

CHAPTER 3:

LEGITIMACY AND RECOGNITION

A - Introduction

The mere fact that legitimacy creates status makes it imperative for a lawyer to distinguish between legitimate and illegitimate children. This is necessary because the right which a child can acquire *vis-a-vis* his parents may depend on whether or not he is legitimate. For example, the right to succeed to a throne or to inherit property may depend on whether or not the child is legitimate.

B - Legitimacy

The first presumption to be drawn is that any child born in wedlock is legitimate. And as we do recognise both statutory and customary law marriages in Cameroon, a child born after the solemnisation of any of these marriages will be legitimate. However, what is material here is the fact that the parent of the child were legally married, either at the time of its conception or at the time of its birth. This explains why at common law, a child would be deemed to be legitimate if he was conceived during the parents' marriage although born after the marriage was terminated by divorce⁸⁰. Under the same circumstances, a posthumous child is given the same status.

This common law position gathers its force from certain presumptions which, if rebutted, could produce different results. It is first of all, in this context, presumed that the husband had sexual intercourse or several acts of intercourse with his wife, and secondly that, as a result of one of these acts, the child was conceived. These presumptions have even gained added ground in the Evidence Act (1943), where it is enacted that legitimacy may be presumed if the child is born within 280 days after dissolution of the marriage, the mother remaining unmarried.⁸¹ So the presumption in Cameroon now has statutory weight although the common law position does not have the added requirement that the mother must remain unmarried.

C - Evidence in Rebuttal

This section cannot be studied without raising the issue of a conflict of laws. Before doing so, it is worth mentioning that a husband's rebuttal can turn mainly on the fact of non-access, for example, that he was not available at the relevant time and so could not have had sexual intercourse with the wife. This is quickly proved where a decree for judicial separation had been pronounced,⁸² but not where the parties mutually agreed to live apart. It is not clear whether a husband who claims that he was abroad when the child must have been conceived would find it easy to rebut the presumption of legitimacy. In any case, the 19th Century cases are not ambiguous in their setting of the normal period of human gestation. In *Bosville v. Att. Gen.*⁸³ it was put at 270 - 275 days, while in *Burnaby v. Bailie*⁸⁴ the court placed it at 273 - 280

⁸⁰Knowles v. Knowles (1961) p. 161

⁸¹ S. 147

⁸²Ettenfield v. Ettenfield (1940) p.96

⁸³(1887) 12 P.D.177 at p.183

⁸⁴ (1889) 12 P.D. 177 at p.183

days. However, the House of Lords has now declared that the court would take judicial notice of the fact that the normal period of gestation is between 270 and 280 days.⁸⁵

The husband could equally rest his case on the fact that he is sterile or impotent, although in the latter case, the court would have to consider the possibility of artificial insemination.⁸⁶ Today, the court will also accept the findings of a doctor on blood tests which have been carried out. As was earlier noted, it is possible to prove convincingly that a particular man cannot be the father of a particular child. But the reverse is not true, name that the results cannot show conclusively that a particular man is the father of a particular child. In any case, proof to rebut the presumption of legitimacy is now based on a balance of probabilities.⁸⁷

Coming back to the problem of conflict of laws raised at the beginning of this section, the question has been asked in Cameroon whether a husband or wife is competent to give evidence of non-access aimed at bastardising a child born during a valid and subsisting marriage. It has been argued that such evidence should not be admissible for being contrary to morality and decency. In fact, the common law position underscored in what is today known as *the rule in Russel v. Russel*⁸⁸ is to the effect that neither the husband nor the wife can give evidence of non-access, which has the effect of showing that the husband is not the father of the child the wife has given birth to. This view was later enacted in the Evidence Act of 1943⁸⁹. It is stated in its S. 147 that:

...neither the mother nor the father is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman's child would be affected even if the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery, nor are any declaration by the upon that subject deemed to be relevant, whether the mother or the father / husband can be called as a witness or not.

In keeping with S.15 of the Southern Cameroons High Court Law 1955, the Matrimonial Courses Act of 1973 is applicable in Former West Cameroon. It is stipulated in its S. 48 (1) that:

the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

S. 147 of the Evidence Act 1943, and S. 48 (1) of the MCA 1973 are not reconcilable. The local decisions, however, show that the courts prefer the tenor of S. 48 (1) of the MCA 1973. This could be so because it is a latter statute.

D - Illegitimacy at Common Law

A child born out of wedlock was regarded at common law as a *filius nullius*, and so had no protection by the law on his legal relationship with either his father or mother. It was assumed

⁸⁵ Preston Jones v. Preston Jones (21951) 1 All E.R. 124

⁸⁶ Clarke v. Clarke (1943) 2 All E.R. 540

⁸⁷S. 26, Family Law Reform Act 1969

⁸⁸(1924) A. C. 687

⁸⁹This Act which is part of the Law in Nigeria is applicable in former West Cameroon

that such a relationship did not exist. Such a child was automatically cut off from succession rights and rights to inherit property.

The problem of artificial insemination (AID) and in-vitro fertilisation and embryo transfer (IVF+ET), could raise enormous problems. In the case of artificial insemination, there is no problem if the semen is provided by the husband. Where the donor is a stranger, the common law position is that the child is illegitimate. In fact, in 1960, a Royal Commission in England concluded that:

*...a child born as a result of AID is illegitimate. The fact that the husband has consented to the artificial insemination is immaterial. He can no more legitimate the child by giving his consent than he can legitimate the issue of an adulterous union by consenting to the adultery.*⁹⁰

But it should be acknowledged here that proof could be very tedious, especially where the alleged parents are already dead. Above all, the doctor, following medical practice, can refuse to disclose that conception resulted from artificial insemination.

It is also possible to store sperms in a hospital bank for a reasonably long time. Another difficulty could arise where artificial insemination takes place after the death of the husband. A child born from such an act would undoubtedly be declared illegitimate for the simple reason that the marriage had come to an end before the conception. The common law had been very firm on this issue of illegitimacy that it even refused to accept that a child could be legitimated by the subsequent marriage of the parents.⁹¹

There has been a great deal of statutory change in England culminating in the Legitimacy Act 1976⁹². Unfortunately, these have all been post-1900 legislation so that they remain inapplicable in Former West Cameroon. Only the relevant provisions of the MCA 1973, and the Family Law Reform Act 1987, being Acts of Parliament concerning matrimonial causes apply in Cameroon, together with the 1981 Ordinance. Tremendous strides have been made in the Family Law Reform Act 1987 to wipe out the stigma that usually accompanies the stigma of illegitimacy. Even the 1981 Civil Status Registration Ordinance (as modified in 2011) expressly provides that where information relating to the father or mother is not known, corresponding items on the birth certificate shall be left blank and equally warns that on no account should one indicate that the father is unknown.⁹³ The Stress in the Family Law Reform Act 1987 is no longer on tagging the titles of legitimacy or illegitimacy on innocent children, but on the distinction that the mother and father were or were not married to each other when the child was born.⁹⁴ In any case, the line between legitimate and illegitimate children is still being drawn in a few instances. For example, the acquisition of British citizenship and succession to a title of honour⁹⁵ would turn on whether or not the child is legitimate.

⁹⁰The Home Office Committee on Human Artificial Insemination (1960) Cmnd 1105

⁹¹The resistance of the Statute of Merton 1235

⁹²Legitimacy Act 1926 and the Legitimacy Act 1959

⁹³S. 34 (3)

⁹⁴S. 1 (3) this Act which is part of the Law in Nigeria is applicable in former West Cameroon

⁹⁵S. 19 (4)

E - Legitimacy of Children of a Void Marriage

The common law position on this issue was unambiguous. Children of a void marriage were immediately treated as illegitimate. English Law has carried out a big change in this area and by the provisions of S. 2 (1) of the English Legitimacy Act (1959)⁹⁶.

The child of a void marriage whenever born, shall... be treated as the legitimate child of his parents if at the time of the insemination resulting in the birth or, where there is no insemination, the child's conception (or the time of the celebration of the marriage if later), both or either of the parties reasonably believed that the marriage was valid.

The English Legitimacy Acts of 1959 and 1976 do not apply in Former West Cameroon. But a solution can be found in S. 41 *et seq* of the 1981 Ordinance which guaranteed the possibility of the recognition of children. So, where for example, one contracts a bigamous marriage, as was the case in *Mbiaffie v. Mbiaffie*,⁹⁷ the marriage is void, but the children will be legitimate if legally recognised by the father. It is relevant that the parties knew of the defect at the time of the marriage. But where recognition fails to take place, the children will be considered illegitimate.⁹⁸

An interesting argument could stem from a case where the parties contract a valid customary law marriage and a few years later, the husband contracts a statutory marriage with the same woman. Even if it is contended that the second marriage is void in law, nothing stops the parties from falling back to their first marriage, the undissolved customary law marriage. In such a case, one can maintain that the children will be considered legitimate.

F - Legitimacy of Children of a Voidable Marriage

The pronouncement of a decree rendering a marriage voidable had very serious effects at common law. The parties were henceforth considered as never having been married. In fact, it was tantamount to saying that the marriage was void. The result was that children of such a marriage were bastardised and so declared illegitimate in the eyes of the law. This used to work considerable hardship especially to children whose parents had had their marriage annulled on the grounds of epilepsy, venereal disease or insanity. The MCA 1937 successfully made this three cases exceptions to the rule.⁹⁹ The problem has finally been solved today by the MCA 1973 by declaring that a decree of nullity will no longer have a retroactive effect. It is provided in S. 16 that:

a decree of nullity granted after 31st July 1971 in respect of a voidable marriage shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time.

⁹⁶Replaced by the Legitimacy Act 1976, S. 1 (1); See also the amendment in S. 28 (1) of the Family Law Reform Act 1987

⁹⁷Suit No. HCSW/30mc/85 (unreported)

⁹⁸See the Nigerian Cases of *Hastrup v. Coker* (1922) 8 N. L. R. 68 and *Cole v. Akinyele* (1960) 5, F. S. L. 84

⁹⁹S. 7 (2)

G - Legitimation

Legitimation is the mechanism through which an illegitimate child subsequently acquires the status of a legitimate person. This could happen when the mother and the father inter marry or when the putative father legally recognises the child in court.

1 - *Legitimatio per subsequens matrimomium*

Legitimation by the subsequent marriage of the mother and putative father was unknown to the common law. IT was only in 1926 that Statutory intervention introduced into English Law the principle that an illegitimate child is automatically legitimated by the subsequent marriage of his parents. This was brought about by the Legitimacy Act (1926)¹⁰⁰ which, for obvious reasons does not apply in the English-speaking regions of Cameroon. There seems to be a vacuum in this area of the law since the common law of England did not permit this type of legitimation.

The 1981 Ordinance is not very clear on this subject, it barely stipulates that:

*the recognition or legitimation of a child born out of wedlock shall be established by court decision.*¹⁰¹

It further enacts that:

*...recognition and legitimation excepting adoptive legitimation shall be based on blood relationship...*¹⁰²

A careful examination of these provisions will show that legitimation here refers to children born to the parties before the celebration of the marriage, while recognition would imply acknowledgement of paternity of a child born to an unmarried woman.

The glaring difference, if this interpretation is correct, is that unlike in English Law, it is not automatic that a child will be legitimated by the subsequent marriage of the parents. There must be a court judgement to that effect.¹⁰³

2 - Recognition of Children

From the analysis stated above, legitimation can arise only where there is a valid marriage. This is not the case with recognition. Here, the 1981 Ordinance makes reference to children born out of wedlock. In the first place, S.43 (2) declares that even a child born as a result of adultery on the part of the mother may be recognised by the natural father provided there is disavowal by the husband before a law court. It is difficult to give a confident interpretation to the provisions of S. 43 (1) namely that:

a child born out of wedlock may be recognised by his natural father.

Does this section apply to both married and unmarried men? Common sense seems to dictate that it applies mainly to unmarried 'fathers'. Were it to apply to married men, it would be

¹⁰⁰S. 1 (1) now Legitimacy Act 1976, s. 2

¹⁰¹S. 41 (1) (a)

¹⁰²S. 41 (2)

¹⁰³S. 41 (1) (a)

tantamount to giving adultery statutory recognition. But this is not true because the Penal Code sanctions adultery.¹⁰⁴ The law cannot on the one hand 'accept' and on the other 'refuse' a particular type of conduct. Also, for public policy reasons, an action brought to recognise a child born as a result of rape shall be inadmissible.¹⁰⁵

The only problem with recognition under the Cameroonian legislation is that the mother of the child must be a party to the proceedings. And if she is a minor, her parents too must be present.¹⁰⁶ It may happen that the mother is stubborn. In such a case, the natural father may only have to resort to blood test. And as prescribed in the 1981 Ordinance, once a blood relationship is established, no one may raise an objection to recognition.¹⁰⁷

The 1981 Ordinance also provides for the recognition of children born out of wedlock by a declaration before a Civil Status Registrar during the birth registration.¹⁰⁸ But in such a case, 'the declaration of the father shall be accepted by the Civil Status Registrar after the consent of the mother and in the presence of two witnesses'¹⁰⁹ In any case, this procedure will not apply when there is a dispute, especially if paternity is claimed by several persons before the establishment of the civil status certificate.¹¹⁰

H - Effects of Legitimation

When a child is legitimated, he immediately acquires rights and duties of a legitimate person. Hence, he will be entitled to claim for damages, compensation, allowances or benefits which are vested in legitimate children. A good example to site will be a right to claim compensation on the death of his father for example, following a negligent act of a third party. The same right will be conferred on him in the inheritance of family property. Indeed, the MCA 1973 makes it possible for one 'to apply by petition to the High Court for a decree declaring that he is the legitimate child of his parents, or that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage'¹¹¹

J - The Customary Law Perspective

It is doubtful if the concept of illegitimacy is recognised under customary law. This makes it difficult to understand the principle of legitimation in this context. As one writer rightly remarks, "judges trained in English law find it difficult if not impossible to appreciate the fact that a person can have a legitimate child without going through a marriage."¹¹² In appreciating the problems surrounding the case where an unmarried mother gives birth to a child, one author writes:¹¹³

... some social stigma is usually attached to such a pregnancy ... although the status of such a child may be regarded as illegitimate, its rights in respect of its

¹⁰⁴S. 36 (2) Law No. 65 – LF – 24 of 12th November 1965 as revised in 2016

¹⁰⁵ S. 43 (3)

¹⁰⁶S. 43 (1)

¹⁰⁷S. 41 (2)

¹⁰⁸S. 44 (1) (a)

¹⁰⁹S. 44 (1) (b)

¹¹⁰S. 44 (5)

¹¹¹S. 45 (1) MCA 1973. See also S. 45 (2 – 9)

¹¹²Kasunmu & Salacuse, Nigerian Family Law (1966) p. 227

¹¹³E. I. Nwogugu, Family Law in Nigeria, (1974) p. 240

natural father or the maternal grandfather are not easily described in English terminology. usually, the child of an unmarried woman is regarded as belonging to its maternal grandfather. under some systems of customary law such a child may require the right of succession in respect of its maternal grandfather - a right exercised with other children of the grandfather. but is the child legitimate at birth, or legitimated? the answer is not simple, because the position under customary law cannot be readily be translated into English - law terminology. however, practice turns to support the view that the succession right of the such a child is not inherent in his status, but acquired by the goodwill of the grandparent and his family, and raising from the traditional love of children. sometimes where the natural father of such a child has accepted paternity, paid the maternity bills and maintained the child and mother, he may be allowed to claim the child even though he does not marry its mother. here again the child may succeed to the estate of its natural father. it is difficult to characterize the process of enjoying such right of succession. it is not clear if it should be described as the incident of being legitimate at birth, or that of legitimation or adoption.

This statement spells out in a succinct manner the particularity of customary law. The various ethnic groups in Cameroon may have different laid down rules in this regard, but there are usually very strong similarities. In fact, it is generally noted that a child born to an unmarried woman belongs to her father. They bring it up as a child of their family and no stigma of illegitimacy is ever considered. But like Nwogugu rightly observes, the natural father could decide to come forward and recognize the child. And such recognition need not be formal. It could be inferred from his conduct. where for example, such a father insist on naming the child, or organises the baptism ceremony or even shows much concern in the events taking place in the 'compound' of the child's mother, recognition can be ascertained. It is even very overwhelming where he compiles documents for the child's birth certificate in which his name occurs as the father of the child.

In any event the discrimination that exists between legitimacy and illegitimacy in English law is not very pronounced under customary law. Generally, a child born to an unmarried woman is treated in the same was as every other child in the family.

CHAPTER 4:

ADOPTION

A - Introduction

The psychological hardship suffered by childless couples cannot be over-emphasized. Many of these people are willing to go to extraordinary lengths if only they could succeed to have a child of their own. Others have children, but contend that the number should increase and so would prefer to have more. The question is should people who have many children and are unwitting or incapable of taking care of them eventually pass on custody of these children to those in need?

The fear had always been that one fine day in the future these natural parents would come back and reclaim their children. It is on the basis of this argument alone that it was strongly argued in Parliament in England that an adoption law was vital so as to effect "a complete severance of the legal relationship between the natural parents and the child and the establishment of a new one between the child and the adoptive parent."¹¹⁴

This latter statement has been accepted as a valid definition of adoption. It is an example of a case where the natural parents in their life time overtly transfer all their rights and duties to the, adopters. Indeed, the adopted child becomes the legitimate child of the adopters. This process should not be confused with the case where a missionary society opts to collect and care for orphans and destitute children. This is pure foster parenthood or guardianship and has nothing to do with the law of adoption. In such a case the natural parents can always walk up to the orphanage and collect their child.

At common law it was never thought of that natural parents could completely relinquish their rights and duties to third parties, let alone sever that legal bond that united them to their children. The fears were understandable, for example, such an exercise could lead to slavery or trafficking with children. In fact it was not until 1926 that the first law on adoption was passed in England. Strictly speaking therefore, the concept was primarily created by Statute. And this was so as a result of several factors. One English writer points out that:¹¹⁵

The practice of de facto adoption grew considerably in the first part of the twentieth century, for a number of reasons. First, the 1914 - 18 war led to an increase in the number of orphans who were available for adoption. In addition it may have led to an increase in the number of those who were unwilling to look after their own children. Secondly, increased knowledge of child psychology led to a preference in informed circles for a child to be brought up as a member of a family in normal home surroundings rather than in an institution. Thirdly, there was an increasing tendency to value child life and to desire association with the companionship of children on the part of those who have no children of their own or desire another child. Finally, societies formed to encourage adoption gave publicity to the matter.

¹¹⁴ Houghton Committee's Report Cmnd. 5107, 1972, Para 14, cited by Bromley, Bromley's Family Law, op cit p.379 and Cretney, Principles of Family Law, op. cit p.419

¹¹⁵ Cretney, Principles of Family Law. Op. cit. p.420

The Adoption Act 1926 was later repealed and consolidated by the Adoption Act 1976.

B - Judicial Error in the Fonlon Case

It should be stated immediately that there is no substantive law on adoption applicable in former West Cameroon. It is undenied that in civil matters the High Court has jurisdiction to try actions and proceedings relating to the status of persons, marriage, divorce and affiliation, subject to the legal provisions relating to the traditional courts as regards *ratione personae* jurisdiction.¹¹⁶

But as was earlier observed, there is no substantive law on adoption in the Anglophone Provinces, so that should any matter arise on this issue the High Court will be at a loss as to the applicable law. Surprisingly however the Court of Appeal in Bamenda took a different view in the case of *Dr. Bernard Fonlon v. Judith Fonlon & 8 others*¹¹⁷ in this case Dr. Fonlon filed an application in the High Court seeking leave of the court to adopt nine children, (nieces and nephews). He founded his case on the provisions of section 16 (1) (b) of Ordinance No. 72/4 of 26th August 1972, and on section 10 of the Southern Cameroons High Court Law, 1955. Having stated the content of section 16 (1) (b) of the 1972 Ordinance it will also be helpful to outline the provisions of section 10 of the Southern Cameroons High Court Law 1955. It states that:

The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this Law or any other written law, and in the absence thereof, in substantial conformity with the practice and procedure for the time being of her Majesty's High Court of Justice in England.

The trial-judge found that the two provisions on which the case was based were not helpful in view of an absence of any substantive law. He therefore refused to make the order. Dissatisfied with this judgment Dr. Fonlon appealed to the Court of Appeal on the sole ground that the "learned trial judge erred in law in holding that section 10 of the Southern Cameroons High Court Law, 1955, and section 16(1) (b) of Ordinance No 72/4 of 26 August 1972 do not give the High Court jurisdiction in matters relating to adoption of children in the absence of a substantive law of adoption."

Having studied the arguments raised on appeal, Justice Ekema, who delivered the unanimous judgment of the court declared as to section 10 of the Southern Cameroons High Court Law 1955:

We are of the opinion that this law gives the High Court power to hear and determine any cause or matter which has not been provided for in our laws provided that the Laws of England have made for the determination of that cause or matter before the High Court of England, it would thus appear to us that the English Adoption Act 1958 and any other previous Adoption Legislation of England apply here. The case of Divorce proceedings before the High Court is quite different from this one because divorce proceedings are specifically dealt with in section 15 of the High Court Law 1955.

¹¹⁶S. 16 (1) (b) Ordinance No 72/4 of 26th August, 1972. See also the 1989 amendment

¹¹⁷Appeal No. BCA/2/75 (unreported)

On this basis, the Court of Appeal in Bamenda applied the Adoption Act 1958. It was held that the appellant's case failed because he had not satisfied the requirements of section 3 (1) of the 1958 Act Concerning the required consent necessary to support the application. Although the appeal was dismissed the fact was recognized that the appellant could re-apply

It is submitted that the Court of Appeal did not truly grasp the purport of section 10 of the Southern Cameroons High Court Law 1955. The section deals specifically with practice and procedure. It states clearly that "the jurisdiction vested in the High Court shall so far as practice and procedure are concerned" but makes no reference to substantive law. Undoubtedly the practice and procedure in England would apply. The interpretation given by the Court of Appeal renders section 11 of this law worthless and in fact calls for an unrestricted application of English law in the Anglophone Provinces of Cameroon. In other words, unlike section 11 there will be no limitation to pre-1900 enactments. That could never have been the intention of Parliament. Post 1900 Statutes will apply only if they deal with matrimonial causes.

On this premise, therefore, the judgment in *Bernard Fonlon v. Judith Eonlon and 8 others*¹¹⁸ cannot be justified.

The court also arrived at the conclusion that since the term "adoption relates to status, the High Court, mindful of section 16(1)(b) of the 1972 Ordinance had jurisdiction to hear the application. This conclusion cannot be challenged. What we are saying is that, although such a jurisdiction exists, there is until now, no applicable law on the subject. So, if we do eventually enact a law on Adoption any application to this effect will be heard by the High Court."

C - The Correct Position

If section 11 of the Southern Cameroons High Court Law.1955 is given its proper interpretation, the common law position is still good law in the Anglophone Provinces. It may surprise many observers that no attempt has been made so far to legislate on this legal issue. As some critics point out the nonchalance must have resulted from the objection that statutory adoption runs counter to the African concept of family where the acquisition of membership is by birth.¹¹⁹ And from the economic point of view, statutory adoption could enable a stranger to control family property, especially landed property. Another cause of this indifference on the absence of any applicable law on adoption is founded on the assumption that it is unnecessary since any member of a family is morally bound to take over and care for any child who loses the parents. And as our scope of adoption is not restricted, some form of social insurance is created to cater for such calamities in the family. This explains why a court will prefer to hand over an orphan to the relatives of the deceased parents than to a stranger in blood. This is precisely what the court did in *Mary Lumi v. Mutanga Ake*.¹²⁰ The plaintiff's sister died in 1972 leaving behind a baby who was just a few months old. The plaintiff handed the child to the Shisong Orphanage in Banso where she felt it would be better cared for. The plaintiff paid the child's initial maintenance fees of 1.400 frs CFA. Shortly after this first

¹¹⁸Ibid

¹¹⁹Kasunmu & Salacuse, Nigerian Family Law Op. Cit. p. 243.

¹²⁰Suit No. HCB/13/73 (unreported)

payment she took ill and was hospitalized for several months - at Ndongi in the former East Cameroon. When she recovered, she immediately went to the Orphanage to find out about the child and was informed that it had been 'adopted by the defendant, a ward: servant in the Acha Tugi Hospital. However, the authorities at Shisong asked her to reimburse the Orphanage in the sum of 40.200 francs being arrears of expenses that had accrued when the plaintiff was hospitalized. The sum was paid without any objection. In any case, before the authorities in the Orphanage handed the child to the defendant an agreement was entered into between the defendant and the authorities to the effect that the defendant should be ready to surrender the child should the plaintiff eventually turn up for it. Hence, the authorities wrote to the defendant mindful of their agreement asking her to bring back the child and also offered to pay over to her the arrears of maintenance paid by the plaintiff. The defendant refused both proposals. Further negotiations failed to yield any fruits, especially as the defendant contended that the child and herself had become very attached to each other.

At that point the plaintiff had no other course but to seek redress from the court. She brought an action in the Mankon Customary Court claiming the return of the child. The case was transferred to the High Court and on listening to the both parties the court did not hesitate to hold that the child could not be said to have been adopted and so ordered that the child be returned to the plaintiff with immediate effect. As the judge pointed out, under African custom, there is always someone to act *in loco parentis* in the event of a child losing the parents.

In the light of the existing vacuum on this topic the question may arise as to the position of the law where a man completely relinquishes his customary law rights. What law, then, will be applicable since we do not have any substantive law on the subject. It could pose serious problems in the prevalent circumstances. In any case, a riposte to that question could mainly give rise to yet another question, namely whether an African, can completely jettison all aspects of customary law in his ethnic group. It would appear that this is not possible. And this is so even when parties opt for statutory marriages.

It is accepted in Cameroon that once the parties to a marriage have capacity and have equally fulfilled the necessary formalities they can get married under statutory law even without the consent of their parents.¹²¹ Surprisingly however, this has not been the practice. Respect for one's parents in Africa in general and Cameroon in particular cannot be over emphasized. This explains why it is very difficult to draw a line between a statutory marriage and a customary law marriage in Cameroon.

Examples abound of spouses who, before the celebration of their marriage in the Civil Status Registry,¹²² begin by discussing the bride-price. And what is more, payments even continue after the celebration of the marriage in keeping with the custom that dowry¹²³ is never paid in ore, instalment. And because it is the father or guardian of the girl who is *in loco parentis* who receives the bride price, the bride-to-be may refuse to go ahead with the celebration of a statutory marriage, notwithstanding the fact that she is of full age, simply because her parents have failed to give the necessary consent. Her fears are usually heightened by the belief that

¹²¹See generally Part VI of ordinance No. 81 - 2 of 29th June 1981,

¹²²As required by S. 48 of the 1981 Ordinance.

¹²³It is common practice to use the words bride-price and dowry interchangeably.

failure to get such consent, and its incident blessings, may result in calamities against her and the husband. Examples that can be cited are that, she may not be able to procreate, her children may die, she may become insane etc. Justice Endeley had once used this reason as justification for dissolving a monogamous marriage in the case of *Njotsa v. Njotsa*.¹²⁴

In the above case the petitioner based her case on only one of the grounds for divorce, namely, cruelty, as required by the law existing at that time.¹²⁵ She alleged persistent assaults on her person by the respondent. She called one witness, whose evidence, unfortunately, did not help her case. The relevant part of Endeley J's (as he then was) judgment read:

The evidence so far led to support the charge on which this petition is being prosecuted falls short of the above standards laid down by law. I therefore find no evidence sufficient to justify my finding that the respondent was cruel to the petitioner. From what I have seen of the petitioner, I feel satisfied that she honestly believes that continued marital relations with the Respondent will be injurious to her health. The marriage as far as the parties are concerned is broken. I am satisfied that the petition is not presented in furtherance of collusive agreement between the parties. I am satisfied that the respondent took all reasonable steps to bring about a reconciliation and that these proved abortive because the petitioner was and is still recalcitrant. I am satisfied that the failure of this marriage has been sealed by the fact that it did not, when it was being solemnized, and does not even now, enjoy the blessings of the married couple's respective parents. In these circumstances, it will not be in the interest of the parties to keep it on.

Since there is no applicable substantive law on adoption in the Anglophone Provinces it will equally not be right to continue in this legal vacuum for equity will not suffer a wrong to be without a remedy. It is therefore submitted that, until we do legislate on this subject recourse should be made to the customary law. It is true that the 1981 Ordinance dictates that substantive conditions for adoption shall be those contained in the written law.¹²⁶ This is vague since there is no available written law to which reference can be made. The only available alternative is our customary law.

D - Adoption under Customary Law

There has been the tendency to confuse the terms guardianship and adoption under customary law. In the case of guardianship there is mainly the question of custody and control over a child. The consequences are not as far reaching as in adoption. One writer remarks that:

While cases of guardianship under customary law are common adoption is rare. Traditionally children are regarded as the greatest gift that God can bestow on a couple or a family. Consequently parents are most reluctant to part with their child or to lose all parental rights and obligations. Even when the parents of a child are to be poor to undertake its maintenance, it is usual for members of the extended- family to come to their assistance in order to ensure the continued family membership of the infant. For the latter reason, most cases of adoption

¹²⁴(1971 - 73) U. Y. L. R. 5

¹²⁵Note that this petition was heard when the Divorce Reform Act 1969 was still in force.

¹²⁶S. 42

*under customary law are between blood relations. It is usual to adopt the orphan child of a relative.*¹²⁷

Under customary law adoption can either take a formal or an informal procedure. In an informal case, the adopter takes custody of a relative's child, when the latter is still very young. In this case he exercises parental control over the child. This may go on for a very long time - during which period his immediate family would gradually accept him as a member of the family. And this is all the more so where the child loses contact with his natural parents. In any case, his consent may be decisive when he becomes of age. Such consent, if given, will only go to consolidate the relationship. In a polygamous home, it may not be necessary that all the wives should give their consent, whether the adoption is formal or informal, since any wife who does so would automatically opt to bring up the child as hers. It has been observed that another proof of whether or not adoption has taken place informally under customary law, can be seen when the child later attains adulthood and seeks to get married. If the bride-price is provided by the relative who has custody over him then adoption can be assumed, but where it is provided by the natural father the implication is that he has not severed his legal relationship with him and so adoption cannot be presumed. In this case the relative would be regarded as a guardian or a foster father.¹²⁸ There is also the possibility of informal adoption of a child of a former marriage who is brought into a second or third marriage.

Formal adoption occurs when the adoptive parents formally inform the parents of the child of their intention to adopt. A date is then fixed for a meeting. It could take place in the Palace of the Fon or the residence of either the natural parents or the adoptive parents depending on the custom. On this date the adoptive parents announce their intention and the necessary consent is immediately sought from the natural parents. It should be noted however that in most tribes only men can adopt and usually they would prefer to adopt minors than adults. At the end of the exercise it is traditional to share a meal together accompanied by their wives.¹²⁹

¹²⁷E. I. Nwogugu, Family Law in Nigeria. Op. cit. p. 251.

¹²⁸E. I. Nwogugu, ibid. p. 252

¹²⁹See generally S. N. Obi, Modern Family Law in Southern Nigeria, (1966) pp. 344 - 346.