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A CHILD BELONGS TO EVERYONE:
LAW, FAMILY AND THE CONSTRUCTION
OF THE 'BEST INTERESTS OF THE CHILD'
IN ZIMBABWE

Alice Armstrong*

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*The author is a lawyer and the founding coordinator of Women and Law in Southern Africa Trust (WLSA). She is now the coordinator of Children and Law in Eastern and Southern Africa Research Network (CLESA).

The views expressed in this paper are those of the author. They do not necessarily represent the views of the UNICEF International Child Development Centre.

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EXECUTIVE SUMMARY

This paper attempts to illustrate and analyse how the concept of the 'best interests of the child' is constructed from cultural, material, legal and political perspectives. To do so, the paper uses examples of child custody decisions in Zimbabwe and the words of interviewees.

This is primarily a legal study. As in most African countries, Zimbabwe employs a general law made up of both statute law and customary law, which comprises the rules, customs and traditions of the indigenous people of the country. Statutory law provides that the 'best interests of the child shall be the paramount consideration' in all child custody cases; however, different legal systems and different people have very different conceptions of what is in the child's best interests.

The cultural construction of the 'best interests of the child' is formed by the evolving and varied norms and values of a society. Thus, in the culture examined here, the custody of a child rests with a family — usually the paternal family — rather than an individual. Another cultural principle states that it is in the best interests of children to be taught obedience, deference to elders and authority, and to act in 'male' and 'female' ways. This raises other questions: to what extent is it in the best interests of children to be raised in conformity with their 'culture'? Or, to what extent is it in the best interests of children to be raised to change parts of that culture, to create a less hierarchical, less authoritarian, less gendered world?

In the material construction, the 'best interests of the child' are limited by the choices available in the material reality. For example, mothers and fathers may have to choose to live in town in order to get a job, leaving the child in the rural areas. In some cases, the interests of one child may have to be sacrificed for the interests of another child. Another aspect of the material perspective, and of the limitations posed by the material reality, is that choices need to be broadened: the constraints of the material reality can be partially alleviated by expanding services, building schools, improving accommodations in towns and cities, bringing more work to the rural areas, etc.

The concept of the 'best interest of the child' is also constructed by the formal law, which is influenced by Western values and enforced by the State. According to the law, custody rests with an individual rather than the family group. The child is usually held to be better off with a natural parent rather than an extended-family member, and the mother is preferred over the father. This construction of the best interests of the child contrasts sharply with the construction given by 'culture' and therefore produces conflicts.

Finally, the concept is politically constructed. At both the state and personal levels, adults construct a version of the best interests of the child that suits their own interests.

If law is to be used as a practical tool to improve the lives of children, it will be necessary to develop a better understanding of the ways that decision-makers at formal and informal levels interpret the 'best interests of the child' in different contexts. Efforts must also be made to pay more attention to the people who are most directly affected by decisions on children. Such people include, of course, children themselves. Increasing this understanding is an important step toward meeting the challenge of cultural complexity in interpreting the 'best interests of the child'.
I. INTRODUCTION

The United Nations Convention on the Rights of the Child requires that the 'best interests of the child' be a primary consideration in all actions concerning children. But as governments, lawyers and international bodies attempt to enforce that requirement they are faced with four major considerations.

First, people's idea of what is in the 'best interests of the child' — aside from a few absolutes (which, upon analysis, turn out to be very few indeed) — is influenced, and even created, by the culture in which they live. This can be seen, for example, in the international attention recently given to 'female circumcision'. On the one hand, many people argue that the 'best interests of the child' must, at the very least, include protection from physical harm, and therefore that the girl child must be protected from this practice. Others argue, instead, that the operation is in the 'best interests of the child', particularly her long-term interests as wife and mother, and that it is of cultural significance. Both sets of people are arguing and acting in what they consider to be the 'best interests of the child'.

Second, when speaking of the 'best interests of the child', one usually implicitly means 'best interests' within the realm of the economic, physical and material possibilities available to the child. It may be in the best interests of a child to live with both parents, but when parents separate, decisions are made about the 'best' interests of the child within the context of that separation. Similarly, when economic resources are limited, decisions about the 'best interests of the child' are made in the context of those limited resources.

Third, both the content and the concept of 'law', particularly in the context of the family, present cultural and practical problems. The content of the legal concept of the 'best interests of the child' may differ from the values and perceptions of people outside the state legal system, which may cause confusion and manipulation of the concept. Further, most decisions regarding children are made within the context of the family and are therefore beyond the reach of what is commonly considered to be law. Most legal systems are reluctant to interfere with the family and family decisions, and they often do so only when it is clear that a child is being abused. Therefore, the concept of the 'best interests of the child' is applied, for the most part, within the family and outside the state legal system. What role, then, does the State have in ensuring that the 'best interests of the child' are considered, and in interpreting the meaning of the concept of the 'best interests of the child'?

Fourth, there is often great disagreement — even within the same cultural and material context — on what is said to be in the 'best interests of the child', and these disagreements may have political dimensions. Governments argue that it is in the best interests of the child to be immunized, but some parents disagree. The mother argues that it is in the best interests of the child to be with the mother, and the father argues that it is in the best interests of the child to be with the father. Those making a decision about children almost always justify their decision as being in the 'best interests of the child', although sometimes it is motivated by self-interest.

According to the Convention on the Rights of the Child, it is not enough for governments to claim they are acting in the 'best interests of the child'; nor does the Convention accept that the concept of the 'best interests of the child' has an entirely subjective meaning. Rather, the Convention provides international standards by which to judge whether an action is in the best interests of the child. The Convention provides rights: the right to life, the right to nationality, etc.

Yet, if one is interested in the welfare of children worldwide, it is important to understand the context within which these rights, coupled with the concept of the 'best interests of the child', are to be enforced. Situations will arise in which the concrete right conferred by the Convention conflicts with the subjective understanding of the 'best interests of the child' in a particular context. Situations will arise in which the concrete right must be interpreted in conjunction with a cultural or an individual understanding of the 'best interests
of the child'. Situations will arise in which the Convention does not provide concrete guidance, and an action must be taken on the grounds of the 'best interests of the child' alone. And situations will arise in which different interests of a child conflict with one another, or the interests of a child or group of children conflict with those of another child or group of children. In all of these situations it is necessary to consider how the principle of the 'best interests of the child' is understood in different social, cultural, material and individual circumstances.

This report presents a discussion of some of the different understandings of the 'best interests of the child' concept in the context of custody decisions both within and outside the state legal system in Zimbabwe. The data upon which this discussion is based are drawn from a research project on the 'best interests of the child' carried out for UNICEF, and originally reported in the International Journal of Law and the Family.5 The sample from that study included: 57 semi-structured interviews (see below) of women and men in one urban and one rural area in Mashonaland, Zimbabwe; 20 court records from a rural Community Court and 20 from an urban Community Court; and 47 custody/divorce records from the High Court of Harare.

In this follow-up study, 40 interviews have been added — 10 urban male, 10 urban female, 10 rural male, 10 rural female — to collect more information about the custody and maintenance of children, and female and male perceptions of 'motherhood' and 'fatherhood'.

All interviews asked about de facto custody arrangements in the past — when the interviewees were children — and in the present. Attempts were made to probe the reasons behind the 'fluctuating' custody found to be common, and the interviewees were asked what they considered to be the in 'best interests of a child' (in the abstract) and why. The interviews were semi-structured, posing open-ended questions, but prompting for information about why the interviewees think and act as they do. They were encouraged to mention what is important to them and what they value (this style of interview has sometimes been called the 'personal narrative'). An attempt has been made to provide the reader with the interviewees' actual words, which have sometimes been translated from the Shona.

This is primarily a legal study; however, the study applies a broader concept of law than many lawyers would recognize. As in most African countries, Zimbabwe employs two official legal systems: the 'general law' comprises statutes and court judgements, mainly applying principles derived from European sources and inherited from the colonial government; 'customary law' comprises the rules, customs and traditions of the indigenous people of the country.6 The Community Court system applies the 'customary law' as well as several statutes containing provisions that make them applicable in the Community Courts. In the case of custody, statutory law provides that in all cases the 'best interests of the child shall be the paramount consideration' regardless of the system of law (general or customary law) applied.7 This, however, begs the question of how to decide what is in the 'best interests of the child'. As discussed below, different legal systems and different people have very different conceptions of what is in the child's best interests.

Both inside and outside the state legal system the principles of customary law still influence the thinking of people in Zimbabwe to a large extent. Since issues of custody have always been, under customary law, almost exclusively decided by families rather than by public 'courts', private arrangements are still by far the most common way of dealing with custody in Zimbabwe today.8 It is probably inaccurate to say that the 'customary law' is still applied in these custody decisions. Instead, families and individuals apply a mixture of customary law principles with other values and principles, which are derived in part from the
state law system and in part from 'modern' (i.e. 'Western') values and the realities of life in a rapidly urbanizing and changing cash economy.

Outside the state court system, the principles and values applied to the innumerable decisions for the best interests of a child are not 'law' in the usual sense of the word as it is applied in the 'developed' world. These principles and values do not have the force of the modern nation-state behind them. They are, however, enforced by families, ancestors, spirits and consciences, which are, in most cases and for most people, much stronger than the State. And they are enforced in much the same way that the 'customary law' has always been enforced. Thus, building on an understanding of 'law' that derives not from the centralized state system but from the decentralized 'customary law', these principles and values are a kind of law that we 'call the 'living law' to emphasize the fact that they are ever fluid and changing and differ from the 'customary law' of the 'olden days'.

Far more important than the legal pluralism just described is the profound cultural pluralism that exists in Zimbabwe today. Zimbabwe is a country undergoing rapid change: urbanization, industrialization and increasing access to ideas, social forms and material benefits dominated by the industrialized North. Rather than two or more autonomous legal and social systems coming into conflict, in Zimbabwe there exist simultaneously legal and social norms and values from a number of different legal and social systems, all of which mix, influence each other and sometimes interact in an almost chaotic fashion. In this composite of law, culture, and changing social and material conditions, there is a mixture of ideas about the 'best interests of the child'.

Therefore the purpose of this report is to present, illustrate and problematize some of the ways in which legal systems, belief systems and individuals interpret the 'best interests of the child', using as examples decisions on child custody in Zimbabwe and the words of interviewees. Although the intention is to look at one specific, local context, every parent will recognize in a more general way some of the problems presented, since, upon reflection, it must be acknowledged that one's ideas about what is in the best interests of the child are constructed by one's own culture, material reality, legal system and interests.

II. CULTURAL CONSTRUCTION OF THE 'BEST INTERESTS OF THE CHILD'

'Culture' is an elusive concept. It usually comprises traditions, rituals, beliefs and values that are said to have been handed down from generation to generation. One dictionary defines culture as 'the customary beliefs, social forms and material traits of a racial, religious or ethnic group'.

In southern Africa, the word 'culture' is usually used synonymously with 'custom' or 'customary law' to refer to the way that an ethnic group acted and believed in the past: the way 'our forefathers did things', 'our traditions'. On the one hand, 'culture' today includes a mix of traditional and new ways of doing things: culture and custom are not static, but evolving. But on the other hand there are some modern ways of doing things that are said to be part of Shona 'culture', and others that are not. For instance, it is said to be 'custom' or part of 'our culture' for a suit to be given to the father of a bride, but it is not 'custom' for a bride to wear a white gown. 'Culture' or 'custom' seems to be used to mean both old and new ways of doing things based on traditional values, rituals and/or worldview.
In this section, 'culture' is used to refer to ways of doing things and of thinking that the interviewees themselves consider part of their 'culture'. Five important cultural aspects concerning the 'best interests of the child' emerged as men and women discussed decisions about child custody outside the state court system and the concept of the 'best interests' in the abstract. These five aspects are interrelated and together demonstrate how 'culture' has 'constructed'—given content to—the concept of the best interests of the child.

Who Decides? What is Law?

Under customary law, when spouses separate or divorce, the State in most instances is not involved in decisions over children or even in the divorce itself. Customarily, the families of the two spouses meet to discuss the divorce, the children and whether any cattle should change hands. Even in the past there was seldom any involvement of traditional authorities, such as headmen or chiefs. Although today women and men in state-recognized marriages have the option of applying to state courts for divorce, most 'divorces' are still negotiated outside both the customary law and the general law of the state court systems.

Unlike Western law, which takes the State as its point of departure and focuses on the power of the State to enforce its rules, customary law is centred on the family and the community. The family is the primary institution that makes and enforces customary law on most issues. For instance, in Western law there are rules that determine whether a marriage exists, when a divorce can occur, whether a child belongs to a family, who has custody of a child, rights of inheritance, etc. In customary law, on the other hand, although there is a framework of guidelines and principles within which decisions are made, it is basically the family that decides when a marriage exists, when a couple is divorced, when a child belongs to a family, etc.

Customary law has been described as 'flexible', 'negotiable' and 'relationship-centred' rather than a regular system of rules. The 'law' is likely to change according to time and place and even according to the family applying it. Decisions are more likely to be made in ways that favour compromise and the possibility of the parties living together peacefully, rather than by the strict application of a rule. Thus, when custody decisions are made after a couple separates or divorces, they are made within this context.

However, many custody decisions today are made by couples who remain married or who never married. Ideally, in the past, when people lived according to 'customary law' and in a rural, subsistence, agricultural economy, families lived together. A father/husband lived with his wife or wives and children on land belonging to his paternal ancestors and close to his own father and brothers. Anthropological literature discusses the situation of children for married couples, where it is assumed they live together, and for unmarried couples—as if these were the only two alternatives. Apparently, in the past, there were few cases of a married couple living apart or an unmarried couple living together. Therefore, traditional norms did not exist to deal with these situations.

Today, however, there are many variations in relationships between men and women that were not contemplated by traditional norms. The most prevalent is that of married couples who do not live together. In 1982, 82 per cent of the people living in communal lands in Zimbabwe were women and children, with the men away presumably working or looking for work. The traditional ideal situation in which the family and the father's extended family lived together is no longer the norm. Separation of family members for work is more typical, as shown by this man's description of his childhood:
I spent part of my childhood with my mother in Chikwaka; she was a peasant farmer. My father was working in Harare and would come home during weekends and would bring us bread, soap, clothes and also new clothes during Christmas. When I came to attend secondary school in Mabvuku, I lived with my father. By then I was able to cook and wash. My mother rarely came to Harare. She used to come once or twice a year, and she would bring maize cobs and fruits.

Custody decisions are made not just in the context of divorce, but also in the context of intact marriages. Families in which the husband and wife are separated for employment or other practical reasons must also decide where each child will live. The state legal system has no role in this decision. The family is the decision-making body in such circumstances.

Thus, the first way in which the concept of the 'best interests of the child' is culturally constructed relates to who decides what is in the best interests of the child, and which 'law' governs that decision. According to customary law, it is the two families that negotiate a decision and that apply their versions of the principles of custom to that decision. This is in contrast to the general law, in which courts and legislatures decide what the law is and who gets custody of a child.

Although this clearly presents fertile ground for the growth of a great variety of ideas about the 'best interests of the child', there nevertheless is, and was, a 'customary' framework of beliefs and principles within which these negotiations were made.

The Family vs. the Individual

The definition of 'family' under customary law is much broader than under the general law. At the very least it includes the paternal brothers and the grandparents of a child. It may also extend to all descendants of a specified paternal ancestor and therefore include paternal cousins, aunts and uncles. A child, according to Shona culture, does not stand as an individual, but as a member of a family. Thus, the family serves the child and the child serves the family.

The family serves the child

The ethic of reciprocal family obligations is important in Shona culture. Reciprocity means that the family is obligated to care for its children, and the child, when he or she has grown up, is obligated to care for the family. This ethic is not only moral, it is also firmly grounded in spiritual beliefs:

According to our customs, if I do not support my mother, like not buying her clothes and blankets, when she dies her spirit will bring bad luck to me and my children. If I take care of her and she dies without any grudge against me, her spirit will bless me and my children. The bad part is that the spirit of your displeased deceased mother will bring bad luck to your children, so you should do all you can for your mother to protect your children from misfortune.

It is also firmly grounded in the ideology that children belong not to individuals, but to families:
I do not know whether the mothers' brothers give a hand (in supporting the man's three children, each of whom has a different mother and is living with that mother) but I do believe that a child belongs to everyone, so if they want to help they can because it's their child as well.

Our interviews showed clearly that extended family values, assisting family members and caring for the children of the family are still an important part of life in Zimbabwe today, across all class, ethnic and geographic lines. There are two ways of 'caring': by taking de facto custody of a child, and by contributing financially to the needs of a child.

Some examples:

My husband's late brother's child stays with us. My husband said "I have a big job. My brother died and left children. So these children cannot fail to go to school."

We took my husband's young sister because my husband's parents were no longer able to send her to school.

My husband's brother's children came because uncle (babamukuru) had a lot of children and he was not working.

My father was the eldest in his family; he paid school fees for his young brothers and bought them clothes.

But reciprocal family obligations do not operate only on the basis of financial need. Middle class people also send children to relatives to stay for long periods of time. Fluctuating 'custody' is typical not just of more 'traditional' families, but also of more 'modern' families:

My father-in-law's youngest brother is very close in age to my husband, and his wife is very close in age to me, so we had right from the beginning a certain rapport...Because of this friendship and because my children came on very close, the second soon after the first, when I had my second one she thought she could help out by taking one...So she took my daughter who was about two years old and stayed with her for about a year. It wasn't because I couldn't manage financially, but it was just because she was my friend and she thought she could help out because of the friendship.

After (my daughter's) 'O' levels I sent her to stay with her aunt. She hadn't done very well in her 'O' levels because I think she had actually grown a little delinquent and that was a way of getting her out of Harare so that she could re-sit her 'O' levels.

However, in spite of the stated 'customary law', in which relatives have an obligation to support family members, and the interviews, which showed that in practice people still care for the children of the family either financially or through fluctuating custody, the interviews also indicated a rising ambivalence about the obligations of the extended family:
I do not expect anyone to help me to support my children. Even those brothers of mine who I supported when they were young, I do not expect them to do anything for me in return. I just wish and hope that they get jobs and support themselves rather than for me to continue to support them when they are big boys. If they feel that they want to do something for me, they can do that out of their own will, but I would never go to them and demand that they do this and that for me. I want to support my children on my own because they are mine. Maybe when I have problems, I may need help, but besides that I will take care of my own children.

Q: Do you think your children have an obligation to support you?

Maybe following our customs, they might support me but I think it will be a very big burden for my children to support me. It is not my wish that they should support me. My wish is to work hard and provide myself with the means of supporting myself when I am old. Life is very expensive nowadays and it is difficult to support parents, though circumstances may force one to do so.

Therefore, although a great many studies have concluded that the extended family system in Africa is 'breaking down', this research suggests that it is instead changing and reforming. The extended family is 'breaking down' in that all family members no longer live together on ancestral lands and care for the young and old on a daily basis. However, extended family members still care for each other, particularly for children. It is still perceived to be in the best interests of the child to belong and contribute to the family. Not only do the family ancestors protect the child from harm, but living family members care for and support the child in times of need and sometimes — just to reinforce family bonds — even when there is no need. The family is a resource for the child, and it is still considered to be in the child's best interests to cultivate that resource. Today, however, this customary ideal of the best interests of the child is being confronted with increasing individualization and the scarcity of resources.

The child serves the family

It is considered to be in the best interests of a child to be a useful part of his or her family. The child is expected to do many things to serve family interests, but these interests are not perceived to be in conflict with the interests of the child. Many decisions are made on behalf of the child, and they are articulated with reference to the needs of the family group or of another individual. For instance, it is common for a child to be sent to stay with a relative because the relative wants the child as company:

My sister's children are living with my parents. It is not because my sisters and their husbands cannot support their children, but my parents want to have their grandchildren with them.

A grandmother: I asked for a grandchild to stay with me and each of my daughters gave me one.
Tete (paternal aunt) asked us saying "Give me your child, I want to look after her." Tete had no children, that is why she came and asked for Joyce to stay with her...she just wanted a child to stay with her.

Sending a child to stay with a relative is not perceived to be contrary to the child's interests. It is believed that grandparents and relatives are good to children. The best interests of children do not necessarily lie in being with their biological parents simply because they are parents, but may lie in being with relatives who are good to them and with whom they can build a strong relationship upon which they may rely in the future. Strengthening family bonds is important for the child's future, as well as for the future of the family that takes care of the child.

Usually, the child's individual interests will not be ignored, even when the child is expected to help meet family needs. This is because it is in the best interests of the family that the child be developed to his or her full potential, since the child is a resource for the future:

If a child is educated he might be able to help you tomorrow.

I think that when I have become of age, when I am too old to work for myself, my children have an obligation to support me. It is part of our Shona custom, just like the way I am supporting my own parents. So I expect the children who I bore to support me...The reason why I say so is that there are times in the life of a parent when he is unable to wear good clothes because of his children. So that parent looks forward to a day when his children, whom he sent to school and for whom he forfeited some of his interests, will support him.

There is a Shona saying, 'chire chigokurerawo' (look after it and it will look after you), so I expect my children to support and take care of me when I am old.

The reason why we women marry and have children is because we want our children to support us in the future.

Thus the interests of the family are thought to lie in supporting, protecting and developing the child's potential as a family member who will support other family members in the future.

Although no doubt exists that many — probably most — people perceive the child's interests to be uniform with family interests, this perspective is problematic. Are children being nurtured, educated and supported because it is good for them, or because the adults in their lives will ultimately benefit? Does the motivation matter? From a family-oriented, traditional perspective, the interests of the child and the family are not in conflict, because the child is, after all, a member of the family. But what happens when the two sets of interests do conflict? And what happens when this group-orientation is confronted with the rapidly individualizing society around it, which provides an individual with limited resources and requires difficult choices about how to use those resources?

The conflict between the group/family orientation of 'culture' and the individual orientation of the material world in which people live today is seen in the practice of child
labour. As expressed in interviews, the concept of 'caring for' a child often includes providing that child with work:

My first child, a girl (nine years old), lives with her grandmother, my mother, in Nyanga. According to our customs, grandparents should be given a grandchild, male or female, to live with. She helps my mother do some work, like fetching water and firewood, watering the garden and going to the grinding mill. It pleases my wife and me to see our child do some work for her grandmother.

There is someone I take care of, but he does not stay with us here in Harare. He lives at our rural home; actually he works for me. We are related. His mother is a sister to me, his grandmother, that is, his mother's mother, and my mother are blood sisters, so he is my nephew.

My parents also took care of my uncle's child. He was not attending school so he came to live with my mother helping her in the fields.

We gave our son to ambuya so that he herds goats for his grandmother.

In a notion of the 'best interests of the child' that merges the interests of a child with those of the group, it is not always clear if the family is really acting in what it considers to be the best interests of the child, or if it is exploiting the child. On the one hand, it is unlikely that the parents' first choice for their child would be that the child work rather than go to school. When interviewees were asked about the best interests of a child in the abstract, every single interviewee mentioned schooling. On the other hand, when there are not sufficient resources to send the child to school, or when there are not sufficient resources to send all the children in a family to school, or when resources are so limited that it is difficult to feed and clothe the children, compromises are made. In this situation, it may be in the best interests of a child to work, and providing work may be one way that a relative can help another. The work serves the child's immediate interests by ensuring that he or she has food and clothing, and it serves the child's long-term interests by strengthening bonds with the extended family. The question of whether it is in the 'best interests of the child' to work in these circumstances therefore illustrates the lack of absolutes and the relativeness of the concept of 'best interests'.

The Concepts of Parenthood and Blood

The concept of parenthood in most societies involves more than the biological relationship to a child, i.e. more than 'blood'. Western societies, for instance, recognize adoption, and the verb 'to mother' is often used colloquially to refer to the act of caring for someone as one would care for a child.

It has been recognized in many African societies that there is a kind of 'pro-parenthood' or 'social parenthood' characterized by the 'movement' of children within or without a kinship group to be 'placed', temporarily or permanently, with someone other than the biological parent.
This also applies among the Shona. In the Shona language, there is more than one version of the word 'mother' (amai), referring to different women in the child's biological mother's family. For instance, the word 'amainini' literally means 'small mother' and refers to the mother's younger sister. A child calls many women 'mother', including the biological mother's sisters, and the biological mother's brothers' wives. A child will also call his biological father's brothers 'father', and they will act as fathers under certain circumstances. There is no Shona word that differentiates the meaning of the English word 'brother' from that of the English word 'cousin, and adults will refer to their brother's or sister's child as their 'son' or 'daughter'.

There are also Shona traditions that assign a member of the family to be a 'mother' to a child. If a woman has no child, she is traditionally given a child from the family:

I stayed with amainini because she had no child.

As you know, when someone gets married she is given a child to stay with and look after.

Although this is expressed in terms of the adult's needs, it is also considered to be good for the child. The interviewees did not perceive a conflict between this practice and the best interests of the child. Even though most interviewees answered the abstract question, 'Who should a child stay with?' by saying 'its mother and father', when they were asked the direct question, 'Is it better for a child to be with its biological mother or amainini?' almost all answered 'it is the same' or 'it depends on what the child wants'.

Parental functions, then, may be shared among a number of different relatives. For instance, the 'tete', or father's sister, also performs one of the important functions usually associated with parenthood — confidant and mentor. The tete is the child's teacher, confidant and family representative, even to the child's own biological mother and father. The tete is responsible for preparing the child for adulthood, and she has various ritual duties in the important ceremonies in the child's life, such as marriage. If the child gets into trouble or misbehaves, the tete is as likely to be blamed as the biological parents.

Similarly, the parental function of caring for the child may be shared among a number of different relatives, as the custody of the child fluctuates from aunt to uncle to grandmother.

Parenthood means more than biology. Far from there being an assumption that the biological parents are the best people to care for the child, or that a child needs the care of his or her biological mother (assumptions made by the state law, as will be discussed below), it is assumed that a child needs many women to perform many 'motherhood' functions and many fathers to perform many 'fatherhood' functions.

One interesting effect of multiple parenting may be that it creates a space for the child to make choices and relieves some of the tensions associated with parenthood. After a child reaches a certain age — and that age may be as young as three or four years — it is not uncommon for the child to say he or she wants to stay for a while with another 'parent', and interviewees say that these wishes are often fulfilled. Adults would seldom prevent the child from staying with whomever he or she wants, as the child belongs to the whole family. To give one example:

I grew up staying at my grandmother's, but at one stage I stayed with my father...for two years; (then) I ran away going back to my grandmother, as
someone who was used to staying with grandmother...I just missed staying with my grandmother...Yes, I ran away, by bus.

A child is expected to have many parents, all of whom share some blood connection with the child. Step-parents, because they are not connected by blood with the child, are assumed to be unable to care for the child very well:

(My husband’s sister) came home pregnant and we do not know the responsible man, so we took the child as if it is our own. She had been to Mozambique when she became pregnant. She cannot look after her child because she is now married to another man.

I thought it reasonable that my children (i.e. his two other children from two other mothers) should live with their mothers since I am living with another woman, and I do not think she is able to care for another woman’s child.

Step-parents often reject their spouse’s child from another partner:

The child was a year old soon after she was weaned off from the mother, who then got married. The man said he did not want the mother together with the child.

The concept of ‘blood’, then, is important in Shona culture. On the one hand it means that a child has many parents from his or her mother's and father's families; on the other hand it means that there is a belief that a step-parent cannot be a good parent. As marriages break up and new marriages are made, many children are separated from their biological parents and placed with relatives who serve as ‘social parents’, because it is in the ‘best interests of the child’. According to this cultural construction of the ‘interests of the child’, a child should have many ‘parents’ who care for him or her, and these parents should be of the same blood as the child.

Paternal Family Rights and Belonging

It is said, according to Shona custom, that a child ‘belongs’ to the family of his or her father. This ‘belonging’ is not quite the same as ‘custody’ as defined by the general law, nor does it — by itself — give the father's family ‘rights’ over the child. However, it is a principle that influences both parental rights and custody.

During an intact marriage, legal custody of a child under customary law is said to be with the child's paternal family, and the child and mother will live with the paternal family. The child is also said to ‘belong’ to the paternal family, arising from the fact that the family (i.e. the whole family, and not just the father of the child) paid the bridewealth, which resulted in the marriage and therefore the child. The grandparents, uncles, etc., are likely to speak of the child as ‘our’ child.

According to written sources of customary law, when a married couple separated or divorced, the father's family kept the children unless they were very young. The customary law position was, however, put somewhat differently by some interviewees, showing the indeterminate and flexible nature of customary law:
Traditionally, where husband and wife had separated, children could go with either parent. If they went with the father, he would support them. If they went with their mother, she and her people supported them. They would go to their father when they were grown up. Depending on the families, some had to pay cattle before they took their children, but others did not.

When the mother and father of a child are not married, written sources of customary law say that the father's family may make a payment to 'take' the child. According to these sources, the maternal family has rights to a child born out of wedlock, and the child lives with and is cared for by its mother and her relatives. However, the father of a child born out of wedlock may obtain rights to that child by paying 'compensation', or maputiro, to the mother's family.

Thus, whether the parents are married, divorced or never married, the child in patrilineal Shona society either 'belongs' to the father's family or can be acquired as a member of that family by the payment of cattle.

The importance of 'belonging' to the father's family comes from traditional spiritual beliefs, which define the 'family' as descendants through the male line and require the assistance of ancestors from this line for good luck and happiness throughout life. According to tradition, the paternal family is responsible for important rituals regarding all its members, calling upon the common ancestral spirits to assist them. These rituals are particularly important in matters of health, marriage and death. It is important to the family that a child be included, because only in that way will the family be complete; and it is important to the child that he or she be included, because only in that way can he or she have the assistance of the ancestors.

It is therefore usually perceived to be in the child's best interests to 'belong' to his or her paternal line. The child must then turn to the father's family in times of need. For the male child, this applies not only to his own needs, but also to his children's needs. If 'belonging' has not been established, the child's health, the opportunity for marriage, the welfare of his marriage and his children, and, at death, his peaceful repose, are all threatened. A female child must also approach the father's family in ritual matters regarding herself, and therefore it may be seen as also in her best interests to be associated with her father's family. But her children will belong to the trans-generational family of their father.

This concept of 'belonging' influences the cultural construction of the 'best interests' by making most people perceive it in the best interests of the child to belong to the paternal family. Because 'belonging' may require a good relationship with the paternal family, it also influences people — mothers, fathers, grandmothers, grandfathers, uncles, aunts, etc. — to favour placing the child in the custody of the paternal family at an early age. It is not only the paternal family that feels this way. The maternal family may even reject the child, because it is perceived to be in the best interest of the child, and of their own family, for the child to be with the father. In practice, although the interviews showed that sometimes fathers took their children and raised them within their own families, and sometimes the children were left with the mother's families, there was in most cases an assumption that the child would 'go to' the father's family at some time to establish his or her 'belonging'. A child's belonging, his or her links to a family, may be more important than where the child lives or who cares for the child.
Culture, Hierarchy and Gender

When both men and women were asked what they thought was in the 'best interests of children', almost all of them gave some variation of the opinion that children should be taught 'good manners' and 'our customs'. The interests of children, then, go beyond the necessities of today and insurance for tomorrow. Children deserve not just life, but a life that is firmly rooted in their culture and traditions: that is, moral, obedient and connected. This is the influence of the 'old', the forefathers. The interviewees said:

Well, a child should fear and respect his parents...He should respect elders and teachers so that he grows up a very nice person. Our culture is now very distorted, it has been invaded by the Western culture. Children, our children, who are growing in this kind of environment, do not even know what their mothers and fathers do. It was not like that in the old days. Our children have lost our culture and do not give parents the respect that used to be given to parents.

Children should be taught about our customs and live the way we did during the old days. If we throw away our customs, we will find our future very difficult. Our elders had good personality and our children should know this and do the same. They should live in accordance with our customs because it is good for their well-being.

It is important for a child to learn 'culture', and the two aspects of culture most often identified were connection with the family and obedience to elders. Obedience to traditional authorities, particularly elder family members, is an important part of the teaching given to children, and it is said to be in their best interests. Obedience is important not just when children are children, but even when they become adults. Shona culture is authoritarian and hierarchical.

Again, it can be seen how culture 'creates' the concept of the 'best interests of the child'. In many societies people would most likely say that it is in the best interests of children to be free to express themselves, to have 'rights' and some 'power'. Shona culture, in contrast, sees it in the best interest of children to blend in with the family, to obey, to fulfil their obligations.

Shona culture is also gendered. It is the duty of women to meet the daily needs of children and to teach children how to behave:

**Male:** A child wants to eat good food, to wear good clothes, a good place to sleep. All these things are found in you women, you are the ones who can see that a child has eaten properly, or is sleeping properly. We fathers fail because we can't do this business by the fire (cooking)...I cannot be seen washing a child's 'rag'.

**Female:** Does the father understand the child? Does a father stay with a child? Does he know the needs of a child? The father can say to an ill child, 'Why do you sleep all over? Wake up, you are so lazy!' yet the child will be sick. A mother is the one who is bound to notice any changes in a child, whether it's
sick or upset...With men, a child can die while the father is there, and he won't notice.

Many interviewees, both male and female, believed strongly in traditional gender roles, and that this traditional division of labour is best for children. For example:

Children should be taught some manual work. Boys should know, for example, how to build a chicken hut, herd cattle or plough. A girl cannot do such things. Girls should do domestic work like fetching water and cooking.

This raises the issue of cultural relativism again, and the thorny issue of the best interests of one child versus the best interests of children as a class. Most interviewees clearly believed that it is in the interests of boys and girls to be treated differently, to be taught how to act as boys and how to act as girls. It can be argued that it is in the interests of girls and boys who are going to live in a gendered society to be taught their appropriate gender roles — in particular, it is in the interests of the individual girl or boy child. On the other hand, it can also be argued that it is not in the interests of boys and girls as a class to be restricted to gender roles and to build a gendered future for themselves and their society.

Culture constructs the concept of the 'best interests of the child', but sometimes it may be in the best interests of the child to change that culture — to change the way that the 'best interests' have been constructed. The content given to the concept is determined by one's worldview, beliefs, traditions — all a part of culture. However, cultures throughout the world are changing, ideas are changing. What do these changes mean for the concept of the 'best interests of the child'?

III. THE MATERIAL CONSTRUCTION OF THE BEST INTERESTS OF THE CHILD

Zimbabwean society is in transition, and much of this transition entails a shift from a rural, subsistence economy to a 'modern', industrialized economy. Economic changes have brought about great changes in lifestyles and aspirations for the ordinary Zimbabwean. The 'material' environment has changed in the sense that different forms of housing, food and drink, labour, transportation, clothing, etc., are part of the lives of most Zimbabweans. As the material environment changes, so too do people's ideas about what is in the best interests of the child.

Interviewees were asked what they thought, in general, was in the best interests of children. Most of the answers were variations on three topics. The first, discussed above, was to learn 'good manners' and 'our customs'. Most other answers related to the material needs of children: either their physical needs of the present, or the need to be able to support themselves in the future.

The first concern was with the child's immediate physical needs. The most important needs of children are good food, clean water, clean and warm clothes, shelter, good health, medical care and whatever else is necessary to sustain life. There is no disputing that it is in the interests of children to have their immediate, present, physical needs met.

Even this very basic interpretation of the 'best interests of the child' is not without problems in Zimbabwe. Problems arise in two ways. First of all, food, clean water, shelter, etc.,
are not available for everyone and in all parts of the country. Because of this, the child's needs either are not met, or meeting the child's immediate physical needs involves compromises in which other important interests of the child are neglected.

A good example is the issue of accommodations. The shortage of accommodations in urban areas means that many parents must be separated from their children even when they do not think it is in the 'best' interests of the children. One interviewee describes the situation:

My children are living with my mother, their grandmother, in our rural home in Filabusi. It is difficult to live with the children here in town. We are lodgers and we do not have enough room for them. Sometimes landlords do not want children and complain that children put dirt on the yard and waste water. Their mother lives with me. She is a vendor, she buys and sells things. We cannot have the children here because my wife sometimes goes to South Africa so there would not be anyone to look after them when she is away since I would be here at work. We cannot afford to employ anyone to take care of them. We earn very little...My mother just lives with them. She does not give them money or buy them clothes. She just makes sure that they do not get hurt. She cooks and washes for them. We, my wife and I, send her money to buy food and soap for washing the children's clothes.

Accommodation for employees in town is often one room, which is particularly problematic after children reach a certain age. They may be sent to a rural area, because the parents do not want them sleeping in the same room. As one interviewee put it, "she is old enough to know."

Thus, the choices of those who decide what is in the 'best interests of children' are restricted by the available possibilities. Although it might be in the best interests of the child, in the abstract, to live with his or her parents, it is also in the best interests of the child to have food, clothing, schooling, etc. Since most jobs are in the urban areas, where accommodations are in short supply, many parents cannot fulfil the basic needs of their children without sending them away. One interest of the child — material welfare — competes with another interest — living with parents. The choices made are not in the best interests of the child, but they are the best under the circumstances, the best among limited possibilities. In today's material reality of Zimbabwe, the various interests of a child often conflict.

The importance of physical needs in the interpretation of 'the best interests of the child' can also be seen from transcripts of Community Court cases. The Presiding Officers always ask questions about the physical environment in which the child would be living. Since it is considered to be in the child's best interests to be living near clean water, schools and clinics, urban areas are sometimes favoured because of greater access to these amenities. On the other hand, accommodations are much scarcer and more crowded in urban areas. Court records sometimes also mention the bad influences present in urban areas and the physical freedom allowed children in the rural areas.

These excerpts show that, rather than acting in the best interests of the child, which is impossible because of the physical realities of life in Zimbabwe for most people, courts, like parents, have to choose some interests over others:
The only reason the Plaintiff wants custody is that he doesn’t want his children to stay at a Growth Point—a she (daughter) might prostitute. But the Growth Point has a school, clinic, shops, etc.

The children are said to be suffering from sores caused by dirtiness, a clear sign that the children are being neglected. Defendant’s sister already has her own four children to look after. In Harare, the children would enjoy better facilities, as it is quite clear that facilities are never the same in Murehwa and here.

The Applicant is staying at a place of work and has only one room. So it is fair to let the child enjoy the environment where it is free and that is in a communal land.

In the material circumstances of Zimbabwe today, it is very difficult for most people to provide an environment for their children that they consider to be in the children’s best interests. If they choose an urban area, it is crowded and there are bad influences (crime, Western ideas, sexual freedom, etc.). If they choose a rural area, there are fewer schools and clinics, there may be no clean water, etc. Compromises are almost always necessary. Choices have to be made—by the legal system and by ordinary people privately arranging custody—within the realm of what is possible.

There is also a gender aspect of the child’s having his or her present physical needs met. Because more men than women are in wage employment, and more men than women migrate to urban areas, children are more likely to be separated from their fathers than their mothers. This reinforces gendered social roles in which women stay at home to take care of children and men work outside the home, theoretically to support the family. Although these social roles are arguably not ‘traditional’, since in a rural, subsistence economy women and men stay together and work together in the fields, they are social roles into which many Zimbabweans have been forced because of economic circumstances. In order to meet the physical needs of their children—and their own physical needs—many Zimbabwean men are forced to be absent. The interest of the child in having a father present succumbs to the interest of the child in eating.

Furthermore, many men, having left behind a child in the rural areas or having separated from the mother of the child, fail to contribute to the physical needs of the child. Wages are low and hardly adequate to meet the man’s needs in the city. He may also have a host of relatives dependent on him for support. Individualization of labour, wages and aspirations means that the man may perceive his wages as his and resent the demands of the mother of his children. Cultural expectations that a mother has the obligation to feed her children may also play a role.27 Thus, in a society in which it is hard enough for a working man or woman to meet their children’s needs, a woman without wage employment, or in low wage employment, is often forced to support her children on her own.

There are, of course, laws designed to force men to support their children, but in practice ‘maintenance’ laws are difficult or impossible to enforce. First of all, the enforcement of these laws is based on the garnishment of wages: but in a country where only a small minority of people work for wages in the formal sector, this is ineffective. There is no effective way to enforce a maintenance order against a worker in the informal or subsistence agricultural sector or against an unemployed person. Second, even though research shows widespread knowledge of the principles of maintenance law, there is very little knowledge of how to approach the legal system to get redress. Therefore, most people entitled to maintenance never
claim it. Third, there are numerous practical difficulties with claiming and enforcing maintenance, ranging from scarcity of courts, to long queues, money that must be paid to issue a summons and the need for a bank account in which to deposit the money. Finally, cultural values, which stress the settlement of disputes within families and discourage exposing one's problems to strangers, inhibit many people. Therefore, although maintenance laws ideally put the interests of children first, in practice they do not work, and children are raised by women who often do not have the financial capacity to meet their needs.

What does this situation say about the way that material reality constructs the best interests of the child? First, the fact that jobs are scarce, usually for males, and urban-centred, along with the fact that accommodations are inadequate and expensive, has meant that the best interests of the child — within the realm of possibility — are usually interpreted as meaning separation from the father and day-to-day caring by a woman who is either the mother or another female relative.

Second, the individualization of the fruits of economic production, low wages, greater employment and wages opportunities for males, scarcity of resources within the (extended) family, and inadequate and inadequately enforced maintenance laws, has meant that the perceived best interests of the child — within the realm of possibility — are that he or she stay with the paternal family. This is because the father is usually in a better financial position to meet the material needs of the child, and he is more likely to contribute to the child's welfare when his child stays with his family. Thus, many women have to give up their children to the father and/or his family, so that the children's most basic physical needs can be met. Since it is in the best interests of the child to eat, and the mother cannot afford to feed the child, she gives the child to the father, who has a job and would otherwise not contribute to the child's support.

Third, because it is often difficult to meet the child's present physical needs, the practical interpretation of the best interests of the child — within the realm of possibility — neglects other, more intangible needs, such as love and affection, play and attention. In societies where day-to-day survival is tenuous, less obvious but no less immediate emotional and mental needs seldom figure in the interpretation of the 'best interests of the child'.

Another material concern relevant to the best interests of the child is the child's interests in having a good future — the child as future adult. Every single interviewee contacted for this study expressed the opinion that it is in the best interests of children to be sent to school to ensure that they have a good future. For example:

Nowadays it is very difficult to live without education. In the old days it was very easy, one could do farming in the rural areas. But nowadays, sometimes it does not rain, so the only alternative is to find a job and you can only find a job if you are educated. Education is the 

*duara* of life today. Even buying clothes needs education.

Parents should prepare their children's future because nobody knows what is going to happen tomorrow...Children should be educated up to that level that would enable them to lead a good life like others who are leading prosperous lives. Life today is very difficult, to get a job you need to be educated; whatever one may wish to do, one has to be educated.
Similarly, the Community Courts consider schooling to be a top priority for all children. A parent who does not send his or her children to school is not considered a good parent, and a home that is not near a school is not favoured:

Plaintiff (father) did not dispute that the schools were far from his mother's place, thus demonstrating that the future of the children in education is being destroyed because either the children are late for lessons or their performance in class work is not good because they arrive at school tired from walking.

There is nothing very problematic in this — it accords with the Convention on the Rights of the Child, which also treats education as a priority. However, the issue of schooling does illustrate three more general aspects to the material construction of the 'best interests of the child'. First, in the realm of possibilities open to many Zimbabweans, determining and acting upon the best interests of the child is an exercise in balancing conflicting interests and compromising. Certain interests of children, such as living with a parent or in an uncrowded accommodation, are often sacrificed for the benefit of the child's schooling, because schooling is seen as so important. Similarly, the interests of different children may conflict. It may be in the best interests of the family to send one child to work, so that he or she can contribute to the school fees of another child, or to keep one child at home to care for younger children. One child's interests may conflict with those of another. The child lives in the context of a family and other children, which may both limit and expand the possibilities available to the child. One child's possibilities are expanded because his older brother works to help pay his school fees; another child's possibilities are limited because she must stay out of school to look after younger siblings.

Second, in the material reality of societies such as that of Zimbabwe (economic hardship, lack of social services and social security, cycles of drought, etc.) the best interests of the child are likely to be interpreted in ways that emphasize the child as a future adult rather than as a child. It is likely to be considered more important that children go to school rather than live with a parent who loves them; more important to work for a relative, and thus strengthen family bonds, than to play. Interpreting the best interests of the child as the need to create a good future for the child as a wage-earner and committed family member not only protects the child, but also represents the interests of the family in having a member who can work for wages and contribute them, when necessary, to needy family members.

Third, even in a system in which most decisions about the best interests of the individual child are made by the family, the State has a role in giving content to the concept. Decisions by the State — where schools are built, how much of the budget is devoted to education, how teachers are trained, what priority is given to public transport in the rural areas, etc. — greatly contribute to the necessity of families to make compromises on the best interests of their children. Because the 'best interests of the child' are so closely linked to practical possibilities, the role of the State is central.

In conclusion, the concept of the 'best interests of the child' must be considered in two contexts: the material reality in which the child lives, which is a world of limited possibilities, and the possible reality in which children could find themselves: a changed world. Acting in the best interests of the child means not only that well-meaning parents and caretakers make the best choices within the limited possibilities available to them; it also means expanding those possibilities. Thus, acting in the child's best interests means that the family chooses to leave the child in a rural area because there is no accommodation in town; but it also means making available safe, healthy, roomy accommodations in town and bringing jobs to the rural areas.
IV. THE LEGAL CONSTRUCTION OF THE BEST INTERESTS OF THE CHILD

Zimbabwean courts are required by statute to consider the 'best interests of the child' in all relevant judgements. This, however, begs the question of how the best interests of the child are to be determined. The state court system gives its own content to the concept of the best interests, just as culture and material reality construct the concept outside the court system.

Who Decides? What is Law?

In practice, most custody decisions — whether between married parents, within extended families, or in divorce cases — are made outside the state court system. Furthermore, according to the customary law, it is the (extended) family that decides what is in the best interests of the child, and even customary authorities, such as headmen and chiefs, are seldom involved in this decision.

According to the law of the State, however, custody decisions are reserved to the State itself and to its institutions, such as the courts and the Department of Social Welfare. The State has the power to protect a child, which can include taking children away from their families, and to decide custody upon divorce. The State also has the power to determine the rules that regulate decisions about custody and about the best interests of the child.

A conflict between the legally and culturally constructed versions of the 'best interests of the child' is already evident. According to state law, the State is in the best position to decide what is in the best interests of the child — both at a general level and in specific cases. However, according to culture — the customary law and the practice of the people today — the family is in the best position to decide what is in the best interests of the child.

A second conflict arises when deciding which legal system provides content to the concept of the 'best interests of the child'. Are 'best interests of the child' to be determined according to the principles of customary law or according to the general law, meaning court judgements and principles derived from both local (Zimbabwean) and foreign (South African and English) sources? Or are the 'best interests of the child' something independent of either legal system?

In practice, in both Community Courts studied, the 'best interests of the child' were determined according to the general law, including both South African and Zimbabwean judgements. Even the rural court, in several cases, quoted a 1909 South African legal judgement as well as several judgements of the Supreme Court of Zimbabwe. This produces a clear conflict, as the following discussion will show, because the legal construction of the 'best interests of the child' contrasts sharply with the cultural construction.

In summary, the very act of bringing a custody case into a formal state court means, first, that 'best interests' will be decided by an institution that is not recognized by the customary law and, second, that 'best interests' will largely be interpreted according to the general law, based on foreign, 'Western' values. Already, the concept of the 'best interests of the child' is being constructed by the legal system that is settling the dispute.
Maternal Care

According to the general (Roman Dutch) law, it is in the 'best interests of the child' to be with his or her biological mother. The Zimbabwean courts follow a South African case where it was held that custody should generally go to the mother, provided that her character is not such as to make this prejudicial to the welfare of the child. In the cases reviewed for this study, several Presiding Officers were fond of an unattributed quotation: 'A child of tender age is more in need of maternal than paternal care'. One Presiding Officer expressed it thus:

The Plaintiff must prove that the Respondent can't be awarded custody for compelling reasons, for there is no mother who can give the natural love, development of the children psychologically, (and) education, as well as sense of well-being, like the natural mother, unless she be insane.

Although Community Courts, like the one from which this quotation arose, are supposed to apply the customary law, the presumption is in stark contrast to the tenets of customary law. It is also in contrast to the actions and values of the people, as expressed in the custody decisions they make in practice, or to the 'living law'. The customary law gives the father's family the right to his child in most circumstances, implicitly assuming it is in the child's best interests to be with the paternal family, whose ancestors will protect it. Although young children may remain with the mother, they can go to the father's family at any time. Similarly, in practice, very young children are often separated from their mothers for a variety of reasons, including practicalities, the desire of a grandmother to have a child to look after, etc.

Thus, a non-traditional, Western concept of 'mothering' and 'mother' is being applied. The state law applies a value that favours mothering by the biological mother, while in Shona culture 'mothering' may be done by any number of 'mothers'. A child calls many different women 'mother', and it is in the best interests of the child to be 'mothered' by many 'mothers'.

Individualization of Custody

As discussed above, custody is traditionally a family, rather than an individual, matter. The family talks about the child as 'our child' and considers it both an obligation and an advantage to look after children. In practice, custody of children fluctuates between family members, sometimes to gain material or practical advantages, and sometimes to reinforce family ties and to help or please family members. Although there is no doubt that expectations for some people are becoming more nuclear-family centred, as seen above, in both the customary law and in practice it is still often considered to be in a child's best interests to live with a relative who is not his or her biological parent.

The state legal system, on the other hand, considers it to be in the best interests of the child to live with a biological parent, and it will only allow the child to live with another relative under exceptional circumstances. Here are some quotations from Presiding Officers in Community Courts:
It is only the parents who can live with their children... There were no reasons given as to why such children of this tender age should leave both parents and live as orphans while the parents are living in luxury in the town of Harare.

This court does not see any reason why the Respondent should keep on having custody when she does not live with the child and why the child should miss both parents as if he is an orphan.... The child can only live with a third party under special conditions. Thus the Court feels it is best for the child to live with the father.

It is not their best interests to live with someone who is not a parent to them.

Of the 40 cases studied, ten of them (25 per cent) were decided wholly or partly on the grounds that it is in the best interests of a child to be with a biological parent rather than a third party.

Again there is a conflict between the legal construction of the 'best interests of the child' and the cultural and material construction of that same concept. Not only does 'culture' consider that the child belongs to the family rather than an individual parent, but in a society where it is often necessary for a person to look for work in urban areas, where accommodations are scarce and often unsuitable for children (as discussed above), the dictates of necessity often mean that children stay with relatives and not their biological parents.

Both men and women may be forced to live apart from their children — give up the day-to-day caring that is part of parenting — in order to work and have the financial capacity to support those children, another aspect of parental 'caring'. That contradiction — parents must give up one kind of caring in order to do another kind of caring — is usually dealt with by sending the children to relatives, usually grandmothers, in the rural areas. Yet a separated or divorced parent who does so risks losing custody of the children should the other parent go to court. This may work to the disadvantage of either parent who wants to work. In one case a mother could not keep her children with her, as she was working and there was no one to look after the children during the day. Therefore, she sent the children to stay with her sister. The Presiding Officer considered it better for the children to stay with their father — even though during the day they would be looked after by a maid — than to stay with the mother's sister. Similarly, in another case, the father wanted to take the children from the mother and leave them at his parents' rural home. The Presiding Officer held that the children should stay with the mother.

The individualization of custody in the Community Courts indicates both a legally constructed version of the best interests of the child that is at variance with 'culture' and material reality, and the ambiguity and contradictions of the way 'best interests' are constructed in a varied, changing, developing country such as Zimbabwe. It is too simple — and inaccurate — to say that everyone outside the court system believes it is in the best interests of the child to stay with relatives while the court system believes otherwise. The reality is that some people have more individualized values with regard to the best interests of the child, and they can use the court system to enforce these beliefs, while other people have more group-centred values and find themselves at variance with the court system. Regardless, the legal system — expressed through the courts — is clear and firm about the way it constructs the 'best interests of the child' in favour of the child's staying with biological parents.
One consequence of the state legal system’s focus on the individual, biological parent is that the character and actions of these individuals become more important than they would be in a group setting. Thus, the Community Courts consider the character and actions of the individual biological parents relevant to a determination of custody. Again, this conflicts with the cultural concept of custody as a family rather than an individual matter, and with the cultural belief that it is in the child’s best interests to remain with the family regardless of the actions of his or her individual, biological parents.

The legal system, by considering the character of the parent relevant to the question of the best interests of the child, has introduced a factor that customary law does not appear to consider at all relevant to custody. Under customary law, the actions of one’s father and the character of one’s mother do not change the basic fact that it is the father’s ancestral spirits who protect the child and with whom the child belongs. If the individual, biological parent is not responsible, other members of his family — the other ‘parents’ — will be responsible.

The focus of the state law on the individual, biological parent may be perceived as unfair by other family members, who also feel that the child is ‘theirs’. This creates a conflict between the values and expectations of the people and the values and expectations of the state court system, which produces dissatisfaction for some people and room to manoeuvre for others. The child, whose interests are supposedly being considered, may be caught between these various values, expectations and agendas.

In addition, in its consideration of the ‘character’ of the parents, the legal system has provided content for the ideal of ‘character’, and therefore for the legal construction of the ‘best interests of the child’. The ideal character to which the litigants were compared conformed with gender stereotypes, as the following discussion shows.

Gender and Constructing ‘Character’

Whenever a court is called upon to judge the ‘character’ of a person, it is implicitly being asked to evaluate whether a person lives up to what is expected of a ‘good’ person. Determining ‘good character’ and ‘bad character’ are value judgements, influenced by culture and ideology. Thus ‘good character’ itself may be ‘constructed’ by the court system applying the concept. Although there are many aspects to ‘good character’, the most striking one in the cases reviewed for this study were the gendered roles and expectations to which litigants were expected to conform.

First, mothers were expected to be non-sexual and not have ‘boyfriends’, even if unmarried or divorced. In some cases, women were accused of being ‘prostitutes’ if they had a boyfriend. A father, on the other hand, was never criticized for having a girlfriend, and often attracted approval if he found another wife to care for his children. While a woman is criticized for attaching herself to another man, a man is praised for attaching himself to another woman. Building on gendered ideals, Presiding Officers implicitly assumed that it is in the best interests of children — and inevitable — that they be cared for on a day-to-day basis by women. It was assumed that there must be a woman to cook for them, clean them, supervise them, etc. As a result, a man applying for custody was questioned on who would ‘care for’ the child.

Mothers were expected to stay with and care for their children (even when the only way they can find a job is to leave the children with a relative). Fathers, on the other hand, were expected to work (to provide money for the children), even if this means leaving the
child with a maid or a female relative during the day. While a man is praised for working, because it shows he wants to provide for the children, a woman is criticized for working, because it separates her from her children:

This behaviour (leaving the children behind when the mother and father separated) is not typical of a mother who has her children's interests at heart.

Applicant voluntarily left the children at the Respondent's home in the Communal Lands...If she did leave (the child of ten years) at such a tender age, what is there to show that she has the interests of the children at heart?

Thus, the notion of 'good character' is linked to gender roles and expectations. But where does this notion of gender roles come from? It is in direct opposition to the Customary Law, under which a mother who separates from her husband would be required to leave the children with her husband's family, and to the 'living law' in which mothers often leave their children with relatives. Further, if a woman who leaves her husband and has no job with which to support her children nor a place to live (meaning she would have to take the children out of school and away from their familiar environment, while at the same time she would find it difficult to look for work or accommodation with children in tow), it certainly seems reasonable that she might consider it in the best interests of the children to remain at their father's place, at least until she gets settled.

This legal version of the 'best interests of the child' fails to take into account either the customs of the people being judged or the practical realities of life, particularly women's lives. Again there is a conflict between the values applied by the State and the values applied by the people. There is also a conflict between one aspect of best interests — a mother who does not leave her children — and another aspect of best interests — stable environment, schooling, food, clothing, etc. As noted above, here again a parent has to act against some of the child's interests in order to fulfil other interests. A balancing act is in progress, with the courts and ordinary people often weighing competing interests differently.

Applying an ideal in which the father works and financially supports the family, while the mother physically cares for the children and is criticized if she separates from her children, reflects both the influence of Western values and the material reality of migrant labour. It is not based on Shona culture, where women as well as men were economically productive, with women assigned the role of producing agricultural goods for food and trade.

In summary, like 'culture' and material reality, the legal system constructs its own version of the 'best interests of the child'. According to state law, it is in the 'best interests of the child' for the State rather than the family to decide the child's best interests, for general rather than customary law to decide the child's best interests, for the child to stay with the mother unless the mother is not of 'good character', and for the child to stay with a biological parent rather than a relative or other third party. In deciding what 'character' is 'good', the law in practice applies gendered notions of what a woman and a man should and should not do, and even these gender expectations are influenced more by Western values about women and men than by traditional values. This mixture of values, expectations and constructions of the best interests of the child provides fertile ground for political interpretations of the 'best interests of the child' — which the next chapter will show.
V. THE POLITICAL CONSTRUCTION
OF THE 'BEST INTERESTS OF THE CHILD'

'Political' here means influencing decisions for public or private gain. The concept of the 'best interests of the child' may be politically constructed for private gain both at the level of state politics and within state institutions, such as the court system. This does not mean that the interests of children are not also sometimes being served, but it does mean that one must look beyond words to uncover the way the content of the concept may be politically created.

The Political Construction of 'Custom'

One example of the way that the 'best interests of the child', and even 'culture' or 'custom' itself, can be constructed by national politics is shown by the national debate in Zimbabwe over maintenance laws.

In Zimbabwe, the word 'culture' is usually used to mean 'tradition', or each ethnic group's rituals, values and beliefs that are passed down from generation to generation. However, even 'culture' itself has been constructed over time: tradition has been invented.

This happens in two ways. First, those with power or struggling to get power may state 'culture' in ways that serve their purposes. Second, those same people may proclaim and use some parts of 'culture' and leave others behind.

Men, in public debate in Zimbabwe, argue that there was no 'maintenance' under customary law:

In the old days there was nothing like maintenance. The girls of those days were very decent and there was no problem of unwanted pregnancies. There were very rare cases where a girl was impregnated, but such cases were dealt with privately. There were also very few cases of divorce. In those cases children would go with their mother but each child would go with one head of cattle. The cattle would be milked or sold but it had to benefit the child.

The argument is made that there is no 'maintenance' under custom, yet it is admitted that a cow was given for the benefit of the child. 'Custom' could just as easily show — depending on the political motivation of the speaker — that maintenance existed under customary law, as evidenced by the payment of a cow to be milked or sold for the benefit of the child. Thus, in this example, 'custom' can be stated in more than one way.

There is evidence that much of 'custom' as applied in state institutions and stated by politicians today is actually the product of misunderstandings and political collaboration, particularly between colonial administrators, missionaries and elderly male traditional leaders. Although most research studies how this affected the position of women, one recent study can be reinterpreted with reference to the interests of children. Schmidt, examining historical materials, shows how in the first decades of colonial rule both traditional authorities and colonial officials interpreted customary law of custody in a flexible way, and, although fathers usually got custody of children when a marriage broke down, in some circumstances the mother and her kin kept the children. However:
As male control over female sexuality became increasingly important to the colonial endeavour, the judgements in child custody cases took a dramatic turn. By the 1930s, native commissioners were increasingly ruling in favour of the husbands. Through rigid application of the father-right principle, native commissioner’s courts frequently coerced women into remaining with abusive or disinterested husbands — under threat of losing their children. Numerous cases reveal that women who persisted in rebelling were, indeed, forced to relinquish their children.45

Thus, because male leaders and their colonial collaborators wanted to control women, the ‘customary law’ came to consider it in the child’s best interests to remain with his or her father after divorce.

Gender and the Construction of ‘Best Interests’

The answers to the general questions about the best interests of the child did not reflect any gender differences. Men and women had similar views on the best interests of the child in the abstract. However, when similar men and women approach the legal system, their stated views on the best interests of the child differ markedly.46 The arguments made in court by women and men attempting to obtain custody of a child reflect a highly gendered combination of the state law — with its emphasis on the nuclear family and its preference for the biological mother — and the customary and living law, with its concept of family rights and obligations.

Men made arguments based on customary law, practices and beliefs when it was to their advantage:

I want to take my blood to my family.

I paid lobolo (brideprice).

I feel custody should be awarded to me because I have parents who can look after the child as well.

My brother and his wife are cooking, washing and finding firewood for the children. I see the children on the weekends.

But men also made the following arguments, based on the state law presumption in favour of biological parents, when it was to their advantage:

The child is living with grandparents in the Communal Lands. (She) is lacking the proper guidance due from parents, which I can give her.

(I should get custody because) the mother does not stay with the child.

Unlike the men, who drew from both systems, women argued on the basis of the state law presumption that a ‘child of tender years needs motherly love’.47 Thus women argued:
They are still young and need their mother.

The children are too young to go to their father.

My children are being looked after by another woman when I am able to look after them.

The women also argued on the basis of the presumption in favour of the biological parents:

(I should get custody because) the children are at Gokwe where they are all kept by his elder brother's wife.

This argument was sometimes made in a somewhat contradictory fashion, in which the woman argued that children need 'maternal care' but left the children with relatives:

I want the two minor children as they are too young to be separated from me. They were staying with my mother...

Women also argued that the father was not meeting his general law obligation to pay maintenance for the children:

I have been looking after the children until now with no help from him — for the past ten years he has not paid a cent toward school fees.

He is failing to pay maintenance, which makes me doubt whether he will look after them.

Finally, women based arguments on the role of the woman as caretaker of children. These arguments worked against the man in two ways: first, the father, being a man, could not look after the children properly; second, his wife, being a woman, was likely to be the one looking after the children (and would not care for them since they are not hers):

He cannot wash the clothes and the bodies of the children.

Who will look after the child, as he has no wife?

I want custody, as the father intends marrying another woman, and I am convinced that the woman would not be able to look after my children.

I don't want the children to be kept by another wife.

I don't see any reason to give custody to another woman as she has her own children.

The manner in which men and women argued in court provides some insight into the ways that the concept of the 'best interests of the child' can be used. It also demonstrates the difficulties of having a variety of different conceptions of the best interests of the child operating within one society and applied in different social or legal spheres.
Men make arguments based on customary law, which would probably be accepted by their families or chiefs, but which are rejected outright by the state court. So they turn to Western law when it suits them. Women make arguments based on Western values of preference for individual, biological mothering. These values are almost invariably accepted by the court, but they would probably be rejected by traditional institutions, such as the family and chief’s court. The introduction of new values into the state court system has benefitted women in their attempts to get custody of their children — but has it benefited children? Are women being disingenuous, or do they simply now have the tools to act in what they genuinely believe to be in the best interests of their children? If they truly believe the children need maternal care, then why, in practice, are children so often left with other relatives? Is maternal care an ideal, which often cannot be realized because of practical difficulties, or is it merely a ‘Western’ value imported into Zimbabwean society and used by women for their own benefit?

Both men and women use arguments based on the children’s need for their biological parents — while these same men and women send the children to stay with relatives. Women rely on their role as caretakers of children. They argue that the father’s new wife cannot fulfil her gendered role of caring for the child since the child is not hers, and that the father cannot care for the child since he is a man.

Thus, the concept of the ‘best interests of the child’ can be constructed according to the political motivations of those doing the arguing — both for personal and for public political advantage. In all societies, it is a complicating factor that individuals have different views on the best interests of the child. The situation is even more complicated in societies such as that of Zimbabwe, where there are rapid lifestyles changes, with corresponding changes in perspectives and values. There are undoubtedly many people who genuinely believe it is in the interests of children to belong to their family, and many others who genuinely believe that it is in the interests of children to be raised by their biological parents. The situation is then further complicated by the fact that two semi-autonomous spheres — the state legal system and the norms and practices outside the state legal system (the ‘living law’) — are in conflict. The existence of different constructions of the ‘best interests of the child’ may in some ways redress old inequalities, e.g. by giving women an avenue through which to put forward their version of best interests, but it may also allow people to use the concept to serve their own interests and obscure the interests of the child.

VI. CONCLUSION

The concept of the ‘best interests of the child’ as embodied in the International Convention on the Rights of the Child has little or no content without placing it in context. In the context of the Convention itself, there are 54 Articles that give content to the phrase. According to the Convention, it is in the best interests of children to get a good education, to live with their parents, to express their views freely, not to work, etc. In other contexts, however, the concept of the ‘best interests of the child’ has different meanings.

This report has demonstrated four ways in which the concept of the best interests of the child is constructed by its context: culture, material environment, law and politics. Each has its own inherent problems, and each interacts with the others.
The Cultural Construction

The study has identified five facets to the cultural construction of the concept of the 'best interests of the child'. First is the question of 'who decides'? According to Shona culture, decisions regarding the best interests of the child are made by the family and not by the State. And according to Shona culture, the 'law', or customary law, is made and enforced at the level of the family.

This raises the question of the role of state law in protecting the interests of the child. In all societies the State is reluctant to interfere with decisions made within the family, which is seen as being private. Yet in all societies, there is interference in family decisions and actions are taken to protect children under certain circumstances. In most societies, for instance, the State will not allow families to abuse or neglect children.

Is it valid to argue that it is not 'culturally appropriate' for the State to intervene in private, family decisions? Or should it be pointed out, instead, that 'culture' is changing: the institutions that traditionally made decisions regarding children are changing, and some of the mechanisms that protected children from decisions made against their interests, such as families living together and seeing and knowing each other on a daily basis, are also changing?

Similarly, the concept of 'law' itself is culturally constructed. Western nations tend to have a concept of law that is state-centred: 'law' is made and enforced by the State. In contrast, customary law is traditionally made and enforced by the family. When the International Convention on the Rights of the Child requires States Parties to ensure that the best interests of the child are taken into account in all decisions by 'courts of law', 'legislative bodies' etc., does this include the 'court' of the family? Does it include the 'legislative' powers of the family? If so, how is the State to effect control over this kind of 'law'? If not, how is the State to effectively protect children?

Second, there is the belief that the interests of the family group and the interests of the child are interrelated: the child may someday depend on the family, and family members may someday depend on the child. Based on this principle, children are sent to stay with relatives, and sometimes to work for relatives, in order to strengthen the family and family bonds. This principle also underpins the myriad of ways that extended family members care for children, including taking them into their homes, paying for food, clothing and school fees, etc.

A world view in which children (future adults) and their relatives are interdependent creates a certain kind of power for the child, a certain space within adult-dominated society in which the child's interests will be considered and promoted. The future role of children in the family gives the whole family a particular interest in children's welfare. Children have a kind of power due to the family members' perceptions of their future role, and particularly the fact that this role is not enforceable, but depends on the voluntary actions of the family member. No court or person can force someone to give money to his aging uncle, but if that uncle was good to his nephew when he was a child, the adult nephew will probably feel a moral obligation toward the uncle. Thus the Shona saying: 'chire chigokurerawo' or 'look after children and they will look after you'. This does not mean that children have the power to decide what will happen to them, but it may increase their power to persuade adults to do what they want, and it most certainly encourages adults to provide for their needs.

The emphasis on the extended family, and on the child as member of the extended family, raises several questions regarding not just Zimbabwe, but other cultural contexts as well. Are parents in a better position than extended families to make decisions regarding children, as most Western legal systems assume? Are parents less likely than other family
members to abuse the dependency that children have upon them? Is there, perhaps, a need to revalue family — meaning the extended family — as a source of material and emotional support for the child, as the child’s locus of community and belonging, as the source of caring for the child, as the child’s home? Should caring be revalued, not in an individualistic way, but in a way that includes the larger family?

On the other hand, the extended family may not always act in the child’s best interests. It may not always be clear when a decision is being taken in accordance with the interests of the child as family member and when the child is being exploited. Parents who would never take their child out of school to work in the fields are quite happy to employ a relative’s child.

The third cultural issue discussed was the concept of parenthood, particularly motherhood. Linked to the principle that the interests of the family and of the child coincide is the principle that there are many women who can ‘mother’ a child. ‘Culture’ dictates that it is not necessarily in the best interests of the child to be with his or her biological mother, as other interests may take precedence. This is a part of ‘culture’ that can be used to control and confine women, but that can also be used to give women greater autonomy. On the one hand, the paternal family of a child may use the argument of culture to remove the child from his or her mother, even though she wants to remain with the child — or the threat of losing her child may force her to act in certain ways (e.g. stay in a bad marriage, not look for work); but on the other hand ‘culture’ may allow a mother to leave her child with relatives while she is in paid employment, giving her financial independence. Similarly, with regard to the child’s interests, this principle may mean that children receive the caring associated with motherhood from many different women, enriching their lives, or it may mean that children are taken away from a ‘mother’ with whom they want to stay.

Again, one might ask, is the biological mother in a better position than a ‘social’ mother to care for a child? The (Western) emphasis on individual, biological motherhood has also been used to control and confine women — to prevent them from taking jobs that are fulfilling and/or give financial independence, to restrict their advancement professionally, to ‘protect’ them in ways they might not want to be protected. It may have also worked in ways that are not in the interests of the child, e.g. by leaving women isolated with their children in ways and places leading to tensions that end up directed toward the child, by restricting the child’s opportunities to be loved by other adults, by preventing men from ‘mothering’, etc.

The fourth issue was the belief in the paternal ancestors and in their protection of children. The conviction that paternal ancestors watch over children, protecting them from harm, sickness, misfortune, and so on, results in the belief that it is in the best interests of the child to belong to the father’s family, through which these ancestors can be contacted. The desire to protect the child — or the fear that spirits might be displeased — sometimes causes adults, including mothers, to send a child to live with the father’s family even if some other interests of the child are not met. This belief means a biological mother may likely be separated from her children if her relationship with the child’s father is terminated, leaving her in a very bad bargaining position if she wants to remain with her children.

In a fifth way of culturally constructing the content of ‘best interests of the child’, children are taught ‘our customs’, which include such values as obedience to authority and gender roles and expectations. Some aspects of culture, such as obedience and conforming to gendered stereotypes, may seem in the immediate interests of individual children if they grow up in a hierarchical, gendered society. However, it is also in the interests of individual children and children as a class that the world be less hierarchical and gendered. These are two different ways of looking at the interests of children: their immediate interests in their current environment and their interests in changing that environment.
Two general points, then, emerge from this discussion of the cultural construction of the concept of the 'best interests of the child'. First, it is impossible to look honestly at the cultural construction of 'best interests' without accepting that there are inherent contradictions that may never be resolved. For instance, focus on the extended family can be both good and bad for children. It may, at the same time, provide children with more people who care about them and their interests, and it may allow children to be exploited.

Second, it may be time to revalue some key concepts with regard to the 'best interests of the child' in a less 'Western' and more 'African' (or other 'developing world') way. For instance, if a feminist analysis might argue that 'caring' for children has lost its value in our materialistic world, and that the value of caring for children should be recognized and even compensated, the developing world could argue that 'caring' for children has been valued only in an individualistic way, and that the value of caring for children should be recognized in a more (extended) family, group-oriented way. Caring for children as a part of 'grandmotherhood', 'grandfatherhood', 'aunthood' and 'unclehood' should be acknowledged, valued, and promoted.

**The Material Construction**

There are two major aspects to the material construction of the content of the best interests of the child. First, best interests include food, shelter, health, clean water, etc., or the immediate needs of children. Second, best interests include schooling, saving money, etc., or the future needs of children. The child is considered as both today's child and tomorrow's adult.

The 'today's child' and 'tomorrow's adult' consideration may cause conflicts among different interests of the child. The interest in educating tomorrow's adult may conflict with the interest in feeding today's child. The interest of tomorrow's adult in forming a close relationship with the extended families may conflict with the interests of today's child in staying with a biological parent. The interest of tomorrow's adult in succeeding, or even surviving, may conflict with the interest of today's child in playing. All cultures and all 'parents' must balance these two aspects of a child's best interests to some extent.

When considering the best interests of the child in a cultural context, it is important to consider the weight attached to each side of the balance. In Shona culture, like in many non-Western cultures, tomorrow's adult is given more weight than today's child. The most obvious example is the fact that every effort is made to send the child to school, even when it means separation from loved ones. This way of looking at the 'best interests of the child' is constructed by the material reality of Zimbabwe, where the child's future is not cushioned by the benefits of a welfare state, where unemployment and even starvation are real possibilities, and where schools are insufficient and unevenly distributed.

Thus, the meaning of the 'best interests of the child' is constructed by the material reality in which decision-makers live. Acknowledgement of this is, at its core, a critique of the liberal notion of choice. Choices are not free — not in Zimbabwe, not for most people. Choices are restricted by the possibilities available. Some interviewees said, in the abstract, it is in the best interests of a child to live with both biological parents. But choosing this option is not a possibility for most families. Fathers and mothers must live in towns, with no accommodations for children, in order to get jobs to provide financial resources to their children. One interest of the child — material welfare — competes with another interest — living with parents. Children must live with relatives in order to be nearer to a school, or to have good drinking
water, or to do chores in exchange for school fees. The choices that are made are not in the best interests of the child, but they are the best under the circumstances. A child has a lot of different interests, and in the present-day material reality of Zimbabwe these interests often conflict.

Similarly, the interests of different children conflict. It may be in the best interests of the family to send one child to work, so that he or she can contribute to the school fees of the other child, or to keep one child at home to care for younger children. It is impossible in such circumstances to act in the best interests of one child without acting against the interests of another: one child's interests are not the same as another's. In the same way that the notion of choice can be considered only in relation to the context within which that choice is made, so the child is not autonomous (any more than an adult is autonomous): the child lives in the context of a family, (usually) other children, the community and the State.

The relativity of the concept of the 'best interests of the child' makes it necessary to look beyond evaluating the choices of well-meaning parents and caretakers, and to focus on enlarging their options. Thus, acting in the child's best interests could mean that a family chooses to leave its child in a rural area because there is no accommodation in town; however, it could also mean making available safe, healthy, roomy accommodations in town and bringing jobs to the rural areas. Although it would be wrong to base all strategies for children on major economic and material changes — i.e. 'development' — it is just as incomplete to limit the concept of the child's best interests to choices within the present limited material reality.

Finally, although the concept of the best interests of the child must be seen as materially constructed, material interests are not the only interests of the child. When discussing the interests of the child in the abstract, interviewees mentioned teaching children 'good manners', ensuring that they 'belong' to the family, and various intangibles such as love, happiness, etc. In concrete situations, however, in a world of limited resources and opportunities, decisions are too often forced by the constraints of tangible, material needs, and intangible, emotional and affectionate needs cannot be given priority.

The Legal Construction

Third, the content of the concept of the 'best interests of the child' is created by law. It has been seen how state law, as applied in the Community Courts, has created a version of the 'best interests of the child' that is at variance with 'customary law' and the way people make decisions on a day-to-day basis (the 'living law'). According to state law, it up to the State to decide what is in the best interests of the child, and these best interests are determined by general law rather than customary law. The state law holds that it is in the best interests of a child to be with the biological parents, even though the customary and living laws emphasize links with the extended family. The state law holds that the 'child of tender years is in need of maternal care' even though the customary and living laws allow 'mothering' and 'parenting' by a variety of different individuals. The state law evaluates the individual traits of the biological parents, while in the customary and living laws, where custody vests in families rather than individuals, these traits have little relevance.

It has been seen how individual interpretations of the 'best interests of the child' are applied in court. Individual Presiding Officers judged women and men according to different
standards of behaviour and generally favoured 'modern' conditions and values in determining the best interests of the child.

The importance of this is twofold. First, it again underlines the point that the concept of the 'best interests of the child' is fundamentally subjective: unless clear guidelines exist, it can be, and is, interpreted in contradictory ways. Its meaning is created — constructed — by the institution applying it. Second, the existence in one environment of so many different constructions of the 'best interests of the child' has created a situation where different people can use different interpretations to make arguments serving their own interests rather than the child's. Thus the concept of the 'best interests of the child' can be politically constructed. It must always be asked: whose version of the 'best interests of the child'?

The Political Construction

'Politics' include strategies to obtain power for either public and private gain. At the public level, for example, the 'best interests of the child' can be constructed by creating a version of 'custom' to underpin the concept. 'Custom', most researchers now acknowledge, is at the very least a flexible and evolving institution, and perhaps it is even invented. Thus, customary law on issues like maintenance and the best interests of the children after divorce may be manipulated to serve the interests of those making political arguments. 'Culture' itself must be examined to determine whether it is genuine, or constructed over time and by those with power.

At the personal level, the concept of the 'best interests of the child' is also constructed in ways that serve the interests of the individual. As noted earlier, the different arguments made by women and men in the context of custody litigation often vary from their actions outside the court system. A woman, for example, argues in court that her child needs a mother's love — even though in the real world she sent the child to live with her mother in a rural area. A man argues that he wants custody of the child because he is in the best position to provide material benefits — yet he has failed to pay school fees for the child during the entire time the child spent with the mother. It is hard to tell whether these women and men are being disingenuous or simply using arguments in court to get what they genuinely believe is in the best interests of the child.

The Way Forward

Evidence that the concept of the 'best interests of the child' is culturally, materially, legally and politically constructed leads to thoughts about other legal concepts relevant to the interests of the child that might be constructed in similar ways, and the importance of the context within which legal rights and concepts are applied. More investigation into the cultural, material, legal and political context of children's rights is necessary in order to understand the situation of children and devise strategies to improve their lives.

If law is to be a practical tool for improving the lives of children, it is also necessary to pay more attention to people, within different social and cultural contexts, when they speak about what they do, why they do it, and what matters to them. There is a great need to apply this methodology more extensively in research on the legal position of children. More needs to
be learned about what children's caretakers think about children's education, emotional and physical health, labour, 'right to expression', etc. Until more is learned about the thinking of those who make decisions for children, it will not be possible to begin ensuring that decisions are made in the 'best interests of children'.

Similarly, more must be learned about children's opinions of what they do, want and need — something neglected in the current study. It is necessary to begin looking at childhood from the perspective of children. In the same way that feminists began challenging the way 'people' thought and acted by pointing out that the 'people' being studied were almost invariably males, it is appropriate to challenge studies of 'children's rights' which rely only on the views of adults.

We need to think more about how various different constructions of the 'best interests of the child' and other legal concepts relevant to children relate to international conventions such as the International Convention on the Rights of the Child. For example, arguments to shift the focus of human rights toward a group, rather than an individual, orientation are often justified on the basis of the values of non-Western cultures. It may be necessary to investigate more carefully the source of both the so-called 'non-Western' and 'Western' values with reference to international human rights conventions.

Finally, it is also necessary to think more about the role of law in improving the lives of children, particularly in societies in which 'the law' traditionally has not been state-centred, but family-centred. Can either or both concepts of 'law' be used as a tool to improve the situation of children?

The toughest challenge facing those interested in improving the lives of children through law is the challenge of cultural complexity. By exploring one area of the law in context — custody of children in Zimbabwe — this paper has tried to present some ideas about how to look at cultural complexity with regard to the concept of the 'best interests of the child'.
NOTES

1. Actions referring to those 'undertaken by welfare institutions, courts, administrative authorities or legislative bodies'.


3. Many people argue that the term 'female circumcision' is a euphemism and that the phrase 'female genital mutilation' should be used to emphasize the negative consequences of the operation. Here, however, an attempt is made to apply the more neutral term in order to make the point that the 'interests of the child' may be in the eyes of the beholder.

4. This argument is not different in form from the arguments used in the West to justify male circumcision, i.e. immediate injury for long-term benefit, cultural significance, etc.


6. There are actually many different systems of customary law, corresponding to the variety of ethnic groups and sub-groups in the country, but 'customary law' will, in this report, be discussed as if it were a unified system. The differences among the systems are often of specific traditions rather than of underlying values or principles. For instance, all patrilineal ethnic groups practice brideprice, although the number of cattle, the ceremonies associated with the payment of brideprice, the timing, etc., may vary. One major difference between customary legal systems is the descent system: patrilineal or matrilineal. In this report, only the patrilineal Shona are discussed, which means that descent is traced through the male line.

7. This same phrase has been used in various statutes throughout the years. See Ncube, 1989.


9. 'We' refers to the Women and Law in Southern Africa Research Trust, of which the author was Regional Coordinator for six years, and its colleagues and associates doing research in southern Africa.


11. 'Legal' divorce in Zimbabwe is obtained in a state court. However, in the state legal system, divorce is only granted in marriages recognized by the State. Many people are involved in relationships that they consider to be 'marriage', and which their families (and therefore the customary law) recognize to be 'marriage', but which are not recognized by the State.


18. Fluctuating custody is not unique to Zimbabwe. See Russell, 1989.


22. In the earlier set of interviews the general question was asked: 'what is best for a child?', and most interviewees included in their answers that it is best for a child to live with his or her parents. The contradiction only became apparent when, in the second set of interviews, a more direct question was asked. Perhaps 'parents' in the first set of answers included 'social' parents.

23. In the vernacular, women usually 'leave' their husbands while men 'divorce' their wives.


25. The Government of Zimbabwe, in an attempt to reduce urban migration, has designated 'growth points' in the rural areas where it has built schools, clinics and government offices.

26. 'Communal lands' are rural areas where customary land tenure still applies.


28. Ibid.

29. Small granary where family food is stored in the rural areas.

30. Children's Protection and Adoption Act No. 22 of 1929 (Chapter 33).


32. Children's Protection and Adoption Act (Chapter 33).


34. The 'Community Courts', at the time of writing, were the state institutions that were supposed to apply the customary law. They are now being phased out, and the Magistrates Courts apply both customary and general law. Although this happened after data collection for this study, it can be speculated that this will increase the conflict discussed, since the Magistrate's Courts are even more likely than the Community Courts to emphasize the general rather than the customary law.

35. Under the Customary Law and Local Courts Act, the customary law is applicable in a civil case where the parties have agreed that it should apply, where it appears that the parties have agreed so, or where 'having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply'.


37. The Harare Community Court cited three judgements from the Supreme Court of Zimbabwe. Mlahaba v. Mlahaba SC 252/90 and Musiwa v. Musiwa SC 27/90 hold that if the children are
illegitimate, the mother should have custody, unless the father (like any other third party) can show that it is positively harmful for the children to remain with their mother. *Dioniso v. Dioniso* 1981 ZLR 118 (AD) held that it is best if children are not removed from the environment to which they are accustomed to live with strange people.


39. Laws requiring a parent to financially support his or her biological children, including the Maintenance Act (Chapter 35).


41. See Chanock, 1985, in which he shows how the colonial governments of Malawi and Zambia colluded with traditional authorities to control women.

42. As when people claim that polygamy is part of African ‘culture’ but omit the ‘part’ requiring the permission of the first wife for taking a second wife.

43. See Armstrong, 1993b.


46. Men and women made some similar arguments based on whether the child was healthy and well cared for, and whether clean water, good accommodation and schooling were available.

47. Data was collected from files consisting of notes taken by Presiding Officers. Although the litigants themselves probably did not talk about children of ‘tender years’, the notes almost invariably did.

48. For an interesting discussion of different kinds of power women have within (nuclear) families, including the power to persuade versus the power to decide, see von Bulow, 1991.

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