

Circumstances of Birth as a Human Right

by

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The end of the First World War in 1918 gave birth to the organisation known as the League of Nations. Soon after the end of the Second World War in 1945, the principal actors who were the victors in the war, reminiscent of its unprecedented horrors, came together to declare from their experience the preconditions they considered desirable for the preservation of world peace, future survival, the maintenance of the dignity and integrity of homo sapiens. This arrangement replaced the League of Nations and gave birth to the present world body, known as the United Nations Organisations. The objectives of both organisations are identical. And this is the realisation of global peace and harmony through respect for human dignity and the recognition of the fundamental rights of man. The movement immediately gathered momentum.

It is pertinent to observe that the catalytic idea was the disregard by states of what we generally considered as the basic minima of rights which they ought to accord to their citizens. This consideration was based on the appreciation of the incontrovertible fact that every individual born into society is entitled to the enjoyment of the ordinary basic requisites of a decent and meaningful living.

The state has, though recognising the rights of the individual, formulated restrictions in their enjoyment in the interest of order and good government. These restrictions result in a combination of the rights to which the individual is entitled, first as homo sapiens and secondly as a member of the political community.

The movement which had a modest beginning from Europe¹ has blossomed in that continent², spread to the Americas³, Africa⁴ and the Commonwealth of Nations⁵. Asia is yet to make its independent contribution, and has now become a flood. What then are these

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1. The Universal Declaration of Human Rights (1948); International Convention on Civil and Political Rights in 1956. International Convention on Economic Social and Cultural Rights, 1966.
 2. European Convention for the Protection of Human Rights and Fundamental Freedoms.
 3. See The American Convention on Human Rights; inter-American Convention on Human Rights.
 4. The African Charter on Human and People's Rights 1981.
 5. Singapore Declaration 1971.

rights? Concisely stated they can be regarded as the considerations for the dignity of homo sapiens and the recognition that the individual is entitled to certain basic rights as a human being which are fundamental to his existence, decent living and participation in the affairs of his society. These are the norms which constitute the human rights regarded as fundamental to the individual.

These human rights norms owe their origin essentially to considerations of justice derived from Natural Law theories. The universality of these human rights has engendered uniformity in the application of the norms. To a very large extent the universality of these norms is the result of the effect of both multilateral and bilateral treaties to which Nations are signatories. For instance all members of the United Nations Organisations are bound by Article 55 of the Universal Declaration of Human Rights which provides as follows:

"... the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".¹

Again, this is re-enforced by Article 56, which provides that "All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55, The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951, The African Charter on Human and People's Rights, 1981, to all of which member states are parties". The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its Optional Protocol, which in Article 60 affirms its adherence to general international law is also an avenue through which accepted international norms on human rights may be incorporated into the domestic law of African States. Already, the European Court of Human Rights has held as with the Courts of most African countries that fundamental rights form an integral part of the general principles of law which it enforces². It seems to me reasonable to postulate that the real motivation for the protection of human rights was the desire for world peace. The protection of the individual is an inevitable concomitant of the pursuit of the objective. Undoubtedly the individual being the actor, protection of his interest in the preservation of his inalienable and other fundamental rights seems to be the only safe and sure method of achieving the goal. Admittedly the protection of these rights belongs to national jurisdictions, the recognition of their universality transcends national frontiers. Accordingly, the possibility for agreement among nations rendered the discussion of the declarations of these rights attractive in the contemporary movement of agglomeration of Nations.

1. See UDHR 1948.

2. See Nold v The Commission, Case 4/73 (1974) C.M.L.R. 338.

The meaning and content of human rights norms

Human rights norms as universally accepted may be classified into those which belong to the individual and inherent by virtue of his being homo sapiens; and those which are conferred on him in his privilege of membership of a political community. It is generally assumed that rights in the first category have no more than a moral force. No modern state recognises the application of natural law proper. All modern states assert absolute powers within their territories. It is therefore inconceivable that any modern state will tolerate the existence, and accept the enforceability of, natural law independent of and over-riding its own enacted positive law. Modern states undoubtedly recognise the existence of natural law, but consider them enforceable only to the extent that the all pervasive authority of positive law will allow. Hence rights derived from natural law have their potency in the extent to which they have been recognised and enacted by positive law. In the absence of such recognition, natural rights have no legal potency and remain enforceable only on moral grounds.

Despite the above observation, consistent persistent political experience over the centuries disclose the inevitability of recognition of natural law as the veritable source of fundamental rights. Because these rights are regarded as fundamental to the existence of the individual, Modern States have taken them into account in determining the nature and scope of rights that should be accorded him in the protection of his rights. These are rights regarded by the State as a sine qua non in the enjoyment of ordinary human existence, and meaningful participation in the affairs of the society. But these rights have not been regarded as absolute. They have invariably been made subject to restrictions imposed by the State in the interest of peace, order and good government of the political society. Hence the human rights conceded consist of a delicate balance between the interests of the State and the individual, for the survival of both.

Nature of human rights norms

Jeremy Bentham has contemptuously dismissed Natural Rights simply as "nonsense, imprescriptible rights, rhetorical nonsense, nonsense upon stilts."¹ He however admits that "immediately a list of the pretended natural rights is given, and those are so expressed as to present to view legal rights". Bentham's criticisms should be viewed within its context of positivism; to which natural law theories are most vulnerable. Since after the universal declaration of human rights in international bodies, States have adopted the practice of making similar provisions in their constitutions.² The constitutional provisions about individual

1. See "Anarchical Fallacies" in Works (ed. Bowring), Vol.2 pp.497, 501.
2. See Chapters on Fundamental Rights in many Commonwealth Constitutions - see Chapter IV, Constitution of the Federal Republic of Nigeria, 1979.

human rights are far from being homogenous. The extent of the restriction of these rights vary as between countries depending upon the political philosophy of the government, whether authoritarian or libertarian. Similarly variable are the provisions for their protection.¹ In Nigeria, fundamental human rights are protected both by the ordinary laws of the land and are specially entrenched in the Constitution which renders the provisions inviolable, by the ordinary process of legislation. These protections notwithstanding, they are nevertheless subject to various exceptions with a view to safeguarding the interest of the state.

Like the provisions of the European Convention on Human Rights, Chapter IV of the 1979 Constitution reflect the classical liberal freedoms. Contrary to the reasons for their inclusion in the Constitution which was for the protection of minorities, the emphasis is almost exclusively on individual rights, liberties and immunities. This is unlike in many European and Latin American Constitutions which have provisions on the rights and duties of the citizen. The most recent of them, the African Charter on Human and People's Rights has provisions on the duties of the citizen.²

The nature of the rights provided in Chapter IV of the 1979 Constitution of Nigeria, may be grouped into two classes. There are those rights which are inherent in the individual and are regarded as inalienable, subject to such restrictions as may be imposed in the circumstances prescribed by the Constitution. There is the right to life, s.30; right to dignity of human person, s.31; right to personal liberty, s.32; right to fair hearing s.33; right to private and fairity life, s.34; right to freedom of thought and conscience and religion, s.35; right to freedom of expression and the press, s.36; right to peaceful assembly and association, s.37; right to freedom of movement, s.38; right to freedom from discrimination, s.39; compulsory acquisition of property, s.40.

The prohibitions are absolute as regards the rights to freedom from torture, inhuman or degrading treatment, freedom from slavery or servitude, the right to impartial justice, freedom from discrimination. On the other hand, the right to life, freedom from forced labour and protection of personal liberty may be restricted during an emergency, and only to the extent that such restriction is reasonably justifiable for the purpose of dealing with the emergency situation. There are yet other rights the exercise of which may be restricted in favour of a law that is reasonably justifiable in a democratic society, in the interest of defence, public safety, public order, public morality, public health or the protection of the rights and freedoms of other

1. See Chapter IV of the Nigerian Constitution 1979, compared with the Latin American and Francophonic African Constitutions.

2. See Part 1, Chapters 1 and 11.

persons.¹

A careful analysis of the rights enumerated above clearly disclose that they fall within the three instruments known as the International Bill of Rights, namely the Universal Declaration 1948 and its two implementing Covenants of 1966, on Civil and Political Rights, and on Economic Social and Cultural Rights, ICCPR, ICESCR respectively. In addition to these, there subsequently have been, the European Convention on Human Rights 1956, The American Convention on Human Rights, the African Charter.

The nature of all the fundamental rights enumerated seem to me to pertain essentially, if not entirely, to rights enforceable against the state or its functionaries. None of the rights relate to or concerns the exercise by private individuals of their ordinary rights of actions contractual or otherwise. Although public morality is indicated in Section 41 as one of the conditions for restricting the right to the exercise of some of the fundamental rights, the enforcement of this provision has posed some undeserved difficulty and anxiety.

Section 39 which protects citizens from discrimination on the grounds of ethnic group, place of origin, sex, religion or political opinion, has specifically in sub-section 2 provided as follows -

"(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."

The novelty in sub-section 2 of section 39 of the Constitution is that it adds circumstances of birth to the fundamental rights protected by the Constitution.

Genesis of the provisions of s.39(2)

This new norm was introduced in the Constitution unilaterally after bitter debates on the provisions of the Constitution of 1979 between advocates of the retention of the concept of illegitimacy in our family law and proponents of those who were in favour of abolition. Religious organisations, Women Societies, and groups basing their arguments on accepted morality and of the protection of the marital status contended that the retention of the status of illegitimacy was fundamental to the preservation of the institution of marriage and a veritable pre-condition for the maintenance of public and private morality. They contended and still do, that abolition of the status will render nugatory the very basis of the unit of the family and make nonsense of the necessity for marriage.

On the other hand the advocates of the liberalisation of the recognition of the status of legitimacy rely equally on moral arguments. They point out the biological identity of children and the irrationality in the artificial distinction. They contend

1. See Chapter IV, Sections 34, 35, 36, 37 and 38.

that the child, the only victim of the distinction, is completely innocent and has not contributed to the status. Finally, they point out the legal and social disadvantages suffered by this category of citizens merely because of the circumstances of their birth.

There seems to be little doubt that in many societies the circumstances of birth of a person determines his status and has considerable bearing on the determination of the rights and duties of his status in that society. It is therefore a fundamental norm determining certain rights and duties which the child can enjoy as a member of such society.

In our plural society as in many others, the legal system recognises the legal dichotomy created by the operation of the two legal systems when they are not in conflict. It is universally accepted that the family is the most elementary unit of the society, and marriage is the fundamental institution of the family. Accordingly, membership of the family is essentially through marriage or by vestitive acts regarded as marriage substitutes.

All known legal systems recognise and accept the status of the child born to persons who are married as their legitimate child.¹ Many accept the regularisation of the status of children born outside marriage by the subsequent marriage of the parents.² There is yet another situation recognised by some societies where the father of a child who was born without the marriage of his parents is accorded rights, if the father acknowledged his responsibility for the birth of the child.³ The situations where the parents marry after the birth of the child, and where the father acknowledges the paternity of the child, are in many societies equated with the status created by the birth of the child born during a valid marriage. There are situations where the child was born when the marriage of the parents was void.⁴ The status of legitimacy created by these situations is generally distinguished from the status of illegitimacy created in the absence of all these situations.⁵

It is important to point out that the legal and social distinction-----

1. The Common Law concept of the acquisition of Legitimacy Status through marriage of the parents is universal.
2. This is by subsequent marriage of the parents after birth known as Legitimation.
3. This consists of vestitive acts indicative of acknowledgement of responsibility. See Salvage v Macfoy (1909) Ren. G.C.R. 50.
4. See s.38 (2) Matrimonial Causes Act 1970, the Legitimacy Act has many no provision. But see Adegbola v Folaranim (1921) 3 NLR.89 Coker v Coker 17 NLR.55.
5. See Legitimacy Act.

tion between the two kinds of status is inveterate in our societies. It is however an artificial distinction created by society for its own protection, but attributable essentially to circumstances of the birth of the child. The child who is subject matter of the distinction and who suffers from the disabilities created by the distinction has not contributed to the status attributed to him.

Conflicting marriage laws

The more complex and complicated legal situation arises when a child is born in circumstances of conflicting marriage laws. There are two systems of legally approved marriages in our society. Marriage under the Marriage Act,¹ which prohibits a plurality of wives and forbids the co-existence of a marriage whatsoever with any other person, before or after. Any valid marriage with another before a marriage under the Marriage Act, renders the subsequent marriage invalid.² All marriages subsequent thereto are also invalid.³

On the other hand, marriage under customary law does not prohibit the existence of any other marriage with any other woman before or after the marriage. This includes marriage under the Marriage Act. This, however, is not the position now. The intervention of modern legislation renders subsequent marriages under the Marriage Act invalid.

A marriage under Islamic Laws allows the man to have not more than four wives at the same time. It seems to me this contemplates marriages under Islamic Law.

The situation is more complicated when a man married under the Marriage Act, and whilst so married marries another woman at Customary Law or Islamic Law.⁴ Or where a man married under Customary Law, marries another woman under Islamic Law. The status of a child born to the parties may give rise to difficult legal consequences notwithstanding the appearance of legality of the conduct of the parents. In the aforementioned circumstances, the birth will result in questionable status of the children. The child may be regarded legitimate as to one law, and illegitimate as to the other, resulting in a situation of limping legitimacy.

The circumstances we have enumerated above can be classified into birth during marriage, or its amelioration thereof, or as birth outside marriage. Whereas the first circumstance results in the legitimacy of the child, the latter results in illegitimacy.

1. See the Marriage Act.
2. See s.33(i), 35, 47, 48 Marriage Act.
3. See Cole v Akinyele (1960) S.F.S.C.
4. See s.47 Marriage Act.

Consequences of the status

The norms produced by these situations are those recognised in legal terms as the status of legitimacy and illegitimacy. Legitimacy is the status of being born in lawful wedlock. Illegitimacy is the converse. These are the only status which can arise from circumstances of birth. Legitimacy is an indicium of birth in lawful marriage. It is conceded that marriage is not the only situation which can result in legitimacy of a child. Birth in lawful marriage is a criterion of all valid marriages. It is not peculiar to monogamous marriages. This was very lucidly pointed out in Bamgbose v Daniel¹ when construing section 36 of the Marriage Act, where it was said:

"As a matter of construction and on the authorities referred to, it cannot in their Lordships' opinion be limited in its local application to children who are the issue of monogamous unions ..."

The somewhat rigid, and in some societies inflexible, dichotomy between legitimacy and illegitimacy which follows circumstances of birth appears to have governed the rights and duties which attach to the relationship of parent and child in almost all societies. Legitimacy makes the issue the lawful child of his father. It vests in the child the right to demand the care and support of the father inter vivos and also confers on him succession rights to the estate of his father on intestacy. Among the Binis of Nigeria, which follow the primogeniture principle, the first son born in a valid marriage cannot be excluded from inheritance.

An illegitimate child is in strict sense not in law the child of the man regarded as his father. This is founded on the principle that a man having not married the mother is not entitled to benefit from the product of her womb. It is couched in the aphorism that a man cannot profit from his own wrong doing. The two concepts are antithetic. They are mutually exclusive.

The plural nature of our society and the operation of conflicting moral and social values governing the marriage institution has complicated the issues further. I have already referred to the systems of marriage recognised by our legal system. The liberal policy of customary law and the essential accommodating nature of polygamous marriages allows the co-existence of marriages under customary law which are polygamous with marriage under the Marriage Act which are monogamous. Customary law regards as his legitimate children, issues born to a man by various women in such circumstances. Customary law goes further to confer legitimacy status on children born to a man by a woman or women outside his monogamous marriage.²

1. See (1955) AC 107 Savage v Macfoy Ren. G.C.R.50.

2. See Savage v Macfoy (1909) Ren. G.C.R.50.

Judicial determination of circumstances of birth

Although there is no legislation protecting the afore-stated situation, the courts by analogical judicial reasoning of the essential character of monogamous marriages¹, and the interpretation of assumed public policy in protection of monogamous marriages have extended the meaning and adopted the view that a man who has married under the Marriage Act, cannot whilst so married confer the status of legitimacy to any child born to him outside his marriage². The effect of this view is that a child born under such circumstances cannot be rendered legitimate by any act of his putative father during the existence of the monogamous marriage³.

This situation was considered in Alake v Pratt & Ors⁴ where the court found that although the children were acknowledged by their putative father who was married under the Marriage Act to a woman not their mother, they could not be regarded as his legitimate children. This is because

"... although legitimate under the laws of this country, it was incompatible with public policy that children born out of wedlock should be placed on the same footing as children born in wedlock".⁵

It seems this view was influenced by the earlier position of the court in In re Adadevoh, where the Court declared,

"where there are children born in lawful wedlock, children born out of wedlock should be excluded from participating in the distribution of the estate of their father, but if the children of the deceased are all of the same status, that is born without marriage, they could inherit their father's property."⁶

The ordinary interpretation of this dictum is that both categories of children, namely, those born in lawful wedlock, and those born outside marriage are entitled to inherit their father's property. However, all those born out of lawful wedlock are not entitled to participate in the inheritance together with those born in lawful wedlock. The situation is different where there is no conflict. That is, where each group of the children are those either born in lawful wedlock, or without marriage, they will be

1. See In re Somefun 7 W.A.C.A. 156.
2. See In re Sarah Adadevoh, 13 W.A.C.A. 304.
3. See Alake v Pratt (1955) 13 W.A.C.A. 20.
4. Ibid.
5. Ibid.
6. See 13 W.A.C.A. 304.

entitled according to the laws governing them to inherit.

Our law has not accepted the insular common law view that legitimacy of issue is tied inextricably to the marriage of the parents of the de cujus in Re Herbert Macaulay,¹ the Federal Supreme Court referring to the concept said:

"... it was only intended as a warning that great caution ought to be exercised in accepting a contention that in certain circumstances a person born out of wedlock must be regarded in law as legitimate. I do not think for one moment that the court intended to suggest that if such Native Law and Custom were proved, and a child born out of wedlock was to be held legitimate under the law in Nigeria, there could in effect be different grades of legitimacy so as to affect their rights of succession".²

The court went on to hold in favour of the legitimacy of children notwithstanding that they were not issues of a valid marriage. The court did not regard the marriage of the parents as a relevant subject for investigation. It also was of the view that public policy demanded that the courts should not hold otherwise. This is because since Yoruba Customary Law held the children to be legitimate by acknowledgement of paternity; the question of marriage of their parents was irrelevant in considering the question of their status.

From the early decisions of Savage v Macfoy,³ Cole v Cole⁴ to the later decisions of Alake v Pratt⁵, Bamgbose v Daniel⁶ and Cole v Akinyele⁷ our courts have consistently wrestled with the difficulties posed to the moral ethos of our society by the intractable issues of reconciling the conflicting moral values on which the two cultural values supporting the concepts of legitimacy in our legal system are founded.

The norms created by circumstances of birth are legal consequences. Our law recognises the status of legitimacy and the different situations that can produce that status. Again the status of illegitimacy is recognised. The question we have posed to ourself is whether circumstances of birth can constitute a

1. Ibid.

2. (1909) Ren. G.C.R.I.

3. (1908) INLR 15.

4. (1955) 15 W.A.C.A. 20.

5. (1955) A.C. 107.

6. (1960) 5 FSC.84 In re Odulaya (1964) LLR.108; Abisogun v Abisogun.

7. (1963) IAIINLR 248.

human rights norm?

Critical appraisal of the position

I have already set out the provisions of section 39(2) of the Constitution 1979 which prohibits the subjection of any person to disability or deprivation merely by reason of the circumstances of his birth.

The initial reaction is that since the circumstances of birth give rise to the status of legitimacy and illegitimacy, and the fact that the illegitimate qua the legitimate suffers a disability or deprivation arising from his birth, section 39(2) has provided a remedy. Again, even within the status of legitimacy recognised by the law there are different grades with different incidents attaching to each. It is these incidents attendant on the birth of a person which are the fundamental inalienable rights the enjoyment of which has been protected by the Constitution. Having been born, a child is entitled naturally to all the incidents of such birth.

The legal and moral rules relating to the discrimination between children born in a valid marriage and those not so born have been created and developed by society to protect the institution of marriage, which is the foundation of its primary unit. The protection is from dilution and subsequent disintegration arising from the moral laxity of its members. The rules which are properly directed at the parents, unfortunately now operate harshly against the innocent child, who is the inevitable product of these legal prohibition and moral lapses. The criticism of the injustice of these attitudes has been too weak against the considerable weight and influence of public opinion in support of the morality of the rule and justice of the provision. It is not so comforting to observe that the negative attitude towards the circumstances of the illegitimate is somewhat universal. All hope is not lost. There is a progressive thinking towards ameliorating the situation. In the United States of America, where the law and social situation are similar to that in Nigeria, Justice Douglas has observed of the distressing effects of the discrimination. He queried in Levy v Louisiana¹

"why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied rights which other citizens enjoy?"

Considered logically it is both inappropriate and an abuse of language to speak of illegitimate children without at the same time referring to its natural correlative of illegitimate parents. The former cannot come into existence without the latter. In reality there can only be illegitimate parents. If illegitimate children are deprived of any rights as they now general-

1. 391 vis 68 (1968).

ly are, this is because they fall within a sociologically approved and accepted test which has denied them the equality which their common biological origin with the legitimate bestows. The discrimination against them is founded on the moral disapproval and legal prohibition of the conduct of their parents. It is hardly therefore fair to punish the illegitimate child who is merely the result of the conduct of his parents and in respect of which he cannot share any responsibility. In Labine v Vincent,¹ Justice Brennan of the United States Supreme Court has made the apt observation that "it is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which he had no control."²

Notwithstanding these judicial homilies in favour of the illegitimate child and in support of the demolition of the legal prohibitions and moral disapprovals erected against the concept of the equality of children arising from the circumstances of their birth, the dichotomy is still persisting. It has not been contended that the illegitimate is biologically inferior or different. The effect of the prevailing legal position and moral sanctions is to deprive the illegitimate of a father despite positive assertions to the contrary.

It is pertinent to point out the absurdity of the concept, by illustration of the presumption of paternity.³ A child born in adultery by presumption of legitimacy remains the legitimate child of the husband and the mother. This is an artificial distinction between illegitimates born in adultery and others. Whereas those born in adultery are conferred with fathers by presumption of law and legal fiat the others are left desolate and considered moral aberrations and rejects of the society. In such a situation, the industrious bastard enjoys an advantage, when his is a more reprehensive social condition.

A cursory review of the legislations of the country governing the duties of the citizen or other rights discloses that illegitimacy is not one of the conditions for determining the obligations of the citizens. The status of illegitimacy does not enjoy any tax rebates, reliefs, or dispensation in respect of any duties expected of the citizen. Notwithstanding, prima facie, the father of an illegitimate has no statutory legal duties towards the child. It is true that in many jurisdictions legislation compelling the father to contribute to the maintenance of the child have been enacted. This expedient is generally relied upon. But this is because the putative fathers shirk their responsibilities towards the children.

In the face of the ever expanding role of the state in the ordering of the society, it cannot ignore its responsibility to the

1. 81 S.ct. 1017 (1971).

2. ibid.

3. See s.147 Evidence Act. See also Cole v Akinyele (1950) 5 F.S.C. 84.

innocent child and the society. The million dollar questions asked have always been, why should children, legitimate and illegitimate, not have the same or equal rights to their parents? Why should the illegitimate be deprived of the right to a family in the interest of and in protection of the legitimate? Should the law protect the legitimate from the illegitimate at any time or for any reason when both are the direct consequences of the act of the same person? It is understandable for the mother of the legitimate child who voluntarily enters into a legally recognised status, to be protected against the mother of the illegitimate, whose position is both legally and morally disapproved.

It is difficult to appreciate why the state which has eschewed distinguishing legitimate and illegitimate children in their obligations towards it should consider it reasonable to allow and encourage private individuals to enjoy the right to discriminate. Society is being progressively more aware of the need for the proper care and comfort of children. It will be retrogressive to allow the ostrich-like common law morality to perpetuate the invidious distinction arising merely from circumstances of birth. The fact of illegitimacy is now generally being regarded as relatively irrelevant. The burdens of illegitimacy in purely social relationships should be enough. Society no longer takes for granted the irresponsibility of the father of an illegitimate child. The father of an illegitimate child can now be compelled to pay sufficient allowance to the mother for the maintenance and education of the illegitimate child. The state has, consistent with prevailing social mores and disapproval, ceased to be less insensitive to parental irresponsibility of the illegitimate father.

The discriminatory classification of children into legitimate and illegitimate undoubtedly enjoys both legal backing and social approval. It is an act of unjustifiable discrimination which perpetuates injustice. It is an imposition of punishment on the results of conduct instead of on the parties responsible for conduct by the Legitimacy Laws. This is tantamount to punishing the child for his status, in respect of which he has no responsibility. Since he cannot alter the status, he cannot avoid the punishment.

In its strict juridical context it will be safe to assume that the Legitimacy Act and all legislative provisions which recognise the distinction between legitimate and illegitimate children offend against the provisions of the Constitution. It is one of the basest acts of irrationality for a legal system to encourage the continuance of such a painful and unjustified dichotomy. It is indisputable that the status attributed to a child is the consequence of the acts of others. Whatever might be the moral culpability of the parties, which has resulted in the status of the illegitimate child and its accompanying deprivations, a state should not irrationally subject a status to legal and moral degradation for the act of others. As sedulous as the moral arguments in support of maintaining the discriminatory legal classification of children is, it seems to me unreasonable to attempt to regulate a relationship by punishing the consequences. If the legal prohibition is aimed at promiscuity and adultery,

the most effective targets should be the actual participants¹. It is accepted fact that neither adultery nor promiscuous sexual relationship necessarily terminates in birth of children. It may or may not. The parties do not necessarily in the Benthamite fashion have intestacy statutes in mind when taking part in the disapproved conduct. The logical result of the present attitude is that there is no punishment in many jurisdictions for adultery or sexual promiscuity simpliciter. What is punished is the consequences thereof, that is the illegitimate child. Where there is no child the conduct of the parties does not incur any legal sanction.

The above arguments accentuate some of the absurdities of the reasons for the retention of the classification based on the protection of the sanctity of marriage and the encouragement of the institution of marriage. A state should not impose restrictions broader than it is necessary for the purpose of realising its desired objective. Instead of punishing the results of conduct, it is manifestly preferable to impose punishments for fornication and adultery. This expedient will sufficiently reflect societal attitude towards the disapproved conduct. It is clearly not correct to regard the reasons of the encouragement of marriage and family life as sufficient grounds for rejecting potential members of the family, whose involuntary membership is the result of an indisputable and sometimes undisputed conduct of the head of the family.

It is a grievous injustice to allow the moral lapses of the parents to determine the status of the child at birth. An appropriate comment about the injustice of the situation has observed that

"... it is evident that no rational relation, much less a compelling justification, can be presented by a policy which punishes the children for their father's and mother's offences against public morality. Such state action merely succeeds in punishing a scape-goat, and an extremely vulnerable one at that, a child."²

Another discriminatory application of the concept of legitimacy resulting from the circumstances of birth is the operation of the intestacy laws in favour of the legitimate child. The intestacy laws clearly exclude illegitimate children, probably on the presumption that if the father had left a Will, such would have been his intention. Hence where in a Will reference is made to children, the presumption is that legitimate children alone are intended, unless it could be gathered from the Will that illegit-

1. See sections 47, 48 of the Marriage Act, and sections 384, 387, 388 of the Penal Code prescribing punishments.
2. See Boltz "Inherit the whirlwind. The illegitimate child and the need for statutory equal protection" New Dimensions in Legislation, Vol.2, Number 1.

imate children were also in contemplation of the maker.¹

At least two decisions of our courts have illustrated that the presumption though useful in theory, is not always followed. In re Egbuna,² and in Onwudinjoh v Onwudinjoh³ where the father left a Will, his illegitimate children were not excluded. In the light of our local experience and the general consideration of the position of children qua their father, it is doubtful whether the presumption in favour of legitimate children is in the best interest of the state and the family.

The injustice of the law and the social sanction attendant upon circumstances of birth makes a certain measure of state intervention not only desirable but imperative. The recognised biological equality of all children irrespective of the circumstances of their birth should be extended by legal recognition of all the rights which are fundamental to a child. The state by recognising the prevailing classification is in a subtle and sophisticated manner discriminating against a group who are not responsible for their status, and are impotent in effecting alteration, because they cannot effectively reject the status. The chief malady with the problem of the discrimination against circumstances of birth which section 39(2) prohibits is the distinction between those who are legitimate and those who are not. This distinction involves both legal and social disabilities approved and supported by the law.

Conclusion

It cannot now be denied that a child, whatever the circumstances of his birth, is entitled to certain inalienable rights. He has a right to be maintained by his parents. He is entitled to enjoy his innocence and should not be subjected to any legal disability or moral sanction because of the conduct of his parents or any other person. The deprivation of these rights concisely stated are the consequences of discriminatory legislation and moral sanctions arising from the prevailing concept of illegitimacy. The most effective way, however, of securing compliance with the constitutional provision is the recognition by the courts that the legal position has been abolished on a proper interpretation of s.39(2). The new legal position is that a child however born should be regarded as the legitimate child of the father. This will obviate the necessity of resorting to the other expedients such as marriage and acknowledgement of paternity as acts constitutive of the status of legitimacy. The provisions of section 39(2) of the Constitution 1979 are clear and unambiguous.

It is without doubt discriminatory to deny a child the rights of a legitimate child merely because the law classifies him as illegitimate merely because of the circumstances of his birth. This

1. See Re Bleckly (1920) 1 Ch.450 at p.461.
2. (1945) 18 N.L.R.1.
3. (1957) 2 E.A.L.R.1

is precisely what the constitutional provision prohibits. Accordingly circumstances of birth is a human rights norm which enjoys constitutional protection.

The courts are now free and sufficiently armed with the provisions of section 39(2) of the Constitution 1979, to strike down any legislation or private acts which discriminates against any person on grounds of the circumstances of his birth. The courts will, in doing this, be giving effect to the constitutional provision and doing justice to a class long oppressed by negative misdirected moral sanctions. It is the sacred function of the courts to interpret public policy correctly and redirect the trend of public opinion in a more meaningful manner for the realisation of the goals of society. The conditions for regarding circumstances of birth as a human rights norm have always been present in the society. Section 39(2) of the 1979 Constitution has accomplished the objective. A child having been born irrespective of the circumstances should be accorded its proper status in the scheme of legal rights. This right is basic and fundamental to all that subsequently follows.

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