

THE CHILD LAW BULLETIN

JUSTICE FOR CHILDREN TRUST (JCT)

CONSTITUTIONALISING THE BEST INTERESTS OF THE CHILD

PRINCIPLE!!

After children were consulted on the issues they wanted included in the constitution, the draft constitution which was released in the media showed that children have been considered and their views heard. The constitution being the supreme law of the land, the presence of children's rights is a major milestone towards the respect, protection and promotion of children's rights in Zimbabwe especially the enshrining of the best interests of the child principle.

Section 2.9 (1) of the draft constitution produced state that "the State must adopt policies and measures to ensure that in matters relating to children the best interests of the children concerned are paramount". This principle has also been enshrined as a right in section 4.33(2) of the draft constitution which state that 'the child's best interests are paramount in every matter concerning the child'. This is one principle which is important with regards to children's issues. The principle had been adopted in selected acts in Zimbabwe such as the Guardianship of Minors Act and the Matrimonial Causes Act. The selected application of this principle meant that children's best interests was in selected issues as well thus not comprehensive. Its application in practice has also been said to be less satisfactory. Ensuring that the best interests of the child is paramount in matters relating to children as a constitutional right creates a new dimension in the interpretation of the principle.

According to the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Determining the Best Interests of the Child, the best interests determination should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option". When dealing with children, judicial officers, parents and the community should ensure that each action gives a primary consideration to the child's best interests. Children should be given an opportunity to participate in order to bring about a good decision. An action 'concerns' children not only when it is directly about them, or in reference or relation to them, but also when it regards or touches them. Even if the child is not the object of the decision, the principle applies if the decision affects her or him.

The stance to include the best interests of the child principle in the constitution also conforms to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child which Zimbabwe ratified. The best interests of the children should be the primary consideration in all matters affecting children.

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Inside this
issue:

CONSTITUTION-
ALISING THE
BEST INTERESTS
OF THE CHILD
PRINCIPLE 1

GOOD LAWS
BUT.....!!!! 2

DISINHERITING
CHILDREN BY
MEANS OF DO-
NATIONS 3

Contact us 3

GOOD LAWS BUT!!!!!!

Orphanhood and poverty are among other reasons which have led children to be in contact with the law. After the death of parents, children are neglected and they lack supervision, guidance and support. Television and friends become the children's minders. Circumstances attributed to poverty force parents to share bedrooms with their children. As a result, children are exposed to so many things such that they would want to experiment. They also become more daring and aggressive and are committing very serious offences at very tender ages. Children as young as 7 years are sexually abusing other children. Young girls are no longer safe from both adult males and young boys. Zimbabwean law however protects male children who are below the age of 12 years from prosecution if they are facing rape allegations.

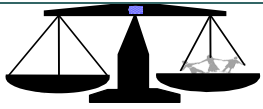
According to the Criminal Law (Codification and Reform) Act (the Code), the minimum age of criminal liability in Zimbabwe is 7 years. This is however not the case in rape cases. Section 63 of the same Act provides that the irrebuttable presumption that a boy below the age of 14 years is incapable of having sexual intercourse does not apply in Zimbabwe for boys who have reached the age of 12 years. There is now a rebuttable presumption that a boy over the age of 12 years but below 14 years is incapable of performing sexual intercourse unless the contrary is shown on a balance of probabilities. This section means that a child below the age of 12 years is incapable of having sexual intercourse and cannot be prosecuted for rape. This law however is not being implemented. Children as young as nine years are being arrested and undergoing prosecution. In one case, a child aged nine was convicted and sentenced to corporal punishment and by the time the organization got to know of the case, the child had already undergone the corporal punishment.

Rape is a very serious offence and court officials are quick to judge and as a result would sometimes go on to prosecute children who are below the age of 12 years. The motive of preserving children who are still young from prosecution is defeated. The court should aim at rehabilitating and reintegrating children into becoming responsible citizens. The law is very clear and no matter how grave the offence might seem in the eyes of the community, children should be spared from the rigors of the formal justice system when they have not reached the age of criminal liability.

When this law was promulgated, it was a reflection that children at very young ages do not understand or appreciate the gravity and consequences of having sexual intercourse. Children will be imitating what they see and would want to experiment. Justice for Children has been assisting children who are facing rape charges. The fact that children do not understand the effect and the gravity of the offences is noted and prosecuting them will not do any good but harm. Children are children and should be treated as such. Parents, relatives and the community should play their roles in grooming and offering guidance to children such that they will desist from criminal activities.



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CHILDREN'S EXPERIENCES

DISINHERITING CHILDREN BY MEANS OF DONATIONS

After the death of parents, minor children suffer when their legacy is taken away from them. Parents strive in building a future for their children but there is need for proper advice on the inheritance laws so that children would benefit. Some decisions meant to benefit children are instead disinheriting them. Zimbabwe has laws that promote children's right to inherit from their parents but ignorance of the law is the major setback.

Justice for Children received a case of a widow whose husband passed away in 2002 and they had six (6) children. The widow inherited the matrimonial house after her late husband's estate was wound up. At the time that the estate was wound up, the widow was seriously ill and she decided to donate the house to her eldest son through a deed of donation in the belief that her son would be responsible enough to look after his siblings. The son got married and started his own family. His wife however is not keen to offer accommodation or assistance to the husband's siblings. The widow approached Justice for Children seeking assistance to register the property in all the children's names so that they could benefit from the property.

She was advised that the effect of the donation made to his son was that the son became the owner of the property and became vested with all rights, title and interests in the property. The rights to the property cannot be changed or transferred without the son's consent and authority. She was further advised that the organisation will endeavor to discuss the issue with the son and explain to him the mother's intentions. This is a sad story where ill advised decisions are made at the detriment of the children. The mother of the children was not fully advised of the consequences of her actions when she donated the property to her son. There is therefore need to raise awareness on property and inheritance rights and the importance of seeking advice before making decisions which will affect children.