

Child Welfare Versus Doctrines of Legitimacy: Reconciling Islamic Law, Customary Law and Statutory Child Rights in Nigeria

By

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Abstract

The legal status of children born outside wedlock remains a contentious issue within Nigeria's plural legal system, where statutory law, customary law, and Islamic law operate concurrently. While the Constitution of the Federal Republic of Nigeria 1999 and the Child's Rights Act 2003 adopt a rights-based framework grounded in equality, dignity, and the best interests of the child, customary and Islamic law continue to attach significant legal consequences to legitimacy, particularly in matters of paternity, inheritance, and social identity. This article critically examines the doctrinal conflict arising from these divergent legal regimes. Adopting a doctrinal methodology, it analyses statutory provisions, judicial decisions, and Islamic juristic authorities on lineage (nasab) and legitimacy. The study finds that strict adherence to traditional legitimacy doctrines often produces discriminatory outcomes that are difficult to reconcile with constitutional guarantees of non-discrimination and evolving human rights standards. It further argues that Nigerian courts have begun, albeit inconsistently, to adopt welfare-oriented interpretations, but a coherent jurisprudential approach remains lacking. The article proposes a harmonised framework that combines purposive judicial interpretation, legislative reform, and internal doctrinal evolution within customary and Islamic law, particularly through ijthad and public interest considerations. It concludes that meaningful reconciliation is both necessary and achievable, provided that the welfare and dignity of the child are prioritised as the overriding legal standard.

Keywords: Child Rights; *Nasab* (Lineage) in Islamic Law; Customary Law and Legitimacy; Best Interests of the Child

1.0 INTRODUCTION

The welfare and protection of children constitute a central concern of contemporary legal systems. Modern legal frameworks increasingly recognise that children require special protection owing to their physical, emotional, and psychological vulnerability.¹ Within this

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¹Freeman M, *The Rights and Wrongs of Children* (Pinter Publishers 1983) 9.

broader framework of child protection, the legal status of children born outside wedlock remains a contentious issue in many jurisdictions, particularly those characterised by legal pluralism.

Nigeria operates a plural legal system consisting of statutory law, customary law, and Islamic law.² Each of these legal regimes embodies distinct normative assumptions regarding family relations, legitimacy, lineage, and parental responsibility. While statutory law emphasises equality and child welfare, customary and Islamic law traditionally link paternal affiliation to lawful marriage.³

The resulting tension between these legal regimes raises fundamental questions regarding the welfare of children born outside wedlock. In many cases, such children may face limitations regarding paternal affiliation, inheritance, and social recognition. These limitations have direct implications for their economic security, psychological development, and overall welfare.

This article examines the interaction between doctrines of legitimacy under customary and Islamic law and the child-centred framework of Nigerian statutory law. It interrogates whether traditional legal doctrines remain compatible with constitutional principles of equality and the statutory requirement that the best interests of the child be paramount.

2.0 CONCEPTUAL FRAMEWORK

2.1 Meaning of Legitimacy

Legitimacy refers to the legal status accorded to a child born within a valid marriage recognised by law. Historically, legitimacy determined a child's entitlement to inheritance, family affiliation, and social recognition.⁴

Under English common law, a child born outside marriage was described as *filius nullius*, literally "the child of no one."⁵ Such children were considered legally unrelated to their fathers and were therefore excluded from paternal inheritance.

2.2 Illegitimacy and Child Welfare

²Park AEW, *The Sources of Nigerian Law* (Sweet & Maxwell 1963) 11.

³ Okonkwo C.O, *Introduction to Nigerian Law* (2nd edn, Sweet & Maxwell 1980) 245.

⁴ *ibid* 247.

⁵Blackstone W, *Commentaries on the Laws of England* (1765) vol 1, 454.

Modern legal systems increasingly reject discriminatory classifications based on legitimacy. Contemporary child rights discourse emphasises that the circumstances of a child's birth should not determine the extent of legal protection available to that child.⁶

Freeman observes that:

“The child should not suffer legal disadvantage merely because of the circumstances of his or her birth.”⁷

This shift reflects a broader transformation from morality-based family law to welfare-oriented child protection.

3.0 HISTORICAL DEVELOPMENT OF LEGITIMACY RULES

3.1 English Common Law Influence

The historical treatment of illegitimacy in Nigeria was heavily influenced by English common law, which formed part of the received law introduced during the colonial period.⁸ Under common law, illegitimate children were excluded from paternal inheritance and family identity.

3.2 Colonial Legal Transplantation in Nigeria

The reception of English law through the Supreme Court Ordinance and related legislation significantly influenced Nigerian family law doctrines.⁹ However, colonial administrators also recognised customary and Islamic law in matters relating to personal status.

This dual recognition laid the foundation for Nigeria's contemporary plural legal system.

4.0 International Legal Framework on Child Rights

International human rights law increasingly rejects discrimination against children based on their birth status.

Article 2 of the Convention on the Rights of the Child provides that:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child... without discrimination of any kind, irrespective of the child's... birth or other status.”¹⁰

⁶ Freeman M (n 1) 21.

⁷ *ibid* 23.

⁸ Park AEW (n 2) 56.

⁹ *ibid* 63.

¹⁰ Convention on the Rights of the Child 1989 art 2.

Similarly, the African Charter on the Rights and Welfare of the Child emphasises the protection of all children without discrimination.

These instruments reinforce the principle that children should not suffer disadvantages arising from circumstances beyond their control.

5.0 NIGERIAN STATUTORY FRAMEWORK ON CHILD RIGHTS AND LEGITIMACY

5.1 Constitutional Protection

The Constitution of the Federal Republic of Nigeria 1999 provides the foundational legal framework for the protection of children's rights in Nigeria. Central to this framework is the principle of non-discrimination, particularly as enshrined in section 42, which prohibits discrimination based on circumstances of birth. This provision represents a significant departure from traditional doctrines of legitimacy that differentiate between children born within and outside lawful marriage.

Section 42(2) specifically provides that no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his or her birth.¹¹ This constitutional guarantee has far-reaching implications for the legal status of children born outside wedlock, particularly in relation to inheritance, parental responsibility, and social recognition.

In addition, section 34(1) guarantees the right to the dignity of the human person, which has been interpreted to encompass protection from degrading or discriminatory treatment.¹² The combined effect of these provisions is to establish a constitutional standard that prioritises equality and human dignity over rigid adherence to traditional legitimacy doctrines.

The Nigerian courts have, in certain instances, affirmed the principle that children should not suffer discrimination due to their birth status. In *Salubi v Nwariaku*, the Supreme Court recognised the rights of children in matters of inheritance and emphasised that legal doctrines should not operate to produce manifest injustice.¹³ Although the case arose within

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

¹² *Ibid.* S34(1)

¹³ *Salubi v Nwariaku* (2003) 7 NWLR (Pt 819) 426 (SC).

the context of customary law, its reasoning reflects a broader judicial willingness to mitigate the harsh consequences of illegitimacy.

However, despite these constitutional guarantees, tensions persist in practice due to the continued application of personal laws that attach legal consequences to legitimacy. This raises fundamental questions regarding the supremacy of the Constitution and the extent to which personal status laws must conform to constitutional norms.

5.2 The Child's Rights Act 2003

The Child's Rights Act 2003 represents the most comprehensive statutory framework for the protection of children in Nigeria. Enacted to domesticate the Convention on the Rights of the Child, the Act adopts a rights-based approach that places the welfare of the child at the centre of all legal considerations.

Section 1 of the Act provides that: "In every action concerning a child... the best interest of the child shall be the paramount consideration."¹⁴

This provision establishes the best interest's principle as the overriding standard in all matters affecting children, thereby displacing traditional doctrines that prioritise parental status or legitimacy.

Furthermore, section 10 of the Act guarantees the right of every child to dignity, while section 15 prohibits discrimination based on birth or other status.¹⁵ These provisions reinforce the constitutional mandate of equality and underscore the irrelevance of legitimacy in determining a child's entitlement to legal protection.

Importantly, the Act recognises the right of a child to parental care and protection, which includes maintenance and support from both parents, irrespective of the marital status of those parents.¹⁶ This marks a significant shift from customary and Islamic doctrines that may limit paternal obligations in cases of children born outside wedlock.

Despite its progressive provisions, the effectiveness of the Child's Rights Act is constrained by issues of domestication, as it is applicable only in states that have formally adopted it. This has resulted in uneven protection across the federation, particularly in some northern states where the Act has not been fully implemented.

¹⁴ Child's Rights Act 2003, s 1.

¹⁵ *ibid* ss 10, 15.

¹⁶ *ibid* s 14.

5.3 Legitimacy Act and Related Statutes

The Legitimacy Act 1929 (as received into Nigerian law) represents an earlier statutory attempt to address issues of illegitimacy. The Act provides for the legitimization of children upon the subsequent marriage of their parents. While this mechanism offers a pathway to legitimacy, it remains limited in scope, as it does not fully eliminate discrimination against children born outside wedlock.

In addition, the Matrimonial Causes Act 1970 contains provisions relating to the custody and maintenance of children, empowering courts to make orders in the best interests of the child, irrespective of legitimacy.¹⁷ This reflects a gradual shift towards a welfare-oriented approach in Nigerian family law.

However, these statutory interventions remain fragmented and do not comprehensively resolve the tensions between legitimacy doctrines and child rights. In particular, inheritance rights under customary and Islamic law continue to be governed by personal law systems that may not fully align with statutory and constitutional principles.

5.4 Judicial Application of Statutory Child Rights Principles

Nigerian courts play a critical role in bridging the gap between statutory child rights and traditional legitimacy doctrines. Through judicial interpretation, courts have the capacity to harmonise conflicting legal regimes and promote the welfare of children.

In *Mgbodu v Mgbodu*, the court acknowledged the evolving nature of family law and emphasised the need to interpret legal principles in a manner consistent with justice and equity.¹⁸ Similarly, courts have increasingly invoked the repugnancy doctrine to invalidate customary practices that operate unjustly against children.¹⁹

Nevertheless, judicial attitudes remain inconsistent, with some decisions continuing to uphold traditional notions of legitimacy, particularly in matters of inheritance and lineage. This inconsistency underscores the need for a more coherent judicial approach grounded in constitutional supremacy and the best interests of the child.

¹⁷ Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004, ss 69–71.

¹⁸ *Mgbodu v Mgbodu* (2015) LPELR-24587 (CA).

¹⁹ *Edet v Essien* (1932) 11 NLR 47.

5.5 Evaluation of the Statutory Framework

The Nigerian statutory framework reflects a clear normative shift towards child-centred justice, emphasising equality, dignity, and welfare. The Constitution and the Child's Rights Act, in particular, provide a robust legal basis for challenging discriminatory legitimacy doctrines. However, several challenges persist:

- a. Legal pluralism, which allows the continued application of customary and Islamic law
- b. Incomplete domestication of the Child's Rights Act across all states
- c. Judicial inconsistency in the application of child rights principles
- d. Limited enforcement mechanisms, particularly in rural areas

These challenges highlight the need for a more integrated legal approach that harmonises statutory law with personal status systems while ensuring that the welfare of the child remains paramount.

6.0 CUSTOMARY LAW APPROACHES TO LEGITIMACY

Under many Nigerian customary law systems, legitimacy is closely linked to lawful marriage and lineage.²⁰ A child's right to inheritance and family membership often depends on recognition within the paternal lineage. However, customary law is subject to judicial scrutiny under the repugnancy doctrine. Customs that are contrary to natural justice, equity, and good conscience may be declared invalid.²¹

7.1 Islamic Law and the Doctrine of Lineage (*Nasab*)

Islamic law provides a comprehensive framework governing family relation, within which the concept of *nasab* (lineage) occupies a central position. Lineage determines a wide range of legal rights and obligations, including inheritance, guardianship (*wilayah*), maintenance (*nafaqah*), and social identity. In the Nigerian context, particularly in the northern states where Islamic law is widely applied, the doctrine of *nasab* plays a significant role in shaping the legal status of children.

However, the classical rules governing lineage, especially as they relate to children born outside lawful marriage, raise important questions when examined alongside contemporary

²⁰ Okonkwo C.O (n 3) 251.

²¹ Park AEW (n 2) 182.

statutory and constitutional principles that emphasise equality and the best interests of the child.

7.2 Concept and Legal Significance of *Nasab*

In Islamic jurisprudence, *nasab* refers to the legally recognised relationship between a child and his or her parents, particularly the father. The establishment of lineage is crucial because it determines entitlement to:

- i. Inheritance (*mirath*)
- ii. Maintenance (*nafaqah*)
- iii. Guardianship (*wilayah*)
- iv. Family identity and social recognition

The Qur’ān emphasises the importance of proper attribution of lineage. It provides: “Call them by [the names of] their fathers; that is more just in the sight of Allah...”²² This verse establishes the principle that children should be affiliated with their biological fathers where lawful paternity is established. Classical jurists interpret this provision as reinforcing the integrity of the family structure and preventing confusion in matters of descent.

7.3 Establishment of Paternity under Islamic Law

Under classical Islamic law, paternity (*nasab*) may be established through several recognised means:

(a) Valid Marriage (Nikah)

The primary basis for establishing lineage is a valid marriage. A child born within a lawful marriage is automatically attributed to the husband under the presumption of legitimacy (*al-walad lil-firāsh*).²³

(b) Acknowledgement (*Istilhaq*)

A man may acknowledge a child as his own, provided certain conditions are met, including the possibility of paternity and absence of contradiction.²⁴ This doctrine introduces a degree of flexibility within Islamic law.

(c) Evidence and Proof

²² Qur’ān 33:5 (Surah Al-Ahzab).

²³ Rahman S A, *Islamic Jurisprudence* (Kitab Bhavan, 1987) 312.

²⁴ Fyzee A A, *Outlines of Muhammadan Law* (5th edn, Oxford University Press, 2008) 164.

Classical jurists relied on testimonial and circumstantial evidence. In modern contexts, this raises questions regarding the admissibility of scientific evidence such as DNA testing.

7.4 Status of Children Born Outside Wedlock

The most contentious aspect of Islamic law in this context relates to the status of children born outside lawful marriage (*walad al-zina*). Classical jurists generally hold that such a child:

- i. Is affiliated with the mother
- ii. Has no legal lineage to the biological father
- iii. Is excluded from paternal inheritance

This position is rooted in the hadith: “The child belongs to the bed (marriage), and the adulterer gets nothing.”²⁵ Under this doctrine, the biological father bears no legal responsibility for the child in terms of inheritance or lineage, although some jurists recognise moral obligations. In the Nigerian context, particularly under the Maliki school, which predominates in many northern states, this position is strictly applied. This has significant implications for children born outside wedlock, especially where paternal acknowledgement is absent.

7.5 Divergent Juristic Opinions

Despite the apparent rigidity of the classical rule, Islamic jurisprudence is not entirely monolithic. There exist divergent views among jurists:

Hanafi School: with more flexibility regarding the acknowledgement of paternity. Some contemporary scholars advocate recognition of biological paternity where it is scientifically proven.

Minority opinions: Suggest that public interest (*maslahah*) may justify extending certain rights to such children. These variations indicate that Islamic law contains internal mechanisms capable of adaptation, particularly where justice and social welfare are at stake.

²⁵ Ṣaḥīḥ al-Bukhārī, Hadith No 2053.

7.6 Maintenance and Welfare Considerations

Although classical doctrine limits paternal lineage, Islamic law strongly emphasises social justice and protection of vulnerable persons, including children. Even where lineage is not established, some juristic opinions support:

- i. Financial support through charitable obligations
- ii. Community responsibility (*zakat* and *waqf*)
- iii. Protection of the child's dignity and social standing

This demonstrates that while doctrinal rules on lineage may be restrictive, the broader ethical framework of Islamic law prioritises compassion and welfare.

7.7 Contemporary Developments and Reformist Perspectives

Modern legal and social developments have prompted renewed debate on the treatment of children born outside wedlock within Islamic law. Key issues include:

(a) DNA Evidence

Scientific advancements now make it possible to establish biological paternity with a high degree of certainty. Some contemporary scholars argue that this should influence legal recognition of lineage.

(b) Human Rights Norms

International human rights instruments, particularly the Convention on the Rights of the Child, reject discrimination based on birth status. This creates tension with classical doctrines.

(c) Reformist Jurisprudence

Certain modern scholars advocate reinterpretation (*ijtihad*) of classical rules to align with contemporary realities, particularly where strict application results in injustice.

7.8 Islamic Law in the Nigerian Context

In Nigeria, Islamic law operates within a broader plural legal system and is subject to constitutional limitations under the Constitution of the Federal Republic of Nigeria 1999.

While Sharia courts apply classical doctrines of *nasab*, their decisions may be subject to appellate review within the wider judicial hierarchy. This creates an opportunity for harmonisation between Islamic law and constitutional principles. However, in practice, the application of Islamic law often remains conservative, particularly in matters relating to lineage and inheritance. This underscores the need for a more dynamic interpretative

approach that takes into account both religious principles and contemporary child rights standards.

7.9 Critical Evaluation

The doctrine of *nasab* reflects a legitimate concern for preserving family structure and social order. However, its strict application to children born outside wedlock raises serious concerns from a child welfare perspective. This includes:

- i. Denial of paternal identity and support
- ii. Exclusion from inheritance rights
- iii. Social stigma and marginalisation

These outcomes appear inconsistent with the broader objectives of justice and compassion that underpin Islamic law itself.

A more balanced approach would involve:

Greater reliance on acknowledgement and evidence

Consideration of the child's welfare (*maslahah*)

Harmonisation with constitutional and statutory protections

8.0 JUDICIAL ATTITUDES TO LEGITIMACY AND CHILD WELFARE IN NIGERIA

The role of the judiciary in Nigeria's plural legal system is pivotal in mediating the tension between statutory child rights and traditional doctrines of legitimacy. While statutory provisions—particularly under the Constitution of the Federal Republic of Nigeria 1999 and the Child's Rights Act 2003—promote equality and the best interests of the child, courts are often confronted with cases governed by customary and Islamic law, which attach legal consequences to legitimacy.

Judicial attitudes have therefore evolved along a spectrum ranging from strict adherence to traditional doctrines to progressive, welfare-oriented interpretations. This section examines these trends and evaluates their implications for the protection of children born outside wedlock.

8.1 Traditional Judicial Approach: Preservation of Legitimacy Doctrines

Historically, Nigerian courts have demonstrated a tendency to uphold traditional doctrines of legitimacy, particularly in matters relating to inheritance and family status. This

approach reflects judicial deference to customary and Islamic law as integral components of Nigeria's legal system.

Under customary law, courts have often affirmed that rights to inheritance and lineage are contingent upon legitimacy. In *Lawal v Younan*, the court emphasised the importance of lawful marriage in determining family membership and succession rights.²⁶ This position aligns with the broader customary law principle that lineage is traced through recognised familial structures.

Similarly, earlier judicial decisions influenced by English common law reinforced the exclusion of illegitimate children from paternal inheritance, reflecting the doctrine of *filius nullius*.²⁷ Although this doctrine has been largely discredited in modern jurisprudence, its legacy continues to influence certain judicial outcomes. This traditional approach, while respecting cultural norms, has been criticised for perpetuating inequality and undermining the welfare of children born outside wedlock.

8.2 Emergence of Welfare-Oriented Judicial Reasoning

In more recent times, Nigerian courts have increasingly adopted a child-centred approach, emphasising fairness, equity, and the welfare of the child over rigid adherence to legitimacy doctrines. A significant illustration is found in *Salubi v Nwariaku*, where the Supreme Court recognised the proprietary interests of children and cautioned against legal interpretations that produce unjust outcomes.²⁸ Although the case did not completely abolish legitimacy distinctions, it signalled a shift towards a more equitable approach.

Similarly, in *Mgbodu v Mgbodu*, the Court of Appeal underscored the need to interpret family law principles in a manner consistent with justice and contemporary realities.²⁹ The court acknowledged that strict traditional rules may no longer be suitable in a modern legal system that prioritises human rights and social justice.

These decisions reflect an emerging judicial willingness to align legal doctrines with the best interest's principle, particularly as codified under the Child's Rights Act.

²⁶ *Lawal v Younan* (1961) 1 All NLR 245.

²⁷ Kasunmu A B and Salacuse J W, *Nigerian Family Law* (Butterworths, 1966) 102.

²⁸ *Salubi v Nwariaku* (2003) 7 NWLR (Pt 819) 426 (SC).

²⁹ *Mgbodu v Mgbodu* (2015) LPELR-24587 (CA).

8.3 Application of the Repugnancy Doctrine

One of the most important tools available to Nigerian courts in addressing discriminatory customary practices is the repugnancy doctrine, which permits courts to invalidate customs that are contrary to natural justice, equity, and good conscience. In *Edet v Essien*, the court applied this doctrine to scrutinise customary practices and emphasised that not all customs are automatically enforceable.³⁰ This principle has been invoked in several cases to challenge discriminatory practices affecting vulnerable groups, including children.

The repugnancy doctrine provides a doctrinal basis for courts to reject aspects of customary law that unjustly disadvantage children born outside wedlock. However, its application has been inconsistent, with some courts showing reluctance to interfere with deeply rooted cultural norms.

8.4 Constitutional Supremacy and Judicial Responsibility

The doctrine of constitutional supremacy requires that all laws, including customary and Islamic law, conform to the provisions of the Constitution. Section 1(3) of the Constitution establishes that any law inconsistent with its provisions shall be void.³¹ In principle, this implies that customary or Islamic rules that discriminate against children based on legitimacy should be subject to constitutional scrutiny under section 42. However, Nigerian courts have not always robustly enforced this principle in cases involving personal status. This judicial hesitation may be attributed to the need to balance constitutional mandates with respect for cultural and religious diversity. Nevertheless, the failure to fully apply constitutional standards risks undermining the protection afforded to children under statutory law.

8.5 Persistent Challenges in Judicial Practice

Despite the emergence of progressive trends, several challenges continue to affect judicial attitudes:

- i. Inconsistency in decisions, leading to uncertainty in the law
- ii. Deference to personal law systems, particularly in sensitive cultural contexts
- iii. Limited reliance on the Child's Rights Act, especially in states where it has not been domesticated

³⁰ *Edet v Essien* (1932) 11 NLR 47.

³¹ Constitution of the Federal Republic of Nigeria 1999 (as amended), s 1(3).

- iv. Judicial conservatism, particularly in inheritance matters

These challenges contribute to the continued marginalisation of children born outside wedlock in certain legal contexts.

8.6 Evaluation

The trajectory of judicial attitudes in Nigeria reflects a gradual but incomplete shift from formalism to functionalism. While earlier decisions prioritised strict legal classifications based on legitimacy, contemporary jurisprudence increasingly recognises the need to protect the welfare and dignity of the child. However, this evolution remains uneven. The absence of a clear and consistent judicial doctrine reconciling legitimacy with child rights continues to create uncertainty. For meaningful progress to occur, Nigerian courts must adopt a more coherent, rights-based approach grounded in constitutional supremacy and the best interests of the child.

9.0 Critical Analysis and Doctrinal Conflict

The interaction between statutory child rights, customary law, and Islamic law in Nigeria reveals a deep-seated doctrinal conflict regarding the legal status of children born outside wedlock. While statutory law, anchored in the Constitution of the Federal Republic of Nigeria 1999 and the Child's Rights Act 2003, adopts a rights-based and welfare-oriented approach, customary and Islamic law continue to emphasise legitimacy as a determinant of legal status. This section critically interrogates whether the continued application of legitimacy doctrines is justifiable within a modern constitutional framework that prioritises equality, dignity, and the best interests of the child.

9.1 The Central Doctrinal Conflict

At the core of the debate lies a fundamental tension between:

- i. Status-based legal systems (customary and Islamic law), and
- ii. Rights-based legal systems (statutory and constitutional law)

Customary and Islamic law derive legal consequences from the marital status of parents, thereby conditioning a child's rights on legitimacy. In contrast, statutory law rejects such distinctions and emphasises that all children are entitled to equal protection. This divergence creates a situation in which the legal rights of a child may vary depending on the applicable legal regime, an outcome that is both normatively problematic and legally uncertain.

9.2 Legitimacy Doctrine and Constitutional Equality

The doctrine of legitimacy, in its strict form, appears incompatible with the constitutional guarantee of non-discrimination under section 42 of the Constitution. By denying certain rights, particularly inheritance and paternal affiliation to children born outside wedlock, the doctrine effectively imposes disabilities based solely on circumstances of birth. Such a distinction raises serious constitutional concerns. As noted in *Salubi v Nwariaku*, the courts have shown a willingness to question legal rules that produce unjust outcomes.³²

However, judicial engagement with the constitutionality of legitimacy doctrines remains limited. A purposive interpretation of section 42 suggests that any legal rule—whether statutory, customary, or religious—that disadvantages a child solely based on birth status should be subject to constitutional invalidation.

9.3 Tension Between Religious Freedom and Child Rights

A key challenge in addressing legitimacy doctrines lies in the need to balance freedom of religion with child rights protections. Islamic law, in particular, derives its authority from religious principles, and any attempt to reform its doctrines may be perceived as interference with religious autonomy. However, this tension is not irreconcilable. The Constitution itself establishes a hierarchy of norms in which fundamental rights occupy a central position. Where religious or customary practices conflict with constitutional guarantees, the doctrine of constitutional supremacy requires that such practices yield.

Moreover, Islamic jurisprudence contains internal mechanisms such as *ijtihad* (independent reasoning) and *maslahah* (public interest), which permit adaptation in response to changing social conditions. This suggests that reform can occur from within the tradition, rather than being imposed externally.

9.4 The Best Interests Principle versus Lineage Formalism

The best interests of the child, as codified under the Child's Rights Act, represent a functional and welfare-oriented standard. In contrast, legitimacy doctrines are rooted in lineage formalism, prioritising the integrity of family structure over individual welfare.

This divergence raises a critical question: Should legal systems prioritise social order or individual justice? While the preservation of family structure is a legitimate objective, it

³² *Salubi v Nwariaku* (2003) 7 NWLR (Pt 819) 426 (SC).

should not come at the expense of the fundamental rights and welfare of the child. The strict application of lineage rules often results in:

- i. Denial of financial support
- ii. Exclusion from inheritance
- iii. Social stigma and marginalisation

These outcomes undermine the very purpose of law as an instrument of justice.

9.5 Legal Pluralism and Fragmentation of Child Rights

Nigeria's plural legal system, while reflective of its cultural diversity, creates significant challenges for the uniform protection of child rights. The coexistence of multiple legal regimes allows for the persistence of norms that may be inconsistent with constitutional and statutory standards.

This fragmentation leads to:

- i. Unequal protection of children across regions
- ii. Forum shopping and legal uncertainty
- iii. Inconsistent judicial outcomes

From a doctrinal perspective, legal pluralism becomes problematic where it permits the continuation of practices that undermine fundamental rights.

9.6 The Limits of the Repugnancy Doctrine

The repugnancy doctrine has historically served as a mechanism for controlling the excesses of customary law. However, its effectiveness in addressing legitimacy-related discrimination is limited.

First, the doctrine is inherently subjective, relying on judicial perceptions of what constitutes "natural justice, equity, and good conscience." Second, courts have often applied it cautiously, particularly in matters involving deeply entrenched cultural practices. As a result, the doctrine has not been consistently used to challenge discriminatory legitimacy rules, thereby limiting its impact as a tool for reform.

9.7 Reconceptualising Paternity and Responsibility

A critical aspect of the legitimacy debate concerns the relationship between biological paternity and legal responsibility. Traditional doctrines often disconnect the two, particularly in cases of children born outside wedlock. However, modern legal systems increasingly recognise that a biological connection should entail corresponding

responsibilities, regardless of marital status. Advances in scientific evidence, particularly DNA testing, further strengthen this position. From a child welfare perspective, it is difficult to justify a legal framework that permits a biological father to evade responsibility solely based on the circumstances of conception.

9.8 Towards a Harmonised Legal Approach

The resolution of doctrinal conflict requires a shift towards a harmonised legal framework that integrates the strengths of different legal traditions while eliminating their unjust consequences. Such an approach would involve:

- i. Interpreting customary and Islamic law in light of constitutional principles
- ii. Prioritising the best interests of the child in all cases
- iii. Recognising biological paternity as a basis for responsibility
- iv. Encouraging doctrinal evolution within personal law systems

This does not necessitate the wholesale abandonment of traditional legal systems, but rather their adaptation to contemporary standards of justice.

10.0 NEED FOR HARMONISATION OF LAWS

The preceding analysis demonstrates that the tension between legitimacy doctrines under personal law systems and the child-centred framework of statutory law creates significant legal and social challenges in Nigeria. While the Constitution of the Federal Republic of Nigeria 1999 and the Child's Rights Act 2003 establish clear standards of equality and welfare, their full realisation is hindered by the continued application of customary and Islamic law rules that attach legal consequences to legitimacy.

This section proposes concrete measures aimed at harmonising these legal regimes in a manner that preserves cultural and religious values while ensuring the protection of children's rights.

10.1 Judicial Harmonisation through Constitutional Interpretation

One of the most effective mechanisms for resolving doctrinal conflict lies in judicial interpretation. Nigerian courts should adopt a purposive and rights-oriented approach in interpreting personal law rules, ensuring that they conform to constitutional standards.

In particular, courts should:

- i. apply section 42 of the Constitution robustly to invalidate discriminatory rules based on birth status.

- ii. interpret customary and Islamic law in a manner consistent with the best interests of the child
- iii. expand the use of the repugnancy doctrine to address unjust practices

By doing so, the judiciary can gradually align personal law systems with constitutional values without abruptly displacing them.

10.2 Legislative Reform and Clarification

Legislative intervention is necessary to address gaps and inconsistencies in the current legal framework. The National Assembly and State Houses of Assembly should consider amending existing laws to expressly prohibit discrimination based on legitimacy in all areas, including inheritance. Also, clarifying the legal responsibilities of biological fathers irrespective of marital status, incorporating provisions recognising modern methods of establishing paternity, such as DNA evidence. Such reforms would provide clear legal guidance and reduce reliance on inconsistent judicial interpretations.

10.3 Full Domestication and Implementation of the Child's Rights Act

A major challenge in Nigeria is the uneven application of the Child's Rights Act 2003 across the federation. Some states have not fully domesticated the Act, resulting in disparities in the protection of children. To address this, all states should adopt and implement the Act in full; and mechanisms should be established to ensure effective enforcement, particularly at the grassroots level. Public institutions, including courts and social welfare agencies, should be strengthened to implement child rights protections. Uniform application of the Act is essential for ensuring that all children, regardless of location, enjoy equal protection.

10.4 Reform within Islamic Law through Ijtihad

Reform of Islamic law should be approached through internal doctrinal mechanisms, particularly *ijtihad* (independent reasoning) and *maslahah* (public interest). Islamic scholars and jurists should: re-examine classical rules on *nasab* in light of contemporary realities; consider the role of scientific evidence in establishing paternity; and emphasise the overarching objectives of Sharia (*maqasid al-shari'ah*), particularly justice, welfare, and protection of human dignity. Such an approach allows for context-sensitive reform that remains faithful to Islamic principles while addressing modern challenges.

10.5 Evolution of Customary Law

Customary law is inherently dynamic and capable of adaptation. Courts and communities should encourage the evolution of customary practices to reflect contemporary values of fairness and equality. This can be achieved through judicial reinterpretation of customs in light of changing social conditions; community-level reforms that recognise the rights of all children; and increased awareness of the impact of discriminatory practices on child welfare. By embracing its adaptive nature, customary law can remain relevant while aligning with constitutional standards.

10.6 Recognition of Biological Paternity and Responsibility

A key aspect of reform is the alignment of biological paternity with legal responsibility. The law should ensure that biological fathers cannot evade responsibility based on the circumstances of a child's birth; children have the right to know and be supported by both parents; and scientific methods, such as DNA testing, are admissible and widely utilised. This approach promotes accountability and enhances the socio-economic welfare of children.

10.7 Public Awareness and Institutional Strengthening

Legal reform must be complemented by social and institutional measures. Public awareness campaigns should be conducted to reduce stigma associated with children born outside wedlock, and promote understanding of child rights; encourage responsible parenthood and, in addition, institutions such as Family courts. Legal aid services and child welfare agencies should be strengthened to provide effective support and enforcement mechanisms.

10.8 Towards an Integrated Child Rights Framework

Ultimately, Nigeria requires a coherent and integrated legal framework that harmonises statutory law with personal law systems. This framework should prioritise the best interests of the child in all legal contexts; ensure consistency across jurisdictions; respect cultural and religious diversity while eliminating injustice. Such an approach reflects a balanced model of legal pluralism in which diversity is preserved without compromising fundamental rights.

11.0 CONCLUSION

The question of the legal status and welfare of children born outside wedlock exposes one of the most persistent tensions within Nigeria's plural legal system. This study has

demonstrated that while customary and Islamic law historically ground rights and obligations in doctrines of legitimacy and lineage, contemporary statutory and constitutional frameworks, particularly the Constitution of the Federal Republic of Nigeria 1999 and the Child's Rights Act 2003, have decisively shifted towards a rights-based paradigm that prioritises equality, dignity, and the best interests of the child.

The analysis reveals that the continued application of strict legitimacy doctrines often results in the denial of paternal affiliation, inheritance, and socio-economic support to children born outside wedlock. Such outcomes are increasingly difficult to justify within a constitutional order that prohibits discrimination based on birth and recognises the inherent dignity of every child. Although Nigerian courts have shown emerging willingness to adopt welfare-oriented interpretations, judicial responses remain inconsistent, reflecting the broader challenges of legal pluralism.

Importantly, this work has shown that the apparent conflict between personal law systems and child rights is not irreconcilable. Both customary law and Islamic law possess inherent mechanisms for evolution and adaptation. Through principles such as judicial reinterpretation, the repugnancy doctrine, *ijtihad*, and *maslahah*, it is possible to align traditional doctrines with contemporary standards of justice without undermining their normative foundations.

The path forward lies in a deliberate and coordinated process of reform anchored in constitutional supremacy, supported by legislative clarity, and reinforced by progressive judicial reasoning. Equally critical is the need for social reorientation and institutional strengthening to ensure that legal protections translate into lived realities.

Ultimately, the legitimacy of any legal system rests on its capacity to protect the most vulnerable. In this regard, no child should be disadvantaged by the circumstances of birth. A truly just legal order in Nigeria must therefore move beyond formalistic distinctions and embrace a unified, child-centred approach in which the welfare and dignity of every child remain paramount.