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Published on: 01 Jul 2004 - [Health and Human Rights](#) (JSTOR)

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This is an electronic version of an article published in *Health and Human Rights: an international journal*, 7 (2). pp. 82-113, 2004. © Oliver Phillips, 2004.

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Abstract

This article historicizes the legal regulation of sexuality and claims to sexual rights in South Africa and Zimbabwe, analyzing their implications. Focusing on the interaction of formal Constitutions and informal customary law in the differential development of agency and rights, it highlights the constancy of women's partial legal subjectivity alongside shifts in authority from lineage to nation-state. The tensions between the legal formalism of rights, and the historical authority of customary structures buttress the regulation of sex and the claims to sexual rights within these two countries, and they frame a discussion of how sexual-health programs and policies might better engage with the development of sexual agency.

Cet article présente le contexte historique des lois réglementant la sexualité et les demandes de droits sexuels en Afrique du Sud et au Zimbabwe, en analysant leurs implications sur les droits relatifs à l'orientation sexuelle qui résultent du concept de citoyenneté post-coloniale. Il discute principalement l'interaction entre les Constitutions officielles et le Droit coutumier informel pour expliquer le développement contrasté des pratiques et des droits, et il met en lumière la constance de la subjectivité légale partielle des femmes parallèlement aux transferts d'autorité, depuis le clan jusqu'à l'État nation. Ces tensions entre le formalisme légal du droit et l'autorité historique des structures coutumières étayent la réglementation du sexe et les demandes de droits sexuels dans ces deux pays, et elles créent le cadre d'une discussion sur une meilleure coordination des programmes et politiques de santé sexuelle avec le développement d'un pouvoir personnel en matière de sexualité.

En este artículo, se hace una reseña histórica de la regulación legal de la sexualidad y las reivindicaciones de derechos sexuales en Sudáfrica y en Zimbabwe, analizando las implicaciones para los derechos de género como parte de la ciudadanía en la época post-colonial. Enfocándose en la interacción de las Constituciones formales y la Ley informal y tradicional en el desarrollo diferenciada de ciudadanía y derechos, el artículo destaca la manutención de la subjetividad legal parcial de la mujer durante los cambios en el sistema de autoridad desde linaje hasta estadonaciones. Esas tensiones entre el formalismo legal de derecho y la autoridad histórica de las estructuras tradicionales sirven de base para la regulación del sexo y para los reclamos de derechos sexuales dentro de esos dos países, y sirven de marco para una discusión acerca de la forma en que los programas y las políticas de salud sexual pueden interactuar más efectivamente con el desarrollo de un marco legal de respecto a la autonomía en el ejercicio de la sexualidad.

(DIS)CONTINUITIES OF CUSTOM IN ZIMBABWE AND SOUTH AFRICA: The Implications for Gendered and Sexual Rights

Oliver Phillips

Since 1990, Southern Africa has witnessed a dramatic increase in the discussion of sexual behaviors, the visibility of sexual identities, and related conflicts over associated rights. These discussions and conflicts have become central to agendas of policy, research, health campaigns, and definitions of national entitlement. As the most active protagonists in this burgeoning recognition of the significance of the sexual, Zimbabwe and South Africa appear at first glance to have approached sexuality in distinctly contrary ways. But closer inspection reveals that their approaches are strikingly similar: both recognize sexuality to be an instrument of social cohesion, whose current discursive prevalence is not simply a result of efforts to prevent the transmission of HIV/AIDS. Instead, this increased discussion and visibility of sexuality is deeply implicated in long-contested gender struggles as well as in the very different attempts each nation has made to define itself at its moment of post-colonial delivery. The formulation of successful policy interventions around sexual health thus requires an understanding of the historical continuity that has brought sexuality center-stage, as well as an awareness of the current framing of state power in relation to sexual rights and their impact on the exercise of agency.

Sexuality's emergence as a key marker of citizenship was most pointedly signified in the mid-1990s through the

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homosexual's incorporation into the body of newly entitled citizens in South Africa and the homosexual's almost simultaneous extirpation from the national polity in Zimbabwe, Namibia, Zambia, Swaziland, Kenya, Uganda, Tanzania, and Botswana.¹ Within months of Zimbabwean President Mugabe's proclamation that "I don't believe they (homosexuals) should have any rights at all," and the labeling of Zimbabwean homosexuals as the "festering finger endangering the body" that government must "chop off," South Africa became the first country in the world to ratify a constitution that included a prohibition of discrimination on the grounds of sexual orientation.^{2,3} While neighboring states more or less replicated the Zimbabwean position, the distinctive inclusivity of the South African approach moved beyond the decriminalization of homosexual acts, encompassing more broadly the positive affirmation of equal rights for gays and lesbians in relation to employment benefits, adoption of children, and immigration through partnership.⁴ In addition, since that time the recognition of same-sex domestic partnerships is being formulated.⁵

As these measures deliver specific rights of formal equality and unsettle the gendered hierarchy so fundamental to exclusive heteronormativity, they are more than a symbolic inclusion of homosexuals into the social body. They contrast markedly with neighboring Zimbabwe's rejection of homosexuality as a "white man's disease" integral to the colonialist corruption of "traditional" African society. Elsewhere, I have analyzed the role this "white-washing" of homosexuality played in discrediting the increased sexual autonomy of Zimbabwean women, positioning such autonomy as another alleged form of Western imperialism.⁶ Both the sexual inclusivity of citizenship in the new South Africa and the sexual exclusivity of citizenship in Zimbabwe are intrinsic to the gendered construction of notions of entitlement and belonging in these post-colonial states.

The ubiquity of sexuality and sexual rights in discussions of citizenship in both countries is not simply a result of the need to engage sexuality in strategic attempts to contain the spread of HIV/AIDS.⁷ This ubiquity is, moreover,

an outcome of the current political and socio-historical trajectories of these two countries. In each case, sexuality has become integral to citizenship: it is explicitly recruited to serve as an index of national belonging in a way that, as this article demonstrates, goes beyond sexual orientation, behavior, or identity, to the very base of gender relations. Furthermore, HIV/AIDS is but one aspect of a multi-dimensional context rich with the conflicts, negotiations, and opportunities that characterize what are arguably revolutionary moments in the national histories of South Africa and Zimbabwe. The presence of HIV/AIDS increases, therefore, the already significant role of sexuality.

The analysis in this piece suggests that there is a real danger that an inadequate understanding of these national histories can lead well-intentioned sexual health interventions to unwittingly reproduce, and in so doing compound, the problems of historical context. Information alone is not enough to reduce women's disproportionate vulnerability to HIV/AIDS, as knowledge of risk does not automatically enable agency. The context through which agency is developed or constrained is defined by formal instruments of law and mapped out by informal mechanisms of social custom; analyzing the history of the ways in which these elements have interacted in Southern Africa suggests that addressing one part of this equation but not the other may well be dangerously counterproductive.

The transition out of a state of minority rule by white settlers took place 24 years ago in Zimbabwe and 10 years ago in South Africa. Enormous differences in contemporary contexts and procedural priorities have produced what are evidently very different approaches to human rights and governance. While there is obviously a complex multiplicity of historical, political, and cultural factors instrumental in defining the limits of citizenship and post-colonial identity, this article focuses on only two of the mechanisms that have framed the contrasting articulation of sexual rights in each of these states. Constitutions are the formal foundations of state power and circumscribe the different possibilities of policy in these two countries. Similarly, "traditional custom" is an informal but institutionalized mechanism of

social regulation, and it is central to negotiating the tensions that exist between claims to cultural authenticity and aspirations to equality with regard to human rights. This article will restrict itself to a consideration of the interaction of these two elements (Constitution and custom) in these two states, whose different treatment of sexual relations is symbolically and practically central to their broader definitions of rights, subjectivity, and citizenship. Focusing on the relationship between the constitutional platform of a state and the customary relations of its society highlights the ways in which sexual hierarchies and gender relations become either entrenched or transformed in specifically post-colonial moments of fissure and reinvention.⁸

The Colonial Legacy of Gender and Rights

The contrasting treatment of both gendered and sexual rights (as well as broader issues of diversity and dissent) in present-day Zimbabwe and South Africa arises partly out of their different responses to a particular post-colonial dynamic. This dynamic consists of a tension between asserting, on the one hand, a “traditional” lineage-based culture that prioritizes interests presented as collective and invoked through claims to group rights and ethnic sovereignty, and, on the other hand, the political culture of a “modern” nation-state where individual autonomous citizens are entitled to rights of equality that are construed as universal.⁹ John Comaroff explains that the continuing prevalence of these contradictory registers of *primal sovereignty* and *radical individualism* derives from the colonial discourse of rights, which created “ethnic subjects, racinated and recast in an often antagonistic dialectic of construction and negation.”¹⁰ Indeed, this “antagonistic dialectic” is evident in the African Charter on Human and Peoples’ Rights. In the Charter, these contradictory registers result in the articulation of not only individual rights and freedoms, but also group rights over the individual as well as individual duties to the collective to an extent not reflected in other international human rights treaties or conventions.¹¹ For the purposes of this article, however, the most pertinent manifesta-

tion of this “antagonistic dialectic” is the historical treatment of women living under African customary law in both colonial and post-colonial periods.

Research by Martin Chanock and others has shown how the colonial need for legal consistency and predictability effectively rigidified the contextual fluidity that had previously been the hallmark of African custom.¹² Systematizing diverse localized customs into one, uniformly applicable African Customary Law had the effect of displacing inherent mechanisms of accountability and entrenching gerontocratic and patriarchal relations of power. In the early colonial period, customary law became a pivotal tool in jockeying for position within the changing structures of African society. Chanock describes this as a battle “for the control of labor in the changing conditions of the rural economy,” with specific reference to the labor of wives, their offspring, and the rights to the fruits of those labors.¹³ Older patriarchs attempted to sustain their traditional position of authority in the face of the growing economic power of younger wage-earning men, while women were forced to become increasingly innovative in gaining access to the few informal and unofficial means by which they had earlier been able to exercise power.¹⁴ A review of the development of laws around marriage and adultery in colonial Rhodesia makes clear that the people testifying to colonial authorities about the content of customary laws are predominantly elder men of standing within their communities.¹⁵ This is unsurprising given the gerontocratic and patriarchal social structures of these communities and given the similarly hierarchical structure of the colonial authorities’ society. Moreover, any initial desire on the part of the colonial authorities to emancipate African women from what they perceived to be “primitive” and oppressive structures of kinship was rapidly replaced by a recognition that their authority was based on the cooperation of African chiefs and headmen.¹⁶ For this reason, some of the early colonial laws impacting directly on women and their sexual independence evince Comaroff’s “antagonistic dialectic of construction and negation”: they demonstrate precisely the tension

between definitions of personhood that were located in lineage and collective identity, and definitions of emancipated individual subjectivity that adhere to the modern state.

The earliest legislative product of this initial emancipatory concern was the Native Marriage Ordinance (NMO) of 1901. This ordinance had the dual and sometimes contradictory aims of constructing a legal framework to support African marriages while also preventing African women from being forced into marriage. It immediately bestowed on women a measure of potential autonomy from men who, under customary law, were perpetually their legal guardians:

The African idea that sexual identity [*behavior*] was an aspect of lineage membership, and that individual members were answerable to the family group for the uses they made of their sexuality, was undermined at a stroke by the Ordinance's provision that no woman should be made to marry against her will. The women's rights were given priority over the rights of the lineage. . . . In effect, the State was usurping the rights of family heads to control the sexual choices of members of their households and lineages.¹⁷ (my own explanation in italics)¹⁸

Ironically, this shift from lineage to state regulation was subsequently compounded by the attempts of chiefs and their headmen to use the colonial law to bring women back into their control. In persuading the colonial authorities to pass the Native Adultery Punishment Ordinance (NAPO) of 1916, African patriarchs specifically prohibited married African women from an act that was permitted for anyone else, penalizing exclusively and specifically the errant-married woman.¹⁹ While this ordinance was aimed at disempowering and restricting women, it also brought African women's particular social status increasingly within the realm of legal regulation. Implicitly, it constituted in law the criminality of African women's sexual autonomy, initiating a *partial legal subjectivity* that extended no further than women's capacity to be disciplined. That is, women were treated as legal subjects in that they could be disciplined for committing the offence of adultery, but they did not have the subjective legal status to be offended by a

man's adulterous behavior, nor did they have any further capacity to act in law other than through their male guardian.

Nevertheless, in constituting the criminality of women's sexual autonomy, the NAPO implicitly relied on a notion of women's independent action and their specific responsibility for this agency. Similarly, while the NMO affirmed a regime of marriage in which woman had no legal subjectivity other than as offenders/adulterers, it simultaneously protected women from being pledged in marriage. In each case, the transfer out of lineage and into state control was predicated on a shift from the power of the patriarch to the rights and obligations of an individual; but in reality it transferred onto women a *partial subjectivity* that was expedient for maintaining traditional relations of power.²⁰ This subjectivity was partial in two senses: first, it was a *negative* subjectivity, as it was restricted to giving women the status to be arrested as offenders. And second, it was an *incomplete* subjectivity: as women had no legal standing of their own (they could only operate in law through a male guardian), it did not deliver direct or proper recourse to the protection offered by the law. But it was also expedient as it was invested in women "solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves."²¹

The lingering historical effects of this *partial subjectivity* are the source of many of the conflicts around gender and sexuality in contemporary Southern Africa. The concept of a sexuality rooted in the self rather than in lineage and family is the basis of the sexual-autonomy claims fomenting Southern African anxieties around both homosexuality and women's sexual agency. Similarly, in relation to such things as rape, while there is some recognition in common law of women's legal subjectivity, customary law continues to temper women's ability to exercise any full legal subjectivity.²² It is precisely this tension between the "traditional" lineage-based subjugation of African women to their guardians (*primal sovereignty*) and the contrary notion of the individual subjectivity of a legal person (*radical individualism*—arguably fundamental to claiming human rights) that pushes and pulls the vacillating attempts of the

Zimbabwean government to initially empower and then restrain women.²³ There is a crippling ambivalence in developing the notion of individual rights while at the same time promoting “traditional” family structures and the priority of customary law. Yet, South African attempts to overcome this ambivalence have not been unequivocally successful, in large part because the legacy of women’s *partial subjectivity* is so deeply embedded in discourses of sexuality.

Constitutional Frameworks and Customary Law

In South Africa, the drafting and adoption of a new Constitution was the “primary objective” of multi-party negotiations that lasted nearly four years.²⁴ An entirely new Constitution was necessary to ensure the abolition of a system that was beyond reform. Apartheid systematized inequalities through separation, differentiation, and the explicit provision of *partial subjectivities* according to race. For the vast majority of South Africans, their race gave them the strong possibility of becoming offenders in law while simultaneously restricting their agency in or recourse to law as an instrument of protection and rights. The new Constitution explicitly premises itself on “diversity,” clearly stating that differences between people should never again be used as a force of division and should rather be seen as a positive asset in building a strong democracy.²⁵ This is a principle enshrined in Chapter 2 of the Constitution, the Bill of Rights, which contains the Equality Clause, implicitly rebuking *partial subjectivities* as it prohibits discrimination “on any one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.”²⁶ “Many of the categories listed above can be problematized,” writes Mikki Van Zyl,

... but as a broad collection they represent many of the concepts that have formed the basis of critiques about exclusions in existing interpretations of citizenship in modern democracies: five out of the sixteen are related to gender and sexuality, and six link to racialization. Hence, it could be argued that the Equality Clause in the

South African Constitution represents a quantum leap in formal rights for previously excluded groups.²⁷

This “quantum leap” is given added impetus by the Constitution’s explicit protection of social and economic as well as civil and political rights, and its express authorization of affirmative action.²⁸ But of most pertinence here is the clear decision not to dilute the Equality Clause with any exemptions for customary law, despite the entreaties of traditional leaders who saw the Equality Clause as a direct threat to the patriarchal structures of customary relations. Representatives from women’s organizations had the unwavering support of the vast majority of the political parties, and this conclusively ensured the defeat of the traditional leaders’ attempts to exclude customary law from the provisions of the Equality Clause.²⁹ Comaroff’s conflict between *radical individualism* and *primal sovereignty* was thus resolved firmly in support of the former, a point made clear by Penuell Maduna, currently South Africa’s Minister of Justice, who was a member of the Constitution’s Negotiating Council and the Ad Hoc Committee on Fundamental Rights:

One of the customary rights is the right of the traditional leader to lord it over you. I have never for one second in my life lived under a traditional leader, and I’m very much a Black South African. Traditional law plays no role at all in my life. . . . To follow the traditional law of succession, my son is my heir and my daughters wouldn’t get anything. Is that what I want to happen to my children? They would live perpetually under male domination, and I honestly, seriously, and utterly believe in the equality of the sexes. . . . There is a tension between a Western-oriented society, as some people want to impose on us, and a pure African, “Africanist” society. I think we are a mixture of all sorts of things but essentially, we place the individual at the center of human activity.³⁰

Through the transitional period of the interim Constitution, South Africans quickly became accustomed to a context within which the Constitutional Court has

supreme jurisdiction.³¹ Decisions by the Constitutional Court indicate the clarity of their jurisdiction over government, political parties, and even the Executive arm of government.³² The consensus that allows such jurisdictional authority arises from both the painstakingly extensive and unusually inclusive process of participation in the drafting of the Constitution, as well as the emphasis on rights (whether civil, political, social, or economic) in a state whose prior absence of rights had dramatically highlighted their necessity for all South Africans.

In direct contrast to South Africa, Zimbabwe's Constitution reflects a clear prioritization of *primal sovereignty* over *radical individualism* as it specifically exempts customary, family, and personal law from the fundamental rights and freedoms guaranteed by its Declaration of Rights.³³ The Constitution currently in place in Zimbabwe was adopted in 1980 after the country's independence; though unlike South Africa, it was neither the "center-piece" nor the "primary objective" of years of detailed and rigorous negotiations.^{34,35} It contains standard default clauses that tend to appear in the post-independence Constitutions of other former British colonies in Africa, with the exception of a few provisions restricting the extent to which the new government could transform political structures and redistribute economic capital.³⁶ The ruling party (ZANU-PF) therefore came to view the Constitution as a frustrating obstacle blocking the implementation of their policies and the post-colonial transformation of the country.³⁷ President Mugabe has frequently lambasted it as a "British" document and has resisted the superior jurisdiction of the Constitution and the Supreme Court. This has often brought the Supreme Court into direct conflict with the Executive, as the government has repeatedly defied court orders and used the notion of *primal sovereignty* to rationalize as a policy of "indigenization," the replacement of those judges who uphold the Constitution when it is challenged by government.³⁸ Mugabe himself told a ZANU-PF Congress that "the courts can do what they want. They are not courts for our people and we should not even be defending ourselves in these courts."³⁹

In 2000, the government proposed a new Constitution, making explicit its determination to increase executive powers in the face of popular opposition and so losing the referendum necessary to enact it.⁴⁰ This draft Constitution of 2000 did, however, confirm the government's dedication to promoting the register of *primal sovereignty* and the accompanying *partial subjectivity* of women, as it included provisions affirming that the majority of women should not have the right to own property and offered a generally reduced commitment to individual and women's rights. President Mugabe is said to have personally drafted a clause that permitted the over-riding of any individual right in the name of "public morality and public security," specifically including a prohibition of gay marriage.⁴¹

The government's evident disinterest in having a Constitution that provides a platform for women's equality is further affirmed by the failure of the Constitution to include both sex and gender in its list of prohibited grounds of discrimination. In 1996, the 14th amendment to the Constitution removed "sex" from this list and replaced it with "gender." Previously, while discrimination on the grounds of biological sex was prohibited, discrimination on the grounds of gender was not, so that even those women who were living under civil law were vulnerable to the many gender stereotypes of socio-cultural origin that underpin discrimination. Subsequent to the 1996 amendment, discrimination on anatomical or biological grounds (e.g., pregnancy, menstruation, childbirth, lactation, or physical attributes) was no longer prohibited by the Constitution. This fudging stands in marked contrast to the careful articulation of so many different forms of discrimination in South Africa's Equality Clause, and, as the Zimbabwean amendment was enacted after the South African Constitution, it is unlikely that the Zimbabwean drafters and legislators were unaware of the distinction between sex and gender. The Supreme Court has not yet been required to provide any interpretive guidance on this issue; but the possibility that they could provide a wide interpretation that includes both sex and gender is remote. First, because such an interpretation is far removed from the clear and direct implication of an amendment that

explicitly replaces sex with gender (demonstrating a concerted consideration of what might be the distinction between the two terms); and second, because the new Supreme Court bench is now more amenable to direction from the government, which drafted the amendment in the first place.

The current Constitution of Zimbabwe seems unclear about the distinction between sex and gender. Its drafters appear to have thought sex and gender were interchangeable synonyms. For if they were clear about this distinction and clear about why both (sex and gender) should be prohibited as grounds for discrimination, then one can only conclude that the Constitution of Zimbabwe has been crafted deliberately to discriminate against women.⁴²

Deliberate or not, the end result is that the rights offered to women through the Constitution are limited on a number of counts. Their *partial subjectivity* is reinscribed through the Constitution as their recourse to law is contingent on either their detachment from the traditional security of lineage or on their attachment to a man—and even after these conditions are realized, their right to equality is limited. This is despite the fact that Zimbabwe was a signatory to The Declaration on Gender and Development passed by the Southern African Development Community (SADC) Council of Ministers in February 1997. This declaration contained a strong commitment to mainstreaming gender equality in national policy and “ensuring the eradication of all gender inequalities in the region.”⁴³

Legislation, Policy, and Court Judgments

During Zimbabwe’s Independence, ZANU-PF had been openly supportive of the principle of gender equality; and soon after assuming power, it passed the Legal Age of Majority Act (LAMA) in 1982.⁴⁴ This conferred legal subjectivity on all Zimbabweans over the age of 18—immediately granting women the unprecedented possibilities of legal subjectivity. Thus, women no longer need the consent of their guardian to enter into a civil marriage. But the majority of Zimbabwean women marry under customary law. Section 23 of the Constitution means that this majority of

women still find themselves under the authority of a male guardian, have no legal subjectivity of their own, and their recourse to the fundamental rights and freedoms listed in the Constitution is strictly limited by custom. The most explicit example of this in practice is the Supreme Court finding in *Magaya v. Magaya*, where the property accumulated by a woman was given to a younger brother who had had no role in its accumulation.⁴⁵ The decision provoked outrage as women's groups and human rights NGOs accused the Supreme Court of a regressive judgment that reversed any progress in women's rights made since 1980. But their anger should rightfully have been directed at a Constitution that was, in fact, correctly interpreted.⁴⁶

Zimbabwean women witnessed their government's flirtation with a move to gender equality in the years immediately following Independence, only to find it subsequently retracted with growing censure of independent women. During the 1980s, the state carried out random street clean-ups in major urban areas of any women found to be without a marriage certificate or proof of employment—an action whose objectives were replicated in the 1990's when mobs of men stripped women naked in the street for wearing mini-skirts that were "too short."^{47,48} In all of these cases, the harassment of women was justified by their denunciation as *mahure* (prostitutes), a word frequently used to describe women who display economic independence or, most particularly, sexual autonomy. The narrow confines of respectability were outlined in the early 1980s by the then Zimbabwean Minister of Home Affairs who suggested that the abolition of *lobola* (bride wealth) would "legalize prostitution" as "a woman for whom *lobola* was not paid could easily move to another man."⁴⁹

Such "traditional" resistance to the mere possibility of women's sexual autonomy explains why homosexuality presents such a challenge to customary relations. Accepting lesbianism implies that women can (and might choose to) survive without men, let alone without men as their guardian, a "problem" compounded by the fact that a lesbian will bring no *lobola* into the family, thereby affecting the ability of her brothers to pay for their own wives and un-

dermining the economic base of reproductive culture. This is a direct illustration of the conflict between the register of *primal sovereignty*, whereby sexual relations are defined in relation to lineage, and individual rights, whereby sexual relations are the distinct manifestation of individual autonomous choice.

A woman's ability to choose her partner is a precondition for her recognition as a fully entitled legal subject and locates her sexual independence at the center of broader structures of social and economic power. The refusal of this independent choice has been at the root of women's sustained *partial subjectivity* and was a source of the recent concern about homosexuality in Zimbabwe. The denigration of homosexuals invariably invoked cultural signifiers to depict them as foreign to Zimbabwean culture, thereby relating the issue specifically to the register of *primal sovereignty* and suggesting that homosexuality was being imposed at western insistence: "Homosexuality is unnatural and there is no question ever of allowing these people to behave worse than dogs and pigs. . . . What we are being persuaded to accept is sub-animal behavior and we will never allow it here."⁵⁰⁻⁵²

This statement was made in Shona, which gives "dogs" (*imbwa*) particular idiomatic significance consistent with Mugabe's calls for a return to "our traditional values that make us human beings."⁵³ He thereby invokes notions of *ubuntu* (or *munhu* in Shona) that refer to Africanist conceptions that the humanity of individuals is derived from the society around them and makes explicit his reliance on the register of *primal sovereignty*.⁵⁴ At issue, however, is not so much his reliance on these notions, but his interpretation of them in such a way as to leave little space for individual rights. While this interpretative strategy is clearly supported by the Zimbabwean Constitution, it is quite different from that emerging under the South African Constitution.⁵⁵

In South Africa, distinguishing "living" customary law from the "formal" customary law that was constructed in the colonial encounter (as outlined earlier) allows customary law to be critically reappraised and reproduced in a more organic, rights-receptive form. Thus, while the

Equality Clause will always trump customary law, considerable value is still given to “living” customary law so that it is “receptive to changing conditions and . . . could be applied and developed in light of the rights and values of the Constitution.”⁵⁶ The decisions in *Amod* and *Moseneke* each deal with a widow married under different customary or religious arrangements and emphasize that “proper consideration has to be given to . . . the dignity of widows and their ability to enjoy a rightful share of the family’s worldly goods.”⁵⁷ This renders impossible the ruling that was so unavoidable for the Zimbabwe Supreme Court in *Magaya v. Magaya*, even though customary arrangements of inheritance are historically very similar in the two countries.⁵⁸

Similarly, the South African Recognition of Customary Marriages Act gives women full majority status and the right to acquire property in their own names, thereby recognizing the value of customary law in many people’s lives while formally removing the constraints of women’s *partial subjectivity*. Predictably, the new Constitution has also fostered a considerable amount of equality legislation of direct application to all women, while the Constitutional Court has delivered a number of judgments affirming formal rights of equality for same-sex couples.^{59,60}

A more recent Constitutional Court ruling, however, provides an indication of the limits of sexual autonomy and individual rights in the new South Africa. In the case of *Jordan*, the majority judgment found that where the Sexual Offences Act criminalized sex workers but not their clients (sex purchasers), there was no gender discrimination as the prohibition on prostitution applied to both men and women sex workers.^{61,62} While Justices O’Regan and Sachs dissented from the majority finding on this question of gender discrimination, all Justices of the Court were unanimously agreed that the prohibition of sex work was consistent with the Constitutional rights to privacy, dignity, freedom, security of the person, and economic activity, and that its decriminalization was a matter for the legislature rather than the Constitutional Court.

This seems an unusually cautious and restrained approach for the Constitutional Court to take with regard to

its law-making role. The failure of the Court to recognize sex workers (acknowledged to be predominantly women) as frequently representative of the most marginalized groups in society is surprising, as it is they who are most desperately in need and most explicitly deprived of rights (social, economic, civil, and political). There are persuasive public-health arguments for decriminalization, and it is arguable that these are also the logical extension of many of the Constitution's founding principles. But these arguments depend on the effective removal of sexuality and law from a discourse of morality and the adoption of a framework of health, harm reduction, worker's rights, and pleasure (as opposed to reproduction).

The *Jordan* ruling, however, ignores the need to promote a context in which sex workers might develop greater agency. On the contrary, their criminality and vulnerability are certified in this decision and the moral borders that signify the acceptable limits of sexual agency are established. The unanimity in the *Jordan* decision suggests that sex workers are seen as having so remote a claim on "innocence" that even a body so accepting of rights as the South African Constitutional Court could not grant their entitlement to legitimate status.⁶³ In this way, some aspects of the historical sexual hierarchies so clearly articulated by Gayle Rubin remain unchanged, and the limits of South Africa's transformative trajectory are clearly delineated.⁶⁴

Sara Jagwanth and Christina Murray point out that much of the gender litigation in the South African Constitutional Court has involved relatively privileged groups, whereas those marginalized in multiple ways—those whose interests the Constitution was most intended to protect—are in fact the people who have received the least benefit.⁶⁵ It is also important to recognize that these are formal rights that still need to be properly embedded in order for them to be accessed and realized by all but the most litigious. This argument goes some way to affirming Mikki Van Zyl's suggestion that the Constitution should be seen as an "enabling tool:"

Though the first steps have been won through the enshrining of sexual rights in the Constitution, the struggle

is far from over. The actual articulation of those rights still depends on positionality, agency, and the manner in which those rights are interpreted, negotiated and implemented or practiced within the institutions of governance.⁶⁶

Van Zyl's caution is borne out by some key disparities between the Constitution's promise and the African National Congress (ANC) government's policies, the most striking of which is their past refusal to supply anti-retroviral treatments to those infected with HIV/AIDS. Prior to April 2002, government policy forbade even doctors and nurses in state hospitals from providing rape survivors with anti-retroviral treatment as post-exposure prophylaxis against infection with HIV.⁶⁷ This policy was derived from President Mbeki's public adoption of the "dissident" position that denies any link between HIV and AIDS, for to provide anti-retrovirals in any situation implies that they might actually be effective.⁶⁸ Such a stance demonstrated significant reluctance to seriously engage with the implications of gender power, sexual relations, and sexual violence.

Mbeki has been remarkably silent on the issue of sexuality, and it might be surmised that the Constitution pre-empted any need for him to break this silence.⁶⁹ The explicit inclusion of sexuality in the Equality Clause, along with the political strength of the various organizations supporting it, foreclose a hyper-masculine, "homophobic" stance of the type proclaimed in Zimbabwe and allow Mbeki the space for this silence. While he cannot engage with the same rhetorical devices as Mugabe, Mbeki's actions and policies concerning HIV/AIDS might actually be more transparent (and consequently more open to detailed and specific critique) if he were obliged to engage openly with the difficult issues of sexuality that are so central to the transmission of HIV/AIDS. His dedication to discussing poverty in relation to HIV/AIDS serves as an effective strategy for avoiding discussion of the clinical links between HIV and AIDS, but it could also be said to do the same for sexuality. The fundamental issues of gendered agency (those that determine one's ability to negotiate safer sex) are sheltered under the promise of the South African Constitution, and therefore avoid serious consideration and comment by politicians. This combines with the exclusive emphasis on poverty to

facilitate the lack of declaration on HIV *and* sexuality that have characterized Mbeki's strategy so far.

For this very reason, in a context of practical inequality and gendered impoverishment, the limits of formal Constitutional rights might be measured through the failure of policies to address the continuation of women's reduced sexual agency and disproportionate vulnerability to HIV infection in South Africa.⁷⁰ It is here that the Constitution can serve as an "enabling tool," providing a platform from which attempts to challenge HIV/AIDS can be launched, but its effect will still be limited without good governance.

An explicit example of this is the reliance on the Constitutional provision of socio-economic rights that enabled activists to successfully develop the call for access to anti-retroviral treatment. Despite its obdurate reticence, the government has been obliged to initiate new policies and commit itself to a national treatment program. The extent to which the government eventually executes a "national" program is still in question, and effective policy is still dependent on good implementation; but litigation, including some in the Constitutional Court, has been pivotal in obliging the government to make a commitment to a national treatment program official policy.⁷¹ The possibilities of agency reflected in this active intervention in the process of policy formation and implementation rely on the premise that the Constitutional Court has the authority to exercise jurisdiction over the government. As has been demonstrated earlier, this is an assumption that one cannot make in the context of Zimbabwe, where the government has perceived itself to be in conflict with its Court and Constitution. Consequently, attempts to challenge the policies of the Zimbabwean government as unconstitutional have been repeatedly unsuccessful, casting the possibilities of the South African Constitution in an ever-more resplendent light.

Nevertheless, it must be acknowledged that another indication of the limits of the formal equality of Constitutional provision is that South Africa still has an extraordinarily high rate of sexual violence, to the extent that some researchers label it as "systemic."⁷² But in South Africa, there is at least official recognition of this problem,

some (if inadequate) attempts on the part of the State to engage with it, and a Constitutional platform around which to locate strategic objectives.⁷³ In Zimbabwe, the current political context includes a dramatic rise in reports of sexual violence. There are widespread reports, for instance, of coercive sex being used explicitly as an instrument of torture by state-sponsored militia in attacks upon the opposition and suspected sympathizers.⁷⁴ Far from attempting to prevent sexual violence, however, reports like these and the resulting impunity suggest that the Zimbabwean government appears to license such violence. Such an instrumental usage of sex would be less likely if there were a more developed context of women's subjectivity, making them fully entitled citizens with recourse to legal equality. If women's identity were not thought to derive so directly from their attachment to men, their physical integrity might not represent a terrain of such appropriation. But when considered in conjunction with South Africa's "systemic" problem of sexual violence, it seems clear that the attempts and interventions of sexual-health policy to "empower" women have not been able to protect them from a level of base violence greater and more concerted than ever. Alternatively, it is arguable that the success of policy interventions aimed at developing women's agency in South Africa might be measured by greater levels of reporting of sexual violence, though there is no way of discovering this with any certainty. Either way, it is clear that the broader context of gender inequalities *has* to be addressed in order to properly develop the concept and reality of sexual agency, and that the Constitutional framework in South Africa provides a starting point that is not present in Zimbabwe. The contrast between these situations therefore suggests that while it is important to acknowledge the limits inherent in the formalism of Constitutional rights, a strong and effective Constitution can provide a platform for popular interventions in democratic governance and the development of political agency.

Conclusion

The formal recognition of equal rights, then, is not so immediate and omnipotent a recipe as to provide all South

African women with an indisputable agency that all Zimbabwean women are perpetually denied. That is too simplistic. There are many women in South Africa whose lives remain relatively unchanged by the primarily bourgeois petitions that have been made to the Constitutional Court, and there are similarly women in Zimbabwe who manage to engage a sexual agency unanticipated by the register of *primal sovereignty*. But in both states, those women who do manage to exercise some real control over sexual choices (as they will in practice) may well do so through resorting to unofficial or even illegal methods that will generally entail disproportionate responsibility taken without recourse to structural support.⁷⁵

Current attempts to promote women's sexual agency through health interventions will stumble without parallel attempts to undo the partiality that constrains women's legal and social subjectivity in a broader context. Sexual agency depends on the ability to exercise agency in the ordinary contexts that surround the sexual. Such agency cannot, alas, be conjured by an expression of will or desire. We cannot simply wish it into being, even if by consensus, as we first need to undo the obstacles that inhibit its development and restructure the habits, patterns, and cultural institutions that are built on its absence. Interventions that attempt to invoke women's sexual agency without first developing a social context that fosters its operation are in danger of replicating the contrary consequences of this *partial subjectivity* once more, as they expose women to increased, possibly violent, censure in their unsupported attempts to exercise sexual agency. Programs and policies aiming to promote women's sexual agency therefore have a clear and unavoidable responsibility to challenge an interpretation of custom that reproduces women's *partial subjectivity*. The ability to negotiate safer sex, for example, is severely circumscribed when the context in which consent is given is based in inequality.

The examples of Zimbabwe and South Africa suggest that Constitutional provisions can be a key determinant of this broader context, either supporting or surpassing the *partial subjectivity* that contributes to women's disproportionate vulnerability to HIV/AIDS. This is primarily be-

cause the Constitutions of these two countries engage very differently with the contrary registers of *radical individualism* and *primal sovereignty* and so establish very different platforms from which to develop and support women's agency. The South African Constitution clearly resolves the tension between rights and cultural authenticity through the notion of "living" custom. It ushers in a legal framework conducive to initiating the development of women's sexual agency. In contrast, the Zimbabwean situation illustrates the extent to which a constitution that has neither symbolic strength nor the practical advantage of an unambiguous dedication to human rights can serve to exacerbate inequities of sex and gender.

Interventions in HIV/AIDS and sexual health more broadly cannot shy away from the implications of this. It is not enough to pay lip-service to the notion of women's agency while colluding in maintaining the structures that block the development of that agency. To be effective in the long term, these programs must challenge those traditional structures of customary relations that produce the *partial subjectivity* of women if they are to reduce women's vulnerability to HIV/AIDS.

References

1. For more on these specific situations see O. C. Phillips, "The Invisible Presence of Homosexuality: Implications for HIV/AIDS and Rights in Southern Africa" in E. Kalipeni, S. Craddock, J. Oppong, and J. Ghosh (eds.) *HIV/AIDS in Africa: Beyond Epidemiology* (Oxford: Blackwell Publishing, 2004), pp. 157-160; and Human Rights Watch and International Gay and Lesbian Human Rights Commission, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, (Human Rights Watch, 2003).
2. R. Mugabe, Zimbabwe International Book Fair (ZIBF) Opening Speech and Press Conference, 8/1/95. The theme of the ZIBF that year was "Human Rights."
3. M. P. Anias Chigwedere, Zimbabwe Parliamentary Debate, 28 September 1995, Hansard pp. 2779-2781.
4. This stands in marked contrast to Zimbabwe where the Immigration Act provides that the entry into the country of "known prostitutes or homosexuals" is prohibited (Chapter 4:02 S.14(1)(f)).
5. For a full discussion of the extent of these rights and a citation of relevant cases, see M. Van Zyl, "Escaping Heteronormativity: Sexuality in Sexual Citizenship" in A. Gouws (ed.) *(Un)thinking Citizenship*:

Feminist Debates in Contemporary South Africa (Aldershot: Ashgate, 2004), pp. 166-168.

6. See O. C. Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies* 6/4 (1997): pp. 471-492; O. C. Phillips, *Sexual Offences in Zimbabwe: Fetishisms of Procreation, Perversion, and Individual Autonomy*, Unpublished PhD. Thesis, University of Cambridge, UK, 1999; O. C. Phillips, "Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa" in C. Stychin and D. Herman (eds.) *Sexuality in the Legal Arena* (London: The Athlone Press, 2000), pp. 17-33.

7. For an analysis of the use and meaning of the term "sexual rights," see A. M. Miller "Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights," *Health and Human Rights* 4/2 (2000): pp. 68-109; R. P. Petchesky, "Rights and Needs: Rethinking the Connections in Debates over Reproductive and Sexual Rights," *Health and Human Rights* 4/2 (2000): pp. 17-29; and (with specific reference to Southern Africa) B. Klugman, "Sexual Rights in Southern Africa: A Beijing Discourse or a Strategic Necessity?" *Health and Human Rights* 4/2 (2000): pp. 144-173.

8. The notion of "sexual hierarchies," as employed here, was first articulated in and is best introduced through the work of Gayle Rubin, who also emphasizes that conflicts over sexual values "acquire immense symbolic weight" at times of nation-building or dissolution. See G. S. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in C. S. Vance (ed.) *Pleasure and Danger: Exploring Female Sexuality* (New York: Routledge and Kegan Paul, 1984). These are conditions that might be used to characterize present-day South Africa and Zimbabwe.

9. For a discussion of the "potential incompatibility" of collective and human rights, see R. E. Howard, "Dignity, Community, and Human Rights" in A. An Na'im (ed.) *Human Rights in Cross-Cultural Perspective* (Philadelphia: Philadelphia University Press, 1992), pp. 97-99.

10. J. Comaroff, "The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity" in A. Sarat and T. R. Kearns (eds.) *Identities, Politics and Rights* (Ann Arbor: University of Michigan Press, 1997), p. 234.

11. The Preamble to the Charter makes explicit the significance for African states of "taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights." Accordingly, Article 27 includes the provisions that "Every individual shall have duties towards his (sic) family and society... rights and freedoms ... shall be exercised with due regard to ... collective security, morality, and common interest." Article 29 stipulates that individuals have a number of duties including to preserve "the harmonious development of the family and to work for the cohesion and respect of the family, ... to preserve and strengthen social and national solidarity, ... to preserve and strengthen positive African cultural values in his [sic] 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." For a comment on the historical and cultural origins of this inclusion of social duties, see M. Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," *Virginia Journal of International Law* 35 (1995).

12. M. Chanock, "Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia" in M. J. Hay and M. Wright (eds.) *African Women and the Law: Historical Perspectives* (Boston: Boston University Papers on Africa VII, 1982); M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Polity Press, 1985); T. W. Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town: Juta and Co. 1985/1991); M. F. C. Bourdillon, "Is 'Customary Law' Customary?" *NADA* 11/2 (1975): pp. 140-149; J. May, *Zimbabwean Women in Colonial and Customary Law* (Harare: Mambo Press, 1983); E. Schmidt, "Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939," *Journal of Southern African Studies* 16/4 (December 1990); E. Schmidt, *Peasants, Traders, and Wives: Shona Women in the History of Zimbabwe, 1870-1939* (Portsmouth, NH: Heinemann Educational Books, 1992); F. G. Snyder, "Colonialism and Legal Form: The Creation of Customary Law in Senegal" in C. Sumner, *Censure, Politics and Criminal Justice* (Milton Keynes: Open University Press, 1982).

13. M. Chanock (see note 12), p. 13.

14. For the argument that patriarchs attempted to sustain their traditional position of authority, see D. Jeater, *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia 1894-1930* (Oxford: Clarendon Press, 1993), p. 127. For a discussion of women's access to power in pre-colonial society and then through traditional structures undergoing colonial transformation, see J. May (see note 12) and S. M. Jacobs, "Women and Land Resettlement in Zimbabwe," *Review of African Political Economy* 10/27-28 (1983): pp. 33-50.

15. D. Jeater (see note 14) and J. May (see note 12).

16. D. Jeater (see note 14), pp. 87-119.

17. D. Jeater (see note 14), p. 81.

18. "Behavior" may be a more appropriate word than "identity" in this quote of Jeater's, as it is significant that social identities were not formed around sexual activity or sexual desire but were derived from lineage. The concept of a "sexuality" with attendant binary identities fixed as normative or deviant was not part of African custom. This is important as it means that the boundaries of sex were not founded on a notion of "perverse" activities and projected cognitive desire, so much as a notion of illicit partners and consequential physical activity. The point here being that sexuality was not located within independent individuals as an "identity," but desire and reproduction were articulated with reference to one's relation to lineage. See D. Jeater (see note 14), pp. 26-30, and O. C. Phillips 2000 (see note 6), pp. 19-24.

19. The Native Adultery Punishment Ordinance (NAPO) of 1916 was intended to strengthen African marriages by making adultery a criminal offence, punishable by up to a year's imprisonment. While this referred to both men and women, the fact that African marriages were polygamous

meant that its application was persistently gender bound. For a married woman to sleep with any man other than her husband would be committing adultery, while a married man could be convicted of adultery only if he slept with another man's wife. Thus, he could sleep with any woman who was not married to another man. So while the NAPO was superficially symmetrical in its design, in effect it penalized only married women and the men they slept with. For more on this, see D. Jeater (see note 14) and O. C. Phillips 1999 (see note 6).

20. This emphasis on the responsibilities of individuals for their actions is reflected across the criminal justice system as notions of retribution, deterrence, and rehabilitation all focus on the behavior and punishment of the individual. In contrast, traditional practices relied on a policy of restorative justice whereby responsibility for restitution fell upon the collective, rather than the individual offender, and the ability to claim restitution lay with the (male) family head rather than the individual victim.

21. T.R. Nhlapo, "The African Family and Women's Rights: Friends or Foes?" *Acta Juridica* 135 (1991): pp. 138-139 quoted in S. Jagwanth and C. Murray, "Ten Years of Transformation: How Has Gender Equality in South Africa Fared?" *Canadian Journal of Women and Law* 14/2 (2002): pp. 255-299.

22. When a man rapes a woman, under common law the state assumes the burden of prosecuting the individual offender and on conviction it is he personally who is punished. But under customary law, the heads of the families will negotiate a settlement to compensate for damages, and while the compensation relates to the woman's value (as determined by bride-wealth), her lack of legal subjectivity in this regime means that any damages paid are given to her husband (or, if she is unmarried, her father or brother or other appropriate male guardian) or to the family as a whole; the underlying principle of restitution may even require the man to marry the victim. While in practice many women will have some active participation in this process, there is no guarantee of this at all. Even if restitution has been agreed upon between the families, the state still has a duty to prosecute, leading convicted offenders frequently to complain that they are being punished twice for the same offence. However, it is arguable that under common law the restrictive definitions of rape and the constraints of procedure specific to rape trials place additional constraints on the victim's recourse to law. O. C. Phillips 1999 (see note 6), pp. 133-178.

23. While human rights are expressed through social relationships, if they are to be equally attributed to all people regardless of status, they must, ultimately, rely on a notion of individual agency. "Human rights are *claims by the individual against society and the state* that, furthermore, 'trump' other considerations such as the legal (but not human) right of a corporation to property. Human rights are private, individual, and autonomous." R. E. Howard (see note 9), p. 82.

24. R. Spitz and M. Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000), p. 34. Liberation movements were unbanned in February 1990, and the first democratic elections were held under the in-

terim Constitution in April 1994. Negotiations took place across these four years, though most successfully in the last year. The interim Constitution was drawn up through a complicated process of committees and working groups that had representatives from all the different political parties and that received submissions from academics, Constitutionalist, and other relevant groups. It was an extraordinary process that involved the negotiation of each provision in detail by participants with widely divergent initial positions. But the process was extensive and powerful enough to substantially moderate these positions, and the final document could be characterized as "a moderate, liberal outcome" that emerged "at the expense of both institutional protections for minority privilege and the more radical socio-economic reforms which many still regard as essential to long-term stability and justice." D. Black, "The Long and Winding Road: International Norms and Domestic Political Change in South Africa" in T. Risse, S. C. Ropp, and K. Sikkink (eds.) *The Power of Human Rights* (Cambridge: Cambridge University Press, 1997), p. 97. The success of the interim Constitution is measured by its substantial adoption in the final Constitution after the first elections. For an extensive account of the entire process, see R. Spitz and M. Chaskalson within this note.

25. This is made explicit in the Preamble to the new Constitution, as well as the Postamble to the interim Constitution, which articulated its premise as the transcendence of the "divisions and strife of the past, which generated gross violations of human rights." R. Spitz and M. Chaskalson (see note 24), p. 412.

26. Chapter 2, s.9(3) of the South African Constitution 1996.

27. M. Van Zyl (see note 5), p. 159.

28. Chapter 2, s.7(2) of the South African Constitution 1996. To oversee this, Chapter 9 of the Constitution established the Commission on Gender Equality "to promote respect for gender equality and the protection, development, and attainment of gender equality."

29. R. Spitz and M. Chaskalson (see note 24), pp. 379-393. Subjugating customary relations to the Bill of Rights resulted in part from the traditional leaders' "refusal to accept a compromise which might have found sufficient consensus in the Negotiating council" (R. Spitz and M. Chaskalson, p. 393). An initial openness to their submissions rapidly shrank as the intransigence of traditional leaders became apparent. Gender equality, by the 1990s, was so fundamental to the liberal democratic tenets that emerged as the broad consensus of all the different political parties negotiating the Constitutional draft that Contralesa (Congress of Traditional Leaders of South Africa), an already small force, found itself further isolated. The racial diversity of the African National Congress (ANC) and the South African Communist Party, as well as the role of women in both organizations, meant that division on this issue was limited and not persistent (R. Spitz and M. Chaskalson, pp. 379-399). Furthermore, the "traditionalist" position of gender disparity that one might otherwise expect from an African nationalist movement was countered by the premise of equality reflected in the Freedom Charter. This was a document drawn up in 1955

through an extraordinary process of mass participation (it came to symbolize “the will of the people”), and it unified as “charterist” much of the South African liberation movement, including the African National Congress. See M. Van Zyl (see note 5), p. 157.

30. Quoted in R. Spitz and M. Chaskalson (see note 24), p. 391.

31. Similarly, the independence of new institutions like the Human Rights Commission, the Public Protector, and the Auditor General was unquestioned from the start. See R. Spitz and M. Chaskalson (see note 24), p. 425.

32. Examples include *Soobramoney v. KwaZulu-Natal (Min of Health)* 1997 (12) BCLR 1696 (CC); *Government of RSA v. Grootboom* 2000 (11) BCLR 1169 (CC); and *Minister of Health v. Treatment Action Campaign(2)* 2002 (5) SA 721 (CC).

33. See s.23(3)(a)&(b) of the Zimbabwe Constitution. The Declaration of Rights appears in s.11.

34. There have been 15 amendments to the Constitution since independence in 1980.

35. The 1979 Lancaster House all-party negotiations were more preoccupied with the practical difficulties of (among other things) settling a ceasefire, the mechanics of transition to a democratic state, the re-entry of guerillas and refugees into the country and their reintegration into society and state institutions, and the holding of the first election. These talks only lasted a matter of weeks from September 10 to December 21 1979. See S. Chan, *Robert Mugabe: A Life of Power and Violence* (New York: I. B.Tauris, 2003), pp. 11-14.

36. These concerned restrictions on the redistribution of land, the reservation of a number of white seats in Parliament for seven years following Independence, and a restriction on the legislation that could be subjected to Constitutional challenge for the first five years.

37. Rather than seeing the present crisis in Zimbabwe as a simple return to an anti-modern barbarism, it is important to understand that Mugabe explains his current politics as a celebration of Zimbabwe’s sovereignty, invoking particular conceptions of progress and reinterpreting modernity in such a way that “modernity’s ‘other’—that which it is supposed to overcome—can also be construed as a past-time of slavery, colonial racism, apartheid, or colonized consciousness.” E. Worby, “The End of Modernity in Zimbabwe? Passages from Development to Sovereignty” in A. Hammar, B. Raftopoulos, and S. Jensen (eds.) *Zimbabwe’s Unfinished Business: Rethinking Land, State, and Nation in the Context of Crisis* (Harare: Weaver Press, 2003), p. 66.

38. While this might initially appear to be consistent with the register of *primal sovereignty*, it subsequently became apparent that “indigenization” referred to an ideological position rather than membership of a race or ethnic group whose roots were historically located in the region now making up the state of Zimbabwe. Those judges who had in the past overridden the Constitution to support the ruling party’s position were promoted over the heads of those judges who, though they were Black and more senior, had shown commitment to the Constitution and political impartiality. See “Outcry Over Chidysausiku’s Appointment,”

Zimbabwe Independent, 8/26/01; "Chidyausiku Accused of Bias," *Daily News*, 9/20/01; "2001: Judiciary's Major Turning Point," *The Herald*, 1/8/02; "The Law Society of Zimbabwe Attacks Supreme Court Judgements," *Daily News*, 4/17/2002; "ZANU-PF's Final Blow on Judiciary?" *Financial Gazette*, 11/20/02.

39. S. Chan (see note 35), p. 167. The ideological premise of the "indigenization" process is further confirmed by the fact that the departure of white judges has not ended government's battle with the judiciary. The first month of 2004 saw two separate incidents of High Court judges not just recusing themselves from cases after political interference but also fleeing the country. See "Judge Majuru Quits," *Herald*, 1/29/04; "Another Judge Flees," *Zimbabwe Standard*, 1/02/04.

40. The alien origins of the Constitution have also been explicitly recognized by opposition figures. B. Kagoro, Keynote Address at *Britain-Zimbabwe Society Open Forum on Zimbabwe and South Africa* at SOAS, University of London, February 28, 2004. A broad coalition of civic groupings had formed the National Constitutional Assembly that drafted a Constitution as an alternative to that suggested by the government. This proposed reducing executive powers and increasing guarantees of civil liberties, (gender and other) indices of equality, etc. For more on this, see S. Chan (see note 35), p. 143; A. Hammar and B. Raftopoulos, "Zimbabwe's Unfinished Business" in A. Hammar, B. Raftopoulos, and S. Jensen (eds.) *Zimbabwe's Unfinished Business: Rethinking Land, State, and Nation in the Context of Crisis* (Harare: Weaver Press, 2003), pp. 1-41.

41. S. Chan (see note 35), p. 167.

42. Zimbabwe Human Rights NGO Forum, *Gender and Constitutional Issues: Special Report 2*, January 2001, p. 7. Available at: www.hrforum.zim.com.

43. For discussion of this, see B. Klugman (see note 7), pp. 145-173.

44. Its 1980 election manifesto listed 13 Fundamental Rights and Freedoms. Ranked at number eight was the right of women to equality with men "in all spheres of political, economic, cultural, and family life," based on the principles of equal pay for equal work and free choice of partner for both parties to a marriage." See Zimbabwe Human Rights NGO Forum (see note 42), p. 5.

45. *Magaya v. Magaya* SC 1999(1) ZLR 100 (S). As a woman living under customary law, Venia Magaya's father nominally owned the property that she had accumulated. On his death, she claimed that property as the eldest child (of the first wife). But her claim was overruled in favor of a younger brother (from a second wife) who had had no role at all in its accumulation. See Women and Law in Southern Africa Research and Educational Trust (WLSA), *Venia Magaya's Sacrifice: A Case of Custom Gone Awry* (Harare: WLSA, 2001).

46. See D. Bigge and A. von Briesen, "Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in *Magaya v. Magaya*," *Harvard Human Rights Journal* 13 (2000): pp. 289-313.

47. S. M. Jacobs and T. Howard, "Women in Zimbabwe: Stated Policy and State Action" in H. Afshar (ed.) *Women, State, and Ideology: Studies from Africa and Asia* (London: Macmillan, 1987), pp. 39-42.

48. See O. C. Phillips 1999 (see note 6), p. 238. See also L. A. Jackson,

"Friday the 13th University of Zimbabwe Mini-skirt Saga," *Southern Africa Political and Economic Monthly* December 1992/January 1993: pp. 25-26.

49. G. Seidman, "Women in Zimbabwe: Post-Independence Struggles," *Feminist Studies* 10/3 (1984): p. 432. ZANU-PF had previously claimed that its commodification and inflation had changed *lobola* from a traditional bond between lineage groups, to a capitalist transaction between men. But when discussion arose around its abolition, the reaction of traditional patriarchs was such that ZANU-PF defended *lobola* as "part of the national heritage, an essential element of stable social relations," which should resist "western feminism, ... a new form of cultural imperialism." Seidman, p. 432.

50. The proposed "foreignness" of homosexuals becomes most evident in the parliamentary debates, though the clearest example was that given by M. P. Anias Chigwedere (see note 3).

51. For a full discussion of the context surrounding the emergence of the "gay issue" at the time of the resulting parliamentary debates on "The Evil and Iniquitous Practice of Homosexuality and Lesbianism," and the contention that Mugabe was actively importing not just homophobia, but also the hetero/homosexual binary into Zimbabwean culture. See O. C. Phillips 1997 and 2000 (see note 6).

52. President Mugabe in an address to ZANU-PF Women's League, 8/11/95, quoted in *The Herald*, 8/12/95.

53. "We have our own culture and we must rededicate ourselves to our traditional values that make us human beings," quoted in *The Citizen*, 8/12/95.

54. However, it should be noted that this is a highly instrumental use of the *ubuntu* concept, as this assertion of culture as exclusively heterosexual, is predicated on the *a priori* concept of a binary division of hetero/homosexuality. This intellectual notion of a "binary sexuality" fixed within individuals is far from the integrated human potential of the *ubuntu* concept, but is a distinctly western European polarization of individual erotic desire as homo/heterosexual, initially popularized by European sexologists in the late 19th Century. See J. Weeks, *Sex, Politics, and Society, the Regulation of Sexuality since 1800* (Harlow: Longman, 1989). What's more, Mugabe claims only one part of this binary (homosexual) to be a definitive signifier of cultural imperialism, when it is actually impossible to define the exclusive heterosexual without reference to the homosexual. His reliance on this particular binary division is itself arguably an indication of successful cultural imperialism and a manifestation of the colonial imprint of primal sovereignty. For further discussion of this question of *ubuntu* and the homo/heterosexual binary, see O. C. Phillips (note 1), pp. 157-160.

55. Justice Yvonne Mokgoro, who sits in the South African Constitutional Court, has derided notions of a categorical definition of *ubuntu* and suggested that "any attempt to define *ubuntu* is merely a simplification of a more expansive, flexible and philosophically accommodative idea." See Y. Mokgoro, "Ubuntu and the Law in South Africa," *Buffalo Human Rights Law Review* 4 (1998): pp. 15-23.

56. S. Jagwanth and C. Murray (see note 21), p. 294.
57. *Amod v. Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA). *Moseneke and Others v. Master of the High Court* 2001 (2) BCLR 103 (CC) declared s.23(7)(a) of the Black Administration Act 38 of 1927 to be invalid. In doing so, it brought inheritance under customary law out of segregated administration and into the purview of all courts up to and including the Constitutional Court, thereby making it similarly bound by Constitutional decisions. The quote is from *Moseneke*, para 30.
58. R. Spitz and M. Chaskalson (see note 24).
59. Equality legislation of direct application to women includes the Prevention of Family Violence Act (Act 133 of 1993), the Choice on Termination of Pregnancy Act (Act 92 of 1996), the Employment Equity Act (Act 55 of 1998), the Maintenance Act (Act 99 of 1998), and the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000). For discussion of these see S. Jagwanth and C. Murray (see note 21), pp. 268-273 and M. Van Zyl (see note 5), pp. 164-166.
60. Judgments affirming formal rights of equality for same-sex couples include *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998(12)BCLR 1517; *Satchwell v. President of Republic of SA* CCT45/2001; *Du Toit v Anor v. Min of Welfare and Population Development* CCT40/2001; *J v B v. Director General, Dept of Home Affairs* CCT46/2002. For further discussion, see M. Van Zyl (see note 5), pp. 166-168.
61. *S v. Jordan* 2002 (11) BCLR 1117 (SC).
62. The minority opinion suggested that the majority decision undervalued the material context and ignored the integral parts played by gender and economics in the relations of exchange that constitute sex work. The minority decision also pointed out that this approach in effect made the prostitute into the primary offender, thereby reinforcing sexual stereotyping and applying double standards whereby men are expected to be active sexual agents and women are not.
63. Carole Vance and Alice Miller have put forward the suggestion that claims to human rights tend to rely on narratives that invoke representations of innocence and victimization, making claims to sexual rights particularly difficult. It is clear that the ideal candidate for a rights "test case" is someone whose "innocence" is indisputable, whose situation is beyond reproach. Panel on "Sexuality and Rights: Questions, Challenges, and Ways Forward," *16th World Congress of Sexology*, Havana, Cuba, March 10-14, 2003. Narratives of commercial sex are inherently lacking in innocence. This makes it very difficult to represent the parties involved as "innocent victims" unless one can show a level of compulsion.
64. G. S. Rubin (see note 8).
65. S. Jagwanth and C. Murray (see note 21), p. 291.
66. M. Van Zyl (see note 5), p. 161.
67. This policy was enforced with such vehemence that it led to the ejection of the Greater Nelspruit Rape Intervention Project (GRIP) from the Rob Ferreira and Temba hospitals because they were supplying the drugs AZT and 3TC to rape survivors.
68. The "dissident" position is one that suggests that factors such as

promiscuous heterosexual activity, sexually transmitted diseases, illicit drug use, poverty, malnutrition, and AZT (Retrovir) are responsible for symptoms "incorrectly" identified as the AIDS pandemic. However, the defining tenet of the "dissident" position is that HIV is a harmless virus and that it does not cause AIDS. The best-known proponent of this position is retrovirologist Peter Duesburg. Further information on this topic is available at: www2.niaid.nih.gov/newsroom/focuson/hiv00/default.htm and also at: www.tac.org.za

69. I am grateful to Alice Miller for this suggestion.

70. See A. V. Akeroyd, "Coercion, Constraints, and 'Cultural Entrapments: A Further Look at Gendered and Occupational Factors Pertinent to the Transmission of HIV in Africa;" E. Kalipeni, S. Craddock, and J. Ghosh, "Mapping the AIDS Pandemic in Eastern and Southern Africa: A Critical Overview;" and I. Susser and Z. Stein, "Culture, Sexuality and Women's Agency in the Prevention of HIV/AIDS in Southern Africa;" all in E. Kalipeni, S. Craddock, J. Oppong and J. Ghosh (eds.) *HIV/AIDS in Africa: Beyond Epidemiology* (Oxford: Blackwell Publishing, 2003), pp. 58-143.

71. On December 14, 2001, Justice Chris Botha of the Pretoria High Court found in favor of the Treatment Action Campaign, the Children's Rights Centre, and pediatricians represented by Dr. Haroon Saloojee of Chris Hani Baragwanath and against the Minister of Health and government on the provision of anti-retrovirals to prevent mother-to-child HIV transmission, describing a countrywide MTCT prevention program as "an ineluctable obligation of the State." The government appealed against the decision to the Constitutional Court but lost the appeal and was obliged to implement a national program (*Minister of Health v. Treatment Action Campaign* (2) 2002 (5) SA 721 (CC)). Similarly, in August 2003, the government eventually made a commitment to a national program deploying anti-retrovirals in the treatment of all who need them; this had been achieved through vigorous political campaigning, backed up by litigation, the threat of litigation, and a reliance on the socio-economic rights enshrined in the Constitution and supported in the Constitutional Court. For more on this, see www.tac.org.za

72. M. Van Zyl (see note 5), p. 164.

73. South Africa has initiated law and criminal justice reforms and addressed police training with the intention of increasing women's access to effective remedies in cases of rape, sexual abuse, and domestic violence. It has also begun to implement policies to improve standards of medical and psychological care and treatment, as well as the forensic medical examination of survivors of sexual violence. However, it is worth noting the enormous pressure that was necessary before the government agreed to allow and implement a policy of voluntary testing, counseling, and provision of post-exposure prophylaxis for rape survivors at risk of HIV infection (see note 68).

74. In January 2002, a respected Zimbabwean human rights organization reported a new pattern of sexual violence after interviewing victims who were forced to rape other victims at the instigation of the militia in Mashonaland Central Province (Statement on Sexual Torture, Amani Trust, January 2002). "By the end of March 2002, the Amani Trust documented further sexual assaults by militia, including incidents in which

men were forced by militia to commit sexual assault on one another. ... Another human rights organization, the Zimbabwe Women Lawyers' Association, estimates that some 1,000 women are being held in militia camps. In Masvingo, newspaper accounts describe farm workers being beaten and forced to watch their wives raped by militia because they may have voted for the opposition." "Assault and Sexual Violence by Militia," Amnesty International Press Release, 4/5/02.

75. For a discussion of a similar dynamic in Latin America see B. Shepard, "The 'Double Discourse' on Sexual Rights and Reproductive Rights in Latin America: The Chasm between Public Policy and Private Actions," *Health and Human Rights* 4/2 (2000): pp. 111-143.