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The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination

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NOTES

The Emperor Is Still Naked: Why the Protocol on the Rights of Women in Africa Leaves Women Exposed to More Discrimination

ABSTRACT

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa entered into force in 2005. Met with much celebration for the protection it would provide African women, the Protocol was heralded as one of the most forward-looking human rights instruments. Now, fifteen years after it was conceived, the Protocol deserves a full assessment of the issues that it has faced in accession and will face in implementation. This Note analyzes the way in which the Protocol was developed and the effect the Protocol's language will have on its ability to achieve its object and purpose. This Note contends that certain language is too narrow, creating an over-specificity that will deter necessary countries from joining. However, this Note also asserts that certain aspirational provisions of the Protocol are overly broad, creating legal obligations that States Parties will be unable to meet. Ultimately, African countries with questionable women's rights records will refuse to sign—States Parties will either be unable or unwilling to protect women to the extent required, leaving women in the same position as before. Worse yet, some States Parties may implement extreme measures that could increasingly disadvantage women over time. By relying on Western ideas of women's rights and without explicitly determining how or if customary law will be considered in implementation, the Protocol faces serious obstacles on the domestic level. This Note concludes by asserting that unless States Parties consider a more grassroots, community-oriented approach to implementing the Protocol, the instrument's requirements will remain unrealized, and women in Africa will remain marginalized.

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An emperor who cared too much for clothes hired two men who promised him the finest suit from the most beautiful cloth. This cloth, they told him, was magical and invisible to anyone who was either ignorant or not fit for his position. The Emperor, nervous because he could not see the cloth himself, sent his ministers to view it. They too saw nothing, yet praised the cloth. When the swindlers reported that the suit had been fashioned, the Emperor allowed himself to be dressed in their creation for a procession through town. During the procession, the crowd "oohed" and "aahed," until a small child cried out, "He has nothing on!" The crowd realized the child was telling the truth and began laughing. The Emperor realized that the people were right as well, but could not admit it. He thought it better to continue the procession under the illusion that anyone who could not see his clothes was either ignorant or incompetent. So he sat stiffly on his carriage, while behind him a page held his imaginary mantle.¹

I. INTRODUCTION

The past few decades have shown an increasing appreciation for women's rights around the world, particularly in Africa.² The most recent indication of change in Africa was the 2003 adoption of an additional protocol to the African Charter on Human and Peoples' Rights (Banjul Charter).³ Forty-three African states have signed this human rights instrument, the Protocol on the Rights of Women in Africa (Protocol), and, as recently as February 28, 2008, twenty-three countries have ratified the instrument.⁴ While the Protocol initially

1. Hans Christian Andersen, *The Emperor's New Clothes*, in FAIRY TALES FROM HANS CHRISTIAN ANDERSON, 215, 215–20 (Ernest Rhys ed., Turnbull and Spears 3rd ed. 1907) (1837), available at <http://books.google.com/books?id=bCwtAAAAAAJ&printsec=frontcover&dq=Tales+of+Hans+Christian+Andersen#PPP12,M1>.

2. Rachel Rebouché, *Labor, Land and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235, 235 (2006) (citing Vincent O. Nmeielle, *A Decade in Human Rights Law: Development of the African Human Rights System in the Last Decade*, 11 HUM. RTS. BRIEF 6, 8 (2004)).

3. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force Oct. 21, 1986, available at <http://www1.umn.edu/humanrts/instreet/zlafchar.htm> [hereinafter Banjul Charter]. The Banjul Charter has been ratified by all fifty-three member states of the Organization of African Unity, now the African Union. African Union, List of Countries Which Have Signed, Ratified/Accessed to the African Union Convention on African Charter on Human and People's Rights, <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (last visited Mar. 25, 2009).

4. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, OAU Doc. CAB/LEG/66.6, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> [hereinafter Protocol]. For a list of countries who have signed, ratified, and deposited the Protocol, see BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL ON WOMEN'S RIGHTS IN AFRICA app. 3 (Roselynn Musa, Faiza Jama Mohammed & Firoze Manji eds., 2006) [hereinafter BREATHING LIFE]; African Union, List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,

received international approbation for the protections it would offer women, few have carefully examined if it has actually succeeded.

The Protocol was designed to protect women in a more comprehensive manner than pre-existing instruments.⁵ Despite an international effort to eradicate all forms of discrimination against women, the African Union recognized that women were still excluded from legal, social, economic, and cultural processes.⁶ The Protocol was thus developed to protect African women from forms of discrimination particular to Africa.⁷ Drafters recognized the unique conflict of laws that arose when courts and legislatures alike had to decide between the application of international and domestic statutory law and customary tribal law.⁸ When opened to signature in 2003, the international community praised the Protocol as the most progressive tool for protecting women's rights to date.⁹ It guaranteed rights never before ensured in the international community, such as the right to an abortion and HIV services.¹⁰ African governments, non-governmental organizations (NGOs), and international human rights groups touted the Protocol as a milestone for women in Africa and worldwide.

However, the Protocol's aspirational language, coupled with its legally binding nature, poses difficulties for States Parties. Limited budgets and legal systems that waffle indeterminately between respecting statutory obligations and cultural traditions constrain many countries. Moreover, in the international context, the creation of protocols has become an iterative process—an academic legal exercise of sorts.¹¹ Furthermore, the Protocol is both overbroad in some sections and too narrow in scope in other sections. It guarantees rights that even the wealthiest of countries could not ensure and specifically articulates measures that must be followed, regardless of the context.¹²

Unfortunately, these supposedly positive steps taken in the Protocol may ultimately have a negative impact on women in Africa. As States Parties realize that the ambitious rights guaranteed in the Protocol are largely unattainable due to their countries' current

<http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf> (last visited Mar. 22, 2009) [hereinafter List of Protocol Signatories].

5. Protocol, *supra* note 4, pmb1.

6. *Id.*

7. *Id.*

8. *See infra* Part III.B.

9. Anne Gathumbi, *Making Reproductive Health Rights a Reality*, PAMBAZUKA NEWS, Jan. 20, 2005, <http://www.pambazuka.org/en/category/features/26455>.

10. Protocol, *supra* note 4, art. 14.

11. Interview with Michael A. Newton, Professor of Law, Vanderbilt University Law School, in Nashville, Tenn. (Nov. 13, 2007).

12. *See* Rebouché, *supra* note 2, at 256 (“[T]he Protocol inadvertently replicates the mistakes of its predecessors: powerful words without functional meaning.”).

conditions, they will abandon their efforts to meet their obligations. Permitting an international obligation to go unmet may, over time, create evidence of an acceptable customary international norm or state practice that ultimately makes such illegal behavior legally acceptable.¹³ Even worse, in an effort to properly and immediately implement the language of the Protocol, many countries have adopted female quotas for government positions.¹⁴ Actions like these create a protected status for women, which might be beneficial for a short period but over time may become limiting, stigmatizing, and contrary to the progress needed for women's rights in Africa.

At the end of twenty years of development, accession, and implementation, scholars and policymakers alike are left with several questions: Should the Protocol be considered a success? Despite overwhelming support from internationally active NGOs, will the Protocol actually help women now and in the future? Or, upon closer inspection, will the women's rights movement recognize that, indeed, the Protocol is naked—dressed only in empty promises that have yet to materialize? Most importantly, is it too late for the Protocol and the women it was designed to protect? Has the Protocol already paraded unadorned into the international arena to the chagrin of its drafters? This Note aims to answer these questions by critically analyzing the key features of the Protocol that may contribute to its ineffectiveness and the instrument's potential for marginalizing women in the future.

Part II details the interaction between the various African instruments and bodies as related to the Protocol. This section assesses why international instruments like the Convention on the Elimination of All Forms of Discrimination (CEDAW) and the Banjul Charter were found to be ineffectual and why the Protocol was viewed as a necessary addition to the growing body of international human rights law. Part II briefly outlines the development of the Protocol to its current status in Africa and the international community. Part III analyzes the basic weaknesses of the Protocol—first by looking at the actual language of several articles and then by exploring the problems it has encountered in the course of implementation. Applying a framework that draws from statutory, customary, and living law framework, Part III explains how the Protocol not only leaves women vulnerable to continued marginalization but also how

13. This concept is explained further later in the text. *See infra* notes 183–88 and accompanying text.

14. *See, e.g.,* Shirley Randell, *Report from Rwanda: Rebuilding in the Wake of Catastrophe*, MAZI: THE COMMUNICATION FOR SOCIAL CHANGE REPORT, Nov. 2008, <http://www.communicationforsocialchange.org/mazi-articles.php?id=388> (“Rwanda is the first African country to meet the 50 percent quota as stipulated in the African Union’s *Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa*.”)

it may enable a new, more permanent form of de jure discrimination. Finally, Part IV proposes possible solutions to prevent the Protocol from fading into history as a futile effort to protect women or worse—from becoming a tool of inequity. These solutions range from redrafting local laws to be gender-neutral to taking a more grass-roots approach of first surveying people and then implementing necessary changes to the law and custom.

II. THE EMPEROR'S OLD WARDROBE: THE PROTOCOL AND ITS ENTOURAGE

The Protocol must rely upon and interact with various international African bodies and documents. It is important to know who developed it, why it was developed, and in what context it is interpreted and enforced. Understanding the relationship between these bodies and the Protocol will better explain why the Protocol as designed is so ill-fated.

A. *The African Union*

The African Union (AU) is a supranational organization consisting of fifty-three African states.¹⁵ Established in 2001 under the Constitutive Act, the AU was formed as a successor to the amalgamated African Economic Community (AEC) and the Organization of African Unity (OAU).¹⁶ The purpose of the AU is to help secure African democracy, human rights, and a sustainable economy—largely by bringing an end to intra-African conflict.¹⁷ The AU is the governing international body in Africa and the progenitor of all Africa-specific international agreements since 2001.¹⁸

B. *The African Charter on Human and Peoples' Rights*

The Banjul Charter is an international human rights instrument developed for the purposes of promoting and protecting human rights

15. For a list of all member states, see African Union, Member States, <http://www.africa-union.org/root/au/memberstates/map.htm> (last visited Mar. 25, 2009).

16. Constitutive Act of the African Union, July 11, 2000, OAU Doc. CAB/LEG/23.15, available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm [hereinafter Constitutive Act].

17. See generally 1 AFRICAN UNION COMM'N, STRATEGIC PLAN OF THE AFRICAN UNION COMMISSION: VISION AND MISSION OF THE AFRICAN UNION (2004), available at <http://www.africa-union.org/root/au/AboutAu/Vision/Volume1.pdf>.

18. See African Union, List of Treaties, Conventions, Protocols, Charters, <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (last visited Mar. 25, 2009) (cataloguing diplomatic agreements of the African Union).

in Africa.¹⁹ In 1979, under the auspices of the OAU, the Assembly of Heads of State and Government adopted a decision calling for the creation of a committee of experts to draft an African human rights charter.²⁰ Similar to those that already existed in Europe and the Americas, the Banjul Charter sought to address human rights from a more Afrocentric perspective.²¹ The Banjul Charter came into effect on October 21, 1986.²² The African Commission on Human and Peoples' Rights, now seated in Banjul, Gambia, oversees and interprets the Charter.²³ Although the Banjul Charter was designed to guarantee the rights of both men and women,²⁴ women's rights are only mentioned explicitly in one article.²⁵ For this reason and others, there was a perceived need for a protocol to the Banjul Charter which specifically dealt with women's rights.²⁶

C. *The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights*

The African Commission on Human and Peoples' Rights (the Commission) is a quasi-judicial body established under the Banjul Charter.²⁷ The Commission, vested with the responsibility of monitoring compliance with the Banjul Charter, began its work in 1987.²⁸ With one of the broadest mandates for a regional human rights organization, the Commission has three areas of responsibility: promoting human and peoples' rights, protecting these rights, and

19. FATSIAH OUGUERGOUZ, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA* 432 (2003); see WHO, *HEALTH AND HUMAN RIGHTS: AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 1*, http://www.who.int/hhr/Human_and_Peoples_rights.pdf (last visited Mar. 25, 2009) [hereinafter WHO REPORT].

20. Curtis F.J. Doebbler, *Complex Ambiguity: The Relationship Between the African Commission on Human and Peoples' Rights and Other African Union Initiatives Affecting Respect for Human Rights*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 7, 10–11 (2003).

21. *Id.* at 11.

22. See *supra* note 3 and accompanying text.

23. Banjul Charter, *supra* note 3, art. 45; African Commission on Human and Peoples' Rights, *History*, http://www.achpr.org/english/_info/history_en.html (last visited Mar. 25, 2009); African Commission on Human and Peoples' Rights, *Mandate*, http://www.achpr.org/english/_info/mandate_en.html (last visited Mar. 25, 2009).

24. Banjul Charter, *supra* note 3, arts. 2–3.

25. *Id.* art. 18(3).

26. Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, 50 *J. AFR. L.* 72, 72 (2006); Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women*, 1 *AFR. HUM. RTS. L.J.* 40, 41 (2001).

27. Banjul Charter, *supra* note 3, arts. 30–31, 41.

28. *Id.*

interpreting the Banjul Charter.²⁹ The Commission reports to the Assembly of Heads of State and Government of the AU.³⁰

A protocol to the Banjul Charter adopted in 1998 created the African Court on Human and Peoples' Rights (African Court).³¹ The African Court, established in 2006, supplemented the work of the Commission.³² It is a regional court that has jurisdiction over AU states' compliance with the Banjul Charter.³³ The court is in the process of merging with the African Court of Justice following a decision by member states at a June 2004 AU Summit.³⁴ Until the African Court begins to hear cases, the Commission interprets and adjudicates the Protocol, but once the African Court is in session, it will assume the duties of interpretation and enforcement.³⁵

D. *Other International Human Rights Instruments*

While the context provided by the Banjul Charter primarily governs the Protocol's interpretation, other international instruments also inform its reading.³⁶ Knowledge of these other treaties is important not only because of the additional obligations they may impose but also because the Protocol was, in many ways, a response to the perceived ineffectiveness or incompleteness of these documents.³⁷ Instruments that existed before the Banjul Charter and the Protocol fall into two categories: soft law (non-legally-binding

29. *Id.* art. 45; see Doebbler, *supra* note 20, at 12. In pursuit of these goals, the Commission is mandated to "collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments." Banjul Charter, *supra* note 3, art. 45.

30. Banjul Charter, *supra* note 3, arts. 53–54.

31. 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. No. OAU/LEG/EXP/AFCHPR/PROT (III), available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> [hereinafter African Court Protocol].

32. *Id.* arts. 1–2.

33. *Id.* art. 3. See generally African International Courts and Tribunals, The African Court on Human and Peoples' Rights, http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last visited Mar. 25, 2009) (providing a background on the creation of the court, its purpose and its predecessors).

34. See African International Courts and Tribunals, The African Court on Human and Peoples' Rights, http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last visited Mar. 25, 2009).

35. Protocol, *supra* note 4, arts. 27, 32.

36. *Id.* pmb1.; African Court Protocol, *supra* note 31, art. 7.

37. African Court Protocol, *supra* note 31, art. 7; Banda, *supra* note 26, at 27; African International Courts and Tribunals, *supra* note 34; see also Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT'L & COMP. L.Q. 193, 202–03 (2006) (discussing the explicit provisions in the Protocol that were not covered by previous human rights instruments).

or aspirational) and hard law (legally binding).³⁸ Generally, these instruments include the United Nations Charter, the Universal Declaration of Human Rights (UDHR) of 1948,³⁹ the International Covenant on Civil and Political Rights (ICCPR) of 1966,⁴⁰ the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966,⁴¹ and CEDAW.⁴²

Hard law instruments generally refer to treaties or international agreements that create legally binding obligations for the States Parties.⁴³ Treaties like the ICCPR, CEDAW, and the Banjul Charter impose affirmative duties, requiring the enforcement of their provisions.⁴⁴ Soft law instruments, on the other hand, are quasi-legal agreements that are only “potentially [legally] binding.”⁴⁵ Although not generally regarded as binding, soft law instruments may have “strong moral force and are . . . respected, particularly those in which a great majority of States participated in their making.”⁴⁶ Some treaties, like the UDHR and ICESCR are designed to be hard law instruments but, due to their more aspirational provisions, are regarded as soft law by parts of the international community.⁴⁷ In order to understand the necessity of the Protocol, it is important to “know why the pre-existing instruments [containing hard or soft law] . . . failed to achieve the [desired] standard of protection of

38. Kaniye S.A. Ebeku, *A New Dawn for African Women? Prospects of Africa's Protocol on Women's Rights*, 16 SRI LANKA J. INT'L L. 83, 97 (2004).

39. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR].

40. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

41. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Annex, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

42. Convention on Elimination of All Forms of Discrimination Against Women of 1979, G.A. Res. 34/180, Annex, at 194, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW].

43. Ebeku, *supra* note 38, at 98.

44. *Id.* at 98–99.

45. ROBERTO ANDORNO, *THE INVALUABLE ROLE OF SOFT LAW IN THE DEVELOPMENT OF UNIVERSAL NORMS IN BIOETHICS* 1 (2007), <http://www.unesco.de/fileadmin/pdf/1507.de.pdf>; Ebeku, *supra* note 38, at 107.

46. Ebeku, *supra* note 38, at 107–08.

47. See, e.g., Katherine Cox, *The Inevitability of Nimble Fingers? Law, Development, and Child Labor*, 32 VAND. J. TRANSNAT'L L. 115, 138 (1999) (referring to the ICESCR as soft law); Jared M. Genser & Margaret K. Winterkorn-Meikle, *The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and Practice*, 39 COLUM. HUM. RTS. L. REV. 687, 747 (2008) (referring to the UDHR as soft law).

women's rights."⁴⁸ To that end, few of these documents addressed women outside the family context.⁴⁹

Specifically, the Banjul Charter and CEDAW are the most relevant to the shape and interpretation of the Protocol, as the Protocol responded primarily to the perceived deficiencies of each.⁵⁰ Many African legal instruments failed to address women's rights entirely.⁵¹ However, the Banjul Charter, created with human rights in mind, mentions women only twice: Article 2 included sex in a broad non-discrimination clause and Article 18(3) required states to eliminate "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."⁵² Because these articles of the Banjul Charter guaranteed the rights of both men and women, there must have been strong reasons to subsequently create a women-specific protocol.⁵³ In particular, NGOs and States Parties alike realized that these instruments did not explicitly address commonplace practices like female genital mutilation (FGM), forced marriages, or *lobolo* (bride price) and, as a result, failed to protect women from harm adequately.⁵⁴

CEDAW, which specifically aimed to protect women from discrimination, similarly failed to meet the needs of women in the African context.⁵⁵ CEDAW was diluted by reservations.⁵⁶ In total,

48. Ebeku, *supra* note 38, at 130.

49. See, e.g., Banjul Charter, *supra* note 3, art. 18; ICCPR, *supra* note 40, art. 23; UDHR, *supra* note 39, art. 16.

50. Protocol, *supra* note 4, pmb1.; Banda, *supra* note 26, at 72.

51. Rachel Murray, *Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 253, 253 (Doris Buss & Ambreena Manji eds., 2005); Rebouché, *supra* note 2, at 236. For instance, the foundational document of the OAU, the 1963 Charter of the Organization of African Unity, never references women or women's rights. See generally Charter of the Organization of African Unity, May 25, 1963, 47 U.N.T.S. 39, available at http://www1.umn.edu/humanrts/africa/OAU_Charter_1993.html.

52. Banjul Charter, *supra* note 3, arts. 2, 18(3); Rebouché, *supra* note 2, at 236–37.

53. Banjul Charter, *supra* note 3, art. 2; Nsibirwa, *supra* note 26, at 40.

54. Rebouché, *supra* note 2, at 238 ("The African Charter [as the] sole juridical instrument at the regional level in charge of promotion and protection of human rights does not offer enough [] specific guarantees as regards women's rights in Africa." (quoting Murray, *supra* note 51, at 263)).

55. See generally CEDAW, *supra* note 42.

56. The Vienna Convention on the Law of Treaties (VCLT) defines a reservation as a unilateral statement made by a state "whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(d), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. For the most current list of reservations taken to CEDAW, see CEDAW, 14th mtg., Provisional Agenda Item 6, U.N. Doc. CEDAW/SP/2006/2 (2006), available at <http://daccess-ods.un.org/TMP/8269846.html> [hereinafter CEDAW Reservations].

twenty-five States Parties made a total of sixty-eight substantive reservations.⁵⁷ To date, it is one of the most heavily reserved of all international human rights instruments.⁵⁸ Although these reservations technically do not undermine the object and purpose of the treaty,⁵⁹ the numerous reservations based on Islamic law and contravening domestic law make it impossible for the women's rights movement to catalyze a coherent realization of women's rights in all countries.

E. *The Development of the Protocol*

Despite the adoption of many legal instruments at the international level, particularly CEDAW and the Banjul Charter, more was needed to protect women's rights.⁶⁰ "African States . . . realised that human rights instruments at the international level do not always address the unique problems of the continent. Africa has at times had to supplement the protection mechanisms at the international level so that they meet the needs of its own unique conditions."⁶¹ Although African countries have participated in the drafting of international rights instruments,⁶² the continent has been excluded largely from "norm-making within the international framework . . . [as] African perspectives are either denigrated or ignored."⁶³

The Commission thus recognized the need for an Afrocentric, women-specific document.⁶⁴ Working together with Women in Law and Development in Africa (WiLDAF), the Commission organized a seminar on women's rights in 1995.⁶⁵ The Commission concluded that an additional protocol to the Charter should be drafted to address women's rights.⁶⁶ In July 1995, the OAU Assembly of Heads of State and Government agreed on the necessity of a protocol to the Charter.⁶⁷ Appointed experts, working together with African NGOs,

57. See CEDAW Reservations, *supra* note 56, at 6.

58. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 644 (1990).

59. See VCLT, *supra* note 56, art. 18.

60. Ebeku, *supra* note 38, at 84; Darnace Torou, *The Struggle Towards Human Rights in Africa: Success or Failure?* pt. IV (Nov. 2001), <http://www.peace.ca/afstruggle/humanrights.htm>.

61. Nsibirwa, *supra* note 26, at 40.

62. James C.N. Paul, *Participatory Approaches to Human Rights in Sub-Saharan Africa*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* 213, 216 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

63. Fareda Banda, *Sex Gender and International Law*, 100 AM. SOC'Y INT'L L. PROC. 243, 243 (2006) (referring to studies done by Rachel Murray).

64. Protocol, *supra* note 4, pml.

65. Nsibirwa, *supra* note 26, at 41.

66. *Id.*

67. *Id.*

drafted the protocol.⁶⁸ In 1998, the Commission approved the Draft Protocol to the Charter (Kigali Draft) and sent it to the OAU for further action.⁶⁹

While the Kigali Draft was being produced, other developments in the area of women's rights were underway, as the Inter-African Committee on Harmful Traditional Practices Affecting the Health of Women and Children (IAC) and the Women's Unit of the OAU together developed the Draft OAU Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Human Rights of Women and Girls (OAU Draft).⁷⁰ "In order to avoid duplication, the OAU suggested that there should be closer collaboration between the African Commission and the Women's Unit."⁷¹ The Women's Unit, together with the Legal Division of the OAU, made suggestions to improve the Kigali Draft.⁷² OAU Legal Counsel suggested that government experts should convene to further discuss the instrument before the OAU forwarded it to the Council of Ministers and the Summit of Heads of State and Government.⁷³

In September 2000, an "integrated" draft was complete.⁷⁴ The final draft of the Protocol was a more thorough document than the Kigali Draft or the OAU Draft and addressed the concerns raised in both.⁷⁵ Many thought that the protections guaranteed to women in the Protocol went further than CEDAW or any other international human rights instrument.⁷⁶ Then the waiting period began, as governments needed time to study the document.⁷⁷ Moreover, the Protocol also needed to be presented to the OAU.⁷⁸ On July 11, 2003, at the second ordinary summit in Maputo, Mozambique, the African heads of state and government adopted the Protocol.⁷⁹ However, in April 2004, after eight years of drafting, negotiating, and promoting the Protocol, only one country, the Comoros, had ratified it—nearly

68. *Id.*

69. *Id.* at 41–42; see African Commission on Human and Peoples' Rights, 26th Ord. Sess., Nov. 1–15, 1999, *Final Communiqué*, ¶ 16 (Nov. 15, 1999), available at <http://www1.umn.edu/humanrts/africa/achpr26f.html>.

70. Nsibirwa, *supra* note 26, at 42.

71. *Id.*

72. *Id.*

73. *Id.*

74. See Protocol, *supra* note 4. For strategic and substantive reasons, the Draft OAU Convention was integrated into the Draft Kigali Protocol. Nsibirwa, *supra* note 26, at 42.

75. Nsibirwa, *supra* note 26, at 42. OAU had 27 articles (although final draft has 32 articles); Kigali Draft had 23 and OAU Draft had 13 articles. Protocol, *supra* note 4; Nsibirwa, *supra* note 26, at 42 n.18.

76. See, e.g., Nsibirwa, *supra* note 26, at 42.

77. *Id.*

78. *Id.*

79. Faiza Jama Mohamed, *African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign*, in BREATHING LIFE, *supra* note 4, at 14–15.

one year after the instrument's adoption.⁸⁰ In an effort to increase support, the coalition Solidarity for African Women's Rights (SOAWR) was formed to encourage adoption of the Protocol.⁸¹

The Protocol's entry into force in November 2005 occasioned celebration.⁸² The Protocol was viewed as not "merely advancing the rights of women, but rather as advancing the interests of society in general," on the grounds that the whole of society could gain from a healthy and sustainable environment through the Protocol.⁸³ The Centre for Reproductive Rights described it as a landmark instrument.⁸⁴ Amnesty International referred to it as "a significant step in the efforts to promote and ensure respect for the rights of African women."⁸⁵ Despite the international accolades, the final document was considered more "cautious" than the predecessor

80. *Id.*

81. *Id.* at 15–16. As of March 2006, 20 organizations are active in SOAWR. Members of SOAWR include: African Centre for Democracy and Human Rights Studies (ACDHRS), African Women's Development and Communication Network (FEMNET), Akina Mama Wa Afrika, Association des Juristes Maliennes (AJM), Cellule de Coordination sur les Pratiques Traditionnelles Affectant la Santa des Femmes et des Enfants (CPTAFE), Coalition on Violence Against Women (COVAW), Equality Now, FAHAMU, Federation of Women Lawyers (FIDA-Kenya), Foundation for Community Development (FDC), Human Rights Law Service (HURILAWS), Inter-African Network for Women, Media, Gender and Development (FAMEDEV), Inter African Committee on Traditional Practices Affecting the Health of Women and Children (IAC), OXFAM GB, Sister Namibia, Union Nationale des Femmes de Djibouti (UNFD), University of Pretoria Centre for Human Rights, Voix des Femmes, Women's Rights Advancement and Protection Alternatives (WRAPA), and Women in Law and Development in Africa (WiLDAF). *Id.* at 16 n.1. SOAWR made use of multiple forms of communication, in addition to the traditional media, for its Protocol publicity campaign, including electronic newsletters, mobile phone text messages, and radio campaigns. *Id.* at 16–17. Other methods included an AU session on gender, "held during the opening of the third ordinary summit of the heads of state in July 2004," and the "Solemn Declaration on Gender Equality in Africa, whereby heads of state and government declared that they would ratify the Protocol by the end of 2004." *Id.* at 16–17. SOAWR also used the UN review of the Commission on the Status of Women in March 2005 (regarding progress made ten years after the Fourth World Conference on Women—Beijing 1995) as another opportunity for advocacy. *Id.*

82. Togo was the fifteenth ratification on October 26, 2005. Rebouché, *supra* note 2, at 235. The Protocol entered into force 30 days after its fifteenth ratification. Protocol, *supra* note 4, art. 29(1).

83. Nsibirwa, *supra* note 26, at 49.

84. Ebeku, *supra* note 38, at 85; see Rumbi Mabuwa, *Africa's New Protocol for Women's Rights: An Agenda for Action*, REPROD. FREEDOM NEWS (Ctr. for Reprod. Rts., New York, N.Y.), Sept. 2003, available at http://web.archive.org/web/20071007203950/http://www.reproductiverights.org/rfn_03_09_2.html#2 (praising the Protocol's "broad protections for women's human rights").

85. Ebeku, *supra* note 38, at 85; Press Release, Amnesty International, African Union: Adoption of the Protocol on the Rights of Women—Positive Steps Toward Combating Discrimination and Violence Against Women (July 21, 2003), available at <http://www.amnesty.org/en/library/asset/AFR01/007/2003/en/dom-AFR010072003en.html>.

drafts, possibly in order to “appeal to a wider African audience.”⁸⁶ Of course, this wider appeal meant the dilution of certain provisions, causing some to feel the new language may not have been as strong as necessary.⁸⁷ Today, twenty-three years after it was initially conceived, with the African Court on the cusp of hearing its first case, the Protocol faces problems not only in ratification but also in the implementation of its provisions.⁸⁸

III. FULLY CLOTHED OR STILL NAKED: WHAT THE PROTOCOL FAILS TO COVER

The AU, in adopting a treaty specifically concerning women, intended to reinforce the “message that women’s rights require priority attention in the protection of universal and inalienable rights.”⁸⁹ Some provisions, such as those addressing affirmative action, divorce, and inheritance rights, were already part of the laws of a few African countries.⁹⁰ Other provisions had never before been articulated in any international or regional human or women’s rights instrument. For instance, the Protocol is the first international human rights instrument to affirm a woman’s right to seek an abortion, “albeit limited to cases of rape, incest, or a threat to the mother’s or fetus’ health.”⁹¹

However, the Protocol faces obstacles beyond a lengthy drafting period.⁹² There are four broad issues that may dampen, if not frustrate, the goals of the Protocol. First, a protocol solely focused on

86. Ebeku, *supra* note 38, at 126 n.115. Even so, there are certain countries that still have not signed. See BREATHING LIFE, *supra* note 4, app. 3.

87. Ebeku, *supra* note 38, at 126 n.115.

88. See generally GEORGE MUKUNDI WACHIRA, AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS: TEN YEARS ON AND STILL NO JUSTICE (2008), available at <http://www.minorityrights.org/download.php?id=537> (discussing the lack of implementation of the Protocol and the resulting detrimental effect on justice).

89. Ebeku, *supra* note 38, at 83 (quoting the U.N. High Commissioner of Human Rights in a speech made on July 14, 2003).

90. For examples of laws and constitutions that embrace provisions, see the laws of Botswana, Kenya, Uganda and South Africa to start. See, e.g., UGANDA CONST. art. 33 (1995), available at <http://www.trybunal.gov.pl/constit/constitu/constit/uganda/uganda-e.htm>; Matrimonial Causes Act, (1941) Cap. § 8 (Kenya), available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php; Divorce Act 70 of 1979 (S. Afr.).

91. Banda, *supra* note 63, at 245; see Protocol, *supra* note 4, art. 14.

92. Although the drafting, negotiation and adoption period was long (approximately eight years), the ratification period was the shortest for any African human rights instrument. The Banjul Charter took five years to come into force (adopted in 1981, entered into force in 1986), the Protocol establishing the African Court took six years after adoption (adopted in 1998, entered into force in 2004), and the African Charter on the Rights and Welfare of the Child took nine years to come into force after it was adopted in 1990. Mohamed, *supra* note 79, at 15.

women may encounter problems that will not become apparent until much later. Making general human rights concerns specific to women may put women in a protected class that could gradually morph into a sheltered or stigmatized group. Moreover, the narrow language of certain provisions may be too limited to actually protect women from all the harmful practices the Protocol intends to proscribe.

The second broad concern is that the Protocol provides little guidance as to what form of law should govern the implementation, interpretation, and application of the articles within the domestic courts of the States Parties. That is, the Protocol draws no distinctions between statutory law, customary law, or living law.⁹³ This is particularly relevant because the application of one form of law over another could dramatically alter the result for the affected parties.⁹⁴

The third, and perhaps most basic, concern is that using a protocol rather than a stand-alone treaty or other instrument lacks the force necessary for handling human rights issues. If ratification and implementation of the Protocol fails, it sets a dangerous precedent for the enumerated rights to be ignored not only in practice but also, over time, in customary international law. Nevertheless, the overriding concern is not *when* or *if* the Protocol will be implemented, but *how* it will be implemented. Currently, there is a disturbing trend in regard to the manner in which States Parties have implemented some of the rights in the Protocol.⁹⁵ The women's rights movement will be limited and harmed in the future by practices including affirmative action and "quota-like" programs that are in place in various countries.⁹⁶

A. Targeting Women and Africa-Specific Practices

Although the Protocol as written may not be the perfect solution, it satisfied a clear need by explicitly addressing women's rights.⁹⁷

93. See generally Protocol, *supra* note 4.

94. For a more in depth discussion on the different types of law and their potential effect on African citizens, see *infra* Part III.B.

95. Irungu Houghton, *Reviewing the Protocol on the Rights of Women in Africa*, PAMBAZUKA NEWS, May 24, 2006, available at http://www.newsfromafrica.org/newsfromafrica/articles/art_10688.html.

96. Randell, *supra* note 14.

97. Women were, and continue to be, politically, financially and socially disadvantaged compared to their male counterparts. "[O]f the 1.9 million victims of conflict in sub-Saharan Africa in the 1990s, 63 per cent were women and children." Karoline Kemp, *General Situation of Women in Africa*, in BREATHING LIFE, *supra* note 4, at 3, 3. According to the United Nations Development Programme, women's share of parliamentary seats in sub-Saharan Africa was only 7.2 percent in 1990; in Northern Africa, women's share was only 2.6 percent in 1990. *Id.* at 4. Statistics from UNAIDS

However, many of the listed rights in the Protocol are ones that should be guaranteed to all individuals—not just women. For instance, Articles 10 and 11 provide for the Right to Peace and the Right to Protection in Armed Conflicts, respectively.⁹⁸ As written, there is nothing inherently unique about women that necessitates that a right be articulated *solely* for women, potentially at the expense of men. In addition, to be sure, other international treaties have guaranteed this right for all.⁹⁹ “On the whole, it is clear that the African Protocol on Women’s Rights is squarely or largely in line with pre-existing instruments on human rights generally and women’s rights in particular.”¹⁰⁰ An instrument that explicitly targets women does just that—it targets women. Creating a protected status for women both in time of peace and conflict may effectively lead to the view that women are in *need* of protection.¹⁰¹ Already stereotyped as the weaker, inferior sex, portraying women as needing protection in this manner may reinforce this negative image.¹⁰² In time, this status may limit the ability of women to participate in other meaningful ways. Regardless, the need for women’s rights to be clearly articulated may outweigh the risk associated with addressing women’s rights in a separate document, rather than solely within a general human rights document.

The level of specificity in the articles of the Protocol may also hurt women. Certain provisions of the Protocol include exceptionally detailed language.¹⁰³ Under the canon of construction *expressio unius est exclusio alterius*, it is understood that to express or include one thing in the language of a document implies the exclusion of others from coverage of the document or the reverse.¹⁰⁴ While it was important to tackle harmful practices particular to Africa, by including so much detail the Protocol may be interpreted to imply that if a particular practice is not enumerated *in* the Protocol it is not prohibited *by* the Protocol, even if it is harmful to women. For example, Article 6 requires a minimum age for marriage, as many conventions concerning marriage have done in the past.¹⁰⁵ However,

show that in 2003, 23 million adults with HIV/AIDS were in sub-Saharan Africa—57 percent were female. *Id.* at 7.

98. Protocol, *supra* note 4, arts. 10–11.

99. See, e.g., U.N. Charter pmb., art. 1; UDHR, *supra* note 39, pmb., art. 3.

100. Ebeku, *supra* note 38, at 129.

101. See *infra* Part IV.

102. See, e.g., VALENTINE M. MOGHADAM, MODERNIZING WOMEN: GENDER AND SOCIAL CHANGE IN THE MIDDLE EAST 171 (2003) (quoting *Al Watan*, an Algerian newspaper, referring to women as the “so-called weaker sex” in the newspaper’s coverage of a 1994 women’s rights protest in Algeria).

103. See, e.g., Protocol, *supra* note 4, arts. 6, 12–14.

104. BLACK’S LAW DICTIONARY 521 (5th ed. 1979).

105. Protocol, *supra* note 4, art. 6. See, for example, Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage, G.A. Res. 1763A, Annex, art. 2, U.N. GAOR, 17th Sess., 1167th plen. mtg. (Nov. 7, 1962), available at

the Protocol actually *sets* the minimum age at eighteen, unlike other instruments that have left it to the discretion of the States Parties.¹⁰⁶ Two States Parties, Tunisia and Sudan, objected to this provision.¹⁰⁷ For Tunisia, the objection is in keeping with its Personal Status Code 1956 as amended, which sets the minimum age of marriage at seventeen for consenting females and twenty for males.¹⁰⁸ In both countries, marriage before either age is permitted with the consent of both parents.¹⁰⁹ However, the Protocol does not expressly allow for States Parties to deviate from its minimum age of eighteen, perhaps excluding the possibility of setting a different minimum age, despite Tunisia and Sudan's objections. In another example, the Protocol does not explicitly prohibit the practices of *lobolo* (bride price) or leviratic marriages (the practice of inheriting a wife). While the Protocol does require that "no marriage shall take place without the free and full consent of both parties," the failure to explicitly address the practices may be interpreted as allowing them to continue.¹¹⁰ Other African countries have wholly ignored the Protocol because these types of provisions interfere with customary practices and religious law.¹¹¹ In this way, the over-specificity of an article may alienate a country from signing the Protocol entirely, leaving women unprotected in the state. In another example, Article 6 also requires marriages to be recorded in writing.¹¹² This directly conflicts with many African customs that do not rely on written documentation.¹¹³ As a result, some States Parties may choose not to follow this part of the Protocol either, which interferes with its potential for effective implementation.

<http://www.unhchr.ch/html/menu3/b/63.htm>, which required States Parties to set a minimum age for marriage.

106. Protocol, *supra* note 4, art. 6; *see, e.g.*, U.N. Convention on the Rights of the Child art. 1, G.A. Res 44/25, Annex, U.N. Doc. No. A/RES/44/25 (Nov. 20, 1989) (setting the age of a child as 18 but allows States Parties to set a different age).

107. Freedom House, Tunisia, <http://www.freedomhouse.org/template.cfm?page=184> (last visited Mar. 27, 2009).

108. *Id.*

109. *Id.*

110. Protocol, *supra* note 4, art. 6.

111. For instance, Niger, a country with one of the highest child marriage rates and a largely Muslim country, refused to sign the Protocol in June 2006. *See Niger MPs Reject Protocol on Women's Rights*, INDEPENDENT ONLINE, June 6, 2006, http://www.iol.co.za/index.php?set_id=1&click_id=86&art_id=qw1149543182315B216 [hereinafter *Niger MPs*]; *see also* United Nations Population Fund, State of the World's Population 2005, Child Marriage Fact Sheet, http://www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm (noting that, in Niger, 76 percent of girls ages 15–19 are married).

112. Protocol, *supra* note 4, art. 6.

113. Edward Kofi Quashigah & Obiora Chinedu Okafor, *Legitimate Governance in Africa—International and Domestic Legal Perspectives: An Introduction*, in LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 3, 9 (Edward Kofi Quashigah & Obiora Chinedu Okafor eds., 1999).

When crafting an international instrument, drafters should generally avoid being so specific that they effectively prevent an instrument from meeting future needs. Furthermore, States Parties may want to implement obligations in different ways. For example, States Parties may have different needs based on economic or cultural makeup. A narrowly written provision binds the States Parties to particular courses of action that may not be the most appropriate or beneficial for their citizens. The Protocol risks over-specificity in multiple articles.¹¹⁴ As will be discussed later, these narrow provisions will limit the effective implementation of some rights.¹¹⁵

B. Which Law Governs Implementation?

Article 26 of the Protocol calls upon States Parties to “ensure the implementation of this Protocol at the national level” and to indicate in periodic reports “legislative and other measures undertaken for the full realization of the rights herein recognized.”¹¹⁶ States Parties have an affirmative obligation to “undertake all necessary measures and in particular [to] provide budgetary and other resources for the full and effective implementation of the rights.”¹¹⁷ Further, they are required to harmonize the obligations of the Protocol with their domestic law obligations.¹¹⁸ By incorporating these principles into domestic law, the States Parties are able to enforce the provisions in their own country.¹¹⁹

Notwithstanding the narrow manner in which the text of certain Protocol articles is drafted, the overarching vagueness in some articles on how these goals should be implemented creates additional problems.¹²⁰ Although the broad leeway granted to the States Parties

114. Other articles that are notably too narrow or overly specific include: Article 11: Women in Armed Conflict; Article 12: Education (requiring the elimination of all stereotypes in textbooks, syllabuses and media—a task that has yet to be accomplished in most countries); Article 14: Health and Reproductive Rights (offering not only access to any form of contraception but also requiring States Parties to establish pre-natal and post-natal nutritional services for women); Article 15: Right to Food Security (requires access to sources of domestic fuel); Articles 8 and 9: Political and Legal Participation (requiring affirmative action plans be instituted). Protocol, *supra* note 4, arts. 8–9, 11–12, 14–15.

115. See *infra* Part IV for a more detailed discussion of Protocol articles 8 and 9.

116. Protocol, *supra* note 4, art. 26(1).

117. *Id.* art. 26(2).

118. Ibrahim Kane, *Harmonising the Protocol with National Legal Systems*, in BREATHING LIFE, *supra* note 4, at 51–52.

119. *Id.* at 53. In an example where domestication of an international treaty obligation did not occur, the Senegalese criminal courts were originally unable to apply the Convention Against Torture in the trial of the Chadian dictator Hissan Habre because it had not harmonized its legislation. *Id.*

120. See, e.g., Protocol, *supra* note 4, arts. 4, 8, 13 17; see also *id.* arts. 25–26 (regarding the form of remedies and their implementation).

in how to implement the Protocol may appear desirable, in this particular context greater specificity is desirable, as more guidance would ensure that all of the States Parties enact at least the same minimum protections. The need for more guidance is partly informed by the fact that the States Parties legal systems are as diverse as the continent itself. Many countries are democracies, but some operate under communist governments.¹²¹ While many countries have a set constitution, others are governed by customary law based on tribal and traditional practices.¹²² Many operate under a system that is an amalgamation of the two, giving deference to customary law either through the legislature or in practice.¹²³ However, some suggest that the states should not be governed by statutory or customary law but instead by “living law,” or the law as it is written, traditionally exercised, and currently practiced.¹²⁴

Understanding this interplay between statutory law, customary law, and living law is necessary for determining the most effective way to provide for the guarantees of the Protocol. If the Protocol is to assist women, it is important to know where, how, and why they need help, from a legal perspective. However, “there is abundant evidence to indicate that the problem [for women] does not lie in paucity or defects in the pre-existing laws. Rather, the problem may be located in the conflict between custom [or] tradition and the contemporary ideas of women’s rights as well as the failure in implementation of the laws by the appropriate authorities.”¹²⁵

1. Statutory Law

In the African context, statutory law is analogous to constitutionalism, or the limitation of government and separation of powers by laws embodied in a written constitution.¹²⁶ This emphasis on the written embodiment and codification of the laws of the community is closely linked to Africa’s colonial past.¹²⁷ Although

121. See generally SAUL BERNARD COHEN, *GEOPOLITICS OF THE WORLD SYSTEM 77–79* (2002) (describing the role of communism in sub-Saharan Africa). Angola, Benin, Democratic Republic of Congo, Ethiopia, Somalia, Eritrea and Mozambique all currently are or have had communist governments. *Id.*

122. Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACK LETTER L.J. 197, 212 (2001).

123. *Id.* at 213

124. *Id.*

125. Ebeku, *supra* note 38, at 130.

126. See RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 1 n.1 (2001) (offering Jan-Erik Lane’s definition of constitutionalism).

127. See generally Fareda Banda, *Women, Law and Human Rights in Southern Africa*, 32 J. S. AFR. STUD. 13, 14 (2006) (“Regardless of the colonial experience and the manner of its conclusion, the common theme in all of these [postcolonial African] countries is that postcolonial legal systems are plural. This means they recognize

Africa had societal structures for governance and rules in place in its pre-colonial epoch, colonialism had a unique impact on these rules.¹²⁸ "With colonialism, African law ceased to be endogenously developed . . . by Africans or . . . for Africans. It no longer evolved according to African needs. Thenceforth, the power to make laws, or sanction those that existed before, passed to the colonialists."¹²⁹ This transfer of power resulted in a "deculturalization" of the law at the same time the continent was "injected with the capitalist mode of production."¹³⁰ Like many of the norms within international human rights law, constitutionalism is intrinsically linked to a "Western" ideology and to colonialism.¹³¹ For this reason, many countries are hesitant to adopt certain human rights instruments.¹³²

The language of Article 26 implicates statutory law as a means for ensuring that States Parties domesticate the goals of the Protocol.¹³³ It requires that States Parties include the Protocol's provisions in their constitutions and report on legislative and other measures taken.¹³⁴ This explicit reference to the legislature is logical; the Protocol itself is a form of statutory law and thus relies on other forms of statutory law to carry out its objectives. However, beyond the requirements of Article 26, the Protocol does not address the function of statutory law.¹³⁵ There is no discussion of whether statutory law should supersede customary laws or practices.¹³⁶ It is understood from the object and purpose of the Protocol that any customary practice that discriminates against or harms women will be prohibited entirely,¹³⁷ but, depending on the situation, this can be misleading.

Article 31 also creates confusion. It states that "none of the provisions of the present Protocol shall affect more favorable provisions for the realization of the rights of women contained in the national legislation of States Parties or in any other regional,

general law (statute law), usually based on the law of the colonizing state . . ."); see also Quashigah & Okafor, *supra* note 113, at 9.

128. OSITA C. EZE, HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS 14 (1984).

129. *Id.*

130. *Id.* at 14–15.

131. Anthony Anghie, *Universality and the Concept of Governance in International Law*, in LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES, *supra* note 113, at 21, 21–22. See generally Virginia A. Leary, *The Effect of Western Perspectives on International Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 62, at 15.

132. LONE LINDHOLT, QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS: THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN BOTSWANA, MALAWI AND MOZAMBIQUE 12 (1997).

133. Protocol, *supra* note 4, art. 26.

134. *Id.*

135. See generally Protocol, *supra* note 4.

136. *Id.*

137. *Id.*

continental or international conventions, treaties or agreements applicable in these States Parties.”¹³⁸ Although clear on its face, this poses a problem for countries that contain statutory hierarchies of law that place customary law on equal footing with statutory law.¹³⁹ In fact, “most African countries have one commonality: a dual or plural legal system, namely, a customary/religious system and a general/statutory system.”¹⁴⁰ In countries like South Africa, “debate has centered on the constitutional recognition of both a right to culture and a right to substantive gender equality.”¹⁴¹ The conflict between the cultural and statutory law dichotomy is embodied in cases like *Mthembu v. Letsela*, a South African case concerning gender discrimination and the inheritance of property.¹⁴²

2. Customary Law

Customary law, like customary international law, is based on generally accepted practices developed over a period of time.¹⁴³ It

138. *Id.* art. 31.

139. For example, Zimbabwe allows for customary law to be considered and treated on the same level as statutory law if the topic has also been addressed and/or codified by statutory law. Otto Saki & Tatenda Chiware, *The Law in Zimbabwe*, GLOBALEX, Feb. 2007, http://www.nyulawglobal.org/globalex/zimbabwe.htm#_Customary_Law.

140. Ebeku, *supra* note 38, at 86.

141. Zimmerman, *supra* note 122, at 198 (citing Thandabantu Nhlapo, *Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons From the South African Constitutional Debate*, 9 INT’L J.L. & FAM. 208 (1995) (looking at the current South African debate pitting ideas of cultural relativism against gender equality)).

142. In *Mthembu*, a conflict existed between a daughter’s right to inherit her deceased father’s land under the statutory law and the customary practice of primogeniture which would have required the land to be bequeathed to a male relative. *Mthembu v. Letsela* 1997 (2) SA 936 (T.P.D.) at 937–39 (S. Afr.). The *Mthembu* decision, rendered in a subsequent trial court opinion after a remission to determine material facts, see *id.* at 947, has been affirmed by the Supreme Court of Appeal in South Africa. See *Mthembu v. Letsela* 1998 (2) SA 675 (T.P.D.) at 688 (S. Afr.) (trial court opinion); *Mthembu v. Letsela* 2000 (3) SA 867 (SCA) at 885 (S. Afr.) (appellate affirmation). It remains to be seen whether it will be appealed to the Constitutional Court.

143. Under the International Court of Justice Statute Article 38(1)(b), “a general practice accepted as law” is an international custom. Although similar to customary international law in how it is developed over time, in this context, customary international law means something entirely different. The Restatement Third § 102(2) provides an insightful definition of customary international law as “[resulting] from a general and consistent practice of states, followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102(2). (1987). Hence, a rule or principle, reflected in the practice or conduct of states, must be accepted by them, expressly or tacitly, as being legally binding on the international plane in order to be considered a rule of international law. (In the case of the Protocol, however, ignoring the legally binding obligations could be indicative that the States Parties do not believe certain duties are required.) Customary law, on the other hand, refers to

includes rules and norms that are based on cultural traditions, often related to tribal, ethnic, or otherwise rural practices.¹⁴⁴ Customary law is often seen as being in conflict with statutory law.¹⁴⁵ “The argument that traditional societies did not possess a legal system was based either on inadequate information or lack of appreciation for the true nature of pre-colonial African societies. It was also based on Western scholars’ concept of law as that emanating from the state.”¹⁴⁶ Certainly,

[t]here is a distinction to be made between custom and law, and it is true that not all custom has the form, and therefore the force, of law, but . . . [w]hat is important is whether the overall trends of society including custom as well as law, reflect some of the same concepts and structures . . . and whether they were perceived by the people to have a binding force of some kind.¹⁴⁷

As first articulated by Francisco de Vitoria in *De Indis*, a 16th century text, the ability to reason binds all people to a universal natural law, or *jus gentium*.¹⁴⁸ Presented within this framework, the applicability of universal norms historically has had a dual effect on customary practices: “on the one hand, it provides . . . a status under the law; on the other, the failure . . . to comply with these ‘universal standards’ means that they [Africans and customary law] may be subject to the sanctions which follow such violations.”¹⁴⁹

The natural law theory is closely related to the universalist feminist view, which is a predominant position in Western legal science.¹⁵⁰ Universalist feminism reconciles conflicts between

the time-honored traditions and tribal practices that are developed in the different cultures, tribes, and enclaves in Africa.

144. See Banda, *supra* note 127, at 13–14 (broadly discussing the development of the plural legal systems in postcolonial Africa as a result of the “Indirect Rule” adopted by colonizers that allowed the “Africans . . . to practice their traditions”).

In such communities, law is not the act of a sovereign, whether an individual or a body of men: it is the traditional rule of the community; and it is enforced, not by a sanction prescribed *ad hoc* by the sovereign, but one that is involved in the beliefs and practices of the community.

T.O. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 48 (1956) (internal citation omitted).

145. See Zimmerman, *supra* note 122, at 198 (“Underlying this construction [women’s rights vs. right to culture], is the assumption of a simple dichotomy between African cultural rights and (western) women’s rights.”).

146. EZE, *supra* note 128, at 10.

147. LINDHOLT, *supra* note 132, at 12.

148. Anghe, *supra* note 131, at 23–24 (citing FRANCISCUS DE VITORIA, *DE INDIS ET IVRE BELLI RELECTIONE* (Ernest Nys ed., John Pawley Bate trans., Carnegie Institute of Washington 1917) (1557)).

149. *Id.*

150. Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 *LAW & SOC. INQUIRY* 635, 649–51 (2000). The universalist feminist position is often defined in contrast to cultural relativism. See, e.g., *id.* at 649; see also Fareda Banda, *Global Standards: Local Values*,

international, national, and customary law through the belief in “the existence of overriding norms and values” that are common to all people.¹⁵¹ The universalist feminist position ensures “coherence and harmony between different norms and values” by establishing a hierarchical framework between these different sources of law, thereby maintaining the general legitimacy of all while still creating a unified, consistent theory.¹⁵²

While statutory law focuses on the obligations and privileges created by the legislature and constitution, customary law represents the traditions, rules, and culture that have evolved within the community over time.¹⁵³ Statutory law has become synonymous with not only Western ideologies, but also a top-down, dictatorial approach to governance, whereas customary laws may be more acephalous or communitarian.¹⁵⁴

The Protocol generally addresses customary law in a negative light, likely because it was crafted as a response to many traditional practices that violate women’s rights.¹⁵⁵ While certain practices are specifically prohibited, others are understood to be forbidden based on the broad language of the Protocol.¹⁵⁶ The Protocol expressly permits other traditions.¹⁵⁷ The explicit prohibition of certain traditional

17 INT’L J.L. POL’Y & FAM. 1, 4 (2003) (“The contention of some universalists is that the cultural relativist position is invoked by states which wish to circumvent the rights of citizens.”).

151. *Id.* at 651.

152. *Id.*

153. ELIAS, *supra* note 144, at 48.

154. Hellum, *supra* note 150, at 651.

155. See Mary Wandia, Editorial, *Rights of Women in Africa: Launch of a Petition to the African Union*, PAMBAZUKA NEWS (June 24, 2004), reprinted in EDITORIALS FROM PAMBAZUKA NEWS 2004, at 95, 98 (Firoze Manji & Patrick Burnett eds., 2005), available at http://www.pambazuka.org/en/publications/africanvoices_chap04.pdf.

Mainstream international human rights standards are defined in relation to men’s experience, and stated in terms of discrete violations of rights in the public realm whereas most violations of women’s human rights occur in private. . . . In most African countries, the same constitutional provisions that guarantee gender equality allow exceptions in the so-called ‘private law’ areas of customary law, personal law and family law. Serious violations of women’s human rights such as violence against women and provisions that discriminate against them are found in that private sphere.

Id.

156. One cultural practice that is specifically prohibited is female genital mutilation (art. 14); some cultural practices assumed to be forbidden include *lobolo* (art. 6), leviratic marriages (arts. 6 and 7), and primogeniture (arts. 20 and 21). Protocol, *supra* note 4, arts. 6–7, 14, 20–21. However, see *supra* Part III.A as to why the inference that these practices are prohibited may not be enough and there is the possibility that the practices could be even *allowed* under the Protocol.

157. Article 6: Marriage, permits polygamy despite the original rejection of the traditional practice in the 2000 draft of the Protocol. *Cf.* Protocol, *supra* note 4, art. 6 (“[M]onogamy is encouraged as the preferred form of marriage and that the rights of

practices is the reason why the Protocol's implementation and choice of governing law is so important. States Parties may opt for reservations to certain articles in order to continue to allow detrimental customs. Alternatively, States Parties may accept the prohibitions in writing, but fail to enforce the provisions, or only apply customary law to the issue when it is raised in court, which may ultimately lead to the nullification of a right.

3. Living Law

Currently, living law perhaps most accurately reflects the state of flux most States Parties experience as they begin implementing and enforcing rights under the Protocol. South African academics refer to "living law" as the "law and custom as it is actually understood and applied in contemporary communities."¹⁵⁸ It is argued that living law "more flexibly reflects recent social changes that have broken down strictly hierarchical relations."¹⁵⁹ As a blend of statutory law, customary law, and developing social norms, experts disagree as to whether the courts and States Parties ought to rely on living law as the litmus test for addressing women's societal conditions and needs.¹⁶⁰ "[I]f judicial recognition of living law is undertaken as a codification of current social practice, the process might do little more than give the force of law to status quo social relationships."¹⁶¹ However, it also potentially affords women an opportunity to contest prevailing cultural norms that disadvantage them. This could provide the impetus for a more participatory process of customary law assessment. Allowing women to voice their beliefs rather than merely relying upon colonial documents or patriarchal customs could enable States Parties to implement more effective measures for assisting women.

The constitutions of many African states reflect "[t]he tense relationship between values and principles such as religious freedom, the protection of African custom and culture, and gender equality."¹⁶² It is also seen in court rooms, where cases like *Mthembu* have failed to set a clear precedent but have provided a terrific insight into the

women in marriage and family, *including in polygamous marital relationships are promoted and protected.*") (emphasis added), with Draft of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 7(c), submitted Sept. 11, 2000, OAU Doc. CAB/LEG/66.6 ("polygamy shall be prohibited").

158. Zimmerman, *supra* note 122, at 213.

159. *Id.*

160. *Id.* at 213-14.

161. *Id.* at 214.

162. Hellum, *supra* note 150, at 636 (quoting Fareda Banda, *Meaningless Gestures? African Nations and the Convention on All Forms of Discrimination Against Women*, in *THE CHANGING FAMILY: FAMILY FORMS AND FAMILY LAW* (John Eekelar. & Thandabantu Nhlapo eds., 1998)).

responsibility of the courts in determining whether statutory, customary, or living law should be applied to legal cases concerning cultural practices.¹⁶³ Appellate Judge Le Roux's decision in *Mthembu* in particular, which favored applying customary law, "resembled less of a balancing of rights than it did an assertion that the purpose behind the right to gender equality could be fulfilled by full recognition of official customary law."¹⁶⁴ When discussing what would be considered gender discrimination concerning the practice of primogeniture he wrote:

It is common cause that in rural areas where this rule most frequently finds its application, the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law This view of the rule relating to succession has much to commend itself. If one accepts the duty to provide sustenance, maintenance, shelter as a necessary corollary of the system of primogeniture . . . I find it difficult to equate this form of differentiation between men and women with the concept of "unfair discrimination" as used in §8 of the Constitution.¹⁶⁵

Although Article 31 of the Protocol and general practice permit the interpreting body to take into consideration other human rights instruments, it does so with the understanding that those documents must provide more favorable protection.¹⁶⁶ In the case of *Mthembu*, Judge Le Roux relied on "outdated anthropological and romantic Africanist idealizations"¹⁶⁷ that glossed over the "well-documented disadvantages faced by women living in rural communities by emphasizing theoretically protective and reciprocal elements of African patriarchy."¹⁶⁸ In *Mthembu*, the defendant was able to pit the rights envisioned for women in the South African Constitution against the South African constitutional recognition of a right to culture.¹⁶⁹ Thus, the case was framed as a debate on constitutional interpretation—a "tug-of-war between those who would claim a constitutionally protected cultural right to lead their domestic lives

163. See generally *Mthembu v. Letsela* 2000 (3) SA 867 (SCA) (S. Afr.) (discussing the intersection of fundamental rights guaranteed to women by the South African constitution with customary practices favoring male ownership and succession of property).

164. Zimmerman, *supra* note 122, at 217–18.

165. *Id.* (quoting *Mthembu v. Letsela* 1997 (2) SA 936 (T.P.D.) at 945 (S. Afr.)).

166. Protocol, *supra* note 4, art. 31; see Nsibirwa, *supra* note 26, at 50 (referring to Article 27 of the Draft Women's Protocol, which later became Article 31 of the Protocol, Nsibirwa explained that "the body interpreting the Protocol will not be limited to the Protocol but should establish the most favorable protection that can be afforded to women . . . [by] taking into consideration other human rights instruments and the domestic law which bind the state").

167. Zimmerman, *supra* note 122 at 218.

168. *Id.*

169. *Id.* at 198 (recognizing the tension in South Africa between "the constitutional recognition of both a right to culture and a right to substantive gender equality").

according to a relatively familiar customary law and those who believe that any reform initiative must now give due consideration to the Bill of Rights and to South Africa's international obligations."¹⁷⁰ This "tug-of-war" epitomizes the struggle between statutory, customary and living law—a struggle between the desire to more broadly recognize the global perception of women's rights and the need to preserve culture through traditions.

The Protocol calls upon statutory law, at a minimum, to be used by the States Parties to implement the provisions of the Protocol domestically.¹⁷¹ However, this does not bar customary law from being presented as a defense to any claims in a court. Moreover, many States Parties recognize customary law in their legal systems.¹⁷² Botswana's constitution, for instance, "gives precedence to custom over contemporary ideas of non-discrimination and gender equality."¹⁷³ As a result, regardless of how the case is brought to the courts, if the court or defendant can present a proper claim that upholding customary law is indeed more favorable, the guaranteed protections of the Protocol may be invalidated. Thus, the real question in implementation may not be which type of law applies to the creation of the law, but rather which type is applied in the enforcement of the Protocol.

Despite the fact that the Protocol does not specifically address the type of law that should be applied in the enforcement of the Protocol's provisions,¹⁷⁴ the States Parties must give careful consideration to how to craft the laws of implementation and enforcement to ensure they will fulfill their obligations under the Protocol. Otherwise, rights to culture may supplant women's right to equality and freedom from marginalization. Indeed, many African legal systems are reluctant to favor statutory law over customary law, even in protecting women's rights, because of the historic connection to colonialism and the current belief that it may promote Eurocentric norms over African traditions.¹⁷⁵ Thus, as the women's rights movement in Africa is increasingly associated with statutory law, it is

170. Zimmerman, *supra* note 122, at 221 (citing S. AFR. L. COMM'N, THE HARMONIZATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES § 1.6.1 (1998), available at http://www.saflii.org.za/za/other/zalc/report/1998/4/1998_4.rtf [hereinafter MARRIAGE REPORT]).

171. Protocol, *supra* note 4, art. 2(1)(b).

172. Ebeku, *supra* note 38, at 134 ("Like Zambia, the Constitution of Botswana gives precedence to custom over contemporary ideas of non-discrimination and gender equality.").

173. *Id.*

174. *Id.*

175. See Zimmerman, *supra* note 122, at 222 (discussing how the perception of "Western" values can be negative in the African women's rights context).

less likely to be considered beneficial to African culture and more likely to be viewed as solely espousing Western theories.¹⁷⁶

C. When Implementation Does Not Occur

A failure to implement the provisions of the Protocol can occur in three ways: (1) a country either does not sign or ratify the Protocol; (2) a country ratifies the Protocol but fails to domesticate the provisions in its laws; or (3) a country ratifies and domesticates but fails to enforce the protections of the Protocol. The failure to sign, ratify, domesticate, and enforce the provisions of the Protocol may have a far-reaching and damaging effect on the women's rights movement. That is, if enough countries either ignore a treaty or fail to recognize its provisions in their general customs or state practice, this can become evidence of a lack of *opinio juris* that the protections enshrined in the Protocol are not legally binding.¹⁷⁷ As gender equality has not yet risen to the level of a *jus cogens* norm,¹⁷⁸ there exists a real possibility that the Protocol will be viewed more as a "declaration" than as a legally enforceable instrument, if the Protocol is poorly received or States Parties fail to implement the appropriate laws. This would likely make future negotiations with non-States Parties regarding women's rights less successful.

In international law, a protocol is an "addition to an already existing treaty,"¹⁷⁹ generally in the form of another treaty or international agreement. A protocol can amend or add provisions to its "parent" treaty.¹⁸⁰ A protocol is only binding on the States Parties who sign and ratify it, not all the States Parties to the earlier agreement; it comes with its own set of newly developed rights and obligations.¹⁸¹ To a large extent, protocols have become more of an exercise in academia and theory, rather than a practical solution to

176. *Id.*

177. *Opinio juris* is short for the Latin *opinio juris sive necessitas* or, a conviction that a rule is obligatory. An *opinio juris* is proven if it is (1) a practice that is widely followed and (2) it is deemed by states to be obligatory as a matter of law. Inaction can also be deemed a form of state practice. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004).

178. BLACK'S LAW DICTIONARY 876 (8th ed. 2004) (defining "jus cogens" as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted"). See generally Ladan Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3 (1998).

179. Nsibirwa, *supra* note 26, at 50.

180. RUTH MACKENZIE ET AL., AN EXPLANATORY GUIDE TO THE CARTAGENA PROTOCOL ON BIOSAFETY 2 (2003), available at http://pdf.wri.org/biosafety_guidefront.pdf.

181. *Id.*

amending international law.¹⁸² Framing expansive and far-reaching policies in a protocol may indicate that either there was not enough initial support for the ideas when the original treaty (e.g., the Banjul Charter) was signed or they were not considered an issue at the time. Because women's rights have been a long-standing concern in Africa, it is more likely that insufficient support or consideration was originally given to protecting women's rights in this comprehensive a manner.

A country may fail to adopt the Protocol or falter in its implementation for valid reasons; in some cases, the goals of the Protocol are lofty and unrealistic for countries to commit to at this point.¹⁸³ For instance, the Protocol guarantees medical access and legal aid services for women,¹⁸⁴ luxuries that many countries struggle to provide adequately to any citizen—male or female. Many countries examine their hierarchy of needs in a manner that construes human rights as an aspirational goal rather than a foundational practice. As a result, ensuring security from attack (internal or external), stability in governance, and a thriving economy, among other indicators, will often come before recognizing a protocol that would impose burdens cutting to the core of these basic needs.¹⁸⁵

“National budgets provide the truest indication of state priorities. The process of allocating scarce national resources reveals a government's highest priorities and identifies its favored constituents when decision makers must choose among policy priorities.”¹⁸⁶ There simply may be budgetary restrictions on properly implementing the Protocol, even if a country is already a State Party. In addition to budgetary concerns, some countries' leaders may be unaware of the Protocol's comprehensive nature or may be generally apathetic or ambivalent to its goals, and so fail to

182. Interview with Michael A. Newton, *supra* note 11.

183. The Draft Women's Protocol may also be said to set out goals that are difficult to attain, and for this reason it may not be ratified by some countries as they may not be in a position to attain the goals it sets out to achieve. The end result would be that the Protocol would become yet another addition to the existing body of human rights instruments meant rather for academic discourse than for practical enforcement.

Nsibirwa, *supra* note 26, at 51.

184. Protocol, *supra* note 4, arts. 8, 14.

185. This is a general reference to Maslow's "Hierarchy of Needs" theory, which proposes that humans focus on and attempt to satisfy needs in a hierarchy beginning with the most basic survival needs and ascending to higher needs of cognitive stimulus. For a detailed explanation of the theory, see generally Abraham Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370 (1943).

186. Mary Rusimbi, *Financing the Protocol: Considerations for Influencing Budgets from Experiences in Tanzania*, in *BREATHING LIFE*, *supra* note 4, at 38, 38.

prioritize implementing its provisions.¹⁸⁷ Other countries have avoided signing the Protocol or considered taking substantial reservations due to an observance of Islamic law, or *shari'a*, which conflicts with many of the provisions of the Protocol.¹⁸⁸

Even when a State Party has the best of intentions in ratifying and implementing the provisions of the Protocol, there may be internal institutional resistance. While certain traditional practices appear to blatantly disregard established human rights norms,¹⁸⁹ some practices are not nearly as controversial, but still barred under the Protocol.¹⁹⁰ As one member of the Zambian Parliament, Request Muntanga, stated less than a year after his country's adoption of the Protocol, the "so-called discrimination was God-made and would be very difficult to get rid of."¹⁹¹ Another member concluded that practices such as polygamy and *lobolo* (bride price) "are so deeply rooted in the African consciousness that it would be impossible to enforce any prohibition."¹⁹² Accordingly, even if a country can bear the economic burden of implementing the Protocol, it will likely encounter friction between its obligations under the Protocol and its citizens' desire to maintain cultural practices.

D. *When Implementation Does Occur, but Is Ineffective, Counter-Productive or Not Enforced*

Addressing the role of women in society, Eleanor Roosevelt observed,

187. Cf. Sarah Mukasa, *Domesticating the Protocol*, in BREATHING LIFE, *supra* note 4, at 28, 32 (discussing "apathy and ambivalence" towards the Protocol and similar initiatives by society at large and a "lack of awareness" of the Protocol by leadership, "especially at local levels").

188. See, e.g., *Niger MPs*, *supra* note 111 (noting Niger, a predominantly Muslim country voted down the ratification of the Protocol); cf. Mary Wandia, *Institutionalising Strategies for the Protocol*, in BREATHING LIFE, *supra* note 4, at 34, 36 (explaining how religious legal systems can lead to legitimized violations of women's rights). Egypt and Tunisia are examples of Muslim countries that have neither signed nor ratified the Protocol. List of Protocol Signatories, *supra* note 4.

189. Here, I refer to female genital mutilation in particular which has been denounced by CEDAW, several UN groups and many women's rights groups. See, e.g., Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 14, 9th Sess. (1990), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom14>; WHO ET AL., ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT 8 (2008), available at http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf.

190. Examples of these are polygamy and discrimination against women in the ownership and inheritance of property.

191. *Customary, Statutory Law in Conflict*, TIMES OF ZAMBIA (Ndolo), Feb. 18, 2004.

192. MARRIAGE REPORT, *supra* note 170, § 2.1.11; Zimmerman, *supra* note 122, at 222.

While it is true that women . . . vote on the same terms as men . . . too often the great decisions are originated and given form in bodies made up wholly of men, or so completely dominated by them that whatever of special value women have to offer is shunted aside without expression. Even in countries where for many years women have voted and been eligible for public office, there are still too few women serving in positions of real leadership. I am not talking now in terms of paper parliaments and honorary appointments. Neither am I talking about any such artificial balance as would be implied in a 50-50, or a 40-60 division of public offices. What I am talking about is whether women are sharing in the direction of the policy making in their countries; whether they have opportunities to serve as chairmen of important committees and as cabinet ministers and delegates to the United Nations.¹⁹³

Once a State Party ratifies the Protocol and incorporates the provisions into domestic law, one might imagine that the country would be well on its way to gender equality. All countries have an affirmative obligation to adhere to the requirements of any treaty to which they are a State Party.¹⁹⁴ However, how a country implements, and later enforces, the provisions of the Protocol is decisive. As discussed above, a lack of implementation and enforcement may indicate that a legally binding obligation is actually non-binding.¹⁹⁵ However, if the provisions of the Protocol are implemented and enforced inappropriately, the damage could be as severe, if not worse, than if the Protocol had never been ratified. If laws are not crafted carefully, they may not be effective in protecting or prohibiting the behavior targeted by the lawmakers. An ambiguous law could allow abuses to continue. Worse still, certain "affirmative action" or "quota-like" laws would have a stigmatizing effect on women in the long-term.¹⁹⁶ Natalee Hevener identified three phases of the development of women's rights law in her 1986 typology:

- (1) the protective, in which women were not allowed to work in mines and at night,¹⁹⁷

193. Ebeku, *supra* note 38, at 105 (citing Eleanor Roosevelt, *U.N. Deliberations on Draft Convention on the Political Rights of Women*, DEPT OF STATE BULLETIN, Jan. 5, 1953, at 29, reprinted in WHAT I HOPE TO LEAVE BEHIND: THE ESSENTIAL ESSAYS OF ELEANOR ROOSEVELT (Allida M. Black ed., 1995), available at <http://www.udhr.org/history/124.htm>).

194. VCLT, *supra* note 56, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). This is the principle of *pacta sunt servanda*. Moreover, the treaty obligations will trump any national laws. Article 27 of the VCLT provides, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *Id.* art. 27.

195. See *supra* Part III.C-D.

196. See Madeline E. Heilman, *Affirmative Action: Some Unintended Consequences for Working Women*, 16 RES. ORGANIZATIONAL BEHAV. 125 (1994) (documenting the potential adverse effects of affirmative action on women in the United States).

197. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 412 (1908).

- (2) the corrective, in which women were to be allowed to participate in national politics and to retain their nationality without having to take up that of their husbands; and
- (3) the final stage, which was the equality or non-discrimination phase, and which included the adoption of CEDAW.¹⁹⁸

Although, in theory, it would appear that the States Parties to the Protocol have reached the third and final stage, in practice, the implementation of certain articles reveals that many African countries are in the “protective” or “corrective” phase.¹⁹⁹

1. Article 9: Affirmative Action, Negative Reaction

“The Protocol . . . endorses affirmative action to promote the equal participation of women, including equal representation of women in elected office, and calls for the equal representation of women in the judiciary and law enforcement agencies.”²⁰⁰ Article 9 of the Protocol details the right of women to participate in the political and decision making processes.²⁰¹ It specifically requires states to “take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through *affirmative action*.”²⁰² The Protocol seeks to ensure that women are permitted to participate in all elections, be represented equally at all levels of the electoral processes, and be provided equal status as men at all levels of development.²⁰³ This ideal seems to be replaced by a quota.

However, as written, the Protocol creates an artificial floor for female representation.²⁰⁴ It does not take into account that there

That woman’s physical structure and *the performance of maternal functions* place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. (emphasis added). Muller is an example of the paternalistic beginnings of the women’s rights movements. *See id.*

198. Banda, *supra* note 63, at 243.

199. *See, e.g.*, Ebeku, *supra* note 38, at 118, 121–22 (discussing implementation of the Protocol by Uganda, South Africa, and Zambia).

200. Faiza Jama Mohamed, *African Union Protocol on the Rights of Women in Africa: The SOAWR Campaign*, in *BREATHING LIFE*, *supra* note 4, at 14, 14.

201. Protocol, *supra* note 4, art. 9.

202. *Id.* art. 9(1) (emphasis added).

203. *Id.* art. 9(1)(a)–(c).

204. Gumisai Mutume, *Women Break into African Politics: Quota Systems Allow More Women to Gain Elected Office*, *AFR. RECOVERY*, April 2004, at 4, available at <http://www.un.org/ecosocdev/geninfo/afrec/vol18no1/181women.htm>.

may not be enough qualified or interested women candidates for positions. It ignores the fact that many women (and men) are limited from participating in elections not because of discrimination but because of geography and poor infrastructure in the country.²⁰⁵ “Equitable and equal do not, as the CEDAW committee has noted, mean the same thing. States Parties should focus on the attainment of substantive equality,”²⁰⁶ rather than on the creation of fixed quotas for women in the political processes, a superficial equality.

Despite African women’s “numerical strength,”²⁰⁷ women are disenfranchised when it comes to participation in the political sphere, a situation likely “related to their subordinate status under customary international law.”²⁰⁸ As evidenced by statistics gathered in 2004 by Kaniye S.A. Ebeku, women are poorly represented in the decision making structures of their countries.²⁰⁹ “For instance, despite their numerical superiority, women in Botswana constitute only eighteen percent of the memberships of the National Assembly (Parliament), thirteen percent of the Mayors, nineteen percent of the members of the Local Government Councils, and thirty-three percent of the members of the Executive Council (the Cabinet).”²¹⁰ In Nigeria, between 1999 and 2003, women held only 181 places (1.62%) out of a total of 11,881 elected positions nationwide.²¹¹ “More specifically, of the 360 members of the House of Representatives, there were only twelve women.”²¹² “Similarly, out of the 109 members of Senate, there were only three women.”²¹³ Yet, “the Protocol is clearly based on the presumptions that women’s rights

205. See generally Sonny Nwankwo & Darlington Richards, *Institutional Paradigm and the Management of Transitions: A Sub-Sahara African Perspective*, 31 INT’L J. SOC. ECON. 111 (2004) (identifying geographical isolation and poor infrastructure as interfering with forms of participation and communication in Africa).

206. Banda, *supra* note 63, at 246.

207. Ebeku, *supra* note 38, at 94–95 (discussing population data indicating that women comprise just over 50% of the population in countries like Nigeria, Ghana, and Botswana and about 70% of the population in Rwanda, perhaps due to disproportionately high deaths of men during the Rwandan genocide).

208. Ebeku, *supra* note 38, at 95.

209. *Id.*

210. *Id.*; C.M. Fombad, *The Constitutional Protection Against Discrimination in Botswana*, 53 INT’L & COMP. L.Q. 139, 158 (2004).

211. Ebeku, *supra* note 38, at 95–96.

212. *Id.*

213. *Id.* The 2003 general elections in Nigeria produced a much worse picture for women in public affairs. See UNITED NATIONS, *THE WORLD’S WOMEN 2000: TRENDS AND STATISTICS* (2000) [hereinafter *WORLD’S WOMEN*]. See generally *Why Nigerian Women Fail in Elections*, THIS DAY (Lagos), Sept. 30, 2007, available at http://www.awlproject.org/fileadmin/user_upload/News_Articles/30Spet07_WhyNigeria nWomenFailinElections_ThisDay.doc. For general statistics on female political participation, see Women in Development Network, *Statistics—Africa, Labour*, www.focusintl.com/statr1a4.htm#001 (last visited Mar. 27, 2009).

may not be given effective legal protections unless women participate in the development, interpretation, and enforcement of the law.”²¹⁴

These low numbers, while a problem in and of themselves, are also symptomatic of other, deeper patterns of marginalization.²¹⁵ In response to these figures, some countries reserve positions for women.²¹⁶ Under Rwanda’s new, post-genocide constitution, 24 out of 80 seats in the lower house of parliament are reserved for women, and 6 out of 20 seats in the upper house are reserved for women.²¹⁷ As a result, women now constitute 49% of the country’s political representation, topping a world average of 15%.²¹⁸ Significantly, during the country’s September 2003 general election, an additional fifteen women were voted into non-reserved seats—thus bringing a total of thirty-nine women into the lower house.²¹⁹ “However, this gain has been attributed to the role of women during and after the country’s civil war and not necessarily to a direct response to the country’s international obligations” under the Protocol.²²⁰

Uganda also has adopted a gender-sensitive constitution.²²¹ Section 32(1) specifically provides for affirmative action in favor of women, including affirmative action designed to address historical inequality.²²² Section 33 provides:

1. Women shall be accorded full and equal dignity with men.
2. The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.
3. The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

This language mirrors the first and second phases in Hevener’s development of women’s rights. Section 33(2) is protective; its language is paternalistic and the provision would create a sheltered status for the women. This creates a protected status—not an equal status.²²³ Section 33(3) is corrective, as well as protective. It was

214. WORLD’S WOMEN, *supra* note 213.

215. See Ebeku, *supra* note 38, at 86–93 (describing discrimination against women inherent in African customary law).

216. See, e.g., RWANDA CONST. arts. 76, 82 (2003) (reserving 24 seats in the Chamber of Deputies and reserving 30 percent of seats in the Senate).

217. *Id.*

218. Mutume, *supra* note 204.

219. *Id.*

220. Ebeku, *supra* note 38, at 124 n.105; Mutume, *supra* note 204. The population is also about 70 percent female, which contributes to the higher representation of women. Ebeku, *supra* note 38, at 95.

221. The Constitutions of Seychelles, Ethiopia, Eritrea, Namibia, Morocco, Guinea-Bissau, Madagascar and Rwanda are also gender-sensitive to differing degrees. Ebeku, *supra* note 38, at 118 n.94.

222. UGANDA CONST. art. 33 (1995).

223. The language of the Protocol is particularly noteworthy here for how it can craft a status or create discrimination rather than respond to it. Anne Hellum writes:

specifically because the Banjul Charter was considered to only protect women in the maternal context that the Protocol was considered necessary.²²⁴

Other significant documents like the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament and CEDAW also rely on affirmative action programs for female representation.²²⁵ Article 4(2) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament provides that “each Member State shall be represented in the Pan-African Parliament by five (5) members, at least one of whom MUST be a woman.”²²⁶ Under CEDAW, in order to achieve de facto equality between men and women, the treaty permits positive discrimination,²²⁷ specifically allowing for the “adoption of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination.”²²⁸

While affirmative action programs have been shown to increase the representation of women in political offices, these programs ultimately risk hurting women. Portraying women as in need of protection and coddling affirms the image of women as weak and subordinate. Providing rights on the basis of a woman’s “natural maternal functions” limits the roles women can expect to fill in the future.²²⁹ Finally, mandating equal representation, regardless of a

[m]ore recent studies have gone beyond the de jure equality–de facto discrimination dichotomy of international to examine how law itself, in terms of legal texts, creates gender boundaries and categories. The British scholar Carol Smart has argued that law should be analyzed as a process of producing fixed gender identities rather than as the application of gender-neutral law to previously gendered subjects. Analysis of how legal texts define concepts like marriage is seen as the first step in dissolving boundaries between law and other aspects of society and facilitating creative thinking about the power that law exercises in women’s lives.

See Helle, *supra* note 150, at 639.

224. Ebeku, *supra* note 38, at 125.

225. Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament art. 4(2), Mar. 2, 2001, OAU Doc. EAHG/3 (V), available at <http://www.africanreview.org/docs/civsoc/pap.pdf> [hereinafter Protocol Establishing African Economic Community]; CEDAW, *supra* note 42, art. 4.

226. Protocol Establishing African Economic Community, *supra* note 225, art. 4(2).

227. CEDAW, *supra* note 42, art. 4; Ebeku, *supra* note 38, at 102.

228. CEDAW, *supra* note 42, art. 4; Ebeku, *supra* note 28, at 102. Currently 185 countries—more than ninety percent of the members of the United Nations—are parties to the CEDAW. U.N. Division for the Advancement of Women, Department of Economic and Social Affairs, State Parties to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Mar 28, 2009).

229. See Fitnat Naa-Adjeley Adjetei, *Reclaiming the African Woman’s Individuality: The Struggle Between Women’s Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1353 (1995) (discussing the woman’s role in African customary law as a mother and object, first and foremost).

woman's availability or qualifications stigmatizes the women who fill those positions, and ultimately, women as a group.²³⁰ Requiring equal representation may act as a de facto "cap" on the number of women who can be elected and mark the women who do serve as "unqualified."²³¹ An affirmative action program may increase the number of female faces in the decision making bodies of a country, but it will not allow men and women to be viewed as equal.

2. Women Do Not Have to Speak with a Unified Voice

Perhaps the most harmful aspect of the affirmative action plans is the underlying assumption that a few women can speak for all women.²³² As with any diverse group, women have a range of experiences, customs, and most importantly, perspectives.²³³

African women cannot be said to possess monolithic and shared interests falling neatly along and between the tracks I have laid [of the women's rights movement]. If invited and empowered to speak, it is unclear what 'they' will articulate, or even if 'they' will articulate anything as a coherent collective.²³⁴

Indeed, women can be just as harmful to the movement as men. In a study of a popular court outside Maputo, Mozambique, Aase Gundersen and Nina Berg observed and interviewed judges and parties to show how the elected lay-judges merged customs, socialist values, constitutional principles of gender equality, and practical considerations in their exercise of the "good sense and justice"

230. Affirmative action posed the same program in the Draft as well. Formerly, Article 10(1)(b) instead of Article 9, the Draft Protocol required that women be equally represented in all elections. This did not take into consideration issues such as women's qualifications and availability as office-bearers. Martin Semalulu Nsibirwa writes:

It rather aim[ed] at achieving a balance based on the sex of individuals. Because of this, Article 10(1)(b) would be seen as controversial in many countries. While the problems of women need to be addressed, caution has to be exercised in the approach that is used. Attention should rather be focused on ensuring that people in offices of authority are gender sensitive and aware of the problems that women face.

Nsibirwa, *supra* note 25, at 51–52.

231. See Mutume, *supra* note 204 ("[W]omen who come into power under such a system may be undervalued or viewed as not politically deserving.").

232. See Zimmerman, *supra* note 122, at 227.

233. In Swahili culture, for instance, gender-specific norms guide proper social behavior. *Heshima*, a cultural understanding to minimize conflict, counsels women to handle domestic problems through silence and men, through legal speech. Other women may have had a completely different cultural or life. Hellum, *supra* note 150, at 645.

234. Zimmerman, *supra* note 122, at 227.

guidelines embodied in the Law on Judicial Organization.²³⁵ The study showed considerable variation in outcome.²³⁶ Interestingly, it was often the female judges who, as middle-aged members of the women's wing, would criticize women who failed to perform their domestic duties.²³⁷ "As such, women acted as the upholders of patriarchal customs and practices."²³⁸

Ironically, women's participation in the women's rights discourse is limited by the perceived roles they can fill: if a woman supports customary practice she is viewed as backwards or uneducated, but if she promotes statutory law she is dismissed as being a mouthpiece for a "hegemonic western orthodoxy."²³⁹ As such, allowing women to contribute as individuals rather than as token voices or a marginalized movement is not assisted by the implementation of affirmative action programs. A woman's voice as an individual, rather than as part of a class, group or status, is hampered by the representation provisions of the Protocol.²⁴⁰

The Protocol was drafted and ratified with the best of intentions.²⁴¹ It engages States Parties in a dialogue about women's rights and forces them to grapple with customary and statutory law in domestic contexts. Although flawed in its execution, it endeavors to redress the plight of women and empower them in the private and public arenas. The first attempts at finding States Parties to ratify, implement, and enforce the Protocol have been admirable and, in many ways, a cognizable success.²⁴² However, if the Protocol is truly to embody the desiderata of law for the women's rights movement, the implementation and enforcement of its provisions cannot continue in the aforementioned manner.²⁴³

IV. IT'S TIME TO DROP THE IMAGINARY MANTLE: HOW TO FIX THE PROTOCOL

Speaking generally, inequalities exist in all societies. Many persons are excluded from full participation on the basis of categorical

235. Hellum, *supra* note 150, at 648 (referencing Nina Berg & Aase Gundersen, *Legal Reforms in Mozambique: Equality and Emancipation through Popular Justice?*, in GENDER AND CHANGE IN DEVELOPING COUNTRIES 266 (Kristi Anne Stølen & Mariken Vaa, eds., 1991)).

236. *Id.*

237. *Id.*

238. *Id.* at 649.

239. SUSAN E. HIRSCH, PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT 360 (1998).

240. Protocol, *supra* note 4, arts. 8(e), 9(2).

241. The author here is reminded of the old adage: "The road to Hell is paved with good intentions."

242. Houghton, *supra* note 95.

243. See *supra* Part III.C-D.

differences The noble words of the United Nations Charter – that the UN shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’ – remain unrealized. For change to come, efforts will be necessary both from inside particular societies and from outside them.²⁴⁴

In order for women’s position in Africa to improve, change must be internal as well as external and executed from the top-down and bottom-up. “The disconnection between the pronouncements made at the regional level, and the action taken nationally and locally, demonstrates that the road to domestication and implementation is riddled with challenges that will have to be overcome if the [P]rotocol is to benefit the women it seeks to protect.”²⁴⁵ The Protocol was a good step in the right direction for an external, top-down adjustment, but, as evidenced by the obstacles it has and will continue to encounter in its application, the revolution is incomplete. States Parties now must focus on a bottom-up, internal modification to truly effectuate the changes aspired to in the Protocol.

A. *Failing to Look in the Mirror: The Status Quo*

There are multiple ways in which to address the inadequacies of the current state of the Protocol. The current implementation of the Protocol has proven to be incomplete. Maintaining the status quo involves little more than allowing States Parties to “copy and paste” the language of the Protocol into their countries’ laws and sit back and wait for society to change. As discussed already, this is an extremely risky path and unlikely to result in any substantial, beneficial changes in the near future.²⁴⁶ Moreover, this path relies on a trickle-down method of change and the passage of time and shifting of cohorts for real change to occur. By implementing foreign laws and norms in the domestic setting, the Protocol would impose an external influence on a community with little regard for the desires and interests of its people. Moreover, the laws are created and applied from the top-down. The citizens to whom the laws will be applied need an opportunity to respond and shape the laws for the most effective transformation to take place. A close inspection of the status quo and how States Parties are currently implementing the Protocol will quickly reveal that it has not been as successful as originally imagined.

244. Claude E. Welch, Jr., *Human Rights in Francophone West Africa*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 62, at 184, 206.

245. Sarah Mukasa, *Domesticating the Protocol*, in BREATHING LIFE, *supra* note 4, at 28, 28.

246. *See supra* Part III.

B. *Women's Rights Education Programs and Advocacy
Conferences: The Ministers' Opinions*

The Protocol calls upon States Parties to ensure the education of women concerning their guaranteed rights.²⁴⁷ Many NGOs and governments have responded to the obligations under the Protocol by developing programs to increase voting by women and improve regional education about women's rights laws.²⁴⁸ "Protection will be contingent on the one hand on the wider climate of opinion and attitude of judges, and on the other hand, on the rigorous training of women's rights activists and organizations."²⁴⁹ While the education programs are laudable and should be continued, they are yet another example of a top-down, external approach to implementing the Protocol.

The purpose of the Protocol is to engage States Parties and their citizenry in a discussion about women's rights;²⁵⁰ an education program about women's rights only exerts external, often Westernized, pressure on a community. As one scholar observed, "[i]t is because the Protocol seeks to redress the power equation in gender relations, and to significantly alter the status quo, that resistance to it on all levels is to be expected."²⁵¹ However, it is not simply because the Protocol seeks to alter the status quo that individuals are hesitant to recognize the laws. The Protocol implicitly tells communities that their histories are wrong, immoral, and illegal. An education program reinforcing this message is clearly going to be met with disdain.

Education programs and conferences on women's rights are tools for spreading a message to individuals who had either little input in the discourse or all the input in the discourse. As Josephine Ouedraogo of Burkina Faso argues, the key reason why gender equality in Africa is still "only on paper" is that gender structures remain marginal and the same casts of characters (mainly women) come to regional and global conferences on women.²⁵² She declared: "We are talking to ourselves We are still not working in the mainstream – targeting . . . the people who make policies critical to the achievement of gender equality."²⁵³

One cannot ask only the drafters of the Protocol or the organizers of education programs how they think women's rights should be

247. Protocol, *supra* note 4, arts. 8–9, 12, 17.

248. *Id.*; Ibrahima Kane, *Harmonising the Protocol with National Legal Systems*, in BREATHING LIFE, *supra* note 4, at 51, 57.

249. Kane, *supra* note 248, at 57.

250. Protocol, *supra* note 4, art. 2(2).

251. Mukasa, *supra* note 187, at 29.

252. Ebeku, *supra* note 38, at 135.

253. *Id.*

implemented; this would be tautological and self-congratulatory. Education programs only spread the Protocol's ideology; they do not interact with the community to learn its perspective. Similarly, Conferences only echo pre-existing ideas. While conferences and local programs are a good idea in general, they cannot be the only approach taken to implement the Protocol. In appraising his mystical new clothes, the Emperor foolishly relied only on the tailors who created them and his lackeys who praised them; in contrast, the Protocol must look past its rhetoric and the ambitions of its framers and speak to the communities it is meant to protect.

C. *Listening to the Child in the Crowd: The Grass Roots Approach*

States Parties need to consider a way to implement the Protocol, starting from the bottom-up and within their countries. Experts and NGOs need to move beyond anthropological studies and human rights discourse; the former observes and reports back and the latter projects its morals upon the target audience.²⁵⁴ To holistically and effectively implement the Protocol, it is necessary to complement the already-present, top-down, external forms of implementation with bottom-up, internal dialogue about the living law. To implement the Protocol effectively, NGOs and governments need to work together to survey communities and find out the underlying values behind controversial practices. There is a true need for a dialogue to exist where all viewpoints can be expressed.

Although the contributions of the NGOs during the drafting of the Protocol were vital, they represented generally homogenous

254. Welch, an anthropologist, tends to favor a top-down, internal approach when reconciling statutory and customary law with each other. While Welch proposes three steps to encouraging human rights, he skims over the basic solution too quickly with an emphasis on a top-down complement to these efforts. Welch proposes: (1) individual societies must be "examined to uncover concepts relevant to human rights: the worth and dignity of individuals, and obligations or duties to others (both within and outside the particular group);" (2) indigenous institutions must be studied and (3) "patterns uncovered widely throughout an entire African state should be compared to find elements of commonality, which form part of the national as contrasted with the ethnic sets of values." Welch, *supra* note 244, at 206.

Moreover, Welch incorrectly concludes that

In the short run, civil and political rights in contemporary West Africa are affected far more by persons in power than by values held within the social communities or by pressures brought to bear from external governments and organization The ultimate focus must be the establishment of a government of laws, not of men.

Id. As is addressed in the body of this Note, the basic solution is to complement top-down, external forms of implementation with bottom-up, internal dialogue about the living law.

viewpoints.²⁵⁵ Rural and informally educated communities effectively were excluded from these conversations for a multitude of reasons (e.g., poor infrastructure, lack of knowledge, lack of funding, etc.).²⁵⁶ Thus, the Protocol was drafted in an echo chamber of women's rights advocates with little offered as a counter-balance. However, now that the Protocol is being implemented, some communities perceive its norms as foreign and unwanted.²⁵⁷ It is because of this initial exclusion that there exists a need for cross-cultural dialogue. The goal of such engagement is to

raise moral voices across societal lines, to further advance the development of a significant core of globally shared values Rather than muting the cross-cultural moral voice as the [ethical] relativists do, all societies should respect the rights of others to lay moral claims on them just as they are entitled to lay claims on others.²⁵⁸

Only after the discussion has been broached in this manner may the next step be taken. This next step entails developing laws that respect the values of customary law, but aim to fulfill the provisions of the Protocol. "Women lead challenging and complex lives, and there are no easy solutions, no quick fixes. All African people must play a role in advocating the rights of women and recognize that the solutions are as diverse as the communities and cultures in which they live."²⁵⁹ If the development of law is considered a process where facts, norms, and behavior are closely interwoven, then it is important to have obtained all the facts.²⁶⁰ Griffiths and Hirsh particularly emphasized the need to go beyond textual and historical analyses and instead pay attention to "how norms and considerations regulating male and female behavior and access to resources is negotiated in the intersection between a wide variety of formal and informal norms in different contexts and settings."²⁶¹ As anthropologists, Griffith and Hirsch stopped short of pursuing change in the communities, instead observing and learning about them.²⁶²

255. See *supra* Part II.E regarding the simultaneous creation of different protocol drafts with the same goals and overlapping aims of protecting women.

256. See *supra* note 81, for a list of the organizations that were involved in the drafting of the Protocol.

257. See, e.g., Rachel Sheier, *Rights Treaty in Uganda Snags on "African Values,"* WOMEN'S ENEWS, June 2, 2008, <http://www.womensenews.org/article.cfm/dyn/aid/3619> (noting that some in Uganda criticized parts of the Protocol for its "import of western values").

258. Diana Fox, *Anthropology and Women's Human Rights: Perspectives on Relativism and Universality,* in THE CHALLENGES OF WOMEN'S ACTIVISM AND HUMAN RIGHTS IN AFRICA 39, 51 (Diana Fox & Naima Hasci eds., 1999) (internal quotation omitted).

259. Kemp, *supra* note 97, at 8.

260. Hellum, *supra* note 150, at 639.

261. *Id.*

262. *Id.*

Despite cultural differences, Griffith and Hirsch uncovered remarkable underlying similarities, noting:

[W]ithin individual African cultures . . . opportunity exists for employing indigenous values in the interest of universally defined human rights. Conceptions essential to human rights – for example, responsibility toward others, participation, or respect for ways of life – exist in contemporary African societies. Civil and political rights are influenced by the underlying social values of compromise, harmony without concurrent uniformity, and tolerance of diversity. Grafts on local roots of this sort seem destined to mature and flower more robustly than alien transplants into inhospitable soil.²⁶³

Opening up a true dialogue with the communities of States Parties will make the implementation of the Protocol more amenable for all involved.

Initiating a dialogue between those who are in charge of implementing the Protocol and those who will abide by its laws is a weighty task that will require time, money and cooperation.

It is usually conceded that appropriate measures to understand, define, and secure these objectives require a much greater involvement of those whose interests are most at stake, and that nongovernmental organizations of various kinds, working with rural communities, should play a greater role in helping to identify and articulate the concerns, needs, and requirements of smallholder households.²⁶⁴

A truly participatory process would legitimize rural and disenfranchised voices.²⁶⁵ Although costly and likely to raise issues as to how competing cultural perspectives are to be weighted and reconciled with one another, this is not a conversation that can be ignored.²⁶⁶

To encourage the recognition of the rights vested in the Protocol, the drafters need to reframe the task: currently, the right to tradition and culture (customary law) and the right to equal treatment (statutory law) are discursively pitted against each other in rural Africa.²⁶⁷ The task should not be teaching statutory law or condemning customary law. The implementation of the Protocol should focus on the successes of living law and the similar underlying values codified in the statutory law and customary practice. Although some courts have been hesitant to embrace living law as a third perspective in the struggle,²⁶⁸ reinforcing this third source of

263. Welch, *supra* note 244, at 206.

264. Paul, *supra* note 62, at 228.

265. MARRIAGE REPORT, *supra* note 170, § 2.2.12; Zimmerman, *supra* note 122, at 215.

266. *Id.*

267. Zimmerman, *supra* note 122, at 198.

268. South Africa, for instance, rejected the use of a survey of living law. When *Mthembu* came before Judge Mynhardt, counsel for the defendant suggested that a survey of current views on judicial development of succession practices be conducted

law with surveys, interviews, and a deeper understanding of the nexus of customary and statutory law could effectively complement the implementation of the Protocol.

To develop laws that will be respected by the community, the governments of States Parties need to start by asking the communities not only about the Protocol but also about the values and desires enmeshed in living law. Simply put, the communities affected by the Protocol have been elided from the development of the Protocol and its implementation. If the Protocol is to be effectively and fairly implemented in a way that will assist women now and in the future, the States Parties must recognize the values of the communities upon which the laws will be imposed.

D. *Knowing When to End the Parade: Other Useful Revisions to the Protocol*

There comes a point when it must be accepted that a policy or law is ineffective or harmful to the cause. Sometimes it is more foolish to continue down the wrong path, expecting a different or better result, than to admit to a poor choice and start over. Although the bulk of this Note has focused on how the Protocol's implementation can be improved, some States Parties have already incorporated the Protocol goals into their domestic legislation.²⁶⁹ Other countries are still teetering on the edge of ratifying the Protocol, debating which reservations to make.²⁷⁰ Furthermore, in time, all the States Parties may conclude that certain aspects of the Protocol need to be amended.²⁷¹

It is of particular import that States Parties be prompted to shift away from the "affirmative action" language in the Protocol. "To comply with international human rights standards, many African governments are gradually replacing their gender-specific and family-based customary and religious laws with new legislation molded on an individualistic, equal-status ideal."²⁷² "One of the fundamental obstacles to women's equality is that de facto discrimination and inequality in the status of women and men derive from larger social, economic, political, and cultural factors that have been justified on the basis of physiological differences."²⁷³ Affirmative action programs

but Mynhardt rejected the idea. *Mthembu v. Letsela* 1998 (2) SA 675 (T.P.D.) at 685 (S. Afr.). The South African Law Commission also rejected suggestions to ascertain the living law. MARRIAGE REPORT, *supra* note 170, §§ 2.2.10–13.

269. See, e.g., South Africa, Kenya, and Botswana, as discussed *supra* note 90.

270. See, e.g., *Niger MPs*, *supra* note 111.

271. Protocol, *supra* note 4, art. 30; VCLT, *supra* note 56, arts. 39–41 (general rules on amending treaties).

272. Hllum, *supra* note 150, at 635.

273. Ebeku, *supra* note 38, at 110; see World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development,

only complicate the matter by stigmatizing women and artificially advancing the "voice" of women through token representation.²⁷⁴ While individual governments are responsible for providing for women's rights in their constitutions,²⁷⁵ affirmative action plans attempt to consolidate feminist concerns beyond an appropriate point. Moreover, because of the varied, statutory methods of implementing the Protocol that are frequently abrogated by contradictory and conflicting customary law, the implementation process has not been consistent.²⁷⁶

It is the responsibility of the States Parties to ensure that the Protocol's protections are in place for all women.²⁷⁷ This will require the creation of new laws, coordination by NGOs and the government, and a significant investment of time, resources and money. However, it will also require humility. At times, a country may select a method for implementing the Protocol that is ineffective or even harmful. It is important that a State Party is able to accept when it has made a mistake and make efforts to rectify the situation, rather than foolishly continue the procession unclad.

V. CONCLUSION

On the whole, it is clear that the adoption of the African Protocol on Women's Rights *per se* does not and will not necessarily translate to an end to the problem of abuse of women's rights in Africa nor does it necessarily mean the attainment of gender equality and non-discrimination.²⁷⁸

An instrument addressing women's rights was in some ways necessary. The present condition of women in Africa cannot be allowed to continue. However, the Protocol as it is currently written and being implemented poses veiled risks for women. Failure to enforce the Protocol may undermine *opinio juris* on the Protocol's binding effect—that it is acceptable that no one can see the invisible "cloth." However, implementing the Protocol ineffectively through stigmatizing and limiting affirmative action plans will have a more damaging effect on women: it tacitly condones sauntering through crowds in the buff!

and Peace, July 15–26, 1985, *Nairobi Forward-Looking Strategies for the Advancement of Women (NFLS)*, ¶ 1, U.N. Doc. A/RES/40/108 (Dec. 13, 1985) (describing the reasons and need for focusing on the advancement of women).

274. See *supra* Part III.D.

275. Rita Anyumba, *Instruments on Women's Rights*, in *BREATHING LIFE*, *supra* note 4, at 9, 11.

276. See *supra* Part III.B–D.

277. Protocol, *supra* note 4, art. 2.

278. Ebeku, *supra* note 38, at 135.

Although the Emperor is more than entitled to purchase a new wardrobe of magical material, he should seek more than the advice of his servile ministers and those personally invested in the success of the new clothes. Similarly, the successful implementation of the Protocol requires input from a circle larger than the drafters and women's rights community.

In any case, if women step out of their prescribed social roles in Africa, they will not do so because of the philosophy of human rights. The existence of human rights as a philosophy has a marginal effect on large-scale social structural change, which it cannot in and of itself either stem or impel. But the principle of human rights can modify the effects of social change in manners compatible with the wishes of individuals who define themselves both as members of communities and as persons with their own particular wants and needs. It can also protect individuals and communities against abuses by ruling classes and the state; this is its chief and most compelling object.²⁷⁹

It is the oft-ignored voices in the community—the children in the crowd—who should be consulted before the Emperor selects and pays for his suit. If the Protocol is to have any long-term success in promoting women's rights and resolving the conflict between statutory and customary law, the States Parties must complement its current efforts with a grass-roots approach to developing the law. The current measures have been developed externally and implemented from the top-down, but it is time that the crowd and the Emperor alike listen to the child before proceeding any further. The Protocol as written and currently implemented risks putting women in a socially and politically more precarious position than before, and unless a more comprehensive, bottom-up approach is taken to developing the domestic laws for implementation, women in Africa will remain exposed—and the Emperor will remain naked.

*Kristin Davis**

279. Rhoda E. Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES, *supra* note 62, at 159, 178.

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