

10-1-2009

Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions

Rachel Rebouché

University of Florida Levin College of Law, rebouche@law.ufl.edu

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Recommended Citation

Rachel Rebouché, *Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions*, 16 Wash. & Lee J. Civil Rts. & Soc. Just. 79 (2009), available at <http://scholarship.law.ufl.edu/facultypub/125>

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Health and Reproductive Rights in the Protocol to the African Charter: Competing Influences and Unsettling Questions

Rachel Rebouché*

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I. Introduction

In 2005, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) came into force.¹

* Associate Director, Adolescent Health Programs, National Partnership for Women & Families; Adjunct Professor, American University Washington College of Law. The author would like to thank Frances Eberhard, Paul Gugliuzza, Zinaida Miller, and Marya Torrez for their comments on earlier drafts. The author is particularly grateful to Professor Charles Ngwena for his leadership in the field of reproductive rights and for organizing the symposium, "Reproductive and Sexual Health and the African Women's Protocol," with the Washington and Lee Journal of Civil Rights and Social Justice.

1. Protocol to the African Charter on Human and Peoples' Rights on the Rights of

Since that time, the Protocol has received scant attention in legal scholarship. Where the Protocol has been mentioned, by and large it has received praise as a major step forward for women's rights on the continent.² Much of that praise is merited. The Protocol includes broad rights to non-discrimination, equality, and dignity, and it addresses a variety of areas such as labor and employment, marriage and the family, the legal system, the political process and public life, education, conflict, the market, the environment, and health.³

Drafted over eight years, the process for creating the document was marked by stops and starts, political compromise, and the influence of non-governmental organizations (NGOs). The text of the Protocol reflects the central purposes of those who lobbied for a regional instrument that focused on women's rights.⁴ First, the Protocol attempts to fill in the gaps in the region's human rights instrument—the African Charter on Human and Peoples' Rights (the Charter).⁵ The Charter only references women's equality in two places⁶ and has rarely been used to support women's rights.⁷

Women in Africa, adopted July 11, 2003, reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights in Africa*, 1 AFR. HUM. RTS. L.J. 40, 53 (2001) (entered into force Nov. 25, 2005) [hereinafter Protocol].

2. See, e.g., ROSEMARY SEMAFUMU MUKASA, *THE AFRICAN WOMEN'S PROTOCOL: HARNESSING A POTENTIAL FOR POSITIVE CHANGE* (2008); cf. Rachel Murray, *Women's Rights and the Organization of African Unity and African Union: The Protocol on the Rights of Women in Africa*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 253, 264 (Doris Buss & Ambreena Manji eds., 2005) (critiquing the approach of the Protocol as wavering between two objectives); Rachel Rebouché, Note, *Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235, 236 (2006).

3. See Murray, *supra* note 2, at 268 (noting that although "the Protocol covers economic, social and cultural rights" it is broader in other areas).

4. Melinda Adams & Alice Kang, *Regional Advocacy Networks and the Protocol on the Rights of Women in Africa*, 3 POL. & GENDER 451, 459 (2007).

5. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 (entered into force Oct. 21, 1986) [hereinafter Charter]. The Charter has been ratified by all member states of the Organization of African Unity/African Union. Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 683 (2004). See also Protocol, *supra* note 1, Preamble ("Despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, . . . women in Africa still continue to be victims of discrimination and harmful practices.").

6. See Charter, *supra* note 5, art. 18(3) (eliminating discrimination against women); *id.* art. 2 (prohibiting sexual discrimination in particular and entitling individuals to equality before the law and equal protection of the law, though not referencing gender).

7. At the time of writing, the Commission had not decided a case concerning women's rights. Danwood Mzikenge Chirwa, *Reclaiming (Wo)manity: The Merits and*

Second, proponents of a Protocol wanted to create ownership for women's rights in a context where rights are often criticized as elitist or as challenging cultural norms.⁸ As two authors note, "[I]t is the first instrument of its kind . . . developed by Africans, for Africans."⁹ Drafters proposed creating an 'African CEDAW'¹⁰—a document that would temper the Charter's allegiance to tradition, morals, and custom with language that would have the legitimacy of international human rights law but would still address women's lived experiences.¹¹ The Protocol attempts to accomplish these goals in a number of ways. The Protocol draws heavily from CEDAW and other international documents, and it includes much of what is already protected in international and regional instruments. In addition, the Protocol (particularly its early drafts) elaborates on rights in the Charter and includes rights that are not found in CEDAW or in the Charter.

This Article examines the drafting of an 'African CEDAW'¹² and concludes that it was a very fragmented process with consequences for the efficacy of the Protocol as a whole. Part I provides an overview of the drafting process including a brief critique of its shortcomings. Part II highlights the dominant influences underpinning the Protocol by way of textual examples. My analysis reveals a lack of cohesiveness in the final document that corresponds to a lack of vision for the instrument, suggesting how the patchwork approach to the Protocol may shape its future

Demerits of the African Protocol on Women's Rights, 53 NETHERLANDS INT'L L. REV. 63, 70 (2006). See VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICES, AND INSTITUTIONS* 133–34 (2001) (stating that, before the Protocol, the African Commission on Human and Peoples' Rights had not investigated women's rights issues using its Article 48 power under the Charter; see also Bronwen Manby, *Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1–7*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2006*, 171, 181 (Rachel Murray & Malcolm Evans eds., 2008) (noting that the discriminatory aspects of customary law and citizenship law have been the focus of litigation on the national and international level).

8. See FAREDA BANDA, *WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE* 44 (2005) (citing Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201 (2001)).

9. Rose Gawaya & Rosemary Semafumu Mukasa, *The African Women's Protocol: A New Dimension for Women's Rights in Africa*, 13 GENDER & DEVELOPMENT 42, 42 (2005).

10. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

11. Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights of Women in Africa ¶ 110, Nov. 12–16, 2001, http://www.chr.up.ac.za/hr_docs/afican/docs/oaui/oaui10.doc (last visited Feb. 19, 2010) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

12. Murray, *supra* note 2, at 253–54.

interpretation. Part III focuses on the health and reproductive rights in Article 14 in light of the Protocol's theoretical tensions. Three problems are analyzed: the failure of the Protocol to highlight how various articles relate to reproductive health rights (such as HIV prevention and prohibition of early marriage), the narrow construction of a broader right to health, and the dual rejection and embrace of women's roles as mothers. This last tension in particular—the intersection of the elimination of stereotypes found in formal and substantive equality rights and the promotion of a positive cultural context for women—best illustrates contradictions in the theoretical influences underpinning the Protocol. I conclude on an optimistic note. Although the Protocol may have missed opportunities to approach women's reproductive health more holistically and critically, the interpretation of the Protocol moving forward can be supplemented with defining principles that were underdeveloped in its drafting.

I. The Drafting Process and Its Difficulties

A. The Intended Purposes of the Protocol

The Protocol followed a broader movement to protect women's rights at the regional level.¹³ Nowhere is this clearer than in the Constitutive Act of the African Union, the treaty that dissolved the Organization of African Unity (OAU) and created a new regional body.¹⁴ While the Constitutive Act focuses on sovereignty (promoting unity, peace, and setting limits to intervention in state's affairs), it acknowledges women in a way that the Charter¹⁵ and OAU's Charter do not.¹⁶ For example, the Preamble speaks

13. See Fareda Banda, *Protocol to the African Charter on the Rights of Women in Africa*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2006*, 441, 442–43 (Rachel Murray & Malcolm Evans eds., 2008) (stating that the regional approach to human rights needed reform and that some women's rights initiatives were taken on by sub-regional bodies).

14. Constitutive Act of the African Union, July 11, 2000, http://mirror.undp.org/african_union_en/treaties/constitution.pdf (entered into force May 26, 2001).

15. The Charter focused on the protection of state sovereignty. Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 33, 58 (2003).

16. See Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 *J. AFR. L.* 1, 9 (2003) (noting that the OAU's Charter reflected states' insecurities about newly won independence, and thus couched rights in sovereignty and domestic governance).

of a united and strong Africa built on partnerships with civil society, "in particular women."¹⁷ Specifically, Article 4(l) lists the goal of the "[p]romotion of gender equality."¹⁸

In this spirit of support for women's rights, national, regional, and international NGOs approached the OAU about a Protocol to the Charter. The process took shape in 1995 when Women in Law and Development in Africa (WiLDAF) co-hosted a seminar with the African Commission on Human and Peoples' Rights (the Commission).¹⁹ Participants passed a resolution calling for a Protocol to the Charter²⁰ and the appointment of a Special Rapporteur on the Rights of Women.²¹ In its 31st Ordinary Session in 1995, the Organization of African Unity Assembly of Heads of States and Government agreed to invest in the project of drafting a Protocol.²²

Advocates could have revised the Charter rather than drafting a Protocol,²³ but they started from the premise that the Charter was too difficult to amend.²⁴ Not only would obtaining agreement among a majority of member states on new language be challenging,²⁵ but advocates believed passing the amendments necessary to cure the Charter's deficiencies would be daunting.²⁶ The Charter refers to women in only two

17. Constitutive Act of the African Union, *supra* note 14, Preamble.

18. *Id.* art. 4. Gender equality is a principle and not an "objective" under Article 3 of the Charter, although the Charter recognizes the objectives of preventing disease and promoting good health as well as promoting human rights and "other relevant human rights instruments." Charter, *supra* note 5, art. 3.

19. Adams & Kang, *supra* note 4, at 460.

20. Forty-four representatives from the Commission and NGOs participated. *See id.* at 460 (explaining that the Charter was "inefficient and affected women in contradictory ways" creating a need for a "more responsive" Charter) (citations omitted).

21. African Commission on Human and Peoples Rights, Special Rapporteur on the Rights of Women in Africa, http://www.achpr.org/english/_info/index_women_en.html (last visited October 18, 2009) (explaining the creation of the position to "reinforce and promote rights of women in Africa") (on file with Washington and Lee Journal of Civil Rights and Social Justice).

22. AHG Res. 240, 31st Sess. (June 1995).

23. Before the Protocol some scholars interpreted Article 18 read with Article 2 as conferring rights found in international documents like CEDAW (such as a state duty to modify customs that discriminate). Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1371 (1995).

24. *See* Murray, *supra* note 2, at 261 n.51 (citing a WiLDAF publication).

25. *See* Charter, *supra* note 5, art. 55 (requiring a simple majority of member states to amend the Charter).

26. *See* NMEHILLE, *supra* note 7, at 244 (summarizing the argument that "the Charter, as a document that is inspired by the virtues and the values of African civilization, cannot

places. Article 2 includes the category of sex in the non-discrimination clause,²⁷ and Article 18(3) states: "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."²⁸ Some observers argue that these two provisions, taken with the non-gendered equal protection guarantee in Article 3²⁹ and the deference accorded to international standards in Articles 60³⁰ and 61,³¹ imply broader protection for women's rights in the Charter.³²

per se be an effective tool to protect the rights of women in view of the role of women in the traditional African family").

27. Article 2 states, "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." Charter, *supra* note 5, art. 2.

28. Charter, *supra* note 5, art. 18(3); *see id.* art. 18(4) (concluding with a clause that guarantees a right to special measures for the "aged and disabled" that are "in keeping with their physical and moral needs").

29. *See id.* art. 3 ("1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.").

30. Article 60 states:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Id. art. 60.

31. Article 61 states:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Id. art. 61.

32. *See* Chaloka Beyani, *Toward a More Effective Guarantee of Women's Rights in the African System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 285, 285 (Rebecca Cook ed., 1995) (explaining that widely accepted standards of human rights in Africa "may have a particular status within general international law"); *see also* NMEHIELLE, *supra* note 7, at 245-46 ("Articles 60 and 61 ensured that other international instruments could be incorporated into the Charter through the interpretation of its provisions.").

Critics of this interpretation note that the Charter's deference to international law pales in comparison to its emphasis on protecting familial and cultural values, which many in the regional (and international) women's rights movement saw as contradictory to women's equality.³³ Article 17 and Article 29 of the Charter, for example, were cited by national courts to undermine gender equality claims under customary law.³⁴ Article 17 creates a state duty to promote morals and traditional values that are recognized by the community.³⁵ Article 29 elaborates on the special role of the state and the individual in protecting cultural norms.³⁶

For those supporting a new protocol, the structure of Article 18, the only article of the Charter that refers to "women," was emblematic of the Charter's recognition of gender in terms of family roles. First, Article 18(3) marries women's rights to the rights of children.³⁷ Other international human rights documents have taken a similar position; the American Convention on Human Rights³⁸ is one

33. NMEHIELLE, *supra* note 7, at 243–45.

34. See Center for Reproductive Rights, *The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights* (Briefing Paper) 2–4 (Feb. 2006), http://reproductiverights.org/sites/err.civicaactions.net/files/documents/pub_bp_africa.pdf (noting widespread acceptance that the Charter has been ineffective in promoting women's rights and the basis for national courts to undermine women's rights); see also Charter, *supra* note 5, art. 17(3) ("The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.").

35. Charter, *supra* note 5, art. 17.

36. Article 29 states:

The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; . . . 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; . . . 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Id. art. 29.

37. See Heyns, *supra* note 5, at 687–88 (arguing that the "lumping together of women and children" perpetuates "outdated stereotypes").

38. Article 17 of the American Convention on Human Rights states in part:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. 2. The right of men and women of marriageable age to marry and to raise a family shall be

example.³⁹ This approach may be at odds with the gender equality norms expressed in international human rights documents like CEDAW, which emphasize the elimination of stereotypes.⁴⁰ Furthermore, Article 18(1) focuses on the protection of the family as the "natural unit and basis of society," and obliges the state to "take care of its physical health and moral."⁴¹ Article 18(2) further requires the state "to assist the family which is the custodian of morals and traditional values recognized by the community."⁴² The Charter does not define morals, values, or specify which community is to define them. Moreover, the Charter does not indicate how the state is to help families protect those values.

A generous reading of Article 18 offered by at least one scholar is that it imposes a duty on states to "create societal conditions in which families might flourish."⁴³ But the type of family that the Charter might envision, as a unit grounded in tradition and community norms, may be fixed. The protection of the Charter may not apply to any configuration of the family. Instead, the document may not protect those families out of step with community norms that value male-headed, heterosexual households.⁴⁴ Even if the recognition of what would help families flourish includes an

recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention

American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978).

39. NMEHELLE, *supra* note 7, at 132.

40. See, e.g., International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Programme of Action*, ¶ 4.19, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) ("Schools, the media and other social institutions should seek to eliminate stereotypes in all types of communication and educational materials that reinforce existing inequities between males and females and undermine girls' self-esteem."); The Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 and A/CONF.177/20/ADD/1 [hereinafter *Beijing Platform*] (discussing concerns about gender role stereotypes throughout the document). See also BANDA, *supra* note 8, at 183 (noting the ICPD revolutionized thinking about reproductive matters by changing the paradigm from fertility and population control to women's rights to decision-making and well-being).

41. Charter, *supra* note 5, art. 18(1).

42. *Id.* art. 18(2)

43. NMEHELLE, *supra* note 7, at 131–32. See also Adjetey, *supra* note 23, at 1376–77 (noting that the reference to cultural values is ill-defined).

44. See NMEHELLE, *supra* note 7, at 77 (explaining how the Charter could be interpreted as promoting a heterosexual conception of the family given the decision to omit sexual orientation from the Protocol and the antipathy toward same-sex relationships in many African countries).

appreciation of the rights of women in the family, many have highlighted that cultural values are often in tension with women's rights.⁴⁵

The demarcation of family roles in customary law or in community practice has been a point of conflict between the agenda for women's equality and many African customs. Custom that is patriarchal—practices that confer property ownership and decision-making to men exclusively, for example—has been criticized as oppressive and antithetical to gender equality.⁴⁶ This is not to ignore the rich literature that questions the dichotomy between culture and equality.⁴⁷ Situating women's human rights as contingent on family identity supports some advocates' worst fears that women will feel pressure to conform to traditional expectations for wives and mothers. As the last Part of this Article highlights, the identification of women as family members and the strength of that association in many African cultures stigmatizes single women or women without children as well as overemphasizes women's caretaking role.⁴⁸ The problem of stereotyping remains if the protection of women's rights is tied to their roles in families as wives or mothers.⁴⁹

The project of writing a Protocol was intended to mitigate some of these tensions by acknowledging the importance of African cultural traditions and promoting those values which complement women's rights to equality and dignity. To this end, drafters emphasized women's participation in writing the Protocol and focused on women's roles in creating community or cultural practices and values.⁵⁰ Advocates also

45. Adams & Kang, *supra* note 4, at 460.

46. NMEHIELLE, *supra* note 7, at 134, 244. See also ROSEMARY SEMAFUMU MUKASA, THE AFRICA WOMEN'S PROTOCOL: A TOOL TO MOBILISE RESOURCES FOR FINANCING GENDER EQUALITY AND WOMEN'S EMPOWERMENT (forthcoming 2010) (describing traditional practices in three African countries that are harmful to women) (on file with the author). This is not a critique limited to the African context. International women's rights advocates have long argued that situating women in families has excluded them from the reach of public international law. See, e.g., Karen Engle, *Views from the Margins: A Response to David Kennedy*, 1994 UTAH L. REV. 105, 106–07 (1994).

47. Scholars such as Tracy Higgins have studied custom that both empowers and limits women's agency. Tracy Higgins et al., *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653, 1708 (2007). See Mukasa, *supra* note 9, at 48 (describing how a lack of cultural influence on women's rights and weak policies that recognize gender equality both contribute to the problems of achieving autonomy for women).

48. BANDA, *supra* note 8, at 91.

49. See *id.* (explaining the role of motherhood and noting how custody is awarded to mothers and fathers based on the age and maturity of the child).

50. See *id.* at 69 (noting the final draft's treatment of the right to positive cultural context in Article 17).

highlighted issues ignored by the Charter (and the Commission) by incorporating rights found in international documents like CEDAW, but changed the wording to acknowledge the practices of various African communities. For instance, the right of consent to marriage and to the equality between spouses⁵¹ drew attention to women's rights *within* family but used language suited to an African regional instrument.⁵²

B. History of the Drafting Process

With these motivations in mind, in 1997, two years after the WiLDAF meeting, members of the Commission convened a working group of experts to write a first draft of the Protocol.⁵³ This group consisted of Commission members, representatives from African NGOs, and international observers.⁵⁴ One commentator noted that the working group did not appear to have a vision for the Protocol.⁵⁵ Although the first draft mirrored the structure of the Charter, expanding on as well as adding rights, overall it looked like a "wish list" of rights to end discrimination against women and focused on issues related to family life, violence, and cultural practices.⁵⁶ The 1997 draft was then submitted to the Commission for comments.⁵⁷ At this point, NGOs that had reviewed the draft took an active role in moving the process forward, but were less involved in debating the substance of the text. The International Commission of Jurists (ICJ) hosted a workshop in late 1997 to help facilitate NGOs' comments on the draft and passed a resolution calling for completion of the drafting process.⁵⁸ The NGO lobby met with some success. The Commission met with the ICJ, WiLDAF, and other organizations to amend the draft and set the terms for the appointment of a Special Rapporteur on the Rights of Women.⁵⁹ In July 1998 at its 23rd

51. Protocol, *supra* note 1, art. 6.

52. NMEHELLE, *supra* note 7, at 244.

53. Mary Wandia, *Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Comoros Lead the Way*, FEMNET, Jan. 1, 2004, at 2, http://old.apc.org/english/capacity/policy/mmtk_ictpol_humanrights_African_Charter_protocol.doc (last visited Feb. 19, 2010) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

54. *Id.*

55. BANDA, *supra* note 8, at 68.

56. *Id.* at 68–69.

57. Wandia, *supra* note 53, at 2.

58. *Id.*

59. *Id.*

Session, the Commission formally endorsed the appointment of the Special Rapporteur and selected a Commissioner as Rapporteur to shepherd the drafting process.⁶⁰ The Special Rapporteur convened another working group of experts to consider the draft.⁶¹ From the start, she was criticized for failing to seek wide consultation. Commentators noted that the Rapporteur excluded many NGOs, observers, and state representatives by only seeking input from government representatives of seven of fifty-three states.⁶²

In the next year the Commission adopted a draft Protocol⁶³ (as revised by the Special Rapporteur) and sent the draft to the OAU for consideration.⁶⁴ Like the previous draft, the 1999 draft consisted of twenty-three articles and focused on discrimination, the elimination of harmful traditional practices, and violence against women.⁶⁵ What is striking is that despite two years of mobilization by civil society and the appointment of a Special Rapporteur the draft's substance had not changed all that much. One noticeable difference was that the draft was organized more like CEDAW, addressing areas of public or private life where women were subject to discrimination or disparate treatment, and relied less on the structure of the Charter.⁶⁶ The Commission had made only a few amendments by this stage. It revised the language to emphasize the rights of the girl-child, added provisions on the elderly and the disabled, and put forward an absolute prohibition of polygamy.⁶⁷ The draft was sent to the OAU in 2000.

The OAU Women's Unit amended the draft by adding language from African regional instruments (of significance was the incorporation of the then-draft Convention on Harmful Traditional Practices⁶⁸) and

60. *Id.*

61. *Id.*

62. See Murray, *supra* note 2, at 263 n. 58 (noting that many NGOs did not see a copy of the Draft Protocol until the 2001 Experts Meeting); see also BANDA, *supra* note 8, at 75 (noting complaints from NGOs regarding a lack of consultation).

63. Draft Protocol to the African Charter on the Rights of Women, Nov. 15, 1999, DOC/OS (XXVII)/159b.

64. BANDA, *supra* note 8, at 74.

65. Odinkalu, *supra* note 16, at 21.

66. See BANDA, *supra* note 8, at 70 (noting the similarity between the Protocol draft and CEDAW rights within the family).

67. *Id.* at 73.

68. Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of African Women in Africa, CAB/LE/66.6/Rev.1, Sept. 13, 2000 (entered into force Nov. 25, 2005); see also Wandia, *supra* note 53 (noting assistance from the Inter-African

incorporating the input of Member States.⁶⁹ The Southern African Development Community also suggested changes to the provisions on violence, temporary measures, and states' ability to make reservations.⁷⁰ The draft shifted between organizations, each adding and deleting language. There was very little communication among the bodies revising the draft or with civil society.

In 2001, the OAU General Secretariat convened a Government Experts Meeting (the Experts Meeting) and representatives from forty-four states were in attendance. NGO and international organizations were allowed to participate as observers. Interestingly, state representatives both rolled back rights in the draft and included higher standards than those already in international human rights law.⁷¹ Participants at the Experts Meeting added rights for refugees, asylum seekers, and internally displaced and returnees; they added protection for "women in distress;" and they strengthened the Protocol's treatment of temporary special measures. At the same time, major disagreements erupted over the complementarity of men's and women's roles; the inclusion of gender and sexual orientation in the definition of discrimination (the latter revision was not included in the final draft); states' abilities to limit women's right to pass their nationality on to their children; and the right to control fertility.⁷²

Fights that had been settled in prior discussions were rehashed, sometimes with differing results, and perspectives absent from initial meetings resurfaced at various points with discordant effects. Perhaps the most controversial issue was polygamy. Issues that cut to the heart of family roles and tradition—polygamy being an example—were the focus of debates at the Experts Meeting.⁷³ The 1997 draft condemned polygamy but did not prohibit it if all parties consented. But the 1999 draft included an absolute ban of polygamy, largely due to NGO pressure.⁷⁴ In 2001, participants at the Experts Meeting could not agree and left three options

Committee on Traditional Practices Affecting the Health of Women and Children to merge the Draft Protocol with the Draft Convention on Traditional Practices).

69. See BANDA, *supra* note 8, at 74 (noting that the OAU's revisions included changes to the articles on education, economic and social and welfare rights, and health and reproductive rights).

70. *Id.* at 75–76.

71. Banda, *supra* note 13, at 447.

72. See BANDA, *supra* note 8, at 71 (discussing the controversy around provisions granting reproductive rights to women).

73. *Id.* at 76.

74. *Id.* at 74.

bracketed. The third option, which prefers monogamy but does not require it and emphasizes consent in polygamous relationships, was finally chosen at a second Experts Meeting in 2003.⁷⁵ Rachel Murray notes that the discussion on polygamy reopened a debate that had been settled in OAU documents and in CEDAW General Recommendation 21.⁷⁶ For example, CEDAW's General Recommendation 21 had concluded that polygamy "contravenes a woman's right to equality with men, and . . . ought to be discouraged and prohibited."⁷⁷

There was little continuity between drafts of the Protocol. More fundamentally, the inability to reach a consensus until the very last stage of drafting shows how contentious the treatment of family and culture were. At the conclusion of the 2001 Experts Meeting, delegates supported further review of a revised draft was needed, as disagreement among states continued to exist. Participants agreed to meet again at a second Experts Meeting, but in 2002, two meetings were scheduled and cancelled for lack of a quorum. NGOs met in June 2002 and passed the "Durban Declaration," which called for expedient adoption of the Protocol and effective participation of government experts.⁷⁸ At a subsequent meeting in January 2003, a coalition of NGOs developed a strategy for completing the Protocol.⁷⁹ Organizations pooled their comments in a collective markup of

75. Of the other two options for polygamy, one clause would have prohibited it whereas another clause would have recognized monogamy only, but protected women currently in polygamous unions. See Protocol, *supra* note 1, art. 6(c) ("[M]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected."). Also, the 2001 Experts Meeting failed to reach agreement on articles concerning monitoring and amending the Protocol. See Adams & Kang, *supra* note 4, at 461.

76. See Murray, *supra* note 2, at 267 n.86–88.

77. Paragraph 14 of General Recommendation 21 states:

States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.

Committee on the Elimination of Discrimination against Women Thirteenth Session, *General Recommendation No. 21, Equality in Marriage and Family Relations*, ¶14, 49th Sess., Supp. No. 38, U.N. Doc. A/49/38 (Apr. 12, 1994).

78. See Adams & Kang, *supra* note 4, at 461 (discussing The Durban Declaration).

79. *Id.*

the 2001 draft and focused on incorporating international standards already ratified by countries.⁸⁰

Sally Engle Merry notes similar strategies employed by advocates drafting international treaties. Reaching a consensus is the driving force of states' and civil society's discussions, which often results in vague and wordy documents.⁸¹ The consensus she describes is rarely evidence-driven and is more focused on inserting text from other international or regional documents to which states have already agreed.⁸² The process, she concludes, conceals intractable differences between states.⁸³

Civil society did not try to solve differences between drafters, but instead pushed for an end to the drafting process.⁸⁴ NGOs directed their attention toward their own governments and lobbied ministers and state representatives to commit to a second Experts Meeting to complete the Protocol. In March 2003, well over a year after the first Experts Meeting, a second Experts Meeting resulted in textual changes to the 2001 draft, but few substantive changes. The following disagreements are noteworthy: Libya, Mali, Senegal, and Togo objected to the right to decide the number and spacing of children even though the same language is found in CEDAW and those states are signatories to CEDAW without reservations;⁸⁵ Tunisia and Sudan objected to the minimum age of marriage; and Burundi, Libya, Senegal, and Sudan objected generally to the health and reproductive rights in Article 14.⁸⁶

80. *Id.*

81. See Sally E. Merry, *Human Rights and Global Legal Pluralism: Reciprocity and Disjuncture*, in *MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD* 215, 221 (Franz von Benda-Beckmann et al. eds., 2005).

82. See *id.* ("Using 'agreed-upon language' meant that there was no need for further debate, nor was further debate even appropriate since global consensus already existed about this language.").

83. See *id.* at 229 ("Localization of human rights does not mean that their cultural content is transformed.").

84. This is not to imply that fears about not finishing the Protocol were illegitimate. At some point, advocates had to make the decision whether to move the process of drafting to its conclusion, rather than to fight ideological battles.

85. BANDA, *supra* note 8, at 78 n.254.

86. *Id.* at 78. In addition, South Africa and Botswana objected to a death penalty prohibition for pregnant or nursing women. South Africa objected because it no longer had a death penalty. *Id.* Libya objected to the protection of women in armed conflict in Article 11(3). *Id.*

Following the second Experts Meeting, the Protocol was adopted by the Second African Union Summit on July 11, 2003.⁸⁷ Women's rights organizations launched a wide-scale campaign for ratification.⁸⁸ The African Union supported the campaign, as demonstrated in the 2004 adoption of a Solemn Declaration on Gender Equality in Africa, which reinforces provisions in the Protocol. The Protocol came into force on November 25, 2005 with the ratification of Togo—the fifteenth state to sign and ratify the Protocol.⁸⁹

C. What the Drafting Process Suggests

Advocates viewed the Protocol as a way "to allow African governments to fulfill the international commitments [to which] they have subscribed."⁹⁰ Drafters primarily relied on CEDAW, but also looked to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on Population and Development (ICPD), and the Beijing Platform of the Fourth World Conference on Women (Beijing Platform).⁹¹ The resulting text based on these influences "waivers between being an interpretation of the [Charter] for women on the one hand, and a collection (not a comprehensive one) of some existing international standards on the other."⁹²

The first draft looked like a list of rights that attempted to mirror the structure of the Charter.⁹³ As the drafting process evolved, the Protocol began to look less like the Charter and more like the international documents that African states had ratified.⁹⁴ At one stage, the OAU added

87. Press Release, *Victory for Women's Rights in Africa*, PAMBAZUKA NEWS, Oct. 28, 2005, available at <http://www.mail-archive.com/pambazuka-news@pambazuka.org/msg00026.html> (last visited Feb. 19, 2005) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

88. *Id.*

89. *Id.*

90. Drafting Process of the Draft Protocol on the Rights of Women in Africa, 27th Session, April–May 2000, DOC/OS (XXVII)/159b, at 1.

91. Murray, *supra* note 2, at 264 n.65.

92. *Id.* at 264.

93. *Id.*

94. See BANDA, *supra* note 8, at 73 (noting that many of the Protocol rights were already in other human rights instruments).

rights to complement regional instruments, and at another stage, government experts amended text to reflect compromises on issues such as polygamy, property division upon divorce, and the right to pass nationality on to children.⁹⁵

The resulting draft Protocol reflected this piecemeal approach to incorporating influences from the Charter, CEDAW, and other regional and international human rights documents. The problem was that the Protocol's drafting proceeded without a clear philosophy for its content: "The omission of some international standards but the inclusion of others does not give a clear vision of what it intends to reflect, and the Protocol is not consistent about its use of African instruments or jurisprudence."⁹⁶ Rights were added and rearranged, particularly at the 2001 Experts Meeting, but not as part of a comprehensive discussion about the Protocol's purpose. As the next Part discusses, the resulting document's structure lacks consistency.⁹⁷

This is not to undermine the many ways in which the Protocol goes beyond the international standards on which it is premised. Discussed in greater depth below, the health and reproductive rights in Article 14 provide an example. The limited right to an abortion moves beyond the ICPD, Beijing Platform, and CEDAW. However, the Protocol also fails to meet existing international standards for reproductive rights.⁹⁸ Article 14's "right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS" is inconsistent with international and regional treaties that recognize women's particular vulnerability to and needs resulting from HIV infection.⁹⁹

This incoherent vision could be the result of certain characteristics of the drafting process. There seems to have been varying participation by NGOs and government experts, and their influence surfaced at different times. It appears that NGOs made key contributions to the first drafts, but were less successful in shaping the debates at the Experts Meetings.¹⁰⁰ The

95. *Id.* at 73–75.

96. Murray, *supra* note 2, at 253.

97. *Id.* at 269.

98. *See id.* at 268 (noting that the Draft Protocol did not provide for temporary special measures to promote women's participation in public life in the way that CEDAW does).

99. *See id.* at 266–67 (contrasting the Protocol's passing reference to HIV/AIDS to the African Commission's Resolution on the HIV/AIDS Pandemic—Threat Against Human Rights and Humanity).

100. It should also be noted that many of the Protocol's rights have a clear imprint of NGO influence as seen in the rights to reproductive health.

strength of the civil society lobby appears to have been in the campaign to ratify the Protocol and not in negotiating the nuances of its final content.

The Protocol's drafting shows a failure to consider how its various purposes—regional accountability and international legitimacy—should converge in a process aligned with a set of defined principles and rights that supported the document's larger purpose. A treaty drafted contemporaneously, the United Nations Convention on the Rights of Persons with Disabilities (the Convention), illustrates a different trajectory.¹⁰¹ Drafters of the Convention began with eight principles and the recognition that although the rights of persons with disabilities were protected elsewhere in international law, the particular needs and voices of persons with disabilities continued to be undervalued or unrecognized.¹⁰² At the beginning of writing the Convention, an Ad Hoc Committee considered proposals for what a comprehensive, international convention should look like based on commitments to social development, human rights, and non-discrimination. The Ad Hoc Committee held its first session over ten working days in which many of the thorny questions about the Convention's purpose and structure were debated. Difficult conversations helped build consensus in the first session, resulting in agreement on foundational principles among participants that informed eight sessions of negotiating the substance of the Convention.¹⁰³

101. United Nations Convention on the Rights of Persons with Disabilities. I thank Rebecca Cook for suggesting I contrast the Convention's drafting to the Protocol's. To compare with the process of writing the South African Constitution at the end of apartheid, see Saras Jagwanth & Christina Murray, *No Nation Can Be Free When One Half of It Is Enslaved*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 233 (Beverly Baines & Ruth Rubio-Marin eds., 2004), discussing the South African Constitution drafters' intent to make gender equality a value that underpinned the entire constitutional system rather than a principle "added on."

102. These principles are:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Guiding Principles of the Convention, <http://www.un.org/disabilities/default.asp?navid=14&pid=156>.

103. See Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities (2005), <http://www.un.org/esa/socdev/enable/rights/adhoca57357e.htm>.

If one of the primary goals of the Protocol was to create an ‘African CEDAW,’ a discussion of how the Protocol should meet that purpose could have supported the document’s relevancy and legitimacy. A well-defined set of principles guiding the drafting process may have resulted in a document with a more consistent approach better aligned with drafters’ ultimate goals.¹⁰⁴ Instead, the Protocol was shaped by an unreflective process among changing participants who negotiated discrete points rather than broad principles.

As Part II demonstrates, the Protocol reflects various theoretical traditions. Because the Protocol draws from the text of international and regional documents, it carries with it the influences of those texts. The result is a set of rights with underlying purposes that may conflict or contradict each other. The aim of the next Part is not to suggest that differing understandings of women’s rights cannot sit together or inform each other.¹⁰⁵ Instead, my purpose is to reveal the competing influences that might undermine the effectiveness of the Protocol going forward, particularly in the area of health and reproductive rights. As Part III explains, the result may be a document whose text does not necessarily set a clear course for addressing the most complex issues that African women face.

II. Theoretical Underpinnings of the Protocol

The Protocol incorporates various insights of feminist legal theory expressed in women’s rights instruments over the last thirty years. As Johanna Bond highlights, the main influences on the Protocol—CEDAW and the Charter—draw from documents with very different normative goals.¹⁰⁶ CEDAW was written in an era focused on formal equality, and the

104. One could attribute the lack of direction in the drafting process to the states’ lack of will to scrutinize the meaning of women’s rights. The more cynical supposition is that states had low expectations of enforcing Protocol rights and, thus, little incentive to parse out their meaning.

105. It is not my objective to catalogue all the influences found in the Protocol and there are influences that I do not address here. For example, the Protocol pays heed to “third generation” rights such as the right to a healthy and sustainable environment in Article 18 or the right to sustainable development in Article 19. Arguably, some of this language reflects influences from the Charter and the Gender Division of the Economic Community of Western African States. See BANDA, *supra* note 8, at 57 (noting Gender Division’s emphasis on peacekeeping and finance).

106. See Johanna E. Bond, *Gender, Discourse and Contemporary Law in Africa* (unpublished manuscript, on file with the author).

Charter reflects an anti-colonialist movement that valued nationalism and cultural identity.¹⁰⁷ Part I's discussion of the clash between equality and culture makes clear that an attempt to incorporate both perspectives entrenched some of the debates among feminist theorists. In this Part, I describe the influence of liberal, dominance, and cultural feminism on the Protocol and note its relevance to Article 14.

A. Formal and Substantive Equality

The Protocol, like the text of CEDAW, is based on the goal of equality and aligned with liberal feminism.¹⁰⁸ Article 1(f) of the Protocol mirrors Article 1 of CEDAW in its definition of discrimination,¹⁰⁹ and Article 2's state duty to eliminate discrimination and promote equal protection is similar to Article 2 of CEDAW.¹¹⁰ Provisions on marriage (excluding clauses on polygamy and registered marriages, which are discussed below) are framed in terms of equal rights. For example, Article 6 of the Protocol speaks of the state's duty to "ensure that women and men enjoy equal rights

107. *Id.*

108. For a concise account of liberal feminism's central tenets, see Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J. L. & GENDER 277, 280–81 (2008). Note that CEDAW, as originally drafted, shows the imprint of liberal feminism. But General Recommendations and the reports from the CEDAW Committee reveal a changing appreciation for how women's rights issues are understood.

109. Fareda Banda, *Blazing a Trail: The African Protocol on Women's Rights Comes into Force*, 50 J. AFRICAN L. 72, 74 (2006). Article 1(f) of the Protocol reads: "Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life." Protocol, *supra* note 1, art. 1(f). CEDAW Article 1 reads:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW, *supra* note 10, art. 1.

110. Article 2(1) of the Protocol, like Article 2 of CEDAW, sets out the duties of States' Parties to combat discrimination "through appropriate legislative, institutional and other measures." Protocol, *supra* note 1, art. 2(1). CEDAW Article 2(f)—"To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women"—is expanded upon in Article 2(2) of the Protocol, *supra* note 1, art. 2(2).

and are regarded as equal partners in marriage," similar to CEDAW and the ICCPR.¹¹¹ The Protocol's property rights in marriage mirror the common law's understanding of separate property, as evidenced by equal rights to acquire and to manage property.

Article 14's treatment of "the right to control fertility" and "the right to choose any method of contraception" resonates with liberal feminism's focus on equal and unencumbered choices.¹¹² The right to decide the number and spacing of one's children in Article 14(1)(b) is drawn from Article 16(1)(e) of CEDAW (with additional language in the Protocol's version, as is noted in the next Part). This choice-focused language sits uneasily with other provisions of the Protocol that acknowledge how abusive or discriminatory treatment undermines women's agency.¹¹³

Perhaps in answer to this criticism, the Protocol, like CEDAW, also focuses on *de facto* or substantive equality.¹¹⁴ Article 2 of the Protocol not only includes permission to "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist," but also addresses "the social and cultural patterns of conduct of women and men."¹¹⁵ Article 2(2) states:

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to

111. See CEDAW, *supra* note 10, art. 16 ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women."); see also International Covenant on Civil and Political Rights art. 23(4), *entry into force* Mar. 23, 1976, <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR] ("States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."). Article 23(4) states: "In the case of dissolution, provision shall be made for the necessary protection of any children." *Id.* art. 23(4).

112. See Beijing Platform, *supra* note 40, ¶ 17 (discussing the right to control one's own fertility).

113. Perhaps interpreting Article 14 as a matter of substantive equality as Roselynn Musa does (who calls Article 14 "central to the realization of women's potential") would help incorporate an account of women's lived experiences. Roselynn Musa, *Provisions of the Protocol*, in *BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL ON WOMEN'S RIGHTS IN AFRICA* 19, 22 (Roselynn Musa et al. eds., 2006).

114. See Banda, *supra* note 109, at 75 (noting that Article 2 of the Protocol builds on Articles 2(f) and 5(a) of CEDAW); see also CEDAW General Recommendation No. 25, art. 4 on Temporary Special Measures, CEDAW/C/2004/WP.1/Rev. 1, ¶ 1, <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> (supporting the interpretation of CEDAW as requiring substantive equality).

115. Protocol, *supra* note 1, art. 2.

achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.¹¹⁶

Article 2 highlights that discrimination in practice derives in part from harmful stereotypes. Article 12 more specifically requires states "to eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination."¹¹⁷

Article 14 reflects CEDAW's influence by emphasizing a state duty to "provide adequate, affordable and accessible health services . . . to women especially those in rural areas."¹¹⁸ Article 14's emphasis on access to services, especially for marginalized women, places importance on de facto equality and mirrors language that is found in the ICPD and the Beijing Platform.¹¹⁹ As Part III will show, the reference to access to services may lack the scope of its international predecessors. The Protocol frames discrimination as a problem for the state as well as private and community actors. This approach is consistent with CEDAW, which has been interpreted to reach discriminatory laws and practices regardless of whether the conduct is caused by the state.¹²⁰

The Protocol, however, incorporates rights that deviate from an equality approach—a consequence of compromises made during the Protocol's drafting. Algeria, Egypt, Morocco, and Tunisia argued against "equal rights" and for the principle of complementarity—the idea that laws should reflect the distinct roles of women and men that align with religious and traditional norms.¹²¹ For example, adding the word "equitable" to the description of property rights following divorce, separation, or annulment

116. *Id.* art. 2(2).

117. *Id.* art. 12.

118. Protocol, *supra* note 1, art. 14(2)(a).

119. Report of the International Conference on Population and Development, A/CONF.171/13 (18 Oct. 1994), ¶ 7.3, <http://www.un.org/popin/icpd/conference/offeng/poa.html>; Beijing Platform, *supra* note 40, ¶¶ 95–96, 223; see Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights, in* TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111, 114 (Ineke Boerefijn et al. eds., 2003) (contrasting formal equality with an "equality of results" approach, which focuses on "equal[izing] the starting point" by giving women equal access to the benefits of society); see also Musa, *supra* note 113, at 22 (describing reproductive rights as "central to the realisation of [women's] potential").

120. Vicki Jackson, Symposium, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 *LOY. L.A. L. REV.* 271, 275–76 (2003).

121. Banda, *supra* note 109, at 76.

in Article 7(d) reflects a major debate at the 2001 Experts Meeting.¹²² The concept of equity also appears in the description of a widow's share of inheritance in Article 21.¹²³

It has been noted elsewhere that 'equitable' and 'equal' do not share the same meaning.¹²⁴ The CEDAW Committee stated in a concluding observation that the two terms, equal and equitable, were not interchangeable because equality is objective whereas equity is situational. Interestingly, Article 14 does not follow CEDAW in emphasizing rights based on the "equality of men and women." Although this framing may portend a more expansive reading of Article 14, it could also be read in the same terms as the 'equitable v. equal debate.' That is, the Article 14 state duty to protect and respect the health of women may allow for different treatment of men and women so long as the state is acting to accommodate women's particular needs.

B. Dominance Feminism and the Treatment of Violence

Other language in the Protocol is distinctly driven by dominance feminism, which reflects the post-CEDAW attention given to the sexual exploitation of women and deep debates among feminists about the sources of women's oppression.¹²⁵ Dominance feminism explains women's inequality as a product of "a system of sexual subordination in which men define themselves as subjects, and women as objects."¹²⁶ The Protocol reflects dominance feminism in its protection of women from violence, including state violence, family or intimate violence, violence or harassment in public institutions, and cultural violence.¹²⁷ For example, the right to dignity in Article 3 focuses on dignity as freedom from "any

122. *See id.* at 74 (discussing the distinction between "equal" and "equitable"). Similar language also appears in Article 7, guaranteeing that "women and men have reciprocal rights and responsibilities towards children." Protocol, *supra* note 1, art. 7.

123. Protocol, *supra* note 1, art. 21.

124. Banda, *supra* note 109, at 77–78.

125. The Protocol drew from the Southern Africa Development Council Addendum on Violence and the Declaration on the Elimination of Violence Against Women. Banda, *supra* note 109, at 79. CEDAW makes no reference to "violence," although later CEDAW documents deal with issues of violence. *Id.*

126. *See* Dixon, *supra* note 108, at 282 (citing the work of Catharine MacKinnon, Andrea Dworkin, and others).

127. *See* Banda, *supra* note 109, at 79 (addressing the themes of violence against women in the family, within a community, and in public).

exploitation or degradation of women" and "protection of women from all forms of violence, particularly sexual and verbal violence."¹²⁸ The Protocol reaches beyond CEDAW and regional instruments in its extensive treatment of violence, causing one commentator to note that the provisions addressing abuse or exploitation of women is where "the Protocol comes into its own."¹²⁹

Violence against women is treated as a pervasive problem for the law to solve. In several places, the Protocol imposes sanctions on perpetrators for violent or harassing behavior.¹³⁰ One of the most striking examples is the Protocol's treatment of female genital mutilation (FGM), which is the phrase used by the Protocol. The choice to use 'female genital mutilation,' rather than female genital cutting or female circumcision, also reflects a position that resonates with dominance feminist thinking. Female genital mutilation has been some feminists' prime example of the way in which a customary practice in a patriarchal society controls women's sexuality. Research documenting the health outcomes of FGM need not be restated here; much time and attention has been paid to the deleterious effects of the most drastic (although less commonly practiced) forms of female circumcision.¹³¹ Those wishing to emphasize the violent nature of a circumcision procedure have objected to the use of alternative phrasing that may convey less judgment about the practice.

In addition to its choice of language, the Protocol's invocation of state power to limit customary violence also reflects the influence of dominance feminism. Article 5 obliges States Parties to outlaw the practice of FGM and to provide health and rehabilitative services for those who have already undergone FGM.¹³² Requiring more than present international standards, the Protocol requires "legislative measures backed by sanctions."¹³³

128. Protocol, *supra* note 1, art. 3.

129. Banda, *supra* note 109, at 79.

130. For example, Article 12(1)(b) of the Protocol provides for sanctions against the perpetrators of "all forms of abuse, including sexual harassment in schools and other educational institutions." Protocol, *supra* note 1, art. 12(1)(b). See also Protocol, *supra* note 1, art. 13(m) (requiring the state to "take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography").

131. See Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946–1947 (1993) (describing three forms of female circumcision (excision, clitoridectomy, and infibulation) and the range of each procedure's invasiveness).

132. Protocol, *supra* note 1, art. 5.

133. *Id.*

Other provisions of the Protocol also promote criminalization of certain practices and invoke the power of the state to protect women¹³⁴—a strategy often aligned with dominance feminism because it casts men as perpetrators and the government as the entity responsible for holding them accountable.¹³⁵ For example, Article 14(1)(d) sets out the "right to self protection and to be protected against sexually transmitted infections."¹³⁶ This right is strengthened by Article 14(1)(e), which specifies a "right to be informed on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS."¹³⁷ Research suggests that the spread of HIV to women is due in part to women's lack of power in negotiating when and how sex occurs (including practicing safe sex).¹³⁸ As Part III discusses, Article 14(1) could have incorporated any number of approaches for addressing the impact of HIV infection on women. Instead it focuses solely on the problem of women who are infected by their husbands or partners. The language of Article 14(1)(d) focuses on the power dynamic between men and women rather than socio-economic concerns (such as access to medicine) and dignitary harms (such as ending the stigma associated with living with HIV).

C. Cultural Feminism and Gender Differences

The Protocol was also influenced by cultural feminism, which seeks to value the differences (biological and social) that make women distinct from men.¹³⁹ Unlike dominance feminism, which situates gender differences in terms of the perpetuation of male power, and unlike liberal feminism, which explains disparate treatment based on gender as unjust, cultural

134. For example, Article 6(d) requires marriages "to be recorded in writing and registered in accordance with national laws, in order to be legally recognized." *Id.* art. 6(d). Banda notes that this may threaten many marriages that are not registered. Banda, *supra* note 109, at 76. See also Protocol, *supra* note 1, art. 7(a) (requiring that "separation, divorce or annulment of a marriage shall be effected by judicial order").

135. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 341 (2006) (discussing the unintended consequences of feminists' reliance on criminalization).

136. Protocol, *supra* note 1, art. 14(1)(d).

137. *Id.* art. 14(1)(e).

138. BANDA, *supra* note 8, at 192–93 (discussing women's reluctance to ask for protected sex out of fear of violence from their partner).

139. See Dixon, *supra* note 108, at 281 (citing authors such as Robin West and Carol Gilligan when drawing a distinction between cultural and liberal feminism).

feminism embraces roles traditionally aligned with women (like motherhood) and argues that injustice is the result of devaluing those roles. The Protocol recognizes a standalone right for pregnant or nursing women in detention to an environment "suitable to their condition and the right to be treated with dignity."¹⁴⁰ In a similar vein, Article 4(j) prohibits the death penalty for pregnant or nursing women,¹⁴¹ and Article 13(h) seeks to "recognise the economic value of the work of women in the home."¹⁴² These and other articles protect particular sub-populations of disadvantaged women, such as the elderly, the disabled, and "women in distress," which includes poor women and "women heads of families."

Article 14(2)(b) protects mothers directly by creating a state duty to "establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding."¹⁴³ The language, like that for pregnant women in detention, carves out rights for mothers. This could be troubling for both dominance and liberal feminism. Liberal feminism might object to the emphasis on women's maternal health needs, which may marginalize other reproductive health needs (like treatment of STIs or screening for cervical cancer). Dominance feminism could view mothers' caretaking role as a product of a private/public distinction that works to women's disadvantage and men's advantage. Cultural feminism, however, might support a substantive equality analysis: Because many women act in a caretaking role and the majority of women become mothers, the Protocol should recognize that reality of women's lives.

The Protocol does not appear to favor one reading over another. However, the Protocol does seek to temper the culture/equality debate in one regard. Cultural feminism may be more aligned with the approach taken in the Charter, which acknowledges the importance of custom and tradition to communal identity. A contribution of cultural feminism is its recognition of women's role in maintaining and shaping tradition.¹⁴⁴ This value is reflected in Article 17, which, like the Charter, promotes respect for women's roles within their communities. The first clause of Article 17

140. Protocol, *supra* note 1, art. 24(b).

141. *Id.* art. 4(j). Arguably, this language may also serve the interests of the fetus. See *infra* Part III (highlighting the Protocol's references to women's maternal role).

142. *Id.* art. 13(h).

143. *Id.* art. 14(2)(b).

144. One of the purposes of the Protocol was to temper the language of the Charter, and the Preamble's requirement that African values must be in compliance with "equality, peace, freedom, dignity, justice, solidarity, and democracy" goes to that end. *Id.* Preamble.

creates the right to a "positive cultural context" and to participate in determining cultural policies.¹⁴⁵ Taken in conjunction with Article 18—the right to protect and enable development of "women's indigenous knowledge" (seemingly a replacement for the Charter's phrase, "cultural development")—the right to a positive cultural context may call for the reform of customary laws.¹⁴⁶

The following Part shows how differing theoretical vantage points may yield differing interpretations of the Protocol's treatment of health and reproductive rights.

III. Problems with the Protocol's Treatment of Health and Reproductive Rights

The different feminist influences on the Protocol highlight the incoherence of the Protocol as a modern women's rights instrument, and these conflicts are at issue in the interpretation of Article 14. The previous Part highlighted what those influences are and how Article 14 might reflect each of them. The central question in this Part is how the absence of basic definitional principles for the drafting process left the Protocol vulnerable to competing accounts of women's rights, which may stunt the document's future interpretation. As a way of thinking about Article 14 more critically, this Part discusses three shortcomings of Article 14 as it is currently configured: its failure to recognize the interdependence of various rights; the underdevelopment of women's rights to comprehensive health care; and the contradictory acknowledgment of women's "natural" role as mothers and women's rights to autonomy or freedom from stereotype.

Article 14 has two sections. The first section ensures the "right to health of women, including sexual and reproductive health, is respected and promoted"¹⁴⁷ and elaborates on the right by setting out six particular areas of control or decision-making. These areas include the right to control fertility; the right to decide whether to have children, the number of children, and the spacing of children; the right to choose any method of contraception; the right to self protection and to be protected against sexually transmitted infections; the right to be informed of one's health

145. *Id.* art. 17.

146. *See* Charter, *supra* note 5, art. 29(7) (promoting the moral well being of society); *see also* Beyani, *supra* note 32, at 285 (discussing how the Charter showed that regional instruments recognized general concepts of human rights).

147. Protocol, *supra* note 1, art. 14.

status and the health status of one's partner; and the right to have family planning education.¹⁴⁸

The second section refers to "appropriate measures" States Parties shall undertake to accomplish three goals. The first goal is to "provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas."¹⁴⁹ The second is to "establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding."¹⁵⁰ And the third, and perhaps most controversial,¹⁵¹ is to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."¹⁵²

As heralded elsewhere, Article 14 of the Protocol represents important 'firsts,' such as the first time that the right to abortion or the right to control one's own fertility were enumerated in a human rights document.¹⁵³ Article 14 also recognizes rights with longstanding histories, such as the right to decide the number and spacing of children. But Article 14 (and perhaps the Protocol in general) does not appear to ground its approach to reproductive health in a way that embraces the field's complexity. Certainly, issues like the prohibition of FGM or early marriage resonate with concerns about protecting women's reproductive health, yet the Protocol does not refer back to or connect these issues. The provision related to FGM could have been even more powerful if it were linked to women's sexual and reproductive freedom. One major objection to FGM, highlighted briefly in the previous section, is that it can impair women's future fertility or ability to experience sexual pleasure.¹⁵⁴ The Protocol could have acknowledged

148. Article 14(1)(e) reads: "[T]he right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices." *Id.* art. 14(1)(e).

149. *Id.* art. 14(2).

150. *Id.*

151. See Banda, *supra* note 109, at 82 (discussing how Libya, Rwanda, and Senegal opposed the right to abortion in the Protocol).

152. Protocol, *supra* note 1, art. 14(2).

153. See Gawayia & Mukasa, *supra* note 9, at 42 (stating that the Protocol is the first document in international law to recognize a woman's right to a medical abortion); BANDA, *supra* note 8, at 80 (stating that the Protocol was the first international document to discuss substantive reproductive rights and the right to an abortion).

154. See REBECCA COOK ET AL., REPRODUCTIVE HEALTH AND HUMAN RIGHTS 263–66

that the cultural barriers to eliminating circumcision are rooted in communities that value female chastity or sexual submission.¹⁵⁵ Linking the rights in Article 5 to the right to healthy sexual development might have tempered the emphasis on violence previously described. Similarly, the prohibition on early marriage could have referenced the health risks associated with early childbirth and the loss of sexual and reproductive decision-making it entails for many girls.¹⁵⁶ A more integrated approach might have linked these rights in ways that could have strengthened their relationship to socio-economic and other rights for women.¹⁵⁷

Article 14 is titled a health right and references a state duty to "provide adequate, affordable and accessible health services, and information, education and communication programmes to women especially those in rural areas."¹⁵⁸ For text that deals broadly with women's health, Article 14 underemphasizes developments in international thinking about access to healthcare. For example, the ICESCR recognizes the right to the highest attainable standard of healthcare.¹⁵⁹ The Committee on Economic, Social and Cultural Rights further elaborated what the highest attainable standard for women means by endorsing "a comprehensive national strategy for promoting women's right to health throughout their life span" that would include "prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services," and "removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health."¹⁶⁰ Most significantly, the Charter itself relies on a "best attainable" standard in

(2003) (describing how female circumcision is deeply embedded in the practices of several East and West African communities).

155. *Id.* Rachel Murray notes that the articles on FGM are not wholly in line with the Convention on the Elimination of All Forms of Harmful Practices Affecting the Fundamental Rights of Women and Girls. *See also* Murray, *supra* note 2, at 269 n.96 (noting that the Protocol addresses the healthcare needs of rural women but not migrants and sex workers).

156. BANDA, *supra* note 8, at 186–87.

157. *See* COOK, *supra* note 154, at 8–9 (emphasizing the significance of reproductive health for women because "[l]ifestyle, behaviour, and socio-economic conditions play an important role in promoting or undermining reproductive health").

158. Protocol, *supra* note 1, art. 14(2)(a).

159. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), ¶ 12, U.N. Doc. A/6316 (Dec. 16, 1966) (*entered into force* Jan. 3, 1976).

160. U.N. ECON. & SOC. COUNCIL, COMM. ON ECON., SOC. & CULTURAL RIGHTS, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 21, U.N. Doc. E/C.12/2000/4 (Nov. 8, 2000).

Article 16¹⁶¹ as does Article 14 of the African Charter on the Rights and Welfare of the Child (ACRWC), which recognizes the right to "the best attainable state of physical, mental and spiritual health" and sets out a number of state duties in furtherance of the best attainable standard.¹⁶²

The Protocol's promise of adequate healthcare potentially falls short of a best attainable standard. The state only needs to provide adequate healthcare that meets women's needs rather than a range of services based on best practices. Article 14 could have imposed a duty on states to reconsider the allocation of resources in order to achieve better delivery of health services, such as directing state funds toward the development of primary health care systems. This approach would not have been out of step with other language in the Protocol. For example, Article 4(i) creates a state duty to "provide adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women."¹⁶³

One example where a higher standard for health might have been useful is in the Protocol's treatment of HIV/AIDS. The rights to self-protection from HIV and to know a partner's HIV status were added at the 2001 Experts Meeting but have been criticized as far too narrow in light of the scope of the HIV epidemic.¹⁶⁴ International documents address HIV in terms of rights to the highest attainable standard of healthcare, dignity, and equality.¹⁶⁵ This standard means more than recognizing the right to non-discrimination based on one's health status. The highest attainable standard of health has been interpreted as active government participation in seeking the most effective treatments for those living with HIV and stemming the spread of HIV. Additionally, the right to dignity (as interpreted in the

161. See Charter, *supra* note 5, art. 16(1) ("Every individual shall have the right to enjoy the best attainable state of physical and mental health.").

162. African Charter on the Rights and Welfare of the Child, Organization of African Unity, 1990, OAU Doc. CAB/LEG/24.9/49, *entered into force* Nov. 29, 1999 [hereinafter ACRWC].

163. Protocol, *supra* note 1, art. 4(i). Note also that Article 10, the Right to Peace, states: "States Parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular." *Id.* art. 10.

164. See Banda, *supra* note 109, at 81 (questioning how many women would ask their partners about their HIV status).

165. See COOK, *supra* note 154, at 12 (examining the expanding definition of reproductive health in international law). It is also strange that the Protocol does not link women's inequality with susceptibility to HIV, as the CEDAW Committee has.

South African context, for example¹⁶⁶) implies there is a role for state and private actors to counteract the stigma that has attached historically to HIV.

Finally, the Protocol sends conflicting messages about women's roles as mothers. On one hand, Article 14's approach is intended to strengthen reproductive autonomy by situating it within Article 14's health rights. On the other hand, Article 14 does not necessarily confront assumptions about aspects of women's familial and societal roles. Much has been written about how expectations that women conform to the role of wife or mother limit women's agency.¹⁶⁷ Certain cultural norms may not recognize women's reproductive or sexual rights because sexuality itself is considered masculine.¹⁶⁸ Customary laws addressing reproductive capacity and a woman's role in the family may be designed to facilitate male control over women's sexual behavior and reproductive decisions.¹⁶⁹

As noted in Part I, the protection for women only as mothers is one of the main points of criticism of the Charter,¹⁷⁰ and it is one that has created tension in earlier international documents.¹⁷¹ The Protocol appears to embrace women's special role as mothers by protecting pregnant and nursing women. Article 14 emphasizes pre-natal, delivery, and post-natal health and nutritional services for women during pregnancy.¹⁷² The Protocol's language thus reaffirms women's maternal role (based in part on the ACRWC) while it also emphasizes autonomy-based rights, such as a right to decide the number and spacing of one's children. This observation is not intended to minimize the importance of pre-natal and post-natal care for women or to ignore its recognition in international human rights law,

166. See *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.) (recognizing a right to most effective treatment); *N.M. v. Smith*, 2007 (5) SA 250 (CC) (S. Afr.) (elaborating on the ways in which the dignity of HIV-positive persons is threatened by societal stigma).

167. See Sylvia Tamale, *Gender Trauma in Africa: Enhancing Access to Resources*, 48 J. AFRICAN L. 50, 52–53 (2004) (arguing that women's reproductive capacity is one factor in the naturalization of gender roles and dichotomization of the public and private spheres).

168. BANDA, *supra* note 8, at 173.

169. See Adjetey, *supra* note 23, at 1352–53 (arguing that cultural traditions around reproduction "keep African women in cultural subordination and put them in such a low bargaining position that they have little, if any, control over decisions which affect their bodily integrity").

170. Charter, *supra* note 5, art. 16(1).

171. Universal Declaration of Human Rights, G.A. Res. 217A, art. 25, U.N. GAOR 3d Sess., 1st plen. mtg., U.N. DOC. A/810 (Dec. 12, 1948) [hereinafter UDHR] (granting special care and assistance for mothers); CEDAW, *supra* note 10, art. 12(2) (addressing "pregnancy, confinement, and the post-natal period").

172. Protocol, *supra* note 1, art. 14(2)(b).

such as the Article 12 right to health in CEDAW.¹⁷³ The Protocol appears to cut against the stereotype of women as mothers in other places. One instance is the right to decide "whether to have children," which complements the right to decide the number and spacing of children.¹⁷⁴ Perhaps this language could have been expanded: Article 14, which speaks to a reproductive health agenda concerned with family planning, could have included language that more specifically related to sexual expression and procreative decision making.¹⁷⁵

Serving as a counterintuitive example of the implicit support of maternal stereotypes, the right to an abortion may inadvertently align with a pro-natalist vision for women. Article 14(2)(c) identifies a right to medical abortion for women with sympathetic reasons—women who are victims of rape, incest, or sexual assault. The striking aspect of Article 14(2)(c) is the right to medical abortion for the women whose physical or mental health is at risk. This provision for mental health stands in contrast with most of the abortion laws in Africa, many of which recognize no right to an abortion on that ground (or any of the grounds stated in Article 14(2)(c) for that matter).¹⁷⁶ That being said, the right to a legal abortion because of a risk to mental health, like the other grounds in 14(2)(c), seeks to protect the potentially "unstable" woman.¹⁷⁷

173. Article 12 of CEDAW reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

CEDAW, *supra* note 10, art. 12.

174. Protocol, *supra* note 1, art. 14.

175. See Banda, *supra* note 109, at 81 (noting that the ICPD changed the international framework for reproductive rights by shifting focus from family planning to individual well-being); see also COOK, *supra* note 154, at 4 (stating that the ICPD adopted the first internationally-recognized definition of reproductive health).

176. See Chad Gerson, *Toward an International Standard of Abortion Rights: Empirical Data from Africa*, 18 PACE INT'L L. REV. 373, 377 (2006) (conducting a study of attitudes toward abortion in African states); see also Banda, *supra* note 109, at 82 (questioning whether Article 14(2)(c) will be enforced because of the variation in member states' laws on abortion).

177. Article 14(2)(c) refers to a "medical abortion," which is administered only in the first trimester of pregnancy. Protocol, *supra* note 1, art. 14(2)(c). The clause presumably does not apply to second or third trimester abortions.

The Protocol could have tried to uncouple stereotypes about women by including text that recognized the rights of those women who are not mothers or wives. For instance, what would creating a positive cultural context under Article 17 look like for women who choose not to become a mother? Instead, the Protocol is better characterized as accepting the "benevolent" stereotype of women as caretaker¹⁷⁸ and lacks critical engagement with the ways that stereotypes conflict with rights rooted in language of self determination.

IV. Conclusion

The tension between the elimination of stereotypes and the special recognition of motherhood has long been at the center of feminist debate. Article 14 may have missed an opportunity to tie together the elimination of stereotypes, women's role in the family, and reproductive and sexual health in a way particular to an African context. This may have been especially important to young women and girls whose rights are scattered throughout the Protocol in inconsistent ways.¹⁷⁹ Moreover, the Protocol could have framed reproductive rights within its broader objectives, such as the elimination of poverty and disease¹⁸⁰ and the reform of colonialist laws.¹⁸¹

This Article, though critical of the Protocol in many ways, is not fatalistic about its potential. Bold and clear application of the implementation and interpretation clauses could ensure that the Protocol evolves into a responsive human rights instrument for women. Article 26 creates a duty to "indicate the legislative and other measures undertaken for the full realisation of the rights [of the Protocol] in a state's periodic reports submitted in accordance with Article 62 of the African Charter."¹⁸² The same powerful NGO lobby that helped bring the Protocol into force could

178. Rebecca Cook, Washington and Lee Symposium, April 3, 2009.

179. For example, see Articles 1(k) in definition, Article 11 in conflict, Article 12 in schools. Protocol, *supra* note 1, arts. 1(k), 11, 12. Article 13(g) in particular prohibits the work of children and exploitation of the "girl-child." *Id.* art. 13(g). A couple of these provisions refer to *male* children also. *Id.* art. 11.

180. See Odinkalu, *supra* note 16, at 3 (discussing how the African continent's history makes it difficult to achieve even modest progress in the realm of human rights).

181. See Charles Ngwena, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective*, 32 J. L. MED. & ETHICS 708 (2004) (showing the imprint of colonial legacies on current abortion laws in southern Africa); see also Odinkalu, *supra* note 16, at 11 (noting that new bills of rights have not been followed by the repeal of colonial era legislation).

182. Protocol, *supra* note 1, art. 26.

shape the ways in which states interpret and implement Protocol provisions. The caveat in Article 31—that "[n]one of the provisions of the . . . Protocol shall affect more favourable provisions . . . in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties"¹⁸³—may serve as a standard by which Protocol provisions are measured against future innovations in women's human rights thinking. Finally, in according the power to interpret the Protocol to the African Court on Human and Peoples' Rights (ACHPR), Article 27 gives a new institution a sense of responsibility for the development of women's rights.

The Protocol represents a great deal of possibility even if the process of understanding the Protocol's meaning happens after its ratification. Despite shortcomings in its drafting, the mechanisms described above might aid willing member states and NGOs to support a progressive, substantive vision for the Protocol—one that will evolve to meet African women's diverse and changing needs.

183. *Id.* art. 31.

