

CUSTODY AND RIGHTS OF CHILDREN BORN OUTSIDE WEDLOCK IN THE IKWERRE OF THE NIGER DELTA

By

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Abstract

This work examined the legal status of the custody of children born outside wedlock in the Ikwerre of the Niger Delta. It shows that children all over the world whether born within or outside wedlock have inalienable rights which must be protected. Thus, making a case for equal treatment and opportunity which must be protected and to forestall the present struggle and remove the stigma of being called a bastard. The work also focuses on the custody of children born outside wedlock from being discriminated from inheritance of their biological father's property upon acknowledgement of paternity and also having equal share from children within wedlock. The findings made from this work is that in spite of the provision of S.42 of the Constitution of the Federal Republic of Nigeria 1999, which eliminated the status of children born out of wedlock as illegitimate in Nigeria, the constitution has not resolved the status of a child whose paternity has not been acknowledged by the putative father if such a child can inherit in his intestate estate. The work concluded that depriving children born out of wedlock from the inheritance of their father or mother's property is illegal as same amounts to discrimination against them. A child born out of wedlock is a victim of a circumstance which he did not create and as such, should not be made to suffer because of the circumstances of his birth and being deprived from inheriting from the father or mother. This work recommended that there should be enactment of a law against producing children outside wedlock, there should be an amendment of adoption laws in Nigeria to provide for the adoption of children born outside wedlock by their biological fathers or natal families if they fail to acknowledge them.

1.1 Introduction

Issues that pertain to children born validly within the marriage or outside marriage wedlock remain a major challenge and concern in the International community and has led to the enactment of laws and conventions for the protection of the rights of such children regardless of

their circumstances of birth. Nigeria being a signatory to the United Nations Convention¹ on the rights of a child has gone a step further to domesticate the Convention into its body of Laws as the Child Rights Act² with provisions enacted for the protection of the rights of children born outside or within wedlock.

Children all over the world whether born within or outside wedlock have inalienable rights which must be protected by well-meaning members of society. Fundamentally, since children belong to the human family, their inalienable rights cannot be abrogated in any form and they are protected by both International and Domestic Laws. The fact that the Nigerian Constitution³ expressly states that no child should be discriminated against by reason of the circumstance of his/her birth, shows that no person should be talking about children born outside or within wedlock, whether half blood or full blood, as they all have equal rights to their father's estate. However, despite the constitutional provisions the reality in some areas of the Niger Delta region especially the Ikwerre ethnic group is that, various customary laws and practices which still regulate the way of life of the society proffer excuses for violating the rights of children born outside wedlock. The society or the Niger Delta region, especially in Ikwerre ethnic, does appear to show some disdain or dislike towards children born outside of wedlock, who in no way participated in coming into the world by an act of two (2) consenting adults.

This issue is what warranted the researcher to undertake this study which will seek solutions that will improve the status of children born outside wedlock especially in areas of inheritance, succession and equal treatment with those born within lawful wedlock. In achieving the above, the researcher will delve into how children born outside wedlock have been adequately protected both by the International and national laws and how these laws make adequate provision for the rights of children in general without discrimination.

Historically, children whose parents were not married to each other were classed as illegitimate with asocial stigma attached both to the child and the mother.⁴ There has been the growth in the number of children born

¹ CRC 1989. This convention was adopted under the auspices of the United Nation in 1989 and entered into force on 2 September, 1990.

² CRA, 2003.

³ CFRN 1999, S 42 (2)

⁴ S. Maldonado, 'Illegitimate Harm: Law, Stigma, and Discrimination against Non-marital Children' [2013] (63) (2) *Florida Law Review*, 8.

outside marriage to over 30% of all live births.⁵ A realization that the sins of the fathers should not be visited upon the children appears to have become a global revelation, as witnessed by the articulation of the international obligation to prohibit discrimination against those born out of wedlock., for instance the CRC⁶ requires states to respect and ensure the child's birth or other status.

When it comes to matters or issues pertaining to the rights and custody of a child in his intellectual resources are limited⁷. This gap in knowledge had created a situation where the mothers of child born outside wedlock are subdued into giving up custody of their children to the father.

This work centers on examining the rights of children born outside wedlock and how the law can help to improve the lives of such children. It therefore highlights other rights and opportunities that are easily enforced for those born within wedlock but hardly given for children born aside wedlock therefore making a case for equal treatment to forestall present struggle and remove the stigma of being called bastards faced by children born out of wedlock. Suffice it to say that these children struggle with the stigma of being called bastard even when the natural father of such a child acknowledges the paternity of the child born outside wedlock as a legitimate child entitled to share the natural father's estate. Unfortunately, the Nigerian society regards children born outside wedlock as sub-humans who are subject to some form of handicap or disability.⁸ These issues of discrimination, confusion as to identity, origin, and self-esteem, do not only affect the child but invariably touch on the overall development of the society, for a society advances to the extent that each individual is availed the opportunity for self-actualization so that he or she can contribute optimally to the collective goal of development.⁹ As Baroness Hale notes;

⁵ C. Barton and G. Douglas, *Law and Parenthood*, (London, Butterworth, 1995) 90

⁶ United Nations Convention on The Right of The Child, art 2(1)

⁷ C D (dansel) Kp, 'Custody/Rights of A Child Born Outside Wedlock'
<<http://www.thenigerialawyer.com>> accessed 14th October, 2020

⁸ P. O. Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance' [2012] (4) (3) *Journal of Law and Conflict Resolution* 33-44

⁹ N. N. Chinwuba, 'Human Identity: Child Rights and the Legal Framework for Marriage in Nigeria' [2015] (51) (4) *Marriage & Family Review*, 305

Guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. It also damages social cohesion, creating not only an underclass, but an under-class with a rational grievance¹⁰

2.1 Rights of Children Born Outside Wedlock

The Constitution provides that 'No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.¹¹The effect of the provision of section 42 (2) of the Constitution is that there is no legal distinction between children born in a lawful wedlock and children born out of wedlock. This is because section 42(2) specifically precludes discrimination against a child on the basis that he/she was born outside wedlock. Implying automatic inheritance and succession right on any child despite the circumstance of his birth. The Supreme Court of Nigeria endorsed the position stated above in the case of *Salubi v. Nwariaka*,¹²where it held that the children of the deceased who were born within a lawful wedlock and the children of the deceased who were born out of wedlock are entitled in equal shares to the properties of the deceased. Ayoola, JSC captured this point beautifully when his Lordship held thus:

It suffices to hold that the court below was right in holding that the trial court below had jurisdiction to entertain the claim before it and that the two issues born out of wedlock are entitled in equal shares with the two other issues of the marriage of deceased and the widow. The implication of the foregoing is that the mere fact that a child was born out of wedlock will not be an impediment to the child getting an equal share of his/her deceased parent's properties with children born in a legitimate wedlock. Devolution follows the blood. This new rule as a result of both the Constitution and administration of estate law is capable of encouraging promiscuity and multiplying children outside wedlock. It is also discriminatory against women. The law also permits children born aside

¹⁰ *Ghaidan v Godin-Mendoza*, [2004] 2 AC 557 (CA)

¹¹ CFRN 1999, s. 42

¹² [2003] 7 NWLR (Pt 819) 426.

wedlock to apply for letters of Administration and in granting letters of administration, the court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof and any such administration may be limited in any way the court thinks fit” The effect of section 22 (1)¹³ is that all the beneficiaries or persons who have an interest in the estate of a deceased person can apply for the issuance of letters of administration in respect of the estate of the deceased person. The phrase, ‘rights of all persons interested’. Children born out of wedlock definitely fall within the category of persons interested.

It is suggested that a child who was born out of wedlock can apply for the issuance of letters of administration in respect of the estate of his/her deceased parent. This is because the provision of the above section is encompassing and covers children born out of wedlock. Further to this, the provision of section 42 (2) of the Constitution of the Federal Republic of Nigeria also makes it unlawful for a child to be denied his/her right to be appointed as an administrator of his/her deceased parent’s estate just because he/she was born out of wedlock.

There is no legal distinction between children born within and outside wedlock. The Constitution¹⁴ provides thus; ‘No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstance of his birth’. The effect of this provision is that there is no legal distinction between children born in a lawful wedlock and children born out of wedlock. This is because the section specifically precludes distinction against a child on the basis that his or her circumstance of birth.¹⁵

The Court of Appeal in line with Section 42 of the Constitution of Nigeria held that the fact that a person is was born out of wedlock was totally irrelevant and could not deprive him from inheriting the estate of his maternal grandfather, this is necessarily so because a child must belong to a family and should not be abandoned and left homeless for a situation he did not create.¹⁶*Muojekwu v Ejikeme*,¹⁷*Fabiyi*, JCA states: it must be pointed out that the fact that the plaintiff/appellants were born out of wedlock is

¹³ Administration of Estate Law, Laws of Rivers State, CAP 1, 1999,s.22(1)

¹⁴ CFRN 1999 s.42(2)

⁶ F. Abbas ‘Intestate Succession in Nigeria: What is the Status of Children Born out of Wedlock’, *This Day Newspaper* 20 October, 2015, 13-14.

¹⁶ *Anode v. Mmeka*[2008] 10 NWLR(Pt1094) 18-19.

¹⁷ [2000] 5 NWLR (Pt 657) 403.

immaterial...this must be so since the child must belong to a family and should not be rendered homeless for a situation he did not create.

By paternal acknowledgment a biological or putative father accepts and the family of the mother grants paternity of a child born out of wedlock.¹⁸ It is not in dispute that birth outside wedlock is a 'status' for the purpose of article 14. It has been so regarded at the very least since the landmark case of *Marckx v Belgium*.¹⁹ In *Amusan v. Olawuni*,²⁰ the Court held that "under Yoruba Customary Law, all children, male and female are entitled to inherit their parents' land. In cases of intestacy, the property devolves on all the surviving children in equal shares. There are circumstances in which the female could also be the head of the family". By the above Yoruba Customary law, issues of circumstance or status of birth is irrelevant, what is important is that the children whether male or female are children of the deceased for them to be entitled to their deceased father's property.

In *Menneson v France, Labassee v France*,²¹ it was a violation of the right to respect for private life for French law to deny the existence of the relationship between the biological father and the children born as a result of surrogacy arrangements in the United States.

2.2 Custody of Children Born Outside Wedlock

The question as to who are the parents of a child or children is/are vital for his welfare, and development under the Child's Right Act, and the biological or natural parent may have parental responsibility for the child.²² A child born from a custom which permits a father to keep his daughter in the family home to procreate out of wedlock, due to lack of a male child, cannot be used against him in inheriting the estate of the deceased, who acknowledged him. The fact that the child was born out of wedlock or in the above circumstance is immaterial though morally, religiously and culturally obnoxious, repugnant to natural justice, equity and good conscience, promoting sexual promiscuity in society which is highly abominable, antithetic to the well cherished tenets of Fundamental Human Rights as enshrined under Chapter IV of the 1999 Constitution.²³

¹⁸ *Adeyemi v Bamidele*, [1968] 1 All NLR. 31; *Lawal & Ors. V Younan & Ors*, [1961] JELR 60237.

¹⁹ [1979] 2 EHRR 330. (ECHR)

²⁰ [2002] FWLR, 1391 (C A)

²¹ App Nos 65192/11 and 65941/11, (ECHR)

²² E.I Nwogugu, *Family Law in Nigeria*, (Revd. Edn, Ibadan: Heineman Educational Book) 297.

²³ *Muojeku v. Ejikeme* [2000] 5 NWLR (Pt.657).

Therefore, if the natural or biological father of the child born out of wedlock is not denied of the said child, which is repugnant to natural justice, but deliberately refused to acknowledge the child born out of wedlock, his refusal is indirectly given credence to the above which supports the custody of that child born out of wedlock follows that of the mother in terms of inheritance. This is a gap in our legislation, wherein it is only a father that will acknowledge the paternity of a child born out of wedlock if when the child knows his natural father, the law is silent over this deliberate refusal of an unfit father to acknowledge his own child born outside wedlock.

2.2.1 Legitimation under Customary, Islamic Law and Statutory Marriage

Legitimation under customary Law simply means the act of establishing a relationship between a putative father and a child born to such man out of wedlock.²⁴ In other words, it is the recognition of the paternity of a child by his natural and biological father unlike in English Law, under customary law, a valid marriage is not a condition-precendent to such legitimation. Legitimation otherwise called acknowledgment, under customary law, a child born out of wedlock may be legitimated by the act of acknowledgment whether or not the parents are married. To show acknowledgment, the act or conduct of the father acknowledging the child must be such that he has established his acceptance of the paternity of the child. The question of non-statutory legitimation including that by subsequent customary law marriage, was considered by Brett, F.J. in *Cole v. Akinyele*.²⁵ In that case, the deceased married a wife under the Marriage Act. During the subsistence of the marriage, the deceased formed an irregular association with the mother of the two Appellants. One of the Appellants was born during the deceased's wife's lifetime and the other, six weeks after her death. In considering the legitimacy of the first Appellant, born during the continuance of the marriage, Brett, F.J. stated that he would regard it contrary to public policy for the deceased during his life time to confer the status of a legitimate child on the first Appellant by any other method than that provided by the statutory law.²⁶ The succession rights of such children are however protected under section 42(2) of the 1999 Constitution.

²⁴ P Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42(2) of the constitution of the Federal Republic of Nigeria 1999 as amended on the Rights of Inheritance' (2012) 4(3) *Journal of Law and Conflict Resolution*, 31-44.

²⁵ [1960] 5 FSC 84 (SC)

²⁶ (n 16),

A legitimate child on the other hand is the child conceived or born in lawful wedlock. Modernly, a child conceived or born in lawful wedlock or legitimated either by the parents' later marriage or by a declaration or judgment of legitimation.²⁷ Islamic law application in the northern part of Nigeria, in certain circumstances considers as legitimate, children born out of wedlock.²⁸ Legitimation through acknowledgment is the process by which a child, who was not born legitimate under customary law, acquires legitimate status.²⁹ Legitimation in other hand is the process by which a child who was born illegitimate acquires legitimate status.

Under customary law, as it is applicable in some part of Nigeria, if a woman had a child by a man to whom she is not married, custody of the child is deemed to be exclusive to the father or the mother, and this is so even if the child has been acknowledged by the father. The Court of Appeal in discussing the custody of a child born outside wedlock held that the custody of a child born out of wedlock follows that of the mother in the absence of any person claiming custody of the child of being the natural father.³⁰ The legal implication of the above position is that where the paternity of a child born outside wedlock is not acknowledged by the biological father for purpose of inheritance, that child born as outside wedlock will inherit from the maternal grandfather in the absence of the biological father.

2.2.2 Legitimation by Subsequent Marriage under Statutory Law

The main reason of Legitimacy Law,³¹ is to amend the law relating to children born out of wedlock. By Section 1(1) of the Law of the said law provides that³²

Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Law, 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, or from the date of the marriage, whichever last happens.

²⁷ B A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters, 2009)

²⁸ *Okija v Adejobi*[1960] 5 FSC 166.

²⁹ E.I Nwogugu, *Family Law in Nigeria* (RevdEdn, Ibadan, Heineman Educational Book) 297.

³⁰ *Okoli v Okoli*[2003] 8 NWLR (pt. 823)

³¹ Cap L78 Laws of Rivers State 1999.

³² *Ibid.*

The operation of Section 1(1) is based on the fulfillment of certain prerequisites. First, the parents of the illegitimate person must have subsequently married each other. The law repeatedly made use of the phrase “illegitimate person” contrary to section 42 of the Constitution,³³ this inconsistency in the law is capable of affecting the illegitimate person, the phrase “illegitimate person” referring to children born outside wedlock should be expunged in our laws, this will increase the self-esteem of children born outside wedlock.

2.2.3 Ikwerre Native Laws and Custom on Rights of Children Born Outside Wedlock

Under Ikwerre native laws and customs, a child born out of wedlock is considered illegitimate. The system, customarily/traditionally, where a child is born into a family, grew up in that family and participated in the family meeting, he is seen by custom that he is part of that family and can inherit from that family.³⁴ However, this system shall be discussed at the appropriate stage in this work. Presently, the work looks at the custom concerning a child born to a man by a woman not married to him. Conversely, under the relevant customs, a child is legitimate at birth if he/she is born in wedlock. This issue of legitimacy has torn many families apart. A lot of families in Nigeria today are affected by this issue of illegitimacy. It has been noted that in some customs even where the man subsequently marries the woman with whom the out of wedlock child was born, the child is still regarded as illegitimate. Legitimacy under such customs must be a child born subsequent to a marriage and not prior to a marriage. The issues are as to when or at what stage of performance of marriage rites will a child be born to acquire the legitimacy status. In other words, the question is; must a child be born when all the marriage rites have been performed to acquire the legitimacy status? In some customs, there is no strict adherence to the system that all marriage rites must be performed completely for a child to acquire the legitimacy status. In customs such as Ikwerre custom, there is a stage where marriage rites are performed, the man, in the eyes of the customary law, is considered and/or deemed to be the husband of the woman being married.³⁵

³³ CFRN, s. 42(2)

³⁴ *Ejikemele v. Opara* NWLR [Pt 567]

³⁵ P. H A Nnokam, *Customary Law and the Development of Indigenous Common Law in Nigeria the Place of Ikwerre Customary Law*, (Okpo Club Nigeria)204 - 212.

There are situations even where brothers of full-blood are at daggers-drawn on the altar over the issue of illegitimacy. Male children born subsequently by a couple asserting that the male child born prior to the marriage or completion of the marriage rites, cannot be the head of the family. Citing deficiency in his status simply because he (senior male child) was born at a time their parents were not husband and wife or at the time marriage rites were not yet completed by the man. This situation is found amongst siblings of full-blood, but in some cases, the subsequent male children allow their older brother born in the above circumstance to function and operate as the heir apparent and head of the family. This appears a gentle man's agreement. What about where there is no such understanding? Crisis becomes the only answer.³⁶ A certain school of thought holds the view that their right of inheritance ensues after all the male children of the man had benefited. Some view holds that their right of inheritance is at the point after first son had inherited, i.e. (if the family is Polygamous and the unmarried daughter is of the kitchen without a male child), thereby placing the child of the first son. These situations have generated a lot of controversy in some families.³⁷ It is even more so when it comes to succession, with respect to 'Owhor' title holding and chieftaincy stools in the families and communities. It is worst in the case of succession to 'Owhor' title holding, where in a typical traditional setting, the 'Owhor' i.e. (the scepter and the symbol of authority in the family) is considered very sacred and hallowed. Such that for a person to ascend that position, the insistence is that the person must be legitimate under customary law.

In some localities for example, Ikwerre communities, distinction is drawn to the effect that a person not legitimate cannot be an Owhor holder, but may be allowed to ascend chieftaincy thrones. Note that even in such arrangements; some very ancestral stools are a no-go-area for persons not legitimate under the Customary Law.

In all the enumerated customary practices, there exist much discrepancies, uncertainties and differences in the manner and approach in which the issue pertaining to legitimacy is addressed under customary law. Similarly, the Ikwerre custom as it relates to custody and rights of children

³⁶ P H A Nnokam, *Customary Law and the Development of Indigenous Common Law in Nigeria the Place of Ikwerre Customary Law*, (Okpo Club Nigeria), 205.

³⁷ *Ibid*, 204 - 212.

born outside wedlock is also practiced in some of the tribes in Rivers State. In Ogoni, a woman may not be allowed to get married. Usually, the first daughter is not allowed to get married. She is seen as the one who will look after the family. She tends or cares for the family/ancestral gods. In Khana, such a woman is called BIAKE, while in Gokana, she is called GBEABE. She is however, entitled to have as many children as she wants from as many men as she desires. Her children belong to her family and not to their father's family. Thus, her children bear her maiden name. Her first son is called DEEGBARA while her first daughter is called DEENWA. DEEGBARA is seen as the Prince of the family. Amongst the grandchildren, he has more traditional ancestral authority than other grandchildren. BIAKE shares benefits from the sharing of ancestral lands. She enjoys the attention of other family members. It should be pointed out that a child born by a BIAKE, while in her father's house belongs to her family and not the father of the child even if she eventually marries the man³⁸ The Iya Marriage is the highest form of marriage under Kalabari Law and Customs. In its most simplest description or definition, it can be considered to be "the buying of the flesh and bone"³⁹ other forms of marriage can only confer the husband with life and flesh rights over his wife and their offspring, it is the Iya marriage rights that cloaks him with total ownership of his wife and their children⁴⁰ The foregoing is rightly admitted by learned author E. I. Nwogugu when he rightly submitted; "The children of the Iya (or big-dowry) marriage and their mother belong to their father's family and have succession right in that family"⁴¹

The Igwa-sime or marriage is the second form of marriage which gives a husband right over his wife for as long as she remains alive. In the Igwa (or small-dowry) marriage, both the children and their mother belong to their mother's family. The children will inherit from their maternal uncles or other maternal relations. I.E. Nwogugu submits that the distinction between the two types of marriage is rapidly breaking down, this position he arrived at simply because children of an Igwa marriage successfully claimed and succeeded to part of their father's estate under Okirika Native Law and custom⁴² which is very similar to that of Kalabari in many respect⁴³.

38 L.O/ Nwauzi and G.O. Akolokwu, *General Principles of Nigerian Customary Law*, (Ledum Press 2019) 40.

39 (Chief Brnoni Briggs (Chief in Oruwari House) and former Min. of Aviation, oral interview on 9th April, 2014.)

41 E. I. Nwogugu, *Famil Law in Nigeria* HEBN Publishers Plc. Ibadan: 2001) 412.

42 K. Williamson, 'Changes in the Marriage System of Okirikajjo' *Africa* Vol. XXXII (1962) 52, 59

The above Ikwerre custom on custody and rights of children born outside wedlock still find excuses by calling these children born outside wedlock “ Nwo-oyie or Omurunuoro” in order to discriminate and deprive the children born outside wedlock certain rights and privileges because of the circumstance of their birth regardless of the extent law.

2.2.4 Legitimation under Statutory Law

The legitimation of an illegitimate child through the subsequent marriage of his parents was first made possible in Nigeria by the enactment of the Legitimacy Act 1929.⁴⁴ This piece of legislation, though based substantially on the earlier English Legitimacy Act 1926, contained some variations intended to suit local conditions. The 1929 enactment applied then to the whole country. With the introduction of federalism in Nigeria in 1954, legitimacy became a subject which falls within the legislative competence of regional governments. Consequently, legitimation has been left out in the Laws of the Federation of Nigeria 2004. Fortunately, state governments have preserved the original enactment without alteration. This accounts for the fact that there is now uniformity in the State Laws on legitimacy.⁴⁵

2.2.5 Legitimation by Acknowledgement

Under some systems of customary law an illegitimate child may be legitimated by acknowledgement.⁴⁶ Acknowledgement consists of any act of the natural father of an illegitimate child by which he recognizes the paternity of the child. Unlike in English or statutory law, the existence of a valid marriage is not a pre-requisite of the operation of the principle of acknowledgment despite the fact that the parents have never been married to each other.⁴⁷ It is the law that children born out of wedlock but whose paternity was acknowledged by the intestate have equal share with the children of the marriage; *Okonkwo v. Okonkwo*.⁴⁸

⁴³ *Ibid*, 42.

⁴⁴ Ordinance No.27 of 1929.

⁴⁵ Legitimacy Law, Cap. 74 Laws of Katsina State 1991; Cap 79 Laws of Yobe State 1994: Cap 77 Laws of Adamawa State 1997; Cap 75 Laws of Oyo State 1998; Cap L65 Laws of Lagos State 2003; Cap. 78 Laws of Rivers State 1999; Cap 81 Laws of Anambra State 1991

⁴⁶ *Alake v. Pratt* [1955] 15 WACA 20 (CA); *Phillips v. Phillips* [1946] 18 NLR 102(SC); *Talyor v. Talyor*[1960] LLR. 286(SC);*Abisogun v. Abisogun*[1963] 1 All NLR 237 (SC);*Akerele v. Balogun, In re Folami*[1964] LLR 99 (SC).*Obidairo v. Adepoju (1975) 10 CCHJCJ 1559 (CA);E., L Nwogugu., Legitimacy in Nigerian Law (1946) 18 NLR 102.*

B. Kasumu ‘The Principle of Acknowledgement or Recognition of Paternity Under Customary Law in Nigeria’(8) *Journal of African Law*, 96

⁴⁷ Per Ademola, CJF, in *Lawal v. Younan*[1961] I ALL NLR 250(SC).

⁴⁸ [2014]17 NWLR . 47 (SC)

2.2.6 Acts Which Constitute Acknowledgement

To constitute acknowledgement, the act or conduct of 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 or conduct should be formal. Informal acts may, in appropriate circumstances would be enough.⁴⁹ It has been held that the performance of the customary naming ceremony eight days after the birth of a child is ample evidence of acknowledgment.⁵⁰ But in *Akerele v. Balogun*,⁵¹ it was contended in defence, that the performance of the 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 express any view on this contention, 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 this particular case, he was anxious to keep his association with the mother of the illegitimate child secret because of the difference in their ages.

There are Acts of Legitimation, legitimation could be in any of the following forms: naming of the child by the putative father. In the case of *Philips v. Philips*,⁵² it was held that the act of a putative father organizing a naming ceremony wherein he names the child amounted to acknowledgment. Even where the putative father pays for the hospital maternity bills of the child's mother has been held to be an act of legitimation.⁵³ In the case of *Young v. Young*,⁵⁴ it was held that an acknowledgment contained in a letter suffices to constitute legitimation. Also, in *Adeyemi v. Bamidele*,⁵⁵ it was held that the maintenance of a child by his biological father including the payment of the child's school fees, constitute acknowledgment. The acts of legitimation are not limited to the above.

In Igbo Customary Laws, in some localities recognize the principle of acknowledgement sometimes on certain conditions. The father of the child may be required to take him into custody or send gifts to the mother's

⁴⁹ *Philip v. Philip* [1946]18 NLR 102 (SC)

⁵⁰ *Ibid.*

⁵¹ [1964] LLR 99 at 100 (CA)

⁵² [1993]3 NZLR 159.

⁵³ *Savage v. Mcfoy* [1909] Ren 505. (S C)

⁵⁴ [195] W.A.C.A 32.(CA)

⁵⁵ [1968] ANLR 286. (SC)

family or name the child in the presence of both families.⁵⁶In the *Ukeje v Ukeje*,⁵⁷ the issue of whether the Respondent was the daughter of L.O. Ukeje (deceased), family photographs may have helped to resolve the issue, but the birth certificate of the Respondent was decisive in settling the issue. It answered the questions when, where the respondent was born and who her parents were. Exhibit J, the guarantor's form signed by the deceased (L.O. Ukeje) further showed that the deceased was the father of the respondent. The Supreme Court invoked the provisions of section 42(1)(a) and (2) of the Constitution of Federal Republic of Nigeria⁵⁸ in quashing the unknown Igbo customary law that disentitles a female child from partaking in the sharing of her deceased father's estate. The rationale of the Apex Court's interpretation of S. 42 (2) and is that the right of a female child and a child born out of wedlock to have a share in the estate of their father are constitutional.

2.2.7 Who Can Acknowledge?

It is well established that the right of legitimation by acknowledgment is exclusively conferred on the natural father of an illegitimate child. The mother has no corresponding right⁵⁹. A related problem is whether the right of acknowledgment is reserved in particular to fathers who are subject to customary law only. In *Savage v. Macfoy*,⁶⁰ which has already been considered, it will be recalled that the court held that a purported customary law marriage between a Sierra-Leonean resident in Lagos and a Lagos girl was void. Such marriage was not permissible or valid by the law of Macfoy's domicile of origin. But Macfoy on his death left some children of the association whose paternity he acknowledged.

2.2.8 Time of Acknowledgement

It is pertinent to determine the time or times at which the right of acknowledgement may be exercised. A number of problems may arise in this connection. Must a father acknowledge his child only during his life time or the lifetime of the child? Is it necessary that the act or conduct of

⁵⁶ S.N.C. Obi., *The Customary Law Manual*. (Anambra: Ministry of Justice Anambra State 1977) 314-318

⁵⁷ *Ukeje v. Ukeje* [2014] 11 NWLR (Pt 1418)403-404 .

⁵⁸ CFRN 1999.

⁵⁹ E.I Nwogugu, *Family Law in Nigeria*,(Revised Edition, Ibadan, Heineman Educational Book) 297; Rivers State Customary Law. No.1, 2014, s.81.

⁶⁰ 1909 Renner Reports. 508 (SC)

acknowledgement be made public during the lifetime of the father? Taking the last problem first, all the decided earlier considered cases dealt with situations where the acknowledgment took place during the lifetime of the natural father and were made public then.⁶¹

It may happen that the father accepted responsibility for the pregnancy but died before the child was born. Will such a child be regarded as being legitimated by acknowledgment? This situation came before the courts in *Oladele and Others v. Akinshola and Others*.⁶² It is significant that there is no requirement that the parents of the illegitimate person must not be married to some other persons at the time the child is conceived or born. The absence of such requirement was a deliberate decision of the law-makers.⁶³ Consequently, the child of an adulterous union may be legitimated. Where the birth certificate of the illegitimate child bears the name of the natural father and was so obtained by him or on his instructions, there is clear evidence of the recognition of paternity⁶⁴

2.2.9 Judicial Response to Issues of Custody of Children in Nigeria

By the provision of section 6(6)(b) of the 1999 Constitution, the judicial powers of the court shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, to the determination of any question as to the civil rights and obligations of that person. Thus, a High Court or any Court of the law has the jurisdiction under is when invited by process of litigation. In *Taiga v. Moses*⁶⁵ held that; "Since it was the Appellant who raised the assertion that the Respondent prior to December, 1993, the Respondent was aware of the statutory nature of the subsisting marriage between the Appellant and a 3rd party and gave evidence in support of his assertion, regardless of whether the Respondent gave evidence under oath in support of the assertion in her defence and counter-claim, the Trial Court had the constitutional power having been

⁶¹ *Philip v. Philip* [1946] 18 NLR 102; *Talyor v. Talyor* [1960] LLr 286; *Abisogun v. Abisogun* [1963] 1 All NLR 237; *Akwrele v. Balogun* [1964] LLR 99.

⁶² Suit No. AB/7/63 (unreported). Abeokuta High Court.

⁶³ For the legislative history of this provision see the Nigerian Legislative Council Debate, 1929. 30 September 1962. The dropping of Section 2(1) of the English Legitimacy act 1926 (which prohibited the legitimation of adulterous children) from the Nigerian statute was decided by a free vote in the, and the voting was 17 in favour of dropping the English provision and 11 against.

⁶⁴ *Young v. Young* [1953] WACA(CA)

⁶⁵ [2012] 10NWL 204. (CA)

invited in the first place by the Appellant himself to declare that the Respondent was aware of the subsisting statutory marriage of Appellant and a 3rd party prior to December, 1993. The Trial Court exercised its constitutional power here rightly and this Court did not find any basis for the challenge of the exercise of that right by the Appellant in his issue one”.

2.3 The Reality of Extant Laws

There are laws adequately provided for the protection of children born aside wedlock, particularly Section 42(2) of the Constitution and the Judicial pronouncements on this issue are replete, but the problem is the unenforceability of these laws relating to custody of children born aside wedlock in our society, especially in the Ikwerre Ethnic group on the ground that they are product of illicit sex and promote promiscuity in the society and the society seeing them as bastard. It is also described as children out of wedlock. It is now commonly known as illegitimate child. An illegitimate child is a child born to a married woman whose husband is not the father of the child. These meaning ascribed to children born out of wedlock is one of the realities leading to disobedient to the enforcement of the extant laws. Recently court made an order for a child to be in the custody of the mother. It is the law that where a man acknowledges the paternity of a child born out of wedlock, that child shall not be subjected to any disability or deprivation merely by reason of the circumstances of his birth.⁶⁶ Despite all these laws protecting children born outside wedlock, the society still found excuses in violating the rights of the children born outside wedlock. The issue of children born within or outside wedlock is still lingering in our various communities where customary law and practices hold sway despite the biases inherent in the socialization process that has been acquired over a period of time.

The society, especially in Ikwerre of Niger Delta region, it does appear to show some disdain or dislike towards illegitimacy on the child who did not in any way participate in coming into the world by an act of two (2) consenting adults.

2.4 Removal of Discrimination against Children of Unmarried Parents

At Common Law, a child of parents who were not married to one another at the time of his birth was *filius nullius* or “nobody’s child”. The law scarcely recognized his relationship with his mother, let alone with his father. Section 42 of the Constitution of the Federal Republic of Nigeria is apt.

⁶⁶ (n 60), s 81.

2.5 Lessons from Other Jurisdictions

The English court in a judgment given on 19th October, 2016 in the case of *Johnson v Secretary of State for the Home department*⁶⁷ considered the fundamental issue is whether it is compatible with the European Convention on Human Rights to deny British citizenship to the child of a British father and a non-British mother simply because they were not married to one another at the time of his birth or at any time thereafter? The court held that there are many benefits to being a British citizen, among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights.

In July 2014, Dingemans J held that the discrimination against a child of unmarried parents was not justified at the time of his birth and continued to be unjustified; that there had been a violation of article 14 of the Convention read with article 8;⁶⁸ and that the certification of the claim as clearly unfounded was unlawful. In *Inze v Austria*⁶⁹; *Genovese v Malta*,⁷⁰ It is also clear that birth outside wedlock falls within the class of “suspect” grounds, where “very weighty reasons” are required to justify discrimination. This was held as long ago as *Inze v Austria*⁷¹, where children born in wedlock were given priority over children born outside wedlock in the inheritance of a family farm: The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member states of the Council of Europe.

The likelihood that a child born outside wedlock would have had less to do with the family farm, and the attitudes of the rural population, were not regarded as weighty reasons. The need for “very weighty reasons” has been repeated many times since, for example, in *Fabris v France*⁷², where reference was made to “the principle of equality eliminating the very concepts of legitimate children and children born outside marriage”, and in *Genovese v Malta*⁷³, at para 44, where it was noted that 22 member states were now parties to the 1975 Convention and it was irrelevant that Malta was not. The United Kingdom signed the Convention in 1975 and ratified it in 1981.

⁶⁷ [2016]UK 56 (SC)

⁶⁸ Universal Declaration of Human Rights

⁶⁹ [1987] 10 EHRR 394, (ECHR)

⁷⁰ [2012] Fam Law 20 (ECHR)

⁷¹ [1987] 10 EHRR 395 (ECHR)

⁷² [2013] 57 EHRR 563 (GC).

⁷³ *Ibid*, 21.

Recently, a very interesting legal puzzle occurred where a 40-year-old Las Vegas hotel cleaner won a child support battle against a 28-year-old millionaire who she never slept with. Jane was 36 when she stole a used condom from a then 24-year-old tech millionaire's hotel garbage can. She inserted the semen inside her vagina and became pregnant with a baby boy who is now 4-years-old. During the child support hearing, Jane confessed that she never slept with the young millionaire and that she impregnated herself with his sperm while she was cleaning his room. The court ordered him to pay the mother of the child \$2 million for the 3 years of his son's life he missed⁷⁴.

3.1 Conclusion and Recommendations

a. Equal Right

Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria gave equal right to children born in Nigeria whether born outside or within wedlock, thereby eliminating any form of discrimination by the reason of the circumstance of the person's birth.

b. Equal inheritance;

The reality of extant law is that children born outside wedlock have equal rights of inheritance with children born within wedlock. Therefore children born outside wedlock shall not be subjected to any disability or deprivation merely reason of the circumstances of his birth. The children cannot be discriminated or seen as an illegitimate children on the reason that they are children of unmarried parents.

c. Lack of enforcement of the extant law

Factors responsible for the violation of the rights of Children born outside wedlock in Nigeria; are that the extant laws lack adequate enforcement provision, especially no punishment for violation of the extant law, rather Section 42 is declarative in nature instead of corrective and punitive

d. The custody of children born out of wedlock follows that of the mother in the absence of any person claiming custody of the child. This is necessarily so because a child must belong to a family and should not be abandoned and left homeless for a situation he did not create.

⁷⁴ <<https://www.vanguardngr.com/2019/11/woman-who-impregnated-self-with-stolen-semen-from-billionaire-wins-child-support-battle>> accessed 30 May 2022.

In addition, the children born outside wedlock can inherit or be in the custody of the biological father upon acknowledgement of their paternity and shall have equal share with children born within wedlock without any form of discrimination or disability.

3.2 Conclusion

It has been shown that depriving children born out of wedlock from the inheritance of their father or mother's property is illegal as same amounts to discrimination against them. The current position in Nigeria today is that there are no illegitimate children and children born out of wedlock have equal right to be entitled to share in the property of their deceased father provided that during the lifetime of the father, he expressly (directly) or impliedly (indirectly) acknowledged that he was the father of the children born out of wedlock⁷⁵.

There however seems to be some shortage of intellectual resources in the aspect of rights and custody of a child born outside wedlock. This vacuum has led to situations whereby the mother of a child born outside wedlock is most times coerced, forced and intimidated to release or give up custody of a child to the father. In most situations, the father of the child born outside wedlock abandons the child and the mother is left to cater for the child alone. Thereby subjecting the child born out of wedlock is a victim of a circumstance which he did not create and as such, should not be made to suffer exclusion from inheriting his father or mother's⁷⁶. Every child no matter the circumstances of his birth deserves the best and enjoys the full coverage of the Law. These rights are not negotiable and can be enforced against a parent, government or any authority or institution in whose care a child is placed.

⁷⁵*Peter Chike Mgbodu v. Willy Kanayo Mgbodu* [2018] LPELR43770(CA); *Messrs A. Younan & Sons v. Lawal & Ors* [1961] LPELR25073(SC); *Ordu v. Elewa* (2018) 17 NWLR (Pt. 1649) Sc. 515.

⁷⁶ Olufemi Abifarin, *The Legal Status of a Bastard and his inheritance right in Nigeria* <http://www. Org.> accessed October 15, 2020.

3.3 Recommendations

The following hereunder are recommendations

1. There should be a federal enactment against deprivation and discrimination of children born outside wedlock.
2. There should be an amendment of adoption laws in Nigeria to provide for the adoption of children born outside wedlock by their biological fathers or natal families in event that the father refuse to acknowledge the child
3. There should be a federal legislation against any person that will breach or violate Section 42(2) of the 1999 Constitution by discriminating children born outside wedlock.
4. Section 42(2) of the 1999 Constitution is declarative, hence there should be inclusion of sanction in the above section to adequately protect Children born outside wedlock. .
5. Adoption and Implementation of the Child Rights Act by all the States in Nigeria and especially the rights of all children and proper socialization of children should be encouraged.by the Government.
6. Increased and programmed enlightenment campaigns on constitutional rights by the Nigerian Orientation Agency (NOA) as well as advocacy by persons, government agencies and Civil society groups. Advocacy is required and recommended to change the minds of people about opinions and values long acquired and practiced which is tacked on children born outside wedlock.
7. The various Ministries of Women affairs and Social Development in the states of the federation should be encouraged to open zonal offices in all the Local Government Areas in the country, where they can have direct access to the grassroots and provide legal aid services, enlightenment campaign and support to women and children who are unable to afford the exorbitant legal fees for litigation geared towards the determination of paternity of their children wherever such a dispute arises.