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The child and the law are both products of society though in different ways. The former is a characteristic of the biological and procreational function of society, whereas the latter is a result of social intercourse in the history of mankind. In historical upheavals and social change, has the position of the child altered considerably or has the primitive repressive nature of society and law been replaced by modern methods of oppression? In order to answer this question we have to look at the position of the child from primitive society to modern society.

It is impossible to imagine the continuation of society without its offspring. Therefore the function of biological generation is very fundamental and inalienable within the existence of society. The proposition that the "child is the father of man" is verified in a number of instances in our daily lives. Neglect your children then you will have a society of misfits. As such, a child expects society to ensure and fulfil certain requirements in order that it grows up to be a responsible and a healthy being. What are these Expectations?

The Universal Declaration of the Rights of the Child declares that a child has a right to:-

1. Affection, love and understanding;
2. Adequate nutrition and medical care;
3. Free education;
4. Full opportunity for play and recreation;
5. A name and nationality;
6. Special care, if handicapped;
7. Be among the first to receive relief in times of disaster;
8. Learn to be a useful member of society and to develop individual abilities;
9. Be brought up in a spirit of peace and universal brotherhood; and
10. Enjoy these rights regardless of colour, sex, religion, national or social origin.

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Of course this package of rights can never be handed to a child on a platter, because it involves the conscious effort of the society and the state in creating a good environment for children. These rights in our present day are meant to be a yardstick to measure how much we have done for our children and how far we have strived to do at least the minimum. Therefore the realization of the rights of the child concerns not only the lawyer but also as well, the economist, the farmer, the doctor and everybody else.

Before we look at the legal framework providing the basis of realising these rights it is appropriate to consider the history of the position of the child in society. In primitive society when man was predominantly a gatherer, hunter or a fisherman, children were considered a burden to him. Moving in herds and over long distances hunting for food, children encumbered the mobility of the mother. Abortion and infanticide were a means of getting rid of unwanted pregnancies and children. Diamond observed that "... because of shortage of food and mother's difficulty in carrying a child over long distances and keeping up with the group, or because the child is weak, or cries too much, or is unusual in some way, children are often killed and abandoned, and sometimes even stolen and eaten".¹ The advancement of man through improvement of tools for labour brought about social upheavals in society. Man no longer moved in a herd but in a socially organised group or clan held together by natural necessity. The natural division of labour based on sex and physical capabilities necessitated men moving afield to hunt while women, children and the old remained within the vicinity of the settlement performing various other duties necessary for survival.² At this stage the position of children began to improve due to the change in the productive forces. They were loved and cared for by the whole community and they considered every female capable of child-bearing in the community, a mother and every male, a father. It was not necessary for a child to know who his biological father was because the basis for such a requirement was non-existent.³ Nor were children considered the property of any one person. Matrilineality was the primary rule based on the indiscriminate care of all children.

Clan society based on primitive communalism disintegrated to be replaced by a society based on individual greed and private property. Children no longer belonged to the whole community. They became

irrevocably the property of one person, the father. Not only were they considered, as objects, a necessary labour force in a mixed farming economy,⁴ but, as chattels, they lost whatever identity they had for the harsh subjection of the father.⁵ According to Engels, the introduction of money economy and the establishment of "father right" led to the dissolution of the gentile society and the establishment of new social relations. He noted that if a mortgage debt was not satisfied through the sale of land the debtor was forced to sell his children into slavery abroad to meet the creditor's claim. He further remarks that "children sold by their father - such was the first fruit of father right and monogamy".⁶ The foregoing illustrates that the movement of society is inexplicably intertwined with the position of its individuals and children.

The section of society which became pastoralists and farmers valued their children on other considerations. Diamond comments that there was more work in a mixed farm economy and that owing to improved nourishment from cattle food products, there was a marked drop of infant mortality and "partly that children were considered a blessing... a source of labour".⁷ In cattle owning societies, social relations were (even now) governed by human-cattle relations.⁸ Cattle, at first inception, were a valuable commodity⁹ and represented the sum total of the family or clan wealth.¹⁰ In various social intercourses, especially in marriage, the transfer of cattle in marriage transactions not only created a valid and binding marriage contract but also incidental to, the contract, legitimacy and ownership of children was thus determined.¹¹ However, where no such transactions had taken place, any other form of union would not be recognised as a valid marriage nor would the children belong to the husband.¹² Nevertheless, for the sake of legitimacy, children born out of wedlock were considered as legitimate issues of their maternal grandfather.¹³

The disintegration of communal society precipitated by changes in social and economic forces led to the breaking up of society into antagonistic classes based on exploitation and subjugation of one group by another. The overthrow of matriarchal rule to be replaced by patriarchal relations was consequential to the discrimination of one's own children between female and male children. The overall result was the creation of social and legal status on the bases of property and sex. Children became chattels of their father.¹⁴ Bastardy became a social stigma and a bastard child was

regarded as a no man's child (filius nullius) encumbered with legal incapacities.

Modern society inherited a number of these attitudes which were to govern it up to the present day. Children in feudal and industrial societies were mainly considered as a source of labour. On the eve of capitalism, in advanced societies children suffered a worst fate than their parents. With the appropriation of land which led to the disowning of the peasantry, children and their parents wandered into towns seeking employment. In order to check the influx of the unemployed into towns and the wave of crime which arose as a consequence, the state passed a number of laws mostly classified as Poor Laws to care for the poor and their children and to check vagabondry.

Oliver Twist in Dicken's novel depicts the life of misery of children in the then working class England.¹⁵ Due to public outcry against the conditions and the employment of children of the poor, subsequent legislation was enacted imposing certain restrictions on the employment of children but not prohibiting it altogether.¹⁶ Under capitalism children are directly and indirectly exploited by the system, owing to the imbalance in the international economic order. As long as third world countries become more and more entrenched in the economic system dictated by the international multinationals, the rate of economic dependence and exploitation will definitely increase. The pauperisation of individual states is reflected in the economic conditions of their peoples who have to intensify labour input to produce more. Children are then also used in the production force or for other purposes which might improve the economic conditions of their parents. A report by the International Labour Office estimated that over 100 million children are being used as slave labour in developing countries; half of these being employed in factories, others on the land, in the home or are "self-employed".¹⁷

The Legal Status of the Child.

The term 'status' in law connotes a different meaning from a social status. Graveson defines 'status' as a person's legal condition in society imposed by the state.¹⁸ In law a minor has the status of an infant until he reaches the age of the majority which is 18 years.¹⁹ Thus, "the status of infancy is based upon an actual or presumed

natural incapacity for the performance of certain legal acts of daily-life. It is an absolute status in the sense that it is of equal interest to all persons dealing with the infant".²⁰ In other words the status of infancy imposes certain incapacities on an infant to perform valid legal acts. Any third party who acts with a minor does so at his own risk because the status of infancy vitiates any liability thus arising. The law therefore protects any infant from liability for any acts with third parties, and likewise imposes a duty on every person and institution in society dealing directly or indirectly with the child. On the other hand should a minor do or omit doing an act which under normal circumstances is unlawful, the law leans very much in his favour.²¹

The extent to which the law can protect and safeguard the interests and welfare of children is primarily determined by the social and economic conditions pertaining in a particular society. Therefore it is of little surprise to witness a disparity in children's services between different countries owing to the fact that a nation is capable of offering what it can according to its economic ability. Yet, economic strength alone is not sufficient without a policy geared towards the improvement and raising the general standard of living of the people.

Law alone cannot provide the basic requirements of the child without the involvement of the whole society. The law forms only the legal framework upon which particular things for children can be realised.

From the above aspects several matters ought to be considered so as to make the law an effective tool in the protection of children and in safeguarding their welfare.

The law ought to protect children from the time of conception to birth and thereafter, and likewise create conditions which will promote a stable and healthy development. In this we envisage certain legal provisions which will relate to family planning and enable a woman to seek unconditional family planning assistance,²³ maternal benefits which are reasonable, family tax reliefs, subsidy in the basic requirements such as food stuffs necessary for the health of children and parents, and a compulsory medical scheme of services and check-ups for children and parents. The health and physical condition of the child is predetermined in the prenatal stage. Therefore great emphasis

should be placed on the health of the mother as well as that of the foetus. Parents should be educated on the need of prenatal health care of the mother.

The climax of every expectant mother and all other members of the family is the event of the birth of the child. We could rightly assume that the days when childbirth was carried on in the bush are slowly receding in the past. It has now become a right for the child to be born in the hospital under medical supervision.²⁴ This is not a right for the sake of it but rather a necessity due to the fact that a lot of complications resulting from childbirth could be avoided or timely detected.²⁵

A child who is already born has a right to a healthy and secure development. From the time of birth he must be ensured of nutrition and child-care supervision. Therefore the education and advice to the mother about his diet, weight health (vaccinations) and day-to-day care are an indispensable service.

Simultaneous with supervised growth and development, a child must be ensured of material well-being, love and affection. It is not enough bringing children into the world, if they lack love and affection from their parents. Nor will it help society to deprive children of their much needed and essential love of their mothers.²⁶

A good law should also create learning opportunities for children to both acquire knowledge of various kinds (for cognitive development), and to prepare them to be useful to themselves and society. In the early years of development the process of learning lays the foundation for future learning for the child. With the help of psychologists a child's ability at a particular age can be tested to discern any impairment or abnormality which might interfere with this process. All children, whatever their capability should be given all possible encouragement to attain the highest possible cognitive development.²⁷

For pre-school children creches and nursery schools are ideal places for them. Not only do the children acquire formal education, they learn to socialize with each other. In the process of playing together they learn to work together, to be considerate to each other and to have respect for their teachers. Moreover, the purpose of these schools is not educational in the strict sense, but rather it is a place where children play and acquire elementary skills in writing, reading and drawing. Children in urban areas lack playing space and

occupation. In many cases they form themselves into roaming gangs. which in the long run turn into criminal gangs. When a mother is working, a child might be left on his own. Due to boredom and lack of attention a child tries to amuse himself through ways he creates for himself and which might be dangerous for him. Nurseries and kindergartens are appropriate places for containing these children. The existing schools should be improved so that they are run on specific principals and policies; with a uniform curriculum and trained teachers. Where possible parents should be allowed to participate in the affairs of these schools. Finally these schools should be subsidised financially by the government. The above tentative suggestions are not new ideas. Several countries in the world have already put them into practice with commendable results.²⁸ These should be contained in the law.

Side by side with nursery schools, recreation grounds should be created. Through play the child learns "how to manipulate material, how to develop skills, how to avoid danger and how to cooperate with others".²⁹ In a strict sense play is the spontaneous expression of innate patterns of behaviour developed in the course of evolution in the animal species, and are designed to maintain existence.³⁰ Hence we find that different types of play such as romping, imitative play or imaginative play as expressions of innate behaviour must be encouraged and given room for outlet. The importance of play on the mental health has been long known, even a saying to this effect exists, i.e. "All work and no play makes Jack a dull boy." Play exercises natural qualities of the mind, work gives only expression to a part of our personality. In our society play is not given its importance. Every free space, especially in towns, is utilised for either commercial or agricultural purposes.

The law as an instrument of social change can go a long way to try to bring about changes in social institutions. The establishment of families is regulated by law. So is their maintenance and control. Yet if the relationships of the members of the family are such that a happy and peaceful existence cannot be achieved in its present form, then the law has to try to bring out changes which are conducive to normal development. The present trend of recognising the equality of the spouses is a positive step towards achieving our objective.

After all, children have a right and should grow up in an environment in which both parents show emotional stability, respect and affection to each other. Where such an atmosphere is non-existent should the law interfere? The answer should be in the affirmative if the sole purpose for intervening is to bring about harmony and establish the pre-existing atmosphere for the sake of children. The paramount consideration of the law should be to ensure and safeguard the welfare of the children. It should establish a machinery for ensuring stable marriages through marriage counselling before and after marriage and abolish those laws which tend to discriminate against one parent. It should also establish a system of relief and facilities for families either through state subvention or through compulsory national insurance schemes which will supplement the family income through allowances and also through assisting one parent families.

Children must have the rights without which their growth and development can be impaired. It is not the duty of parents alone to see to it that children get all they require for their welfare; much is also required from the state. With an increase of diminishing parental control over their children the state should assume more responsibilities towards the children. It is therefore justified to demand from the state to do those things parents used to and are not capable of doing now. And since the state has resources at its disposal and is also able to mobilise its institutions and organs, much of what has been proposed can be implemented.

FOOTNOTES :

1. Diamond, A.S. The Evolution of Law and Order Watts & Co. London, 1951, pg. 11.
2. Reed, E. Problems of Women's Liberation Pathfinder Press, Inc. New York, 1971 5th edition. pp. 28-47.
3. Engels, F. Origin of the Family, Private Property and the State, Lawrence & Wishart, London, 1973, he states that: "In all forms of group family, it is uncertain who is the father of a child, but it is certain who the mother is". pg. 106. Also Reed, E. op. cit. says that: "Another feature of early society the

diehards have found hard to accept was the fact that primitive people did not know or care about individual parentage of any child. All adults in a clan or community regarded themselves as the social parents of all the children, providing for them equally". At page 18.

4. Diamond, A.S.

op. cit. pg. 207.

5. Curzan, L.B.

Roman Law. Macdonald & Evans Ltd., London, 1966.

Note the Patria Potestas, meaning paternal power exercised by the head of the family (paterfamilias) granted him by the Twelve-Tables and Royal Laws:

- he had the power of life and death (jus vitae necisque) over his children.
- he had the power of selling children into slavery, though prohibited by later Roman Emperors, yet an exception was made in case of poor parents who were given the right to sell a newly-born child.

6. Engels, F.

op. cit. pg. 174.

7. Diamond, A.S.

op. cit. pg. 207.

8. Rwezaura, B.A.

Cattle, Children and Marriage in Tanzania: A study of relationships between persons and things.

9. Engels, F.

supra at pg. 209.

10. Rwezaura, B.A.

supra at pg. 1.

11. Cory,

Sukuma Law and Custom (1953) at pg. 13 he notes that the function of bridewealth is to "determine the status of children".

Also Rule 175 of Customary Law Declaration Order, G.N. 279/63.

12. Rule 178 G.N. 279/63, also in the case of:

Loijurusi v. Ndiiga (1971) HCD 331 the appellant (the respondent's brother-in-law) took her sister (wife of respondent) and the children away in order to exact payment of bride price from the husband. Due to changed

socio-economic circumstances the court found in favour of the marriage and declared that "it is against public policy to interfere with the family which is the fabric of the entire society..."

13. Rules 178, 179 and 180 G.N. 279/63.

14. Curzon

supra. That the father had a right to sell his children into slavery and etc. Also Carcopino, J. in Daily Life in Ancient Rome (Penguin, 1967) pg. 90 noted that it was not "until the beginning of the third century when abandoning a child was considered the equivalent of murder". Otherwise a father could dispose of his child (mostly bastards and girl babies) by exposing them to cold so that they perish of cold and hunger, or let them be devoured by dogs on one of the public refuse dumps.

15. Dickens, Charles

Oliver Twist.

16. Abbot, Grace

The Child and the State. Also in our present Legislation Employment Ordinance, Cap 433, s. 75.

17. IPPF

Law File No. 9 September, 1979 cited in the Daily Mirror, London, August 30, 1979.

18. Graveson, R.H.

Status in the Common Law (1953).

19. The Age of Majority Ordinance, Cap. 431.

20. Graveson

supra at pg. 18.

21. Penal Code Cap 16 (Revised 1970) s. 15 specifically states that a child above seven years but below 12 years can be presumed to be guilty of an offence.

22. Mussen, P.H.

Child Development and Personality. A Harper International Edition, 1968, at pp. 57-77.

23. The modern trend of liberalising abortion laws has not come to Tanzania. Ss. 150-152 of the Penal Code make abortion an offence. Other countries permit abortion if the pregnancy was a result of rape or if it would injure the health of the mother. Also see People, vol. 5 no. 2/1978 IPPF - London.

- Usually permission from the husband is required in getting contraceptives.

24. Adam, P. Children's Rights: Towards the Liberation of the Child. Elek Booka (2nd ed.) 1971.
25. Mussen, P.H. op. cit. at pp. 70, 77-80.
26. Customary Law Declaration Order G.N. 279/63 r. 175.
27. UNESCO, The Child and his Development from Birth to Six Years Old. UNESCO - International Children's Centre, Paris (2nd ed.) 1978 at pp. 37-
28. UNESCO supra. Cameroun, Italy, El Salvador, France and many others. at pg. 43.
29. Hadfield, J.A. Childhood and Adolescence. Penguin at page 171.
30. ibid. at pg. 171.