Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v. Magaya*

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I. INTRODUCTION

In May of 1999, international human rights organizations focused their outrage on the Supreme Court of Zimbabwe's decision in *Magaya v. Magaya*, a case dealing with women's rights and inheritance law.[1] These organizations decried the Court's decision, based in customary law, as equating the status of women within Zimbabwean society to that of teenage boys. *Magaya* became a rallying point for women in Zimbabwe and beyond who attacked the decision as a violation of both Zimbabwe's constitution and international human rights norms. Responses ranged from *ad hominem* accusations against the Supreme Court to letter writing campaigns and rallies in the streets of Harare and Bulawayo. Yet such protests ignored the most troubling aspect of the *Magaya* decision: though contrary to international human rights norms, it was perhaps the only decision that the Zimbabwe Court could have reached.

The decision of the Supreme Judicial Court clearly reflects an antiquated Constitution and outdated laws, illustrating the challenges and difficulties facing legal systems that attempt to incorporate traditional or customary laws into a contemporary framework. If the international human rights community and the progressive community within Zimbabwe wish to better the position of women under customary law, they must attack the prob-

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1. *See* Magaya v. Magaya, SC No. 210-98 (Zimbabwe, Feb. 16, 1999) (on file with the *Harvard Human Rights Journal*).

lem at its source: by addressing the shortcomings of judicial reliance upon undefined "custom," and, more importantly, by addressing the weaknesses of a legal system that grants discretion as broad as that which made the *Magaya* decision a logical one.

Part I of this Article explores the background to the Court's decision and the case. First we discuss Zimbabwe and the colonial origins of its customary law and community courts. Next, we examine the facts of *Magaya* and analyze the reasoning the court used to reach its decision—reasoning that relied on intuition and secondary sources rather than rules of law. In Part II, we review the reaction of local and international human rights organizations. This criticism was misdirected to the extent that it focused on the decision itself, and not on the legal system that possibly dictated this decision.

In Part III, we analyze various aspects of the case. First, we show how the *Magaya* decision demonstrates the conflict between two different areas of human rights: women's rights and the right to self-determination of local cultures. Internationally, these rights have been codified in the forms of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Draft Declaration on the Rights of Indigenous People, respectively. *Magaya* lies at the crossroads of these rights. Second, we examine the colonial origins of customary law, and its interpretation in Zimbabwe. Third, we review statutory treatment of customary law and women's rights, with particular emphasis on the Legal Age of Majority Act (LAMA). Finally, we discuss how the *Magaya* decision was predictable given the confused nature of customary law in civil legal systems.

In Part IV, we suggest changes in Zimbabwe's legal system that will better equip it to protect the rights of women and indigenous people. Possible solutions include constitutional reform, codifying customary law, structural change, and pursuing more avenues for more immediate change. Part V concludes the Article.

A. *Background*

Zimbabwe forms the heart of central southern Africa, a fertile highland plateau ringed by the mighty Zambezi River to the north and west that forms Zimbabwe's borders with Zambia and Botswana; the Limpopo and Sabe that flows across its south, edging South Africa; and the legendary Chimanimani range that looms over its eastern Moçambican frontier.[2] With an area slightly larger than Montana, Zimbabwe is home to approximately 11.5 million people.[3] More than ten percent of this population (1.4 million)

2. *See* The Zimbabwe Government, *About Zimbabwe* (visited Feb. 8, 2000) <http://www.mother.com/~zimweb/travel/zim/about_zim.html>.
3. *See* The U.S. Department of State, *Zimbabwe* (visited Feb. 8, 2000) <http://dosfan.lib.uic.edu/ERC/bgnotes/af/zimbabwe9511.html>.

live in the capital, Harare, in the center of the country. The official language is English, and an estimated 70% of the population is literate.[4]

A majority of the people of Zimbabwe fall into one of two traditions: the Shona (71%) and the Ndebele (16%). These tribes speak the Shona and Sindebele languages, respectively.[5] There are a variety of religions in Zimbabwe, including several traditional African (or animistic) religions and Islam, though Christianity is professed by 75% of the population. The current life expectancy hovers around thirty-nine years for both men and women, the result of an AIDS epidemic that is turning a once prosperous and self-sufficient country into a virtual orphanage.[6] The deadly specter of AIDS has made the issues surrounding the interpretation of customary wills all the more crucial to resolve.

For an understanding of the dichotomy that exists between civil and customary law in Zimbabwe, a brief review of the colonial history of the area is necessary. In 1888 the Ndebele tribe, the dominant tribe in what is now the western part of Zimbabwe, granted mining rights to British colonialist Cecil Rhodes. Rhodes instigated a wave of British and white settlement to the area. With this settlement came direct conflict with tribes in the area, conflict that escalated at times into warfare. In 1923 Britain officially proclaimed the area as "Southern Rhodesia," a self-governing colony of the United Kingdom. It remained a British colony until 1965 when Ian Smith, the leader of the Rhodesian Front, declared independence from Britain in order to maintain white dominance in Rhodesia. Zimbabwe remained under the control of the Rhodesians until the late 1970s, though coalitions of Africans (termed "terrorists" in the white language of the day) struggled against Smith. After a series of power exchanges, including a brief reversion to British rule, a landslide election in 1980 resulted in Robert Mugabe's rise to power. Formal independence was declared that same year.[7]

During the colonial period between 1888 and 1980, a bifurcated judicial system developed that allowed the colonizers to maintain a "hands-off" policy towards African tribal populations. There were two judicial systems: one was a judiciary based on the European model that governed white colonials, and the second was a customary law system that governed black "natives." Through the customary law system, the colonizers allowed local tribesmen to govern themselves within limits established by colonial powers.

Zimbabwe continues to use and contend with the difficulties of this bifurcated court system, where two formal courts exist under one hierarchy. Gen-

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4. *See id.*

5. *See id.*

6. *See, e.g.*, The U.S. Department of State, *Background Report on Zimbabwe* (visited Feb. 23, 2000) <http.//www.state.gov/www/background_notes/afbgnhp.html>. *See also* World Health Organization, *Report on Infectious Diseases: Removing Obstacles to Healthy Development* (1999) (visited Feb. 23, 2000) <http://www.who.org/infectious-disease-report>, which reports, "in Zimbabwe, 20%–50% of pregnant women in some areas are infected with HIV and risk infecting their children."

7. *See generally* Microsoft Encarta, *Zimbabwe* (visited Feb. 23, 2000) <http://www.encarta.msn.com/>.

erally, poorer blacks and their issues are not addressed by the same courts as richer whites. The Community and Primary Courts were formalized in 1990 to respond to pressing post-colonial needs for more localized decision-making. The court of first instance is the Headmen's Court (primary court), and cases can be appealed from the Headmen's Court to the Chief's Court (community court). If the disputants are still dissatisfied, an appeal can be made to the first rung of the civil court system, the Magistrate's Court.[8] The civil system, to which anyone can petition, consists of various Magistrates' Courts, a High Court, and a Supreme Court. These civil courts are not restricted to the application of civil law—they may apply customary law when they deem it is appropriate.

The local customary courts, existing as sub-rungs to the civil court system, have extremely limited jurisdictions. The local courts were designed to handle disputes of customary law. However, in an effort to remedy discrimination against women in these courts, local courts are prevented from having jurisdiction over matters dealing with the "custody of minors, maintenance, dissolution of marriage, determinations of the validity of wills or rights in land or other immovable property."[9] If parties wish to have these matters settled by the judiciary, they must apply to the Magistrates' Court, who in turn must apply customary law. Furthermore, Headmen's Courts can only entertain disputes where damages are less than Z$1500, and Chief's Courts only retain jurisdiction over disputes involving less than Z$3000,[10] even if these cases involve application of customary law outside of the exempted subject matters. This has been troublesome, according to some local chiefs, because the Magistrates' Courts are largely inaccessible to those living in customary communities.[11] More worrisome, however, is the fact that this system, designed to promote local decision-making with regard to customary law, has largely removed that decision-making capacity to civil courts by severely limiting the jurisdictions of the local courts. *Magaya* suffers from the effects of these limitations.[12]

B. Magaya v. Magaya*: Statement of the Case*

When Shonhiwa Lennon Magaya, a Zimbabwean of African descent and practitioner of traditional Shona[13] custom, died, he left behind two polyga-

8. *See* Joanna Stevens, Traditional and Informal Justice Systems in Africa, South Asia, and the Caribbean: A Review of the Literature (1998) (unpublished paper prepared for Penal Reform International, on file with authors), at 25.

9. Stevens, *supra* note 8, at 26. *See also* AFRICAN RIGHTS, A PAPER, JUSTICE IN ZIMBABWE (1996).

10. As of Feb. 15, 2000, the exchange rate is approximately Z$38.25 for US $1.

11. *See* Stevens, *supra* note 8, at 26.

12. *See id.*

13. The Shona comprise the largest affiliated tribal group in Zimbabwe, with approximately three-fourths of the nations' population identifying as Shona. *See* The Zimbabwe Encyclopedia Online, *The Shona People* (visited Feb. 8, 2000) <http://196.25.115.20/cods.asp?ID=2125>.

mous wives and four children, a house in Harare and some cattle at a communal home outside the city.[14] He did not, however, leave a will.[15]

Venia Magaya, the eldest child and Mr. Magaya's only daughter, was born in 1941 of his first, or senior, wife; his three sons, Frank, Nakayi and Amidio, were all the children of his second wife, born in 1942, 1946 and 1950, respectively.[16] Shortly following the decedent's passing, Ms. Magaya sought heirship of the estate in the local community court. The eldest brother, Frank, declined to seek the inheritance, claiming he would not be able to look after the family as is required under traditional law. Ms. Magaya had been living in the house with her parents until her father's death.[17] With the support of her mother and three other relatives, she received the appointment and title to the house and cattle.[18]

Soon thereafter the second son, Nakayi Magaya, applied to cancel this designation. Nakayi filed, claiming that the failure to involve him and "other persons interested in the deceased's estate"[19] contradicted § 68(2) of the Administration of Estates Act. Ms. Magaya's appointment was cancelled forthwith and all interested parties then attended a new hearing on October 14, 1992.[20]

Nakayi Magaya was proclaimed the rightful heir under customary law. He proceeded to evict his sister from the Harare property.[21] In justifying its decision, the Court relied on the Administration of Estates Act, which at that time stated:

> [I]f any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.[22]

The African custom defined by the community court is not articulated within the decision, yet its intent is clear: "Venia is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man."[23] Ms. Magaya appealed to the Supreme Court.

Writing for the Court, Justice Muchechetere affirmed the Community Court's decision primarily on the basis of a personal interpretation of cus-

14. *See Magaya, supra* note 1.
15. *Id.* at 1.
16. *See id.*
17. *See* Mercedes Sayagues, *Zimbabwe Women Protest a Loss of Rights*, MAIL & GUARDIAN, 21 May 1999, *available in* 1999 WL 17314781.
18. *See Magaya, supra* note 1.
19. *Id.* at 2.
20. *See id.*
21. *See* Sue Nanji Matetakufa, *Zimbabwe in Reverse Gear as Court Ends Women's Rights*, AFR. NEWS SERV., Oct. 27, 1999, *available in* 1999 WL 25952068.
22. *See Magaya, supra* note 1.
23. *Id.* at 2.

tomary law and the 1983 Zimbabwean Constitution. After a perfunctory review of the facts and lower court's decision, he sought to define applicable customary law. He determined that "[w]hat is common and clear from the [texts] is that under the customary law of succession of the above tribes males are preferred to females as heirs."[24] Citing a number of cases in support of this interpretation, he then proceeded to address the legal merits of the case. Given that customary law appeared to indicate that males generally are the rightful heirs under customary law and that such bias was constitutional, the holding appears inevitable by page four of the decision's scant seventeen pages.

First, the Court dismissed Venia Magaya's argument that an inheritance preference for male offspring "constitutes a *prima facie* discrimination against females and could therefore be a *prima facie* breach of the Constitution of Zimbabwe."[25] Instead, the Court reasoned that constitutional construction of the division between customary and civil laws in Article 23(3) of the Constitution prevent this matter from falling under constitutional scrutiny. Thus, the popular criticism that the decision "gave precedence to customary law over the Constitution"[26] was not well founded: the Constitution itself exempts customary law from constitutional scrutiny.

Even though the Court has broad discretion in deciding matters involving customary law, the Court declined to use its discretion in deference to customary law and the court's interpretation of African culture. "Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society," wrote Justice Muchechetere, "I am of the view that great care must be taken when African customary law is under consideration."[27] Such deference to customary law is a fundamental characteristic of the Zimbabwean construction of justice, a reflection of one nation's response to internationally recognized, though seldom codified, rights.

While *Magaya* reflects one choice of rights prioritization, a choice created by Zimbabwe's legislature and administered through its courts, it also highlights the difficulties of maintaining dual legal systems. It is thus an excellent example of the flaws inherent in the separate customary and civil legal systems, by which a civil court judge must determine customary law through a variety of non-legal tools and must in the end use his or her own judgment to determine the outcome of a case. The resolution of rights in this instance—in favor of one interpretation of customary law over arguments for women's rights—left Venia Magaya with no further recourse.

Today she lives in a shack in a neighbor's backyard.[28]

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24. *Id.*
25. *Id.*
26. *See* Sisterhood is Global Institute, *Urgent Action Alert: Zimbabwe's Supreme Court Decision Denying Women's Inheritance Rights Violates International Human Rights Treaties*, June 30 1999 (visited Feb. 7, 2000) <http://www.sigi.org/Alert/zimb0699.html>.
27. *Magaya*, *supra* note 1, at 17.
28. *See* Sayagues, *supra* note 17, at 1.

II. THE *MAGAYA* RESPONSE

Women's rights groups were outraged by the decision. Lawyers, law professors, and human rights organizations declared their opposition to the Court's findings. Calls for reform or repeal echoed from Australia to England and back to Harare: critics alleged that the decision violated fundamental issues of fairness, international norms and rights, and even customary law itself. The decision was said to constitute not only a direct attack on the rights of Zimbabwean women to inherit, but it also called into question the effectiveness of Constitutional provisions to ensure women's rights and the applicability and enforceability of international treaties in Zimbabwe.

Media coverage of the case, both in Zimbabwe and internationally, immediately focused on the most drastic interpretations of the decision possible: "Zimbabwe Turns Back Clock: Rulings Deny Women's Rights,"[29] "Supreme Court Hits Out at Women,"[30] "Zimbabwean Court Decides Women are Junior Males."[31] On their face, and in international media, these critiques of the Court's apparent disregard for women's rights seem accurate representations of the decision: the progress that women's organizations within Zimbabwe had worked towards was gutted, seemingly overnight, in a single Court decision.

Women's rights groups in Zimbabwe focused on the effects of this ruling, both socially and within the legal system. Women converged on the steps of the court building shortly after the decision was handed down, hoisting signs reading "Discrimination against women is not compulsory in African Society," "We will not accept customary legalized tyranny," and "Are we going backwards into the year 2000?"[32] They represented numerous women's rights groups within Zimbabwe, a number of human rights organizations, and other interested individuals.[33] In the *Zimbabwe Independent* on May 7, 1999, Zimbabwean law professor Amy Shups Tsanga called for Judges to "be more sensitive to Gender Issues."[34]

> Because African women in our society have basically been denied the . . . human rights and simple dignity which has been accorded to others without question, the role of the judiciary in advancing the rights of the oppressed is even more significant. The Supreme Court is our highest court and as such, the precedential effect of its

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29. Neely Tucker, *Zimbabwe Turns Back Clock: Rulings Deny Women's Rights*, DETROIT FREE PRESS, Apr. 14, 1999, at 4A.

30. *Supreme Court Hits Out at Women*, ZIMBABWE INDEPENDENT, June 18, 1999, *available in* 1999 WL 19531727.

31. Andrew Meldrum, *Zimbabwean Court Decides Women are Junior Males*, THE GUARDIAN, May 20, 1999, *available in* 1999 WL 18925381.

32. *Court's Position on Inheritance Sparks Debate*, ALL AFR. NEWS AGENCY, June 18, 1999, *available in* 1999 WL 19531703 [hereinafter *Court's Position on Inheritance Sparks Debate*].

33. *See Id.*

34. Amy Shups Tsanga, *Judges Must be More Sensitive to Gender Issues*, ZIMBABWE INDEPENDENT, May 7, 1999, *available in* 1999 WL 17312639.

> judicial pronouncements often chart the path for ways of thinking and dealing with important social issues. It is therefore important for judges to be guided by notions of justice when it comes to women's issues instead of letting tradition paralyze their minds as happened in the case of *Magaya v. Magaya*.[35]

Women's rights groups were also among the first to respond internationally, though they referred exclusively to the impact of the decision. Leilani Farha of the Women's Housing Rights Programme (WHRP) at the Geneva-based NGO Centre on Housing Rights and Evictions focused on the potentially devastating effects of the decision on women's ability to hold property at all.[36] *Magaya*'s result clearly countered WHRP's aims of broadening women's inheritance rights in specific, essential areas—namely, land, property and housing. International groups recognized this, but failed to acknowledge the fundamental flaws within the judicial system that created this result.

Yet broad issues of gender equality were but one face of the decision. More crucial and important than the facial results of *Magaya* are the structural and procedural methods at issue in this case. This case implicates the balancing of customary law with civil law in the creation of a system of justice responsive to nationally and internationally recognized rights priorities.

Unlike the general reaction to the case both domestically and abroad, some human rights lawyers in Zimbabwe did speak to the broader legal implications of the decision: "This ruling is a clear indictment of the need for constitutional reform and for a strong Bill of Rights," argued Tendai Biti.[37] Social researcher and lecturer in law Julie Stewart criticized Muchechetere's adoption of an interpretivist stance. "In setting himself as the determinator of the content of customary law, Justice Muchechetere has robbed it of its dynamic capacity and has denied Zimbabwe the real possibility to explore real jurisprudence in customary law."[38] These critics offered no alternatives to the current bifurcated judicial system, however. This Article seeks such a remedy.

III. ANALYSIS

A. *Human Rights Norms: Women's Rights and Self-Determination*

Magaya violated both the spirit and letter of a host of international human rights treaties to which Zimbabwe is a party. Most significant among those are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social

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35. *Id.* at 34.

36. *See* Correspondence from Leilani Farha, Director, Women's Housing Rights Programme, to Amélie von Briesen (May 31, 1999) (on file with the *Harvard Human Rights Journal*).

37. *See Court's Position on Inheritance Sparks Debate, supra* note 32.

38. *Id.*

and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). The role of self-determination through assertion of customary law is also important, and the *Magaya* decision furthers that end. The inherent and fundamental tensions within conflicting prioritizations of human rights are evident both within the decision and by its reception by international and Zimbabwean human rights organizations. Determinations of individual and group rights result in directly competing claims and irreconcilable differences. Such is the case in *Magaya.*

CEDAW was ratified in 1981 with the explicit purpose of condemning "discrimination against women in all its forms,"[39] thereby extending the basic condemnation of gender discrimination put forth in the Universal Declaration of Human Rights (UDHR). It symbolized the states parties' commitment to eliminating discrimination against women in all its forms, from legal to social and cultural "prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes."[40] It called for the modification or abolition of discriminatory "laws, regulations, customs and practices."[41] Functionally, CEDAW is administered by the Committee on the Elimination of All Forms of Discrimination Against Women (the CEDAW Committee), which reviews country reports and evaluates state actions regarding the status of women to promote the implementation of CEDAW.

In *Magaya,* however, CEDAW's aims were not met. More crucially, CEDAW could not be a source of redress for Venia Magaya. In part, this resulted from the CEDAW Committee's decision not to review the case.[42] The Committee's refusal to review the decision reveals the structural and political limits of CEDAW and its Committee.[43] If a member state chooses to refuse review of cases that may violate the convention, there simply is no remedy to violations. In addition, advice offered by the Committee garners little respect without accompanying political support. Further, it is unlikely that Zimbabwe or other countries with gender-biased customary or social expectations would recognize CEDAW or its Committee as legitimate enforcement agencies. Additionally, CEDAW's Optional Protocol has yet to come to force.[44]

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39. Convention on the Elimination of All Forms of Discrimination Against Women, preamble, G.A. Res. 180, U.N. Doc. A/34/180 (1980), 19 I.L.M. 33 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

40. *Id.* art. 5.

41. *Id.* art. 2.

42. *See* Letter from Katherine Hall Martinez, Deputy Director, International Program Center for Reproductive Law and Policy. United Nations Development Program (UNDP), *CEDAW* (visited Feb. 23, 2000) <http://www3.undp.org/cedaw/msg00102.html>.

43. For further explication of the shortcomings of the CEDAW and its Committee, see Andrew C. Byrnes, *The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women,* 14 YALE J. INT'L L. 1 (1989).

44. The U.N. Commission on the Status of Women adopted the Optional Protocol on March 12, 1999. The Optional Protocol would have to be signed by the participating country for the protocol review to have jurisdiction over the country. *See, e.g.,* United Nations, *Optional Protocol Adopted* (visited Feb.

This could be remedied. As Theodor Meron explains, the CEDAW Committee could "authorize [a] rapporteur to investigate and report on serious violations of sexual inequality."[45] This role is addressed directly in the development of the optional protocol, which is designed to encourage complaints from any individual, group or organization negatively impacted by a state party's failure to comply with or remedy violations of CEDAW. Additionally, even were *Magaya* heard by the Committee, the process for rectifying the blatant discrimination against women inherent in the *Magaya* decision would not necessarily result in more than the Committee's reprimand of Zimbabwe and a call to legal reform or for recognition of women's rights, neither of which would respond to Ms. Magaya's immediate inability to inherit.

Magaya also violates the anti-discrimination articles of both the ICCPR and the ICESCR. In so doing, it reflects the imbalance inherent in the search for the establishment of and equalization among competing human rights. Like CEDAW, both the ICCPR and the ICESCR were based within the text of the UDHR, the cornerstone of modern human rights. Importantly, the ICCPR establishes that "[a]ll persons shall be equal before the courts and tribunals" within Article 14. While this equality does not explicitly refer to gender, later provisions in the Covenant establish the continuance of this concept from the UDHR. In particular, Article 26 calls for equality for all persons, and universal entitlement to equal protections of the law, which "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex . . . ."[46] This is followed immediately by what at first appears a complimentary call for minority groups to "enjoy their own culture" in community with other members of their group. Similarly, the ICESCR calls for the elimination of discrimination against women and "the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."[47] It also, arguably more prominently, includes a call for the self-determination of all peoples, and "by virtue of that right [that] they freely determine their political status and freely pursue their economic, social and political development."[48] Self-determination and women's equality are thus structured as close, but separate and possibly conflicting, rights. As such, the question of prioritization arises: is the self-determination of a population more valid than the assertion of a global norm

23, 2000) <http://www.un.org/womenwwatch/daw/cedaw/protocol/adopted.htm>.

45. Theodor Meron, Editorial Comment, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990).

46. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

47. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 3, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

48. *Id.* art. 1.

of women's rights? Or are women's rights merely one of a number of examples of the self-determination of groups?

The Draft Declaration on the Rights of Indigenous Peoples (DDRIP) increases these tensions, if only by reemphasizing the importance of the self-determination of groups without detailing protections against discrimination based on sex.[49] "Indigenous people have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices," reads Article 33. While these customary systems are intended to be "in accordance with internationally recognized human rights norms," there is no itemization of such norms and thus no specific recourse against such discrimination. Articles 3 and 13 clearly favor the broad interpretation of tradition or customary law and support the *Magaya* decision.

Clearly, *Magaya* offends principles of equality for women. Yet just as clearly, it upholds important emerging principles of group self-determination. The conflict between these areas is evident; its resolution less so. One of the challenges this poses for courts like Zimbabwe's is the construction of solutions *resolving* these competing claims of rights instead of merely elevating one right or group over another. Careful interpretation and incorporation of the respective priorities of these rights could yield innovative positivism, a new outlook on the universality of human rights. The balance of applicable general civil laws and customary law within the Zimbabwe judicial system is crucial to this end.

B. Customary Law: Origin and Application

The Customary Law and Local Courts Act of 1990 (the Act) defines customary law in Zimbabwe. Under Article II of the Act, customary law is the law "of the people of Zimbabwe, or any section or community of such people, before the 10th June, 1891, as modified and developed since that date."[50] In relying upon such an overbroad and indefinite focus for customary law, the statute compounds the difficulties of working with imprecise precedent and history. Moreover, the restriction of dates to the late colonial period premises the laws in question on historically questionable interpretations of power relations within Zimbabwean societies. The Act also establishes wide judicial power to interpret both the foundations of and modifications to traditions and beliefs that are rarely codified and often unwritten altogether. These limitations on the very character of customary law create clear problems in applying customary law generally. Zimbabwe's liberal interpretivist stance towards customary law within its overall legal system exacerbates these issues; the result is untenable.

49. While this document is a draft, it offers important insight into international attitudes towards group rights as human rights and notions of communal self-determination.

50. The Customary Law and Local Courts Act of 1990, ch. 7:05, art. 2 (1990) (Zimb.).

Customary law has great significance globally. Nations actively facing challenges posed by interpretation and incorporation of customary law include most of Southern Africa (Botswana, Moçambique, Namibia, South Africa and certainly Zimbabwe); Ghana; Mexico; Nigeria; Papua New Guinea; and the United States, among others.[51] In contemporary southern Africa there are various understandings of the meanings and origins of customary law. Basically, as Nhlapo explains, it is "a custom-based system [whose] legitimacy lies largely in its claims to a direct link with the past and with tradition."[52] A common belief is that pre-colonial African tribes used flexible systems of indigenous law. This system of law used a set of rules that governed tribes or clans in ways similar to the European legal system, complete with tribunals and established penalties for abrogating the rules. Another view of customary law suggests that there was no clear body of "law." Rather, there were oral traditions that governed the daily lives of Africans. This view argues that the complex yet straightforward customary legal system now in place, purporting to be a codification of indigenous oral traditions, probably does not accurately reflect the oral traditions that would have emerged in a society that had high rates of relocation and inter-tribal marriages.[53]

Of course, it was not until the arrival of European colonizers that the distinction of "customary" from other, generally Roman-Dutch, law was constructed. Both the methods of researching these traditions and the laws established after this process were flawed. Ascertaining the body of customary law has proven challenging even in the best of circumstances; the class, race and cultural differences between the colonizers and indigenous Africans made these variances even more significant. Colonial governors looked to customs and practices, to oral histories, and especially to tribal leaders to establish baseline expectations of traditional rules. Generally, these cultural investigators were male members of white patriarchal societies. They interviewed men to determine customs or traditions almost exclusively; almost as equally without exception they would defer to or assign power to the men and male authorities within the tribal structures.[54]

There is significant reason to revisit these findings. As Amede Obiora argues, in many ethnic groups in Africa women attained high levels of authority and respect—respect not accorded them under customary law codified by the colonizers.[55] The participation of "emergent class and gender

51. *See generally* David M. Bigge, Prospects for Reforming Customary Marriage Law in Namibia: A Comparative Law Analysis 35–60 (Aug. 1999) (unpublished paper on file with the *Harvard Human Rights Journal*).

52. Thandabantu Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously,* THIRD WORLD LEGAL STUD., 1994-95, at 49.

53. *See* L. Amede Obiora, *Reconsidering African Customary Law,* 17 LEGAL STUD. F. 217 (1993).

54. *See id.*

55. *See id. But see* Rene R. Gadacz, *Customary Law: Terror of Colonialism or Orphan of Tradition?* 17 LEGAL STUD. F. 261 (1993).

elites" in the redefinition of "indigenous social, economic and political structures *for their own benefit*" is also a serious possibility.[56] It is feasible that "female subordination was a feature of traditional patriarchal and gerontocratic societ[ies]," although it is impossible to discern how accurately this is reflected in recorded customary law.[57]

In instituting these concepts of customary law, the colonizers removed much of the inherently flexible and reactive nature of indigenous law and oral traditions. "[I]t is accepted," writes Nhlapo, "that indigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states."[58] These alterations, he continues, have "led to a growth of 'official' customary law which consists of rigid rules, embedded in judicial decisions and statutes, which have lost the characteristics of dynamism and adaptability which distinguished African custom."[59]

Customary law was procedurally established through the colonial construction of an administrative system for tribal affairs. These "customary laws" were perceived to parallel European codes, and were to be administered as rigidly as possible. Numbers of European customary law scholars described their early observations as "tradition;" their writings are regarded as accurate sources of such law even today.[60] Customary law was perverted further still as the legal system attempted to blend colonial needs with traditional mores. The tension is especially evident in the transition from indigenous African communal ownership of property to singular ownership after European traditions. "The development of new forms of property, the possibilities of individual acquisition, the inculcation of individualistic values and reworked patterns of consumption" all required responses not available in earlier observations of traditional customs.[61] These "redefined the socio-economic terrain, corroding kinship bonds, exacerbating the incidence of tension among family members over kin-based productive property," finally "reducing gender to a determinative fault-line for access and control of land."[62]

Mistaken customary law has been much more deeply entrenched in Zimbabwe through its application by courts other than traditional courts. The application of customary law by local and civil courts is sanctioned under Section 89 of the Constitution of the Republic of Zimbabwe, and is raised above Constitutional scrutiny by Article 23(3). As *Magaya* states, "the application of customary law generally is sanctioned under Section 89 of the

56. Gadacz, *supra* note 55, at 263 (emphasis added).
57. *Id.*
58. Nhalpo, *supra* note 52, at 53.
59. *Id.*
60. *See, e.g.*, the use of Bennett and Goldin & Gelfand in *Magaya*, *supra* note 1.
61. Obiora, *supra* note 53, at 228.
62. *Id.*

Constitution."[63] This includes exemptions from provisions against discriminatory practices and laws, which are otherwise liberally protected under the Constitution. In fact, Section 89 explicitly subjects legislation to provisos of customary law, reserving several specific areas of law from discrimination review. These include "adoption, marriage, divorce, burial, devolution of property, or other matters of personal law."[64] Thus, as noted in the *Magaya* decision, "matters involving succession are exempted from the discrimination provisions."[65] Indeed, the provision authorizing the application of laws explicitly subjects further legislation to provisos of "customary law."

The explicit provisions relating to the applicability of customary law and civil courts' ability to grant it partial deference frequently mix substantive customary and civil law to create hybrids of custom and clearly established precedent or codified civil law. Should a civil court determine that applicable law in a given instance is customary, it has full authority to issue a decision, binding as precedent, based on its own interpretation of customary law.[66] Thus ascertaining tradition has become the province of the civil courts even though they are ill-equipped and poorly prepared to render determinations of custom and customary laws. Ascertainment has become a crucial question in judicial decisions—one that is, as evidenced in *Magaya*, neither consistently determined nor regularly applied. The creation of interpretations of customary law combined with the inexactness of application foster difficulties, especially in Zimbabwe's civil courts.

The Customary Law and Local Courts Act further explains the applicability of the laws and their procedural usage. Specifically, they may be used in "any civil cases" if "the parties have expressly agreed that it should apply; or" due to the "nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or... it appears just and proper that it should apply."[67] Explicit within the same is the clarification of "surrounding circumstances." This definition is extraordinarily broad and includes: "the mode of life of the parties; the subject matter of the case; the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case; [and] the relative closeness of the case and the parties to the customary law or the gen-

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63. *Magaya, supra* note 1, at 6. "Subject to the provisions of any law in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law." Interpretation Act, ch. 1:01 (1962) (Zimb.).

64. ZIMB. CONST. art. 23, § 3(a).

65. *Magaya, supra* note 1, at 5.

66. *See* Customary Law and Local Courts Act, *supra* note 50, at art. 3.

67. The President of Zimbabwe has not yet enacted Part II of the Customary Law and Local Courts Act, in which these sections are found. *See id.* art. 31. However, the provisions regarding ascertainment of customary law are essentially the same as those found in the Customary Law (Application) Act, ch. 8:05, art. 30 (1981) (Zimb.), which the Customary Law and Local Courts Act was intended to replace.

eral law of Zimbabwe, as the case may be."[68] If the Court is uncertain as to the "existence or content" of a rule of customary law, it is further instructed to "consult reported cases, text books and other sources, and [it] may receive opinions, either orally or in writing, to enable it to arrive at a decision in the matter."[69] These sources are themselves often few and far between and more research is certainly needed if the present judicial system is to be preserved.

In a classic example of the difficulties of ascertaining customary law, Justice Muchechetere's opinions in *Magaya* drew heavily from secondary—if not tertiary—sources. His brief, generalized ascertainment of the customary law of inheritance relied on *Human Rights and African Customary Law Under the South African Constitution*[70] and *African Law and Custom in Rhodesia.*[71] Both of these texts, written by European observers of traditional practices, argue that the eldest son of a Shona decedent would inherit the property and responsibilities of the estate. In the *Magaya* decisions, Justice Muchechetere extensively cites T.W. Bennett, a South African scholar specializing generally in Southern African customary societies and law. Yet neither Zimbabwean nor Shona customs are discussed explicitly in the passages quoted. Muchechetere seems to justify using Bennett as a source by describing the similarities of Shona and Ndebele customs according to 'tribal groupings': "[i]t was also conceded that the Shona and Ndebele tribal grouping in Zimbabwe have broadly similar customs and usages on succession and inheritance. These, I gather, are similar to many tribal groupings in South Africa ... I therefore agree with what Bennett said ...."[72] Muchechetere also quotes broad passages from Goldin and Gelfand's *African Law and Custom in Rhodesia*,[73] and cites Rhodesian and Zimbabwean case law in rendering the conclusion that "what is common and clear ... is that under the customary law of succession of the [discussed] tribes males are preferred to females as heirs."[74] Also evident in this decision is the importance of the Judge's own personal opinion, much more so than in standard civil cases. Indeed, Justice

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68. *Id.* art. 3.

69. *Id.* art. 9.

70. *See* T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION (1995).

71. *See* BENNIE GOLDIN & MICHAEL GELFAND, AFRICAN LAW AND CUSTOM IN RHODESIA (1975).

72. *Magaya, supra* note 1, at 3. This final passage only reemphasizes that determination of customary law is an imprecise art, at best.

73. *See* Goldin & Gelfand, *supra* note 71.

74. *Magaya, supra* note 1, at 4. It should be noted that if the President of Zimbabwe had enacted Part II of the Customary Law and Local Courts Act, these problems might have been avoided. Section 4 of the later Customary Law and Local Courts Act, *supra* note 50, reads: "Subject to any enactment affecting such capacity, the capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law or to inherit rights or property shall be determined in accordance with the general law of Zimbabwe." However, as this provision is contained in the yet-to-be-enacted Part II, customary property devolution is governed by § 7 of the Customary Law (Application) Act, *supra* note 67: "The heir at customary law of any deceased person to whom customary law was applicable shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased person and not devised by will."

Muchechetere used the term "in my view" six times, and "in my understanding" four times, in his explanation of customary law.[75]

Obviously, the *Magaya* decision is not the first in which outside sources were used as reference in determining customary law. Time and time again, the Zimbabwean courts have reiterated the value of the list of sources used to determine customary law and have further emphasized the courts' discretion in evaluating each bit of evidence. One of the clearer statements on the sources for customary law and judicial discretion came in the Supreme Court case *Madondo v. Mkushi*:

> The learned provincial magistrate will, after hearing counsel's submissions, decide for himself what he considers to be relevant authorities ... this is important for the magistrate to take evidence from experts on African custom. The receipt by the court of their opinions will go a long way in assisting the court to come to a just decision. The parties may, in consultation with the trial magistrate, decide to call their own experts. That will be proper. But the decision as to which people's opinions the court will rely on is one for the court.[76]

The difficulty in ascertaining customary law, or at least in ascertaining the proper decision under customary law, was well expressed by Justice Chinhengo in *Deputy Sheriff, Harare v. Mafukidze & Anor.*[77] In a case that profoundly impacted the rights of all Zimbabwean women living under customary law, the Justice attempted to determine whether, under that law, women were allowed to own property purchased with their own money, as opposed to the property becoming marital property falling under the control of their husbands. Chinhengo quoted from the appellate court on this matter, explaining that "the ownership of property acquired by married women by means of monies earned from employment, [is] an activity unknown to traditional African society."[78] Because African *men* had no "universally shared" view on this matter, he deemed it a controversy needing legislative determination. In the face of legislative inaction, the court "can only do its best to pronounce the law, guided as it should be by logic and equity."[79]

Essentially, the Court has free reign to explore and expound upon whatever sources it deems fit to determine customary law. The role of customary

75. *See Magaya*, *supra* note 1.

76. Madondo v. Mkushi, 1985 (2) ZLR 198 (SC) at 202. *See also* Ruzane V. Paradzai & Anor, 1991 (1) ZLR 273 (SC).

77. 1997 (2) ZLR 274 (H).

78. *Id.*

79. *Id.* at 280. In this particular case, drawing upon textbooks and the effects of LAMA on customary life, the court determined that a woman could own property beyond the control of her husband. The case was in response to a sheriff coming to claim property owed by a debtor—the woman's husband. The sheriff attempted to seize items purchased by the woman with her own money from employment, under the auspices of the property being marital and, therefore, seizable to repay the debt.

law is complicated by the broad deference it is granted by the Zimbabwe Constitution. Thus, actual customary law is almost entirely subject to individualized judicial interpretation. This is compounded in Zimbabwe by the construction of two separate, but interactive, systems of justice, civil and customary. *Magaya* is not the first decision that has suffered from these overlays of interpretation.

Traditional local courts are charged with the application of these customary laws, despite the many problems inherent in their determination, as discussed previously in this Article. The question remains: why? Why ought a modern state rely on apparently antiquated, certainly in many instances outmoded, interpretation of legislation? Why should a black African state rely on potentially illegitimate colonial perceptions of customs from centuries past? Alternatively, what benefits result from reliance on independent iterations of tribal customs without documentation?

This is, to a large extent, a political question. In the post-colonial era, southern African states are searching for means of reflecting and reinforcing pre-colonial belief systems. That these were unrecorded save the observations of colonists is arguably secondary in importance. A return to tradition is therefore an important step in establishing independence through self-determination. At a minimum, it allows at least facial adherence to traditions despite the existence of a rigid, more clearly administrable civil law system. Moreover, the continued use of customary law is, in many ways, a tribute to its utility. It responds to issues not extant within westernized law, such as *lobola*, or bride price. In addition, it permits the Zimbabwean government to distribute decision-making power to traditional bodies—tribal chiefs—and by so doing reinforce its own legitimacy in the eyes of traditional populations. Further, traditional authorities and community courts are unlikely to admit the distorted colonial origins of their customary law. This reinforces the need for the Supreme Court of Zimbabwe and for human rights groups in Zimbabwe to encourage the development of a modernized, responsive customary law, one that reflects traditional cultures of today instead of ages past.

C. *The Legal Age of Majority Act: General Laws' Failure To Guarantee Equality*

Occasional attempts have been made to rectify certain shortcomings in constitutional provisions and legislative gaps through national legislative action. One such example is the Legal Age of Majority Act of 1950 (LAMA),[80] which sought to ensure gender equality in receipt of majority status. LAMA holds that regardless of gender or marital status, all Zimbabweans achieve majority status at age eighteen. As the Supreme Court of Zimbabwe stated, "The Legislature by enacting [LAMA], made women who in African law and custom were perpetual minors majors and therefore equal

80. Act No. 15, § 15, ch. 8:07 (1982) (Zimb.)

to men who are majors."[81] So far, the provisions of this law have been applied to all Zimbabweans, regardless of personal adherence to customary law. The implications of LAMA for customary law are still in dispute, and *Magaya* is but one in a series of decisions attempting to determine if LAMA significantly alters substantive customary law.

The first case to examine the interaction between LAMA and customary law was *Katekwe v. Muchabaiwa.*[82] *Katekwe* determined that as LAMA granted women majority status and thus *locus standi in judicio*, it enabled women to sue for seduction damages, a cause of action formerly reserved to fathers of seduced unmarried women. Seduction damages were designed to recompense families for decreased *lobola* for a non-virgin bride. In a new interpretation of these damages, Chief Justice Dumbtshena wrote that "the girl seduced is entitled to be compensated for the loss of her virginity, and for her diminished chances of making a suitable marriage."[83]

In *Jenah v. Nyemba*,[84] the Court drew a strict divide between the substantive and procedural law for potential application of LAMA. Under customary law, married women were not allowed to be plaintiffs in an action without the aid of their husbands. The defendant in this particular case was attacking the plaintiff's *locus standi in judicio*, as she was a customarily married woman suing without her husband. The court made it clear that LAMA gave all women the ability to utilize the Zimbabwean court system, customary or civil, regardless of marital status. However, the *Jenah* court was careful to distance the substantive law of property from its decision:

> I respectfully disagree . . . that § 13 of the African Marriages Act has been repealed by implication by [LAMA]. Section 13 deals with the substantive law governing the movable property of African spouses and the disposal and devolution of such property. [LAMA] on the other hand, is concerned with age, status and capacity, all of which are matters of adjective law.[85]

The Court adopted a different perspective one year later in *Chinhowa v. Mangwende*,[86] affirming a community court decision that daughters are entitled to heritable property in the absence of sons. In the case, a brother of the deceased argued that regardless of the *locus standi* of the woman, the customary law of property requires that the property devolve to male heirs. The court strongly disagreed. Charging misinterpretation of customary law, the Court explained, "some of the traditional anchors and obligations of African society have broken down and are being intentionally abused by those who

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81. Chinhowa v. Mangwende, 1987 (1) ZLR 228 (SC), 231.
82. 1984 (2) ZLR 112.
83. *Id.* at 125-126.
84. 1986 (1) ZLR 138.
85. *Id.* at 143.
86. 1987 (1) ZLR 228 (SC).

want to derive benefit from the old situation."[87] Having determined that customary law would apply to the devolution of property, the Court then applied LAMA directly to substantive customary law. The Court thus interpreted LAMA as changing customary law, but nothing in LAMA necessarily dictated this application.

Since *Chinhowa*, the Court has vacillated in its application of LAMA to substantive customary law. Prior to *Magaya*, the trend was toward granting women in customary traditions more substantive rights, as their majority status was found to make them equal to men in all ways. Nonetheless, constitutional protections frustrated efforts to eliminate customary law, even when they are blatantly discriminatory or harmful. In *Seva & Ors v. Dzuda*, [88] the Court ruled that the eldest son, the heir under customary law, had an absolute right to personal inheritance of property even if the rest of the family was left with little or no familial property.[89] *Mashingaidze v. Mashingaidze*,[90] carefully maintained the integrity of customary law with regard to control of property in marriage and at its dissolution. The Court suggested, however, the ability of parties to lay foundations "for applying general law to the facts of [their] case in lieu of the application of customary law, in accordance with the choice of law rules."[91]

In *Magaya*, the Court directly addressed the Legal Age of Majority Act (LAMA) and its effects on customary law. The Court did not dispute the decisions applying LAMA to women's rights to contract and to appear in court. Rather, it stated that other decisions made under LAMA granting women substantive rights under customary law were wrongly decided because they were based upon the idea that discrimination against women in customary society resulted from women's minority status. Muchechetere took direct exception to the decision in *Katekwe*, emphasizing that damages related to the value of *lobola* would necessarily be received by the father, and as women do not receive *lobola* they could not receive money for damages. Further, he found that "loss of virginity" and "diminished chances for mar-

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87. *Id.* at 233. This statement might be considered a recognition of the inherent fluidity formerly present in customary law.

88. 1991 (2) ZLR 34 (S).

89. *See id.* In this particular case, the son inherited the father's immovable property, including the home where his father's wives and his siblings lived. The inheritor-son then sold the property with the home, and the buyer evicted the deceased's family. The family then sued to try to retain possession of the home by stating that, under customary law, the eldest son is to inherit the property for the purpose of caring for the rest of the family as the patriarch. The court ruled that under Zimbabwean law, the customary heir had the right to inherit the property personally, and not as any sort of trust. Therefore, the son could dispose of the property any way he chose, and the buyer had every right to evict the family. This decision was counter to former decisions regarding the heir's responsibility to his family and indicated a reliance on the general law of personal property, not formerly applied to customary inheritance. *See* Masango v. Masango, S-66-86 (unreported), *quoted in Magaya, supra* note 1, at n.14: "[t]o order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent [inheritor-son] of his customary obligation to care for his father's wife and children." *See also* Matambo v. Matambo, 1960 (2) RLR 154 (AD).

90. 1995 (1) ZLR 219 (H).

91. *Id.* at 223.

riage" exist only in common law, not in (his determination) customary law. Noting that customary society does not have notions of minority or majority, the Court further pointed out that there is a difference between a statute that grants additional competencies, which LAMA does, and a statute that grants additional rights, which LAMA does not. Therefore, as customary law has not been, or at least should not have been, altered by LAMA, the interpretation of customary law stands, and the Court found the son to be the rightful heir. As established above, this result is neither countenanced, nor prohibited by LAMA. Rather, the finding is one interpretation enabled through the structure of the Zimbabwean court system and specifically encouraged through Zimbabwe's special deference to customary law.

D. Predictability

Given the structure of the customary law system in Zimbabwe, the "shocking" decision in *Magaya* appears predictable, or perhaps even inevitable. The Zimbabwe legal system demanded that the Justices deciding the *Magaya* case interpret a law in which they have living experience, but no training and for which there are few interpretive resources. Most civil determinations of customary law come from a wide array of sources and seem to have an almost quilted quality, especially given that one of the sources evaluated is previous case law, itself an interpretation of customary law. LAMA has also failed to definitively resolve issues such as the one addressed in *Magaya*.

The Supreme Court of Zimbabwe had to resolve one question in *Magaya*: does customary law dictate that a woman may not inherit property when there is a male heir? The answer to that question was yes. Customary law is exempted from constitutional scrutiny, and the fact that LAMA exists was irrelevant. Women over the age of 18 can still be majors for the purposes of Zimbabwean civil law and customary law with regard to procedural matters (e.g., *locus standi*), but with regard to substantive customary law, women are essentially equivalent to adolescent males. This is not a determination of women's overall status, nor does it necessarily reflect the discriminatory attitudes of the justices. Rather, it is an interpretation of customary law using a limited number of sources and a loose framework with which to decide the question. The Supreme Court explicitly did not construe LAMA to grant substantive rights that did not exist under customary law as they interpreted it.[92]

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92. *Magaya* was not the only instance in 1999 whereby the Zimbabwean Court limited the rights of customary women to those they interpreted as previously existing in customary law. In one case, the Supreme Court ruled that a woman did not have a right to sue for adultery against the lovers of her husband, even though a customary man would have such a right. The court ruled that LAMA did *not* grant women the same legal rights as men, or grant women the same legal rights as other women not subject to customary law. The reasoning: "If the intention of the legislature was to completely do away with the difference between customary law marriages and general law marriages, the legislature would have provided for that in the Act." Nomsa Nkala, *Adultery Not Recognised Under Customary Law*, HERALD (Zim-

Critics of *Magaya* who attacked the court for its ruling were misguided in suggesting that the Supreme Court was proclaiming women to be minors under the law. Rather, the Supreme Court was interpreting women to be minors under customary law. Under the system in which the civil Supreme Court must determine customary law, they can only react to what they believe the customary law to be. Of course, under a system where civil courts have jurisdiction over uncodified law, the Supreme Court's interpretations of customary law are almost equivalent to legislation—the Supreme Court's decisions are some of the only written versions of customary law, and certainly the Court's writings are the only ones with value as legal precedent. The only way out of this loophole is either to circumscribe customary law altogether, or to let the Supreme Court apply civil law only, leaving customary law only to those who should be developing it: the community courts.

IV. POSSIBLE SOLUTIONS

A. Constitutional Reform

Recently, the government of Zimbabwe and its president, Robert Mugabe, decided to form a 400-person Constitutional Commission to review and rewrite the Constitution of Zimbabwe. Many of the members of the Constitutional Commission are women,[93] and it probably could be safely assumed that most of the members have ties to a customary ethnic group and are concerned about customary law. In the aftermath of the misapplication or misinterpretation of customary law in *Magaya*, it was assumed that the Constitutional Commission would address the subject of customary law *vis à vis* women's rights.

On November 30, 1999, the Constitutional Commission submitted its draft Constitution to President Robert Mugabe. This draft statute failed to fully protect women's rights in the context of customary law. The parts of the former Constitution that raised customary law above the Bill of Rights were eliminated, but the draft Constitution did not state that the Bill of Rights superseded customary law where the two are in conflict. With regard to customary law, the Constitution states only that courts, tribunals and forums must be guided by the spirit and objects of the Bill of Rights.[94] Twenty-four members of the Constitutional Commission refused to endorse the draft and joined noted women's rights advocate Welshman Ncube in his

babwe), Feb. 20, 1999.

93. It should be noted that, despite the protests of Zimbabwean and international gay rights groups, no openly homosexual Zimbabweans were appointed to the Constitutional Commission. This, combined with Mugabe's frequent anti-gay rhetoric, is viewed as a sign that discrimination against gay people will not be addressed in the new Constitution.

94. *See* The Government of Zimbabwe, *Draft Constitution of the Republic of Zimbabwe* (visited Feb. 8, 2000) <http://www.gta.gov.zw/Constitutional/Draft.Constitution.htm>.

new political party. Ncube and has party are in the process of developing their own draft of a new Constitution.[95]

B. Codifying Customary Law

Another approach is to incorporate customary law and grant indigenous rights from within the statutory system, limiting those rights where necessary. Codification would circumscribe the reach of customary law, and women's rights could be protected even when customary law might apply. This would raise women's rights above indigenous rights, an unlikely occurrence, but not an unprecedented one. Zimbabwe has already done this to a certain extent with regard to customary marriage. In Zimbabwe, if one marries customarily (i.e., not under the Marriage Act), the marriage must fit within a prescribed definition and solemnization ceremony.[96] Furthermore, all customary marriages must be registered. Lack of registration results in a severe limitation of the recognition of such a marriage.[97] However, those customary marriages that are registered are entitled to many of the protections that exist for couples married under the Marriage Act.[98] For example, according to the Customary Marriages Act, women cannot be forced to marry without consent (§§ 11, 15), and divorces occur only in civil court (§ 16).[99]

LAMA itself was certainly an active move with regard to customary law, as the legislature granted women procedural rights not recognized by customary law. In addition, the 1997 amendment to the Administration of Estates Act 6 of 1997, which would have governed the *Magaya* decision had the deceased died after this act, specifically allows women to inherit property, both as spouses and as children of the deceased. Such laws legislatively

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95. *See* Dumisani Muleya, *Commissioners Defect to NCA*, ZIMBABWE INDEPENDENT, Dec. 3, 1999, *available in* 1999 WL 25958455.

96. *See* Customary Marriages Act, 1 STATUTE LAW OF ZIMB. 249 (1996).

97. This, of course, results in its own deprecation of the rights of women in Zimbabwe, as many women do not know that they have to register their marriages. To view the limits of an unregistered customary marriage, one need only read the decision in Katiyo v. Standard Chartered Zimbabwe Pension Fund, 1994 (1) ZLR 225 (H). The case involved a spouse of a deceased member of the fund. The deceased and the spouse had been married under customary law, but had failed to register the marriage. The decision ruled that "the refusal by the trustees of the fund to treat the plaintiff as a spouse for the purposes of the fund did not violate § 23 of the Constitution. Section 3 of the African Marriages Act [Chapter 238] lays down that unregistered customary law unions are not valid, except for the purposes of status, guardianship and rights of succession of children.

98. The fact that not many women know to register their marriage has been recognized by at least one member of the Constitutional Commission. Jessie Majome, the youngest of all those serving on the Constitutional Commission, complained to the *Zimbabwe Standard* about the predicament and noted that, "This is the kind of information that I think people should have off-hand so that they know how far their rights stretch." Joyce Hamba, *Zimbabwe: A Married Feminist Now on the Commission*, ZIMBABWE STANDARD, June 14, 1999, *available in* 1999 WL 10448229.

99. Section 16 of the Customary Marriages Act requires that divorces occur only in appropriate courts as dictated by the Matrimonial Causes Act. These include only the High Court, and for customary divorces, the Magistrates Court; traditional courts are not included. *See* Customary Marriages Act, *supra* note 96, at 251; *see also* Matrimonial Causes Act, 1 STATUTE LAW OF ZIMB. 277 (1996).

regulate customary law in such a way as to bring it in line with the norms of the greater Zimbabwe society and international human rights community.

While circumscribing customary law, this incorporation need not necessarily curtail custom. The current system of separate customary and civil law within civil courts is not especially protective of custom. Civil judges, used to determining civil law by interpreting statutes and cases, must decide customary law questions by drawing on a bewildering array of secondary sources and, in the end, personal experience. If a custom is truly adhered to by a majority of Zimbabwe citizens, then it should become the law of the state. This might present an immediate danger to women's rights, but it would eradicate the uncertainty that exists under the current system of civil judges applying customary law. Women's rights advocates could, therefore, focus their attention on reforming statutory law, rather than struggling to reform vague, conflicting, and perhaps ultimately unchangeable notions of customary law.

C. Structural Change: Separating Civil and Customary Law

Another possible solution to the customary law conundrum is to have civil courts only apply statutory law, while customary courts determine disputes using customary law. The choice between the two systems of law would lie in the hands of the litigants. The state court system would serve as the dominant jurisdiction, but both litigants could agree to take the case to customary courts. Then, if dissatisfied with the result in customary court, litigants could turn to a civil court with a firm set of rules governing its decisions. Since either party could move to have the dispute settled in civil court, customary courts could continue to exist without cutting off litigation from constitutional protections and international human rights standards. Rather, as more people choose civil law, pressure would mount on customary leaders to make customary law more appealing, forcing them to keep it in line with the will of the people.

In this way, self-determination would take on a new, truer meaning as individuals determine the system of law applicable in each case. At the very least, it would allow those most experienced with customary law, the local community courts, to be its primary interpreters. Freed from the binding interpretations of the civil courts, customary law could retain its fluidity and flourish. If it repsonds to the customs and needs of *all* its citizens, there would be no reason for litigants to turn to less accessible civil courts. As Nigeria demonstrates, there may be many issues more comfortably litigated in customary courts.

The idea of separating the legal systems is not an original one. In Nigeria, neither the state nor the village tribunal has exclusive jurisdiction over most matters, and thus the choice of court and, therefore, law depends on the choice of the complainants. In one case study, the indigenous system adjudicated 96% of all spousal abuse cases, a majority of adultery cases were heard

in the indigenous system, and the state court handled a majority of divorce cases. Presumably, this is because the traditional mode of handling spousal abuse cases is preferable to the state method, whereas the statutory system of divorce is preferred over the customary law of divorce. According to research, there is much cooperation between the state and indigenous system.[100]

This solution could also be combined with the previous codification approach. The state of Zimbabwe could also choose to incorporate certain customs into the statutory system by codifying and necessarily limiting them. Thus, the civil courts would have statute and case law upon which to rely, rather than vague determinations of law arising from secondary sources and life experience. This would ensure reliability in the civil court system.

D. More Immediate Solutions

Short of restructuring the legal system in Zimbabwe to rid it of a useless dichotomy between customary and civil law within the civil system, there are steps that human rights workers in and out of Zimbabwe can take to aid in the development of women's rights in Zimbabwe. Given the current system of law and the logic with which *Magaya* was decided, there are two possible modes of attack. First, if the justices in *Magaya* misinterpreted the current status of customary law with regard to inheritance, the human rights community must inundate the legal community with research properly reflecting reality. Such reports are currently published by the WLSA, but more needs to be done by a variety of groups to give a true and convincing representation of customary law. The difficulty with this strategy is that, even if convincing research and arguments are put forth in abundance, the judges in the current legal system still have too much discretion and are free to ignore such research in favor of their own interpretations, relying on text that might be a century old. Still, it would seem more difficult to ignore the research if it is compelling and complete. Along these lines, as opposed to petitioning CEDAW and writing letters to the Zimbabwe Supreme Court, international human rights groups would be wise to dedicate their efforts to fundraising for those doing ground research in Zimbabwe.

On the other hand, if the possibility that Justice Muchechetere's interpretation of customary law was the correct one is acknowledged, a bottom-up approach is required. Women in customary communities ought be educated as to their rights under international and Zimbabwean civil law. If customary law is to be maintained within the civil system, while reforming it to better protect women's rights, then it is the customary people themselves who will have to change it. Efforts should be oriented toward rights enforcement and education within the communities themselves, with appro-

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100. *See* Ernest E. Uwazie, *Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria*, 34 J. LEGAL PLURALISM 87, 98 (1994).

priate written promotion of the changes occurring in the communities so that judges can be kept abreast of developments.

Finally, given that the decision rests at least partly on a loophole in the Legal Age of Majority Act, which does not specify the substantive rights that come with majority, it might be wise to continue lobbying efforts at the Zimbabwe legislature. Nationwide movements and marches aimed at an elected legislature could be more effective than marches aimed at a judiciary that has exercised the discretion the legislature granted.

V. CONCLUSION

Attacks on the Supreme Court of Zimbabwe for its decisions in *Magaya v. Magaya* by women's rights organizations were both misplaced and futile. The real problem in Zimbabwe lies not with the Court's decision, but with the system in which unfettered discretion and interpretation enable the Court to make such arbitrary decisions. At the same time, the situation is complicated by the existence of competing rights: women's rights and the right to indigenous self-determination. The answer to this problem lies in re-designing the system of law in Zimbabwe. Customary law must either be codified so that it is easily controlled and managed by the courts, and the law of Zimbabwe truly becomes one that is "self-determined" by the people of Zimbabwe, or customary law should be taken out of the jurisdiction of the civil courts so that there is less arbitrary decision making, allowing the people themselves to choose the system of law for their case. Either way, the current system of civil courts determining customary law is bound to give rise to more decisions like *Magaya*—decisions that give deference to old versions of customary law in a way that prevents customary law from growing and developing in reaction to modern human rights norms.