Ideal International Journal,2012:13(2):78.
48. If the children are given birth posthumously under a validly constituted levirate marriage they are entitled to inherit either from the biological father or from their new father.
49. Okonkwo v. Okagbue, Supra.
50. See Nwodo & Anor. v. Nwodo, Supra.
51. (2017) LPELR-42582 (CA).
52. Ibid. at p. 57, paras. A-B, Per Bolaji-Yusuf JCA.
53. (2014) LPELR-22683 (CA).
54. Ibid. at p. 44-45, paras. G-A, Per Agube JCA.