



STUDY ON THE LEGITIMACY OF CHILDREN IN
ISLAMIC LAW AND ITS APPLICATION IN NIGERIA

BY

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A thesis submitted in fulfilment of the requirement for the
degree of Doctor of Philosophy in Law

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JULY 2019

ABSTRACT

Legitimation of children born out of wedlock has long been a conundrum among Muslim legal experts. The genesis of their controversy is traced to the diverse interpretations given to the commonly cited dictum; '*alwalad lil firāsh*' (The child belongs to the one on whose bed it is born). The strong inclination of the majority of early Muslim jurists to the view that a child born out of wedlock is not allowed to be attributed to his putative father has become predominant. Many countries with legal pluralism, like Nigeria, where Islamic law is an integral part of their legal system have always been faced with legal challenges over the legitimation of illegitimate children. Islamic law has been fiercely criticized for preventing putative fathers to acknowledging their biological children. Besides, the position of Islamic law on the legitimation of children born out of wedlock has been perceived as antithetical to Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria, popularly known as non-discrimination clause. Therefore, the primary objective of this research is to explore polemical discourse on the legitimation of children born out of wedlock under Islamic law. The research also examines the process of legitimating children born out of wedlock under the existing laws in Nigeria. Additionally, some selected Muslim countries have been included to find out the status of those children. The research has been achieved through the adoption of the qualitative approach, which includes doctrinal and non-doctrinal legal research methodology. Semi-structured interviews were conducted with Law Lecturers, Islamic Studies lecturers, Presiding Justice of the Court of Appeal, Judges/Qādis, children born out of wedlock, Muslim scholars, medical experts and Community Leaders. Based on the findings of the research, bizarre conditions of children born out of wedlock have been traced to the one-sided interpretation of legal texts. This research has also found that the consensus reported by some jurists that any child born illegitimate cannot be legitimated is completely unfounded. Ultimately, the study has found that there is a possibility of harmonization of Islamic and Civil laws in this regard without trampling on the fundamental principles of Sharī'ah.

خلاصة البحث

قد طالما كانت مسألة استلحاق الأولاد غير الشرعيين معضلة بين العلماء المسلمين، وسبب خلافهم يرجع إلى تأويلات عديدة للقاعدة المشهورة " الولد للفراش"، فإن ميل جمهور الفقهاء القدامى الشديد إلى عدم جواز استلحاق الأولاد غير الشرعيين أصبح سائداً، والعديد من بلدان التعددية القانونية، مثل نيجيريا، حيث إن الشريعة الإسلامية جزء لا يتجزأ من نظامها القانوني تواجه دائماً تحديات بشأن استلحاق الأطفال غير الشرعيين، وقد تعرضت الشريعة الإسلامية لانتقادات حادة لمنع الآباء استلحاق أولادهم الناتجين من الزنا، إلى جانب ذلك، وقد اعتبر موقف الشريعة بشأن استلحاق الأطفال المولودين خارج نطاق الزوجية متناقضاً مع مادة 42 (2) المعروفة بشرط عدم التمييز من دستور عام 1999 لجمهورية نيجيريا الاتحادية، ولذلك، فإن الهدف الأساسي من هذا البحث هو دراسة الخلاف الفقهي حول استلحاق الأولاد المولودين خارج نطاق الزوجية بموجب الشريعة الإسلامية، ويدرس البحث أيضاً طريقة استلحاق الأطفال المولودين خارج نطاق الزوجية بموجب القوانين القائمة في نيجيريا، بالإضافة إلى ذلك، لقد تم إدراج بعض البلدان الإسلامية المختارة لمعرفة وضع الأطفال المولودين خارج إطار الزواج، وقد تم تحقيق البحث من خلال الاعتماد على منهج البحث النوعي الذي يشمل منهج البحث المكتبي القانوني وغير المكتبي، وقد أُجريت مقابلات شبه منظمة مع محاضري القانون ومحاضري الدراسات الإسلامية، ورئيس محكمة الاستئناف، وقضاة محاكم شرعية، الأطفال المولودين خارج نطاق الزوجية، وعلماء مسلمين، وخبراء طبيين، وقادة المجتمع، واستناداً إلى نتائج البحث، فإن سبب الظروف القاسية التي تواجه الأطفال المولودين خارج إطار الزوجية يرجع إلى التأويل أحادي الجانب للنصوص الشرعية، وقد وجد هذا البحث أن دعوى الإجماع عن عدم جواز استلحاق الأولاد غير الشرعيين الذي ينقله بعض الفقهاء لا أساس له من الصحة، وفي نهاية المطاف، وجدت الدراسة أن هناك إمكانية المواءمة بين الشريعة الإسلامية والقوانين المدنية في هذا الصدد دون المساس بالمبادئ الشرعية.

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DECLARATION

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*To my lovely parents and my beloved wife I dedicate this work for their bizarrely
unwavering supports. I owe you absolutely everything.*

ACKNOWLEDGEMENTS

Primarily, I am deeply indebted to Allah for making this seemingly impossible ambition eventually achieved. I gratefully thank Him for His boundless blessing.

I owe a great debt of gratitude to my supervisor, Assoc. Professor Dr Azizah Mohamad and co-supervisors, Assoc. Professor Dr Norlia Ibrahim and Professor Dr Abdul Haseeb Ansari, for their unceasing guidance, remarkable endurance, efficacious supervision and revealing insights into the research. My deep appreciation also goes to the internal and external examiners for their invaluable contributions. May Allah, in His infinite mercy, bless you and your family.

I would like to express my deep appreciation to my beloved wife for the infinite patience exercised and profound understanding showed throughout this journey. I ask Allah- in His infinite mercy- to reward you. I would also like to express my warmest thanks to my in-laws for their unwavering support and profound understanding from the dawn of our relationship. I beseech Allah to reward them with goodness. To my siblings a deep appreciation for their unwavering supports from my childhood. Only word of appreciation comes to mind whenever your unwavering supports are remembered.

I would like to express my deep sense of gratitude to all invaluable friends home and abroad whose companionship has tremendously contributed to the success of this work. Kindly accept my humble protestations of gratitude.

I am highly indebted to Intentional Islamic University Malaysia and Ahmad Ibrahim Kulliyah of Law in particular for the conducive learning environment provided.

Words are powerless to express my gratitude to all of you for making this academic journey meaningful, enjoyable and successful. *Jazakumullah Khayra.*

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LIST OF ABBREVIATIONS

AI	Artificial Insemination
AID	Artificial Insemination Donor
AIH	Artificial Insemination Husband
ARTs	The Assisted Reproductive Technologies
CAI	Combined Artificial Insemination
CDC	Constitutional Drafting Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Nations Convention on the Right of the Child
DNA	Deoxyribonucleic Acid
FSCA	Federal Sharia Court of Appeal
IIFA	The International Islamic Fiqh Academy
IUI	Intrauterine Insemination
JPN	National Registration Department
LMP	Last Menstrual Period
MKI	National Council for the Islamic Affairs
NSCIA	Nigerian Supreme Council for Islamic Affairs
WHO	World Health Organization

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Marriage is an essential prerequisite for establishing the legitimacy of a child under both Shari'ah and conventional laws. When a child is born under Islamic law by a legally married couple, he automatically becomes legitimate.¹ Besides, disclaiming such a child by his father becomes impermissible except through the process of imprecation (li'ān). On the other hand, a child becomes illegitimate when he is a product of illicit acts.²

However, attributing a child born out of wedlock to his putative father has long been a conundrum in both Islamic and conventional laws. The genesis of the conundrum in Islamic law can be traced to the parent-centered interpretation of the common dictum "*al-walad lil firāsh*".³ The opinion held by the majority of early Muslim jurists that any child born out of wedlock cannot be acknowledged has a tremendous impact on the law of many Muslim countries.⁴ The opinion has become so predominant that consensus has been erroneously reported. However, classical Islamic books are replete with divergent views on whether a child born out of wedlock can become legitimate or not.

¹ Abu al-Hasan 'Ali Abdus-Salam, *al-Bahjah fi Sharh al-Tuhfah*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998), vol.2, 588.

² Sonbol Amira al-Azhary, "Adoption in Islamic Society: A Historical Survey", *Children in the Muslim Middle East* (1995): 45-67.

³ The legal meaning of the doctrine is that the paternity of a child born in lawful wedlock belongs to the husband of the mother without any acknowledgement or affirmation of parentage on his part and such child automatically follows the status of the father.

⁴ Syed, Safir, "The Impact of Islamic Law on the Implementation of the Convention on the Rights of the Child: The Plight of Non-marital Children under Shari'a", *The International Journal of Children's Rights*, vol. 6, no.4 (1998): 359-393.

There has always been a conflict of laws where Islamic law and other conventional laws are run side by side as far as the issue of the legitimation of children born out of wedlock is concerned. This conflict has made many children born out of wedlock suffer abject misery as a consequence of the opinion held by the majority of Muslim scholars and the common practice not only in countries where Sharī'ah is a major legal system but also in legal pluralistic countries like Nigeria.⁵

Section 42 (2) of Nigeria's 1999 Constitution known as the non-discrimination clause has been used by Nigerian courts as a shield to avert discrimination against children born out of wedlock.⁶ Section has overturned the law in respect of concept of illegitimacy and the rights of acknowledged children to inherit their putative fathers. Section has also practically removed the social stigma and societal discriminations that denied children born out of wedlock their fundamental human rights attached to the concept of illegitimacy.⁷

However, the Nigerian Supreme Council for Islamic Affairs (NSCIA) takes the position that Section 42(2) of the 1999 Constitution would demolish the very basis and essence of Sharī'ah and Islamic culture. It was said that the Child Right Act's provisions that give equal rights to male and female children in inheritance and the establishment of a Family Court that replaces Sharī'ah Courts' jurisdiction in all matters relating to children would undermine Islamic law.⁸ The Council, therefore,

⁵ Gopal, Meerah Deiwi Raja, "Does Illegitimacy Status of Children Matter? A Review on Malaysian Perspectives", *International Journal of Applied Psychology*, vol. 5, no. 4 (2015): 109-114.

⁶ Onuoha, V. E., and Michael Attah, "The Right to Inherit: Illegitimacy and Constitutional Liberation in Nigeria—just a legal shield?", *Journal of Social Welfare and Family Law*, vol. 36, no. 3 (2014): 226-240.

⁷ Oni, Babatunde Adetunji. "Discriminatory Property Inheritance Rights under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms", *IOSR Journal of Humanities and Social Science*, vol. 19, no. 2 (2014): 30-43.

⁸ Weimann, Gunnar J. "An Alternative Vision of" Shari'a" Application in Northern Nigeria: Ibrahim Salih's" Hadd Offences in the Shari'a", *Journal of Religion in Africa*, vol. 3, no 5, (2010): 192-221.

discouraged the Northern states, and by implication, the Shari'ah -implementing states not to adopt the CRA.

In reality, several issues raised by the Nigerian Supreme Council for Islamic Affairs (NSCIA) were valid by reason of some fundamental differences in the philosophical underpinnings and provisions of the CRA and Islamic Law. As a case in point, the CRA's provisions in respect to adoption, marriage, custody, and family court are fundamentally at variance with Islamic Personal Law. Nevertheless, the section could still find a place under Islamic law, most especially the issue of the legitimization and inheritance of the child born out wedlock when the judicial determination is not exclusively confined to the majority of scholars' opinion, which is the goal of this research.

The application of the Maliki School of law is the official madhab in Nigeria and has been affirmed by Shari'ah Court of Appeal.⁹ Albeit, the leaders of Sokoto *Jihad* were Malikis, they were emphatic that the judge has rights to refer to the rulings of other Schools of law when deemed necessary.¹⁰

To find common ground for the divergent opinions among Muslim jurists, it necessitates examining the polemical discourse over the concept of legitimacy, legitimation under Islamic law. Besides, the research would be extended to studying the law of legitimacy in the family law of Nigeria. This study, therefore, intends to examine the polemical discourse of legitimation of children born out of wedlock under Islamic law with a brief reference to the Nigerian family law.

⁹ Sharia Court of Appeal Law, Cap. 122, Laws of Northern Nigeria, 1963, Section 14. See also *Idowu v Akanbi* (2003), Annual Report Sharia Court of Appeal (Kwara State), 126-33 at 132; *Sadiq v Animakun* (2005), Annual Report Sharia Court of Appeal (Kwara State), 89-98 at 97-8; and *Rabiu v Amadu* (2003) 5 N.W.L.R. (Pt. 831) 343-75 (Court of Appeal, appeal from Katsina State Sharia Court of Appeal).

¹⁰ Sodiq, Yushau. "A History of Islamic Law in Nigeria: Past and Present", *Islamic Studies*, vol. 31, no. 1 (1992): 85-108.

1.2 STATEMENT OF PROBLEM

This study has been undertaken based on the problem of the legitimation of illegitimate children under Islamic law. Jurists' views on this issue have been problematic and unsettled. Similarly, the application of the theoretical concept of legitimation of Islamic law in Nigeria and many other Muslim countries does not fully protect children born out of wedlock in Nigeria.

Intensive study of the classical books of Islamic law makes it clear that the issue of illegitimate children has been lengthily discussed, though this study is sporadic. The opinion held by majority of Muslim scholars that children born out of wedlock are only affiliated to their mothers has devastating consequences.¹¹

This had been the position in Nigerian law before the enactment of Section 42(2) of the 1999 Constitution, which is a reproduction of Section 39(2) of the 1979 Constitution, right of inheritance was predicated on the status of the child. This shows that it is only children born within lawful wedlock and those acknowledged by their putative fathers that have the rights of inheritance in the deceased estate.¹²

The above Islamic law perspective has been widely accepted and more considered as a solid underpinning of all the four famous Islamic schools of law that some have made a claim of consensus of all Sunni jurists on this opinion.¹³ It is also the opinion held by the Nigerian Muslim scholars as expressed by M.A. Ambali.¹⁴

¹¹Fakhr al-dīn al-Rāzī, *Maḥāṭib al-Ghayb*, (Beirut: dar- al-kutub al-‘ilmiyyah, 2000), vol. VI, 569.

¹² Ibid.

¹³Sujimon Mohammad, *The Problems of the Illegitimate Child (Walad Zina) and Foundling (Laqit) in the Sunni Schools of Law*, (Kuala Lumpur: IIUM Press, 2010), 26.

¹⁴ That “a child born out of wedlock is not qualified to inherit from the estate of his/her mother in the act of adultery, and the man also is barred from sharing in the estate of the product of his illegal association with a woman. See Ambali, M. A. "The practice of Muslim Family Law in Nigeria", (1998) 344.

The above point of view has been rationalized based on imposing punishments on the adulterer and curbing spreading of obscenity and immorality in the society.¹⁵ However, there is no doubt that such punishments would definitely affect innocent souls, which could consequently result in injustice that is inconsistent with the tenet of Sharī'ah.

Further, considering the maximum of lesser of two evils, the consequence of preventing the illegitimate child to be legitimized when acknowledged by his biological father would be more detrimental to society, particularly in the time when the government pays little or no attention to them.

The prevalent opinion, therefore, has pernicious effects on those innocent children. Without encouraging immorality in any form, the researcher believes that a child born out of wedlock should not bear the brunt of some other peoples' recklessness. Therefore, this study seeks to analyze various means of the legitimation process under Islamic law and a brief reference to Nigerian family law to find a realistic solution to the alarming situation of illegitimate children that arises as a consequence of textual interpretations.

1.3 OBJECTIVE OF THE RESEARCH

Family institution occupies a very pivotal position in Sharī'ah for the preservation of offspring as one of the higher goals of Islamic law. It affirms the right of the child born by a legally married couple to inheritance. However, a child might be born out of wedlock as a result of adultery that is prohibited in Islamic law. Denying such an

¹⁵ Ogunniran, Iyabode, "The Child Rights Act versus Sharia Law in Nigeria: Issues, Challenges & a Way Forward", *Child. Legal Rts. J.*, vol. 1, no, 30 (2010): 62.

innocent child the right of affiliation to his biological father¹⁶ and right to inheritance without clear-cut proofs from sources of Islamic law would subject him to numerous difficulties in the society.

To obviate the juristic conundrums of illegitimate children, the following are the objectives of this research:

1. To study the position of Islamic law on the legitimation of illegitimate children.
2. To study the status of illegitimate children in both Sharia'h and Nigerian Family law.
3. To compare Nigeria law of legitimacy with some selected Muslim countries.
4. To provide recommendations and suggestions for improving the law governing the legitimation of illegitimate children in Nigeria.

1.4 RESEARCH QUESTIONS

The research aims to provide coherent answers to questions proposed as a solution for the underlying problems. The proposed questions are as follow:

1. To what extent does Islamic law allow children born out of wedlock to be attributed to their putative father?
2. What is the legal status of illegitimate children in both Sharia'h and Nigerian family law?
3. To what extent can the laws of legitimacy of children be compared and harmonized?
4. Can acknowledged children inherit their fathers?

¹⁶ This is subject to two conditions: a- mother of the child born out of wedlock must not be a legal wife of another man, b- the child must not be acknowledged by another claimant.

1.5 HYPOTHESIS

The study is undertaken based on the premise that the law relating to legitimation of illegitimate children in as well as protection of legitimized children are not adequate. Therefore, the thesis wishes to propose certain recommendations for its improvement.

1.6 SCOPE AND LIMITATION OF THE STUDY

Numerous issues are attached to the status of the illegitimacy of children most of which are broadly discussed in the classical books of Islamic law. For instance, Muslim jurists have focused on the following issues: genealogical relation of the illegitimate child, maintenance and care of illegitimate children,) bloodwite (*diyyah*), inheritance of illegitimate children, marriage of illegitimate children, illegitimate children's permissibility to lead prayer, credibility of the illegitimate child to stand as witness (*shahādah*), leading the prayer of illegitimate children and observing prayer upon an illegitimate when he dies (*salat al-janāzah*). The research focuses only on the legitimation of illegitimate children under Islamic law with a brief overview of the legitimation process only in under the Nigerian family law.

1.7 RESEARCH METHODOLOGY

The research has embarked upon the following methodologies: the doctrinal and non-doctrinal, comparative legal research. The doctrinal methodology is a black letter approach legal research, which is purely theoretical in nature.¹⁷ This method has been adopted in the course of discussion over the legitimation process in both the Islamic law and Nigerian law respectively. This has necessitated using both primary and

¹⁷ Ogloff, James RP, David R. Lyon, Kevin S. Douglas, and V. Gordon Rose, "More than Learning to Think Like a Lawyer: The Empirical Research on Legal Education", *Creighton L. Rev.*, vol. 3, no. 34 (2000): 73.

secondary sources such as Qur'ān, hadith, classical and contemporary books of Islamic law, available textbooks, and journals, judicial authorities, dissertations/theses, articles from newspaper and magazines, computer-aided electronic research (internet) such as Westlaw International, LexisNexis, LawNet, Index Islamicus, HeinOnline, and CLJ Law.

Similarly, the interview has also cut across the illegitimate children who have fallen victim. To achieve the prime objective of this research, the researcher has adopted unstructured interview questions.¹⁸ This enabled the researcher to gather relevant information that has formed a part of the research findings and conclusion.

In addition, the comparative method¹⁹ has been carried out from Sharī'ah and Nigerian family law. The reason for the comparative method is to look at divergent and convergent points between Nigerian Common law and Sharī'ah purposely to the possibility of harmonization.

1.8 LITERATURE REVIEW

In reviewing some of the literature, an attempt has been to arrange the idea in a thematic approach in order to avoid any form of ambiguity in the presentation of ideas.

1.8.1 Illegitimate Child in the Islamic Law Literatures

The issue of illegitimacy and legitimization of a child born out of wedlock has stared from the dawn of Islam. It happened during the time of the Prophet (s.a.w) as well as the time of his companions. Every substantial book of Islamic law has discussed the

¹⁸Becker, Saul, Alan Bryman, and Harry Ferguson, *Understanding Research for Social Policy and Social Work: Themes, Methods and Approaches*, (Bristol: Policy Press, 2012), 32.

¹⁹ De Cruz, Peter, *Comparative law in a changing world*, (Routledge: Deal Press, 1999), 24.