ZIMBABWE'S *MAGAYA* DECISION REVISITED: WOMEN'S RIGHTS AND LAND SUCCESSION IN THE INTERNATIONAL CONTEXT

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"Discrimination against women is not compulsory in African society." [1]

[W]hose customary law is this anyway?[2]

INTRODUCTION

When Shonhiwa Magaya died without a legal will, a local court in Zimbabwe designated his eldest child, Venia Magaya, heir to his estate. On appeal, Ms. Magaya's younger half-brother claimed heirship on the grounds that according to African customary law, "a lady . . . cannot be appointed [as heir] to (her) father's estate when there is a man" in the family who is entitled to claim it.[3] An appellate magistrate agreed and Ms. Magaya's

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[1] David M. Bigge & Amélie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-determination in* Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289, 295 (2000) (quoting a placard carried during a 1999 march through Harare, Zimbabwe, to protest the *Magaya* ruling).

[2] Mercedes Sayagues, *Zimbabwe Women Protest a Loss of Rights*, MAIL & GUARDIAN (South Africa), May 21, 1999, *available at* http://www.mg.co.za/articledirect.aspx?articleid=211100&area=%2farchives__print_edition%2f.

[3] Magaya v. Magaya, (1999) 3 L.R.C 35, 40 (Zimb. Sup. Ct.) (emphasis omitted).

heirship was reversed.[4] The newly appointed heir took his position as head of household, removed Ms. Magaya from her family home, and placed her in a shack in the neighbor's backyard.[5] Upon further appeal, the Supreme Court of Zimbabwe upheld the appellate decision, stating that, despite constitutional protections against discrimination, the fact that this case arose under customary law exempted its discriminatory aspects from court scrutiny.[6] The court explained that the constitution permits this type of discrimination against women as within "the nature of African society."[7]

Magaya v. Magaya, [8] the now-infamous Zimbabwe customary law and intestate succession case, triggered significant domestic and international opposition. Critics alleged that the decision was invalid under both Zimbabwean constitutional law and international law, violating "fundamental issues of fairness, international norms and rights, and even customary law itself."[9] Questions surrounding the outcome of *Magaya* still linger throughout southern Africa. On one hand, critics argue, legal and social norms require that female children and widows be given equal rights to property inheritance upon the death of a family member, particularly as economic and health crises have imposed a disparate impact on the resources of women throughout the region.[10] On the other hand, legal

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[4] *Id.* at 39-40.

[5] Sayagues, *supra* note 2.

[6] *Magaya,* (1999) 3 L.R.C. at 41.

[7] *Id.* at 44.

[8] *Id.* at 35.

[9] Bigge & von Briesen, *supra* note 1, at 295. Bigge and von Briesen also indicate the scope of this criticism:

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.

Id. at 289. Some human rights advocates saw this decision as retrogressive and as "a clear indictment of the need for constitutional reform and for a strong Bill of Rights" in Zimbabwe. *Id.* at 296.

[10] *See, e.g.*, Letter from Leilana Farha to CEDAW-in-Action, Zimbabwe—Women's Rights in Action (May 19, 1999), *available at* http://www.sdnp.undp.org/ww/lists/cedaw/msg00075.html; *see also* UNAIDS, FACT SHEET: WOMEN, GIRLS AND HIV/AIDS IN ZIMBABWE (2004), *available at* http://womenandaids.unaids.org/documents/factsheetzimbabwe.pdf (discussing the

decisionmaking is a delicate balancing process. Courts across southern Africa have upheld the cultural rights embodied in national constitutions,[11] as well as in numerous international human rights instruments,[12] as a basis for autonomy and development. With strong legal protections for cultural practices and the application of customary law in Zimbabwe, one of the most troubling critiques of this case is the idea that this decision may have been the only outcome the court could have reached; that, even if the court *had* incorporated human rights considerations, the law in Zimbabwe so clearly sanctions gender-based discrimination that the case could not have come out any other way.[13] Although this view is rather extreme, it

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"unfortunate" *Magaya* precedent and women's property and inheritance rights as they relate to impacts of the spread of HIV and AIDS in Zimbabwe).

[11] *See* NAMIB. CONST. art. 19 (1990) ("Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest."). The constitution of South Africa also includes protections for traditional leadership and the application of customary law in court, subject to the terms of the constitution. *See* S. AFR. CONST. 1996 arts. 211-12 ("The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution . . . . The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law . . . . National legislation may provide for a role for traditional leadership as an institution at a local level on matters affecting local communities.").

[12] *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 22, at 75, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] ("Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."); *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1 § 1 at 53, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *id.* art. 27 at 56 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 1 § 1 at 49, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR] ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *id.* art. 15 § 1 ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life . . . .").

[13] Sayagues, *supra* note 2 (Zimbabwean human rights lawyer Pearson Nherere discussing *Magaya* decision).

demonstrates the scope and importance of the fundamental rights and freedoms at issue, and the legal obstacles that these rights face under Zimbabwean law. With such critical protections at stake, *Magaya* has raised the important question of whether a fundamental tension exists between anti-discrimination rights, particularly on the basis of gender, and the right to cultural self-determination, including a right to the application of customary law.

While there has been extensive discussion about the domestic legal grounds for *Magaya*'s outcome, there has been little exploration of the tension between gender and cultural rights in the international context.[14] *Magaya* provides a unique starting point for the examination of rights-balancing questions throughout southern Africa because of the court's particular focus on "the nature of African society" and the privileging of cultural practices over individual rights. In contrast, Ms. Magaya argued that the case struck at the heart of her internationally recognized human rights, and that denying her heirship would run contrary to basic principles of gender equality and individual rights.[15] Although there is arguably some support for the court's decision in *Magaya*, legal and policy implications within Zimbabwe, comparative constitutional considerations, and regional and international agreements seem to outweigh those arguments. In addition, a careful consideration of basic human rights concerns—including the right against gender-based discrimination, the right to economic opportunity, and the community right to cultural preservation—comes out in support of the widespread global criticism against the *Magaya* outcome.

To examine these tensions and to address the implications of *Magaya* in a local, regional, and international context, Part I of this Article will look first to the status of women in Zimbabwe generally, and Part II will discuss the legal arguments presented in the *Magaya* opinion. Part III will examine *Magaya*'s legal impact and implications within Zimbabwe, examining in particular its effect on the following rights: to be protected from discrimination; to economic opportunity; and to cultural preservation. After discussing these rights in a local context, the Article will shift to a

[14] *See* Bigge & von Briesen, *supra* note 1. The primary law review article available on the *Magaya* case was published in 2000, almost immediately following the court's decision. Although other authors have dealt with the case in the context of customary law and human rights jurisprudence more broadly, this is the first article to deal with *Magaya's* implications in a specifically international context. As Zimbabwe faces internal economic and human rights crises and questions its role in the international community in 2006, it seems only fitting to reexamine this well-known Zimbabwean gender and cultural rights case in the context of domestic policy and international law.

[15] Magaya v. Magaya, (1999) 3 L.R.C. 35, 41 (Zimb. Sup. Ct.).

discussion of regional and international norms. Part IV of this Article will discuss the status of these rights in other African constitutions in order to provide a comparison and regional guide for the legal understanding of these rights. Part V will look to the Banjul Charter, an African human rights agreement, for similar comparison and as an example of a relevant regional human rights instrument that should have been considered by the Zimbabwe court. Part VI will discuss the potential role of broader international human rights instruments in the case. Finally, in Part VII, this Article will discuss the potential incorporation of human rights norms from all levels of legal discourse (domestic, regional, and international) into this type of judicial decision, and will suggest that the *Magaya* court should have taken a more balanced approach in examining Ms. Magaya's case.

I. THE SOCIAL AND LEGAL STATUS OF WOMEN IN ZIMBABWE

The story of women's status in any context cannot be outlined adequately in any brief introduction; one must always bear in mind that the social and legal status of women varies by time, location, age, class, ethnic group, and personal circumstances. The interests of these women also vary widely, and generalizations are only useful as tools for description and discussion of a broader and more nuanced situation. To provide some context for Ms. Magaya's case, however, this section will briefly address some of the greatest challenges facing women in Zimbabwe today. The discussion will focus on women's access to land resources and the impacts of recent political, land reform, economic, and health crises facing the country.

A. The Historical and Current Status of Women in Zimbabwe

According to anthropologists studying pre-colonial Zimbabwe, the status of Zimbabwean women has shifted dramatically due to the impact of colonial structures and a colonially-imposed legal system. Historically, women's land and resource access was guaranteed through social and familial connections, with women's agricultural production tied to traditional roles in the family, and access to land guaranteed by marriage or clan-based land allocation.[16] "Prior to colonization," one researcher

[16] WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATIONAL TRUST, A CRITICAL ANALYSIS OF WOMEN'S ACCESS TO LAND IN THE WLSA COUNTRIES: BOTSWANA, LESOTHO, MALAWI, MOZAMBIQUE, SWAZILAND, ZAMBIA AND ZIMBABWE 10 (2001) [hereinafter WLSA].

describes, "women were always assured of land which was allocated to them by their husbands at marriage. Those who were never married, or were single (divorced or widowed), were also allocated pieces of land."[17] Pre-colonial Zimbabwean women held a relatively high social position and were attributed "a certain place of honour and respect"[18] by customary laws and traditional community structures. Although Zimbabwean societies have been historically male-dominated,[19] it is evident that women were traditionally accorded some resource access and legal and social powers[20] that were negatively impacted by the imposition of colonial frameworks.[21] Contrary to popular claims that "African culture" privileges cultural and community rights, [22] there is evidence that women and children held an important status in traditional Zimbabwean social structures.[23]

As British colonial influence penetrated Zimbabwe (Southern Rhodesia) during the years 1888-1980, newly imposed legal structures reduced women's access to economic and natural resources, including access to land. A bifurcated judicial system was established to distinguish between European and customary law, and to allow the "colonizers to

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[17] MILDRED T. MUSHUNJE, AN ANALYSIS OF WOMEN'S LAND RIGHTS UNDER THE LAND REFORM PROGRAMME IN ZIMBABWE 11 (2002).

[18] *Id.*

[19] *See* Beverly L. Peters & John Peters, *Women and Land Tenure Dynamics in Pre-Colonial, Colonial, and Post-Colonial Zimbabwe*, 9 J. OF PUB. & INT'L AFF. 183, 186-92 (1998).

[20] *Id.* at 187 ("Daughters were often granted usufruct rights over the land of their fathers. A divorced daughter who had left any children and returned to her patrilineal clan usually received usufruct rights to cultivate the land of her patrilineage for subsistence . . . . A married Shona or Ndebele woman received indirect usufruct rights to land through the patrilineage of her husband and labored on her husband's land for subsistence . . . . A husband often granted his wife or wives plots or *tseu/isivande* which remained under the control of women.").

[21] *Id.* at 189 ("Given the shortage of land and the fragmentation of holdings between kin and non-kin in the [colonially-imposed 'native reserves'], the usufruct rights to land which Shona and Ndebele women enjoyed prior to colonialism were threatened.").

[22] *See, e.g.*, Nimi Wariboko, *A Critical Review of the Firm in Africa*, 3 J. INT'L BUS. & L. 113, 117 (2004) ("All this is not to say the manager is programmed to always pursue communitarian aims, but to point out that if the emphasis in the West is on 'moving up,' in Africa it is on 'fitting in' and sublimation of individual interests to take account of the obligations to the community.").

[23] MUSHUNJE, *supra* note 17, at 11.

maintain a 'hands-off' policy towards African tribal populations."[24] As colonization affected the legal structures and African rights to natural resources, women faced increased competition for land,[25] due in part to "a customary law [that] was developed which accorded women the status of perpetual minors . . . who would need the assistance of a male member of the family to carry out any legal or commercial transactions."[26] Under these new legal structures, it became clear that "the colonial authorities and administrators had much to do with the subjugation of women."[27] A system emerged which denied women equal access to resources as that enjoyed by men; customary law practiced within colonially-imposed limits made it difficult to maintain traditional economic and social protections and guarantees for married and single women. Because of this manipulation of the traditional customary practices, scholars distinguish "living customary law," the customs actually practiced within African communities, from "official customary law," the post-colonization rules observed by the official legal profession. Consequently, the official customary law "must be treated with circumspection, for it may have no genuine social basis."[28]

Since independence in 1980, the dominant Zanu PF political party has espoused rights for women, but "Zimbabwe has long lacked a gender policy"[29] and "has thus far shown extremely limited State budgetary and staffing commitment to achieving gender equity and integrating women into all of its development programmes."[30] Women in Zimbabwe suffer higher

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[24] Bigge & von Briesen, *supra* note 1, at 291.

[25] *See* Peters & Peters, *supra* note 19, at 189.

[26] MUSHUNJE, *supra* note 17, at 15.

[27] *Id.*

[28] T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 64-65 (2d ed. 1999).

[29] ZIMBABWE HUMAN RIGHTS NGO FORUM, GENDER AND CONSTITUTIONAL ISSUES: SPECIAL REPORT TWO 5 (2001), *available at* http://www.hrforumzim.com/frames/inside_frame_special.htm.

[30] *Id.*

levels of poverty, significantly less access to resources,[31] and increased health risks than their male counterparts.[32] The notion of

> gender equality was not written into the Constitution of Zimbabwe until the end of 1996, and when it was so recognized, it was massively diluted by the retention of the much-hated 'Section 23,' . . . [which has] since 1980 exempted all customary, family and personal law from Constitutional [anti-discrimination] regulation.[33]

These issues demonstrate some of the legal, social, and economic challenges faced by women in Zimbabwe and implicated by the concerns raised in the case of Ms. Magaya.

B. The Impacts of Recent National Turmoil

Although recent political and economic instability has deeply affected both women and men in Zimbabwe, certain of these developments present more serious consequences and challenges for women. Zimbabwe's infamous "fast track" land reform programs, a steep increase in HIV/AIDS infections, government-sanctioned property demolitions, and serious food shortages have each occurred or intensified after the *Magaya* decision. These complicating factors must be considered when discussing women's rights and the constantly changing needs and interests of women in Zimbabwe.

The government of Zimbabwe has been pursuing land reform options since its ascension to power in 1980, but the more drastic "fast track" land resettlement program was announced in July 2000.[34] This program was implemented to redistribute farms from white owners for the benefit of other Zimbabweans, but the process, characterized by violence and uncertainty, was "carried out so rapidly, short-circuiting legal

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[31] HUMAN RIGHTS WATCH, FAST TRACK LAND REFORM IN ZIMBABWE 31 (2002), *available at* http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf [hereinafter FAST TRACK LAND REFORM].

[32] *See, e.g.*, *HIV Now a Bigger Threat to Women than Men*, MAIL & GUARDIAN (South Africa), Nov. 24, 2004, *available at* http://www.mg.co.za/articlepage.aspx?articleid=142595&area=/breaking_news/breaking_news__international_news.

[33] ZIMBABWE HUMAN RIGHTS NGO FORUM, *supra* note 29, at 8.

[34] FAST TRACK LAND REFORM, *supra* note 31, at 7-11.

procedures . . . [that] many of those who have moved to new plots or those who might otherwise do so, are worried about the lack of certainty that their title will be secure."[35] Because this level of uncertainty and the resulting lack of production have been so closely linked with poverty and food shortages, women's rights activists have stepped in to emphasize the serious impact that the resettlement programs have had on women.

Critics of the land resettlement program have argued that the process is "just moving poverty from one location to another."[36] Land reallocation has tended to be highly unequal across existing social divisions, and the program's destabilizing effects have impacted all segments of Zimbabwean society. The program has also failed to adequately address root causes of poverty, including gender inequalities and women's lack of land access. Reports have indicated that the "programme was generally silent on gender issues or on restoring women's traditional rights to land . . . [T]he selection criteria focused on household heads and thus excluded women . . . [and at] divorce or the death of the husband, most women in resettlement areas are forced off the land."[37] In addition, the relative lack of infrastructure available in many of the resettled areas "is likely to affect women more seriously than men, since women are the principal subsistence farmers, [and] are less likely to have access to casual cash-paid work."[38] Other reports have alleged that women seeking land allocations faced sexual harassment and rapes perpetrated by officials involved in the program,[39] leading critics to wonder if the land resettlement process has harmed women's interests rather than helped them.

Recent health and economic crises have also deeply affected the status and resources of women in Zimbabwe, increasing the burden of economic inequality and family responsibilities borne by women to a greater extent than men. The rapid spread and increasing impact of HIV and AIDS in Zimbabwe has placed "a huge burden on women as they become the caregivers to those that are affected and/or infected. . . . Those women that are living with AIDS also suffer the effects of limited medical services and having to continue working even when they are ill."[40] Women are also

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[35] *Id.* at 14.

[36] *Id.* at 15.

[37] WLSA, *supra* note 16, at 24-25.

[38] FAST TRACK LAND REFORM, *supra* note 31, at 32.

[39] *Id.*

[40] MUSHUNJE, *supra* note 17, at 49.

at increased risk for infection and constitute a majority of new and existing HIV infections in Zimbabwe.[41] While health issues are not directly implicated in *Magaya*, the disproportionate impact of health crises makes it difficult for women to carry on productive activities.[42] This significantly affects their ability to achieve economic independence, including access to land and property.

Finally, the 2005 implementation of widespread urban "clean up" operations by the government[43] has resulted in the destruction of township housing and informal markets. These evictions and demolitions heavily impacted the interests of poor women throughout Zimbabwe, and "[a]ccounts of the victims share a common thread: all cite a similar process of forced, indiscriminate and often violent displacement at the hands of police coupled with consistent orders to move to rural areas."[44] The effects of these government-ordered property confiscations and forced evictions have been similar to the destabilizing impacts of the fast track land reform programs. Human Rights Watch reported that "women, children, persons living with HIV/AIDS and foreign-born residents were particularly hard hit by the evictions."[45]

C. Potential for New Precedent and Improvement of the Status of Women

Although the previous examples illustrate the disproportionate difficulties faced by women in the current political and economic state of Zimbabwe, they also demonstrate the potential for dramatic improvements and legal support that would be provided by a positive decision in a future case similar to *Magaya*. The importance of land rights and access to property in Zimbabwe cannot be overstated, and much of the country's instability and recent famine has been attributed directly to the legal insecurity over and inequality of access to land. With a widespread

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[41] UNAIDS, *supra* note 10, at 1.

[42] *Id.*

[43] *See Zimbabwe Defends Urban Demolitions*, BBC NEWS WORLD EDITION, Sept. 18, 2005, *available at* http://news.bbc.co.uk/2/hi/africa/4258508.stm.

[44] Human Rights Watch, *Zimbabwe: Mass Evictions Lead to Massive Abuses: Government Delays Provision of U.N. Humanitarian Assistance*, HUMAN RIGHTS NEWS, Sept. 11, 2005, *available at* http://hrw.org/english/docs/2005/09/11/zimbab11718.htm.

[45] *Id.*

disadvantaged female population and a clear lack of legal protection of women's economic and social interests, a court decision defending these interests would provide a critical platform from which women's rights and economic progress can be based. The status of women within Zimbabwe could be greatly improved by increased judicial respect of internationally-recognized human rights in Zimbabwe.

II. LEGAL ARGUMENTS IN THE *MAGAYA* OPINION

In its interpretation of the issues raised in *Magaya*, the Supreme Court of Zimbabwe looked predominantly to domestic legal sources, including Zimbabwe's national constitution and Zimbabwe's Administration of Estates Act,[46] which concerns the role of customary law in the distribution of property. Although the question of intestate succession in Zimbabwe is on its surface a question of customary law, the *Magaya* court used a positivist interpretation[47] of constitutional text and statutory sources to ultimately find that the texts supported the customary law preference of male heirs over a right against sex discrimination, while disregarding the customary law requirement that women's access to resources be protected.[48] The court also separated customary from common law, stating that common law "concepts . . . not known to African customary law"[49] cannot remove the customary legal barriers to women

[46] Administration of Estates Act, No. 3 (1997) (Zimbabwe).

[47] Legal positivism is generally understood to be a strictly "rules-based" approach to legal interpretation. Positivism has been defined by one author as "the conception of law as a system of rules. . . . articulated and administered by agents of the state and in that sense are 'official.' . . . Justice depends on [the rules'] application by the judiciary in a consistent and objective manner, without regard to . . . case-specific notions of fairness . . . ." David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669, 670. Although I do not mean to assume that the *Magaya* court subscribed to this legal approach in general, I use the term to explain the court's stubborn literalism in this decision and to highlight the lack of judicial consideration of case-specific concerns, broader human rights norms, and issues of fairness.

[48] It should be noted here that Ms. Magaya likely would have been denied access to the inherited property if the court had strictly applied customary law as well. The problem, however, is that the court applied relevant laws inconsistently, privileging "the nature of African society" on one hand, but ignoring customary obligations to protect Ms. Magaya's interests, relying instead on a very narrow reading of the written law. The court framed its rationale in texts, but used them selectively towards an unjust conclusion, ultimately providing only the worst possible outcomes for Ms. Magaya.

[49] Magaya v. Magaya, (1999) 3 L.R.C. 35, 44 (Zimb. Sup. Ct.).

being appointed to heirship, as to do so would be "tantamount to bestowing on women rights which they never had under customary law."[50] In this manner, the *Magaya* decision demonstrates an unwillingness to examine considerations of policy implications or international norms, focusing solely on the strict interpretation of Zimbabwean legal texts.

A. The Constitution of Zimbabwe

The anti-discrimination provisions in Zimbabwe's constitutional Declaration of Rights[51] set forth a complicated framework of protections and exceptions that leave unanswered the question of whether gender-based determinations and customary legal decisions are excluded from the basic constitutional protection against discriminatory legal interpretations. For example, although section eleven—the first in The Declaration of Rights—extends gender protection to the Declaration's "Fundamental Rights and Freedoms,"[52] section twenty-three—also in The Declaration of Rights—

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[50] *Id.* at 47. Judge Muchechetere justifies this approach with the explanation that

> the "perpetual discrimination" against women [in traditional African societies] stems mainly from the fact that women were always regarded as persons who would eventually leave their original family on marriage, after the payment of roora/lobola [brideprice], to join the family of their husbands. . . . [T]he appointment of female heirs would be tantamount to diverting the property of the original family to that of her new family . . . a distortion of the principles underlying customary law of succession and inheritance.

Id. at 45.

[51] ZIM. CONST. §§ 11-26 (1996).

[52] The Preamble to section eleven ("Fundamental Rights and Freedoms of the Individual") of the Constitution of Zimbabwe states:

> Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation; and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

Id. § 11. Note that although Zimbabwe's constitution was significantly amended in 2000, I have chosen to use the version last amended in 1996 (except where otherwise noted)

excludes gender from its protections against discrimination.[53] This discrepancy became a central issue in *Magaya*, and the court ultimately asserted that even if subsection 23(1) was to be interpreted as incorporating "Zimbabwe's adherence to gender equality enshrined in international human rights instruments" to which Zimbabwe was a party, subsection 23(3) declares that "matter[s] involving succession [under customary law] are exempted from the discrimination provisions."[54] According to subsection 23(3), the anti-discrimination provision of subsection 21(1) does not apply to customary law cases "involving Africans."[55] Although the terms of subsection 23(3) are relatively clear, this interpretation would run contrary to the guarantee of fundamental rights, regardless of race and origin, granted in section eleven.[56]

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because it is the document that would have been available to the Supreme Court during the *Magaya* case in 1999. In addition, the 2000 amendments were primarily related to the government's land reallocation program and do not implicate the questions of intestate succession that are relevant to *Magaya*. *See* Rahman Ford, *Law, History and the Colonial Discourse:* Davies v. Commissioner *and Zimbabwe as a Colonialist Case Study*, 45 HOW. L. J. 213, 218 n.22 (2001); *see also* John McClung, *Property Under Siege: The Legality of Land Reform in Zimbabwe*, 16 EMORY INT'L L. REV. 737, 774 (2002).

[53] In contrast, subsection 23(2) states that: "[A] law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced." ZIM. CONST. § 23(2) (1996).

[54] Magaya v. Magaya, (1999) 3 L.R.C. 35, 41 (Zimb. Sup. Ct.). Subsection 23(1) states that

> no law shall make any provision that is discriminatory either of itself or in its effect; and . . . no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

ZIM. CONST. §§ 23(1)(a)-(b) (1996). Subsection 23(3) states that

> [n]othing contained in any law shall be held to be in contravention of [the subsection 23(1) anti-discrimination provision] to the extent that the law in question relates to any of the following matters: . . . [including] the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case.

Id. § 23(3).

[55] ZIM. CONST. § 23(3) (1996).

[56] Taken to its logical conclusion, however, this argument may lead one to wonder whether a constitutional provision could, in fact, be considered "unconstitutional" under

Specifically, under section eleven of Zimbabwe's constitution, "[f]undamental [r]ights and [f]reedoms" are guaranteed "to every person in Zimbabwe . . . whatever his race, tribe, place of origin, political opinions, colour, creed, *or sex* . . . subject to the rights and freedoms of others and for the public interest."[57] Because this provision is placed as the first section of the constitution's Declaration of Rights, this nondiscriminatory protection of "fundamental rights and freedoms" could arguably apply to each subsequent enumerated right. However, section twenty-three, which is included within the constitution's "Fundamental Rights and Freedoms," extends "[p]rotection from [d]iscrimination" only if "persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced."[58] A careful examination of this anti-discrimination provision reveals the fact that protection on the basis of sex has been omitted, indicating a peculiar exception and, perhaps, implying that "protection from discrimination" is the only provision of the Bill of Rights to be removed from the understanding of "fundamental rights and freedoms." Although an interpretative approach like the one taken by the *Magaya* court might read this to be the case, there remains a strong argument that section twenty-three and section eleven, if read together, should extend protection to women against discriminatory "law or treatment," as stated in section twenty-three.[59] Otherwise, the impact of this discrepancy may extend so far as to remove a general anti-discrimination right from the "fundamental" rights protected by section eleven of the constitution.

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preceding and more expansive terms in the same instrument. Because of its circular nature and somewhat troubling constitutional implications, this Article leaves that discussion for further consideration.

[57] ZIM. CONST. § 11 (1996) (emphasis added).

[58] *Id.* at § 23(3). Although subsections 23(1) and 23(2) state that "no law shall make any provision that is discriminatory either of itself or in its effect; and . . . no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or public authority," subsection 23(3) seemingly attempts to limit these protections rather than to protect them as "fundamental rights" under section eleven and the Bill of Rights. Judge Muchechetere, in *Magaya*, reads section 23(3) as an exception that removes property succession and customary law from the anti-discrimination protections, "firstly because they relate to 'devolution of property on death or other matters of personal law', and secondly in this case because they relate to customary law being applied between Africans." Magaya v. Magaya, (1999) 3 L.R.C. 35, 41-42 (Zimb. Sup. Ct.) (quoting ZIM. CONST. § 23(3) (1996)).

[59] ZIM. CONST. § 23(2) (1996).

Zimbabwe's constitutional inconsistencies regarding gender, custom, and protections against discrimination reflect a broader historical question of gender and constitutionalism in the nation. During Zimbabwe's Liberation War[60] from 1972 to 1980, women played a major role in the fight against Britain. Restrictive customary gender practices were generally relaxed during that time on the basis of necessity and, to some extent, out of respect for female contributions to the struggle.[61] In a sense, the war provided an opportunity for women to play a more visible role in public life.[62] Following independence in 1980, the newly independent Mugabe government commended the role of women in the war and promised to support legal and civil rights for women.[63] These promises "soon gave way to a series of retractions"[64] by constitutional inconsistencies, exceptions for sex discrimination, and sweeping exemptions for the application of customary law and "other matters of personal law."[65] The post-independence promises to women began to fade to the "second-class" status reflected in the *Magaya* interpretation of these provisions. As suggested by the *Magaya* court's reliance on its constitutional interpretation to justify ongoing sociolegal repression, the inconsistencies in the application of gender rights and protections in the constitution itself may demonstrate a broader social and legal uncertainty about the status of women, despite political promises of equality.

B. Customary Law Considerations

The use of customary law considerations in the *Magaya* opinion stemmed from section eighty-nine of the Zimbabwe constitution, which generally sanctions national courts' application of customary law according

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[60] Also referred to as the "Second Chimurenga."

[61] Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105, 115-16 (1996).

[62] *Id.* at 116.

[63] Amina Mama, Challenging Subjects: Gender and Power in African Contexts, Plenary Address at the Nordic Africa Institute Conference: "Beyond Identity: Rethinking Power in Africa," Upsala (Oct. 4-7, 2001), *in* 5 AFR. SOC. REV. 63 (2001), *available at* http://www.codesria.org/Links/Publications/asr5_2full/mama.pdf.

[64] *Id.*

[65] ZIM. CONST. § 23(3) (1996).

to legislative provisions.[66] The court then looked to section 68(1) of the Administration of Estates Act, [67] which dictates that the estate of a deceased be administered in accordance with the customary law, "which prefers males to females as heirs."[68] Because of this explicit statutory and customary law indication, the court disregarded policy and fairness considerations, including the impacts of their decision on Ms. Magaya and on the economic and social status of all women in Zimbabwe, and followed these terms exactly, awarding the property to the younger son of the deceased rather than to his eldest daughter. Interpreting the statutory provisions of the Administration of Estates Act and the Legal Age of Majority Act,[69] the court determined that any policy or norm considerations that would alter the application of these statutes were beyond the scope of judicial consideration and should be left to the legislature.[70]

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[66] *Id.* § 89 ("Subject to the provisions of any law for the time being 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 . . . ."); *see also* Frances Raday, *Culture, Religion, and Gender*, 1 INT'L J. CONST. L. 663, 683 (2003) ("The Supreme Court [of Zimbabwe, in *Magaya*]—relying on an exemption for customary law under the Constitution and rejecting the binding effect of the international human rights instruments to which Zimbabwe was party—refused to invalidate a customary law rule that gave preference to males in inheritance.").

[67] Administration of Estates Amendment Act, No. 3 (1997) (Zimbabwe). The court's reading of the Administration of Estates Act played a major role in the outcome of the case. Zimbabwe's legislature had repealed and replaced section sixty-eight of the Act, which would have affected the customary rules of succession. The amendment, however, occurred after the deceased's death, but before the argument of Mrs. Magaya's case. The court found that "if the deceased in this case had died on or after 1 November 1997 his estate would have been administered in terms of the amended [section] of the Act." Magaya v. Magaya, (1999) 3 L.R.C. 35, 50 (Zimb. Sup. Ct.). Although the court goes on to assert that "succession under customary law . . . has now been reformed," *id.*, both public and legal response following the issuance of this decision indicate that the amendment of the Administration of Estates Act has not corrected the inconsistency between codified customary law and fundamental rights against discrimination on the basis of gender.

[68] *Magaya*, (1999) 3 L.R.C. at 41 (emphasis omitted).

[69] Legal Age of Majority Act (1982) (Zimbabwe).

[70] *Magaya*, (1999) 3 L.R.C. at 49 (Judge Muchechetere states: "I do not consider that the court has the capacity to make new law in a complex matter such as inheritance and succession. In my view, all the courts can do is to uphold the actual and true intention and purport of African customary law of succession against abuse . . . . Matters of reform should be left to the legislature.").

A second customary law issue considered by the *Magaya* court is that of the inheritor's duty to support the deceased's dependents. According to the court, customary practice requires that an heir succeed to the status as well as the property of the deceased, inheriting "also his responsibilities, in particular the duty to support surviving family dependants."[71] Although the appellant claimed that this was a unique case in which care was unlikely to be provided to her and her mother, the court concluded that there was no reason to diverge from this customary assumption. Precedent, the decision strongly implies, provided a separate opportunity for Ms. Magaya to file suit against the respondent if he was not fulfilling the obligations of heirship.[72] The court neglected to consider the fact that Ms. Magaya appealed to the courts only after she was removed from the family house in which she had been residing for over twenty years,[73] and that she continued to live in a state of poverty, residing "in a one-room wooden shack . . . [while] her half-brother, who owns another house, has since sold off their father's house to buy a car."[74] Although it is clear that the respondent was not "fulfilling the obligations of heirship," the court relied on customary rules to terminate Ms. Magaya's rights to property without ensuring that her customarily protected interests or future access to legal process would be attained. This *was* her chance to apply to the court for help and, in the interest of preserving male-dominated traditions and discriminatory customary law provisions, the court turned her away.

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[71] *Id.* at 40 (quoting T. W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 126 (1995)) (emphasis omitted). The question of "status" inheritance is particularly interesting because it seems to explain, in part, why the court focused on the potential consequences of female inheritance in terms of family and social obligations (external factors) rather than the effects of inheritance on the woman herself. This type of social assumption, however, diverges from the court's purported positivist approach, and allows discriminatory norms to impact the outcome of a constitutional case. Although the notion of the inheritance of status is common throughout sub-Saharan Africa, it is more pronounced in cases of the application of Islamic law. *See* Muojekwu v. Ejikeme, (2005) 5 N.W.L.R. 402 (Nigeria), *discussed in* Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 561-62 (2002); *see also* James N. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 576 n.349 (2002) (discussing that for cultural inheritance, "[i]n most contexts, offspring inherit the status of their mother").

[72] *Magaya*, (1999) 3 L.R.C. at 44-48.

[73] Sylvia Tamale, *Gender Trauma in Africa: Enhancing Women's Links to Resources*, 48 J. AFR. L. 50, 56 n.15 (2004).

[74] Sue Njanji Matetakufa, *Women's Rights Gone Wrong*, DEVELOPMENTS MAG., Nov. 12, 1999, *available at* http://www.developments.org.uk/data/08/womens_r.htm.

The most serious problem with this approach is that it omits from judicial consideration the full circumstances of an inheritance case. On one hand, a customary expectation existed that affirmed a duty to support dependants. Realistically, however, women living with limited financial means in rural Zimbabwe would likely have little opportunity to appeal to the courts—not once, but twice—in order to raise this concern. According to a recent article regarding African women's inheritance rights, the customary "social safety net providing for widows and orphans at the death of the male head of household . . . is no longer the common practice."[75] As such, it is unrealistic to assume for the purposes of the original inheritance case that this protection will be provided. Once the court denies customary protection and access to the family's financial resources, the court's assumption that Ms. Magaya would have the means to launch a second legal complaint seems highly impractical.

III. LEGAL IMPACT AND IMPLICATIONS IN ZIMBABWE

Although some elements of the *Magaya* decision might appear valid under a narrow legal interpretation, many modern legal theorists agree that a court decision—particularly one regarding the rights of communities or individuals—should take into account the broader social policy and human rights implications surrounding the case at hand.[76] Most immediately, the legal impact and implications of the case's outcome in the country in which it was decided should have had some bearing on the

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[75] Abby Morrow Richardson, *Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform,* 11 No. 2 HUM. RTS. BRIEF 19, 19 (2004). Richardson notes that although legislatures throughout sub-Saharan Africa have attempted to reform customary laws of succession, "there remains a considerable disconnect between official policy and actual practice. . . . Legislators have seemingly ignored the cultural realities of their countries and have passed laws that are largely unpopular and consequently ineffective." *Id.* She also argues that the customary "social safety net" of providing care for widows and orphans has been exhausted by the modern impacts of "[i]ncreasing poverty, widespread war, and the advent of the HIV/AIDS epidemic in the past two decades." *Id.*

[76] *See, e.g.*, Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985) (stating that the application of individual rights in U.S. constitutional law requires courts to consider and respect human rights: "Our rights and the rights of people everywhere, do not derive from the Constitution; they antecede it."); *see also* Elizabeth M. Schneider, *Anna Hirsch Lecture: Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 723 (2004) (discussing the use of international human rights norms to support domestic women's rights advocacy, and arguing that judicial recognition of these norms is "an important first step").

outcome of the *Magaya* case, particularly as there is constant reevaluation and pressure to reform Zimbabwe's constitution and customary law.[77] The court should have considered the effect on the right against discrimination, the right to development, and the right to cultural preservation.

A. Right Against Discrimination

In addition to the customary and common law claims in her appeal to the court, Ms. Magaya argued that the court should "exercise its discretionary law-making role to ensure that women were not excluded from being appointed heiresses at customary law."[78] The court, by denying this discretionary judicial approach, threw the status of Zimbabwean women into question, essentially determining that "even unmarried women are more likely to be property than to own it . . . [and] holding that the 'nature of African society' dictates that women are not equal to men, especially in family relationships."[79] Perhaps even more legally troubling,

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[77] Since the Zimbabwe constitution was adopted in 1979, it has "been amended at least 16 times." *Mugabe in Bid to Overhaul Zim Constitution*, MAIL & GUARDIAN (South Africa), July 17, 2005, *available at* http://www.mg.co.za/articlePage.aspx?articleid=245590&area=/breaking_news/breaking_news_africa/. Although NGOs and other rights activists have opposed many of President Mugabe's constitutional changes, "[p]ro-democracy grouping NCA [National Constitutional Assembly] has also dismissed piecemeal attempts at changing the country's highest laws." *Id.* Human rights groups, such as NCA, have also pushed for constitutional reform from a sweeping and grassroots level, stating that "[w]hat Zimbabwe needs is a whole new Constitution . . . especially where other areas are in urgent need of reform such as the trimming down of executive powers and broadening human rights to democratic levels." *Id.* Southern African NGOs have used this opportunity and dialogue of constitutional reform to raise issues of women's rights and land rights reforms as well. According to a report issued by the Human Rights Trust of Southern Africa (SAHRIT), these "structural issues plague women's rights to land. African states have an obligation to ensure women enjoy land rights as a basic human right. The colonial injustices cannot be undone but there is a window of opportunity which is open and beckoning to these states to act positively." *See* MUSHUNJE, *supra* note 17, at 25.

[78] Magaya v. Magaya, (1999) 3 L.R.C. 35, 48 (Zimb. Sup. Ct.). Judge Muchechetere responds that although "[t]he said rule which prefers males to females as heirs to the deceased's estates . . . could therefore be a prima facie breach of the Constitution of Zimbabwe . . . it seems to me that these provisions do not forbid discrimination based on sex." *Id.* at 41 (emphasis omitted).

[79] Tamale, *supra* note 73, at 56. In her discussion of customary gender roles and women's landlessness, Tamale also notes that

[w]omen from all corners of Africa have made a request for joint ownership of land between spouses but the leadership has largely met such demands with contempt. [Zimbabwe's]

the court's favoring of a right to the application of discriminatory customary law sets a strong legal precedent. The *Magaya* decision clearly established a precedent that supports the constitutional legality of discrimination on the basis of sex, and subsequent amendments to the constitution of Zimbabwe have maintained these "blanket exceptions to gender discrimination."[80] This approach has exacerbated a perceived "conflict between 'customary law' and personal 'traditions' on one hand, and the Constitutions and statutes on the other,"[81] discouraging future challenges to gender discrimination. The court's upholding of constitutional provisions favoring cultural practice over the fundamental right against discrimination poses a serious threat to women's rights in Zimbabwe because, as a substantive precedent, it removes constitutional anti-discrimination challenges from the options available to women opposing discriminatory laws in court.[82]

Because of the sweeping impact of this interpretation of constitutional anti-discrimination protection in Zimbabwe, international NGOs have seized this point as an issue for major constitutional, legislative, and judicial reform. Human Rights Watch, for example, has criticized the decision's discriminatory interpretation of section twenty-three, expressing concern that "section 23 of the constitution still exempted African customary law from the principles of nondiscrimination, and other

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President Mugabe is on record as advising Zimbabwean women in 1998 that they should not get married if they wanted to own land!

Id.

[80] ZIMBABWE HUMAN RIGHTS NGO FORUM, *supra* note 29, at 8. The Constitution of Zimbabwe as amended to No. 16 on April 2000 maintains the customary law exemption from protection against discrimination on the basis of gender, stating that

[n]othing contained in any law shall be held in contravention of subsection 1(a) [anti-discrimination provision] to the extent that the law in question relates to . . . (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law.

ZIM. CONST. § 23(3) (2000).

[81] ZIMBABWE HUMAN RIGHTS NGO FORUM, *supra* note 29, at 8.

[82] Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 300 n.103 (2003) ("The Magaya court treated the customary law basis for the gender discrimination as having overriding force in constitutional interpretation.").

legislation also still discriminates on gender grounds."[83] Similarly, following the court's decision in *Magaya*, the Center for Reproductive Rights issued an alert calling for additional constitutional protections for women in Zimbabwe, to "rectify gaping deficiencies" in the anti-discrimination clauses.[84] The Center for Reproductive Rights called on Zimbabwe to follow the examples of other African nations, to "provide for non-discrimination without then turning around and undermining the law with broad exceptions."[85] The interpretation of section twenty-three deeply affects the broad enjoyment of women's rights, issues of land rights and land reform, the right to economic opportunities, and the right to protection against discrimination.[86] The *Magaya* court's restrictive interpretation of section twenty-three undermines each of these rights and severely limits Zimbabwean women's ability to rely on legal anti-discrimination provisions in order to protect their rights and interests.

B. Right to Economic Opportunity

The outcome in the *Magaya* case also adversely impacts women's rights to economic opportunity within Zimbabwe. In addition to its effect on related economic and social rights, the right to economic opportunity implicates women's practical interests and their ability to function in Zimbabwe's already male-dominated society. Although guarantees for women's ability to inherit would not fully correct economic gender inequalities in Zimbabwe, property security for women holds direct consequences for their rights to economic opportunity. According to Human Rights Watch and the United Nations, "gender inequality hinders development: women's insecure property rights contribute to low agricultural production, food shortages, underemployment, and rural poverty."[87] This lack of land access "is directly related to women's poverty in both the rural and urban areas. . . . For women, land serves as security

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[83] FAST TRACK LAND REFORM, *supra* note 31, at 31.

[84] Center for Reproductive Rights, Zimbabwe Must Act to Reassert Women's Equality: Women's Status Sharply Diminished by Recent Decision (June 30, 1999), *available at* http://crlp.org/pr_99_0630zimb.html.

[85] *Id.*

[86] FAST TRACK LAND REFORM, *supra* note 31, at 31-32.

[87] Human Rights Watch, Women's Property Rights: Violations Doom Equality and Development, *available at* http://www.hrw.org/campaigns/women/property/ (last visited Apr. 2, 2006).

against poverty—a means to basic needs."[88] Development experts point out that land and property ownership can also increase women's status within their households and communities, providing a unique and necessary source of economic and social bargaining power.[89] In order to ensure economic and social stability at all levels of society, it must be recognized that the rights at stake are not only those of individual women, but of the economic stability and well-being of their families and surrounding communities.

Customary systems in Zimbabwe generally include the requirement that an heir provide for widows and orphans of the male head of household. The reason for such a responsibility was presumably based upon historical restrictions on the ability of women to hold title to real property, despite the fact that they are often the primary caretaker of family land.[90] More recently, tenure reform efforts have broadened statutory protections of land ownership. In Zimbabwe, the constitution explicitly provides protection against the deprivation of property,[91] and various national land acts address issues of tenure protections and tenure reform.[92] However, the protection of women's land rights are rarely mentioned in these laws.[93] In addition, Zimbabwe's land redistribution programs have notoriously shifted the government's restitution and fair compensation obligations to former colonial powers, bringing into question its commitment to land tenure

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[88] MUSHUNJE, *supra* note 17, at 29 ("Access to and control of land has direct and indirect benefits and advantages. The direct advantages stem from production possibilities e.g. growing commercially viable crops (tobacco, cotton) and the indirect advantages include using land as an asset to facilitate credit from institutional and private sources.").

[89] *Id.*

[90] *See generally* Liz Alden Wily, Making Progress—Slowly: New Attention to Women's Rights in Natural Resource Law Reform in Africa, Presentation to the CTA/GOU Regional Conference on the Legal Rights of Women in Agricultural Production, Kampala, Uganda (Feb. 19-23, 2001), *available at* http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/slowprogrtf.rtf.

[91] *See* ZIM. CONST. § 16 (1996) ("No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law [subject to numerous constitutional conditions, including resettlement conditions, adequate notice, public safety, etc.] . . . .").

[92] *See* FAST TRACK LAND REFORM, *supra* note 31. This report discusses Zimbabwe's application of its 1992 Land Acquisition Act (amended in 2001 with retroactive effect to May 2000) and the Rural Land Occupiers (Protection from Eviction) Act of June 2001.

[93] Wily, *supra* note 90, at 10.

guarantees.[94] Due to these factors, critics of *Magaya* have argued that the broad uncertainty raised by the court's adherence to customary law deprives women of ownership of land in a way that may impinge on their right to economic protection and the right to development.[95]

One notable issue that was not raised in *Magaya*, however, is that the constitution's protection against deprivation of property in section sixteen presumably falls under section eleven's "fundamental rights and freedoms," as both provisions are incorporated in the Declaration of Rights, and section sixteen does not state otherwise. If so, such a fundamental property protection should apply *regardless of sex*, as described in section eleven. While this approach has not yet been tested in court—and could potentially clash with subsection 23(2)'s "devolution of property" exception[96]—it could prove to be an interesting and valuable tool in future *Magaya*-type cases.

C. Right to Cultural Preservation

Alongside the rights to economic opportunity and protection from discrimination, there exists a perceived tension with the right to cultural preservation, as seen in the *Magaya* court's discussion of certain rights being "opposed" to fundamental practices in African society. The right to cultural preservation is embodied in numerous international agreements,[97] as well as in Zimbabwe's constitution itself, and is understood as the right to maintain certain cultural practices, including the application of customary law. Subsection 23(3) and section eighty-nine of the constitution, as well as subsection 68(1) of the Administration of Estates Act, provide for the protection and application of customary law and practices.[98] According to

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[94] *Id.* at 12 tbl. 2.

[95] Sayagues, *supra* note 2; *see also* Musasa Project & Sisterhood is Global Initiative, *Zimbabwe's Supreme Court Decision Denying Women's Inheritance Rights Violates International Human Rights Treaties*, AFRICA POLICY E-JOURNAL, June 30, 1999, http://www.africaaction.org/docs99/zim9907.htm; Farha, *supra* note 10.

[96] ZIM. CONST. § 23(3)(a) (1996) ("Nothing contained in any law shall be held to be in contravention . . . to the extent that the law in question relates to any of the following matters . . . [including] devolution of property on death or other matters of personal law.").

[97] *See infra* Section VI.

[98] Magaya v. Magaya, (1999) 3 L.R.C. 35, 40-42 (Zimb. Sup. Ct.). Under subsection 68(1) of the Administration of Estates Act, the estate of the deceased, who had "contracted his two marriages according to [Shona] law and custom," was to be administered in accordance with Shona customary law, in "which males are preferred to females as heirs."

subsection 23(3), a particular exception to anti-discrimination protection applies to "the application of African customary law."[99] Problems arise, however, when this right is perceived to be in conflict with, or privileged over, anti-discrimination and economic opportunity rights, because none of these entitlements are absolute and must be carefully balanced in order to achieve a fair outcome. An implication of the court's decision within Zimbabwe is that a constitutional right to cultural preservation is applied at the expense of African women living and marrying in traditional societies. A troubling consequence is that these women would be granted different and, more importantly, *fewer*, rights than non-Africans and those living under the common law.

IV. OTHER AFRICAN CONSTITUTIONS

Although the application of comparative constitutional law is not binding upon any country's judicial decisions, other African constitutions provide critical insight into the general rights and values shaping an "ideal" outcome for cases such as *Magaya*. While many African constitutions provide a right to cultural preservation, sometimes incorporating the application of customary law, many of them face similar tensions as those in Zimbabwe by also granting protection to the right against discrimination, the right to property, and the right to development.

A. Right Against Discrimination

Like Zimbabwe, the constitutions of Botswana and Zambia exclude from their anti-discrimination provisions issues "pertaining to marriage, divorce, devolution of property, and other personal and family matters."[100]

Under subsection 23(3) of the constitution, such "matters involving succession are exempted from discrimination provisions, firstly because they relate to the 'devolution of property on death or other matters of personal law', and secondly in this case because they relate to customary law being applied between Africans." *Id.* at 41-42.

[99] ZIM. CONST. § 23(3)(b) (1996) ("Nothing contained in any law shall be held to be in contravention of [the anti-discrimination provision in subsection 23(1)(a)] to the extent that the law in question relates to . . . the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case.").

[100] Richardson, *supra* note 75, at 21. The Constitution of Zambia states:

[N]o law shall make any provision that is discriminatory either of itself or in its effect. . . . [But exceptions apply] so far as that law makes provision: (a) for the appropriation of the general revenues of the Republic; (b) with respect to persons who are not citizens of Zambia;

Despite the fact that these are areas of "critical concern for women," the legal systems of these other African nations face a serious tension between the right to protection against discrimination and the application of a customary system that legitimizes gender bias.[101]

The Constitution of Botswana, for example, omits protection from discrimination on the basis of sex, extending its anti-discrimination provision only to "race, tribe, place of origin, political opinions, colour or creed."[102] In the 1993 case of *Unity Dow v. Attorney General*,[103] however, Botswana's high court interpreted the constitution's anti-discrimination provision to extend to protections against discrimination on the basis of gender.[104] Although the Constitution of Botswana is now understood to

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(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

ZAMBIA CONST. art. 23 §§ 1, 4 (1996).

[101] Richardson, *supra* note 75, at 19-21.

[102] BOTS. CONST. art. 15. (1987). Article fifteen of the Constitution of Botswana defines "discrimination" as

affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed [sex/gender basis excluded from the definition] . . . [and] shall not apply to any law so far as that law makes provision . . . (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not.

Id. art. 15 §§ 3, 4.

[103] Unity Dow v. Attorney General, (1992) 103 I.L.R. 128 (Bots. Ct. App.), *available at* http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm.

[104] *Id.* at 162. In the *Unity Dow* case, Botswana's high court struck down the 1984 Citizenship Act on the grounds that it awarded citizenship according to a patrilineal basis and that the Constitution of Botswana's anti-discrimination clause prohibited such legal awards on the basis of gender. This decision required the court to read into Botswana's constitutional prohibition against discrimination on the basis of gender, despite the fact that the text does not specifically include gender discrimination. *Unity Dow* has come to represent a hopeful expansiveness of African human rights provisions as interpreted by

protect against gender-based discrimination, like Zimbabwe, the constitution also removes customary law from the constitution's anti-discrimination protections.[105] As a result, there still exists a legal gap between the overarching right to customary practices and the case law that protects women's rights under the constitution, essentially creating a "dual system of law."[106] This tension between constitutional anti-discrimination protections and customary legal protections prevents the full recognition of gender rights in exchange for a "system of law that both [espouses] concepts of equal rights and at the same time legitimize[s] traditional practices steeped in harmful acts of gender bias."[107] While this tension is understandable in countries still struggling to reconcile colonial legal approaches with traditional systems, this difficulty is one that must be overcome to ensure equal protection to all citizens.

The Constitution of Zambia also excludes gender protections from its anti-discrimination provisions, and provides for the application of customary law free from any applicable discrimination concerns, effectively legitimizing gender-based discrimination and a discriminatory customary system.[108] Section three of article twenty-three of Zambia's constitution defines discrimination as "different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe,

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progressive courts. *See* Uché U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the "New" International Trade Regime*, 20 BERKELEY J. GENDER L. & JUST. 75, 140 n.398 (2005); *see also* Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 306 (2004).

[105] BOTS. CONST. art. 15 § (4)(d) (1987).

[106] Richardson, *supra* note 75, at 21. Article fifteen of Botswana's constitution exempts matters of customary law from its section 15(1) anti-discrimination provision, stating that section 15(1)

shall not apply to any law so far as that law makes provision . . . for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not.

BOTS. CONST. art. 15 § (4) (1987).

[107] Richardson, *supra* note 75, at 19. Similarly, "[i]n Zambia, as in Botswana, the dual system of law simultaneously promotes concepts of equality and anti-discrimination and allows a discriminatory system of customary law to govern the majority of matters affecting an ordinary citizen's life." *Id.* at 21.

[108] *Id.* at 21.

sex, place of origin, marital status, political opinions color or creed."[109] As in Zimbabwe's constitution, section four of article twenty-four of Zambia's constitution provides an explicit exemption from anti-discrimination protections for "the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."[110] As a consequence, Zambia suffers continuing widespread discrimination against women in "education, access to work and participation in the conduct of public affairs . . . [and] the application of customary laws in matters of personal status, marriage, divorce and inheritance rights reinforces outdated attitudes concerning the role and status of women."[111] According to the director of Zambia's Child Affairs Department, "[g]irls are very disadvantaged in our environment. It's not an accident; the reasons are known. Zambia is a culture of men."[112] Gaps in legal provisions, including those of the constitution, provide little opportunity for relief for women and girls suffering discrimination or systematic disadvantage in Zambia.

At the other end of the spectrum, Ghana's progressive intestate succession laws were enshrined in article twenty-two of the nation's 1992 constitution. According to that provision, spouses in Ghana "shall have equal access to property jointly acquired during marriage"[113] and female "spouse[s] shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."[114] In addition, Ghana's constitution does not provide an anti-discrimination exception for the application of customary law.[115] Although Ghana has

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[109] ZAMBIA CONST. art 23 § 3 (1996).

[110] *Id.* art. 23 § 4.

[111] Christine Ainetter Brautigam, Mainstreaming a Gender Perspective in the Work of the United Nations Human Rights Treaty Bodies, Address at American Society of International Law Panel: Compliance with the International Human Rights of Women, 91 AM. SOC'Y INT'L L. PROC. 389, 393 (1997).

[112] HUMAN RIGHTS WATCH, SUFFERING IN SILENCE: THE LINKS BETWEEN HUMAN RIGHTS ABUSES AND HIV TRANSMISSION TO GIRLS IN ZAMBIA (2002), *available at* http://www.hrw.org/reports/2003/zambia/zambia1202.pdf (quoting John Zulu, Director, Child Affairs Department, Ministry of Sport, Youth, and Child Development, Speech in Lusaka (May 30, 2002)).

[113] GHANA CONST. art. 22 § 3(a) (1992).

[114] *Id.* art. 22 § 1.

[115] Article seventeen of Ghana's constitution states:

faced significant difficulty in adequately implementing its constitutional anti-discrimination and property protections,[116] the scope of its protections and avoidance of gender and customary law exemptions provides a promising model for future non-discriminatory amendments to African constitutions.

Notably, many of the nations that have developed constitutions since 1990 provide liberal protections for disadvantaged groups within the population. The constitutions of Malawi, Ghana, South Africa, and Uganda each include expanded rights protections in which "women are, without exception, mentioned as a sector deserving attention."[117] The practical

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(1) All persons shall be equal before the law. (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status. (3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

Id. art. 17 §§ 1, 3 (1992).

[116] *See generally* Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L. J. 259 (2001).

[117] Wily, *supra* note 90, at 4; *see* MALAWI CONST. art. 24 § 1 (1994) ("Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status . . . ."); *id.* art. 24 § 2 ("Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as . . . (c) deprivation of property, including property obtained by inheritance."); *id.* art. 30 § 1 ("All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right."); *see* GHANA CONST. art. 35 § 5 (1992) ("The State shall actively promote the integration of the peoples of Ghana and prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs."); *id.* art. 36 § 6 ("The State shall afford equality of economic opportunity to all citizens; and, in particular, the State shall take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana."); *id.* art. 36 § 7 ("The State shall guarantee the ownership of property and the right of inheritance."); S. AFR. CONST. 1996 art. 9 § 3 ("The state may not unfairly discriminate directly or indirectly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."); *id.* art. 9 § 4 ("No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of [the above subsection]. National legislation must be enacted to prevent or prohibit unfair discrimination."); UGANDA CONST. art. 21 § 2 (1995) ("[A] person shall not be discriminated against on the ground of sex, race, colour,

impact of these provisions, of course, has played out differently in each country according to varying social, political, and economic factors. In Uganda, for example, women hold over twenty-five percent of all seats in the nation's Parliament, outnumbering those in United States and United Kingdom legislative bodies,[118] but own only seven percent of land in the country.[119] In South Africa, women's rights are supported by extensive legislation and economic equality programs.[120] Customary law exceptions, however, have continued to pose serious legal problems even in African countries with progressive new constitutions, including similar recent cases regarding intestate succession in Mozambique and South Africa.[121] Although each country's situation is unique, this advancement suggests a possibility that future reformers of Zimbabwe's constitution might consider the national outcry following *Magaya* and incorporate additional anti-discrimination provisions on the basis of gender.

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ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability."); *id.* art. 32 § 1 ("Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them."); *id.* art. 32 § 2 ("Parliament shall make relevant laws, including laws for the establishment of an equal opportunities commission for the purpose of giving full effect to clause (1) of this article.").

[118] Denis Ocwich, *Uganda Women MPs Place 25th*, NEW VISION (Kampala), Jan. 13, 2004, *available at* http://www.peacewomen.org/news/Uganda/Jan04/mp.html.

[119] Jacqueline Asiimwe, *Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses*, 4 YALE HUM. RTS. & DEV. L.J. 171, 173 (2001).

[120] *See* Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N.C. J. INT'L L. & COM. REG. 693, 698-704 (2001).

[121] *See* Bayano Valy, *Widows Stripped of Their Rights by AIDS*, MAIL & GUARDIAN (South Africa), Sept. 1, 2004, *available at* http://www.mg.co.za/articlepage.aspx?articleid=136332&area=/insight/insight_africa/ (discussing the recent Albertina Come and Emelda Ricardo cases in Mozambique); *see also* South African Constitutional Court cases on women and customary law inheritance, including Daniels v. Campbell, [2004] C.C.T 40/03 (S. Afr.). *See generally* Andrew P. Kult, *Intestate Succession in South Africa: The "Westernization" of Customary Law Practices within a Modern Constitutional Framework*, 11 IND. INT'L & COMP. L. REV. 697 (2001); *see also* S. AFR. LAW COMM'N, DISCUSSION PAPER 93, PROJECT 90, CUSTOMARY LAW OF SUCCESSION (2000), *available at* http://wwwserver.law.wits.ac.za/salc/discussn/dp93.pdf.

B. Right to Economic Opportunity

Despite the fact that economic rights, including the rights to economic opportunity and protection of property, are included in a number of regional human rights agreements,[122] many African legal systems face difficulties in the area of gender and property rights. Traditional societies throughout Africa tend to regulate land, housing, marriage, and family under customary law, putting widows and orphans in a precarious position after the death of a male head of household.[123] As in *Magaya,* the risk of "[d]isinheritance seriously undermines women's economic security and independence as well as their access to adequate food and housing."[124] The simple knowledge that a wife does not own land means that she is especially vulnerable to eviction—even by her living husband—in times of crisis, including divorce or marital disputes.[125]

The most notable African constitutional property rights debate in recent years has taken place in Kenya. Throughout its recent constitutional reform process,[126] Kenya has struggled with the question of women's property rights and their related economic and social benefits, including the enjoyment of the right to economic opportunity. In a 2003 letter to delegates of Kenya's National Constitutional Conference, Human Rights Watch criticized the current Kenyan constitution on the grounds that it "provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex . . . . [but] exempts certain laws from the prohibition against discrimination. . . . [I]n areas vital to women's property rights, such as marriage, inheritance, and the application of customary law,

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[122] *See supra* Section II.

[123] Richardson, *supra* note 75, at 19.

[124] *Id.*

[125] Wily, *supra* note 90, at 9.

[126] As of the time of publication, the people of Kenya had not yet approved a new constitution, although the reform process has operated for a number of years. In November 2005, Kenyan voters soundly rejected the proposed new constitution, citing concerns of "sweeping presidential powers" and other legal issues. *See Kenyans Reject New Constitution,* MAIL & GUARDIAN (South Africa), Nov. 22, 2005, *available at* http://www.mg.co.za/articlePage.aspx?articleid=257252&area=/breaking_news/breaking_news__africa/.

discrimination is condoned."[127] In addition, article 82 § (6) of the Kenyan Constitution provides that "if a land control board issues a decision permitting a man to sell family agricultural land, his wife cannot challenge that decision as discriminatory."[128] According to Human Rights Watch, women in Kenya face discriminatory inheritance practices, unequal property distribution upon divorce or separation, lack of legal control over property, and other obstacles to property ownership and personal economic security.[129] As in Zimbabwe, women in Kenya currently face significant legal obstacles to their property rights and individual opportunities for economic development. Such constitutional gaps impede women's rights to economic opportunity, also affecting the broader developmental consequences of lack of ownership by women contributing to their community and national economies.

C. Right to Cultural Preservation

As in the case of Zimbabwe, many African constitutions that grant a right to cultural preservation often subject it to the limitation of the country's public interest, common law, and the constitution itself. Namibia's constitution, for example, states that "every person shall be entitled to . . . promote any culture, language, tradition, or religion . . . subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest."[130] The South African constitution, in addition to providing explicit protection against discrimination on the basis of gender, provides also for the application of

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[127] Letter from Janet Walsh et al. to the Delegates of Kenya's National Constitutional Conference (Aug. 2003), *available at* http://www.hrw.org/press/2003/08/kenya082203-ltr.htm.

[128] KENYA CONST. art. 82 § 6. (2001) ("[Anti-discrimination provision of] [s]ubsection (2) shall not apply to . . . (b) the giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.").

[129] HUMAN RIGHTS WATCH, FACT SHEET: WOMEN'S PROPERTY VIOLATIONS IN KENYA (2004), *available at* http://www.hrw.org/campaigns/women/property/factsheet.htm.

[130] NAMIB. CONST. art. 19 (1990). Namibia's constitution also provides for the continued application of customary law for the purposes of marriage, citizenship, and to some extent, "fair trial." *See id.* arts. 4, 12; *see also id.* art. 66 ("Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.").

customary law, subject to the nation's constitution and relevant legislation.[131] Many African constitutions providing protection for the practice of customs and application of customary law do so only to the extent that such application is not repugnant to the other terms of the national constitution. South Africa's constitution, for example, states that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[132] Similarly, the Constitution of Uganda protects customary law and practices to the extent that they are "consistent with fundamental rights and freedoms, human dignity, democracy, and with the Constitution."[133]

Although claims to cultural preservation—and customary law, by extension—are deeply rooted in African cultural nationalism, the incorporation of such provisions into national constitutions raises difficulties and tensions with other rights, as we have seen in the *Magaya* case. As discussed previously, the dual frameworks of customary and common law established during colonialism exaggerated this tension, setting cultural practices and socioeconomic rights at odds with each other. In order to ensure that rights to cultural preservation, anti-discrimination protections, and economic opportunity exist in support of each other instead of at odds, national courts such as the one in *Magaya* must be able to balance these rights in a way that protects, rather than disadvantages, their citizens. Provisions requiring consistency with other constitutional rights would allow a court to consider other factors, not solely customary law. Without these changes, the unfair privileging of any one of these rights at the expense of the others risks perpetuating a harmful legal dualism that was established by outside forces.

V. THE BANJUL CHARTER

The African Charter on Human and People's Rights, commonly known as the Banjul Charter,[134] was formally adopted in 1981 by the member states of the Organization of African Unity, the predecessor to today's African Union (AU). The Banjul Charter entered into force in 1986

[131] S. AFR. CONST. 1996 art. 211 § (3).

[132] *Id.*

[133] UGANDA CONST. art 24 (1995).

[134] Banjul Charter on Human and Peoples' Rights, Organization of African Unity, June 27, 1981, 21 I.L.M. 58 [hereinafter Banjul Charter].

and has been ratified by each of the fifty-three member states of the African Union, including Zimbabwe.[135] Intended to address serious and widespread human rights violations perpetrated in the first two decades following post-colonial independence,[136] the Charter suggests a willingness by African nations to accept binding human rights obligations[137] and to express "at least a formal commitment . . . to conform their national law and practice to international standards."[138] The Banjul Charter has a particular "African" focus, seeking to strive "toward the protection of human rights . . . based upon an African legal philosophy and responsive to African needs,"[139] but its language also reflects inspiration from other international human rights instruments, including the UN Charter and the Universal Declaration of Human Rights.[140]

To address both African customary rights and internationally recognized individual rights, the Banjul Charter incorporates a unique focus on collective cultural and "peoples'" rights,[141] granting explicit protections for the right against discrimination and the rights of cultural preservation and development.[142] As a regional instrument, the Charter provides particular insight into the publicly expressed legal expectations and values of sub-Saharan African states. In practice, however, the general adherence to and broad, regional enforceability of the Charter's terms has fallen short

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[135] Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 682 (2004).

[136] GEORGE WILLIAM MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 187 (2003).

[137] Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 107 (2004).

[138] Carlson Anyangwe, *Obligations of State Parties to the African Charter on Human and Peoples' Rights*, 10 AFR. J. INT'L & COMP. L. 625, 626 (1998).

[139] Banjul Charter, *supra* note 134, Preamble.

[140] Mugwanya, *supra* note 136, at 190.

[141] Banjul Charter, *supra* note 134, Preamble ("[T]o promote and protect human and peoples' rights . . . to achieve a better life for the peoples of Africa . . . that the reality and respect of peoples['] rights should necessarily guarantee human rights . . . [and the] duty to promote and protect human and people'[s] rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa . . . .").

[142] *See id.* arts. 19-24.

of expectations.[143] Some critics have even suggested that "repressive regimes may use ratification [of the Charter] to whitewash human rights abuses and hide the reality of oppression."[144] The Banjul Charter obligates states "to implement the Charter in good faith; to give effect to the rights inscribed in the Charter; to address inter-state communications; and to submit periodical reports"[145] to the African Commission on Human and Peoples' Rights, an oversight and interpretive body established under the mandate of the Charter.[146] A corresponding enforcement body, the African Court of Justice, was finally established in 2004 under a Protocol to the Banjul Charter.[147] Although the court was not in operation at the time of Zimbabwe's *Magaya* decision and was therefore not involved in the case, it has the authority to provide advisory and compulsory opinions on similar rights-based disputes arising under the terms of the Banjul Charter. This level of adjudication is intended to elevate the Charter's provisions from aspirational to legally enforceable obligations applying to states, communities, and individuals.[148]

A. Right Against Discrimination

The Banjul Charter sets forth its anti-discrimination position in the Preamble, where it states that one of the Charter's purposes is "to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions."[149] The way this clause is phrased suggests that it

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[143] Udombana, *supra* note 137, at 108.

[144] *Id.* at 108 n.18; *see also* Frans Viljoen, *Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997*, *in* HUMAN RIGHTS LAW IN AFRICA 47, 49 (Christof Heyns ed., 1999).

[145] Banjul Charter, *supra* note 134, art. 162.

[146] *See id.* arts. 30-45.

[147] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), *available at* http://www1.umn.edu/humanrts/africa/courtprotocol2004.html.

[148] *Id.* art. 3 ("The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.").

[149] Banjul Charter, *supra* note 134, Preamble.

takes discrimination particularly seriously, to the extent of aligning it with the military aggression of colonization. Articles two and three of the Charter grant rights and freedoms regardless of "race, ethnic group, color, [or] sex"[150] and establish that "every individual shall be entitled to equal protection of the law."[151] In addition, the Charter emphasizes the extension of this protection to gender, requiring that states "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[152] Although agreements such as the Banjul Charter are not typically considered binding upon national courts without additional legislative implementation, the *Magaya* court abrogated its responsibility to incorporate regional norms into its decision, arguably depriving Ms. Magaya of her basic rights under the Charter. Although the *Magaya* court argued that international approaches to rights against discrimination might run contrary to "the nature of African society," the regional nature of the Banjul Charter demonstrates the importance of equal protection under the law, and contradicts the court's assertion that anti-discrimination rights on the basis of gender are beyond the scope of regional norms.

B. Right to Economic Opportunity

The Banjul Charter integrates civil and political rights with economic, social, and cultural liberties, stating that "the satisfaction of

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[150] *Id.* art. 2. Article two of the Banjul Charter is rather specific, stating that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed by the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." *Id.* The mention of "other status" suggests that the discrimination against potential female heirs on the basis of the legal status of marriage may also be contrary to the provisions of the Charter.

[151] *Id.* art. 3 ("Every individual shall be equal before the law . . . . Every individual shall be entitled to equal protection of the law.").

[152] *Id.* art. 18 § 3. In contrast to apparent legal tensions between gender and cultural rights, the Banjul Charter recognizes these rights side by side in article eighteen, using "the family" as the basis for resolving these tensions. Article 18 § 2 says that "[t]he State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community." *Id.* art. 18 § 2. Immediately following, the Charter sets forth the requirement that the state "ensure the elimination of every discrimination of women and also protect the rights of the woman and the child," *id.* art. 18 § 3, suggesting that these two rights are not entirely in opposition with each other. In fact, the state, which includes judiciary bodies such as the court in *Magaya*, has the responsibility to protect gender and cultural rights simultaneously under these terms of the Charter.

economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."[153] Although this statement indicates the importance of property (economic) and cultural rights, it also demonstrates the simultaneous integration and tension between these rights. In the *Magaya* case, for example, the economic, social, and civil right of equal access to property conflicts with the equally important right to cultural preservation. Unless it can be argued that a right to culture does not necessarily include the right to application of customary law, then the Banjul Charter must be calling for a recognition and alignment of each of these rights with the others. The right to development in particular falls into a number of these categories, with all of the complexity that this entails.[154]

The Banjul Charter guarantees a right to property, stating that "it may only be encroached upon in the interest of public need or in the general interest of the community."[155] While this right weighs in Ms. Magaya's favor, counteracting arguments may assert that public or community interests require that property devolve to males of the family, according to

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[153] *Id.* Preamble ("Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.").

[154] Following the association of the right to development, civil and political rights, and economic, social, and cultural rights in the Preamble, the Charter continues to focus on a right to development as a seemingly holistic notion of what these other rights should look like, or at least what their realization should produce. Article 20 states that "[a]ll peoples shall have the right to existence . . . . They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." *Id.* art. 20; *see also id.* art. 22 ("All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind . . . . States shall have the duty, individually or collectively, to ensure the exercise of the right to development."); *id.* art. 24 ("All peoples shall have the right to a general satisfactory environment favorable to their development."); *id.* art. 29 ("The individual shall also have the duty . . . to preserve the harmonious development of the family and to work for the cohesion and respect of the family . . . ."). As mentioned previously, the family seems to play a central role alongside development and the resolution of the tensions between gender and culture rights, serving both as an ideal means for progress and the idealized results of such progress. Arguably, the Zimbabwe court's approach in *Magaya* contradicts both of these notions, as it may serve to divide families and disincentivize the traditional social safety nets, as well as to hinder the development of women, children, and the communities that surround them.

[155] *Id.* art. 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

custom. In addition, article twenty-two of the Charter includes the right to "cultural development . . . in the equal enjoyment of the common heritage of mankind."[156] The provision continues, however, to dictate that "states shall have the duty, individually or collectively, to ensure the exercise of the right to development."[157] The difficulty of this provision is that it again implicates dual protections of cultural preservation and socioeconomic development, which, as we have seen in *Magaya*, do not always seem to point in the same direction.

C. Right to Cultural Preservation

The right to cultural preservation is reiterated in articles seventeen and twenty-nine of the Banjul Charter. While article seventeen assigns a duty of the state to protect cultural values,[158] article twenty-nine takes a different approach, requiring that each individual "preserve and strengthen positive African cultural values in his relations with other members of the society." [159] In the *Magaya* case, these provisions operate in two ways, requiring that the state and the court protect customary practice, but also that the male heir should preserve the practice of protection of female dependents. Although this does not address discriminatory aspects of the customary law of succession, it does incorporate affirmative protections not clearly granted by the *Magaya* court.

VI. INTERNATIONAL COVENANTS

Like the Banjul Charter, other international covenants would not typically be considered binding by courts in Zimbabwe. While some nations automatically incorporate international obligations into their positive body of law, section 111 of Zimbabwe's constitution states that international covenants are not considered binding until they are implemented by the

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[156] *Id.* art. 22 § 1.

[157] *Id.* art. 22 § 2.

[158] Article seventeen of the Banjul Charter states: "Every individual may freely take part in the cultural life of his community . . . . The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." *Id.* art. 17 §§ 2, 3.

[159] *Id.* art. 29 § 7 ("The individual shall also have the duty . . . [t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.").

national Parliament.[160] The covenants discussed in this section have all been signed and ratified by Zimbabwe, but it is unclear whether ratification constitutes Parliamentary "implementation" under section 111.[161] In *Magaya*, the appellant argued that to deny her heirship would violate "Zimbabwe's adherence to [the principle of] gender equality enshrined in international human rights instruments."[162] Similarly, the Banjul Charter's guarantees explicitly mention and take into account the Charter of the African Union, the Charter of the United Nations, the Universal Declaration of Human Rights, and other international human rights covenants.[163] Despite uncertainty surrounding the practical enforceability of these instruments,[164] they were intended to play a role in rights-based advocacy through their legal focus and incorporation of substantive rights and

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[160] ZIM. CONST. § 111(b) (1996).

[161] *Id.*

[162] Magaya v. Magaya, (1999) 3 L.R.C. 35, 41 (Zimb. Sup. Ct.).

[163] *See* Banjul Charter, *supra* note 134, arts. 60-61 ("The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members . . . . The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions . . . practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.").

[164] *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 183-86 (2002). In his introductory section on "The Current Reality of Rights Without Remedies," Collingsworth discusses these and other international human rights agreements as:

> a stack of well-intentioned human rights conventions and resolutions that remain basically unenforceable. A fundamental inequity is at work when commercial interests and property rights are protected by enforceable agreements, while adherence to internationally recognized human rights norms remains largely voluntary. . . . Any hopes for a remedy to human rights violations are generally left to the sometimes-influential but ultimately unenforceable mechanisms of moral persuasion and damning reports . . . . The Universal Declaration of Human Rights is well-crafted and comprehensive. It has also been on the books since 1948, and we are a far cry from realizing its objectives because its signatories can and do ignore its provisions at will.

Id. at 183-85.

responsibilities. As such, these agreements should have been considered and respected as guiding principles by the *Magaya* court.

A. Right Against Discrimination

Both customary law and the right to non-discrimination have been accepted as principles of international jus cogens since World War II.[165] Protection against discrimination has been considered a basic human right by a significant number of modern international human rights agreements,[166] and the protection for minorities has become a responsibility of all states.[167] According to its Charter, one of the primary purposes of the United Nations is to "achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[168]

Interpreting and expanding this right into the legal realm, the Universal Declaration of Human Rights (UDHR) states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."[169] The U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) goes even further, requiring that state signatories, including Zimbabwe, take "all appropriate measures, including legislation, to ensure the full development and

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[165] Lynn Berat, *The Future of Customary Law in Namibia: A Call for an Integration Model*, 15 HASTINGS INT'L & COMP. L. REV. 1, 3 (1991) ("The legal position of customary law is derived from the incorporation of the right of non-discrimination into the jus cogens in the post-World War II period . . . . [T]he United Nations Charter propounded universal respect for human rights and fundamental freedoms, including equality and non-discrimination. Non-discrimination was included in the context of protecting human rights and fundamental freedoms for all, not just minority groups.").

[166] For further discussion, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 25-28 (1982).

[167] *Id.* at 3-4 ("With the adoption of the Charter, the Universal Declaration, and other instruments, the protection of minorities ceased to be a problem restricted to certain areas of the world . . . . [I]t became a question concerning all states and one whose solution must be found in the broader context of respect for human rights and fundamental freedoms.").

[168] U.N. CHARTER, art. 1, ¶ 3.

[169] UDHR, *supra* note 12, art. 7.

advancement of women,"[170] including guarantees for equal rights "in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."[171] Because these instruments interpret the basic right of freedom from discrimination to include protection regardless of sex, Zimbabwe should have some obligation to guarantee these rights through its courts, including in the *Magaya* case.

B. Right to Economic Opportunity

Although the status of economic and developmental rights has generated extensive debate in the international arena,[172] it is clear that these international human rights instruments embody protections for individual and community rights, economic and social opportunity, and advancement. According to the U.N. Declaration of the Right to Development, the right to development is defined as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[173] Because the focus is on the right to "participate in, contribute to, and enjoy" the benefits of development, even critics of a substantive universal "right to development" are willing to acknowledge at least a right to the *opportunity*

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[170] International Convention on the Elimination of All Forms of Discrimination Against Women, Annex art. 3 at 195, Dec. 18, 1979, G.A. Res. 34/180, U.N. Doc A/RES/34/180 ("States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.").

[171] *Id.* art. 16 § (1)(h) ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.").

[172] *See, e.g.*, Sara E. Allgood, *United Nations Human Rights "Entitlements": The Right to Development Analyzed Within the Application of the Right of Self-Determination*, 31 GA. J. INT'L & COMP. L. 321 (2003); *see also* Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004).

[173] Declaration on the Right to Development, Annex art. 1 §1, Dec. 4, 1986, G.A. Res. 41/128, U.N. Doc. A/RES/41/128.

for advancement.[174] This approach to economic and social opportunity rights is implicated by cases such as *Magaya*, and it is clear that there should exist a substantive judicial responsibility to protect these opportunities, and to ensure that they are not impeded as a result of the decision.

Pursuant to this understanding of the right to development, the U.N. Charter aims to promote "higher standards of living . . . and conditions of economic and social progress and development."[175] Contrary to the fact that customary law often limits the economic entitlement and development of women, the UDHR also grants an individual human right to development and economic opportunity, guaranteeing a right to participate in "advancement and its benefits,"[176] and in "social progress and better standards of life."[177] In conjunction with the right to non-discrimination, these instruments, alongside the terms of the Banjul Charter and the U.N. Declaration of the Right to Development, strive to guarantee a substantive opportunity for individual economic advancement, something which Zimbabwe's customary rules for succession arguably do not.

C. Right to Cultural Preservation

International covenants on human rights also guarantee basic rights to cultural preservation, indicating either that minority groups have a right to practice their own culture[178] or that state governments have the duty to

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[174] Marks, *supra* note 172, at 151-53.

[175] U.N. CHARTER art. 55; *see also* U.N. CHARTER Preamble ("We the peoples of the United Nations determined . . . to promote social progress and better standards of life in larger freedom . . . to employ international machinery for the promotion of the economic and social advancement of all peoples.").

[176] UDHR, *supra* note 12, art. 27 § 1.

[177] *Id.* Preamble (referring also to the language of the U.N. Charter: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.").

[178] ICCPR, *supra* note 12, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

promote further development of culture.[179] The UDHR takes the former approach, recognizing a participatory right of everyone as a member of society and the freedom "to participate in the cultural life of the community."[180] As mentioned previously, however, it is unclear how much weight this right gives to the application of customary law over other rights considerations.[181] Although a right to voluntary cultural practice is clearly an issue in the *Magaya* case, there is no evidence in international human rights instruments that it should be dispositive.

VII. POTENTIAL INCORPORATION OF HUMAN RIGHTS NORMS

A. Judicial Consideration of International Standards

As demonstrated through the decision in *Magaya,* domestic courts are often hesitant to incorporate international human rights norms into their decisions, due in part to perceptions regarding national sovereignty, judicial legitimacy, and inconsistencies between domestic and international legal norms.[182] As mentioned previously, African courts have demonstrated a particular unwillingness to privilege international understandings of human rights over local customary practices, due in part to domestic political restrictions, the potential appearance of disrespect for local traditions and "African values," and the fear of perceived legal impositions from the West.[183] According to one scholar, given "the limitations on the status of international law in domestic courts, and the precarious cultural balance between indigenous African values and universal human rights norms, it is surprising that national courts in Africa *have* interpreted the fundamental

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[179] *See* United Nations Educational, Scientific, and Cultural Organization (UNESCO) 1965 meeting, *cited in* Berat, *supra* note 165, at 4.

[180] UDHR, *supra* note 12, art. 27 § 1.

[181] *See supra* Section III.C.

[182] *See generally* Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues For Change*, 4 N.Y. CITY L. REV. 59 (2001).

[183] *See* Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 123-24 (2002).

rights enshrined in their postcolonial legal systems in light of international norms."[184]

Critics, however, have attributed the general failure to implement constitutional protections in Africa to a lack of judicial responsibility, carrying broad and serious human rights consequences. One human rights lawyer stated that "the judiciaries in Common Law African countries must take substantial responsibility for the collapse of constitutional government . . . . [T]he judiciary in many of these countries deliberately and knowingly abdicated its constitutional role to protect human rights . . . ."[185] Although domestic cases incorporating international human rights norms are still exceptions rather than the rule in Africa, there is an increasing awareness of a judicial responsibility toward human rights, and a number of notable cases are beginning to express this approach to legal decisionmaking.

The most significant obstacle to the consideration of human rights norms in domestic courts occurs when a common law nation has failed to incorporate an international agreement into its domestic legislation, as in the case of Zimbabwe. Although many courts have refused to address such nonincorporated agreements, preferring instead to assert national sovereignty and rely on domestic legal texts, some judges have proposed methods of interpretation to "overcome the technical obstacle that nonincorporation would normally impose."[186] In an important Ghanaian case,[187] for example, the Chief Judge asserted that as a party to the Banjul Charter, the state is

> expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[188]

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[184] *Id.* (emphasis added).

[185] Chidi Anselm Odinkalu, *The Responsibility for the Failure of Post-Independence Bills of Rights*, 8 AFR. SOC. INT'L & COMP. L. PROC. 124, 124 (1996), *quoted in* Adjami, *supra* note 183, at 124.

[186] Adjami, *supra* note 183, at 112.

[187] *See* New Patriotic Party v. Inspector-General of Police, (1993) I.C.H.R.L. 4 (Ghana).

[188] *Id.*

The most important example of judicial activism in the context of African human rights jurisprudence is in the case of *Unity Dow*, issued by the High Court of Botswana in 1992.[189] In finding the Botswana Citizenship Act[190] unconstitutional on the grounds that it was discriminatory against women, the *Unity Dow* court decided that the anti-discrimination clause in Botswana's constitution extended to the protection of women's rights, despite its exclusion of terms protecting "gender" or "sex."[191] Concurring in the *Unity Dow* decision, Justice Aguda stated that "the primary duty of judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity."[192] In reaching its decision, the Botswana court "drew on a wide range of sources, including the constitutions of five other countries, the African Charter on Human and People's Rights of 181, United Nations Declarations on Human Rights . . . and the [Convention on the] Elimination of Discrimination Against Women."[193] The *Unity Dow* decision greatly contrasts with the outcome in *Magaya* due to the court's concern for the social and legal consequences of its decision, in addition to its notable willingness to consider human rights norms and to broaden the scope of a constitutional anti-discrimination provision, even in the absence of explicit protection on the basis of gender in that provision. Although *Unity Dow* was decided prior to the decision in *Magaya*, and was omitted as a potential source of support for Ms. Magaya's case, it still holds some hope and potential guidance for future women's rights claims on the basis of constitutional anti-discrimination protections.

Zimbabwe's own former Chief Justice Enoch Dumbutschena has advocated judicial activism in the area of human rights, arguing:

> In order to advance human rights through the courts there are two essentials to be met. The judge's personal philosophy must have a bias in favour of fairness and justice. There must exist an activist

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[189] Unity Dow v. Attorney General, 103 I.L.R. 128 (Bots. Ct. App. 1992).

[190] Citizenship Act of 1982 (Bots.).

[191] Richardson, *supra* note 75, at 20.

[192] *Unity Dow*, 103 I.L.R. at 163 (Aguda, J., concurring).

[193] M.D.A. Freeman, *Botswana: Bucking the Backlash*, 33 U. LOUISVILLE J. FAM. L. 293, 293-95 (1995).

> court. Judicial activism in human rights cases is a prerequisite for the development of a human rights jurisprudence.[194]

Justice Dumbutschena also "recognized that judicial activism is a radical break from the practices of the post-independence courts . . . [in the interest of] promoting social justice."[195] Notably, however, the decision in *Magaya* avoided application of Dumbutschena's landmark women's rights decision in *Katekwe v. Muchabaiwa*,[196] criticizing his approach to judicial decisionmaking. While these prominent African judges have taken progressive positions, representing an important shift in judicial philosophy, such positions remain far from the norm and continue to face criticism and opposition in subsequent decisions and ongoing legal dialogue.

B. Roles for Rights-Based Norms

As suggested by the previous examples, there exists a number of ways in which international human rights and women's rights norms could be incorporated into a *Magaya*-type judicial decision in African courts. Although Zimbabwean Justice Dumbutschena's progressive approach in *Katekwe* was rejected by the *Magaya* court, his understanding suggests that there is a possibility for such a shift to occur in Zimbabwe courts in the future. The hope is that human rights provisions will serve as potential solutions for domestic problems rather than a source of tensions with local understandings. Discussing these approaches, as well as the relevance of regional and international norms in a case such as *Magaya*, is essential to establishing increased understandings of this potential incorporation and to allow for the resolution of the perceived domestic-international tension in the area of rights-based jurisprudence.

Judges are not the only actors in the legal system who have the opportunity to advance human rights norms in Africa. Lawyers also carry this responsibility, as those who "determine when to raise claims under constitutional guarantees of fundamental rights and have the ability to draw international and comparative law parallels . . . . This encourages judges in

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[194] Enoch Dumbutschena, *Role of the Judge in Advancing Human Rights*, 18 COMMONWEALTH L. BULL. 1298, 1301 (1992), *quoted in* Adjami, *supra* note 183, at 127-28.

[195] Adjami, *supra* note 183, at 128.

[196] Katekwe v. Muchabaiwa, (1984) 2 Z.L.R. 112 (Zimb. Sup. Ct.) (determining that a father could not sue on behalf of his daughter because, at age eighteen, she was an adult and could sue in her own right).

the national court systems to take these sources into account . . . ."[197] As demonstrated through the example of the *Magaya* case, even a negative outcome in a single case may significantly increase awareness and pressures for reform which may improve the legal situation for women in Africa. The invocation of human rights provisions serves to provide possible solutions to legal and social inequities, providing not only an aspirational starting point for dialogue, but also a potential tool for women seeking the active recognition of their rights. Local, regional, and international norms are given meaning and substance by providing a clear starting point for the recognition and definition of rights that have not yet been recognized by local courts.

The *Magaya* court missed a critical opportunity for progress, not only in its ultimate decision, but in its unwillingness to even consider the social, legal, and economic impact that its decision would have on women or to address the relevance of rights-based instruments and dialogue on the implications of the case. Whether or not one agrees with the court's decision, it must be acknowledged that by avoiding these responsibilities altogether, the court actually triggered a rights-based discussion that would extend far beyond the boundaries of the case at hand. Issues of fundamental rights were implicated in Ms. Magaya's case, whether the court chose to address them or not.

VIII. CONCLUSION

While the examination of regional and international human rights agreements provides important insights into the *Magaya* court's obligation to balance fundamental rights and freedoms in its decision, the most important issue to remember is the impact of these norms upon women within Africa. As this case demonstrates, the balancing of customary and common law systems becomes even more difficult when considering the apparent tensions between basic human rights of freedom from discrimination, right to economic opportunity, and right to cultural preservation. Because the *Magaya* decision focuses particularly on the judicially perceived role of women within African society, we are led to ask what their rights are within that society as well. Under international covenants, the Banjul Charter, other regional instruments, and arguably even under the laws of Zimbabwe itself, the right against discrimination is an essential and powerful protection. A careful examination of the legal and normative underpinnings of these protections reveals that individual rights,

[197] Adjami, *supra* note 183, at 129.

including those of women and children, are just as important to "the nature of African society" as cultural and community practices.

The *Magaya* court's strict interpretation of national law led to a decision that some have called "not palatable or desirable according to human rights, but . . . correct according to jurisprudence."[198] Such a statement is made not to commend the court for its legal interpretation, but rather to indicate the restrictive nature of the laws themselves, particularly those regarding women's rights and the legalized application of discriminatory customary practices. The restrictive nature of such understandings allowed the court to ignore Zimbabwe's substantive obligations to protect women's rights to non-discrimination, property ownership, and equal protection of the law under the guise of upholding a right to customary practices. As in any area of the law, competing interests should not necessarily result in the privileging of one interest to the detriment of all others—particularly when the rights and resources of an individual are so highly at stake. The understanding of gender and cultural rights as expressed in the Banjul Charter, for example, suggests that each of these rights can be realized in conjunction with the others, and that they are certainly not mutually exclusive.

Although there is some support for the outcome of *Magaya* in the context of strictly interpreted national law, the implications of that decision on the status of women within Zimbabwe suggest that the court should have looked to broader sources for guidance in its decision. Regional and international norms indicate that, while there is a basic right to customary practice, it must be weighed against individual and community property rights, developmental concerns, and the important right against discrimination in order to achieve a reasonable and valid legal outcome. In *Magaya*, a lack of judicial balancing misrepresents the rights at play in the circumstances of this case, ultimately coming to an unjust and widely criticized conclusion.

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[198] Sayagues, *supra* note 2 (quoting Zimbabwean human rights lawyer Pearson Nherere).

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