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**“YOU CAN’T DO IT ALONE, WOMAN!” AN ANALYSIS OF THE LAWS AND  
PROCEDURES GOVERNING THE ACQUIRING OF TRAVEL DOCUMENTS FOR  
MINOR CHILDREN BY WOMEN IN ZIMBABWE**

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## Abstract

In Zimbabwean law a father is considered to be the legal guardian of his minor children. This dissertation, written by a woman civil servant, analyses how this strongly patriarchal legal position informs the policies and practices of the Registrar General's Office ("RGO") which severely discriminates against countless women by refusing their legitimate request to obtain passports and travel documents for their minor children without the consent of their fathers. This is just one example of the discriminatory treatment suffered by Zimbabwe's female citizens at the hands of Mr Tobias Mudede and his officers which has become so serious that they are known to act in contempt of court. The study also explores the dilemma in which the Government of the former British colony finds itself. On the one hand, relying on often misconceived notions of African culture, its mainly male public servants uphold these laws, policies and practices in terms of the provisions of its own backward and, some would say, colonially-imposed 1980 Lancaster House Constitution. On the other hand, by upholding them, it violates its duty to comply with various binding/persuasive regional and international Human Rights instruments (e.g., CEDAW) to which it has subscribed since its Independence and which declare them to be discriminatory against women and children and a violation of the progressive idea of shared parental responsibility (regardless of marital status), including the right of guardianship. The writer uses a combination of several gender-sensitive methodologies, in particular, the Women's Law and Human Rights Approaches, to direct her research of a sample of women respondents who approach the RGO. Using the complementary Grounded Theory Approach, she collects and analyses material and relevant data (including, the law and literature on the subject and information gleaned from interviews with respondents and key informants, especially, relevant government officials, including the Deputy Registrar General, a female incumbent) which she constantly presents through the eyes or 'lived realities' of the respondents. They rightly believe that the effect of these laws and practices is both degrading and perverse: relegated themselves to the status of children, these women are expected to be content, even in the case of absent or unreasonably unco-operative fathers, to fulfil all the duties of custodial parents but to be denied the vital right to exercise any powers of guardianship over their children. Other options, such as court litigation, have not solved the problem and the corruption of public officials, to which the failing institution easily lends itself, have made it worse. The only alternative, suggests the writer, is that Zimbabwe, which is currently redrafting its Constitution, follow the example of other enlightened African countries by amending the offending provisions of its legislation and Constitution so that they comply with its more recent progressive international HR commitments. This will enhance the women's right-to-equality-with-men movement, serve the best interests of children and set the stage for transforming the backward and gender-insensitive RGO.

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## **Dedication**

To the two women who mattered most in my life, my mum Ivy and my sister Tabeth, unfortunately you did not live long enough to see the results of their encouragement, but thus far I have gone.

And to my little girls, Kupakwashe and Kunaishe, you give meaning to my life and make me look forward to tomorrow. *Thanks!!!*

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Constitution of Zimbabwe

Constitution of Malawi

Guardianship of Minors Act {Chapter 5:08} (Zimbabwe)

General Laws Amendment Act {Chapter 8:07} (Zimbabwe)

Customary Marriages Act {Chapter 5:02} (Zimbabwe)

High Court Act {Chapter 7:06} (Zimbabwe)

The South African Guardianship Act 192 of 1993

Namibian Married Persons Equality Act 1 of 1996

Kenya Children's Act of 2000

Children's Act of Uganda of 1997

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Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

Convention on the Rights of Children

International Convention on Civil and Political Rights

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(NM)

## **CHAPTER 1**

### **1.0 INTRODUCTION**

#### **1.1 Introduction**

This is a study on the procedures and laws that apply when women want to obtain travel documents for their minor children and it is partially influenced by my own personal experience in trying to obtain a travel document for my child.

After the hectic first semester break from my Master's in Women's Law Programme, my body and mind ached to have a break, a break in a different environment. The only place that would give me that much needed break was outside the country where my husband is employed. I made up my mind to visit South Africa for the few weeks and I had to take my daughter who was then three years. Unfortunately she had no passport but I did not see that as a problem because I knew where I could get it from. Early the next day I packed all the documents that I thought were necessary which included my child's birth certificate, passport sized photos, my identity card, birth certificate, marriage certificate and a letter from my husband's employer showing that he is a teacher at Glenbrack Junior School in South Africa. The letter was on an official letter head and was date stamped. I was confident that that was enough to get my child an emergency travel document, but, my assumption was totally wrong because, according to the authorities, one thing was missing: the father of the child was needed for the process to be completed; without his active participation I was regarded as the potential thief of my own child! I was devastated. No persuasion could move the officials at the Registrar General's office; I had to leave their offices feeling very defeated and dejected.

I went on the holiday leaving my child behind and it was not as restful and peaceful as anticipated because leaving my daughter behind unsettled. I was also concerned that a mother could be perceived as a baby thief and hence my idea to make further investigations into the issue.

## 1.2 Statement of the Problem

The above scenario was not unique to me; women in Zimbabwe face the same predicament when they want to obtain travel documents for their children who are registered in the name of the father. They discover that the Registrar General's office does not consider that they have authority to sign the section on the passport form that requires the signature of the guardian. Women, in terms of our Zimbabwean law, are not the guardians of their own children; they can only act as such if there is a court order to that effect and the basis for this position is Section 3 of the Guardianship of Minors Act which reads as follows:

*Where the parents of minor:*

- (a) *Are living together as husband and wife;*
- (b) *Are divorced or living apart and so guardianship of the minor has not been granted to either of them by the order of High Court or a Judge, the rights of guardianship of the father shall be exercised in consultation with the mother and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers who may make such order in the matter he deems fit.*

What emerges from the above provision is that the rights of guardianship of a child are vested in the father and such rights can only be transferred to the mother of the child by an order of the court. If the woman is disgruntled by any decisions of the father she has to approach the courts for relief. The office of the Registrar General relies on this piece of legislation so much that women from all walks of life who have 'made the mistake' of registering their children in the father's name are not able to execute travel documents for their minor children without the father of the child, the guardian of the child, the owner of the child. But not all women live with the fathers of their children. Some women have broken ties and contacts with these men over a long period of time. Some men deliberately hide their existence from their children. Some women have had nasty divorces. Some men are around but they are just uncooperative and, unfortunately for women, the Registrar General insists that they locate the men, get the cooperation of such men and drag them to come and sign the relevant section on

this passport form. No doubt this is very costly for women, emotionally, financially and even socially, but this is what Zimbabwean women have been forced to endure in order to get travel documents for children registered in their father's name.

Even in many instances where women have cared for their children since conception, raised them single-handedly and even supported them after they have become adults, the position that the Registrar General's Office takes is that their rights are trumped by those of their absent irresponsible fathers. Based on this reality several questions now have to be asked and answered. Is a mother less of a parent to a child than a father because she cannot execute a travel document for her child without his assistance? If so, does this not constitute discrimination against women? And why is it that neither the law nor the Registrar General's Office entrust women with the same rights as men in regard to this issue?

The man on the other hand does not have to go through this entire hectic road to get a travel document for his child; he can successfully make the application on his own without the woman. It seems the man is complete being who he is and all things he wants done on his own can be done; on the other hand the woman needs to be complemented by the man. This is the bone of contention in this whole issue, why can't women be afforded the same rights as men when it comes to this issue, with the work they do in bringing up the child why should they suddenly be incapable when it comes to the application for travel documents for the child. Besides the international scene recognizes that men and women ought to be given the same rights and responsibilities on issues that concern children<sup>1</sup>, why can't we do the same in our country when it comes to this issue, the state has an obligation to see to it that the playing ground for men and women is levelled when it comes to issues that concern children.

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<sup>1</sup> Article 16(1) (d) of CEDAW

### **1.3 Objectives of the Study**

My objectives of the study were:

1. To investigate the process and requirements for obtaining travel documents for minor children by women in Zimbabwe.
2. To investigate the law of guardianship and find out the extent to which this law and the process and requirements (in 1 above) are in compliance with the Constitution.
3. To explore how the administrative measures set by the Registrar and s3 of the Guardianship of Minors Act impact on women including single or divorced mothers among other classes of women.
4. To make recommendations for the improvement of the process currently prevailing.

### **1.4 Research Assumptions**

The following assumptions were used as the basis of the study:

1. Women suffer different treatment from men when they want to obtain travel documents for their minor children.
- 2(a) It is a violation of s23 of the Constitution not to allow women to obtain travel documents for their children on their own.
- 2(b) The current laws on guardianship of minors make it difficult for women to obtain travel documents for their minor children on their own.

- 3(a) The administrative measures hinder women from obtaining travel documents for their minor children without the authority/assistance of the father of the child.
- 3(b) The administrative measures and the law on guardianship are influenced by various factors that are social, cultural, religious and patriarchal.
4. There are corrective measures that can be implemented to ensure that the law on guardianship and the administrative measures are in harmony with the Constitution.

## **1.5 Research Questions**

The following research questions emanating from the assumptions formed the basis of the study:

1. Do women suffer different treatment from men when they want to obtain travel documents for their minor children?
- 2(a) Is it a violation of s23 of the Constitution to prohibit women from obtaining travel documents for their minor children on their own?
- 2(b) Are the current laws on guardianship of minors making it difficult for women to obtain travel documents for their minor children on their own?
- 3(a) Do the administrative measures hinder women from obtaining travel documents for their minor children without the authority/assistance of the father of the child?
- 3(b) Are the administrative measures influenced by social, religious, cultural and patriarchal factors?
4. Are there corrective measures that can be taken to ensure that the law on guardianship and the administrative measures are in harmony with the Constitution?

## 1.6 Challenges

My research topic relied mostly on the reception that the Registrar General would accord me and my intention was to have interviews with the Registrar General himself but this was never to be because my request to carry out research and interview him were turned down. I however had the opportunity to talk to the Deputy Registrar General. The reason that I was given was that my topic was likely to jeopardize a case which involved the office and is still pending at the Supreme Court. The reason was not valid considering that the case by then had already reached judgment stage which was reserved and it is still reserved to date. A lot of persuasion and limited truth assisted me to get to the office of the Deputy Registrar General who agreed to talk to me as long as I would not make reference to the case that was pending in the courts. I however, did not get the permission to carry out interviews with the women who came to seek services at the office, but, I did interview women at the premises although it was a bit unnerving because I worried that if somebody from the office would ask me what I was doing then it would be apparent that my interviews were not sanctioned by the authorities there.

The research period happened to be the same period when the NGOs that I needed input from were busy trying to consolidate their work and reports and it meant that most of my scheduled interviews would be postponed on the day of the interview and we had to reschedule but I managed to get to talk to all the relevant NGOs. This was not much of a challenge though.

Eventually I managed to collect some data despite these challenges but I still feel it would have been more informed if I had got the chance of talking to the Registrar General himself and if I had done the interviews at his office without restrictions and getting statistics on the number of women that are turned away for lack of guardianship rights.



## **CHAPTER 2**

### **2.0 RESEARCH METHODS AND METHODOLOGIES**

#### **2.1 Introduction**

This chapter will deal with the research methods and methodologies that were used during the research. The chapter will explain why each of the methods and methodologies was adopted and give reasons as to the significance of each in light of the research assumptions. In discussing these methods and methodologies, such questions as what that method is, why it was adopted and how it worked in bringing out certain issues will be addressed. The methodologies engaged were the women's law approach, the grounded theory approach; the human rights based approach and the influence of actors and structures. The methods used included in-depth individual interviews, interviews with key informants, focus group discussions and observations.

#### **2.2 Methodological Framework**

##### ***2.2.1 The Women's Law Approach***

The women's law approach according to Stang Dahl (1987) takes the woman as the starting point, exploring the women's experiences in relation to law and their rights with a view to explain and understand and analyze women's legal rights in order to improve their legal position in life. With women's law, the concept of equality will refer to the right of women to have equal treatment of men and women before the law. This approach of taking what the law provides for, how it benefits the woman and whether it accords women the same rights as men was really significant. The woman in this case was the woman who approaches the office of the Registrar General to get a travel document for her child and it is at that stage that she comes into contact with the law on guardianship which is used as the basis of the requirements for women who want to obtain travel documents for their children to set the

tone on the such requirements, which is Section 3 of the Guardianship of Minors Act. In terms of this provision the rights of guardianship of a child rests with the father. Looking at the lived realities of women it emerged that the child is usually in the care of the mother and it is the mother who knows what is in the best interests of her child and getting that child a travel document would be one of the things done in the best interests of the child. The law cited earlier does not seem to recognize this aspect. It is divorced from reality. The current law, it emerged through looking at the law and the life of the woman, gives the man the upper hand when it comes to issues that concern children, there is no equality, the woman has less rights than the man when it comes to children.

Through the use of the approach, it became apparent that the woman is disadvantaged and there is a need to deal with the biased law to ensure that the position of the woman is improved to give her the same rights as the man, so that she is able on her own without seeking the consent of the man to execute travel documents for minor children. The law should level the playing field so that both parents can obtain such documents for the minor child bearing in mind that the woman is an equal parent.

### ***2.2.2 The Grounded Theory Approach***

Grounded theory refers to the discovery of theory from data obtained from social research and the use of comparative analysis as a strategy to develop new theories (Glaser and Strauss in Tsanga 2003:). The grounded theory was able to open new directions as they unfolded in the research. The approach was also significant in that it further informed my assumptions.

When I set out to do my research my assumptions were generally to do with the discriminatory laws on guardianship and their effects on the woman, the unconstitutionality of the laws on guardianship, the insensitive administrative procedures that make it difficult for women to obtain travel documents for their minor children on their own and the various social, religious, cultural and patriarchal factors that influence such laws and administrative measures. Through the use of this approach other various categories of issues worth pursuing emerged and these included:

- a) The set requirements for obtaining birth certificates by the office of the Registrar General being the origin of the problems that women face when they want to obtain travel documents for their minor children, my initial assumption was that the problem began at the passport office. It was therefore necessary to follow up on the requirements of obtaining birth certificates to get to know how the process at that level would later influence the issuance of travel documents. What I discovered is that women, married or single, voluntarily and involuntarily register their children in the father's name for various reasons, but their registering a child in the father's name especially for single mothers created a lot of problems.
- b) The Registrar General is law unto himself; it is his personal views that determine the manner in which travel documents would be processed. According to the officials at the Registrar General's office they do what the Registrar General wants, it became apparent that it is not only the law but personal perception also came into play in the operations of the office.
- c) The economic instability in the recent years has seen the number of minors seeking travel documents swelling with women wanting to take their children outside the country to work there or to follow a working partner who would have left earlier, initially I thought it was just a problem of a few women.
- d) It is not only women as mothers who are affected but also grandmothers and aunts who are left in custody of young children while their mothers seek greener pastures.
- e) The High Court offers relief on this regard but the relief is for those that are enlightened and have the means to take up litigation seeking transfer of guardianship from the father to the mother. The reason for following up on the issue was to assess the efficiency of the relief and whether it could address the concerns of all the women and if it did not which women in particular benefited from the relief.

- f) Other women have resorted to illegal means to go about the problem like offering bribes to officials and smuggling children out of the country.
- g) There is decided case authority which if used to guide policy in the office of the Registrar General, some of the problems that women are facing would be averted.

These are some of the new areas that emerged in the research and I had to follow them up in an effort to make my study meaningful. All the emerging issues were pursued to broaden my understanding of the woes that women face at the hands of the Registrar General's office and at least try and find lasting solutions that will probably address the issue once and for all.

### **2.2.3 The Human Rights Based Approach**

This was used as an approach to understand what the international instruments provide for in as far as rights and responsibilities of parents over children are concerned and to understand where the international instruments place the woman in a family; is she equal to the man or she is subordinate. CEDAW in Article 16(1)(d) specifically provides that state parties shall ensure on a basis of equality between men and women :

*The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.*

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa has almost a similar provision Article 7(c) that states should ensure that men and women enjoy the same rights:

*In case of separation, divorce or annulment of marriage, women and men shall have the reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance.*

The research therefore sought to measure compliance by the state with these human rights provisions that specifically refer to rights and responsibilities of parents over their children despite marital status. From the research, it became clear that equality of rights and responsibilities over children by parents is non-existent in our laws of guardianship which vest all the powers of guardianship in the father, consultation which is provided for in section 3 of the Guardianship of Minors Act does not constitute equal rights and responsibilities over children, there is a breach by the state through the office of the Registrar General in as far as this aspect is concerned. Refusing women the right to execute travel documents for their minor children is a violation of the provisions of both CEDAW and the Protocol.

#### ***2.2.4 The Influence of Actors and Structures***

One of my assumptions was that the current laws on guardianship and the administrative measures hinder and make it difficult for women to obtain travel documents for their minor children on their own. With this assumption it was necessary to look at who has the mandate to interpret that law and who makes the discriminatory administrative procedures. The actors and structures that I had to investigate to answer this question included the office of the Registrar General and its personnel, the courts, specifically the High Court and the personnel, the NGOs and the Legal Aid Department in the Ministry of Justice in as far as their understanding of the law on guardianship is concerned and the services that they render to women who approach their offices for assistance.

The office of the Registrar General is expected to serve the women in as much as they serve men, but the office is rather hostile to women who come on their own to execute travel documents for their children. Sometimes they are turned away in a demeaning manner amid pronouncements that they are trying to steal children and in some instances they are never told where they can find assistance. Such attitudes discourage women and leave them victims of the administrative measures rather than beneficiaries. The High Court offers relief to women but the process to get that relief is not easy to comprehend and the personnel there is not obliged to give advice to women. The most they can tell the women is to go and seek the services of legal practitioners. Through this it became apparent that some of our institutions

need reformation or restructuring if women are to find some fair treatment when they want to obtain travel documents for their children. The NGOs and the Legal Aid Department are rather receptive to women but their efforts alone cannot resolve the issue at hand. It will take efforts from all the major players including the office of the Registrar General to improve on the services that women are currently receiving at the offices. Just like Bentzon put it that the actors and structures approach:

*... assumes that legal and social change can only take place through interaction between human beings as individuals or groups and not through some seemingly abstract medium of law.*

The use of this methodology was therefore significant in understanding the attitudes that women are faced with when they approach certain offices and noting areas that need reform so as to make women's lives bearable when they want to execute travel documents for their minor children.

## **2.3 Research Methods**

### ***2.3.1 In-Depth Individual Interviews***

This method was used with fifteen Respondents who were mostly female who had come to the office of the Registrar General for services and some that I met at various appointed places. The significance of the method was that the respondent will express their views on the issue and cite their experiences which were relevant to my study. The women that I interviewed at the offices were really useful in that it would still be the heat of the moment and the experiences of the Registrar General's office would still be vivid in their minds. The danger was getting emotional response like some would jump to conclusions that since they did not get the travel document they would smuggle the children illegally out of the country. The method also allows for face to face interaction such that one is likely read the facial expressions; observe body language and draw inferences from them which would help to determine the truthfulness of the answers being given. The danger that I encountered in some

instances was trying to talk to someone who is already in a bad mood due to the reception they would have got in the offices and some women would just go on and on like they have found someone to vent their frustrations on. Women interviewed using this method expressed their concern and disappointment with the manner in which the office of the Registrar general treated their requests and the method was able to unveil how women are discriminated against at that office.

### ***2.3.2 Interviews with Key Informants***

These were the people who had the expertise, valuable knowledge and experience on the laws and processes of obtaining travel documents for minor children by women. They are the people who in my view had some influence in the manner in which these documents were issued. The Deputy Registrar General was key in that it was her office that is solely responsible for the issuance of travel documents and has policies that govern this procedure. It was enlightening to know that in as much as they are guided by laws and policies, in some instances it was what the Registrar General wanted that guided their operations. I also got to understand the justification they had for their policies. My other key informants were representatives from local such as NGOs Justice for Children Trust and Legal Resources Foundation who usually assist women who would have been turned down at the office of the Registrar General to hear how they assist them by making court applications on their behalf. The official from the High Court, the Assistant Registrar were useful in informing me how they expected the applications to be made, that the woman should be legally represented and the usual manner that the order if granted will take. The method therefore helped to note the origins of the problem and how several players like NGOs come in to try and lessen the burden on the women.

### ***2.3.3 Focus Group Discussion***

I had one focus group discussion with three lawyers who work in the Legal Aid Department in the Ministry of Justice and the purpose was to get diverse opinions from different lawyers

at the same time and this is what I got. On my assumption that women are treated differently from men when they want to obtain travel documents for their minor children, this they confirmed citing the number of women who had come to their offices to seek help; each of the lawyers had handled a case of that nature and what they wanted to see was legal reform so that women are accorded the same powers as men to execute documents on behalf of their children. The group was small, consisting of lawyers only and manageable such that I did not have to act as umpire to keep things under control, but my shorthand skills were put to test.

#### **2.3.4 Observations**

The importance of observation is that you watch the way people behave, the way they communicate including the body language; they are themselves when your presence has not been noticed and your intentions are still unknown. This method was used at the Registrar General's office where in some instances I would join the queue like a client and at times I would just go into one of the offices and pretend to seek help but my intention was to find out how women had their grievances addressed and to note the attitude of the officials at the Registrar General's office to women who want to obtain travel documents for their minor children and what I noted is that the women are sometimes turned away without much explanation as to what they should do next and they are just told to go and bring the father of the child and the officials in some instances were not interested to hear what the woman had to say. Patience in dealing with women was not present in most of the cases. In the queue, what I observed is that the women would be expectant of getting help, but they would look disappointed after they had been in the office. The method would have been much more effective if my presence had been sanctioned by the Registrar General but I was like prying and this reduced the period that I could sit in any office and the frequency of visiting a particular office lest my presence would be questioned and my research would have been affected seriously.



## 2.4 Evaluation of Methodologies and Methods

The methodologies that were engaged were very useful in coming up with informed findings that are based on women's lived realities, the reaction and reception they got from the relevant offices when they want to obtain travel documents for their minor children, the reasons advanced by the relevant office for such reception and possible ways that can be adopted to deal with the current problems.

The methods were of assistance in that different people require different approaches so that they open up with their information and having been taught these I could determine how best to use each method with different people, as a group or on an individual basis and as such get the necessary information.

## 2.5 Table of Respondents

**Table of Respondents**

Groups of Respondents	Respondents affected by the law and requirements at the passport office.	Respondents not affected by the requirements at the passport office.
Professionals		10
Single Women	7	3
Women on Separation	4	1
Divorced Women	2	
Married Women	2	2
Grandmothers	3	2
Male Respondents		4

## **CHAPTER 3**

### **3.0 LITERATURE REVIEW**

#### **3.1 Introduction**

This Chapter seeks to explore the law in relation to issues of guardianship and the rights and responsibilities that parents have over their children. The reason why women are denied the right to obtain travel documents for their children is based on the fact that the law in Zimbabwe has entrusted the father of the child with all the rights of guardianship, hence the need to explore the issue from various perspectives. The Chapter will therefore consider the human rights frame work, the legal and constitutional framework, test case litigation and a comparative study will be dealt with lastly.

#### **3.2 Human Rights Framework**

The rights and responsibility of parents over children has been spelt out in different human rights instruments. Human rights give the minimum standards which the subscribing parties should adhere to and makes known to states their obligations towards their citizens.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has the following provisions that govern the area under discussion.

Article 2 (f) obligates state parties:

*To take appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*

Article 16(1) (d) obligates state parties to accord the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children being of paramount importance.

The Zimbabwean law on guardianship is discriminatory, treats men and women differently in their relation to their children and accords the man all the rights over children; this is not in tandem with the standard set at the international level. The standard being set is that men and women should have the same rights and responsibilities over children despite their marital status and states should take appropriate measures to abolish existing laws that constitute discrimination. The international standard is the route to go if we are to make progress in advancing women's rights; women are parents just like the men and as such they need to be accorded the same rights that men have over their children. Such a stance will bring about the emancipation of women and do away with the current inhibitive requirements currently prevailing.

The Protocol to the African Charter on Human and People's Rights on the Rights of women in Africa provides the following on the subject. Article 7(c) calls upon state parties to enact legislation that ensure that men and women enjoy the same rights in case of separation, divorce or annulment of marriage and ensure in particular that:

*In the case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance.*

The protocol also highlights the importance of shared responsibilities and rights over children and it covers those situations where women are mostly affected, at divorce and at separation. It is women in such situations that are largely affected by the current provisions and such a law would alleviate the problems that women in Zimbabwe are currently facing. The Protocol is silent on the situation during marriage; the assumption is that the rights over children are equally shared. A combination of the provision in CEDAW and the Protocol would go a long way in addressing the situation of women in Zimbabwe so that they are afforded the same rights and responsibilities over children despite marital status.

Closely linked to the rights and responsibilities of parents over children are the rights of the children in as far as the issues of registration of their births are concerned.

Article 7 of the Convention on the rights of Children requires that:

*The child be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his parents.*

Article 24 of the International Convention on Civil and Political also requires that a child be registered immediately after birth and shall have a name.

Although these provisions do not directly address the issue of guardianship what could be inferred from the provision is that each parent has a role to play in a child's life, the concept of caring could include doing all acts done on behalf for the child's welfare, even juristic acts which should be done be the concern of all parents. In essence no parent should be discriminated against when it comes to caring for the child; our laws are however to the contrary.

### **3.2.1 The Efficacy of Human Rights**

The international instruments set a standard and guide line which if followed would be very useful; states and their citizens would live in some form of tranquillity. (I am sure total tranquillity is not really achievable.) It has been noted that although these international instruments have been in existence for decades gross violations of these fundamental human rights still persist in most parts of the world.<sup>2</sup> Various explanations can be proffered for these continued violations of human rights. In this context there are reasons why women in particular and children in general continue to have their rights violated and according to An

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<sup>2</sup> Abdullahi Ahmed An Nai'im in Human Rights in Cross Cultural Perspective, 1992

Naim some of the reasons could be cultural biases of various nations which have a competing effect and diminish the prospects of having truly universal human rights. He argues that in as much as it is the responsibility of states to bring their domestic laws into conformity with their obligations under international law to protect human rights there is need to deal with customary and religious laws so that they are also in conformity with such human rights. That might mean removing inconsistencies between human rights and religious and customary laws in operation in that state. This is dependant on the voluntary compliance and cooperation of states in making efforts to have their laws accord with human rights. It is at this stage of removing inconsistent cultural aspects to meet international standards that the whole process of complying with international human rights is derailed. The issue of cultural aspects being possible explanation for and a force behind continued human rights violations could be true of the subject under discussion in that our law is premised on the traditional belief that the man is the head of the family and everything including the children are his. It is possible therefore that any international law that does not accord with that belief is likely to be met with resistance or is not taken seriously but is viewed with scorn in a patriarchal nation like ours.

To ensure that human rights are not just pieces of paper that incense patriarchal states but are a reality that are enjoyed by the intended beneficiaries An Naim assumes that if human rights are to be practically implemented in any society they should be accepted as legitimate in all the major cultural traditions of the world because people cannot be expected to accept and effectively implement which they believe is inconsistent with their own culture. The issue according to An-Na'im is to try and connect culture and human rights so that we have a global cross-cultural legitimacy of human rights, which is validated in terms of the values and institutions of all cultures. In our scenario what we will be validating is the equality of responsibilities and rights over children between men and women presented by human rights with our culture that believes in the headship of the man and sees the woman as a subject whose duty is to ensure that the family name lives on through child bearing. It seems to me that that role assigned to a woman makes her as important as the man; if she is not there the family name is not extended to future generations; hence the call by the international human rights to adorn her with the same rights and responsibilities over the children she bears. It has to be accepted that men and women have different but complimentary roles in the family and

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as such they are both important and equal. If we do that we end discrimination of women in this aspect. We then go a step further according to An-Na'im to look at how other cultures are handling the issue, which is cross-cultural dialogue. In Malawi for example women and men have equal rights of guardianship in terms of the Constitution and in our case this would be a similar stand as a yard stick to measure how effective it is to adopt such a stance. The internal discourse and cross-cultural dialogue are just working methodologies in changing popular beliefs and attitudes and transforming common practice not extinguishing them; they set the tone on how such issues can be addressed in order to achieve some compliance with human rights.

States still play a vital role in ensuring that human rights are complied with in that they must be committed to discharging their duties to bring domestic customary law into conformity with the requirements of international human rights law, and in such an atmosphere An - Na'im's proposal might yield results. Caution is vital when we deal with culture so that we do not invite into the process the evil that human rights are trying to address; it must be recognised that transforming a culture through improved human rights observance could still be the route to ensure greater respect for human rights. If the conflict between culture and human rights is dealt with in this way then the rights language can still play a significant role in addressing current sex and gender as well as other inequalities.

### **3.3 The Legal and Constitutional Framework**

This section will explore the concept of guardianship under customary and general law, decided court cases on the subject of the study and also the provisions of the Zimbabwe Constitution on discrimination.

#### ***3.3.1 The Constitution***

Section 23 of the Constitution of Zimbabwe outlaws all forms of discrimination and specifically section 23 provides as follows:

- (1) *Subject to the provisions of this section-*
- (a) *no law shall make any provision that is discriminatory either of itself or in its effect; and*
- (b) *no person shall be treated in any discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

Subsection 2 of the same section lists the grounds on which discrimination is prohibited and the grounds include race, sex, gender, marital status, and colour among others.

The essence of the above provisions is that women should not be discriminated against by virtue of the operation of a discriminatory legislative provision and also no public official should treat them differently from men in executing their duties; in other words, any conditions that apply to men should also apply to women.

Section 18(1) of the same Constitution provides that every person is entitled to protection of the law; this assumes that if all are to be protected by the law then there is some equality of all before that law. From the cited provisions, it is clear that our Constitution has certain rights that it wants to afford to all citizens based on certain values. This concept of the Constitution was defined as follows by a South African Chief Justice in the case of *State v Acheson 1991(2) SA 805*:

*The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and the disciplining government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion*

That is how important a Constitution is and ours to some extent abides by the above principles although it has some claw back clauses which require generous interpretation so that the document remains a mirror that reflects the values of the nation. Our Constitution

does not make specific reference to the rights of women. Women have through the Women's Charter which is a working document to the current Constitution making process aired their views on what they believe should be the values to be reflected in the Constitution. Among some of the values are that women have equal rights with men over their children in relation to guardianship, custody, and access, the issue of joint guardianship is also cited as an important aspect to be included in the new document. The subject of claw back clauses will be discussed later in this section.

### ***3.3.2 Guardianship under Customary Law***

The term guardianship is different from custody and refers to a parent or guardian's right or duty to clothe the minor child with legal capacity, assisting her in the performance of juristic acts and in the administration of her property and business affairs, (W. Ncube, 1989). According to Professor Hahlo the term guardianship includes custody, and where the two are separated the custodian parent will have the care and control of the minor's person, while the guardian parent administers his property and business affairs. The definitions are not the problem; the problem is which parent is what in the child's life and why is that the case.

Under customary law guardianship of legitimate children is with the father. The woman has no claim to that and this has been the position since time immemorial, there is a bit of shift when it comes to illegitimate children. The position has been that the guardian of that child is the father or guardian of the woman and the father of the child has no claim unless he has made some payment to the father or guardian of the woman. This has been challenged by the coming into effect of the General Law Amendment Act wherein women have been elevated to have majority status like men upon attaining the age of 18. The position on illegitimate children has been changed; whether or not children are registered in the father's name the mother should have guardianship. Registration in the father's name does not make them legitimate; they remain under the mother's guardianship. The question is how far this is being applied in real life; this will be answered in Chapter 4.



Though not related to guardianship it is important to illustrate through case law authority how courts and the society have perpetuated the minority status of women disregarding the law that seeks to enhance the position of women. In some cases it is the arguments that are advanced and in others it is the judgment passed which shows that the emancipation of women faces a lot of resistance even from the courts and public officials. The case of ***Magaya v Magaya 1999(1) ZLR 100 (S)*** illustrate the court's efforts to bring down the woman. The Appellant, Venia Magaya was appointed heiress to her father's estate (house) by a community court and her brother (younger than her and born of a different mother who had not contributed anything to the property to be inherited) successfully appealed against the decision at the Magistrate's Court. The Appellant then contested the result in the Supreme Court but the Court confirmed the findings of the lower court resulting in the Appellant, Venia, being evicted from the house. Part of the reasoning was that she was female hence she could not inherit from her parents thereby ignoring the liberating effect of the General Laws Amendment Act, section 15.

The judges by refusing the Appellant the right to inherit was bringing back customary beliefs that seek to perpetuate the minority status of women and discriminate against female children on inheritance, which holds that women cannot inherit from their parents despite being the eldest child. Women's organizations have termed it a retrogressive precedent that eroded the progress made in advocating for the rights of women. It seems the judgment was based on the judge's knowledge of customary which does not really help the position of women. The significance of the case, as Dr Amy Tsanga<sup>3</sup> puts it:

*Is that it did awaken women to realize that our problems are more serious than we realized and that the solution goes beyond the legalistic... it was easy to destroy all the gains through a mere stroke of the pen.*

This case shows the position that women hold in society and how much effort is still required to bring women at an equal footing with men in our country. It is clear that with such bad

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<sup>3</sup> The quote is from the book Venia Magaya's Sacrifice by WILSA,2001, page 72.

precedents, women really have a long and winding road to achieve that much needed equality with men in all areas including the sharing of guardianship.

Another case which illustrates the minority position that women are expected to occupy in society is the case of *Rattigan and Others v The Chief Immigration Officer of Zimbabwe*. Rattigan and her colleagues brought this application after their foreign husbands had been refused residence permit on the basis that they had no special skill to offer and their wives who were Zimbabweans could not be principal applicants for the residence permits. It was the preserve of the man as the head of the family; only he could be the principal applicant. The Respondents argument illustrates how women are seen as second class citizens. Immigration Officials acknowledge the man only to be the principal applicant for a family residence permit; a woman can never be the principal applicant. By virtue of being a woman incapacitates her. This was the argument of the Respondent. The court however ruled in favour of the Applicant that the foreign husbands be allowed to reside in the country with their families.

In this case what is important to note are the arguments advanced by the Respondent which clearly show the position that women are assigned in society. They are second class citizens who are incapacitated by their position in the family to stand as principal applicants for the family's residence permit. A man in their position married to a foreign wife does not have to litigate to have that right, it is automatic. It is natural for the man to take lead in all family issues, he possesses the ability and the women do not. It is this perception of women that has to be dealt with to ensure that women are also accorded the same rights with the man in all areas be it guardianship, citizenship or even inheritance. One is tempted to conclude that Registrar General in his dealings and insistence that the father of a child is the guardian and as such should sign the relevant sections of the passport form is influenced by such notions as reflected in the case cited above.

### **3.3.3 Guardianship under General Law**

Section 3 of the Guardianship of Minors Act addresses the issue of legitimate children and provides:

*Where the parents of minor:*

- (a) *Are living together as husband and wife;*
- (b) *Are divorced or living apart and so guardianship of the minor has not been granted to either of them by the order of High Court or a Judge, the rights of guardianship of the father shall be exercised in consultation with the mother and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers who may make such order in the matter he deems fit.*

Common law also governs this area and accords natural guardianship of a legitimate child to the father as was held in the matter of *Lynch v Lynch 1965(2)SA(SR)* by Young J who stated as follows at page 51:

*By common law the paramount rights of guardianship of a legitimate child, including custody and education and the control of the child's property belong to the father, subject to the power of the court as the upper guardians of minors to overrule the claim of the father in the interests of the child where the parties are living apart.*

This position is just confirmation of the statutory position and its effect is to discriminate against women who are in marriage so that they do not enjoy the same rights over their children as their male counterparts.

The settled position in terms of the above law is that the father of the legitimate child is the guardian and his rights may be exercised in consultation with the mother and the rights are transferable by an order of the High Court.

Under the Roman-Dutch common law the guardianship of an illegitimate child is vested in the mother of that child and this position was stated by Boberg (1977) as follows:

*Whereas the parental power over a legitimate child rests with the father, in the case of an illegitimate child it is his mother who, unless is herself a minor has the right of guardianship and custody over him and whose surname and domicile he assumes.*

There is a plethora of case authority to support this position and an example is the case of ***Docrat v Bhayat 1932 TPD 125***. At page 127 de Wet J said that the mother of an illegitimate child was the natural guardian. The position on illegitimate children under customary and general law is the same: the mother is the guardian. The issue of the surname that a child takes is unlikely to change this position but it remains to be seen in the study how far this position has been implemented to benefit the woman. For legitimate children the position is that the father of the child is the guardian and there is need to explore how far such a patriarchal position has affected women. If people are married it makes sense that the parties to the marriage are equal and have to be afforded the same rights.

It is clear from the above that our laws and practices are lagging behind other neighbouring jurisdictions in as far as guardianship of minor children is concerned. W Ncube (1998) suggests:

*The enactment of laws which provide that the husband and the wife are joint and equal guardians and custodians of their children and should their marriage fail each shall be entitled to claim and be granted, if it is in the best interests of the children, the custody of such children. On the incidence of guardianship both shall continue to exercise these equally and by agreement and where agreement is not possible either may approach the courts for the resolution of the matter one or the other. This is surely not only reasonable and practicable but also necessary and compelling. It is the law in many countries of the world. Zimbabwe can follow suit and abolish the common rule law that makes the father of marital children the natural and predominant guardian without much ado and without difficulty. Indeed such a change is long ove due.*

The words of the Professor are apt and sum it all up and give direction as to what needs to be done to meet the democratic standard that is not autocratic on issues of legitimate children. Joint and equal responsibility is necessary in this day and age.

### ***3.3.4 The Courts' Point of View***

In the recent years it seems the courts have been bombarded with court applications by women who have sought to have the powers of guardianship transferred to them so that they could obtain travel documents for their minor children or court applications compelling the fathers of their children to sign the relevant section on the passport form so that they could obtain travel documents for their children. The court has however made clear its stand point on this issue. In the case *Makuni v Makuni 2001 (1) ZLR 189 (H)* the parties were formerly married. At divorce the wife was granted custody of the children and she got employment in the United Kingdom. She wanted to take the children with her but the former husband would not sign the passport forms but instead made a counter request that custody of the children be given to him. The court however ruled in favour of the Applicant and compelled him to sign. Gowora J. held that the rights of the father over legitimate children can be dispensed with if the father refuses to sign the passport forms. The order she passed compelled the Respondent husband to sign the relevant documents and if he failed to do so the Registrar General could go ahead and issue the passports without the signature of the Respondent. This was a liberal interpretation of section 3 of the Guardianship of Minors Act; it was not restrictive.

The issue of the guardianship of children born out of wedlock was satisfactorily dealt with in the case of *Rumbidzai Cleo Katedza v Adrian Tulani Chunga and Registrar of Births and Deaths. HH-50-2003*. The Applicant in this case filed an application for an order declaring that she is the guardian of her minor child and directing the Registrar General to issue a birth certificate for the child in its new name. The child already had a birth certificate in the father's name and the Applicant wanted to change the name to hers. The order was granted by Smith J. The background of the Application is that applicant and first Respondent had entered into an unregistered customary union in which the child was born. Lobola was paid to the Applicant's family. The union broke up two years later and that is when the mother

sought to change the name of the child to hers. **The Registrar refused to issue the new birth certificate despite the court order.** Instead he interviewed the father of the child who was not opposed to the change of name. The court's reasoning on the matter was that the union was not registered hence it was not recognized as a marriage in terms of the laws of Zimbabwe. It was held that the position under general common law of this country is that she, being the mother, is the guardian of her child, the child was to be treated as a child born out of wedlock and for this the learned Judge made reference to Spiro's on the issue of birth registration and naming:

*In the first instance, the illegitimate child takes its name from its mother. The registrar shall not enter in the birth register any name of any person as the father of the illegitimate child except at the joint request of the mother and the person who in the presence of the registrar or assistant registrar acknowledges himself in writing to be the father of the child, any such acknowledgement being only of evidential value in respect of the question who the natural father is. It is also for the mother to assign a Christian name to her minor illegitimate child.*

It was held that from the above it is clear that the mere fact that the name of the father only appears on the birth certificate does not mean that he has any rights of guardianship or custody. It is only an acknowledgement of paternity. The court further attacked the attitude of the Registrar that he did not act reasonably and responsibly. He had no right to refuse to issue the birth certificate that was being requested, exceeded his powers by interviewing the father of the child and for such negligence he had to pay the costs of the application.

This case is significant to the operations of the office of the Registrar General and it clarifies what course of action should be taken if the office is approached by a woman who has an illegitimate child registered in the father's name. The surname is of no effect and the officials should assist such women and not try and invent their own laws to the misery of women. The Applicant sought to change the name on the child's birth certificate from that of her former customary law husband's to that of her own. The court's argument was that the wife could effect the change on her own without the consent of the husband, since his name only appeared as an acknowledgement of paternity and not for any other purposes.

In a related case dealt with by the same Judge an order was granted declaring the mother of a child born out of a customary union its sole guardian. The brief facts of the case of *Nenya v Gambakomba HC10172/02* are that the parties entered into a customary union and a child was born of that union and was registered in the father's name. The Respondent immigrated to USA leaving the child with the mother and her efforts to follow him were frustrated by the office of the Registrar General who insisted that the consent of the father be obtained for the child to be issued with a passport. She had to apply for an order declaring her sole guardian of the child which order was granted on the basis that the court said she was the sole guardian of the child by operation of the law and it was not necessary for that to be declared by an order of the court. An order was granted, however, because it might assist her in her dealings with officials who do not know the law, or who apply what they want the law to be rather than what it is. The Judge further indicated that the acts of acquiring birth certificates or passports cannot be regarded as part of customary law or custom relating to status, guardianship and custody of children in terms of Section 3(5) of the Customary Marriages Act. Birth certificates are governed by Chapter 5:02 and passports are issued to citizens to enable them to exercise their rights of freedom of movement under the Constitution.

The above cases are enough authority to depart from some retrogressive and oppressive measures that gravely affect women when they want to obtain travel documents for their minor children who are registered in the father's name, the courts have done their part in interpreting the law in a clear and unambiguous manner and it is up to the office of the Registrar General to ensure that this is implemented. The law is that in as much as customary unions are not valid there are valid for purposes of customary law and customs relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage. There are some issues especially the one under study which cannot be regarded as part of customary law or custom relating to the specified issues as these include the acquisition of a birth certificate, a passport or a visa hence the refusal to grant the same to women cannot be justified even by reference to customary law.

### 3.4 Test Case Litigation – The *Dongo* Case

Simon Moran has categorized test cases into three types as follows:

- \* Cases that seek to clarify or test the scope of existing legal rights and duties;
- \* Cases that challenge the accepted interpretation of legal rights and duties that are fixed at common law or statute;
- \* Cases that seek to establish new legal rights and duties in the common law or under statute.

The categories set above tend to overlap but the purpose of test cases is to effect change of laws and promote social reform that benefits people who are at some type of disadvantage for which the law can provide some remedy. Litigation obviously has its limitations but it plays an important part in “a multi- pronged strategy to expand social justice and preserve victories against erosion and assault”.<sup>4</sup> The limitation of test case litigation will be discussed later in the section, in the meantime I want to discuss one such case that NGO, Zimbabwe Women’s Lawyers Association has taken up through one of its clients in order to challenge the current law on guardianship. In the case of *Margret Dongo v Registrar General and Attorney General SC 292/08* the Applicant is married to one Tonderai Dongo in terms of the African Marriages Act. They were blessed with a child born on 28 October 1989 and the Applicant sought to apply for a travel document for the child and the First Respondent refused to issue the document on the basis that only the father of the child could sign the papers since this was an issue of guardianship and guardianship is vested in the father in terms of section 3 of the Guardianship of Minors Act. The matter was argued and almost completed but judgment was still reserved at the time this research was started. The Applicant’s argument was based on ten parts but I will consider those arguments that I think are relevant to the study.

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<sup>4</sup> Mary McClymont, Stephen Golub, The Ford Foundation, 2000, p89



### **3.4.1 The Approach to Constitutional Matters**

The contention of the Applicant was that Section 3 of the Guardianship of Minors Act was not in harmony with some provisions of the Constitution hence it was important to argue how constitutional matters should be dealt with. It was argued that all constitutional matters should give thorough regard to the context, spirit and purport of the Bill of Rights in the Constitution. The Constitution usually creates a new legal order. It is a break from the past and it serves as a conversion on the country's values and ethos. It is a mirror reflecting the values of the nation thus it has to be interpreted generously to provide for rights as opposed to taking them away; a generous and purposive interpretation should be the hallmark of all constitutional interpretation. This was as stated in the Namibian case of *The Government of the Republic of the Namibia v Cultural 2000 and Another 1994 (1) SA 407 (NM)* that:

*A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievements of the ideals and aspirations of the national, in the articulation of the values bonding its people and government.*

The above argument will guide the court in interpreting the two competing provisions, which are section 3 of the Guardianship of Minors Act and section 23 of the Constitution. A liberal approach should be given to section 23 of the Constitution so that the values of being non-discrimination are upheld; former discriminatory laws and practices are buried; and the new order may be seen as the giver and not depriver of rights. Guided by this the court (I believe) should have no problems in outlawing section 3 of the Guardianship of Minors Act since it is a retrogressive enactment that seeks to take us back to autocratic and patriarchal society where all rights are vested in the father. The section should not be allowed to stand in the way of the values and current beliefs of our society and in the way of the supreme law of the land which is the giver and protector of the rights of all, especially in this age of human rights which are growing universally popular.

### 3.4.2 Doctrine of Equality

It is also argued for the Applicant that the law treats her and her husband differently with regard the issue of guardianship despite the fact that they are married. The basis for this unequal treatment is section 3 of the Guardianship of Minors Act. This was described as an archaic position of the law which is a mere codification of the Roman Dutch Law where the father is the legal guardian of any minor child. It was noted that the Zimbabwean Constitution has equality clauses under both section 18 and section 23. Section 18 states that every person is entitled to protection of the law and this presupposes that there is equality. Equality, according to Aristotle lies at the epicentre of any democratic society:

*Equality in morals means this: those things that are alike should be treated alike, while those that are unlike should be treated unlike in proportion to their unlikeness. Equality and justice are synonymous: to be just is to be equal to be unjust is to be unequal.*

This distinction between men and women was nothing more than patriarchal and it was argued that there is no government policy that is served in patriarchy. Government policy since Independence (from Great Britain in 1980) has been to promote development of women's status in all the fields of human endeavour and in pursuance of this policy much effort has been put into the removal of barriers that have stood in the way of the Constitution in achieving both *de jure* and *de facto* equality with men.<sup>5</sup> This argument is significant in its endeavour to place women and men on the same level in the eyes of the law.

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<sup>5</sup> This was the finding of Gwaunza J in the case of *Mandizvidza v Chaduka NO and others* 1999 (2) ZLR 375(H)

### ***3.4.3 The Constitution's claw-back Clauses – Do they protect section 3 of the Guardianship of Minors Act?***

The Applicant sought to close all the avenues that the Respondent might want to raise by dealing with the saving provisions in the Constitution, namely, section 23 (3) (a) and (b) (quoted above) on the issue of personal rights and the application of customary law. It was argued that personal law could not include the question of guardianship or custody because these are such important issues that the framers of the Constitution could not have put them in such a fashion especially considering that it is the only that is paramount where children are concerned is their best interests and the need to move towards joint parenting. Besides, the phrase is too broad and ambiguous and would cover all things including private law. On the issue of exception on the grounds of African customary law, it was pointed out that the concepts of guardianship and even custody are alien to African Customary Law.

Guardianship involves performance of juristic acts and the question that will arise is what juristic acts were performed under customary law? None, because customary law was not allowed to develop without fossilization and ossilisation otherwise it would have moved from the concept of ownership to the clear concepts of guardianship and custody. Unfortunately this did not happen. The claw back provision cannot protect guardianship which could not be located under customary law. The Constitution cannot protect that which never existed. It is clear from these arguments that it will still be impossible to protect the rights of guardianship of the father and also to sustain section 3 of the Guardianship of Minors Act. What remains to be seen is whether the Supreme Court Bench presented with such arguments would go on a frolic of their own and ignore such a wealth of knowledge and rule against the Applicant and grant long life to section 3. The period the judgment has been reserved really raises eyebrows but we continue to wait and hope that one day it might happen. The idea behind the case is to challenge the accepted interpretation of the law on guardianship and at the same time establish new legal rights for women who want to obtain travel documents for their minor children.

The Respondent on the other hand has argued among other issues that historically in Zimbabwe the father is the guardian of a child and this arose from the need to stabilize the family. He also stated that marriage is the key institution in society and the application before the court sought to attack the institution and destabilize the society. As regards shared guardianship his argument was that in countries where it has been adopted it has failed resulting in large numbers of children in foster homes especially in developed countries. The gist of the Respondent's argument was well expressed in the submissions he made as follows:

*It is further submitted that the purported discrimination of women and married women is but a perception of a certain category of women whose understanding, interpretation and application of women's rights and gender imbalances issues relating to their lives tends to be clouded by emotions to seek to change the lives of other women and society at large whose relationships will be functional. It is respectfully submitted that the laws which Applicant wants the court to declare unconstitutional are constitutional and reasonably justifiable in Zimbabwe.*

These submissions are enough to tell the attitude of the Respondent towards women, the Respondent is a traditionalist and has taken that into his office and will defend his beliefs without fear because his aim is to preserve culture as much as possible. The effects of this preservation on women is not important, to him women should just sit there and keep quiet and accept all that happens in their lives those that want to complain are rebelling against culture. It is yet to be seen which argument will appeal to highest court of the land and should they go with this one the aim will be to silence women completely so that they retain their traditional position as minors with no say in any matters that concern them.

#### **3.4.4 The Pitfalls of Litigation**

With test cases the idea is to litigate so that we can achieve some social justice. This is not guaranteed especially with rights cases where there are certain issues that have to be established. According to Nherere the issues include whether the issue/right in question is a justiciable right for a matter to be justiciable there must be a judicially discoverable and manageable standard on the basis of which the legal obligation of the parties can be

adjudged.<sup>6</sup> The issue must give rise to a legal question. Litigation is also dependant on the aggrieved party taking up the issue. Closely related to that is the issue of funding, whether the aggrieved party has the requisite financial resources to initiate litigation and is prepared to endure the inconveniences of litigation. The other limiting factor is that the order can in some instances be in favour of a particular individual. This does not guarantee that all the other victims with the same problem will have gotten answers; they might need to pursue their own processes. I however want to believe that this is not the case with the *Dongo* case. This one is likely to have countrywide effect. It can in essence influence change for the benefit of all the women in the same predicament. Nherere also cites another draw back as the issue of separation of powers, where each organ of the state has its own sphere of operation, the judiciary at times has to make decisions against some departments they have no control over and have no expertise in that area. Be that as it may, there is much hope in litigation. Challenging a system that is oppressive is good enough and getting a favourable judgment will be the icing on the cake.

### **3.5 Best Practices in the Region**

This section will look at the law and practice in other jurisdictions on the following issues; law of guardianship, birth registration requirements and the requirements for executing travel documents.

In South Africa they have legislation that governs guardianship and it is the Guardianship Act 192 of 1993. Section 1(1) of the Act provides for equal guardianship of children by parents and it reads:

*Notwithstanding anything to the contrary contained in any law or the common law, but subject to any order of a competent court with regard to sole guardianship of a minor child or any right, power or duty which any person has or does not have in respect of such a minor child, a woman shall be the guardian of her minor child born out of a marriage and such guardianship shall be equal to that which a father has under common law in respect of his minor children.*

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<sup>6</sup> According to Brennan J. in *Baker v Carr* 369US186 at p217

The South African scenario is such that parents have equal guardianship over their children and they can exercise this authority independently. There are however issues that need the consent of both parents like passport applications, where parents are divorced the parent in custody of the child has to submit what they term a letter of permission to issue from the parent who is not living with the child. Single parents have to register children in their own names and the father of the child can just sign to acknowledge paternity, otherwise the child is automatically registered in the mother's name. The passport form also has a provision for a single mother to sign as guardian of the child.

The Namibian Married Persons Equality Act No.1 of 1996 section 14 is worded in almost similar words with the Section 1 of the South African Guardianship Act. It provides for equal and joint guardianship and each of the parents is competent to exercise his or her guardianship rights independently and without the consent of the other. This power is subject to the power of the court to make an order to the contrary. The consent of both parents may be required through an order of the court when it comes to matters of adoption, emigration or obtaining a passport among other issues, otherwise each parent can exercise the rights independently without the consent of the other party. The concept of sole guardianship in the best interests of the child is necessary because there are instances where it might be necessary to exclude one parent so that what is in the best interests of the child is achieved especially on the issue of passports. A child may need to travel out of the country for sports which will probably map the future of the child and a parent who wants to use their refusal to settle old scores with a former spouse should be excluded. The other aspect about Namibia is that a project has begun to register children in hospitals where they are born; the Ministry of Home Affairs has set up offices in some hospital maternity wards. This is progressive in that women especially single ones can register their children in their names away from family pressures to register in the father's name.

The Children's Act of Kenya of 2001 brings with it a new term for guardianship which is "*parental responsibilities*". It is defined as all the duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of children. Section 24 of the Act

provides that parental responsibility shall be shared between married parents with no parent exercising a superior right or claim over the child. Where the parents of the child are not married, the mother of the child shall have parental responsibility at the first instance with the father having an option to apply for the parental responsibility. The Act in my view, tends to put women and men on a par and this is commendable and worth pursuing in a country like ours where such powers are vested in one person. On single parents, it gives women some form of emancipation right from the birth of the child. On birth registration the procedure is that where a couple is not married the name of the father should not appear on the birth registration form. There is actually a note that says, if the mother of the child is not married to the father, do not insert the name of the father. This position liberates women from making concessions with the fathers of their children, which is the situation in our country where even the office where births are registered, women feel compelled to disclose the name of the father of the child because of the belief that every child has a father whose name that child should be registered in.

The Children's Act of Uganda of 1997 also uses the term "*parental responsibility*" include the rights, duties, powers, responsibilities and authority which by law a parent of child has. I want to believe such responsibilities will include executing of juristic acts on behalf of a child and in terms of section 6 (1) every parent shall have parental responsibility over his or her child. Like the other jurisdictions discussed above, discrimination of one parent is not permissible and this only shows how our laws are outdated and lagging behind in the region on issues of custody and specifically guardianship. What might be missing from the examples given above is the need to inform the other party when one is exercising their rights, not necessarily to get their consent but to just bring them into the picture on which areas one has decided to exercise their authority and powers. The Citizenship Act of Uganda also allows a parent to endorse their child on their passports. This is good but I think a child should be allowed to have its own document as long as the procedures are not cumbersome and prohibitive.

## **CHAPTER 4**

### **4.0 FINDINGS AND ANALYSIS**

#### **4.1 Introduction**

This Chapter will present the main findings of the research and further make an analysis of the research. These key findings will include the issues that the researcher initially had when she undertook the study and those issues that emerged during the research. In discussing each issue it will be indicated whether it is part of the initial assumptions or emerging issue since the issues have been mixed to make the text coherent.

#### **4.2 The Difficulties presented by the Law on Guardianship and the Registrar General's Administrative Measures**

This section will seek to address some of the assumptions raised at the onset of the research that women are treated differently from men when they want to obtain travel documents for their children and that the current laws and administrative measures in place make it difficult for women to execute such documents on their own. The law on guardianship in Zimbabwe is very clear in as far as it makes the father of a legitimate child the guardian. That guardianship is exercised in consultation with the mother, who can make a High Court application to challenge such if she feels the child's father is acting to the detriment of the child. The intention of the legislature in my view was to accord guardianship of legitimate children only to the father.

The practice on the ground at the office of the Registrar General is that every child as long as they are registered in the name of the father, that father whose whereabouts in some instances is unknown is the guardian. That is how Section 3 of the Guardianship of Minors Act is interpreted at the office of the Registrar General. The Deputy Registrar General informed me that when issuing a travel document for minor children the surname that appears on the birth



certificate of the child will inform them who the guardian of the child is. The issue of marital status of the mother of that child is vital but not relevant. She further informed me that beside the law, they have their own policy that guides the office on travel documents for minor children. This policy is influenced by the Guardianship of Minors Act which states that the father is the natural guardian of a child and the High Court Act which makes the High Court the upper guardians of minors. Their policy is that if a woman wants to obtain a travel document for her child and the child is registered in the father's name, **the father of the child has to appear in person to sign a special section on the passport form.** The passport form has various sections but section 5 of that form has to be signed by the guardian or father of the child. To them the person whose name appears on the birth certificate of the child is the guardian; for anyone to sign who is not the father they will have to get a court order awarding them guardianship of the child. If the father of the child is out of the country he has to go to the Zimbabwean Embassy in that particular country, purchase the form, fill it in before a consular officer, then fax it or send it by a diplomatic bag, courier or find other means of sending the form. In the event that the father of the child is dead or unavailable they can require the paternal grandparent to sign the section 5 and should he not be available they trace through their records who the nearest paternal relative is who can then sign section 5 of the passport form.

A mother who has a child that is registered in her name can easily acquire a travel document for her child. She said to me that it is unfortunate that in some instances, their policy can end up creating problems for the women involved but it is not their intention to cause problems but they have reasons why they operate in that manner, which reasons will be looked at later in the discussion. She also informed me that for men it is different because men who have children registered in their names can come and get the passports for their children on their own.

There is no doubt that such a 'strict' interpretation of the law and the cumbersome procedures present a lot of problems to women. Some women have lost lifetime opportunities because they could not meet the requirements. An example is Ratidzo Gava. She has an accounting background and had secured employment in South Africa and she intended to take her child aged 3 along with her. She had not got any assistance from the offices because the officials

wanted her to bring along the father of the child to sign the relevant section. Unfortunately she did not know the whereabouts of this man; they had a sexual relationship, a child was born her parents persuaded her to register the child in the father's name for cultural reasons. The man was available hence the child was so registered, she last saw the man at that stage and since then he disappeared into thin air. She had tried to explain her situation to the Registrar's officials but they would not buy it. This was the second time she had come to try her luck but it was never to be. She was not aware of other means to get help. Her fear was that she would lose the job in South Africa. Her parents were not in a position to remain with the child in Zimbabwe, they were of little means.

The lifetime opportunities are not only lost by women but by the children that need those travel documents. The question is whose interests are those policies and law serving? Obviously if it is not the interests of women or their children, then it must be the interests of men. If it favours men then it must be men's law. Is it not necessary then to have laws and policies that consider the interests of these marginalized groups? The answer will always be in the affirmative.

Ms Masuku a lawyer with the Legal Aid in the Ministry of Justice told me of a case she had dealt with. The father of the child, as is the norm, had refused to obtain a passport for her child who wanted to travel to Italy with the school's drum majorettes. She made an urgent chamber application for an order declaring the mother the guardian of the child. Unfortunately the matter did not sound urgent to the Judge and it was placed on the normal roll and by the time the order was granted the team had already left for Italy and that child was left behind. Who knows how that Italian trip would have shaped the child's life? It was probably her dream. Besides it is not all children who are academic achievers, so should they be disadvantaged by a system that discriminates against women thereby impacting negatively even on the children. This should not be. A call for a revamp of the system would not be asking for too much. Ms Masuku also told me that the women that they have dealt with on this issue look and sound traumatized and confused and they lack confidence. This only explains the impact of the reception they get at the Registrar General's office. Instead of being advised on the routes they can take, they are often turned away as if they were not people at all.

Mrs. Marutsi, a paralegal with High fields Projects Centre, was also concerned with the attitude that women are faced with. They are treated like people of loose morals. It seems it is unacceptable for women to just state that they do not know where the father of their child is.

These are some of the challenges that women face at the Registrar's General's office which are a result of the retrogressive, oppressive, outdated and patriarchal laws and policies that influence the operations in that office. Most of the countries in the region have moved from the traditional position of sole guardianship to progressive steps whereby the man and woman are given equal status and have the same rights and obligations over children. Equal rights in this regard will mean each parent can independently exercise that right and what is important is to inform the other party, not necessarily to get their consent. No parent is superior regardless of marital status. This is the way to go and I am confident that we will not regret it should we as nations decide to adopt such measures in our legislation.

#### **4.3 The Impact of the Law and Policy on different Women**

This section partly addresses the assumption that the law and policy hinder women from obtaining travel documents for their minor children. It will basically explore the various categories of women and how they are affected by the current laws and policies when applying for travel documents for their minor children and this is from the discussions held with the Deputy Registrar General.

##### **Group A**

This group involves those women who are not married and they do not register their children in the husband's surname. They do not have problems when they want to obtain travel documents for their children. The children bear their name. They are the guardians according to the set requirements. The question however is how many unmarried women are able to stand and assert their rights when the man who has to issue them with the birth certificate tells them to go and bring the father of the child otherwise they will never get the birth certificate. It is likely that they can find themselves in some categories that are troublesome.

The guarantee that they will not have problems with the passport is ON condition that they managed to be assertive to have registered their children in their own name.

### **Group B**

This group consists of unmarried women who for reasons mentioned earlier have registered their children in the father's name. The Deputy Registrar General acknowledged the effect the case of *Chunga* should have on them, they should be allowed to sign section 5 of the passport form since they are the responsible parent, the name of the father appears only as an acknowledgement of paternity not as guardian. These women however still suffer at the hands of the officials as they are told to bring the father of the child. The problem is upon implementation, the office recognizes the import of customary law that the father is the permanent guardian of the child. They do not subscribe to general law that allows the shifting of guardianship. This is stiff resistance from the office of the Registrar General and it is depressing to note that even with case authority to guide it, the office is a law unto itself. Change in the office is long overdue. This calls for revamp in the system and the officials that administer that system. Ratidzo was compelled by her parents to use the father's name and in the end found her self in this category. She could not locate the partner and her job in South Africa was dependent on whether she would get it or not.

### **Group C**

According to the Deputy Registrar General this group consists of women who are in registered marriages. They are not the guardians by virtue of the marriage hence cannot sign section 5 of the passport form. I was informed that they usually do not have problems because couples tend to agree on certain important issues and come with their partners to obtain travel documents. This category sounds as though it does not present too many problems to women but the reality on the ground is that they also have difficulties and the *Dongo* case is one example where this position is being challenged. Treating parties in a marriage as unequal is unconstitutional and discriminatory hence the need to accord women and men equal rights over their children despite their marital status. All parents are important and they should be treated as such.

### **Group D**

This group comprises those women who are separated from their spouses but the marriage still subsists. The father retains guardianship of the children. These cases are very prevalent. Usually the father is out of the country and at times the separation would have been a nasty one such that the children are used as weapons between the warring parents and it is the children who suffer the most. The husband will not hear her and the passport office will not listen to her story. She is caught between a rock and a hard place, but it is these very institutions that should give her the relief that she requires. If such public institutions cannot serve the interests of those they are meant to, including female citizens, it is obvious they need to change both in their structures and personnel. This is not asking for too much but mere service from those that are supposed to deliver. Patience had to use illegal and risky means to get the service she wanted after she found herself between an abusive husband and a rigid and insensitive system. She had to forge the signature of his husband and risk being imprisoned after the husband had refused to cooperate. The question is how many women have the capacity and courage to devise other means. The need to revamp the system is clearly vital and it has to be done now.

### **Group E**

These are the women who are divorced and like separated women, the father retains guardianship. They cannot successfully apply for travel documents unless they get a court order transferring guardianship to them. Most divorce orders do not include a determination on guardianship and the assumption is that the father is such. The woman has in some instances gone through a nasty divorce; how is she expected to get the arrogant man to understand which is not easy like what Machingauta told me:

It is stressful to beg somebody that you are divorced with they will give you a tough time, even tell you unprintable words, my husband told me to seek help from the men that I was sharing my bed with, he could not help because there was no benefit he would get from me.

They are no exception to the problems encountered by all the other women. Theirs is worse in that it has an element of trauma. It is evident from the above that with the current

legislation and policies women, despite marital status are victims of the system. It needs no fortune teller to point to the need to change they system. If some countries have opted for shared guardianship, we also need to move towards that. It is clear that being rigid does not really pay.

#### **4.4 Factors influencing the Law and the Registrar General's Administrative Measures**

This section will address the assumption that there are various factors that influence the law and the administrative measures that are currently in place. According to African custom, a father has absolute control, custody and guardianship of all children born of the marriage, whether it is polygamous or monogamous.(Goldin and Gelfand,1975) The man through payment of lobola acquires these rights. The mother of those children because she is married and bought, she is also a subject of the husband. The man is the head and is the owner of all that is under his household and it follows that nothing can be done without his approval. Actually he should be the one to initiate everything that might need to be done in the home. This scenario is a reflection of culture and its closest ally patriarchy. The law that we have on guardianship dictates that the father is the natural guardian. No travel document can be issued without his approval (signature on section 5 of the passport form). The policy on the other hand as I was informed seeks to link the child to his father and to maintain that link. The Deputy Registrar General said that their office does not believe that there is a child without a father and a traditional descent; her words were '*hakuna mwana asina dzinza*'. The turning away of women to go and bring the father of the child is evidence that the father is regarded as the owner of the child.

Clara Chisi when she was refused to execute a passport for her child, got the explanation that she would be stealing the child if the process was done without the father. 'You steal what is not yours,' that means that the child is not the mother's but the father's. It follows therefore that the law and the policies in place on this issue are a mirror of the cultural belief that the child is the father's and the patriarchal system dictates that the man is the head and is the

initiator and approver of all issues regarding the family and his subordinates, the wife and the children.

Religion and patriarchy are sometimes separated by a thin line; Patience Rembo was told that even if she was divorced from her husband, the man was biblically the head of the house so she had to bring him along so that the process could be completed in time. His approval of the process could not be dispensed with. With such findings, I am tempted to believe that the laws in operation and the policies in place are not from the moon but a perpetuation of some ugly cultural, patriarchal, social and religious beliefs that have the effect of reducing women to perpetual minors who are incapable of initiating and completing juristic processes for their minor children without the approval and assistance of the men. The payment of lobola plays a critical role, where it has been paid the father has absolute control of the woman and her offspring. They become some commodities that owned by the man hence she cannot successfully apply for a child's passport on her own. If a woman was seen as a human she would be allowed to do all this on her own but because she is the other, no equal to the man, she is disabled.

#### **4.5 Birth Registration Requirements – a Catalyst to the Problem?**

According to one official who works at the births registration office, a woman who is married is expected to bring her husband along to register the birth of that child. They require physical appearance of the father of the child. Besides the physical appearance of both parties, a marriage certificate is required and the woman is required to change her surname to that of the husband if she had not done so in the past. The last requirement is so important to the office but very unnecessary and inconvenient to the woman. The explanation that I got for the change of name of the woman is that it is what the Registrar General wants. A single woman can register her child in her own name but she told me that they however prefer that the woman brings along the man who is responsible. They have been told to insist on that because the Registrar believes that there is no child who does not have a father. In some instances where a couple is not married but agree that the child be registered in the name of the father the officers are willing to do that. In all these scenarios, the woman should bring a

birth record which she obtains at the maternity home where she delivered the child. The birth record simply states the day the child was born, the sex of the child, the place of birth, the name of the child and the name of the mother.

The above requirements sound very noble but in practice the position is different especially for single or unmarried women. Some of the women approach the office with the intention of registering their children in their own names but they are turned away and told to bring the father of the child. This practice is common at the office of birth registration such that women are compelled to drag along an unloving and irresponsible man to come and be registered as the father of the child. This causes problems in the future when the woman wants to get a travel document for the child. She has to find that man who has never been cooperative from the time the child was born and in most instances the man would have cut ties with this woman and it is difficult to locate him. If you located him the problem is to have him sign the passport form. Mrs. Marutsi who works for Highfields Projects Centre confirmed that single/unmarried women are turned away and told to bring the father of the child.

The women whom we empower and encourage to register their children in their names are usually turned away and told that there is no child without a father hence they should go and bring the father of the child. Even if we empower women this will not work unless the attitude of the officials at the Registrar General's office changes because their attitude really embarrasses women and portrays them as people of loose morals who just sleep around. This requirement really costs women because they are not assured that this man will also be available in the future to assist with other documents.

The same sentiments were expressed by Phillipa Muchemwa, the Projects Lawyer with Legal Projects Center in Harare who said the practice is very prevalent and it takes women who are assertive to get what they want, but one cannot be assertive in an environment they are not familiar with.

Gloria Mpofo, a single mother also shared her experiences and said at the birth registration stage she managed to persuade the man who made her pregnant to come after the officials at the births registration office told her that as long as the man was in the country, she had to



bring him along otherwise they would not register the child. The problem was getting a passport where the father of the child would not budge because he says his child does not need a passport; he is Zimbabwean and will stay in Zimbabwe so he will not hear of the issue of signing the passport form. The child does not have the passport up to now because the father will not cooperate. The situation would probably be different if she had been allowed to register the birth in her own name; she would not need the assistance of the father of the child to get a travel document. Three other women that I talked to had difficulties in getting travel documents for their children because they could not find the men whose names appeared on the children's birth certificates.

The law that single/unmarried women can register their children on their own is very good. It would however be beneficial only if the office responsible would live by that and desist from crowning the man with all responsibilities even when he is irresponsible and not befitting that title. If the woman approaches the office on her own, she should be allowed to take the birth certificate on her own. Her appearance on her own speaks volumes about the man responsible for the pregnancy. It is either he is not willing to be known as the father of that child or the woman is responsible enough to take up that responsibility hence the office should accept and spare the woman the trouble of dragging an unwilling man.

This concept that the Registrar General's office has that every child has a father and that father should register the child should fall away because it creates problems for the woman especially when it comes to obtaining travel documents for the children. The same father who has not been cooperative from the day the child was born is unlikely to have reformed to become more cooperative. For married women who are in loving, harmonious and accommodative relationships, the requirement of having the father present at birth registration could be workable but it's not on all issues that married people get each other's consent. The issue of passports for children is one such issue and from the field it emerged that men do not easily give their consent when it is the woman who initiates the passport application for the child. The man would be adamant. Patience Nyuswa was married but the husband would not cooperate when she suggested that they obtain a passport for their child. They were living under the same roof but he refused and she had to engage other means to get the passport after his refusal.

Whichever way, the requirement is likely to impact negatively on women and creates the ground work for future figurative landmines at the passport office. If anyone cares to address the issue women whether married or not, should be allowed to register the child in their own names to avoid the hassle and sometimes humiliation they experience at the hands of the officials at the passport office who label them thieves who want to steal children and people of loose morals who do not know where the fathers of their children are. The requirements are an exact opposite of the dictates of modern society where men and women are equal and the human rights instruments call for states to have policies and laws to this effect and our country through the office of the Registrar General has an obligation to ensure that this equality becomes a reality. It is not a question of what the office wants but it is an obligation to be fulfilled.

In as much as the requirement to have the father of the child appear, there are some other reasons besides this compulsion that make women especially the single/unmarried register their children in the name of the father and the next section will consider these factors.

#### **4.6 Why Women register Illegitimate Children in their Father's Name**

This was an issue that came up during the research. The Deputy Registrar General informed me that out of say a possible number of ten women, who come to have their children registered, eight are not married but they decide to have the birth certificates in the surname of the father of the child. The reasons for such a scenario she suggested could be that women do not want to reveal their true marital status for fear of being stigmatized as loose women who give birth to children out of marriage. Traditionally it is unacceptable for a woman to give birth out of marriage. This fear of stigmatization has also seen some women bring the identity document of the man they allege to be the father and claim that they are in an unregistered customary law union, a claim their office cannot dispute<sup>7</sup>.

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<sup>7</sup> I am sure it makes the life of the office easy as they are more comfortable if all children, legitimate or otherwise, are registered in the father's name.

Culture seems to have a serious hold on women. They want to be right with culture all the time; but it is unfortunate that they are short-sighted and cannot see what problems this could create for them in the future. It is also the duty of society to accept that the same culture that we want to abide by so much is also very dynamic. Times are changing. So why should women be labelled loose when they have children out of marriage, if the man does that he is some kind of hero and at times it is never spoken about. If we decide to term an act bad then it should be bad whether it is done by a man or a woman. If we decide to celebrate let us celebrate the man and women who have children out of marriage not be after the women only.

Still on culture, the issue of names is very important with some believing that the boy child should as much as possible take his father's name. Munhenzva, one of the few men I talked to said:

If my wife cannot give birth to a boy and my small house<sup>8</sup> does that for me I will take whatever means possible to ensure that the child is registered in my name and have access to that child even if it means begging and paying the small house, I will do that.

This is how far our culture values the boy child and his identity, but as mentioned before, there is need for our culture to adapt to the changing world so that women are not only instruments that produce children that are not theirs but the father's. Women need to be given that same claim over children whether it is a boy or girl.

According to Mrs. Marutsi a paralegal at Highfields Projects Centre some women are not so informed that they believe that if the child is not registered in the father's name they might have difficulties in claiming, maintenance from a man who has a different name from that of the child. This is just ignorance and misinformation and it just needs that women be sensitized on this aspect so that they do not find themselves in some kind of a mess with a name of a father whose whereabouts are unknown on their children's birth certificates.

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<sup>8</sup> It is the name used to refer to the woman involved in an extra marital relationship.

Traditional beliefs also have an effect on the registration of children. It is believed that to avoid spiritual problems a child should be known by his father's name. Ratidzo Gava, for example had her child from a short term relationship registered in the father's name because her parents insisted the child be registered as such to avoid spiritual problems from the child's ancestors and this could include sickness or some weird behaviour by the child. Culture and cultural beliefs are major concerns when it comes to child registration. Some of the beliefs could be true but at times it is just fear of the unknown. The point is there is need to deal with culture. We do away with those traditional practices that hinder the progression of women and promote patriarchy because a woman is an equal of the man and she should view herself and be treated as such. This however is not as easily done as it is written but it takes concerted effort from all stakeholders that include the custodians of culture, law and policy makers and the women themselves.

The other factor that appeared to influence women to register their children in the name of the father is deceiving relationships that would have been created with the man or his relatives. Clara Rembo had a happy relationship with her boyfriend and she believed that things would work out and probably she would get married hence she registering the child was a way of working towards a promising relationship. Unfortunately the man deserted her and what remains of him is his name on the child's birth certificate, complicating her life. Another woman Clara Zvenyika a single mother fell for the antics of her mother-in-law to be. Clara said:

My boyfriend's mother liked me very much and even when I was pregnant she would make sure that I was comfortable such that when I gave birth I felt indebted. I could not refuse to have the child registered in his father's name. It was just proper at that time and it was worth it.

That is how some women were created. We sacrifice and comply with certain conditions hoping that the future will reward us for that sacrifice. At times it does not, like in Rembo's case. It is time that women start to believe that they can do it and be what they want without really identifying with a man. Not that all men are evil but we can do without them. They can

help to have the child but we can do the rest. The issue of identity was also raised by Portia Madzivanyika, who said:

Assuming that I have a child with Philip Chiyangwa<sup>9</sup> I would not think twice about whose name should appear on the birth certificate so that the child knows and it will help that I will get maintenance without going to court as he won't have his name tarnished in the papers.

It does sound wrong to a Women's law student but to the woman in the street that could be an achievement, a child with the rich and famous. Women are capable of standing on their feet and succeed but this mentality has to be dealt with so that they realize that they could be the rich and famous that men might want to identify with them. It is clear from this discussion that if these factors that influence women at child registration are to be a thing of the past, there could be ingredients for the recipe for attitude change from the officials at the births registration office. These include, discarding of cultural practices that promote patriarchy and hinder the progression of women and lastly make the woman realize her worth and capabilities. These are not conclusive but could go a long way in addressing the issue; there are other factors that can really add flavour to the recipe.

#### **4.7 Policy Justifications and Women's Responses**

These issues discussed here came up during the research. According to the Deputy Registrar General their office policies on issuing birth certificates and travel documents are based on certain values and principles. She said that their office has been accused of being rigid, gender insensitive and a promoter of African culture but they have reasons for operating in that manner.

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<sup>9</sup> He is one of the famous and very successful businessmen in the country.

Their office does not make it easy to obtain travel documents for minors partly because they want to protect children from acts of trafficking which is likely to happen if a person who is not the guardian of the child signs the passport form. There are circumstances when they can allow even a grand parent to sign like where the child has to attend an emergency medical operation out of the country. Their office, according to her is not cruel and insensitive to the plight of women but the office wants to protect the best interests of the child. Her office has an open door policy. The majority of women who approach that office to apply for travel documents for children are women and the reason being given for not assisting them is that they can traffick the children. Women trafficking their own children? That is absurd. It might be valid but it is being applied and affecting the wrong people, women will do anything to protect their children not harm them. This reason does not sound good enough unless if the trafficking they refer to is just taking the child out of the country without the knowledge of the other party. All the same it would be for the good of the child in most cases. There was no example she gave me on such cases but she told me of a man who came fuming and threatened the office after passports had been issued to his child without their knowledge, not that the woman had taken the child out of the country.

The other reason is that the office is very alive to the system of family trees hence they require that a child be registered in their true name and that name be maintained so that the family tree is not disturbed. People of the same clan should be easily traced. The office feels it is morally wrong to remove a child deliberately from their family tree through some administrative measures. This guards against some step fathers who steal children and this happens in circumstances were a woman remarries and changes the children's surnames to that of the new husband to ensure the children benefit from schemes like medical aid from the man's place of work or from his money. This cannot be theft but a sign that we still have some men out there who really care. On the issue of family trees, the question is what value it adds in a child's life that in some cases has been long abandoned by the father. Why hook up the child with a man who never bothered to take responsibility for that child? It is time that fatherhood should be earned not just given wantonly through the family tree. This might however be valid to the extent that there are some shocking cases of sexual relationships like incest which result in pregnancy and such children have a right to know their true origins. That is when the office comes in to link children to their true family.

Closely linked to family trees is that the office believes that there can never be a child without a father and that a child belongs to the father, hence they make it tough to get any document without the father. This is just a mere perpetuation of cultural practices meant to belittle the woman and make her a perpetual minor who cannot do any juristic acts for her child without the assistance of the man. It is the preservation of patriarchy. Patriarchy can never be a principle or value because it does not benefit anyone even the child whose affairs are at stake, except the power hungry males. A public office should serve public interests but in this case the justifications that are in place are meant to maintain male dominance, they are against the emancipation of women.

Women had their own responses to these justifications on the policy at the Registrar General's office and particularly on trafficking Mrs. Matikiti had this to say:

Women are known for being strong and resilient but when it comes to children we are not like that, no woman in her proper senses can do such a thing to her own child, giving birth is such a painful experience and woman cares so much for their children they want to know where the child is always, what she eaten, who spent the day with her and what she was doing the whole day, trafficking for women is out of the question.

Trafficking of children is a reality but the question is who is the perpetrator of this heinous offence? By denying the women the rights to obtain travel documents for their minor children are we in any way dealing with trafficking? Is it going to alleviate the problem or these are just flimsy excuses? I want to believe that we are misfiring at our target, it is wrong, if we want to deal with trafficking, besides the relevant institutions should be dealing with the issue, the police and not the passport office. If almost all African nations have entrusted the woman with equal responsibility as men over children does it mean the women in Zimbabwe must be very evil to have been denied this right? Safeguards are actually in place to ensure that their evil is nipped in the bud. This only shows how the policy is not alive to realities. It is high time that the office of the Registrar General admits its shortcomings that impact badly

on women and start to be practical and desist from tendering flimsy excuses for their ill-advised policies.

On the issue of maintenance of family trees, Takura a banker I talked to said to belong or not to belong to a certain family tree should be an individual's choice. The Registrar General should not force it upon anyone. He has no obligation to ensure that the child is linked to his family tree. It should be that child's choice. I tend to agree with that proposition. Children should be allowed to make their choices. The office has no legal or even moral obligation. To me it concentrates on issues that are not important to its functions but trivial and put so much emphasis on them. Some children have gone without birth certificates for the best part of their childhood because of such requirements and some are missing out on lifetime opportunities because they have no travel documents. It is appreciated that the number of fatherless children is high; the system has to strike a balance so that the fatherless benefit and those denied by their fathers also benefit from the system.

Mbuya Mandizvidza had this to say on family trees:

To know where one comes from is good but it is not necessary that you carry that name, there are great people we know even some of our leaders use their mother's names and they have not had any misfortunes instead they have excelled in life.

It is good to know one's family but to be bound to them through some administrative measures is really not necessary. The Registrar General's office cannot really continue with that policy because it has emerged that it is not primary to those children especially the illegitimate whose father at times has nothing to do with them. Truly speaking, the justification for the policy is not sustainable and it only makes sense that the policies be changed to meet the public interest. The policies have an effect of discriminating against women and drastically changing the future of children. An ideal situation would be that children take on both surnames and when they are old enough they can make a choice.



#### **4.8 The Effects of Economic Instability**

The economic instability of recent years has seen the increase in the number of women who want to obtain travel documents for their minor children. The twelve women that I talked to at the office of the Registrar wanted to travel out of the country, to seek employment or to follow their spouse who had already left the country and were working abroad. Mrs. Barwe wanted to obtain travel documents for her two children so that they could follow the husband who was working in South Africa. She had successfully processed the papers since the children were registered in her name because the husband rarely comes to visit because of the nature of his employment so the children were registered in her name for that reason. Ratidzo Gava also had secured employment in South Africa and wanted to take her child with her but she had failed to secure the document because the child had the father's name.

Any policy should be responsive to the changing times but ours remains rigid making life difficult for the citizens especially the vulnerable, women and children.

The crisis has also seen women who are custodians of children being compelled to rise in the early hours of the morning and get their place at the queue at Registrar General's office. These include grandmothers who naturally should just sit at home and wait for their children to bring them goodies from town. In this era this is not possible as they have to try and help their children to make ends meet by processing travel documents for their grandchildren whose parents have left the country to seek greener pastures. Mrs Chikwapi aged 54 was one such grandmother I met at the queue. She was however not successful in processing the passport for her grand child because they wanted the father of the child to sign section 5 of the passport form which has to be signed by the guardian of the child. In this case it was the father since the child had the father's name. She was fortunate to be told to go and get an order from the High Court but there was no elaboration on how she would get it.

The above shows the effects of economic meltdown and how it can be important to address the issue rather than to stick to the former and usual way of doing things which does not in any way benefit the citizens of a country. It is imperative that policies especially in public

offices should address the concerns of the nation at large. It does not bring blessing to a nation to see old women with genuine needs being denied help by a public office. A people are the responsibility of the government and any nation that does not seek to meet the needs of its citizens has failed in its mandate. If there is anything that needs immediate attention is our economy. True things have changed, but that does not answer all the needs. More action is needed so that those grannies rest and enjoy in their old age and that the nationals serve their nation without envying those across the borders. But most importantly the office of the registrar should have policies that accommodate all people and that adjust to the changing times so that their purpose of serving the nationals is achieved.

#### **4.9 Alternative Solutions to the Problem**

This section partly addresses the assumption that there are ways available to deal with the problem that woman face. There are various ways that have been invented to go about the woes that women face. Some of the ways are legal and some illegal as will also be discussed in this section.

##### ***4.9.1 Interventions of NGOs***

Some NGOs like the Justice for Children Trust, Legal Resources Centre and Zimbabwe Women Lawyers Association have led the way in penetrating the system to ensure that women get the documents they require for their children by litigating on behalf of the women and at times they make correspondence to remind the passport office of the case authority that governs that area. Success in litigation is not always guaranteed, the *Dongo* case which is expected to bring a breakthrough. The limitations of litigating means that women will continue to face these hassles thus the need to have a lasting solution to the issue.

### ***4.9.2 The High Court Route***

Prior to 1993 the women who had problems would just approach the Judge President who would write a Memo to the RG and the RG would act on that memo to issue travel documents for children. According to an official at office of the Assistant Registrar of the High Court the procedure they perceived was being abused by women and the JP issued a Practice Direction of 2003 which required that women who need the service of the court should approach the court like any other litigant and file the necessary papers and appear in court or chambers to defend their applications. The Master of the High Court attaches to the women's application the Master's Report which states his opinion on the application whether or not it is in the best interests of the child to grant the woman an order declaring the woman to be the guardian of the child. The final determination rests with the judge who can either grant or refuse the order being sought by the woman.

The difficulty that I have noted with the relief is that with High Court cases one has to be legally represented. The procedure is complicated and it is not all women who can comprehend such procedures. The cost and the complexity of the procedure means that the route is a preserve of the elite and the well to do women, thus living out the majority of the disadvantaged women who are the exact opposite. Besides, there is no guarantee that the order will be granted, so for these reasons the route is insufficient. It caters for just a small percentage of women.

### ***4.9.3 Corruption and Underground Deals***

The current system has become fertile ground for illegal dealings and bribes. Mai Welly told me of her experiences and how much she had lost on two occasions to officials at the passport office who elected to help her since her husband was out of the country. On the first incident she lost about 700USD when she wanted to renew a neighbour's passport who was out of the country. The process never went through and she had to report the matter to the police. On the other occasion she needed an emergency travel document (ETD) for her child

so that they could visit the father South Africa; the ETD costs 39USD but she had to pay a 100USD so that she could evade the inhibitive procedures.

While the office claims to be taking preventative measures worse things are happening right in the office that is meant to guard evil from happening. Underground dealings are probably the order of the day and it is likely that women who are seen as having the means will never get services unless they bribe the officials. Still this route will serve women who have the means and desire to risk those resources.

The system has opened opportunities for worse things which include forging of documents and the concealing/disappearance of these documents. Patience had an experience that only shows what worms the system has created for itself. She was married to a violent and abusive husband, who was a soldier, and she wanted to escape with her child to the UK. The husband refused to sign the papers so she approached his relative who has a big post in parliament who then instructed the Registrar General to issue her and the child with passports. She forged her husband's signature on section 5 of the form and the passports were issued. Information was leaked to the husband about the passports and he came fuming at the office of the Registrar General as he denied ever signing the form as guardian; unfortunately the forms to verify the signatures could not be located and she had been arrested for forgery and uttering but was released for lack of evidence. This is all a result of a system that does not work for women. Those with the desire will go this far but it is not what we want. Let us correct the system. She also told me of her sister who is based in the UK who through paying the officials managed to retrieve a copy of her former husband's Identity Document and managed to process the passport for her child and she was paying all those guys all the way through until she got the document in her hand.

I do not blame these women it is the procedures and the laws that are inherently inadequate and discriminatory that give rise to such corrupt and criminal tendencies and this will only come to an end if these laws and procedures are changed because they are not serving any good purpose. Instead their application foment a climate of corruption and underhand illegal activities.

#### ***4.9.4 Cross-border Child Smuggling***

Some women have resorted to crossing the border illegally with their children if the correct source of help fails them as it always does. Mrs. Damba that said that since she could not get the travel document she would just cross the border illegally with her grandchild and pay the conductors of the bus she will be travelling with. These conductors actually make a killing out of such acts. Women are ripped off either by the corrupt officials or by the other means and it is time that they proper and adequate relief.

#### ***4.9.5 Internal Remedy***

According to the Deputy Registrar General (DRG), her office is open to women who might have genuine problems so that they are assisted but with the way our public offices work, seeing the boss is difficult unless you are somebody special. Besides I am sure the majority of women are not aware that after being harassed at the lower offices, they can still approach the higher offices with their requests. The DRG said their long term plan was to engage many legal personnel so that women and everyone else gets help. This would probably be a positive move although it is too early to judge how effective it might be. The open door policy has to be communicated to the members of the public and measures that allow for it to work should be put in place.

#### **4.10 What do we do with Section 3 of the Guardianship of Minors Act (“GMA”)? Answers from Women’s Perspectives**

Women do not just sit and bemoan their situation. They think and wish and some of their wishes will be discussed in this section. Some women believe that this section is out of touch with reality and it has to be struck out; Ms Chipfupa had this to say:

It should be common knowledge that the mother of the child is care giver and owner of the child, just strike out that section and you will

see that the issue of being asked to bring the father of the child will die a natural death.

It might sound like the idea is far fetched but I agree with it. Let us remove that which is currently giving us problems and see where the problem will arise from. Even the learned lawyers who argued the *Dongo* case want the section to be struck for its failure to comply with the Constitution. If that section is removed the Registrar General will probably be compelled to abide by the Constitution, treating women and men equally. This would assist the women categorized as **Group C** (above) the married women and even all the other groups as it will remove guardianship from the father. Some however felt striking out the section will not yield the results we want; rather let us have it amended and according to Priscilla a lawyer, the section should be amended to require consent from either party. The father of the child should not exercise his powers without the consent of the mother and the same should apply to the mother. In this way discrimination against one partner would have been dealt with, both parties will be placed at an equal footing. This will be helpful to all women regardless of marital status as they will be placed at an equal footing with men. This is equally good but women have suffered so much differential treatment from men and one is tempted to say at least they deserve that unfair advantage for once, but what is required is a working system, practicality and equality.

Takura the banker felt that the issue of single mothers should be stated in clear terms and should also be alive to reality. She said:

The current law dose not sound practical to me, it does not consider reality and it does not address the plight of single mother. What I suggest is that there should be a provision that allows single mothers to get passports for their children on their own without regard of the name that appears on the birth certificate, I have single handedly brought up the child and I know what is best for them.

Single mothers are so disadvantaged that at times they cannot locate the father of the child. To allow them to execute the documents would mean so much to them as that would lessen

their burden since most of them have the sole care of the child. The father contributes nothing. That is enough trouble. Passport application procedures should not add to that.

Some women took the traditional way to say if a man has not paid bride price they should not be guardians of those children which is the current position. This could be retrogressive to some extent it is like going back to the traditional position that we so much detest and also it makes children some form of commodities who can be transferred upon making some payment.

These suggestions can be sifted and merged to come up with a progressive provision which will see section 3 of the GMA being deleted and in its place equal rights and responsibilities for men and women over children, consent being a requirement that can be waived if the other party is being unreasonable in refusing to give their consent. Single women should be vested with all the rights and responsibilities over children and if the father wants to share, he has to apply for such an order. This could go some way in addressing the long standing issue of guardianship in Zimbabwe.

## **CHAPTER 5**

### **5.0 CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Conclusion**

Despite their marital status, women in Zimbabwe, who have their children registered in the name of the father have great challenges when they want to obtain travel documents for these children. The current law on guardianship and the administrative measures set by the Registrar General hinder them from executing such documents without the man who is bestowed with all the rights of guardianship of the children. Besides being inhibitive the law is also discriminatory thus offends against the provisions of section 23 of the Constitution of Zimbabwe which outlaws all forms of discrimination and is not in line with international instruments that advocate for shared parental responsibility without regard to marital status. The administrative measures are based on this law and are also a reflection of the beliefs and personal views of those that are in charge. Some of the countries in the region have moved from this traditional position of crowning the father with all the rights of guardianship but have progressed such that guardianship is shared equally between parents. It will be best to move towards that direction. Legal and illegal measures have been devised to go around the problems created by the current law and administrative measures. A public system put in place to benefit the people should be responsive to the needs of the people and should treat all people equally despite their sex or gender. The situation is bad but not hopeless. There are certain measures which if adopted could go a long way in helping the situation of women in Zimbabwe.

#### **5.2 Recommendations**

The following recommendations are made to ensure that women also enjoy the same rights and responsibilities as men and where necessary exercise some autonomy.



### 5.2.1 Law Reform

Section 3 of the Guardianship of Minors Act (“GMA”) is undoubtedly the most contentious provision when it comes to women being unable to obtain travel documents for their minor children. Its discriminatory and inhibitive effects have been noted and as such it is imperative that its provisions be changed. It is submitted that the section should be deleted and be replaced with a provision that allows for shared guardianship between parents. Consent would be a factor but where another party is unreasonably uncooperative the consent should be waived. Single mothers should be awarded sole guardianship and a father who wants a claim over the child should get a High Court order to that effect. The proposed provision for single mothers should read something like:

*Where a child’s mother and father were not married to each other at the time of the child’s birth and have not subsequently married each other:*

- a) *the mother shall have sole guardianship of the child;*
- b) *the father may subsequently acquire such guardianship over the child through an order of the High Court.*

Men and women are humans and should be treated alike. Human rights instruments call for equal rights and responsibilities over children between them hence the need to have legislation to that effect. The provision for shared parental responsibility should read something like:

- a) *The parents of minor child who are married shall have equal guardianship over a minor child of their marriage.*
- b) *Where both the mother and the father have guardianship of a minor child, each one of them shall be competent, subject to any order of the court to the contrary, to exercise independently and with the consent of the other any right or power to carry out any duties arising from such guardianship. Provided that were such consent is unreasonably denied, the other party may proceed to exercise such rights and powers which are in the best interests of the minor child.*

- c) *Consent is unreasonably denied where the act to be done is in the best interests of the child and the other party withholds consent.*

The above are the proposed amendments to the current unconstitutional and discriminatory provisions of section 3 of the Guardianship of Minors Act and they are meant to place men and women at an equal footing as regards rights and responsibilities of parents over their children. This is the trend set by international instruments, specifically CEDAW in Article 16(1) (d).

### **5.2.2 Constitutional Reform**

The Constitution being the supreme law of the land, it is also necessary to have a clause that states in clear and precise term the rights of women over children and the rights of women in general. Our current constitution is quiet in this area. In the previous years there have been proposed draft Constitutions and I have noted that adopting some of the provisions in the current Constitution making process could be a move towards regional standards. Both the Kariba Draft Constitution and the National Constitutional Assembly Draft have some provisions on equality of rights between men and women. I find the clause in the Kariba Draft clearer although it might be necessary to have precise grounds were the equality of rights will be exercised. The provision reads:

*S 27 The state must appropriate measures to ensure that-*

- (c) *there is equality of of rights and responsibilities of spouses during and after marriage and at its dissolution.*

This provision however does not seem to address the plight of single women and as such it might be necessary to adopt the National Constitutional assembly Draft which reads:

*S36 (1)(b) Every woman has full and equal dignity of the person with men and this includes equal rights in civil law.*

The above provision will cover the single women and civil matters should be interpreted to include guardianship, so the two provisions should be included and be fused to follow the Malawian Constitution and should read as follows:

*Women have the right to full and equal protection of the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right to be accorded the same rights as men in civil law, including equal capacity to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing.*

Such a provision in a national Constitution is vital so that the rights of women regardless of marital status are clearly spelt out so that the issue of guardianship is dealt with once and for all with women being given equal rights and responsibilities with men over children and it will help to dispel the untruth in the Registrar General's office that the father is the owner of the child.

In making this Constitution it is necessary to have regard to the women's voices on this issue and currently there is the Women's Charter which is a working document in adding the voices of women in the process. The values stated therein are important. Besides any law that is brought about as a result of a top-bottom approach is likely to be resisted.<sup>10</sup> The women's demands on the issue of equality and guardianship are that women should have equal rights with men over their children in relation to guardianship, custody and access. Women must also be joint guardians to their children. If the above proposed provisions and the women's demands are taken into account during the constitution making process, we are unlikely to go wrong on the aspect of guardianship and shared rights and responsibilities of men and women over their children. A clear constitution will set the ball rolling towards a democratic society where equality is key.

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<sup>10</sup> Tsanga, A. S in Taking Law to the People page 65

### ***5.2.3 Policy and Attitude Change***

It has been noted that the current policies at the office of the Registrar General are based on some archaic traditional beliefs and bad law. If we are to see some reform, the policies should be based on the concepts of equality of men and women and shared rights and responsibilities between men and women over their children. The office should desist from viewing women as second class citizens who always need the authority of the husband. Even where the law is clear the office wilfully goes against that showing the need for a shift in the manner it views the issues that affect women. Gender sensitization can change attitudes, to appreciate that all beings desire equal treatment. If such attitudes cannot change, then there will not be any offence in calling for a revamp of the structure and change of personnel.

### ***5.2.4 Awareness Campaigns***

Sometimes you do not know it until someone tells you about it. Women have to be sensitized that it is their right to be treated equally with men in all aspects of life and not to be discriminated against in terms of international standards and our own Constitution. It is then that they can seek to assert their rights. Campaigns like those held against domestic violence have yielded results in that some women now have the guts to report their abusive partners to the police and it is the strength behind such campaigns that has to be adopted to mark some progress on this issue. Law reform will come but we can start by educating the women on their rights in this regard. Knowledge is power, let them know and help them to act upon that you have taught them. Organizations such as ZWLA, Justice for Children Trust and Legal Resource Centres can play a key role in the educational awareness campaigns

### ***5.2.5 Decentralization of Births and Passports Registration Offices***

We have four regional centres where travel documents can be obtained in Zimbabwe and this could be a contributory factor to the rigidity of the system. Establishing offices in almost

every town will help reach out to those women who have given up on the process because of the costs that are involved. This might not have a direct bearing on the problem under discussion but it is another way of lessening the woes that women face. A pilot to register children upon birth at maternity homes could be a way to ensure that women, especially single, use their discretion to name the child without pressure from family and the usual go and bring the father of the child syndrome.

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