

DISCUSSION PAPER

GENDER EQUALITY AND WOMEN'S RIGHTS IN THE CONTEXT OF CHILD CUSTODY AND CHILD MAINTENANCE

An International and Comparative Analysis



No. 30, July 2019

FRANCES RADAY

FOR PROGRESS OF THE WORLD'S WOMEN 2019-2020

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SUMMARY

The division of care and responsibility for children, including financial care, is usually determined by the family law of the State. This study identifies some of the most prevalent custody and child maintenance regimes in cases of divorce, dissolution of a civil union and separation of parents. It examines the various regimes with particular emphasis on their impact on gender equality and women's rights.

Until the 19th century, a male prerogative over guardianship and legal custody of children—giving fathers sole authority regarding the child's personal affairs, such as property, domicile, travel, education and marriage—was the norm in Roman law and in secular systems (both common law and civil law). The male prerogative has been rescinded in secular law systems, in accordance with the international human rights law requirement of the elimination of discrimination against women in the family. However, it has been retained in patriarchal religious and customary systems, which are endorsed by those States that maintain theocratic, religious-based or plural legal systems. Thus, both secular and religious or customary laws are relevant in examining current custody regimes.

Three overarching issues relating to custody may negatively impact women's rights: domestic violence,

the ongoing danger of which is often neglected in custody or visitation awards; the weaker bargaining position of women in the family as a result of patriarchal legal, cultural or economic contexts, which will disadvantage them in cases where the custody is subject to negotiation; and interpretation of the best interest of the child in a gender-biased way.

Child maintenance and support is a heavily gendered issue. The majority of custodial parents are mothers, and single mothers with young children are highly prone to poverty. The payment of maintenance by non-custodial parents throughout the child's minority is required by many but not all legal systems. In systems where non-custodial parents have an obligation to pay child maintenance, non-payment can result in both civil and criminal penalties. In the event of default, some States have public support systems. Custodial mothers are not sufficiently protected financially in almost any system because there are often inadequacies in the calculation of custody payments, high percentages of arrears or defaults in payment by the non-custodial parent, few criminal prosecutions and low levels of public support payments. Deficiencies in enforcement and support systems are a significant factor in producing a gender gap in income after divorce and in contributing to gender-based poverty.

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