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COMPARATIVE TRENDS IN THE STATUS AND RIGHTS OF THE ILEGITIMATE CHILD

KEHINDE, ANIFALAJE

Abstract

This study seeks to examine the dual laws on illegitimacy in Nigeria and the changing fortune of the "illegitimate child" from the colonial era to the landmark provisions of section 39(2) of the 1979 Constitution (now section 42(2) of the 1999 Constitution of Nigeria. Although it has been a little over 33 years now since that Constitutional provision came into effect, there is still much controversy within the academic circle as well as differing judicial decisions of the Courts on its full import and application. Whilst it is generally agreed and fairly settled from judicial interpretation and application that the said Constitutional provision has abolished the discriminatory practices against the illegitimate child especially in respect of maintenance and inheritance rights, opinions still differ on whether or not that Constitutional provision has actually abolished the status of illegitimacy in Nigeria. This study examines the pernicious effect of the common law policy and the unsavoury attitude of the society towards the illegitimate child and makes a case for the abolition of not only the legal incidents of the status but also the status itself. Relevant international and regional conventions on the subject as well as the legislative strides of some select developed and developing countries in their quest towards improving the lot of the illegitimate child and establishing legal equality between the legitimate child and the child born out of wedlock are also discussed with a view to highlighting the path to law reform in Nigeria.

KEHINDE, ANIFALAJE *is a Lecturer at the Department of Private and Business Law, University of Ibadan,* Ibadan, Nigeria.

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INTRODUCTION

Illegitimacy in Family Law is a sociological expression which its English exposition is related to the French Word "*illegitimate*" [(il-le adv., illegitimate, unlawful, unjust, spurious) and the Spanish word "*ilegitimo*" (ee-lay-hee teemo; adj. illegitimate; unlawful; out of wedlock) from which it has probably been derived. The evolution of legitimacy or illegitimacy as a status[1] to which several incidents are attached is as old as the institution of marriage itself. All major legal systems of the world, such as the Canon law, the Common law and the Roman law, had long recognized, upheld and protected the sanctity of marriage. Thus, children of marriages recognized and considered legitimate by these legal systems are those born or conceived during the subsistence of legally recognized unions, while children born out of such legally recognized unions are regarded as illegitimate children of the parties concerned.

In England for instance, religion, for a long time, had pre-eminence over what marriage would be regarded as valid and the issue of legitimacy or illegitimacy of a child was closely tied up with the issue of marriage. Thus, a statute in 1540 specified that marriage solemnized by the church and consummated should take precedence over unconsummated pre-contracts not celebrated in church. This statute was repealed in the reign of Edward VI and *spousals per verba de praesenti* were held to be "very matrimony". However, if such a marriage was not followed by a religious ceremony, a woman might forfeit her dower and the children would be rendered illegitimate. Thus, certain marriages were binding but not in good standing; husband and wife were legally united but their children were bastardized.[2]

Furthermore, the question of the status of legitimacy or illegitimacy like other types of status is inextricably linked to the law of domicile of the father (that is, the person who would legally be the father if the child were legitimate) at the time of the birth of the person whose status is in question.[3] It has been held in *Re Grove*[4] that despite the English rule that the domicile of an illegitimate child is that of its mother, the determination of whether a child is legitimate or not is always governed by the law of its

father's domicile. What is also common to most legal systems is the distinction usually drawn between the legal position of a child born of a legally recognized union and that of a child born of an illicit union. For instance, children born in lawful wedlock are generally regarded as "superior" to those born out of wedlock and are accorded much legal rights than those born out of wedlock.

The aim of this study is to examine the status of illegitimacy and its associated legal incidents at common law with particular reference to Nigeria as well as under the Nigerian customary law. The paper also seeks to measure the impact of statutory interventions in improving the lot of the illegitimate child from comparative perspective. We hope to make suggestions on ways and means of improving the lot of the illegitimate child in Family Law, particularly in Nigeria and the World at large. The origins, character and rationale of this concept should be our first focus and to this we now turn.

Origins, Character and Rationale of Illegitimacy as a Status in Nigeria

In Nigeria, as in other common law countries, the common law rule on the status of illegitimacy applies. At common law, the status of legitimacy is generally acquired by any child who is conceived and born in lawful wedlock. Conversely, any child born out of wedlock was *ipso facto* regarded as an illegitimate child and is generally referred to as "bastard". However, apart from the normal case of a child conceived and born during marriage, a child will be legitimate if conceived before but born during the marriage of its parents or if conceived during the marriage but born after the dissolution of the marriage by death or divorce.[5] Common law refused to accept that the mere fact of parenthood gave rise to a legally recognized relationship between parent and child. Instead it chose to recognise only the legal relationship between parent and legitimate child.[6] The stern policy of the common law has been defended as "to the encouragement of marriage and the discouragement of illicit intercourse."[7] Moreover, because of the dual marriage laws - statutory

and customary laws, within the country, the determination of the legitimacy or otherwise of a child is dependent on the applicable law governing such marriage. For marriages contracted under the Marriage Act, which is monogamous in nature, the status of a child is determined by the common law rules and relevant statutory laws. Thus, only children born during the subsistence of a valid marriage are *prima facie* legitimate. Also, by section 115(3) of the Matrimonial Causes Act, (MCA) 1970 the birth of a child during the subsistence of a valid marriage between the spouses or within 280 days after its dissolution is conclusive evidence of that child's legitimacy.[8] Consequently, a child born of a void statutory marriage, or born by another woman other than the wife of the statutory marriage to a statutorily-married man is illegitimate.[9] However, where the parents of the child had contracted a customary marriage before the void statutory marriage, the customary marriage will continue to subsist and such a child is legitimated by virtue of the customary marriage of his parents[10]. Also, at common law a decree of nullity of a voidable marriage is retroactive, thus rendering a child born legitimate, illegitimate.[11]

On the other hand, the legitimacy of a child of a customary law union is usually determined by the applicable customary law. The origin of the status of illegitimacy under customary law in Nigeria is rooted in the cultural beliefs of the people that if an illegitimate child is brought and accepted into a home, such a child would eventually be the cause of conflict in that family and his birth is usually viewed as an evil omen. Generally, customary law also regards children conceived and/or born in lawful wedlock, as legitimate. However, in some ethnic groups in Nigeria, there may not necessarily be a real connection between paternity, marriage and legitimacy. A child may be regarded as legitimate even though the natural parents are not married to each other and the person with respect to whom the child is legitimate is not its natural father. Among the Nnewi people in Ibo land of the Eastern Nigeria, the "N*rachi*" custom for instance, enables a man to keep one of his daughters unmarried perpetually under his roof to raise issues, more especially males to succeed him. The purpose of such an arrangement is for her to produce a male successor to

her father, and thereby save the line from threatened extinction. With the custom performed on a daughter, she takes the position of a man in the father's house and technically, she becomes a "man". A woman with the custom performed on her can inherit her father's property while others without same cannot. Also, any child the daughter bears by any man while remaining with her parents is considered the legitimate child of her father at birth and any male child of that daughter has full rights of succession to the grandfather's land and title.[12] Also, under the Igbirra customary law, any child born within ten calendar months of a divorce is regarded as the legitimate child of the former husband even if the circumstances were such that he could not possibly be the father of the child.[13] The Court in *Mariyama* V *Sadiku Ejo*[14] while accepting this rule as "sound and would in almost every case be fair and just in its results" however ruled that it would be repugnant to natural justice to apply the rule in the particular circumstances of that case since it would have taken a child away from the couple who were universally acknowledged to be its natural parents. Thus, the criteria for determining the legitimacy or otherwise of a child varies from one ethnic group to another depending on the relative scale of social values.

Islamic law, which also is an aspect of the customary law in Nigeria, recognizes legitimacy of children born of a valid union. Thus, a child conceived during the subsistence of a marriage is presumed legitimate. Similarly, unless a contrary proof is adduced, a child shall be presumed legitimate, if such child was born two years after the dissolution of such marriage either by divorce or death, the mother remaining unmarried. However, any child conceived and born out of illicit affairs is illegitimate even if the adulterous father acknowledges paternity or subsequently marries the mother. Also, any child born before six months of the marriage or after two years or four years of cessation of cohabitation is conclusively and irrebuttably presumed to be illegitimate.[15]

Nevertheless, the fate of some children born out of wedlock is not sealed as the law recognises the act of legitimation whereby an illegitimate child may be legitimated by *legitimation per subsequens*

matrimonium (that is, legitimation by subsequent marriage) of the parents of the child or by acknowledgement of paternity by the father. The former is governed by the Legitimacy Act[16] while the latter is governed by the customary law. Acknowledgement, which is well entrenched in the customary law, consists of an oral declaration by the putative father of the illegitimate child coupled with any act of his by which he recognises the paternity of the child. The existence of a valid marriage is not a prerequisite of the operation of the principle of acknowledgement.[17] Consequently, an illegitimate child may be legitimated by acknowledgement despite the fact that the parents have never been married to each other. Acknowledgment may however take various forms and these include performance of the child's naming ceremony by the father,[18] arranging medical attention for the child[19] or paying his mother's maternity bill[20]. Indeed, in *Young V Young*,[21] a letter of acknowledgement found amongst the father's personal effects after his death was held to constitute a valid act of acknowledgement. The legal effect of legitimation is the acquisition of all the rights of a legitimate child by the otherwise illegitimate child. Thus, in *Taylor V Taylor*,[22] it was held that the acknowledgement of paternity by the father *ipso facto* completely legitimises the children and that there could not for the purpose of succession be different degrees of legitimacy. It is also important to note that acknowledgement of paternity operates retroactively, that is, from the time of birth of the child. However, for spouses who are married under the Marriage Act, acknowledgement by the natural father to legitimate a child considered illegitimate is not permitted. Such a child could not also be legitimated even after the termination of the statutory marriage of their parents.

The prejudice expressed in many societies in one way or another against the illegitimate child has been based on certain assumptions. First, there is the belief that there would be a considerable threat to the marriage institution if legal recognition is given to the illegitimate child as individuals who had hitherto been circumspect with regards to the type of heterosexual relationships they had entered into so as to avoid bearing illegitimate children may no longer see any reason to refrain from extra-marital

relationships. Also, it is generally believed that the moral tone of the society is likely to be substantially weakened and the tendency for the rate of promiscuity to increase to a higher level if the social position against the illegitimate child becomes more lenient and he is readily integrated into the civil society. Thus, for centuries, throughout history, the illegitimate child has been subjected to one form of disability or another either socially or legally just to show societal resentment to the concept. The socio-legal incidents of the status of illegitimacy are examined hereafter.

Socio - Legal Functions of Illegitimacy

The status of legitimacy or otherwise is generally connected with the parents' legal obligations towards their children not only in terms of maintenance but also the right to family name and inheritance. Whilst the rights of the legitimate child to these benefits are given legal recognition, the situation with the illegitimate child has however, always been a pathetic one. The status of illegitimacy has always been associated with shame and social exclusion. The child born out of wedlock is subjected to various forms of social stigma and crippling legal disabilities. The society looks down upon them and regards them as social outcast. Great is the social stigma attached to the status of illegitimacy that a legitimate child who is called a bastard can seek redress for defamation against the tortfeasor.

At common law, a bastard was *filius nullius*, that is, "child of no one" and consequently none of the legal powers or duties which flowed from the relationship of parent and legitimate child was accorded him or his parents.[23] The illegitimate child was a "stranger" in law not only to his natural father but also to his mother and all other relatives. He thus had no legal right to succeed to their property, to receive maintenance or other benefits deriving from the status of parent and child.[24] A bastard has no surname except such as he acquires by reputation or except such as he chooses to adopt. He has such Christian name as he may be baptized or registered by.[25] The fact that a bastard has relations is only recognised by the law as to marriage which prohibits marriage between a bastard

and anyone with whom marriage would be unlawful if he had been born in wedlock.[26] The public policy against illegitimate children is overwhelming such that an illegitimate child had no right to participate on the intestacies of either of his parents, and likewise neither parent had a right to succeed on his intestacy. He also had no right to take, on the intestacy of a grandparent or brother or sister (whether legitimate or not) and vice-versa.[27] Also, the Sexual Offences Act, 1956 (England)[28] has placed a bastard on the same pedestal as a person born in wedlock for the purposes of that Act. The significance of whether a person is legitimate or not is not only relevant in the area of succession as it is also of considerable importance in such matters as the law of domicile, the law of nationality and custody and affiliation proceedings.[29] The question of illegitimacy may also be put in issue if in divorce proceedings, where the husband relies upon the fact of his birth as evidence of his mother's adultery.[30]

Statutory [31] and judicial positions in Nigeria on the status and rights of the illegitimate child born during the subsistence of a statutory marriage was equally overwhelmingly clear as would be seen in the plethora of relevant decided cases that the legitimate child of a statutory marriage would inherit to the exclusion of any other illegitimate child. For instance, in *Cole* v *Akinyele,*[32] a case which was based on the English decision of *Fender* v *St. John Mildway,*[33] the deceased was married under the Marriage Ordinance (now Marriage Act) and had two children by another woman, the appellants' mother - one born during the wife's lifetime and the other shortly after her death. He acknowledged both of them as his children. In determining the status of these children and their right of inheritance, the Court held that as regards the child born during the continuance of the marriage of the deceased to a wife under the Marriage Ordinance, it would be contrary to public policy to enable him to legitimate that child by any other method other than that prescribed in the Legitimacy Act and the fact that the deceased acknowledged him as his son when he was born did not serve to make him legitimate. The Court further held that to hold otherwise would almost be to reduce the distinction between

the effects of the two forms of marriage to a matter of words. And as regards the child that was conceived during the currency of the marriage but born after the death of the wife, it was held that there was no principle of public policy to exclude the rule under which he, as the acknowledged son of his father, born at a time when his father was free to marry, could be regarded as legitimate and capable of inheriting under his father's intestacy. According to Brett, F.J, the deceased could have married the mother of the appellants on the death of his statutory wife and, thereby, render the children legitimate, but he chose not to do so but to marry another woman, the second respondent in this case.

The decision in this case has been much criticized by learned writers *inter alia* that if as asserted by the Court that the decision of the Court was based on public policy, then both children should have been equally affected since the public policy must surely, equally apply to the child born in adultery and the one conceived in adultery, as both involved promiscuous inter-course.[34] It has further been rightly observed that public policy in a country such as Nigeria, would seem to demand that a child – who had been acknowledged by his/her father, recognized as such by the whole community into which he/she was born and then not regarded as illegitimate by his personal law – be entitled to a share out of his/her father's intestate estate.[35]

In *Oluwole* v *Olympio,*[36] the deceased had children outside his statutory marriage. He not only acknowledged them, but also paid their school fees and was also responsible for their maintenance. Apart from this, their names were included in the list of deceased children when the eldest and legitimate child of the deceased filed an application for letters of administration. In spite of this, the Court held that the defendants in this case could not be heard to say that because the plaintiffs had included the names of their children (illegitimate children) in the names of beneficiaries or because they accepted these children to be children, they are estopped from denying that at law, they are not the legitimate children of the intestate and could not be entitled to share in the inheritance. Also, in *Osho* v *Phillips*,[37] the Court held that the defendants being the legitimate

children of the deceased intestate by his legal wife under the Marriage Act, had a right, under section 36 of the Act, to succeed to the deceased's property to the exclusion of the plaintiffs, who were born as a result of the deceased's association with another woman during the subsistence of a legal marriage under the Act, and are therefore illegitimate; and the fact that two of the defendants, as administrators had distributed a portion of the deceased's personal property amongst the plaintiffs as beneficiaries and invited them to the family meeting of the deceased's children did not estop the defendants from maintaining that the plaintiffs were not legitimate children of the deceased.

Similarly, under the Nigerian Fatal Accidents Act, 1961, an illegitimate child could not maintain an action and recover damages in respect of the wrongful act, neglect or default of a person resulting in the death of its putative father and cannot also take any benefit under the Act unless he/she has been acknowledged by the deceased as his child.[38]

Thus, in Nigeria, the judicial attitude of the courts towards the illegitimate child has been premised generally on public policy geared towards protecting and stabilizing the marriage institution and it is of no consequence if the father acknowledges paternity or not. It would appear that the idea of public policy was based on the fact that since the parties involved had out of their own volition contracted a marriage under the Marriage Act, they must be taken to have consented to bear the consequences flowing from such a union. The position assumed by Nigerian Courts in the light of the foregoing cases may be regarded as rather a peculiar position in view of the widespread acceptance of polygyny by the society as a way of life. Children born out of wedlock are usually socially included within the families whether their parents are married to each other or not. It may also be observed that most often than not, a vast majority in the society who find themselves in this type of situation, will neither complain nor consider initiating any legal proceedings. At least, the cases of *Osho* v *Phillips*[39] and *Oluwole* v *Olympio*[40] should have been decided differently taking cognisance of the fact that these children had already been fully integrated into the family. As it has been

stated by an eminent commentator, it is difficult to imagine what greater degree of recognition could give rise to estoppel than the one in *Oluwole* v *Olympio,*[41] in which the legitimate children filled a court form requesting to be granted letters of administration in order to administer the estate on behalf of, amongst other persons, the illegitimate children. Since they were listed as the lawful children of the deceased by the legitimate children, and their names were being used to obtain a grant of letters of administration, the legitimate children should have been stopped from denying the rights of the illegitimate children to a share of the estate.[42]

In Nigeria, under customary law, an illegitimate child cannot also succeed to the estate of the putative father unless the father acknowledges him. However, the traditional love of children and spontaneous willingness of the natural father or the extended family to accept the child often remove the burdens attached to that status in English Law. Customary law therefore is more liberal in its attitude towards illegitimate children, so that they are not treated as bastards in the English sense. All that is required to legitimate the child is acknowledgement by the putative father.[43] Similarly under the Islamic law, the illegitimate child is linked to and identified by the mother's name and has no right whatsoever to maintenance or inheritance from the adulterous father.[44] Moreover, the father and the mother of the illegitimate child are likely to be punished for "Zina", that is illicit sexual relations.[45]

In the light of the foregoing, it would be observed that the status of illegitimacy was such that no one would wish to acquire or experience. There has however, been a radical alteration of the social and legal consequences attendant on this status in various jurisdictions through statutory reforms. These statutory reforms have greatly improved the lot of the illegitimate child especially in succession rights and there is at present no more distinction between the legitimate and the illegitimate child in some jurisdictions. It will be necessary now to consider some of these statutory reforms of alleviation in select countries and how far reaching they are starting with Nigeria.

Statutory Reforms of Alleviation in Nigeria

In Nigeria, the first statute that was enacted which had some measure of positive impact on the status and rights of the illegitimate child was the Legitimacy Act of 1929.[46] By section 3(1) thereof, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of the 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 the Act or from the date of the marriage, whichever last happens. However, section 2 of the Act clearly defines "marry", "married" and "marriages" as used in the Act to mean "Christian marriages only". "Christian marriage" as defined by the Act means a marriage which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and woman to the exclusion of all others, thus meaning monogamous marriage only. Therefore, the application of the provisions of section 3(1) excludes customary law and Islamic law marriages. It would also appear that where the putative father and the mother of the so-called illegitimate child do not eventually marry each other, the child retains the status of illegitimacy with the consequential denial of succession rights.[47]

In a revolutionary manner however, the Act allows the legitimation of children born of adulterous unions[48] through subsequent marriage of the parents when it provides in its section 3 that where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of the 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 the Act, or from the date of the marriage, whichever last happens. Thus, the burdensome common law requirement that the father of the child at the time of the birth of the child must be domiciled in a country which recognised legitimacy by subsequent marriage has been dispensed with. Also, section 5(1) and (2) of the Act gives the legitimated child and his spouse, children or more remote issue the right to take any interest in

the estate of an intestate dying after the date of legitimation as well as under any disposition coming into operation after the date of legitimation in like manner as if the legitimated person had been born legitimate. Also, the common law rule that an illegitimate child is not entitled to any form of maintenance from the father is jettisoned by section 8 of the Act which gives a legitimated person the same rights in respect of the maintenance and support of himself or of any other person as if he had been born legitimate and the provisions of any Act relating to claims for damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child is to apply in like manner in the case of a legitimated person.

Furthermore, the common law rule that an illegitimate child could not benefit from the intestate estate of either of his/her parents is attenuated by section 10 of the Act, which provides that 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 would be entitled to take any interest in the estate to which he or his issue would have been entitled to if he had been born legitimate. Similarly, by the provisions of this same section, 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 if the child had been born legitimate and she had been the only surviving parent. It would however be observed that the provisions of this section are limited in scope in the sense that an illegitimate child can only share in his intestate mother's estate if there is no legitimate child. Thus, if the mother has a legitimate child, he would take to the exclusion of the illegitimate child. Moreover, this section did not accord the right of succession to an illegitimate child in respect of his natural father's intestate estate. But this is the beginning.

Another statute enacted in Nigeria which positively impacted the illegitimate child is the Matrimonial Causes Act (MCA), 1970. By section 38 (1) of the Act, a decree of nullity of a voidable marriage annuls the

marriage only from the date on which the decree becomes absolute. Thus, any child born of such a marriage is not only born legitimate but maintains his legitimate status even after the decree of nullity.[49] This is an improvement on the common law position where a decree of nullity in respect of a voidable statutory marriage was retrospective and thus bastardized the child of such marriage. The Act is however silent on issues of void marriages. Also, sections 69 and 70(1) of the MCA allow for the maintenance by the natural father of his illegitimate child born during the subsistence of his Act marriage.

A land-mark provision affecting the status and rights of the illegitimate child was however made in the Constitution of the Federal Republic of Nigeria, 1979 which provides in section 39 (2) thereof, (now Section 42(2) of the 1999 Constitution[50]) that: No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth....

The full import of this Constitutional provision is however still subject to a lot of controversy in view of the indeterminate judicial pronouncements on the matter. The argument has been centered on whether the Constitution has abolished outright the status of illegitimacy or whether it has merely removed the incidents of illegitimacy existing before the 1979 Constitution.

On the one hand of the divide are those who believe that the phrase "the circumstances of his birth" is a reference to illegitimacy, which is therein not denied but has been affirmed whilst its legal effect has been abolished. This school is of the view that to contend that section 39 (2) of the 1979 Constitution has abolished the status of illegitimacy would have the effect of rendering the section itself otiose, since the section is meant to remedy situations where a person may suffer discrimination on the basis of his status, and that if that status no longer exists, what is left to remedy. This school of thought also contends that if acknowledgement is a condition precedent to the application of section 39 (2) of the 1979 Constitution and which ought to be, where there is no acknowledgement in any given situation, the child will remain illegitimate and thus the status

remains.[51] It further contended that considering the "spirit" behind section 39 (2), which could be inferred from section 35(3) of the "Report of the Constitution Drafting Committee", which provided that "No citizen of Nigeria shall be subjected to any disability or deprivation merely on the ground that he was born out of wedlock", it is clear that the intention of the legislature was merely to cater for the interest of any Nigerian citizen born out of wedlock and not to abolish the status.[52] On the other hand are those who are of the opinion that the provisions of section 39(2) of the Nigerian Constitution, 1979, have abolished the status of illegitimacy. This school has sought to apply the literal interpretation rule to the interpretation of section 39 (2) to the effect that the concept and status of illegitimacy of children no longer exist in Nigeria. Once a child born out of wedlock is acknowledged by the father or his family, then he becomes a legitimate child from birth.[53] With due respect, it is our belief that this argument has taken the inevitable position that this Constitutional provision is curative of a legal problem and that it is therefore of *secondary* significance which springs automatically from the *primary* condition or status of illegitimacy. As such, the concept still exists as a concept but it has been legally "cured" or neutralized.

The judiciary has also not been of much help as there have been conflicting Court decisions on the interpretation of this constitutional provision. In the High Court, the first case was that of *Da Costa & Others* v *Fasheun & others*[54] in which the deceased married Juliana Fasheun under the Marriage Act and there were five children of this marriage. However, the deceased, during the subsistence of this marriage associated with two other women who had five other children for him. He acknowledged paternity. The Court relying on *Cole* v *Akinyele*[55] refused to allow the children born outside the monogamous wedlock any share on the ground that they were illegitimate and that it would be contrary to public policy to legitimise them. The Court further held that section 39(2) of the 1979 Constitution does not give them a right of inheritance, as the subsection could not have been intended to sweep away previous accepted practice and create such an absurd and chaotic situation as suggested by

the applicants. The application was therefore dismissed.

Also, in *Olufemi Marquis* v *Olufemi Marquis*[56] the children of an adulterous union were held to be strangers to their father's estate and were not entitled to share in it. With due respect, these decisions may be said to have been reached erroneously as it did not reflect the true intent of section 39 (2) which is to remove any social or legal disability attaching to an illegitimate child. It is generally accepted and well known that the provision was directed at the consequences legally attached to the status of illegitimacy in Nigeria.

In *Olulode* v *Oviosu,*[57] applicant brought an action by way of *habeas corpus* for an order of the Court to obtain custody of the common child of the applicant and the respondent. The two parties had cohabited for a period of three years whilst the applicant's husband was away in England during which period the child was born. The applicant's case was that the mother of an illegitimate child is by law automatically entitled to its custody. While declaring that judicial precedents dictated that the Constitution should be construed in a liberal and elastic manner, the Court held that the pith and substance of section 39(2) of the 1979 Constitution is to abolish the status of illegitimacy and to treat every Nigerian citizen, whether born within or outside wedlock equally and consequently since that section came into being, the status of illegitimacy no longer existed.. In the view of the court, the section confirmed the principle enunciated in a long line of decisions such as that of *Lawal* v *Younnan*[58] and *Bamgbose* v *Daniel*[59] that there is no issue of illegitimacy in Nigeria once the father has accepted the paternity of the child.

Similarly, at the Court of Appeal, the judicial position is still not certain. In *Salubi* v *Nwariakwu & Ors,*[60] the deceased got married to the 3rd respondent under the Act and the marriage was blessed with two issues-the appellant and the 1st respondent. There are however two other issues born by two different women for the deceased which the couple accepted and brought up in the matrimonial home. The deceased died intestate and one of the questions for determination was how his estate should be distributed. The trial Court held that the two children born out of wedlock, being illegitimate, were not entitled to share in the distribution

of the estate. The appellant appealed against the application of section 36 (1) of Marriage Act to the distribution of the estate and the disqualification of the two children born out of wedlock in the distribution of the deceased's estate. Allowing the appeal, the Court of Appeal held that since the coming into force of the 1979 Constitution and the provisions of section 39 (2) thereof, the term "illegitimate children" used to describe children born out of wedlock has been rendered illegal and unconstitutional. The Court further held that the learned trial judge erred in law in holding that the children born out of wedlock are not entitled to benefit from the estate of their acknowledged father who died intestate. To do this it was held would amount to subjecting them to disability or deprivation merely by reason of the circumstances of their being born out of wedlock which is exactly what section 39(2) of the 1979 Constitution is aimed at preventing.

Also, in *Ukeje* v *Ukeje*[61] the respondent, as plaintiff, claimed that she was the daughter of one Late L.O. Ukeje. She contended that since her paternity was acknowledged by the deceased, she was entitled to share in the estate of the deceased. Upon the decision of the trial Court in favour of the plaintiff, the Court of Appeal formulated the issue for determination *inter alia*, as whether the trial Court was right to have held that Igbo customary law which disentitles the female child from inheritance in her father's estate was unconstitutional. The Court held that the issue whether there was a marriage between the deceased and the respondent's mother was irrelevant having regard to the provisions of section 39(2) of the 1979 Constitution. The Court stated further that the circumstances of the birth of the respondent should not constitute a disadvantage to her in view of the clear provisions of that Constitutional provision. Also, in *Muojekwu* v *Ejikeme*[62], the appellants sued the respondents claiming that as heirs and successors-in-title to one Reuben Muojekwu who died intestate, they are by virtue of the Nnewi custom called "*Ili- Ekpe*" entitled exclusively to the estate of the deceased. They claimed that the deceased had two daughters – Comfort, who died childless and Virginia, upon whom "*Nrachi*" custom was performed by Reuben,

and who thereafter gave birth to one Chinwe and one Uzoamaka. The appellants further contended that the deceased acknowledged Chinwe (deceased), the mother of the 2nd appellant and Uzoamaka, the third appellant and mother of the 1st appellant, who were born out of wedlock, as a result of the *"Nrachi"* custom as his grandchildren. The respondents, on their part claimed to be entitled as distant cousins, to succeed to the intestate of the deceased due to the fact that the deceased had no male child surviving him. The Court of Appeal held that the circumstances of the appellants' birth should not be a bar to their legal rights guided by the mandate of section 39(2) of the 1979 Constitution (now section 42(2) of the 1999 Constitution) that bans such a disability. It was further held that the fact that the appellants were born out of wedlock is immaterial and that it cannot be used against them in inheriting the estate of the deceased and that as blood relations, the property of the deceased should devolve on the appellants.

It is also worth mentioning that the Child's Rights Act 2003 in its Section 10(2) has similarly provided that "no child shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth"

Statutory Reforms in Other Jurisdictions

In recent times, the legal status and the accompanying disability in terms of maintenance and inheritance rights of the child born out of wedlock have undergone tremendous reforms in most legal systems. From Europe to the Americas, Asia and Africa, positive developments have taken place in most countries towards ameliorating the unjustifiable dehumanizing and degrading treatment of the illegitimate child. This is attributable to a number of factors ranging from the phenomenal changes in the cultural, social and economic life of the people such as the general decline in the core moral values of the society, the increase in the number of unmarried cohabiting heterosexual couples, the growing liberation and economic independence of women among others to the crusade of Human Rights activists and the invaluable recommendations of the various Law

Reform Commissions established in various jurisdictions that have progressively emancipated the illegitimate child from some of the legal and social disabilities and have made differentiating between children on the basis of their parents' marital status inconsequential.

In England for instance, the law Commission in their preliminary sessions to the enactment of the Family Law Reform Act of 1987 favoured the radical plan that the status of illegitimacy should be abolished altogether.[63] They argued that since the label was itself discriminatory, true equality demanded not simply the removal of all areas of legal discrimination but the abolition of the very status. Also, at the regional level, the European Convention on the Legal Status of Children Born Out of Wedlock, which was opened for signature on 15 October 1975 sets out general principles of equality between children, irrespective of the marital status of their parents, although it does provide for distinction in respect of guardianship and access. In this connection, the European Court on Human Rights in *Marckx* v *Belgium*[64] condemned Belgian legislation on illegitimacy as violating Articles 8 and 14 of the European Convention on Human Rights and held that there was no objective and justifiable reason why an illegitimate child should have no entitlement in the estate of members of her mother's family in intestacy.

Similarly, in Africa, the Organization of African Union Charter on the Rights and Welfare of the Child which came into force in 1999 has equally required State Parties to ensure that every child is entitled to the enjoyment of the rights and freedom recognised in the Charter irrespective of the child's or his or her parents' or legal guardian's race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status..[65] Also, Article 17(5) of the American Convention on Human Rights provides for equal rights for children born out of wedlock and those born in wedlock. Furthermore, the activities of the human rights groups which culminated into the adoption and coming into force of the United Nations Convention on the Rights of the Child, (CRC) 1989 wherein State Parties are enjoined to take all appropriate measures to ensure that the child is protected from

all forms of discrimination or punishment on the basis of the status, activities, expressed opinion or belief of the child's parents, legal guardian or family member are also salutary.[66]

Thus, at the national level, statutory reforms have been made in one form or another almost in all jurisdictions in Europe to establish legal equality between the so-called illegitimate child and the legitimate child especially with regards to maintenance and inheritance rights. Also, most statutes have largely abandoned the phrase "illegitimate" in favour of the term "out of wedlock". Indeed, in Norway, as far back as 1915, the Children's Rights Laws of that year took the initial step towards putting the illegitimate child on an equal footing with the legitimate child. The statute *inter alia* provided that a child whose parents have not entered into marriage with each other has a right to the family name of both father and mother, the right to inherit from both parents and from relatives as if born in wedlock and a claim on whichever of the parents has the care of it to maintenance and education in the same manner as if it were legitimately born.

In England, the common law doctrine of illegitimacy had since 1926, lost much of its importance through the introduction into English law of the doctrine of legitimation by subsequent marriage of the parents of a child born out of wedlock by the Legitimacy Act of that year. Thus, the effect of the marriage of the parents of an illegitimate child whose father at the date of the marriage is domiciled in England and where neither parent was married to a third person when the child was born is to make the child legitimate from the date of the marriage or from the commencement of the Act of 1926 which ever is the later. Also, section 9 of the Act gave entitlement to an illegitimate child and his issue to succeed on the intestacy of his mother if she leaves no legitimate issue, and the mother of an illegitimate child was equally entitled to succeed on his intestacy as if she were the only surviving parent. This was the first statutory provision that brought a ray of hope for this category of children who hitherto were referred to as illegitimate.

Furthermore, the doctrine of putative marriage was introduced into England in 1959 by the Legitimacy Act of that year which provides in section 2 thereof (now Section 1(1) Legitimacy Act, 1976 as amended by the Family Law Reform Act 1987) that the child of a void marriage, irrespective of the date of his birth shall be treated as the legitimate child of his parents if, at the time of the insemination resulting in the birth, or where there was no such insemination, the child's conception, or the celebration of the marriage, if the marriage takes place between conception and birth, either or both parents reasonably believed themselves to be validly married in English law and the father was domiciled in England and Wales at the time of the birth or, if he died before the birth, was so domiciled immediately before his death. In *Azad* v *Entry Clearance Officer Dhaka,*[67] the English Court of Appeal held that a reasonable belief that the marriage was valid in English law was required. This provision applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law. It has however been held in *Re Spence dec'd* that the section does not apply to a child born to a couple before the void marriage is contracted.[68]

With respect to illegitimate children of voidable marriages, statutes have also been enacted to mitigate the strictness of the common law rule. For instance, section 11 of the Matrimonial cause Act 1965 (U.K) re-enacting provisions of the Acts of 1937 and 1950 preserves the legitimacy of children of voidable marriages even when the marriage of their parents is annulled. This section provides that "where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child". This provision is further strengthened by the Nullity of Marriage Act, 1971 U.K which provides in its section 5 that decrees granted after the Act annulling voidable marriages shall not operate retrospectively. The marriage thus being treated as valid to the date of the decree, any child born of it remains legitimate. Furthermore, section 8 of the Legitimacy Act 1976 accorded a legitimated person the same

rights, and subjected him to the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate. Thus, both the Legitimacy Act, 1959 and 1976, and the Nullity of Marriage Act, 1971 (England) have in different ways separated the questions of the validity of a marriage and the legitimacy of children of such marriage.

The Family Law Reform Act, 1969 (Part II) and The Family Law Reform Act, 1987 have further diminished the legal distinction between legitimate and illegitimate children especially in succession matters. For example, the Act repealed the provisions of section 9 of the Illegitimacy Act 1926 under which an illegitimate child and his issue were entitled to succeed on the intestacy of his mother if she leaves no legitimate issue, and the mother of an illegitimate child was entitled to succeed on his intestacy as if she were the only surviving parent[69] and establishes the right of the illegitimate child to succeed on intestacy of parents, and of parents to succeed on intestacy of illegitimate child as if she had been born legitimate. Thus, by the provisions of section 14 of the 1969 Act, where either parent of an illegitimate child dies intestate as in of respects all or any of his real or personal property, the illegitimate child or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate. Similarly, where an illegitimate child dies intestate in respect of all or any of his real or personal property, each of his parents, if surviving, shall be entitled to take any interest therein to which that parent would have been entitled if the child had been born legitimate. Also, by this same provision, any reference to the issue of the intestate in the Administration of Estates Act 1925 is to include a reference to any illegitimate child of his and to the issue of any such child; any reference to the child or children of the intestate is to include a reference to any illegitimate child or children of his; and in relation to an intestate who is an illegitimate child, any reference to the parent, parents, father or mother of the intestate were a reference to his natural parent, parents, father or mother. Also, by section 15 of the 1969 Act, any reference to the child or children of any person in any

disposition made after the coming into force of the section, shall, unless the contrary intention appears, be construed as, or as including, a reference to any illegitimate child of that person.

Furthermore, section 1 of the Family Law Reform Act 1987, establishes the general principle that there should be legal equality for children and provides that "references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time." Maintenance obligations of the father to a child born out of wedlock is also given legal recognition under section 4 of the 1987 Act which empowers the father to make application to the court for an order that would enable him have all the parental rights and duties with respect to the child. Also, as far as property rights are concerned, section 18 of the 1987 Act provides that references (however expressed) to any relationship between two persons in the distribution of the estate of an intestate under Part IV of the Administration of Estates Act 1925 shall be construed in accordance with the provisions of section 1 of the Act thereby almost completely equating the rights of succession of a child born out of wedlock on the intestacy of their parents to those of the legitimate child. Thus, so far as intestacies are concerned, an illegitimate child can succeed on an equal footing with the legitimate child and both parents of an illegitimate child can succeed on the intestacy of that child. Moreover, by section 19(1) of the 1987 Act, any reference to a relationship between two persons in a disposition *inter vivos* or dispositions by will or codicil executed on or after that date is to be similarly construed in accordance with section 1 of the Act unless the contrary intention appears. The provisions of this section also extend to entail interest in real or personal property, the use, without more, of the terms "heir" or heirs" being deemed not to show the contrary intention referred to in section 19(1).[70]

Nevertheless, as far-reaching as these statutory reforms are, the Family Law Reform Act did not completely abolish the distinction between legitimacy and illegitimacy or the concept of legitimation in certain matters. In the first instance, so far issues of nationality are concerned, the distinction between the legitimate child and a child born out of wedlock still exists. For example section 50(9) of the Nationality Act 1981, provides that for the purposes of the Act, where a child is born before 1 July 2006, "the relationship of a mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her, but . . . the relationship of father and child shall be taken to exist between a man and any legitimate child born to him." Also, with regard to dignity or title of honour, section 19(4) of the Family Law Reform Act 1987 provides that: "where under any disposition of real or personal property, any interest in such property is limited (whether subject to any preceding limitation or charge or not) in such a way that it would, apart from this section, devolve (as nearly as the law permits) along with a dignity or title of honour, then

(a) whether or not the disposition contains an express reference to the dignity or title of honour; and

(b) whether or not the property or some interest in the property may in some event become severed from it, nothing in this section shall operate to sever the property or any interest in it from the dignity or title, but the property or interest shall devolve in all respects as if this section had not been enacted."

It is therefore clear from the above provisions that despite the new construction of the term "heir", children of unmarried parents will not be able to succeed to property which is limited to devolve along with a dignity or title of honour.[71]

The status of children conceived by a wife through AID has also been changed by the provisions of section 27 of the Family Law Reform Act, 1987 (U.K) which provide that in relation to a child born in England and Wales after the coming into force of the section as the result of the artificial insemination of a woman, who was at the time of the insemination

a party to a marriage (being a marriage which had not at that time been dissolved or annulled) and was artificially inseminated with the semen of someone other than the other party to the marriage, then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to that marriage and shall not be treated as the child of any person other than the parties to that marriage. In other words, where the consent of the husband has not been obtained before the insemination of the woman, that child will be treated as the child of another person and thus illegitimate.

In Ireland, the Family Law (Maintenance of Spouses and Children) Act 1976 had earlier conferred on all children without discretion as regards marital status of their parents, new and extensive rights to maintenance greater than that provided for in the Legitimacy Act, 1931. The 1976 Act imposes an equal obligation on each of the parents of the illegitimate child, just as it did on parents of a child born within marriage. However, the Status of Children Act, 1987, has further reformed the provisions of the Legitimacy Act 1931 which only gave the illegitimate child the right to succeed only to the intestate estate of the mother, by providing that any relationship between child and parent will be adduced irrespective of the marital status of the parents and all the relationship will be determined accordingly. In other words, children will be deemed legitimate notwithstanding the marital status of their parents.

In the Continental European countries such as in France, Spain and Germany, one of the most striking features of the reform is the concept of voluntary acknowledgement of paternity whereby the father of a child born outside marriage may by authorized means (of varying degrees of formality) acknowledge that the child is his.[72] Maintenance obligations owed by parents to their children born outside marriage are generally the same as those owed by them to their children born within marriage. Succession rights of children have also tended to be equalized, but in some countries, full equality has not yet been achieved. For instance, in France, it is generally provided in the French Code, C.C. 201 that a

marriage which has been contracted in good faith produces its civil effects both as regards the spouses and the children despite the fact that it has been declared void. Similarly, although as a general rule, children born outside marriage have equal rights of succession as those born within marriage, nevertheless, in the case of an adulterine child; the principle of equality does not arise. The issue of an incestuous or adulterous union can lay claim only to maintenance, but other illegitimate children are permitted after compelling legal recognition by a Court proceeding to inherit only one-half of the share to which a legitimate child would be entitled if the parents have also legitimate issue, the other half being added to the share of the legitimate children of the marriage.[73] The limitations on the adulterine child's rights to succession are designed to protect the deceived spouse and abandoned legitimate children as against other persons including grandparents and children of previous marriage.[74]

Also, under the Spanish Civil Code, all illegitimate children where the paternity is sufficiently established, have a right to support; and natural children, who are defined as those born out of marriage of parents who, at the date of the conception of the child, could have married with or without dispensation, receive if recognized by either parent, the right to bear that parent's name and the rights of inheritance corresponding broadly to those of legitimate issue.[75]

In the United States of America (U.S.A.), attempts at improving the condition of the illegitimate child started in the early twentieth century when some States started enacting laws to cater for the interest of illegitimate children so that they may have approximately the same advantages as the legitimate children. For instance, in Illinois, three bills were introduced in the Assembly providing respectively for giving to every child the father's surname; making children born in and out of wedlock equally heirs of father and mother and their kindred and providing for inheritance by illegitimate child from putative father whenever such paternity shall have been established.[76] However, beginning in 1968 in *Levy* v *Louisiana*,[77] the U.S. Supreme Court has consistently upheld the rights of illegitimate children to all the benefits which are open to legitimate

children. Thus, the U.S. Supreme Court invalidated on grounds of equal protection clause of the Constitution the various state laws that discriminated against children born out of wedlock and declared that: Imposing liabilities on the illegitimate child is contrary to the basic concept of our system, that legal burdens should bear some relationship to individual responsibility or wrong doing...The equal protection clause does enable us to strike down discriminatory laws relating to the status of birth. In several situations today, it is the parent-child, such as when the parents are married or have acknowledged paternity.[78]

In Canada, section 15 of the Canadian Charter of Rights and Freedom which guarantees the equal rights of its entire people and ensures a constitutional protection against discrimination in any form has been utilized to fault many family law legislation on the basis of discrimination. The harshness of the common law has therefore been gradually eroded such that illegitimate children in several provinces have rights of intestate succession against their mothers or the right to ask for proper maintenance from their parents' estate under dependants' relief legislation. Furthermore, the status has been repealed in several provinces such as Quebec[79] by legislation and the legal effects of legitimacy have been greatly diminished over the past years. Parents and children now owe a duty to support their illegitimate children and provincial legislation provides for such applications.[80]

Similarly, in the Cuban Family Code Law No 1289 of 1975, the distinction in the status of legitimate and illegitimate children has also been abolished. By Article 65 of the Law, "all children are equal and they have equal rights and duties in relation to their parents, regardless of the latter's civil status". Also, by Article 74 of the Law, children born during marriage or those born within 300 days following the end of the matrimonial ties, provided the mother has not married again are presumed to be children of the marriage. However, by Article 68 of the Law, where the parents of a child are not married, the mother may have the birth of a child registered in the Civil Register by stating the name of the natural father. The father is however, required under the law to be given 30 days

ɔtice to accept or deny paternity of the child. If he fails to appear, the ıild will be registered as his. Following this period, and if there is no ıallenge to the paternity, the registration will become binding and once ıis has been done, the challenge can only be carried out by means of the ɔrresponding procedure within one year. If however there is a denial of ıaternity, the child will be registered without mentioning the name of the ıther, without prejudice to the right of the mother to take legal action to btain recognition of paternity.

In New Zealand, the concept of legitimacy and illegitimacy has lso been abolished by section 3 of the Status of Children Act, 1970 New Zealand), which has placed all children on equal status.

In Australia, section 89(1) of the Commonwealth Marriage Act 961 also seeks to legitimate children born out of marriage where the ɔarents subsequently marry. The subsequent marriage of the parents has he effect of legitimatizing the child back to the time of birth or the ɔommencement of the 1961 Act, whichever is later. However, although he various Equality of Status Acts passed by the States do not operate to abolish the concept of legitimacy, nor legitimatize children in any situation, they do have the effect of removing most of the legal disabilities of the illegitimacy in regard to State law. Where the parents of a child born out of marriage marry subsequent to the introduction of the relevant Equality of Status Act, the child is still legitimated by the Commonwealth Marriage Act (a Federal Law) and not by State Act. But, where the parents of such child never marry, the Commonwealth Marriage Act does not apply and the State Acts will not operate to remove the status of illegitimacy.

In Africa, some countries have also taken pro-active statutory reform measures to address the intolerable treatment of children born out of wedlock especially for purposes of succession to the intestate estate of the putative father. In South Africa for instance, the Intestate Succession Act 81 of 1987 in section 1(2) thereof has excluded the application of the obnoxious common law rule or any such other provisions in any other law when it declares that "illegitimacy shall not affect the

capacity of one blood relation to inherit the intestate estate of another blood relation."[81]

Similarly, in Zambia, the definition of "child" in the Intestate Succession Act, 1989,[82] in section 5(1)(b) thereof has included "a child born in or out of marriage" and the portion of the estate that devolves upon the children is required to be shared only in such proportion as are commensurate with a child's age or educational needs or both.

It is therefore evident that the common law doctrine of *filius nullius* has largely lost much of its potency in most jurisdictions. The social and legal disabilities suffered by children born out of wedlock have been virtually eradicated as highlighted in this paper in the legal regimes which we have examined. The socio-legal impact of illegitimacy should be the focus of our attention now.

Illegitimacy As A Socio-Legal Problem

The stern posture of the society against the illegitimate child undoubtedly has had its own negative impact on the society. As a social problem, there is *inter-alia* a sorry clash between the social morality against waywardness and sexual irresponsibility *vis-à-vis* the deadly blow of injustice meted out to the children of immoral living whose status of illegitimacy has been accompanied with deprivation of vital privileges and "natural rights" and who are more often than others, at risk of being abandoned on the streets by their mothers. Moreover, illegitimacy as a status has often caused disaffection and hatred among siblings of the same "father" who are deprived of equal opportunities and benefits from the attention and financial support of their father. Also, the status of illegitimacy has served as a breeding ground for social discontent amongst frustrated children who may be idle in many cases on account of lack of sustenance and of moral support. The idle hand, we are told, is the devil's workshop. Consequently, many of these children most frequently end up being vagabonds and a pest on the society and being idle, they pose a serious threat to the peace of the society and their battered mind most often lead to considerable increase in the crime rate.

Illegitimate children are on the same pedestal with children of broken homes who have a tendency to indulge in deviant behaviours such as drug trafficking and perpetration of all sorts of crimes. To crown it all, illegitimacy is a mere social and cultural construction. It is created by society as a problem for itself and it is painful to observe that it has been at a significantly expensive price of manifold dimensions of which the foregoing represents just a few. To deny a child born out of wedlock his rightful claims against his father would not necessarily discourage illicit intercourse and giving birth to "illegitimate" children and neither is the society well advanced by allowing the father of such a child escape responsibility for the care and support of the child. One of the duties of parents, whether married to each other or not, is to provide as best as the parents can, for the welfare of the child and to ward off dangers to the health of the child.

As a legal problem, legitimacy has been rightly described as nothing but a legal fiction.[83] The simplicity of the statutory reform measures in most jurisdictions has clearly shown for example, that the legal regime of illegitimacy in family law had been shockingly technical, harsh and had served as faceless instruments of oppression and injustice to these innocent victims as the succinct declaration of the American position in *Levy* v *Louisiana*[84] has vividly shown. One marvels at the nature and depth of lawyers' ingenuity both as legal draftsmen and as judicial officers in most jurisdictions in the formulation of a rigid public policy against the status as well as the interest of the illegitimate child. The problem arising from this uncanny ingenuity lies in the voice of polite critics[85] who have pitched their camp against the harshness of the obnoxious legal position.

Although to be born at all or out of wedlock or in lawful wedlock is the municipal affair of every sovereign State, it is incontrovertible that the problem of hostile legal status of illegitimacy and its original devastating incidents are of universal concern being a vital problem of "man in the universe" since global co-existence of different nationals has given rise to a sizeable literature in Conflict of Laws. It therefore, appears

that the problems identified in this study are of such a magnitude to engage the decisive attention of the United Nations Organisation (UNO).

The Path to Law Reform

There is no gainsaying the fact that the sanctity and stability of the marriage institution should be held sacrosanct in the interest of all. However, the plight of the illegitimate child ought also to be of great concern to the society as a whole. It is in this vein that the concerted efforts of Nation States to put the illegitimate child almost on the same pedestal as the legitimate child by abolishing virtually all discriminatory rules against the status of illegitimacy are laudable.

One is however, of the view that there is need for further intervention by the UNO in the form of a "Universal Declaration on the Illegitimate Child" as an aspect of global Human Rights Campaign in consonance with the worthy and laudable constitutional and statutory reforms of most countries. The proposed UN Declaration may not necessarily be a new one. It may come by way of an enlargement of its current Convention on the Rights of the Child. The proposed enlargement may feature as World enlightenment campaigns of widespread dissemination in every country under such befitting captions as "the Natural Rights of the Illegitimate Child" on the one hand and "The Damage of a Promiscuous Life" on the other. In respect of the latter, emphatic enlightenment campaign on the risks of contagious sexually-transmitted diseases including the terminal disease of Acquired Immune Deficiency Syndrome (AIDS) should be vigorously embarked upon. Also, the UN ought to seize the opportunity to impress it in appropriate persuasive language the virtues and values of disciplined marital life *vis-à-vis,* the destabilization and social disequilibrium naturally occurring in extra-marital affairs which not infrequently have produced a large number of children born out of lawful wedlock under the symbolic and factual designation of *illegitimacy* as a social status. It has been the lot of man to adjust his social responses in accordance with invaluable counsel of imminent dangers associated with naturally inevitable conducts as it has

been eloquently illustrated in sex education to adolescents in the secondary institutions of individual Nation States. Furthermore, where the State Constitution or statute has made provisions altering the status of illegitimacy, there is the need to make necessary amendments to auxiliary legislation in the individual State concerning marriage, matrimonial causes and succession in the interest of explicitness.

In Nigeria, that section 42(2) of the Constitution of the Federal Republic of Nigeria, 1999 has abolished the incidents of the status of illegitimacy is incontrovertible as may be gleaned from the judicial application of this constitutional provision to the few relevant cases. However, the National Assembly ought to seize the opportunity of the on-going process of constitutional amendment to amend the provisions of this section in such a way as to remove the ambiguity surrounding the interpretation of the said provision and to make definite the stance of Nigeria on the status of the illegitimate child. One is however hopeful that the National Assembly would take a cue from the reform experience of such countries as New Zealand and Cuba to abolish not only the disabilities but also the status, especially where paternity has been acknowledged by the natural father of the so-called illegitimate child or where such paternity has been sufficiently established through blood test in cases where paternity is in issue. This would no doubt reflect the Nigerian social realities which is well established and entrenched in the customary law of the people where a "legally" illegitimate child could be "socially" legitimate. Also, there should be a provision that would render as unconstitutional and invalid such discriminatory terms as "illegitimate" used in any statute in the country in compliance with Article 2(2) of the CRC and Article 3 of the OAU Charter on the Rights and Welfare of the Child which both prohibit discrimination in any form against any child and replace it with terms such as "a child born outside marriage" or "child whose parents are unmarried" as it is now being used in some other legal systems examined in this study.

In the meantime, the provisions of Legitimacy Act, 1929 ought to be amended in such a way that would accommodate legitimation other

than by subsequent marriage such as either by acknowledgement of paternity as it is well established under the customary law or by legal recognition of the child by the putative father as it is being done in France and Spain. In addition, it is expedient if the law is amended to allow for subsequent marriage of the parents of the illegitimate child to be contracted under the customary law, since the subsequent marriage of the mother of such child and the putative statutory husband is prohibited by the Marriage Act whilst the putative father's statutory marriage subsists.[86] Also, for children of void marriages, it is worthwhile if the progressive legislative stride in other countries such as the United Kingdom and France[87] is introduced into the Nigerian law to consider those children legitimate if, at the time of the insemination resulting in the birth, or where there was no such insemination, the child's conception, or the celebration of the marriage, if the marriage takes place between conception and birth, either or both parents reasonably believed themselves to be validly married.

The ceaseless struggles over the ages in every country, in international congregations and under the aegis of the U.N. for unalloyed respect for the dignity of man in the society and for human rights would surely remain incomplete unless and until the beleaguered dignity and natural rights, respect and protection of the so-called "illegitimate child" is adequately addressed. The longer the UN intervention is delayed, the more glaring would be the self-contradictory global approach to the inviolate idea of human rights.

FOOTNOTES

[1] "Status" may be described as a person's legal condition in society, either absolute or in relation to another person, which is imposed by the state in order to secure and protect interests of society in its institutions, and carries with it rights, duties, capacities, incapacities, powers and disabilities, or any combination of them, such legal condition and its incidents being generally unchangeable at the mere will of the person or persons subject to the status. See Graveson, R.H., *Conflict of Laws, Private International Law,*

(7th ed.) , London, Sweet and Maxwell, 1974, 226. See also *Niboyet* V. Niboyet (1887) L.R.4 P.D. 1 at 11 C.A, where status is defined as the legal position of the individual in or with regard to the rest of the community.

[2] See Queen, S.A. & Habenstein, R.W., *The family in various cultures,* (4 th ed), U.S.A., J.B. Lippincourt Coy., 1974, 285 -286.

[3] See Graveson (n 1 above) 362[4] (1888) 40 Ch. D 216

[5] See Graveson (n 1 above) 361

[6] See Bromley, P. M. and Lowe, N.V. Family Law (*8th* edition), London, Butterworths, 1992, 278.

[7] See Thomas, M.I.'Rights of illegitimate children under modern statutes' *Columbia Law Review* 698. Available at www.brocku.ca/../ columbia_1916.html. (Last accessed 25 November 2012)[8] Egwunwoke V Egwunwoke (1966) 2 All NLR 1 at 3-4.

[9] See sec. 33(1) of the Marriage Act, 1914, Cap. M 6, LFN, 2004. See also sec. 47 of the Matrimonial Causes Act (MCA) 1970, Cap M 7, LFN 2004 which makes it an offence punishable with five years imprisonment for any person to go through a statutory marriage ceremony with the third party during the subsistence of an Islamic marriage or customary marriage See also *Oshodi* V. *Oshodi* (1963) 2 All NLR 214; Onwudinjo V. Onwudinjo (1957) 11 E.R.N..L. R.1.

[10] See Kasumu, A.B. & Salacuse, J.W. *Nigerian family law,* London, Butterworths, 1966, 208.

[11] See Graveson (n 1 above) 361

[12] See Muojekwu & Ors V. Ejikeme & Ors (2000) 5 NWLR (Pt. 657) 402.

[13] See also S. 147 of the MCA, 1970 which Similarly deals with Presumption of Legitimacy.

[14] (1961) NRNLR 81

[15] See S Idris "A Comparative Analysis of the Provisions of Legitimacy and Paternity Under the Child's Rights Act and Islamic Law in Nigeria" in *Ahmadu Bello University Law Journal* Vol. 25-26, 2006-2007, 141 & 142.

[16] See section 3 of the Legitimacy Act, Cap.103, Laws of the Federation of Nigeria (LFN) & Lagos (1958). This Act amended the earlier Legitimacy Ordinance No 27 of 1929.

[17] See Nwogugu, E.I., *Family law in Nigeria*, Ibadan, Heinemann Educational Book (Nig.) Ltd., 1974-229.

[18] *Phillips* v *Phillips* 18 NLR 102

[19] As above

[20] *Savage* v *Macfoy* (1909) Ren-505

[21] (1953) WACA 19

[22] (1960) LLR 286

[23] See Bromley & Lowe (n 6 above) 292. See also *Galloway* v *Galloway* (1965) AC 299, 311, per Viscount Simonds (dissenting).

[24] See Cretney, S.M., *Principles of Family Law* (4th ed) , London, Sweet and Maxwell, 1984, 594.

[25] See Jowitt & Walsh *Dictionary of English Law* (2nd ed), London, Sweet and Maxwell Ltd., 1977, London, 197.

[26] See *R* v *Brighton* (*Inhabitants*) (1861) IB & S 447.

[27] See Cretney (n 24 above) 604.

[28] See Sections 10 and 11 of the Act.

[29] See Cheshire & North *Private International law* (10th ed), London, Butterworths, 1979, 440.

[30] See Bromley & Lowe (n 6 above) 283.

[31] See e.g. section 10 of the Legitimacy Act 1958 which provides that illegitimate children can only benefit from their mothers' intestacy where their mother has no illegitimate children.

[32] (1960) 5 F.S.S.C. 84.

[33] (1938) AC I.

[34] See Kasumu & Salacuse (n 10 above) 236. See also Nwogugu (n 17 above) 236.

[35] See Onokah, M.C., *Family Law,* Lagos, Spectrum Books Ltd, 2003, 368.

[36] (1968) NMLR 469.

[37] *Supra*

[38] See Section 2 of the Fatal Accidents Act, 1961, No. 34; see *Jirigho* v *Anamali* (1958) WRNLR 195.

[39] (1972) 1 All N.L.R. 276.

[40] (1968) NMLR 469.

[41] As above.

[42] See Sagay, I, "Legitimacy, Legitimation and Right of Inheritance. Evolution and Revolution, 1990-1997" in ***The Lord Justice,*** (A Journal of the Law Students' Association of Nigeria, University of Ibadan) Vol. 4 1999, 85.

[43] See *Savage* v *Macfoy Supra* (n 26 above). 508.

[44] See Idris, S (n 15 above) 143.

[45] Zina means sexual intercourse between a man and a woman not married to each other. It is immaterial whether one or both parties have their own spouses living or are unmarried. It is also immaterial that the act is done with the consent of the parties. See Doi, A.I., *Shari'a : The Islamic Law,* London, To Ha Publishers, 1997, 236.

[46] Cap. 103, LFN and Lagos, 1958.

[47] See e.g. *Cole* v *Akinyele* (*Supra).*

[48] In England, it was not until the Legitimacy Act of 1959 that provision was made for legitimation of children born of adulterous unions.

[49] See Sec. 38(2) of MCA 1970, Cap. M7, LFN 2004.

[50] Cap. C.23 LFN 2004.

[51] See Osinbajo, Y, 'Legitimacy and illegitimacy under Nigerian law' 14 *The Nigerian Journal of Contemporary Law,* 1984-1987, The Nigerian Society of Contemporary law, Lagos, 30 at 43.

[52] See Oyebanji, M.B., 'Illegitimacy under the Nigerian Constitution – Dead or alive? 6 & 7 *The Journal of Private and Property Law,*1986 &1987, Department of Private and Property Law, Faculty of Law, University of Lagos, Lagos, 33 at. 44.

[53] See S agay (n 42 above) 92.

[54] Unreported, High Court of Lagos, Oladipo Williams J., 22 May 1981 Suit No M/150/80.

[55] *Supra.*

[56] Suit No 1/685/84, unreported, 3 March 1986 in the High Court of Ibadan.

[57] Unreported High Court of Lagos State, Ikeja Judicial Division, 27 November 1981 suit No. M/132. 81.

[58] (1981) I All NLR (pt. 2) 243.

[59] (1954) 14 WACA 111.

[60] (1997) 9 NWLR (pt. 505) 442.

[61] (2001) 27 WRN 142.

[62](2000) 5 NWLR (Pt. 657) 402.

[63] See Law Com. No. 118. See also Ireland's Law Reform Commission Report on Illegitimacy (LRC 4 – 1982).

[64] Series A, No. 31, Judgement of 13 June 1979.

[65] See Art. 3 of the OAU Charter on the Rights and Welfare of the Child.

[66] See Art. 2(2) of the CRC 1989.

[67] December 2000 (Unreported).

[68] (1990) 2 WLR 1430.

[69] See section 14(7) of the Family Law Reform Act (U.K.).

[70] See section 19(2) of the Family Law Reform Act, 1987 (U.K.).

[71] See also section 15(5) of the Family Law Reform Act, 1969.

[72] See e.g. Art. 334-335 of the French Civil Code; Art. 260 of the Swiss Civil Code. See also D Lasok 'Legitimation, recognition and affiliation proceedings' (1961) 10 *International Comparative Law Quarterly* 123 at 129 – 131 where it was discovered that under Swiss and German laws, the father is entitled to recognise his illegitimate child and the Swiss Code further provides for the recognition by the paternal grandfather if the father dies or is mentally incompetent.

[73] See Thomas 'Rights of illegitimate children under modern statutes' (n 7 above).

[74] See Frame The legal status of children of illegitimate parents: A comparative study (1978) 2 *Comparative Law Year Book* 47.

[75] As above

[76] See Legislative Digest of 49th General Assembly, State of Illinois. H.B.454, 455, 602.

[77] 391, U.S. 73 (1968).

[78] See Hall, K.L. (Ed) *The Oxford Companion to American law,* London, Oxford University Press, 2002, 296.

[79] See the Quebec Civil Code.

[80] See *The Canadian Law Encyclopedia,* Available at www.the Canadian encyclopedia.com/Art...(Last accessed 23 November 2012) See also Status of Children Act 1981, Chap. 48:07 of the Laws of Trinidad and Tobago.

[81] See however the case of *Mthembu v Letsela & Anor* (2000) (3) S.A. 867 (SCA) in which the Supreme Court held that the custom of excluding children born out of wedlock from inheritance does not contravene the provisions of the interim Constitution against discrimination.

[82] Cap 59 (Vol. 5).

[83] See Ayrinhoc, H.A., *Marriage legislation in the New Code of Canon Law,* 1946, N.Y. 299.

[84] *Supra.*

[85] See e.g. Sagay (n 42 above) 92.

[86] See section 35 of the Marriage Act.

[87] See Section 1(1) Legitimacy Act, 1976 (U.K.).See also sec. 91 of the Australian Marriage Act, (Commonwealth) 1961 (as amended).