

*Review*

# Authority and Validation in Inheritance Law in Nigeria: A Critical Examination of Section 42(2) of the 1999 Constitution

Paul Okhaide Itua

Department of Commercial and Industrial Law, Ambrose Alli University, P. M. B. 14, Ekpoma, Edo State, Nigeria.  
E- mail: [okhaidelawoffice@yahoo.com](mailto:okhaidelawoffice@yahoo.com).

Accepted 09 February, 2024

The concept of “legal pluralism” exists in Nigeria wherein three systems of law are simultaneously in operation. The interactions between these systems of law with respect to a common subject matter have resulted in serious internal conflicts of laws and human rights issues. The interactions between common law, statutes and customary law on the subject of legitimacy and legitimation offer a more complex problem. The situation is further compounded, when it is viewed against the backdrop of succession. With the enactment of Section 42 (2) of the 1999 Constitution, many public affairs commentators, lawyers, social workers and some Human Rights activists were of the opinion that the concept of illegitimacy has been abolished in Nigeria by that section of the Constitution. Unfortunately, this initial optimism has paved way to despair in certain aspects concerning succession on intestacy. This paper therefore seeks to examine the concepts of legitimacy, legitimation and succession in Nigeria, with a view of evaluating the legal effect of Section 42 (2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended on the rights to inheritance of an illegitimate child in Nigeria. Also the study shall suggest ways in which the lacuna that still exist in spite of the Constitutional provisions can be address and further enhance the status of person born out of wedlock.

**Key word:** Legitimacy, legitimation, succession, Nigerian Constitution rights of inheritance.

## INTRODUCTION

In Nigeria, three different systems of law operate side by side. The consequence of this “legal pluralism” is the complex interplay between Common Law, Statutes and Customary law, which in some cases had resulted in serious conflict of law issues domestically. Although, the effect of this legal pluralism is noticeable in different aspects of our law, it is however more evidently noticeable with regard to legitimacy, legitimation and succession. In this regard, most times it is difficult to determine which of the three systems of laws is to be applied in a certain situation. The origin of this may largely be traced to the history of Nigeria state and its legal system. Like, in most parts of Africa, the current legal system used in the adjudication of the disputes is a

child of colonialism. This explains why the English common law applies till this day in Nigeria, with some substantial modifications by statutes.

With respect to legitimacy, legitimation and succession, the genesis of this present state of our law began with the adoption of the English laws of marriage, which became applicable to Nigeria and thereby importing the English rule of legitimacy. The English laws of marriage recognise monogamy. Islamic religion which is widely practised in the Northern part of the country permit a man to marry up to four wives in accordance with Muslim law. Customary law on the other hand allows a man to marry as many wives as he wishes. On the question of legitimacy, the English law recognises as

legitimate any child born in lawful wedlock. Customary law on the other hand admit as legitimate children born in lawful wedlock and also extend legitimacy to children born outside wedlock but whose paternity their father or putative father has acknowledged. Also, Muslim law in certain circumstances admits as legitimate, children born out of wedlock. Because of the obvious difficulties associated with resolution of legal issues pertaining to legitimacy, legitimation and succession, resulting from the interrelationship between these three systems of law, the drafter of the 1999 Constitution incorporates Section 42(2), which is a reproduction of Section 39(2) of the repealed Nigerian 1979 Constitution. This section provides "that no citizen of Nigeria shall be subject to any disability or deprivation merely by reason of the circumstances of his birth". One school of thought has argued that this section in effect, removed the toga of illegitimacy from persons who hitherto were adjudged to be illegitimate under the law. On the other hand, the antagonists are of the view that the Constitutional provisions did not completely remove the concept of illegitimacy from our statute books.

This study seeks to examine the concept of legitimacy, legitimation and succession in Nigeria, and also evaluate the legal effect of Section 42 (2) of the Constitution of the Federal Republic of Nigeria, 1999 as amended<sup>1</sup> on the rights to inheritance of an illegitimate child. The study shall further suggest ways to ameliorate the defect that were not addressed by the Constitutional provisions in other to enhance the status of person adjudged to be illegitimate under the law.

## HISTORICAL BACKGROUND

Nigeria has had its own peculiar experiences and circumstances, which have influenced its legal development. The British influence in Nigeria began from the annexation of Lagos in 1861 and ended with the seizure of what is today Nigeria by 1900.<sup>2</sup> It is important to mention for the purposes of this discourse that one of the earliest treaties was signed on the 6<sup>th</sup> of August 1861 by King Dosunmu of Lagos, wherein he ceded his island to Her Majesty's Government.<sup>3</sup> The British penetration of Nigeria took three different forms. There was the penetration through Lagos, which was extended into the Yoruba hinterland. The occupation of the south-eastern part of Nigeria which was undertaken by the British Foreign Office. The North was developed and secured for

the British enterprise through the work of Sir George Goldie of the Royal Nigeria Company.<sup>4</sup> By January 1, 1900, the territories had metamorphosed into three political units- the Colony and protectorate of Lagos, the Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria. A final amalgamation was effected on January 1914 and the new political entity called Nigeria continued under British rule until October 1, 1960 when it became an independent country. On 1<sup>st</sup> October 1963, Nigeria abolished the monarchy, the only remaining vestiges of colonialism.

It is on record that long before the advent of the British settlers in the in the early part of the nineteenth century, the various communities that had occupied the area which later became known as Nigeria had their respective traditional system of law and the machinery for the administration of justice. What ever the nature of customary administration that were adopted by these various communities, they were all aimed at maintenance of peace and order, the promotion of social welfare and the sustenance of social equilibrium. The Court of Equity, were the first judicial innovations devised to cater for the commercial interest of the European traders in the southeast coast of the Niger.<sup>5</sup> It was first established in Bonny in 1854, and by 1870 other commercial centres in the Niger Delta had adopted it. These courts did not share the same characteristic with the Court of Equity in England, but they were designed to resolve disputes amongst the merchants and between them and the natives. There over riding consideration were fairness, honesty and the general interest of commerce. The next court to evolve was the Consular Courts. The emergence of this court could be attributed to the defect and the crude fashion that was adopted by the Court of Equity for the administration of justice. The Consul, alongside his administrative functions, assumed judicial powers over British and non-British interest. His court enjoyed limited civil and criminal jurisdictions, together with Probate and Admiralty jurisdiction. The effectiveness of this court was undermined by serious logistic problems. Until 1893, there was only one of such court covering the entire coastal stretch of the Southern Nigeria. With the reorganisation and incorporation as the National African Company in 1882, the company was granted a Royal Charter in 1886 and became known as the Royal Niger Company with a mandate to govern and administer the area, paying due regard to: The customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding,

<sup>1</sup> Cap C23 Laws of the Federal of Nigeria 2004.

<sup>2</sup> Prof. J.Akande (Mrs) "Constitutional Development " in T.A.Aguda ed. *The Challenge of the Nigeria Nation. An Examination of Its Legal Development 1960-1985.* (1985, Ibadan Heinemann Educational Books (Nigeria) Limited) at 1

<sup>3</sup> J.O. Asein *Introduction to Nigerian Legal System* (2005, Ababa Press Ltd) at 149.

<sup>4</sup> For a fuller history see Coleman, *Nigeria, Background to Nationalism* cited in J.Akande (Mrs) "Constitutional Development " in T.A.Aguda ed. *The Challenge of the Nigeria Nation. An Examination of Its Legal Development 1960-1985.* (1985, Ibadan Heinemann Educational Books (Nigeria) Limited) at 1

<sup>5</sup> J.O. Asein *Introduction to Nigerian Legal System* (2005, Ababa Press Ltd) at 153.

possession, transfer, and disposition of land and goods, and testate or intestate succession thereto and marriage, divorce and legitimacy and other rights or property and personal rights.<sup>6</sup>

The company exercised its judicial powers through its District Agents with jurisdiction in civil and criminal cases involving both natives and foreigners. Appeal from its judgement went to the Supreme Court in Asaba. By 1862, the first Governor of the Colony of Lagos Henry S. Freeman established three courts in the Colony. These courts were the Police Magistrate Court, the Commercial Court and the Slave Commission Court. The Police Magistrate's Court was opened at Olowogbowo area, Lagos in January 1862 as the first English styled court in Nigeria.<sup>7</sup> Ordinance No. 3 of 1863 formally introduced the English law to take effect from March 4, 1863. On January 1, 1914, the Colony and Protectorate of Southern Nigeria was amalgamated with the Protectorate of the Northern Nigeria to form a single Political unit under Sir Frederick Lugard. The Supreme Court of Nigeria was also established that year via the Supreme Court Ordinance of 1914. Like its predecessor, the court was enjoined to administer the common law of England the doctrine of equity and the statutes of general application which were in force in England on January 1, 1900. On 1<sup>st</sup> October, 1954, Nigeria became a federation by virtue of the Constitution of that year. The Constitution created federal, and three regional governments, to run the affairs of the country. These were as follows: the Northern, Western, Eastern and the Federal Territory of Lagos. Suffice it to say that the judicial administration was also reorganised to reflect the new structure.

Thus, a Federal Supreme Court was established for the Federal Territory of Lagos. The various Regions continued to have their respective magistrates' and native courts while appeals from the former went to the Regional High Courts. On 1<sup>st</sup> of October 1960, Nigeria became an independent sovereign state,<sup>8</sup> with new Constitution for the Federation and the Federal Territory of Lagos and the Regional Constitutions for each of the three regions.<sup>9</sup> Under this Constitution, the pre-1960 court structures were kept. However, from the 1<sup>st</sup> of October 1963, Nigeria became a Republic, thus severing all its political linkage with Great Britain. On the judicial sphere, all appeals to the Privy Council were terminated. The Federal Supreme Court became the court of last resort in Nigeria. This outline explains the complex way through which Anglo-Nigerian partnership was formed. Naturally this mode of association was bound to have some effect on the legal development of the country.

<sup>6</sup> Art.8 of the Charter cited in J.O. Asein *Introduction to Nigerian Legal System* (2005, Ababa Press Ltd) at 155.

<sup>7</sup> *ibid* at 156.

<sup>8</sup> Nigerian Independence Act 1960 (8 & 9, Eliz. 2 C, 55)

<sup>9</sup> See the Nigerian (Constitution) Order-in-Council, S.I. No.1652 of 1960 published in Nigeria, L.N 159 of 1960.

## LEGITIMACY

The question of legitimacy and legitimation are principally connected with status.<sup>10</sup> According to Kasumu and Salacuse<sup>11</sup> legitimacy is the status acquired by a person who is born in lawful wedlock, and such a person is regarded as being legitimate from birth. Since lawful wedlock includes marriage under the Act, as well as customary law, which included Islamic marriage, any child born during the subsistence of either of these aforementioned marriages is legitimate.<sup>12</sup> Also, if the child is born within 280 days after his parents have obtained a decree absolute, the presumption of legitimacy will still apply to the child. Under Islamic law, a child is presumed to be legitimate once he is conceived during subsistence of the marriage. It is immaterial whether the child is born after the marriage has been dissolved. In Nigeria, the concept of legitimacy is very important because of the social stigma that is associated with illegitimacy. At common law, an illegitimate child had no right whatsoever with regard to his parent. He is described as *filius nullius*<sup>13</sup>. The illegitimate child was a stranger in law not only to his father but also to his mother and all other relatives. He thus, has no legal right to succeed to their property, to receive maintenance<sup>14</sup> "or other benefits deriving from the status of parent and child."<sup>15</sup> Also, an illegitimate child has no right to participate in the intestacies of either of his parents. Likewise, neither of his parent had a right to success on the intestacy of the illegitimate child. He also had no right to take on the intestacy of a grandparent or brother or sister (whether legitimate or not) and vice versa<sup>16</sup>.

In *Adeyemi v. Bamidele*<sup>17</sup> the Nigerian Supreme Court held that "...Legitimacy in England is a different concept to legitimacy in Nigeria." Thus, the Legitimacy Ordinance of 1929 has modified this common law position.<sup>18</sup> Thus by Section 10 of the Ordinance, where the mother of an illegitimate child dies intestate after 17 October 1929, leaving real or personal property, but not survived by any legitimate child, the illegitimate child or if he is dead, his issue, is entitled to take any interest in the estate to which he or his issue would have been entitled to if he had been born legitimate.<sup>19</sup> Also where an illegitimate person who has not been legitimated dies intestate in respect of all or

<sup>10</sup> E.I.Nwogugu, *Family Law in Nigeria* (Revised Edition, 2006 Heineman Educational Books) at 286.

<sup>11</sup> Kasumu & Salacus, *Nigerian Family law* (1966) at 207.

<sup>12</sup> See also *Lawal v. Younan* [1961] 1 All NLR 254.

<sup>13</sup> *Galloway v. Galloway* (1965) A.C. 229, 311 per Viscount Simonds (dissenting)

<sup>14</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 2

<sup>15</sup> Cretney, *Principles of Family law* (4<sup>th</sup> Ed, 1984) at 594.

<sup>16</sup> Cretney, *Id* at 604

<sup>17</sup> *Adeyemi v. Bamidele* [1968] 1 All N.L.R. 31 at p.37

<sup>18</sup> Now Legitimacy Act, Cap. 103, 1956 Laws of Nigeria.

<sup>19</sup> See footnote 4 above.

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 has been argued that this ordinance provided partial remedy to the problem created by the common law rules concerning illegitimacy.<sup>20</sup>

## LEGITIMACY AND NULLITY OF MARRIAGE

Nullity of marriage, which comprises of void and voidable marriages, has its own implications on legitimacy. In Nigeria, prior to the enactment of Section 39(2) of the 1979 Constitution<sup>21</sup>, any child born of a void statutory marriage was illegitimate.<sup>22</sup> On the other hand, if the child is born during the subsistence of a voidable statutory marriage, the child will be regarded as legitimate, and he maintains his legitimate status after the marriage has been annulled.<sup>23</sup> Unlike the position under the common law where a decree of nullity even of voidable marriage has retrospective effect.<sup>24</sup> The child of a void or voidable customary-law marriage is not regarded as born legitimate, but such a child may, in some parts of the country, be legitimated by the subsequent acknowledgement of its natural father.<sup>25</sup>

## LEGITIMATION

Legitimation is the process by which a child who has not been born legitimate acquires legitimate status.<sup>26</sup> In Nigeria, legitimation can be achieved either by the subsequent statutory marriage of the parent of the illegitimate child or through the process of acknowledgement under customary law. Legitimacy by subsequent marriage was first made possible under the provisions of Legitimacy Act 1929<sup>27</sup> which applied

<sup>20</sup> According to E.I.Nwogugu in his book *Family Law in Nigeria* (2006 Revised Edition Heineman Educational Books) at 305 under the ordinance, an illegitimate child can only share in his intestate's mother estate if there is no legitimate child. The implication of this statement is that if the mother had a legitimate child, he will certainly take to the exclusion of the illegitimate child. Also, the legitimate issue of the mother's legitimate issue can displace her illegitimate child.

<sup>21</sup> Currently enacted as section 42(2) of the 1999 Constitution.

<sup>22</sup> This statement might not be true in all cases because if the parent contacted a customary marriage before the statutory marriage, the child will be legitimated as a result of the subsisting customary law marriage between his parents. This is one of the effects of "double-deck" marriages in Nigeria. See also Kasumu & Salasuse footnote above at 208.

<sup>23</sup> See generally provisions of section 38 of the Matrimonial Causes Act Cap M7 laws of the Federation of Nigeria 2004.

<sup>24</sup> E.I.Nwogugu. *Family Law in Nigeria* (Revised Edition 2006 Heinemann Educational Books) at 289.

<sup>25</sup> Ibid.

<sup>26</sup> E.I.Nwogugu *Family Law in Nigeria* (Revised Edition, 2006 Heinemann Educational Books) at 291

<sup>27</sup> Ordinance No.27 of 1929.

through out the whole country at that time. However, legitimacy became a regional subject with the introduction of federalism in Nigeria in 1954.<sup>28</sup> Under the aforementioned statute, where the parents of an illegitimate child marry after the birth of the child, the child becomes legitimate from the date of the marriage. But if the marriage took place before the date the legislation that is, Ordinance came into effect, then the date of legitimation, will be the date the Act came into effect. The legal effect of legitimation is that the legitimated child acquires the same status with children born in lawful wedlock. He can effectively participate in the administration of the estate of his parents and also be entitled to inheritance. However, when an illegitimate person died after the commencement of the Act, and before the marriage of his parents, his spouse, children and remoter issue living at the date of the marriage of his parent will inherit property and take any interest as if the person had been legitimated<sup>29</sup>

On the other hand, under customary laws, a child though born out of wedlock can be legitimated by acts<sup>30</sup> of acknowledgement by his putative father. The legal effect of acknowledgement was aptly described by Cole, J in *Taylor v. Taylor*<sup>31</sup> when he held that "the acknowledgement of paternity by the father *ipso facto* legitimatises the children and there could not for the purpose of succession be different degrees of legitimacy".

## SUCCESSION

The laws governing succession in Nigeria can be divided into two broad categories namely Testate and Intestate succession. This classification can be further divided into intestate succession (Non – customary) and succession under customary law.

## TESTATE SUCCESSION

As the name implies, testate succession consists

<sup>28</sup> The various regions inherited and preserved this legislation, which were further inherited by states created from these regions. This explains the uniformity of legislations on legitimacy till this day in Nigeria. See also Legitimacy Act, Cap103 Laws of the Federation of Nigeria, 1965; Cap 62, Laws of the Western Nigeria, 1959; Cap75 Laws of the Eastern Nigeria, 1963; Cap 63, Law of Northern Nigeria, 1963; Legitimacy Act Cap. 88 Laws of Bendel State applicable to Edo State, 1976.

<sup>29</sup> This is possible only if the subsequent marriage of his parents would have legitimated the child if he were alive. See also I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 4.

<sup>30</sup> These includes but not limited to acts such as performance of the naming ceremony by the father see the cases of *Phillips v. Phillips*, 18 NLR 102; paying the mother's maternity bills, see also *Savage v. Mcfoy* [1909] Ren.505 and an acknowledgement contained in a letter was held to be valid in *Young v. Young* [1953] W.A.C.A. 19.

<sup>31</sup> *Taylor v. Taylor* (1960) L.L.R. 286.

primarily of wills. In Nigeria, there is no uniformity of applicable laws relating to wills. Consequently, among the states that were created out of the former western region<sup>32</sup>, the applicable law is the Wills Law<sup>33</sup>. By virtue of the provisions of the Applicable Laws Edict of 1972<sup>34</sup>, Lagos State adopted the Western Nigerian Law. On the other hand, the rest of the country<sup>35</sup> consisting of the states from the Northern and the Eastern part, still applies the English Wills Act 1837 and the Wills Amendment Act 1852.<sup>36</sup>

A critical analysis of the provisions of the Wills Law shows that the legislation basically re-enacted the provisions of the Wills Act 1837 and the Wills Amendment Act 1852 together with the provisions of the Wills (Soldiers and Sailors) Act 1918, but with inclusion of some provisions that took into consideration the prevailing customary laws principles that regulate succession under customary law in the affected states. For example, Section 3 (1) of the Wills Law provides that real and personal estate, which cannot be affected by testamentary disposition under customary law, cannot be disposed of by will<sup>37</sup>. Also, Section 15 of the Wills Law provides that every will made by a man or woman shall be revoked by his /her subsequent marriage. However, the Wills Law exempt a marriage in accordance with customary law from having this effect.

## INTESTATE SUCCESSION

On the other hand, intestate succession basically involves the applications of three systems of laws, like the position with legitimacy and legitimation. These are (a) the common law (b) the Administration of Estate Laws of the various States and customary law.<sup>38</sup> The crucial question is how does one determine the applicable laws to be applied in cases of intestates' succession non – customary? According to Prof. Itse Sagay (SAN)<sup>39</sup> “[t]he factor, which determines which system is to apply in every case, is the type of marriage contracted by the intestate person. In the case of Muslims the religion practised by the deceased is also relevant”. Commenting further, the learned Professor stated the principles of law as follows:

<sup>32</sup> Oyo, Ondo, Ogun, Osun, Ekiti, Edo and Delta States.

<sup>33</sup> Cap. 133, Laws of Western Nigeria 1959

<sup>34</sup> No 11 of 1972

<sup>35</sup> With the exceptions of some few states that have enacted their own Wills Laws in line with the Laws of Western Nigeria, 1959.

<sup>36</sup> This Statute qualifies as Statute of general application in Nigeria.

<sup>37</sup> See *Idehen v. Idehen* (1991) 6NWLR (Pt.198) P.382 and *Lawal-Osula v. Lawal-Osula* (1995) 9 NWLR. (Pt.419) P.259 where the Supreme Court, discussed extensively the legal implication of the provisions of section 3(1) of the Wills Law of Bendel State applicable to Edo State.

<sup>38</sup> Customary Law in this context includes Muslim law. See also *Zaidan v. Zaidan* (1974) 4UILR 283.

<sup>39</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 73

Thus, if a person contracts a Christian (monogamous) marriage outside Nigeria, the common law of England governs the distribution of his estate. If he contracts a statutory (Act) marriage in Nigeria, then if he dies domiciled In Lagos or any of the states comprising the old Western Region, then the Administration of Estate Law<sup>40</sup> will govern. If he contracts a statutory marriage, but dies domiciled in any of the states comprising the former Northern or Eastern Regions, which are yet to enact their own law on non-customary succession, then the common law will also govern the distribution of his estate.<sup>41</sup> Finally if the intestate person was an indigenous Nigerian and he did not contract a Christian or Act marriage, or even if he did, and no issue or spouse of such a marriage survived him, his estate will be distributed in accordance with the relevant customary law. If the intestate was a Muslim, then Islamic law would govern.<sup>42</sup>

It is imperative to bear in mind that the above stated position of the law is subject to many qualifications. For instance, in cases involving the distribution of immovable properties of intestate persons, the applicable law is the *lex situs*, in other words, the law of the place where the land is situated. Therefore, the above generalisation is only correct with respect to movable. Also, where a person who is subject to customary law or Islamic law dies intestate, it is his personal law that will apply to the distribution of his immovable property and not the *lex situs*.<sup>43</sup>

## COMMON LAW

The common law principle that governs the administration of the estate of persons, who dies intestate while domiciled in Nigeria, but having contracted a Christian Marriage outside Nigeria, is the rule in *Cole v. Cole*. The facts of the case<sup>44</sup> are as follows. Mr. Cole, native of Lagos, lived most of his life in Lagos, and he died domiciled there. However, during his lifetime, he contracted a Christian marriage with one Mary Cole in Sierra Leone, and they had a child Alfred Cole. Cole died in 1897. His brother, A.B. Cole commenced an action seeking to be declared the customary heir of his late brother in accordance with customary law. Mary Cole the widow challenged him and contented that succession to Cole estate should be governed by English law relating to the distribution of personal estate of intestates. Under the English Common law the widow and her son were entitled to inherit the estate to the exclusion of the

<sup>40</sup> Cap. 1, 1959 Laws of Western Nigeria

<sup>41</sup> See *Administrator –General v. Egbuna and Others*. 18 NLR 1

<sup>42</sup> I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 73

<sup>43</sup> See *Zaidan v. Zaidan* Supra and section 13 of the Bendel State High Court Law.

<sup>44</sup> *Cole v. Cole* (1898) 1NLR 15

brother. The court held that by contracting a Christian marriage, Cole had removed the distribution of his estate from customary law to English system.<sup>45</sup>

## ADMINISTRATION OF ESTATE LAW

The Administration of Estate Law regulates the administration of the estate of a person who married under the Nigerian Marriage Act, but never the less dies intestate domiciled in Nigeria. States created out of the former Western Regions have basically re-acted the provisions of the Administration of Estate Law of Western Nigeria.<sup>46</sup> As stated earlier, Lagos state has adopted the Administration of Estate Law of Western Nigeria<sup>47</sup>. Before the adoption of the Administration of Estate Law of Western Nigeria, Section 36 of the Marriage Act<sup>48</sup> was applicable to Lagos. By that section, any person who is subject to customary law, and contracts a marriage under the Act, and such a person dies intestate, leaving a spouse or issue of such marriage, all his properties, both real and personal would be distributed in accordance with the English law relating to the distribution of the personal property of an intestate. Commenting on the implication of Section 36 of the Marriage Act in *Obusez v. Obusez*<sup>49</sup> Tobi JSC stated as follows “By contracting the marriage under the marriage Act, the deceased intended the succession to his estate under the English law and not Customary law” Therefore, real property was to be distributed in the same manner as personal property under the statute of distribution.

On the other hand, Section 49(5) of the Administration of Estate Law of Western Nigeria contained similar provisions to that of Section 36 of the Marriage Act<sup>50</sup>. Section 49(5) of the Administration of Estate Law provides as follows: Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance, and such a person dies intestate after the commencement of this law leaving a widow, or husband or any issue of such marriage any property of which the said intestate might have disposed of by will shall be distributed in accordance with the provision of this law, any customary law to the contrary notwithstanding.

In *Salubi v. Nwariaku*<sup>51</sup> Ayoola JSC succinctly brought out the difference between Section 36 of the Marriage Act and Section 49(5) of the Administration of Estate Law

thus: The only difference in the two provisions is that while Section 36(1) of Marriage Act incorporated the English law (fixed at the date of commencement 1914) into our laws of intestate succession by reference, the latter statute has directly and not by reference substantially incorporated the contents of the current English law on the subject in its provisions with consequence that it was not necessary to search for what the English law on the matter was from the foregoing, before the provisions of the Administration of Estate law can apply in any given circumstance, the following conditions must exist:

- (a) A spouse or issue of such marriage must survive the deceased;
- (b) Properties covered by the law are such as the deceased could have disposed of by will.

It is imperative to state that the Administration of Estate Law applies to all persons not subject to customary law, irrespective of the type of marriage contracted by them. It is only in respect of a Nigerian (a person subject to customary law) that the condition of marriage under the Act is applicable.<sup>52</sup>

## EASTERN AND NORTHERN STATES

Prior to the enactment of the various Administration of Estate laws in the former Eastern States<sup>52</sup> there was no Nigerian statutes governing the distribution of the estate of intestate in the Eastern and Northern states. Therefore, the common law rule laid down in the case of *Cole v. Cole* and later modified in *Smith v. Smith* continue to apply to cases of intestacy. This issue came up for consideration in the case of *Administrator-General v. Egbuna*.<sup>53</sup> The respondent in this case has argued that since Section 36 of the Marriage Act<sup>54</sup> was made to have direct application to the colony of Lagos only, and that since the matter occurred outside Lagos, it is the deceased customary law that should be applicable to the distribution of his personal estate. The court held that the principles in *Cole v. Cole*, which represent the common law principle, should apply because it involved general principles as to the application of customary law to such a case.

## CUSTOMARY LAW

Basically succession under customary law is intestate

<sup>45</sup> See also, *Adegbola v. Folaranmi & Ors.* (1921) 3 NLR 89. Also, see *Smith v. Smith* (1925) 5 NLR 105 and *Ajayi v. White* (1946) 18 NLR 41 where the court adopted a more liberal interpretation to the rule in *Cole v. Cole*.

<sup>46</sup> Cap. 133 Laws of Western Nigeria 1959.

<sup>47</sup> See footnote 9 above.

<sup>48</sup> Cap. 115 Laws of the Federation 1958.

<sup>49</sup> *Obusez v. Obusez* (2007) All FWLR (Pt.374) p.245

<sup>50</sup> Cap.115 Laws of the Federation 1958.

<sup>51</sup> *Salubi v. Nwariaku* (2003) 20 WRN SC 53

<sup>52</sup> See for example the Administration of Estate Law, Cap 1 laws of Rivers State of Nigeria 1999; The Anambra State Administration of Sucession to Estate of the Deceased Laws 1987. See also Administration of Estate laws Cap.5 Laws of Eastern Nigeria, 1963.

<sup>53</sup> *Administrator-General v. Egbuna* 18 NLR 1

<sup>54</sup> Cap.115 Laws of the Federation 1958

succession. Succession under customary law is applicable to the estate of a person who is subject to customary law, who dies without being survived by a spouse or a child of that marriage, that is, Statutory or Christian marriage. In Nigeria, there is no uniformity of rules of succession under customary law. The reasons for this state of affairs are not far fetched. They are so many ethnic groups in Nigeria, each with their own peculiar characteristics, even within a larger ethnic classification. In some part of Nigeria, for example among the Yoruba speaking ethnic groups in the southwest, succession is based on the concept of family property. While on the other hand, among the Edo people in the present day Edo State in Mid-Western Nigeria, the concept of male succession prevails with little modifications. What then is the correct law to be applied in cases of intestate succession under customary law?

Essentially, the deceased customary law is the appropriate law to be applied. The principles of customary law will still be applicable irrespective of whether the deceased died outside his ethnic group or he leaves properties outside his hometown. It is also important to observe that while it is true that with respect to land matters generally, the customary law of the place where the land is situated is the applicable law. However, with respect to inheritance, the appropriate customary law is the customary law of the deceased.<sup>55</sup> Before the Supreme Court decision in *Adeniyi Oluwu and Ors v. Olabowale Oluwu and Ors*<sup>56</sup> it was a generally accepted principle of law in Nigeria that a person carries his customary law with him. Therefore, it was not legally possible for a Nigerian to change his ethnic group and acquire another ethnic identity, irrespective of the number of years he must have spent in that "foreign" ethnic group. Thus, in *Osuagwu v. Soldier*<sup>57</sup> the court was faced with a situation, that is, whether to apply Islamic law, which was the *lex situs* and *lex loci*, or Ibo customary law, which was the personal law of the parties to the resolution of a dispute between two Ibo men who were living in Kano, in the present day Kano State. The court, in the interest of justice opted to apply the Ibo customary law. Consequently, the court held as follows: We suggest that where the law of the court is the law prevailing in the area but a different law binds the parties, as where two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will...in the interest of justice...be reluctant to administer the law prevailing in the area, and if it tries the case at all its will... in the interest of justice...choose to administer the law which

<sup>55</sup> See *Tapa v. Kuka* (1945) 18 NLR 5, *Zaidan v. Zaidan* (1974) 4 UILR 283.

<sup>56</sup> *Adeniyi Oluwu & Ors v. Olabowale Oluwu & Ors* (1985) 3 NWLR (Pt.13) 372

<sup>57</sup> *Osuagwu v. Soldier* (1959) NRNLR 39 .see also *Tapa v. Kuka* (1945) 18NLR 5 and *Zaidan v. Zaidan* (1974) 4 UILR 283.

is binding between the parties.<sup>58</sup>

In *Yinusa v. Adebusokun*<sup>59</sup> Bello J (as he then was) held that duration is immaterial when considering whether a settler and his descendants have merged with the natives of the place of settlement. The test is whether it can be establish that as a result of the settlement, the settler has merged with the native, and has subsequently adopted their ways of live and custom. The learned Judge continued as follows: [S]ubject to any statutory provision to the contrary, it appears...that mere settlement In a place, unless it has been for such a long time that the settler and his descendants have merged with the natives of the place of settlement and have adopted their ways of life and custom, would not render the settler or his descendants subject to the native law and custom of the place of settlement.<sup>60</sup>

The view expressed by Bello J (as he then was) above was given judicial recognition / consideration by the Nigerian Supreme Court in the case of *Adeniyi Oluwu & Ors v. Olabowale Oluwu and Ors*.<sup>61</sup> Here the court was urge to consider whether it was possible for a person to change his personal customary law of origin in favour of that of his adopted place of settlement. The facts of the case are as follows. The deceased, Adeyinka Ayinde Olowu, was a Yoruba man by birth from Ijesha. He had lived most of his life in Benin City. He married Benin women who bore him all his children who were the plaintiffs and defendants in this case. In 1942 the deceased applied to the Omo N'oba of Benin (the traditional Ruler of Benin) to be "naturalized" as a Benin citizen. His application was granted. As a result of his status as a Benin man he was able to acquire a lot of landed property both in Benin City and elsewhere in Bendel State. The deceased died in 1960 without making a will. The defendants, two of his children were granted Letter of Administration to administer the deceased's estate. First defendant distributed the estate in accordance with the Benin Customary Law, but the other children, the plaintiffs and the second defendants were dissatisfied and claimed that the estate ought to have been distributed in accordance to Ijesha Customary Law rather than by Benin Customary Law. The plaintiffs applied to the High Court for an order setting aside the distribution according to Benin customary Law, and for a Declaration that Ijesha Customary Law was the applicable law. They failed in the High Court. The High Court held that Benin Customary Law was the applicable law. They appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal, wherein they further appealed to the Supreme Court. In a well considered Judgement, five Justices of the Supreme Court unanimously dismissed

<sup>58</sup> *ibid* at page 41.

<sup>59</sup> *Yinusa v. Adebusokun* (1968) NNLR 97.

<sup>60</sup> *ibid* at page 99.

<sup>61</sup> See footnote 33 above.

the appeal and confirmed the decision of the High Court on the ground that although the deceased was a man of Yoruba extraction, he had spent most of his life in Benin City, “naturalized” as a Benin and acquired considerable properties in Benin City. On the strength of this evidence, the Supreme Court held that his personal law should be the law governing the distribution of his estate at his death, which in this case was Benin Customary Law and not his personal law of origin, which was Ijesha (Yoruba) Customary Law. Coker JSC in his lead judgement observed that in the light of the facts of the case, the deceased in effect relinquished his Yoruba cultural heritage and acquired Bini status. Accordingly, his Lordship held as follows: It follows therefore that by virtue of his change, his personal law changed to Benin Customary Law; distribution of his estate on intestacy must necessarily be governed by Benin Customary Law. He married Benin women who had children for him, he carried on various business activities in and around Benin City. He found also that the change of his status endowed him with the rights and privileges of a Bini indigene and his change in status accords with Benin customary law. Unless this finding of fact is reversed, I hold the view that the trial Judge was right in saying that the applicable customary law for the distribution of the estate is Benin Native Law and Custom.<sup>62</sup>

From the foregoing judicial authority, it is now possible in Nigeria for a person to change his personal customary law of origin in preference to another one which he acquires as a result of acculturation / assimilation.

## BENEFICIARIES

Unlike the situation under the Administration of Estate Laws, children are the exclusive beneficiaries to the estate of a deceased person under customary law. In most of the culture in Nigeria, the mode of succession is patrilineal and virilocal.<sup>63</sup> Some tribes do not discriminate between the sexes of the children of the deceased. For example, among the Yoruba speaking tribes in the south –western Nigeria, there is no discrimination between male and female children in the distribution of their father’s estate.<sup>64</sup> Thus, in *Amusan v. Olawunmi*<sup>65</sup> the

<sup>62</sup> See I.E. Sagay, “The Dawn of legal Acculturation in Nigeria – A Significant Development in Law and National Integration: Olowu v. Olowu” (Autumn 1986) Vol.30, No. 2 *Journal of African Law*, at 179-189. See also I.E. Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 260-261.

<sup>63</sup> There is also in existence the matrilineal mode whereby inheritance is traced through the mother and female for example in Ohafia, Ihechiowa, Abam in Edde/Afikpo areas in the Eastern parts of Nigeria. See also A.. Ibidapo –Obe (2005), *A Synthesis of African law* (2005 Concept Publication Ltd) at 162 where he referred to U U Uche, “the Materilineal System of Inheritance: The Nigerian Model” in *Towards a Restatement of Nigerian Customary Law* (Y Oshinbajo and A W Kalu ed) Federal Ministry of Justice Law Review Series.

<sup>64</sup> See *Andre v. Agbebi* (1931) 5 NLR 47.

court held that the right of inheritance of female children in Yoruba custom emerges from the fact that in some situation women can be head of family. However, in *Mojekwu v. Mojekwu*<sup>66</sup> the court held that an Ibo customary law that allows only male children to exercise a right of inheritance and deny female children of the deceased the right of inheritance while conferring the right on distant male relatives is repugnant and unconstitutional. In Edo State, the patrilineal system is generally practised<sup>67</sup>. Therefore in most cases, the eldest son inherits certain property of the deceased exclusively, while the other children are entitled to the distribution of the remaining estate. The practise is common among all the tribes in Edo state, and also amongst the Urohobo and Itsekiri in Delta state.

## CONSTITUTIONAL PROVISIONS AND RIGHT TO INHERITANCE

Prior to the enactment of Section 42(2) of the 1999 Constitution, which is a reproduction of Section 39(2) of the 1979 Constitution, right of inheritance was predicated on the status of the child. From the foregoing, this study has been able to show that it is only children born in lawful wedlock and those acknowledged by their putative father that have the rights of inheritance in the deceased estate. Thus children born outside wedlock during the subsistence of a statutory marriage were deprived of their share in the distribution of their father’s estate. In *Cole v. Akinyele*<sup>68</sup> the deceased who was married under the Act, had a romantic association with another woman during the subsistence of that marriage. The relationship produced two children. The first child was born during the subsistence of the statutory marriage while the other child was conceived during the marriage but born shortly after the death of the wife of the statutory marriage. The issue for determination before the court was whether the two children could be regarded as legitimate children of the deceased as a result of the acknowledgement of their paternity by the deceased. For the child born during the subsistence of the statutory marriage, the court held that it was contrary to public policy to allow the father to legitimise that child by any other method other than the procedure provided by the Legitimacy Ordinance. According to Brett, F.J. (Delivering the Judgment of the Court) held as follows:

<sup>65</sup> *Amusan v. Olawunmi* [2002]12 NWLR (Pt.780) p30 see also *Akande v. Oyewole* [2003] 6 WRN 36.

<sup>66</sup> *Mojekwu v. Mojekwu* [1997] 7NWLR (Pt.512) p283

<sup>67</sup> For further reading, see P.O. Itua, “Succession under Benin Customary law in Nigeria: Igiogbe matters arising”. (2011) Vol.3 (7) *Journal of Law and Conflict Resolution* pp.117-129. “Available at: <http://www.academicjournals.org/JLCR> (last accessed 29 September 2011).

<sup>68</sup> (1960) SCNLR 192



The judgment in *Alake v. Pratt* does not go into the question of what constitutes a sufficient acknowledgment by the father to make a child legitimate, nor does it decide whether the acknowledgment must be given at the time of the child's birth, or whether it may be given at any time during the joint lives of the father and the child, and no evidence has been called in this case to suggest that the fact that the deceased continued to treat the first appellant as his child after the death of his first wife could constitute, as it were, a fresh acknowledgment on which the first appellant could rely. I prefer, however, to base my judgment not on the failure to prove any applicable rule of Yoruba law and custom, but on the ground that such a rule would be contrary to public policy. On the death of his first wife it would have been open to the deceased to legitimate the first appellant by marrying his mother under the Marriage Ordinance. He did not do so, and although he was entitled, in the words of Kaine, J., "to go back to native law and custom if he chose" in his personal relationships I would hold it contrary to public policy for him to be able to legitimate an illegitimate child born during the continuance of his marriage under the Ordinance by any other method than that provided for in the Legitimacy Ordinance. When a man who might have married under native law and custom has voluntarily accepted the obligations imposed by a marriage under the Marriage Ordinance it seems no undue hardship upon him to hold that in order to legitimate the children of an adulterous union he must follow the same procedure as a person to whom a marriage under the Ordinance is the only form of lawful marriage open; indeed to hold otherwise would almost be to reduce the distinction between the effects of the two forms of marriage to a matter of words.<sup>69</sup>

With regard to the second child conceived during the subsistence of the statutory marriage, but born after the death of the wife, the court held that there was no principle of public policy to exclude the rule under which he as the acknowledged son could be deprived from entitled to share in the distribution of his father's estate. Brett, F.J. further held thus: I feel bound to hold that the rule adopted in *Alake v. Pratt* applies to the second appellant. Kaine, J., excluded it because the second appellant "was already in being" when the lawful wife died, but under the law of England legitimacy by birth depends on being born after a marriage between the parents, not on being conceived in wedlock, and I cannot believe that the rule of Yoruba law on which the second appellant relies introduces a refinement of this kind, when in the ordinary case of a child born out of wedlock it treats acknowledgment by the father as the only test. In *Re Adadevoh* (1951) 13 W.A.C.A. 304, Sir John Verity, C.J., pointed out that the encouragement of promiscuous intercourse must always be contrary to public policy, but the law both of England and Nigeria, including the

<sup>69</sup> *ibid* at 195.

presumptions as to the legitimacy of any child born by a married woman, clearly leans against holding anyone to be a bastard, *filius nullius*, and I know of no principle of public policy to exclude the rule under which the second appellant, as the acknowledged son of his father, born at a time when his father was free to marry who he chose, is to be regarded as legitimate.<sup>70</sup>

Apart from the principles of law discussed above, the court has also granted illegitimate children right to share in the estate of their deceased father applying the doctrine of estoppel.

## COURTS AFFIRMATION AND USE OF THE DOCTRINE OF ESTOPPEL

In *Ogunmodede v. Thomas*<sup>71</sup> the deceased had married under the Act and had one issue a female called Patience Ajibabi. During the subsistence of the marriage, the deceased had 16 other children from different women. He openly acknowledged these children. His legitimate wife and his daughter Patience also accepted these children, and treated them as co-owner of the estate of the deceased. There was evidence that Patience and one of the children always signed documents for and on behalf of other children. When Patience died, her husband attempted to claim the property to the exclusion of the other children. Relying on the case of *Cole v. Akinyele* he argued that since the 16 children were born illegitimate and were not capable of being legitimated, the deceased estate therefore passed on to patience his wife exclusively after her mother's death, and that he being her husband by statutory marriage is entitled to her estate including the deceased estate on her death. The Supreme Court rejected this argument and held that Patience in her life time would have been estopped from claiming the property as her own because she had always treated the property as a joint property with the other children of the deceased consequently, the other 16 children were held entitled to their share in the estate of their father. However, in *Osho and Ors. v. Phillips and Ors*<sup>72</sup> the same court refused a similar prayer, and distinguished it from *Ogunmodede's* case. The plaintiffs/ respondents claimed that they and the defendants appellants were the children of Solomon Ajibabi Phillips the deceased, they also sought a declaration that they and the defendant were the beneficiaries jointly entitled to share with other children in the estate of the deceased and an account of all the proceeds received as rents from the deceased's landed property. They further claimed that although their mothers were never married to the deceased and that they were

<sup>70</sup> *Ibid* at 153.

<sup>71</sup> *Ogunmodede v. Thomas*, Supreme Court, FSC 337/1962

<sup>72</sup> *Osho & Ors. v. Phillips and Ors* (1972) 3 SC (Reprint) 226

born during the subsistence of his statutory marriage to the mother of the defendants, they (the plaintiffs) had been in the house of the deceased and christened by him in the presence of the defendants' mother, and they had lived together with the defendants in the deceased's house. They aver further that the personal effects of the deceased had been shared equally by all the children of the deceased including the plaintiffs.

Relying on *Ogunmodede v Thomas*<sup>73</sup> the plaintiffs argued that the defendant and their mother were therefore estopped by their previous conduct from denying that the plaintiffs were the beneficiaries entitled to share equally with the defendants in the deceased's estate. On their part, the defendants acknowledged that the plaintiffs were the children of the deceased; but denied that they were born in the deceased's house or had ever lived there. Distinguishing this case from *Ogunmodede v Thomas* his Lordship Madarikan JSC delivering the judgment of the court observed as follows: We need to point out that *Ogunmodede's* case did not lay down such principle. The controversy in that case related to the ownership of land claimed by the parties as the beneficiaries of the estate of their deceased ancestor. The question of the legitimacy of some of the parties was also raised but the case was decided on the basis that as one Patience Ajibabi, the predecessor in title of one of the parties to the action, did not deal with the property in dispute all on her own but she regarded it as belonging to herself and the illegitimate children; her husband (that is, the 1st defendant) could not contend after her death that the property was her individual property. After quoting the following recitals appearing in the Deed of Conveyance (Exhibit 'G') executed by Patience Ajibabi.<sup>74</sup>

The court then held that on the authority of *Cole v. Akinyele* the defendant were entitled to succeed to the property of the deceased to the exclusion of the plaintiffs who were illegitimate children.

These two cases explained the complex interplay between legitimacy, legitimation and succession in Nigeria before the enactment of Section 39(2) of the 1979 Constitution, which has now been re-enacted as Section 42 (2) of the 1999 Constitution<sup>75</sup> after the repeal of the 1979 constitution. The section provides as follows: [2] No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

As expected, this provision generated much controversy as soon as the Constitution was promulgated, between religious moralist and human right activists. Opinions were divided on the effect of the section. One view was that the provision had eliminated all the disadvantages associated with illegitimacy; that for example, an illegitimate child now has the same rights to

maintenance and succession as a legitimate child. Others took the view that the provision was a mere sop to those calling for the abolition of the status of illegitimacy and that it was not meant to have practical or legal effect on the existing state of the law regarding the status and consequences of illegitimacy.<sup>76</sup> In *Olulode v. Oviolu*<sup>77</sup> the court held that the "pith and substance of the above section (Section 39(2))<sup>78</sup> is to abolish the status of legitimacy and illegitimacy and to treat every Nigerian citizen as a citizen, whether born within wedlock or outside wedlock". However, in *Kehinde Da Costa and Ors. V. Juliana Fasehun and Ors*<sup>79</sup> Williams J refused to following the judicial reasoning in cases like *Lawal v. Younan*<sup>80</sup> and *Bamgbose v. Daniel*<sup>81</sup> "that there is no issue of illegitimacy in Nigeria once the father has accepted the paternity of the child". Rather, he held that the provision in the Section 39(2), which is currently Section 42(2) of the 1999 Constitution, did not change the existing law in any manner. He relied on the authorities like *Osho v. Phillips*, and *Cole v. Akinyele*, decided before the enactment of the aforementioned section. The issue for determination in this case was whether the illegitimate children of an intestate who had been acknowledge in his lifetime when he was married under the Marriage Act could share equally with the children of the statutory marriage. The deceased was married to one Juliana Fasheun in accordance with the Marriage Act in 1948 and they had five children. He also had five other children from two other women during the subsistence his statutory marriage, and he equally acknowledged these children and provided for them. On his death intestate the acknowledged children were held not entitled to a share in the deceased estate, as they remained illegitimate. Accordingly the judge observed as follows: If Section 39(2) of the Constitution is made applicable to the accepted fact in this case, it would follow that all laws which are based on sound social norms and public policy in order that they should regulate the action of persons who have voluntarily submitted themselves to be bound by those laws either because of conscience, belief, religion or accepted practice have been swept away by the present Constitution. If that was so, as claimed by the plaintiffs in this case, it would mean that a person who by his action during his lifetime has agreed to recognize, accept, create and practice monogamy would after his death intestate, create a situation which would compel those responsible for the

<sup>76</sup> I.E Sagay, *Nigerian Law of Succession Principles, Cases Statutes and Commentaries*, (1<sup>st</sup> ed, 2006, Malthouse Press Limited) at 11

<sup>77</sup> *Olulode v. Oviolu* .Unreported High Court of Lagos State, Ikeja Judicial Division 27<sup>th</sup> November 1981. Suit No. M/133/81.

<sup>78</sup> Same as current Sec. 42 (2) of 1999 Constitution as amended.

<sup>79</sup> *Kehinde Da Costa & Ors. V. Juliana Fasehun & Ors* Suit No. M/150 80 Unreported Lagos High Court Judgement delivered on 22<sup>nd</sup> May 1981 by Williams J

<sup>80</sup> *Lawal v. Younan* [1961] 1 All N.L.R. Pt.2., p243

<sup>81</sup> *Bamgbose v. Daniel* (1954) 14 W.A.C.A. 116

<sup>73</sup> See footnote 59 above.

<sup>74</sup> See footnote 60 above at 232.

<sup>75</sup> See footnote 1 above.

administration of good government and justice to allow his property to become a booty for all and sundry. In my view that cannot be the intention behind the present Constitution. If I were to interpret Section 39(2) of the Constitution as urged by learned counsel for the plaintiffs, I would have subscribed to an abuse and chaotic situation.

The provisions of Section 42 (2) of the 1999 Constitution completely broke new frontiers and revolutionized the law with regard to the consequences of illegitimacy on the right to inheritance. It also took cognizance of the discriminating practices that violate human rights and prohibit them. In *Dr. T.E.A. Salubi v. Mrs. Benedicta Nwariakwu and Ors.*<sup>82</sup> The deceased Chief T.E.A. Salubi was married to Mrs. Angela Salubi under the Marriage Act in 1939. They had two children namely the appellant, Dr. T.E.A. Salubi and the first respondent Mrs. Benedicta Nwariakwu. The deceased later had two other children out of wedlock from two women. After the death of Chief Salubi in 1982, his first son, the appellant in this case and his mother were granted letters of Administration to administer the estate in 1985. Later the appellant became the sole administrator as a result of their mother's illness and old age. The first respondent being dissatisfied with the manner in which the appellant was handling the affairs of the estate, instituted an action at the High Court seeking to set aside the letters of Administration, and an order that the probate registrar should effect the distribution of the estate of the deceased to all beneficiaries in accordance with the marriage ordinance applicable to the deceased. The trial court set aside the letters of administration as sought and also ordered that the administrator-General should distribute the estate between the two children of the statutory marriage. It further held that two children born out of wedlock, being illegitimate were not entitled to share in the distribution of the estate. The appellant appealed to the Court of Appeal. On the exclusion of the other two children on the ground that they were illegitimate children, the Court of Appeal rejected the argument and held that the court can not shut its eyes to the specific provision of Section 39(2) of the 1979 Constitution, and that to hold that the two children born out of wedlock in the instant case were not entitled to benefit from the estate of their acknowledged father who had died intestate amounted to subjecting them to disability or deprivation merely by reason of the circumstance of their being born out of wedlock, which was exactly what Section 39(2) of the Constitution was aimed at preventing.

Commenting further Ige, J.C.A., observed as follows: "Under our law and the provisions of the Constitution of the Federal Republic of Nigeria 1979 they are lawful children and entitled as beneficiaries under the estate of their later father...the decision in *Cole v Akinyele*... is no

<sup>82</sup> *Dr. T.E.A. Salubi v. Mrs. Benedicta Nwariakwu & Ors* [1997] 5 NWLR (Pt. 505) 442

longer the law."<sup>83</sup> On a further appeal to the Supreme Court, the Supreme Court held that "the court below was right in holding that the trial court 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 the deceased and the widow."<sup>84</sup> From the above judicial opinion it is clear that the law now recognizes as legitimate children, children born out of lawful wedlock provided their paternity was acknowledged by their putative father irrespective of the form of marriage contracted by the father.<sup>85</sup>

As stated above, the provision of Section 42(2) of the 1999 Constitution has effectively eliminated the status of illegitimacy in Nigeria. Once a child has been acknowledged by his putative father, he is entitled to equal share of his estate with the children born in lawful wedlock. This position is similar to what is obtainable under Article 17 (5) of the American Convention on Human Rights<sup>86</sup> which provide equal right for children, irrespective of whether they were born in lawful wedlock or not. Also, the current position of the law accord with the various human rights instruments. For example, Article 26 of the International Convention on Civil and Political Rights provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on the ground of...Sex...birth or other status.

However, one issue has remained unresolved; that is, what is the status of a child whose paternity has not been acknowledged by the putative father, can such a child inherit in his intestate estate? Can he argue that he has been discriminated against as a result of the circumstances of his birth as provided by Section 42(2) of the 1999 Constitution as amended? On the authorities examined in this study, I submit that such a child cannot legally lay any claim to the intestate estate of his putative father. The authorities suggest that the only qualification is the acknowledgement by the father. Where this element is lacking, then it will be difficult for the claimer to establish his claim before the court. But where the mother of the child or the child himself is sure that his putative father is his biological father, he can institute a suit for the determination of his paternity while his putative father is still alive, and relying on the provisions of Section 6 (6)(b) of the 1999 Constitution as amended which provides as follows. Subsection 6: The judicial powers vested in accordance with the foregoing provisions of this section.

(b) Shall extend to all matters between persons, or

<sup>83</sup> see page 477 of the law report.

<sup>84</sup> (2003) 2 S.C. 161

<sup>85</sup> see also *Ukeje v. Ukeje* [2001] 27 WRN142 at 160.

<sup>86</sup> "Available at: [www.hrcr.org/docs/American\\_Convention/oashr5.html](http://www.hrcr.org/docs/American_Convention/oashr5.html) accessed 18th September 2011).

<http://  
(last

between government of authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of *any questions as to the civil rights and obligations of that person*.<sup>87</sup>

In such a situation, the court can order a DNA test in other to determine the paternity of the child.

Furthermore Section 42(2) of the 1999 Constitution has also removed discriminatory customary law practices that violate human rights. In *Agbai v. Okogbue*<sup>88</sup> Wali J.S.C. held that "I have no hesitation in coming to the conclusion that any customary law that sanction the breach of the aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our courts".

## CHALLENGES

In spite of the provisions of Section 42(2) of the 1999 Constitution, there still exist evidence of discrimination based on gender in area of succession in Nigeria. Prior to the enactment of Section 42(2) of the Constitution, one area where gender discrimination was palpable was the disinheritance of female children on intestate under customary law. Article 1 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) define discrimination against women as follows: Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their status, on a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field.

Equally, the Article 2 of the CEDAW State parties to the Convention is enjoined to condemn any form of discrimination against women. However, there are some factors militating against the elimination of discriminatory practices and rules of succession in Nigeria. One of such factors is public policy. It seems as an unwritten code that there is public policy of not declaring some culture to be repugnant.<sup>89</sup> The reason is that since some of these practices are declared repugnant, the principles of primogeniture, Islamic law inheritance rules, which offer twice what women can inherit to men may be challenged.<sup>90</sup> This explained why, the unambiguous provision of the draft of Section 42(2) of Constitution<sup>91</sup>

was replaced with the current provision. The argument was that it was immoral and anti-Islam. In Islamic religion, a person born out of wedlock has no right of inheritance to the estate of his putative father. It was further argued that such a provision in the Constitution would contradict this Islamic principle and would be seen as not reflecting the will of the people concerned.<sup>92</sup>

Also, as stated earlier, Article 2 of CEDAW enjoined Member State to condemn any form of discrimination against women. Apart from CEDAW, there are other international instruments preaching the equality of sexes and the principle of non- discrimination. However, it is still difficult for affirmative action to be taken in the area of customary law, because of the use reservation by member state.<sup>93</sup> It has been observed that CEDAW has received more reservation than any other human rights treaty and the reservation would appear to be exactly anti-thesis to the aim of the convention.<sup>94</sup> It is a well-known fact that Nigeria is a signatory to most of the United Nations Human Rights instruments (treaties, declaration covenants) without reservations. I submit that by being a party to the adoption and ratification of these instruments particularly without reservation, Nigeria is obligated to fully implement these International Human Rights Instruments. Unfortunately, Nigeria has failed to domesticate CEDAW in accordance with the provision of Section 12(1) of the 1999 Constitution as amended. That section provides that "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly." This section has also been judicially interpreted by the Supreme Court in the case of *Abacha v. Fawehinmi*<sup>95</sup> it must be noted that ratification is an executive exercise while domestication is a legislative duty. Therefore, one can easily state that the failure to domesticate International Treaties, which will make life much easier for the greater member of the society, is due to insensitivity of the National Legislature in Nigeria.<sup>96</sup> It is my humble submission that once any treaty has been domesticated, any state law or custom, which is contrary to the enacted law will be declared void by our court because such law will be applicable throughout the whole country.<sup>97</sup> It is ironic that the content of the 1966 International Covenants are incorporated in the 1999 Nigerian Constitution. For example, the crux of the International Covenant on Civil

<sup>87</sup> Italic my for emphasis.

<sup>88</sup> *Agbai v. Okogbue* [1991] 7NWLR (Pt.204) 391

<sup>89</sup> A.Oluwakemi. (Mrs) "Succession at customary law- Addressing the crossroad of Constitutional conflicts" Electronic copy "available at <http://ssm.com/abstract=1589648. > (Last accessed 18<sup>th</sup> September 2011) at 21

<sup>90</sup> A.Atsenua, "Custom and Customary Law; Nigerian Courts and Promise for Women's Right" in *Contemporary Issues in the Administration of Justice. Essays in Honor of Justice Atinuke Ige* (Rehoboth Pub) at 344

<sup>91</sup> That section provides that no citizen of Nigeria shall be discriminated against merely by virtue of the fact that he was born out of wedlock.

<sup>92</sup> See the Report of the Constitution Drafting Committee containing the draft Constitution, vol. 1, 1976, Federal Ministry of Information, Printing Division, Lagos Cited in J A Akande, *Introduction to the Constitution of the Federal Republic of Nigeria 1999* (2000, MIJ Publisher) at 104-108.

<sup>93</sup> See note 80 above.

<sup>94</sup> Id at 22 see also K.Tomasevski, *Women and Human Rights* (1993 Zed Books) at 117

<sup>95</sup> *Abacha v. Fawehinmi* [2006] 6 NWLR (Pt. 660) at 228

<sup>96</sup> V.C. Ikpeze, *Gender Dynamics of Inheritance Rights in Nigeria need for women empowerment* (2009 Folmech Printing & Pub.Co.Ltd) at 77

<sup>97</sup> See footnote 81 above.

and Political Rights (ICCPR) are contained in the fundamental Rights provisions in chapter IV of the 1999 Constitution as amended and these provisions are justiciable. Also, the content of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are contained in chapter II of the aforementioned Constitution, but sadly, these provisions are non-justiciable before our courts. I posit that the contents of both covenants cited above, and that of the 1948 Universal Declaration on Human Rights and part of the Conventions on the Elimination of All Forms of Discrimination Against Women (CEDAW) which Nigeria has ratified, are contained in the African Charter on Human and Peoples' Rights (ACHPR) which has been domesticated and has formed part of our laws<sup>98</sup>. This Act, advocate the rights to property and the rights to freedom from any form of discrimination based on sex. From the foregoing, I submit that any discriminatory customary law practice contrary to the provisions of the African Charter is unconstitutional and by implication void.<sup>99</sup>

Discrimination in marriage and family is also objected to on the ground that it would be incompatible with customary and religious practice.<sup>100</sup>

Furthermore, the inability of private citizen to sue and use the provisions of Section 42(1) and (2) is also a limiting factor to the use of the Constitution as a shield in the enforcement of human rights<sup>101</sup>. In *Nzoukwu v Ezeonu*<sup>102</sup> the Court of Appeal held that the trial court was right when it held that the rights granted by Section 39(1) of the 1979 Constitution (equivalent to the present Section 42(1) of the 1999 Constitution) is to be invoked against the state and its apparatuses and not private persons; that the discrimination envisage must have been based on law; the action complained of does not apply to other Nigerian; is an action by government or any of its agencies; and where Sharia or Customary law is alleged, the law must be clearly identified. The limitation of these sections to the activities of the state and its agents is an undue constraint on the enforcement of human rights.<sup>103</sup>

<sup>98</sup> See Cap 10 Laws of the Federation of Nigeria 1990 now known as Cap A9 LFN, 2004, now cited as LFN 2007.

<sup>99</sup> For further reading, see V.C. Ikpeze, *Gender Dynamics of Inheritance Rights in Nigeria need for women empowerment* (2009 Folmech Printing & Pub.Co.Ltd) at 17-100.

<sup>100</sup> See Tomasevski note 85 above. See also Cook, "Reservations to the Convention on the Elimination of All Form of Discrimination Against Women"(1990) 30 *Vancouver Journal of International Law* 643.

<sup>101</sup> See footnote 80 above at 23.

<sup>102</sup> *Nzoukwu v Ezeonu* [1991] 6 NWLR (Pt.290) p70. It was argued on behalf of the counsel to the respondents Prof. Ben. Nwabueze that the phrase 'circumstance of birth' is a circumstance existing by law, not one existing by mere social practice. The complaint of the appellants was that the respondents regarded and treated them as slaves and descendant of slaves and in consequence prevented them from owing properties, taking titles and taking part in developmental activities' of the town.

<sup>103</sup> See *Madu v. Onuaguluchi* (1985) NCLR 419.

## RECOMMENDATIONS

Having discussed the impact of Section 42 (2) of the 1999 Constitution as amended on legitimacy, legitimation and succession in Nigeria, it is hereby recommended that there should be a programme for re-socialization and re-direction of the public policy. The government should be able to formulate a policy that will be all embracing that will protect human rights and at the same time meet the aspirations of the citizens.

Also, there should be an enlightenment campaign to educate the people on the negative impact of illegitimacy and the possibility of circumventing the limitation of customary law on succession. One such area is marriage under the Act. Also where a testator makes a will, and the will conforms to the provisions of the Wills Law or the Wills Act, the effect of customary law on succession will be eliminated. Also, a testator can make specific gift to any child in his will subject to the limitation impose by customary law.<sup>104</sup>

The various Ministries of Women affairs and Social Development in the states of the federation should be encouraged to open zonal offices in the all the Local Government Areas in the country, where they can have direct access to the grassroots and provide legal aid, 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.

Furthermore, it is imperative that some forms of legislation are enacted to eliminate the harsh effect of customary law. For example, in Enugu state in southeastern Nigeria, there is a law enacted to prohibit the infringement of Widows' and Widowers' Fundamental Rights.<sup>105</sup> This law provides a legislative framework for the protection of widows against oppression and discriminatory widowhood rites.

## CONCLUSION

This study has discussed in detail the concept of legitimacy, legitimation and succession in Nigeria. It has evaluated the effect of Section 42(2) of the 1999 Constitution on the right of inheritance. From the study, it is apparent that once a father acknowledges the paternity of a child, that child becomes legitimate irrespective of the fact that the child was born out of lawful wedlock. But the problem becomes more complicated where the father refuses to acknowledge the paternity of the child in his

<sup>104</sup> <sup>104</sup>

See *Idehen v. Idehen* (1991) 6NWLR (Pt.198) P.382 and *Lawal-Osula v. Lawal-Osula* (1995) 9 NWLR. (Pt.419) P.259 where the Supreme Court, discussed extensively the legal implication of the provisions of section 3(1) of the Wills Law. of Bendel State.

<sup>105</sup> See the Prohibition of Infringement of a Widow's and Widower's Fundamental Rights Law 2001.

lifetime. On his demise, the child will find it impossible to participate in the distribution of his putative father's estate because he will be considered by the other children of the deceased or by his family members as a total stranger. Such a child will remain for all intent and purposes an illegitimate child. Consequently, it is submitted that Section 42(2) of the 1999 Constitution has only eliminated the status of illegitimacy from our statute books to the extent that the putative father acknowledges the paternity of the child. But where such an acknowledgement is refused, the child remains an illegitimate child, and thus confines the views of those who still believe that the concept of illegitimacy has not been completely eliminated from our society.

## REFERENCES

- Abacha v. Fawehinmi (2006). 6 NWLR(Pt. 660): 228.  
 Adegbola v. Folaranmi and Ors (1921). 3 NLR 89.  
 Adeniyi Oluwa, Ors v. Olabowale Oluwu, Ors. (1985). 3NWLR (Pt. 13):372.  
 Adeyemi v. Bamidele (1968). 1 All NLR 31.  
 Administration of Estate law Cap 133 Laws of Western Nigeria 1959.  
 Administration of Estate Law Cap. 1 Laws of Rivers State of Nigeria 1999.  
 Administrator-General v. Egbuna and Ors. 18 NLR 1, (1945).  
 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.  
 Agbai v. Okogbue (1991). 7 NWLR (Pt.204): 391.  
 Ajayi v. white (1946). 18 NLR 41.  
 Akande JA (2000). Introduction to the Constitution of the Federal Republic of Nigeria 1999, MIJ Publisher, pp. 104-108.  
 Akande v. oyewole (2003). 6 WRN 36.  
 American Convention on Human Rights (1978).  
 Amusan v. olawunmi (2002).12 NWLR (Pt. 780): 30.  
 Anambra State Administration of Succession to Estate of the Deceased law 1987.  
 Applicable Laws Edict No 11 of 1972 Lagos State.  
 Atsenua A (2002). "Custom and Customary Law: Nigerian Courts and Promise for Women's Rights' in Contemporary Issues in the Administration of Justice" Essays in Honour of Justice Atinuke Ige (Rehoboth Pub) p. 344.  
 Bamgbose v. Daniel (1954) 14 WACA 116.  
 Cole v. Akinyele (1960). SCNLR 192.  
 Cole v. Cole (1898). 1 NLR 15.  
 Constitution of the Federal Republic of Nigeria 1979.  
 Constitution of the Federal Republic of Nigeria, Cap C23 Laws of the Federation of Nigeria 1999.  
 Convention on the Elimination of all Forms of Discrimination against Women. (CEDAW) (1979).  
 Cretney Principles of Family Law (1984). 4<sup>th</sup> Ed., p. 594.  
 Dr. T.E.A. Salubi v. Mrs Benedicta Nwariakwu and Ors (2003). 20 WRN SC 53.  
 Galloway v. Galloway (1965). A.C. 229.  
 Ibadapo- Obe A (2005). Synthesis of African Law. Concept Publication Ltd, p. 162.  
 Idehen v. Idehen (1991). 6 NWLR (Pt.198): 382.  
 Ikpeze VC (2009). Gender Dynamics of Inheritance Rights in Nigeria need for women empowerment. Folmech Printing Pub. Co. Ltd, p. 77.  
 Itua PO (2011). "Succession under Benin Customary Law in Nigeria: Igiogbe Matters arising" J. Law Conflict Resolut., 3(7): 117-129. Available at: <http://www.academicjournals.org/JLCR>.  
 Kasumu and Salacus (1966). Nigeria Family Law, p. 207.  
 Kehinde Da Costa , Ors v. Juliana Fasehun, Ors (1981).. Unreported High Court of Lagos State suit No. M/150/80.  
 Lawal- Osula v. Lawal-Osula (1995). 9 NWLR (Pt.419): 259.  
 Lawal v. Younan (1961): 1 All NLR (Pt.2): 243. Legitimacy Act, Cap 103, 1965 Laws of the Nigeria. Legitimacy Act, Cap 62 Laws of Western Nigeria, 1959 Legitimacy Act, Cap 63 Laws of Northern Nigeria 1963 Legitimacy Act, Cap 75 Laws of Eastern Nigeria 1963  
 Legitimacy Act, Cap 88 Laws of Bendel State applicable in Edo State 1976.  
 Legitimacy Act, Ordinance No. 27 of 1929.  
 Madu v. Onuaguluchi (1985) NCLR 419.  
 Marriage Act Cap115 Laws of the Federation 1958.  
 Matrimonial Causes Act Cap M7 Laws of the Federation of Nigeria 2004.  
 Mojekwu v. Mojekwu (1997). 7 NWLR (Pt.512): 283.  
 Nwogug EI (2006). Family law in Nigeria. Revised Edition, Heinemen Educational books, p. 286.  
 Nzoukwu v. Ezeonu (1991). 6 NWLR (Pt. 290): 70.  
 Obusez v. Obusez (2007) All FWLR (Pt. 374) 245.  
 Ogunmodede v. Thomas (1962). FSC 337.  
 Olulode v. Oviolu unreported High Court of Lagos State (1981). Suit No.M/133.  
 Oluwakemi A (2010). "Succession at Customary Law – Addressing the Crossroad of Constitutional Conflicts" Electronic copy available at <http://SSM.Com/abstract=1589648>.  
 Osho, Ors v. Phillips, Ors (1972). 3 SC (Reprint) p. 226.  
 Osuagwu v. soldier (1959). NWLR 39.  
 Phillips v. Phillips 18 NLR: 102. (1945).  
 Prohibition of Infringement of Widow's and Widower's Fundamental Rights Law 2001.  
 Sagay IE (1986). "The Dawn of legal Acculturation in Nigeria- A significant Development in law and National Integration: Oluwu v. Oluwu". Autumn J. Afr. Law, 30(2): 179- 189.  
 Sagay IE (2006). Nigerian Law of Succession, Principles, Cases Statutes and Commentaries. 1<sup>st</sup>.ed., Maithouse Press Limited, p. 2.  
 Salubi TEA v. Mrs Benedicta Nwariakwu & Ors (1997). 5 NWLR (Pt.505): 442.  
 Savage v. Mcfoy (1909). Ren 505.  
 Smith v. Smith (1925). 5 NLR: 105.  
 Tapa v. Kuka (1945). 18 NLR: 5.  
 Taylor v. Taylor (1960). LLR 286.  
 Tomasevski K (1993). Women and Human Right. Zeb Books, p. 117.  
 Uche UU (1991). "The Materilineal System of Inheritance: The Nigerian Model" in Toward a Restatement of Nigerian Customary Law (Y. Oshinbajo and A.W.Kalu ed) Federal Ministry of Justice Law Review Series.  
 Wills (Soldiers and Sailors) Act 1918  
 Wills Act 1837.  
 Wills Amendment Act 1852.  
 Wills Law of Bendel State applicable in Edo State. (1976).  
 Wills Laws Cap 133 Laws of Western Nigeria 1959.  
 Yinusa v. Adebusekun (1968). NWLR 97.  
 Young v. Young (1953). WACA 19.  
 Zaidan v. Zaidan (1974). UILR 283.