Do custody laws protect the best interests of children in Zimbabwe in the light of international instrumnts?

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Abstract

The laws of custody do not fully comply with the international instruments on the rights of children. International instruments presuppose a society based on principles of equality where all members of the human race enjoy the same rights and are equal in dignity, where women and children's rights are recognized and guaranteed. In reality, however, the society is patriarchal in nature – the ideology of male domination creates inequalities. The legal and policy frameworks work together to disempower women and children whose rights and interests must then be subordinate to the interests of men as the supreme authority in the family, clan or tribe.

This is the reason why legal structures, like most other institutions in the society, will militate against the equal treatment of children and equal access and enjoyment of the same rights without discrimination based on sex, birth or other status. The provisions of section 23 of the constitution and section 111 B are just some specific examples of how patriarchy packaged as culture, can defend the status and privileges of men against both women and children.

SECTION 1

Introduction

This essay will argue that to the extent that the law of custody refers to the best interests of the child, it is in compliance with the internationally upheld principle. Section 5 of the Customary Law and Primary Courts Act is in compliance but this compliance has been negated by the manner in which the judiciary has interpreted and applied it and other provisions dealing with the rights of children.

Unfettered compliance would challenge deeply-rooted cultural practices and norms that protect the dominant position of men in society. The result has been piecemeal reforms dealing with the symptoms and not the underlying cause. The provisions of CEDAW have set the pace for a legal reform process that does not divorce law from all other societal structures. It recognizes the interconnections between a people's culture, its norms and values and the laws that regulate these jointly-owned beliefs and values. We need to adopt CEDAW's holistic approach, only then can we begin to see legal reforms that truly create an enabling environment for children to enjoy the same rights as other members of the human race. The rights that must truly protect and safeguard children's best interests in all aspects of life, including child custody, in a manner that is consistent with international instruments on the rights of children.

The text of the law

In my dissertation (Mutambara, 1995), I outlined that in Zimbabwe, both in terms of customary and general laws, judicial officers have to take the best interests of the child as the paramount consideration in deciding child custody cases. This is so by virtue of the provision of statutory law which provides firstly in section 5 of the Customary Law and Local Courts Acts (chapter 7:05) that:

> 'in any case relating to the custody of or guardianship of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied.'

Secondly, in section 4 of the Guardianship of Minors Act (chapter 5:08), which reads:

> '4 (1) The High Court or Judge thereof may
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> a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or
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> b) on the application of either parent of a minor whose parents are divorced or are living apart;
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> 'If it is proven that would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other that the survivor shall be guardian of the minor, to the exclusion of the survivor or otherwise.'

The Customary Law and Local Courts Act provision does not differentiate between children born in or out of wedlock. The provisions are neutral and if one were to interpret statutes so as to give effect to the intention of parliament, as expressed in the words of the statute, there would be no basis for treating children, whether born

in or out of wedlock, differently. The ordinary grammatical meaning of the words employed in that statute are clear and:

> '…where words (of a statute) are clear and unambiguous, then effect should be given to their ordinary, …literal and grammatical meaning.'

It therefore would mean that in Zimbabwe under customary law, all children born either in or out of wedlock are treated in a non-discriminatory manner in any cases relating to their custody or guardianship.

This would be in harmony with the provision of the Convention on the Rights of the Child whose article 3 (1) reads:

> '…in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

This article does not discriminate between children on the basis of whether or not they are marital or non-marital children. This is hardly surprising considering that the convention makes special reference in its preamble to the Universal Declaration of Human Rights and to the international conventions on human rights in their principles of non-discrimination. The underpinning principle of the Convention on the Rights of the Child are therefore non-discrimination and the recognition that children are entitled to special safeguard and care, including appropriate legal protection in a family environment of happiness, love and understanding.

This thrust is also evident in the African Charter on the Rights and Welfare of the Child which makes reference in its preamble to the Charter of the Organization of African Unity and its recognition of the paramount nature of human rights and the African Charter on Human and People's Rights, and upholds the principles of non-discrimination in the enjoyment of all rights. Its article 4 reads:

> 4 (1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be a primary consideration.

Again there is no discrimination whatsoever in the language of the text between marital or non-marital children.

The general law position is somewhat different; the provision of section 4 (1) of the Guardianship of Minors Act seems to limit the application of the principle to situations where either parent of a minor '… *in proceeding for divorce or judicial separation ...* '[1] (Cockram, 1987: 49) or 'on the application of either parent of *a minor whose parents a divorced or living apart…*'[2]

The ordinary grammatical meaning of the above passages seems to limit the considerations of the best interests concept to only those children whose parents are separating or divorced or divorcing.

It would mean that those children whose parents are neither separated nor divorcing would not qualify under the Guardianship of Minors Act, particularly when regard is taken of the legal maxim that

> 'Expressio unius, exclusio alterius'

The statute expressly refers to children whose parents are seeking judicial separation or divorcing and thus excludes those whose parents are neither seeking a divorce or separation.

If such an interpretation were to be given to the statute it would run contrary to the spirit of non-discrimination that underpins the international and regional conventions on the rights of children. Non-marital children's best interests would not be a requirement under the law.

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[1] My emphasis.

[2] My emphasis.

The Matrimonial Causes Act (Chapter 5:13) provides in section 10 that :

> 10 (1) Where there are any children of the marriage, the appropriate court, before granting any decree of divorce, judicial separation or nullity of marriage, may require evidence to be produced by either party for the purpose of determining whether or not proper provision has been made for the custody and maintenance of such children.'

Read on its own, the statute makes no reference to the interests of children and would run contrary to the principles and spirit of the international and regional conventions.

The only yardstick is what the court may deem fit under section 10 (2) (a) which reads:

> '(a) Commit the children into the custody of such of the parties or such other person as the court may think best fitted to have such custody…'

If this section had stated that the court shall make its order as to custody in terms of section 4 (1) of the Guardianship of Minors Act, it would have been in harmony with the international provisions.

Further, the section also appears not to apply to children whose parents are not married. The provisions of both the Matrimonial Causes Act and the Guardianship of Minors Act are thus discriminatory whereas those of the Customary Law and Local Courts Act are non-discriminatory.

These general law provisions do not conform to the provisions of article 16 (1) (d) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).

CEDAW's article 16 (1) (d) seeks to give women and men 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.

What CEDAW is doing in article 16 is to recognize that inequalities between men and women must be addressed first before we can start addressing other inequalities in family relations whose basis is really the inequalities that exist between men and women. It is these inequalities that are the underlying cause of categorizing children and treating them in a discriminatory manner.

Article 16 is therefore a corrective provision in that it seeks to correct inequalities between men and women in their status in relation to all issues relating to marriage and family relations. It also seeks to protect non-marital children who were and are still being discriminated against on the basis of whether they were born in or out of wedlock. The article can also be said to be protective of the rights of children including non marital children.

The Constitution of Zimbabwe also prohibits the making of laws whose provisions are discriminatory. It provides further that no person shall be treated in a discriminatory manner. Section 23 reads:

> '23 (1) Subject to the provisions of this section:
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> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
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> (b) no person shall be treated in a 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.'

This provision is not as wide as other similar international treaties that include that there shall be no distinction of any kind, including distinction based on birth or other status. But the constitution does give a basic framework in section 23 (1) for the prohibition of discriminatory practices and, to that limited extent, conforms with international conventions on the rights of the child.

But lo and behold, the constitution takes with two hands, in a typical claw back provision, what it had given with one hand as it provides in section 23 (3) which reads:

> '(3) …nothing contained in any law shall be held to be in contravention of subsection (1) (a) to the extent that the law in question relates to any of the following matters:
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> (a) adoption, marriage, divorce, burial, devolution of property on death or other matter of personal law;
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> (b) the application of African Customary Law in any case involving Africans;

It can be seen here that the constitution sanctions discrimination in a wide variety of matters of personal law and in the application of customary law.

This provision can easily be used to defend making decisions that are not in a child's best interests. However, it is doubtful that a discriminatory decision in relation to custody can be justified under the constitution in view of the clear provisions of section 5 of the Customary Law and Local Courts Act yet it does set up an environment that may detract from children's enjoyment of this right.

The law is not in conformity with article 5 of CEDAW which provides that state parties shall take appropriate measures:

> '(a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

It is in the area of personal law that women and children's rights are made subserviant to the rights of men and so the protection under section 23 (3) (a) and (b) will simply maintain cultural patterns and prejudices and customary norms and practices which are the underlying cause for children's failure to fully enjoy the rights stipulated under international conventions.

Another area of conflict between our constitution and international conventions on the rights of children is section 111 B of the constitution which reads;

> '111 B (1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations:
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> (a) shall be subject to approval by parliament; and
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> (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

International conventions, even if they were ratified, do not form part of our domestic law unless specifically incorporated by an Act of Parliament. We can come back to look again at how this provision of the constitution impacts on compliance of our laws with international conventions when we look at the application at the law.

Finally, in looking at our law, there is section 5 of the Guardianship of Minors Act which 'shall be for minors the act which provides for where either of the parents of the minor leaves the other and such parents commence to live apart the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made…'

This provision does not comply with the International conventions on the rights of children. It is discriminatory against men's rights to enjoy custody of a minor before a competent court or authority has made a decision that is in the child's best interests. It is also a provision that excludes the consideration of a child's best interest.

In its text, we can conclude that Zimbabwean laws partially comply with the set standards in the international and regional conventions in so far as they refer to the best interests of the child concept. Its greatest failure is in not treating all children on an equal basis without distinctions of any nature whatsoever, including distinctions as to birth or other status. Further it does not comply in its failure to take appropriate measures to modify the social and cultural practices which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of rights of children.

Children's rights in our cultural context

The African family like the society, is patriarchal in nature. Children, like women, fell under the authority and control of men in the family and again in society. Property, including land, was owned by the males in the society. Women and children were 'possessed' or owned by the paterfamilias who would make decisions for them. The paterfamilias had rights to owe property, including children and women. Children and women were subordinate in status to men.

> '… women like children, are considered unable to make intelligent, informed and rational decisions about their own lives, they are subjected to the paternal power….' [of the patriarch] (Kaufman Hevener, 1986)

This was a social order. Like women, children had no rights except the duty to obey in the cultural context. Under customary practices, women belonged to their fathers or some other male relative. They could be moved like objects to other owners, often through marriage. The payment of *lobola* would divest a father of rights over his daughter who would be expected to now listen to and obey the male who had paid *lobola*. So *lobola* bought rights over women and the fruits of their womb – children.

In my diploma dissertation, women who were interviewed clearly accepted this traditional and customary truism that children belonged to men where *lobola* had been paid. Even where no *lobola* had been paid, a man could still buy all rights over his biological children by paying *chiredzwa*. *Chiredzwa* is a payment given to a family which had shouldered the responsibility of looking after a man's child or children when he now wanted to claim rights over his children.[3]

This abridged discourse on the customary status of children in the cultural context clearly shows that men had parental authority over children. This authority included rights of guardianship and custody over a child.

Custody was thus not discussed on the basis of what 'is in a child's best interest'. The decision had nothing to do with the particular child or children but with who owned that child; once that ownership was settled, everything else fell into place.

Where a woman was given custody, it was only for very small children who were dependent on her but even then the children were not in her custody but that of her father or some other male relative. Once they are capable of joining their proper family, they would then be transferred upon the payment of a consideration to the mother's male authority.

We would thus not have a custody dispute as envisaged in the modern context between (generally) the mother and the father of the child. The disputes that were likely to arise would be in respect of non-marital children who could not be released prior to the payment of *chiredzwa*. Once *lobola* and or *chiredzwa* had been paid, all rights are relinquished and custody goes to a father or his relatives whether or not it was in a child's best interests.

Customary law does not inform the custody laws in Zimbabwe, a statutory provision in the form of section 5 of the Customary Law and Local Courts Act altered and modified the position.

[3] See also Ncube (1989) pages 163–164.

Children's rights under general law

The position under general law is similar to that under customary law in that the father of a non marital child has no rights:

> 'The father of the child has on right or duties of guardianship over his non marital child.
>
> 'There is no statutory provision which could be interpreted as remotely altering or modifying this common law position' (Ncube, 1989).

That is where the similarity ends. Under general law, it is in the mother of a non-marital child that all rights over the child are vested. Thus the mother of a non-marital child has sole legal guardian and custody rights.

For marital children, their parents, both mother and father, share custody when one parent leaves the other for whatever reason and they proceed to live separately; the mother has custody in terms of section 5 of the Guardianship of Minors Act until a competent authority makes a decision as to the custodian after considering a child's best interests under general law. At least in relation to marital children there is provision for best interests of the child consideration. This concept is thus an alien consideration under customary law where children have no rights over those of a father who has paid *lobola* or *chiredzwa*. Under general law principles, the interests of the child could be considered at least in relation to marital children.

There is therefore a serious conflict between the customary law as amended by statute and the people's lived realities which has affected the manner in which judicial officers have considered what is in the best interest of a child.

CEDAW, recognizing this conflict, seeks to address it through its corrective provisions. It treats children as a group requiring special treatment, not as subordinates. It recognizes that there is a problem with the historical perception of children as mere objects belonging to a paterfamilias whose rights and interests are supreme. It thus focuses on this issue and tries to right the specific wrong. The law thus tries to correct and does not seek to perpetuate traditional thinking and perceptions in society.[4]

Dealing with custody of children without recognizing the underlying cause why children's interests are not considered or why society has placed a distinction between marital and non-marital children would be dealing with the problem in a piecemeal fashion and only addressing the symptoms. This is ineffective as the law can be there on paper but may not affect how people live. Both the courts and families can resist, evade or opt out of state law.

As observed by Ncube (1989: 183):

> 'We have noted the capacity of the family and communities, as semi-autonomous social fields, to resist, evade and sometimes to opt out of the state law sanctioned domain. This raises serious questions on the efficacy of legislative reforms which ignore this and the fact that it is necessary for law reformers to 'move along' with people. It thus becomes necessary for advocates of children's rights to ensure that 'culture' is properly presented, understood and used, within the framework of legal reform, to advance the interests of the children.'

If you properly identify what any cultural practice seeks to protect, and in this case it is patriarchy, then you have to first address culture instead of moving along with it. You would never manage to change anything except by addressing all negative cultural aspects, CEDAW style.

Under the general law, it was clearly not about the child as a person with rights, it was about the father's rights or the mother's rights. The custody battle as it were was between men's rights vis a vis women's rights. Custody

[4] CEDAW Articles 5 (a) and (b) 9 (2) , 16

and guardianship over children was just an expression of the superiority of men's rights over women and the fruits of her womb, except where the children were non-marital. Under international instruments, the focus is being redirected. The child is made the starting point with men and women having duties and obligations as opposed to rights.

The categorizing of children as marital and non-marital and the resultant unequal protection of their interests under general law was not about the children themselves but about men's dominant position under patriarchy. This found expression in laws dealing not only with custody but other laws which included guardianship, access of non-custodial parents, nationality and citizenship, among others. So failure to deal with patriarchy may jeopardise the ability to find a legal framework that can successfully advance children's interests.

Under African culture, custody, like most other rights enjoyed by men over children, is directly linked to whether or not a parent has paid *lobola* or *chiredzwa*. It has not been about any inherent rights that a child had. It is really about men's power over women and children, their ability to purchase children with *lobola*. This is contrary to the spirit of the conventions which make children the starting point. Culture is self preserving and will resist any threats to the status quo.

The whole debate on whether or not a non-marital child's father has an inherent right to access his child is about the courts' reluctance to embrace the spirit of the conventions on equality and unqualified principles of what is paramount in deciding a child's right to reside with a parent only when it is in that child's best interest to so. If it was a simple unqualified right of what is in a child's best interest in deciding custody cases, then the question of whether a child is marital or non-marital would be irrelevant but to take this approach would jeopardize or place at risk the very foundation of patriarchy.

Legitimacy does not only affect custody of children, it affects a child's nationality, citizenship and guardianship. So for the courts to embrace the need not to discriminate on the basis of legitimacy in issues of custody, guardianship and access of a non-custodial parent, would also mean that we revisit nationality and citizenship and doing so may affect the entire social organization and may upset the power relations between men and women.

International instruments on the rights of children seek to move away from cultural practices by placing equal responsibilities upon both parents for the upbringing and development of the child,[5] without any distinction as to whether he or she was born in or out of wedlock. The traditional position is that where children are born in wedlock, it is the father who shoulders all parental responsibility to the exclusion of the mother if they were living apart. This is also the practice for non-marital children for whom *chiredzwa* has been paid.

Article 1 of the African Charter on the Rights and Welfare of the Child takes after CEDAW in its articles:

> (3) where it discourages 'any custom, tradition, culture or religious practice that is inconsistent with the rights, duties and obligations contained in the charter'.
>
> (4) which makes a child's interests 'the primary consideration'.
>
> (21) provides 'protection against harmful social and cultural practices by seeking to eliminate harmful social and cultural practices affecting the welfare, dignity, … of a child particularly customs and practices discriminatory to the child on the grounds of sex or other status'.

The customs and norms that underpin our laws and values are thus not in conformity with the underlying principles of international instruments.

[5] Article 18 of the United Nations Convention on the Rights of the Child

Judicial and societal attitudes

As indicated, it became necessary to distinguish between children on the basis of whether they were marital or non-marital in deciding how the law should be applied to them to protect the society's patriarchal structures and property. Marital children were regarded as legitimate, with the right to inherit from their fathers, acquire his nationality and citizenship and to enable their fathers to have paternal authority over them, including the right of access and guardianship even when they were separated from their fathers under the general law system.

This tying of rights and parental authority to issues of legitimacy were the same under customary law. Non-marital children were not recognized by their fathers or his families and could not enjoy the same benefits. The only difference between the two legal systems was that under customary law a father could pay *chiredzwa* to establish his rights over the non-marital children whereas, under general law:

> '…the mother of a non-marital child is his or her natural and sole guardian and custodian.'(*D v M* 1986 (1) 2 LR 158 (4))

This distinction is contrary to CEDAW which is generally non-discriminatory in nature as can be seen from the preamble which refers to:

> '…the role of both parents in the family and in the upbringing of the children'
>
> and to the fact that the '…upbringing of children should be a shared responsibility between men and women and society'.

The African Charter on the Rights and Welfare of the Child does not take this direct approach. It is non-discriminatory. Article 3 prohibits discrimination on the basis of birth or other status but does not specifically say that it is the responsibility of both parents to bring up children irrespective of their 'legitimacy'[6] The failure to specify in this regard can be used to legitimize discrimination in marital laws. The chapter should have taken the lead from CEDAW. Article 19 of the charter is also evasive in this regard. But the Convention on the Rights of the Child is, like CEDAW, specific in its article 18 which urges state parties to recognize of the principle that both parents have common responsibilities for the upbringing and development of the child.

This international thrust is contrary to the law in Zimbabwe. The courts have not sought to distinguish between non-marital children under customary law and under general law. They have taken the approach that fathers of non-marital children have no inherent right of custody, be it in customary or general law cases. They have to prove like any other interested third party that the mother is an unfit person to have custody before they can hope to have custody of their children and access as stated by Ncube (1989: 157):

> '… the father has no inherent right to claim custody, which means that for him to succeed in obtaining custody he must first persuade the court that there are special grounds which justify the court's interference with the mother's natural custodial rights in the interests of the child. The courts will only find special grounds where it has been shown, for example, that the mother's custodianship is prejudicial or is a danger to the child's life, health or morals'

As pointed out in *W v W* (1981) 2 ZLR 243 at 247–248, clearly in such an approach, a child's interests are not the issue for enquiry but the mother's moral and other attributes.

Records perused at the juvenile court show that mothers continue to rely on this argument that they are the sole guardians and custodians as there was never a valid marriage between them and the child's father.

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[6] I am aware of the undesirability of calling children illegitimate but use the term here and elsewhere to highlight that this is the social perception which informs discrimination since these children are socially frowned upon as they are an obvious exhibit of damage to men's property (daughters) who would no longer be highly priced, reducing *lobola*.

In the case of *Phillips v Andy Hodges* JC 329/05 the mother used this argument. In the case of *F. Mwayera v R. Mwayera* JC 320/05, the court actually found that the father had failed to show special grounds that the mother was an unsuitable custodian. Both the cases are 2005 cases and this shows that the position outlined above still obtains.

This position is surprising in view of the clear provisions of section 5 of the Customary Law and Local Courts Act which states that irrespective of which law or principle is applied, the interests of children shall be the paramount consideration. This appears to be a clear departure from the natural law position concerning non-marital children. The provision is non-discriminatory, focus is removed from the child's status and thus all children should be treated equally. Like CEDAW, it recognizes that both parents have the equal rights of access and custody and that 'legitimacy' should not be the basis for discrimination.

As regards the position of marital children, the law recognizes that both parents should have custody but again culturally-based views which are gendered interfere with the manner in which the courts have applied the law.

Traditionally, women are viewed as natural care givers, and mothers. These socially-constructed gender roles for women have led to a definite bias in favour of women by the courts in custody cases. The courts generally tend to find that mothers are more affectionate and thus better adapted to the care of young children than the fathers or that, in the absence of compelling reasons to the contrary, the natural mother of a very young girl is the obvious person to whom custody of such should be entrusted. Courts therefore generally find that, other things being equal, young children, especially girls, should be with their mothers.[7]

This approach discriminates against children on the basis of sex and age and does not conform with international instruments. Apart from failing to treat children equally, it also perpetuates social prejudice and bias against women, contrary to the clear provisions of CEDAW which:

> (a) …prohibits social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.
>
> (b) …ensures that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.[8]

Women have tended to take advantage to this position and, in most of the cases perused at the juvenile court, women almost always argue that children of a tender age need them as the natural care giver when applying for custody or opposing applications for custody by the fathers of their children.[9]

In her unpublished essay entitled 'Does the division of marital property in Zimbabwe adversely affect children?', Machaka also found that courts generally award women custody of small children at divorce.

This approach is also expressed in section 5 of the Guardianship of Minors Act which provides that when one of the parents leaves the other, custody shall be awarded to the mother. This approach is informed by the perceived role of women as wives and mothers and not necessarily by what may or may not be in a child's best interest.

It has been argued that the law appears to be what it is because marriage is the ideal, a valuable institution to be protected. While this may be so, it certainly cannot be the underlying cause, perhaps it is the immediate cause

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[7] See, for example *W v W* 1981 ZLR 243; *C W (barnO) v JMS* HH 150 /94; DVM 1986 (1) 158

[8] Article 5

[9] See for example: *Memory Chimuchembere v Webster Kudambo* J C 335/05; *Hilgard Madziwa v Rumbidzai P Makope* JC 332/05; Chipo *Mashoko v Aclidk Chikwamba* JC328/05; *Pauline Bashitiyawo v Thomas Watyoka* JC 316/06; *Sara Chisaka v Peter Nyangoni* JC341/05.

but the underlying cause is the desire to perpetuate the inferior status of women and children, especially girl children under the patriarchal system. Marriage is an institution where women's subordinate and inferior status is maintained and reinforced through the gendered roles of men and women and also where stereotypes are reinforced. It is not marriage but the system and structures that constructed the traditional roles of both men and women which must be revisited.

To continue to regard women as care givers of very small children will prejudice these children because their best interests may not be genuinely considered. Children's upbringing and their custody should not remain a 'women thing'. Both men and women have to realize that they have equal responsibilities and it is only then that the focus can be turned to what is in a child's best interest. We do not need to perpetuate traditional thinking in the society as this has led to paternalistic and, at times, retrogressive laws. There is need to challenge the status quo and look at the core of the problem. There is need to challenge the structural factors as sources of inequality. The existing structural inequalities and links between the inferior status of women in society and failure to effectively protect interests of children must be exposed. Otherwise, whatever solutions one may come up with will be superficial since the forces surrounding children's rights are overpowering and have not changed in spite of the enabling international regime.

It is because of provisions like section 23 of the constitution that the force of paternalistic laws are kept firmly intact and piecemeal legislative changes are rendered ineffective in law reform.

Culture reflects the values of any given society and in a patriarchal society like our own, it promotes the ideology of male domination which was used to disempower women in favour of men. Children, particularly girls, also assumed a subordinate position. Culture also informs the gender roles which, in turn, promote the inequalities and discrimination which are reflected in our custody laws.

The concept that children are of the same blood as their fathers rather than their mothers has helped men gain custody of their children without having to shoulder the responsibilities and duties of child care when the children are more dependent and require care. Children remain the father's possession, irrespective of whether the father has ever cared for the child. This position is accepted by women who will not resist being disempowered of all rights over their children once *lobola* or *chiredzwa* has been paid.[10]

Children's vulnerability, like that of women, is rooted in the need to protect men's power over women and children in society. *Lobola* was tied to the rights of children and status of women in marriage and protects men's access to that resource. Children's vulnerability is a function of how society is structured. The failure of new laws to positively impact is not because legal reform is not sensitive to culture but because 'regulatory and policy responses tend to be piecemeal and comprehensive analysis of their effect scarce' (Rittich, 2004).

There is need to analyze the underlying source of the problem then the intermediate and immediate causes. Once these are exposed, dealing with the underlying cause will make the intermediate and immediate causes fall away.

Current cases show that women, men and judicial officers are still influenced by traditional perceptions.

In the case of *Brian Chirata v Loreen Chitrata* JC 339/05 the father argued that he was paying fees and maintenance and should thus have access. Access was granted though the magistrate gave no reasons. The father's argument was that since he was acknowledging the child he ought to have rights over the child like in the traditional position where a father pays *chiredzwa* to establish full rights. This argument succeeded.

In *Takawirei Chabirika v Lessie Makosa* J C 340 /05 the mother's argument was that since the father was dead she should have the access. The argument was not that it was in the best interests of the child but rather that the

[10] My dissertation showed that women accept that children are not theirs. They are afraid of Spiritual forces that may make the children sick should a woman insist on retaining the child in her custody.

father who had superior rights had died so she could now exercise her otherwise inferior rights over the child.

In *Pauline Basihitiyawo v Thomas Watyoka* JC 316/05 both parents agreed that the mother should have custody of a seven year old child and a one and half year old child since the mother was the natural care giver. The father had initially removed these children into his mother's custody. It is clear from this case that the man did not see himself as having parental responsibilities or the ability to care for young children and was just transferring the burden to another woman.

In *Samson Jekera v Elias Chikomo* JC 239/05, two men were fighting for custody of children whose mother had died. The father argued that the children needed to associate with their own family but the children's maternal grandfather argued that the maternal grandmother was not being respected. He argued that she was owed *lobola* for her dead daughter and *chiredzwa* in respect of the care she had given to the children before they could be released. Custody was given to their father and there were no reasons given.

Since most of the records gave no reasons for judgement, it was not clear what issues had been considered by the magistrate. The contents of the affidavits reflect that both men and women argue along the lines of traditional value systems. There is thus need to find out from the magistrates what informs their decisions to test whether or not they are complying with international instruments which are not mentioned in their decisions.

In conclusion, the legal framework must be seriously revisited to repeal the provisions of section 23 (3) of the constitutions and pave the way for a CEDAW like approach to deal with all forms of discrimination. This way we will not be superficial in our reform agenda. International instruments must inform judgements. State parties who ratify international instruments clearly indicate a willingness to be bound by these instruments and the judiciary should interpret legal provisions, especially the provisions which enhance non-discrimination in conformity with international instruments.

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International

Convention on the Rights of the Child

Universal Declaration of Human Rights

African Charter on the Rights and Welfare of the Child

African Charter on Human and People's Rights

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