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THE NEED FOR SUBSTANTIAL JUSTICE IN ELECTION PETITIONS AT THE LOCAL GOVERNMENT ELECTIONS. IMOISI EJOKEMA SIMON	1 - 46
NIGERIA FEDERALISM:- HISTORY, CONTENTS, CHALLENGERS OF ETHNIC NATIONALITIES AND THE RIGHT TO SELF DETERMINATION. AYODEJI EBENEZER OGUNNIYILGE	47 - 133
CUSTOMARY JURISPRUDENCE & DEVELOPMENT:- THE DYNAMICS OF THE SOUTHWEST. AYODEJI EBENEZER OGUNNIYILGE	134 - 235
LEGITIMATION A PLURAL LEGAL SYSTEM: NIGERIAN LEGAL SYSTEMS EXAMINED. J.O OLATOKE SAN, Ph.D, E.A ADESINA & OLUFEMI ABIFARIN, Ph.D	236 - 254
AN APPRAISAL OF LEGAL FRAMEWORK FOR PROTECTION OF SINGLE PARENTHOOD IN NIGERIA. OLUFEMI ABIFARIN, Ph.D, E.A ADESINA & ADEREMI OYEBANJI, Ph.D	255 - 294
OBLIGATIONS AND LIABILITIES OF LEGAL PRACTITIONERS HANDLING PROPERTY TRANSACTIONS IN NIGERIA. KEHINDE ADEOLA OLUFUNKE (Dip in Law, LL.B, LL.M, Ph.D)	295 - 320
CURRIE AND de WAAL FRUSTRATION WITH ENVIRONMENTAL LAW: RESOLVING THE CONFLICT IN SUBSECTIONS 24(b)(ii) AND (iii) OF THE ENVIRONMENTAL CLAUSE IN 1996 SOUTH AFRICAN CONSTITUTION. A.P. AGBONJINMI, A.O KEHINDE & O.A. AGBONJINMI	321 - 349
HUNTING THE BEAST OF PORNOGRAPHY IN NIGERIA: THEORETICAL, LEGAL AND ETHICAL PERSPECTIVES. ANDREW ASAN ATE, Ph.D, DR. JOHN KENNEDY CHUKWU (Esq)	350 - 377
AN APPRAISAL OF THE APPLICATION OF 'LAST SEEN' DOCTRINE AND THE CONSTITUTIONAL RIGHTS OF SILENCE AND PRESUMPTION OF INNOCENCE IN HOMICIDE TRIALS IN NIGERIA. O.M. ATOYEBI, SAN, & SHAIBU ENEMONA GABRIEL (LL.B, B.L, LL.M)	378 - 402
THE COMPLEXITIES AND IMPLICATIONS OF IDENTIFICATION EVIDENCE IN CRIMINAL TRIALS IN NIGERIA. O.M. ATOYEBI, SAN, & SHAIBU ENEMONA GABRIEL (LL.B, B.L, LL.M)	403 - 443

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LEGITIMATION IN A PLURAL LEGAL SYSTEM: NIGERIAN LEGAL SYSTEMS EXAMINED

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Abstract

The necessity to examine the law relating to illegitimacy arises from the fact that the rights of illegitimate child are controversial. Further, the presumed rights of the illegitimate child may possibly conflict with the succession rights of legitimate children of the marriage, whether under the Acts or the customary law. This point is evidenced in the statement by Kasumu¹⁴⁷ that "most of the cases on illegitimacy deal with the rights of illegitimate children to succeed the property... it is in that area... that the consequences of illegitimacy are being greatly felt"

It is a well established rule of law that a child born during the subsistence of a customary or statutory marriage between his/her parents is legitimate. However, where a child is born to a legally married man by extra-marital relations, the question of illegitimacy arises. More often

¹⁴⁷ Kasumu A.B. "Adultery, Acknowledgement and the Illegitimate Child in Nigeria" (1973) U.G.L.J. Vol.X, pp.1-15atp.1-2.

than not, the mothers of this class of children in Nigeria believe that their children, though born outside marriage, have the same inheritance rights to the estate of their father, as do the children of the marriage. This inevitably leads to litigation, during which time the court, in applying the law attempt to reconcile it with social realities. This recalls the statement that:

Illegitimacy as a social problem is as old and unsolved as human existence itself. In attempting to a legal solution, the courts have allowed strict legal rule to override policy and social consideration¹⁴⁸.

However, in consideration of the dual marriage system, the Supreme Court in *Adeyemi v Bamidele* made it clear that; legitimacy in England is a different concept to legitimacy in Nigeria¹⁴⁹. This people, reconciles the various views with the constitutional provision that dominated forms of discrimination.

WHAT IS ILLEGITIMACY OF A CHILD?

The question of legitimacy is principally connected with status¹⁵⁰. According to Kasumu and Salacuse¹⁵¹ legitimacy

¹⁴⁸ Rubin N.N. and Cotran E. (ed) *Annual Survey of African Law* (1967) vol. 1 at p. 45

¹⁴⁹ (1698) 1 All N.L.R. 31 atp. 37

¹⁵⁰ E.I. N wogugu, *Family law in Nigeria* (Revised Edition, 2006 (Isinneman Educational Books) at 286.

is the status acquired by a person who is born in lawful wedlock, and such a person is regarded as being legitimate from birth. Since lawful wedlock includes marriage under the Act, as well as customary law, which included Islamic marriage, any child born during the subsistence of either of these aforementioned marriages is legitimate¹⁵².

Also, if the child is born within 280 days after his parents have obtained a decree absolute, the presumption of legitimacy will apply to the child. Under Islamic law, a child is presumed to be legitimate once he is conceived during the subsistence of the marriage. It is immaterial whether the child is born after the marriage has been dissolved. In Nigeria, the concept of legitimacy is very important because of the social stigma that is associated with illegitimacy. At common law, an illegitimate child had no right whatever with regards to his parent. He is described as *filius nullius*. The illegitimate was a stranger in law not only to his father but also to his mother and all other relatives. He thus, has no right to succeed to their property, to receive maintenance¹⁵³, or other benefits deriving from the status of the parent and child¹⁵⁴. Also, an illegitimate has no right to participate in the intestacies of either of his parents. Likewise, neither of his parents

¹⁵¹ Kasumu & Salacuse, *Nigeria Family law* (1966) at 207

¹⁵² *Lawal v. Yunna* (1961) 1 All NLR 254

¹⁵³ *Galloway v. Galloway* (1965) A.C. 229, 311 per Viscount Simonds (dissenting)

¹⁵⁴ I.E Sagay, *Nigeria Law of succession principles, cases statutes and commentaries* (1st ed, 2006, Malthouse press limited) at 2

has right to succession on the intestacy of the illegitimate child. He also had no right to intestacy of a grandparent or brother or sister (whether legitimate or not) and vice versa¹⁵⁵. In *Adeyemi v Bamidele* (supra)¹⁵⁶ the Supreme Court held that "legitimacy in England is a different concept to legitimacy in Nigeria." Thus, the Legitimacy Ordinance of 1929 has modified this common law position¹⁵⁷. Thus by section 10 of the Ordinance, where the mother of an illegitimate child dies intestate after 17 October 1929, leaving real or personal property, but not survived by any legitimate child, the illegitimate child or if he is dead, his issue, is entitled to take any interest in the estate to which he or his issue would have been entitled to if he had been born legitimate¹⁵⁸.

Also where an illegitimate person who has not been legitimated dies intestate in respect of all or any of his real or personal property, his mother, if surviving shall be entitled to take any interest in his estate to which she would have been entitled to if the child had been born legitimate and she would have been the only surviving parent. It has been argued that this Ordinance provided partial remedy to the problem created by the common law rule concerning illegitimacy¹³.

¹⁵⁵ *Fretney*, *Principles of Family law* (4th ed, 1984) at 594

¹⁵⁶ *Ibid* at 604

¹⁵⁷ *Adeyemi v. Bamidele* (1968) 1 All N.L.R at p. 37

WHO IS A LEGITIMATE CHILD?

A legitimate child is one who is born of parents lawfully married to each other. A child is legitimate at birth if born in a lawful wedlock. To be legitimate at birth, the parents of the child must be lawfully married either at the time of his conception or at the time of his birth. For instance a child may be regarded as legitimate even though the natural parents are not married to each other and with respect to who the child is legitimate is not its father.

In Ibo custom, for instance, a man who has no male child may persuade one of his daughters to stay behind and not marry, the purpose of such agreement is for her to produce a male successor to the father, and there by save the line from threatened extinction thus any child she bears while remaining with her parents is considered legitimate child of her father at birth. Any child male so produced has full rights of succession to the grandfathers land and title. Again, a barren wife may, in an effort to fulfill her obligation to bear children for her husband, marry another woman for her husband—that is provide the bride price for the marriage. Children of the other wife are regarded as the legitimate children of the husband. There are also instance of a child being regarded as the legitimate child of a man who is not its natural father. For instance, a widow remain in her late husband's home without re-marrying and her marriage with her late husband is not formally dissolved, any child she bear post humously is regarded as the legitimate child of her late husband at birth. This custom

was judicially approved in *Nwaribe v President Oru District Court & Anor*¹⁶ as not being contrary to natural justice and equity. In this case the husband of Oyibo died and she continued to live in the matrimonial home, in the family of the deceased. She became pregnant by the applicant, Nwaribe, while she still living there, but before delivery she left the house and went to stay with her people. Subsequently, she took an action in the customary court for a formal divorce. The Court held that marriage to the deceased. Obiora, was not dissolved by death in 1952, and awarded Oyibo's child to brother of the deceased. Although the applicant did not participate in the customary-court proceedings he challenged the decision of the court as being contrary to natural justice and equity. Egbuna, J, distinguished the case from *Edet v Essien*¹⁷ on the ground that in that case under consideration Oyibo continued to reside in her late husband's house after his death and became pregnant while staying there. There was no question of claim to the child on the basis that the late husband was not refunded the dowry, as was the case of *Edet v Essien*¹⁸. Moreover, the learned judge argued that the applicant did not contest the issue of the custody of the child in the customary – court proceedings, and he was aware and admitted in his affidavit that the custom of his locality the child was that of the Oyibo's late husband. He therefore held that the custom was not contrary to natural justice and equity.

Also a statutory law marriage that is void has its own implication on legitimacy. In Nigeria, prior to the enactment of section 49 (2) of the 1979 constitution¹⁹ (now 42 of 1999 constitutions any child born of a void marriage was illegitimate²⁰.

Finally, children of a voidable marriage are not considered illegitimate because such a marriage is voided at the instance of any of the parties. Again, under customary law, any child born illegitimate can be legitimated by subsequently acknowledgement. More so, there is a general presumption of legitimacy under the common or statutory law²¹, in favour of children born during the subsistence of the relationship considered or believed to be valid and up to 280 days after the situations of voidable marital union under customary law, if the marriage is subsequent voided at the instant of any of the married partners, any child born, or any pending child to be born, from a prevailing pregnancy before decree absolute voiding the said marriage remains legitimate.

LEGITIMATION OF A CHILD

Legitimation is a process by which a child who has not been legitimate acquires legitimate status. The process of Legitimation may be achieved by the subsequent marriage of the parents or his acknowledgement, that is, by recognition of the paternity of the child by his natural father. Legitimation by subsequent marriage can be

achieved either under the statutory law or under the customary law.

LEGITIMATION BY SUBSEQUENT MARRIAGE UNDER THE STATUTORY MARRIAGE

The Legitimation of an illegitimate child through the subsequent marriage of its parents was first made possible in Nigeria by the enactment of the legitimacy Acts (1929)²². This piece of legislation, though based substantially on the earlier English legitimacy Act 1929, contains some variations intended to suit local conditions. This applied then to the whole world. By section 3(1) of the legitimacy Act:

Where the parent of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria, render that person, if living, legitimate from the commencement of this Act, from the date of the marriage, whichever last happens.

Also according to section 9(1) of the Legitimacy Act makes provision for the situation where the father of an illegitimate person who domiciles in a foreign country of which does not permit legitimation per subsequent matrimony, but at the time of his marriage to the mother of the illegitimate he was domiciled in a country by the law of which such Legitimation is recognized, the

illegitimate child will be recognized as legitimated in Nigeria. His Legitimation will be by virtue of the subsequent marriage, and takes effect from the commencement of the Legitimacy Act or the date of the marriage, whichever happen last.

LEGITIMATION BY SUBSEQUENT MARRIAGE UNDER CUSTOMARY MARRIAGE

There is a paucity, if not absence of authority on the principle of Legitimation or by subsequent customary-law marriage. A probable reason for this state of affairs is the fact that some systems of customary law provided for an illegitimate than to resort to Legitimation by subsequent marriage. The question of non-statutory Legitimation, including that by subsequent customary marriage, was considered by Brett, FJ, in *Cole v Akinyele*²³. In this case, the deceased married a wife under the Marriage Act. During the subsistence of the marriage, the deceased formed an irregular association with mother of the two appellants. One of the appellant was born deceased's wife's lifetime and the other, six weeks after the death. In considering the legitimacy of the first appellant, born during the continuance of the marriage, Brett FJ, stated that he would regard it contrary to public policy for the deceased during his life to confer the status of a legitimate child on the appellant by any other method than that provided by the Legitimacy Act.

PATERNITY CONTROVERSY OR LEGITIMATION BY ACKNOWLEDGEMENT

Paternity of a child refers to the fact of being the father of a particular child or the question of who the child's father is²⁴. Paternity of a child is very important because it can also lead to single parenting. This will be so, where the fatherhood of the child is doubtful. The supposed father of the child doubt his paternity because he suspects infidelity on the part of the mother. He denies that he was not the owner of the pregnancy that produced the child. The paternity of a child is always determined by a legal action known as paternity suit or paternity action. In this a mother asks a court of law to find proof that a particular man is the father of her child usually in order to claim financial support from him²⁵. The Nigerian courts have devised rules of evidence to resolve paternity cases, paternity can be determined by acknowledgement of a child by the father²⁶. Under some systems customary of law an illegitimate child may be legitimated by acknowledgment, Acknowledgment consists of any act of the natural father of an illegitimate child by acknowledgment despite the fact that the parents have never been married to each other²⁷.

(a) Acts which constitute acknowledgment

To constitute acknowledgement, the act or conduct of the illegitimate child's natural father must be such as to indicate or establish his acceptance of the child's

paternity. It is not necessary that the act should be formal. Informal acts may, in appropriate circumstances, be enough. It has been held that the performance of the customary naming ceremony eight days after the birth of a child is simply evidence of acknowledgement²⁸. But in *Akerele v Balogun*²⁹, it was contended in defence, that the performance of naming ceremony of the illegitimate child by his natural father outside his house was proof that he did not accept paternity. Although the court did not rule on this defence, it is submitted that its validity is doubtful. The failure to perform the ceremony in the natural father's house may be capable of being explained away. For instance in, in this particular case, he is anxious to keep his association with the mother of the illegitimate secret because of the difference in their ages.

Where the birth certificate of the illegitimate child bears the name the natural father and was in fact obtained by him or on his instruction, there is clear evidence of recognition of paternity³⁰. But in *Young v Young*³¹ it was held that a baptism certificate bearing the name of the natural father cannot be regarded as an admission of paternity by him. However, if proper evidence is adduced to explain the circumstances in which the baptism certificate was issued and connected to the parentage of the illegitimate child, it may constitute adequate evidence of admission of paternity.

An admission of paternity made in a letter addressed to the chief Registrar of the supreme court of Nigeria was

held to amount to acknowledgement³². Sometimes, the maintenance of the child by the natural father, including his education (that is, the payment of school fees) is regarded as evidence of acknowledgement³³.

(b) Time of acknowledgement

It is pertinent to determine the time or times in which the right of acknowledgement may be exercised. Must a father acknowledge his child during his lifetime of the child? Is it necessary that the act of acknowledgement made public during the lifetime of the father? In proffering answer to these questions it is necessary to look at the decision in the case of *Oladele and others v Akinshola and others*³⁴. The deceased died as a result of a motor accident allegedly caused by the defendant's negligence. The plaintiffs claimed compensation under Western Nigeria Torts law as the wives and children respectively of the deceased. It was alleged that the deceased married three wives. One of the wives claimed compensation on behalf of herself and her child, who was born after the death of the deceased. The Court found out that this woman was not married to the deceased, but held that the question of acknowledgement did not arise as the child was born after the death of the father. This is so because on the birth of the child the putative father may, if still alive, realized that he made a mistake- the child may resemble someone else, medical tests may show that he is not the father, or facts may come to light before or at the birth which show conclusively that someone else is the father in which case he may

ultimately refuse to accept the child as his. The inchoate act of acknowledgment of pregnancy must be perfected by the formal acceptance of the child at birth by its natural father.

THE USE OF DNA TEST TO ASCERTAIN PATERNITY

Paternity of a child can be determined or ascertained by paternity action or suit. A paternity suit is a court proceeding to determine whether the person is the father of the child born out of wedlock. The suit is usually initiated by mother in an effort to obtain child support. The DNA test or paternity test is a test usually involving DNA identification or tissue typing, for determining whether a given man is a biological father of a particular child. Parties can go to the hospital by consensus or the court can order medical test to determine the paternity of the child. In divorce matter also where the proceeding is nullity of a void or voidable marriage or where the paternity is in contention as was done in *Oduche v. Oduche* and *Magwuala v. Megwalu*³⁵.

SUCCESSION RIGHTS OF AN ILLEGITIMATE CHILD

The practice varies among various communities. Among the Yorubas, illegitimate children are accorded equal right as their legitimate counterparts; the same is true of Annan, Ibibio, Oron, Aba-Ngwa, and Nsukka, among others, in

some other communities, illegitimate children are deprived of succession rights. The court appear to support this reprehensible practice, as demonstrated in *Onwudinjo v. Onwudinjo*³⁶, where the court rejected the claim of an illegitimate child to share in the intestate estate of his father on the ground that no evidence had been laid in support of such claim, but supported a claim by a child where the paternity had been acknowledged. With due respect this is miscarriage of justice by justice Ainley, C.J. (as he then was). His decision is contrary to section 39(2) of the 1979 constitution, (now section 42(2) of 1999 constitution) which assimilates into society citizen born out of wedlock who ordinarily would have been disinherited under English law or their customary law. Similarly, section 42(2) states, "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of his birth". The constitution is the foundation of legalities in Nigeria. It is the duty of the court not only to protect it but also to promote its operation to achieve its objective of social engineering through articulate and purposeful interpretation of law. Furthermore, provisions in America and Europe provide for equal right for children born in or out of wedlock, though the European does not contain any explicit provision to this effect, the European Court of Human Right held in *Marckxx v. Belgium*³⁸ that no objective and reasonable justification existed for denying the illegitimate any entitlement on intestacy in the members of her mother's family. In *Mojekwu v. Mojekwu* the Nnewi customary law of Oli-ekpe was struck down

under the repugnancy principle by the unanimous judgment of the Enugu Division of the Court of Appeal. The basis of the decision was that the customary law in question which "permits the son of the brother of the deceased person to inherit the property of the deceased to the exclusion of the deceased's female child" was a clear case of discrimination and inapplicable. In *Mojekwu v. Ejikeme, Fabiyi JCA* (as he then was), held that it must be pointed out that the fact that the plaintiffs/appeallants were born out of wedlock is immaterial, that cannot be used against them inheriting the estate of their father Reuben Mojekwu.

SUCCESSION RIGHT OF A LEGITIMATED CHILD

The laws governing succession in Nigeria can be divided into two broad categories namely Testate and intestate succession. This classification can be further divided into intestate succession (Non-customary) and succession under customary law. Although Islamic law has now attained a distinct legal system as was declared, by the supreme Court. Islamic law is now distinguishable from customary laws⁴⁰.

TESTATE SUCCESSION

As the name implies, testate succession consist primarily of wills. In Nigeria, there is no uniformity of applicable laws relating to wills. Consequently, among the states that were created out of the former Western Region, the

applicable law is the wills laws³⁹. By virtue of the provisions of the Applicable laws Edit of 1972⁴¹, Lagos State adopted the western Nigeria law. On the other hand, the rest of the country⁴² consisting of 19 states from the northern and 11 States eastern and south South part, still applies the English wills Acts 1837 and the Wills Amendment Act 1852 but with inclusion of some provisions that took into consideration the prevailing customary law in the affected area by testamentary disposition under customary law, cannot be disposed of by will⁴³. Also, section 15 of the wills law provides that every will made by a man or woman shall be revoke by his or her subsequent marriage. However the wills law exempts a marriage in accordance with customary law from having this effect.

INTESTATE SUCCESSION

On the other hand, intestate succession basically involves the applications of three systems of laws, like the position with legitimacy and Legitimation. These are (a) the common law (b) the Administration of Estate laws of various states and customary law⁴³. According to Sagay⁴⁴ "The factors which determines which system is to apply in every case, it is the type of marriage contracted by intestate person. In the case of Muslims the religion practiced by the deceased is also relevant". Commenting further the learned professor stated the principles of law as follows: thus, if a person contracts a Christian marriage outside Nigeria, the common law of England governs the

distribution of his estate. If he contracts a statutory (Act) marriage in Nigeria, then if dies domiciled in Lagos or any of the states comprising the old western religion, then the Administration of Estate law⁴⁵ will govern. If he contract a statutory marriage, but dies domicile in any of the state comprising the former Northern or Eastern Regions, which are ye to enact their own law on non-customary succession, then the common law will also govern the distribution of the estate⁴⁶. Finally if the intestate person was an indigenous Nigerian and he did not contract a Christian or Act marriage, or even if he did, and no issue or spouse of such a marriage survived him, his estate will be distributed in accordance with the relevant customary law. If the intestate was a Muslim, then Islamic law governs⁴⁷.

LEGITIMATION UNDER ISLAMIC LAW

In order to avoid the usual controversy surrounding paternity of a child, Islamic law provides that a free woman who has been repudiated or who has become a widow, must undergo a term of prohibition before she can re-marry. The object of this term is to be sure whether she is pregnant or not. The length of time is that of three period of purity in the case of a free woman and of two in the case of a slave woman. Even in the case of illicit intercourse, the same period of Iddah must be observed⁴⁸.

After observation of Iddah, if a woman has a child within six months, the child is affiliated to the man whom she kept the Iddah but if after six months the child is affiliated to the

new husband, *Sarutu Nna Gogo v Jubril Mohammed*⁴⁹. However, a father can acknowledge paternity by admission. According to Ruxton, only a father's declaration is uncertain and who may reasonably be attributed to him as being the child, taking into account the difference of age and local customs⁵⁰. Ige in his opinion said under Islamic law in any situation where paternity of a child is in dispute and where the mother has already contracted a second marriage as in the instant case, the essential thing to establish is how long is the period from the date of the second marriage, and the delivery by her of the child⁵¹.

According to all Sunni Schools of Islamic jurisprudence, the minimum period of gestation is six months. In effect, Islamic law, attribute to the husband the paternity of a child born to his wife within a period of less than six months of the marriage between the two parties. This is the decision of the court in *Ashietu Mayoki v Alhaji Nda*⁵². However any child born to the Muslims who are not legally married to each other is not capable of being legitimated under Islamic law. This is because Islamic law does not approve of extra-marital sexual relationship and to allow legitimation of any issue of that relationship will amount violation of the laws of Allah. However in so far as Nigeria is a secular state and the constitution is the grundnorm, section 42(2) of the Constitution will apply to legitimize any illegitimate child born to Muslim parents.

Conclusion

From the foregoing legitimization is applicable to the three types of marriage possible in Nigeria since the Constitution is the ground norm in Nigeria and Nigeria being a secular state, legitimization is possible in the three types of marriage in Nigeria. It is also clear from the wordings of the Constitution that any child born in Nigeria whether it not the parents are married the child is legitimate and must not be discriminated against, must not be called a bastard and should not be made to suffer any disadvantage or disability by reason of the circumstances of his/her birth. The philosophy behind this provision is that the child is an innocent being who did not create the situation that led to his birth. However it may also be posted that such a provision in the Constitution can discourage marriage and encourage promiscuity and single parenthood if there is no difference between a child born in wedlock and that born out of wedlock. This provision though is capable of encouraging single parenthood but it has solved a social problem of discrimination against child born out of wedlock by making the child to be able to inherit the father's property and also removing the stigma of bastard always placed in such a child by the society.

AN APPRAISAL PROTECTION

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Abstract

Marriage as a unive
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