

ARTICLES

GENDER, DISCOURSE, AND  
CUSTOMARY LAW IN AFRICA

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## I. INTRODUCTION

Around the world, efforts by states to accommodate cultural pluralism vary in form and vigor.<sup>1</sup> Some multiculturalist states cede to cultural minorities the authority to govern in certain substantive areas, such as family law.<sup>2</sup> Not surprisingly, feminists have raised concerns that a state's reluctance to govern in areas traditionally seen as "private," and leaving those areas of law to customary legal systems, leaves women within those minority communities vulnerable to discrimination.<sup>3</sup> The potential clash

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1. See Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65, 65 (2006) (explaining that in "legally pluralistic countries," traditional law (based on custom) and national law (based on formal legal structures) "exist side by side"); *id.* at 91 ("Legal pluralism seeks to satisfy and incorporate the world view of assorted segments of society, in particular, traditionally marginalized cultural communities, by permitting the use of diverse, and often conflicting bodies of law."); John F. Burns, *Top Anglican Seeks a Role for Islamic Law in Britain*, N.Y. TIMES, Feb. 8, 2008, at A10 ("The archbishop of Canterbury called Thursday for Britain to adopt aspects of Islamic Shariah law alongside the existing legal system.").

2. See, e.g., Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws"*, 4 INT'L J. CONST. L. 181 (2006) (examining equality discrepancies between national law and the "personal laws" governing the family law context in India); Oppermann, *supra* note 1 (examining marital laws in Egypt, which recognizes religious laws such as the Islamic Shari'a, in South Africa, which recognizes customary tribal law, and in the United States, which recognizes American Indian tribal law).

3. See, e.g., MacKinnon, *supra* note 2, at 191 ("Out of step [with the equality jurisprudence under Indian national law] is the judicial reluctance to apply sex equality principles to the personal laws. To varying degrees, the personal laws of all of India's religions have contained facial and applied sex-based distinctions to women's disadvantage. Yet in the family area, the courts often permit them, even as the provisions are strained (sometimes to the breaking point) to provide an approximation or appearance of gender equality in result. . . . [W]hen legislated in the family law context, facially sex-unequal provisions are repeatedly permitted to stand."); Oppermann, *supra* note 1, at 91 ("While dual legal systems may be seen as protecting a cultural minority in the case of the United States, reflecting cultural diversity in South Africa, or endorsing fundamental religious beliefs in Egypt, they also allow for the systematic maltreatment of women."); Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285, 289 (1998) ("Clearly, when the state awards self-governance power over members' marriage and divorce affairs to identity groups, it enhances their autonomy. At the same time, this delegation of legal authority also exposes insiders who belong to traditionally subordinated classes, such as women, minorities within the group, and children, to what I call the paradox of multicultural vulnerability." (emphasis omitted)).

between multiculturalism and equality has been the focus of much theorizing in the last decade.<sup>4</sup> Much of the discourse has been abstract, polarizing, and minimally productive.<sup>5</sup> Furthermore, the ways in which women act with agency, engaging with and reformulating cultural policy, has received insufficient attention. Many women value cultural identity, even as they work to eliminate discrimination within their cultural communities.<sup>6</sup>

The international human rights community, however, has not always viewed women as committed, active members of their cultural communities.<sup>7</sup> By viewing African women almost exclusively as victims of their culture, the international human rights community has historically undervalued the potential for African women to reformulate cultural policies within their communities.<sup>8</sup> The two primary human rights treaties for the promotion of gender equality in Africa, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”

4. See generally Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT’L L. REV. 483 (2002) (discussing the tension between gender hierarchy in certain cultures and the rights of women in such cultures based on international human rights norms); Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT’L L.J. 381 (2000) (examining gender inequality in development and human rights efforts in third world societies in the context of property relations).

5. E.g., Susan Moller Okin, *Part 1: Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

6. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1411–12 (2003) (“Confronted with the same options today, women reformers in Muslim communities increasingly refuse to choose between religion and rights and demand both.” (footnotes omitted)).

7. See *id.* at 1471 (“Having no context for conceiving the presence of religion *and* equality, we discount as conservative or ignore completely the radically new frameworks for human rights [Muslim women reformers] are building. In short, Muslim women are producing a new legal consciousness but there is static on the receiving end.”). See also Celina Romany, *Introduction to RACE, ETHNICITY, GENDER AND HUMAN RIGHTS IN THE AMERICAS: A NEW PARADIGM FOR ACTIVISM* 11, 15 (Celina Romany ed., 2001) (“Shifting multidimensional identities heightens the need for a human rights model which addresses the complexities of the human condition.”).

8. For a definition of culture, I rely on Abdullahi Ahmed An-Na’im, who states:

Culture is therefore the source of the individual and communal world view: it provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them. It stipulates the norms and values that contribute to people’s perception of their self-interest and the goals and methods of individual and collective struggles for power within a society and between societies. . . . The impact of culture on human behavior is often underestimated precisely because it is so powerful and deeply embedded in our self-identity and consciousness.

Abdullahi A. An-Na’im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19, 23 (Abdullahi Ahmed An-Na’im ed., 1992).

or “the Convention”<sup>9</sup> and the African Charter on Human and Peoples’ Rights (“African Charter” or “the Charter”),<sup>10</sup> are dismissive of culture and gender equality, respectively.<sup>11</sup> The Protocol to the African Charter on the Rights of Women in Africa (“the Protocol”)<sup>12</sup> attempts to remedy the shortcomings of CEDAW and the African Charter and offers new hope for promoting gender equality on the continent.<sup>13</sup> In addition to strong substantive rights, the Protocol provides important procedural rights to ensure that women have a voice in the ongoing examination and reformulation of cultural practices and customary law.<sup>14</sup>

By specifically providing for women’s agency in the formulation of cultural policies, the Protocol reflects theoretical advances in both the conception of women’s self-identity and the potential of dialogical processes to promote rights.<sup>15</sup> I argue that the Protocol offers African feminists, among others, largely unexplored procedural, dialogical rights that have the potential to engage women in the public discourse that shapes African customary law.<sup>16</sup> The dialogue is constrained, however, by the power disparities among discursive participants, particularly traditional leaders and rural women.<sup>17</sup> For this reason, the value of deliberation is limited in the context of African customary law, as is the applicability of deliberative democratic theory.<sup>18</sup> Recognizing that democratic deliberation, or discourse more generally, is constrained in its ability to eliminate these power differentials, I explore the ways in which discourse, as embodied in certain provisions of the Protocol, may nevertheless be helpful for women’s rights activists in the region.<sup>19</sup> Localized deliberation, for example, still has

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9. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW].

10. African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

11. *See infra* notes 88–90, 157–64 and accompanying text.

12. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, *adopted* July 11, 2003, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> [hereinafter Protocol].

13. *See* ROSEMARY SEMUFUMU MUKASA, *THE AFRICAN WOMEN’S PROTOCOL: HARNESSING A POTENTIAL FORCE FOR POSITIVE CHANGE 5* (2008) (“[T]he African Women’s Protocol is a potential force for changing the lives of African women for the better.”).

14. *See infra* Part III.C.

15. *See infra* Part III.C.

16. *See infra* Part III.C.

17. *See infra* Part V.A.2.

18. *See infra* Part V.B.

19. I engage deliberative democratic and discourse ethics theory in a limited sense here. Rather than a full exposition of the theory, which is simply impossible in a work of this length, I sketch the broad parameters of the theory in an effort to explore its practical value and application to a real-world case—the struggle for women’s rights within customary law in Commonwealth Africa.

a role to play in identifying the most effective and viable methods of implementing women's human rights. This approach embraces the universality of rights but recognizes that implementation of those rights benefits from an approach that is particular, context specific, and deliberative. The Protocol, therefore, has the potential to engage traditional leaders in dialogue about localized implementation of human rights norms, which will lead to greater internalization of those norms at the local level.<sup>20</sup>

Part II of this Article outlines the limited success of CEDAW and the African Charter in negotiating potential conflicts between multiculturalism and equality. Part III explores the Protocol's corresponding potential to effectively mediate such conflicts through its substantive provisions. Part IV draws on philosophical currents within discourse ethics to argue that inclusive deliberative processes, such as the procedural rights in the Protocol, allow women to systematically engage with cultural meaning and facilitate enculturation of human rights norms among traditional leaders. I reject, however, a strong form of discourse ethics and argue that such a model will not advance the cause of women's equality within African customary law. Many proponents of discourse ethics do not adequately account for the very real power disparities that pervade localized discussions of customary law.<sup>21</sup> Although discursive notions of the democratic process are attractive because they seem to open a space for women's agency, the theory falls short in its application because it is insufficient to meet the structural discursive challenges that women face on the ground.

For this reason, in Part V, I propose a two-part solution. First, in a radical departure from discourse ethicists, I propose limiting the scope of deliberation in the context of African customary law. I argue that dialogue should focus not on norm definition, which is already largely accomplished through the drafting and adoption of the Protocol itself, but on localized modes of implementation. Even with this more focused discourse, states and civil society have an important role to play in ensuring dialogical fairness and minimizing structural inequalities among participants. Second, I argue that litigation is a useful backstop in Commonwealth Africa when dialogical political decisionmaking results in illiberal outcomes.

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20. See Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 *LAW & SOC. INQUIRY* 975, 990 (2006) ("The concept of vernacularization was developed to explain the nineteenth-century process by which national languages in Europe separated, moving away from the medieval transnational use of Latin and creating a new and more differentiated sense of nationhood in Europe. Human rights language is similarly being extracted from the universal and adapted to national and local communities." (citation omitted)).

21. See *infra* note 260 and accompanying text.

Women must have a voice in the implementation of equality standards and cultural practices and norms. Effective, facilitated dialogue, together with careful litigation, will allow women to shape the customary law and cultural practices that dramatically affect their daily lives. The Protocol provides a vehicle for improving women's rights through both litigation and deliberative processes designed to encourage women's engagement with and reformulation of the normative content of customary law.

Commonwealth Africa provides an illuminating case study.<sup>22</sup> As postcolonial states, many contemporary African governments continue to negotiate the boundaries between state- and community-based law.<sup>23</sup> Although these states were pluralist states well before British occupation, the colonial authorities reified stratifications between state-sponsored law and the law of the indigenous communities.<sup>24</sup> During the colonial period, British colonial authorities established a plural legal system in which the "received" or British law operated alongside indigenous customary law and religious law in certain areas like family law.<sup>25</sup> Thus, for the indigenous population, African customary law or religious law governed issues such as marriage, divorce, custody, burial, and inheritance.<sup>26</sup> To date, many

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22. Commonwealth Africa includes the following countries: Botswana, Cameroon, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Nigeria, Seychelles, Sierra Leone, South Africa, Uganda, the United Republic of Tanzania, Zambia, and Zimbabwe (departed in 2003). A full list of Commonwealth member states is available at <http://www.thecommonwealth.org/Internal/191086/142227/members/> (last visited Mar. 1, 2009).

23. See Boaventura de Sousa Santos, *The Heterogeneous State and Legal Pluralism in Mozambique*, 40 *LAW & SOC'Y REV.* 39, 45–46 (2006) ("Whereas in colonial society it was easy to identify the legal orders and their spheres of action . . . in present-day African societies the plurality of legal orders is much more extensive and the interactions between them much denser. . . . The boundaries between the different legal orders become more porous and each one loses its 'pure,' 'autonomous' identity and can only be defined in relation to the legal constellation of which it is a part.").

24. See Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869, 869 (1988) ("Tribes and villages had some law developed over the generations on to which formal rational law was imposed by the European colonial powers. The imposed law, forged for industrial capitalism rather than an agrarian or pastoral way of life, embodied very different principles and procedures. Scholars termed these situations legal pluralism. They recognized that the introduction of European colonial law created a plurality of legal orders but overlooked, to a large extent, the complexity of previous legal orders.").

25. See *id.* at 870 (noting that British and French colonial powers incorporated indigenous customary law into the law they imposed, "as long as it was not repugnant to natural justice, equity, and good conscience" (internal quotation marks omitted)).

26. See Bart Rwezaura, *Tanzania: Building a New Family Law out of a Plural Legal System*, 33 *U. LOUISVILLE J. FAM. L.* 523, 524 (1994–1995) ("As would be expected, the majority of people for whom indigenous law was applicable were African, while Europeans and people of other cultures preferred Western law. Africans who adopted the Islamic faith also acquired an additional system of law (besides African customary law) that courts could apply to them in some contexts." (footnote omitted)).

African states have retained this structure of parallel legal systems.<sup>27</sup>

In the years since independence, some countries have attempted to integrate or unify parallel systems of family law.<sup>28</sup> Ghana, for example, established a unified law of inheritance in 1985,<sup>29</sup> although implementation of the unified law has been spotty, particularly in rural areas.<sup>30</sup> Similarly, Tanzania passed a law integrating its marriage law under the 1971 Law of Marriage Act (“LMA”).<sup>31</sup> Despite these and other examples of integration, many Commonwealth African countries have retained fairly rigid divisions between parallel legal systems.<sup>32</sup> In a number of countries, those divisions are in fact constitutionally sanctioned.<sup>33</sup> A handful of Commonwealth African countries’ constitutions preserve the separation between statutory and customary or religious law by specifically excluding the latter from constitutional nondiscrimination protection.<sup>34</sup> These constitutions, thus, perpetuate the separation between public law and private, familial law, an

27. See Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 *FORDHAM INT’L L.J.* 289, 291 (2008) (“The history of colonialism in the region has created a plural legal system in which multiple systems of law—statutory, customary, and religious—operate simultaneously.” (footnote omitted)).

28. See Mark J. Calaguas, Cristina M. Drost & Edward R. Fluet, *Legal Pluralism and Women’s Rights: A Study in Postcolonial Tanzania*, 16 *COLUM. J. GENDER & L.* 471, 491 (2007) (“The movement for the unification of laws during the early postcolonial period in East Africa was most pronounced in the area of family law, which had been particularly beleaguered by the choice of law problems created by the plural legal system inherited from the British.” (citing Rwezaura, *supra* note 26, at 523–24)).

29. See Jeanmarie Fenrich & Tracy E. Higgins, Special Report, *Promise Unfulfilled: Law, Culture, and Women’s Inheritance Rights in Ghana*, 25 *FORDHAM INT’L L.J.* 259, 268 (2001).

30. *Id.* at 326–27 (citing as part of the enforcement problem a lack of knowledge about the law, particularly in rural areas).

31. See Rwezaura, *supra* note 26, at 526 (describing provisions adopted in an effort to pursue both reform and integration and accommodation of customary law).

32. See, e.g., Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 *LAW & SOC. INQUIRY* 635, 637 (2000) (citing Botswana as an example).

33. Bond, *supra* note 27, at 290.

34. See, e.g., CONSTITUTION, Art. 23 (1979) (Zimb.), available at [www.chr.up.ac.za/hr\\_docs/constitutions/docs/ZimbabweC\(rev\).doc](http://www.chr.up.ac.za/hr_docs/constitutions/docs/ZimbabweC(rev).doc). Article 23 of the constitution of Zimbabwe states:

(1) Subject to the provisions of this section—

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

(3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters—

(a) . . . matters of personal law; [or]

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case . . . .

*Id.*

area in which the state will not intercede to prevent gender discrimination.<sup>35</sup> These states have embraced a strong form of multiculturalism, ceding the authority to govern family law to local communities and removing the backstop of constitutional nondiscrimination rights.

The strength of this presumption in favor of particularity over generality and universalism varies from state to state.<sup>36</sup> Some states embrace a weak form of multiculturalism in which deference to community law is tempered by far-reaching equality rights or specific statutory overrides, such as Ghana's integrated inheritance law.<sup>37</sup> Wherever states fall on this continuum, women within indigenous African communities continue to engage with cultural norms, sometimes pushing them incrementally closer to national and international standards of gender equality.<sup>38</sup>

## II. LACUNAE IN CEDAW AND THE AFRICAN CHARTER

Women value cultural identity.<sup>39</sup> Although it seems axiomatic, the mainstream human rights movement, which has historically been

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35. See Bond, *supra* note 27, at 318 ("In countries that have retained constitutional exclusionary clauses, for example, the state has carved out areas of law that are considered 'personal' or 'private' and are not subject to constitutional scrutiny. This distinction between public and private was enshrined in the independence constitutions when the non-discrimination provisions were drafted to specifically exclude personal or family law from protection." (footnote omitted)).

36. The debate over particularity/relativism versus generality/universalism in some ways parallels the discourse surrounding multiculturalism and equality. This Article approaches culture and its formation as a complex process, in which women have a vital role to play, rather than as a static phenomenon that uniformly subjugates women. I have argued previously for a nuanced understanding of women's identity that embraces the notion of "qualified universalism," which recognizes that equality and discrimination will be experienced differently by different women depending on intersecting vectors of subordination. See generally Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003).

37. See Fenrich & Higgins, *supra* note 29, at 287 (noting that the law "was intended 'to provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted by him or her'" (quoting Memorandum, Intestate Succession Law, P.N.D.C. L. 111 (1985) (Ghana))).

38. See, e.g., *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC) at 633 (S. Afr.), available at <http://www.mangaung.co.za/docs/Shibi%20Case.pdf> (declaring section 23 of the Black Administration Act 38 of 1927 to be inconsistent with the constitution and invalid). In the *Bhe* case, Bhe brought suit on behalf of her two minor daughters, whose father had died intestate. *Id.* at 594–95. Under the Black Administration Act, "the . . . children did not qualify to be the heirs in the intestate estate of their deceased father." *Id.* at 597. The court found that the principle of primogeniture violated the right of women to human dignity as guaranteed by the constitution. *Id.* at 622.

39. See Coomaraswamy, *supra* note 4, at 484 ("Many women acquiesce [to discrimination] because they see their group identity as the most important aspect of their lives.").



dominated by Western, urban elites, only recently embraced this important insight.<sup>40</sup> For many years, the movement's majority cast women in developing countries exclusively as victims of a foreign, exotic culture.<sup>41</sup> Although women in the Global North struggled to resist discrimination in their homes, workplaces, schools, and other venues, this discrimination was not widely viewed as a manifestation of discriminatory culture.<sup>42</sup> According to the Western view, gender discrimination in the Global North was not embedded in the very fabric of social relations as it was in the Global South, including Africa. Modern, Western liberalism came to be viewed as "cultureless," and women in the Global South became defined exclusively as victims of, rather than agents of or participants in, culture and local custom.<sup>43</sup>

Defined broadly, culture is "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men [and women] communicate, perpetuate, and develop their knowledge about and attitudes toward life."<sup>44</sup> Although conceptually distinct from culture, customary law

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40. See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 90–91 (1996) (noting that the "theoretical dilemma" of cultural differences among women "has become a serious political hurdle for global feminism" and seeking to "sort out the degree to which feminism, by virtue of its own commitments, must take cultural defenses seriously, particularly when articulated by women themselves"). See also Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 47, 49 (Doris Buss & Ambreena Manji eds., 2005) (noting that the critiques by feminists in the Global South began around 1992 and "often implicitly or explicitly critique the failure of the previous stages [of feminist international human rights history] for their exclusion or false representation of third world women"). By "mainstream human rights movement," I am referring to that segment of the movement that is dominated by elites, mostly from the Global North, who have the greatest access to human rights institutions, such as the United Nations, and are therefore able to play a larger role in shaping the international human rights agenda.

41. See Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002) (noting "cultural essentialism" in which "[w]omen in the Third World are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West").

42. See Leti Volpp, Essay, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1186–87 (2001) ("Part of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants—rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations." (footnote omitted)).

43. Karen Engle states, "Third world feminist critiques have also challenged the extent to which structural bias feminism denies women's agency in its representation of women as victims." Engle, *supra* note 40, at 62. See also Sunder, *supra* note 6, at 1415–17 (describing a historicist view in which religion and culture constitute "law's past").

44. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 89 (1973).

is a legal expression of cultural norms and values.<sup>45</sup> Like culture, customary law is dynamic and changes based on social, economic, and legal developments.<sup>46</sup> It is internally contested, and powerful elites often determine the dominant cultural interpretation and provide what is seen as a definitive interpretation of customary law.<sup>47</sup> In many Commonwealth African countries, the customary law of inheritance, for example, excludes women as potential heirs.<sup>48</sup>

Although human rights instruments offer support to women who wish to contest cultural interpretations, these instruments are not without flaws. CEDAW was drafted in the 1970s, an era during which many women's rights activists in the Global North focused rather narrowly on gender-based inequality.<sup>49</sup> As a result, CEDAW privileges gender as an analytical focal point.<sup>50</sup> The African Charter is also the product of a particular

45. As one scholar explains, "Sometimes termed customary law, indigenous law is the system of norms which governs the lives of millions of African people, particularly (but not exclusively) in the rural areas." Thandabantu Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously*, 1994–95 THIRD WORLD LEGAL STUD. 49, 53.

46. Rwezaura describes one formulation of customary law as "living law," or the "flexible and highly negotiable, custom representing the law governing the actual social life of the people in their day to day lives often changing in response to changing conditions." See Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J.L. & FAM. 314, 327 (1993) (quoting Bart Rwezaura, *From Native Law and Custom to Customary Law: Changing Political Uses of Customary Law in Modern Africa* (1992) (unpublished manuscript)). Nhlapo further notes:

Nowadays it is accepted that indigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states. The process has led to the growth of "official" customary law which consists of rigid rules, embedded in judicial decisions and statutes, which have lost the characteristics of dynamism and adaptability which distinguished African custom.

Nhlapo, *supra* note 45, at 53.

47. See An-Na'im, *supra* note 8, at 27–28 ("A third and more significant feature of cultural dynamism is the ambivalence of cultural norms and their susceptibility to different interpretations. In the normal course of events, powerful individuals and groups tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage. Given the extreme importance of cultural legitimacy, it is vital for disadvantaged individuals and groups to challenge this monopoly and manipulation.")

48. See, e.g., Abby Morrow Richardson, *Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform*, HUM. RTS. BRIEF, Winter 2004, at 19, 19.

49. CEDAW, *supra* note 9. See also Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 52 (2007) ("[E]quality activists on the international stage sought to protect women's rights to education, to physical safety, to health care, to national citizenship independent of that of their marital partner, to broader political participation, and to full access to wage work. Those aspirations became enshrined in [CEDAW], which entered into force in 1981." (footnote omitted)).

50. This singular focus is not necessarily desirable. See Bond, *supra* note 36, at 72–73 ("With the exception of some voices from the global South, the international women's human rights community's focus on 'women' to the exclusion of other identity categories, such as ethnicity, race, class, religion, and sexual orientation, has resulted in a limited understanding of women's human rights." (footnote omitted)).

historical moment, and its drafting was informed by anticolonial struggles on the continent.<sup>51</sup> Thus, the Charter's text privileges culture over gender equality.<sup>52</sup> The Protocol, in contrast to both CEDAW and the African Charter, represents a more current view that explicitly values the positive aspects of both culture and equality rights for women.<sup>53</sup>

When CEDAW was drafted, women were not seen as members of religious and cultural communities, and many human rights activists did not view women as active members or beneficiaries of cultural communities.<sup>54</sup> Combating a simpler, narrower notion of discrimination as against women qua women, without attention to the multiple sites of oppression in women's lives, is embodied in the Convention's text.<sup>55</sup> Only a handful of CEDAW's articles even address culture, and those that do primarily treat culture as uniformly regressive and bad for women.<sup>56</sup>

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51. See Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 33, 53–57 (2003) (describing the political movement following the end of colonization). Specifically, “[i]t appears that the Charter was conflicted from the beginning given its attempt to reconcile deep-seated African values (which arguably subjugate women’s gender roles) and the emerging global values of non-discrimination and gender equality. In many ways, the Charter embraced the . . . principle of protecting state sovereignty.” *Id.* at 58 (footnotes omitted).

52. See Deborah A. Wean, Comment, *Real Protection for African Women? The African Charter on Human and Peoples’ Rights*, 2 *EMORY J. INT’L DISP. RESOL.* 425, 456 (1988) (“[I]n the United Nations, women’s rights have been forced to take a back seat to human rights in general. African women may realistically expect to face a similar problem in light of the fact that proponents of the Charter seemed to be more concerned with the inequities of race than the inequities of sex in African society.” (footnote omitted)).

53. Rosemary Semufumu Mukasa notes:

While the CEDAW’s effectiveness was undermined in some quarters because it was considered to be a western woman’s instrument, the African Women’s Protocol is a homegrown instrument developed by African women for African women. On the other hand, where the African Charter on Human and Peoples’ Rights (ACHPR) went overboard is in its wholesale embrace of African traditions, values and customs without acknowledging that some of these customs and traditions discriminate against and harm women; the African Women’s Protocol outlaws traditions such as [female genital mutilation], widow inheritance and child marriages.

MUKASA, *supra* note 13, at 7.

54. See Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 *BROOK. J. INT’L L.* 857, 857–58, 860 (1996) (“Feminist theory and the knowledge derived from a common experience of subordination has exposed the male-centered values upon which the international human rights framework is built. . . . However, feminist methodology, particularly when applied to the cross-cultural magnitude of the world, must guard against its essentialist impulses. . . . A feminist critique that merely focuses on gender or grants as an afterthought the existence of other forms of subordination, retains the abstract contours of the liberal self it aims to attack while politically alienating key allies in securing global social justice.”).

55. See Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in 1 *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 3, 4 (Kelly D. Askin & Doreen M. Koenig eds., 1999) (noting that CEDAW “has been criticized by many feminists as being outdated”).

56. See *infra* Part II.A.

Because CEDAW largely fails to consider the power and meaning of cultural and community membership in women's lives, it has the potential to create a backlash in any given conflict between gender equality rights and cultural rights.<sup>57</sup>

In the 1990s, a critical mass of women's rights activists in the Global South, and a segment of the women's rights community in the Global North—particularly activists from communities of color—popularized a more complicated picture of discrimination, one that more accurately represented their experiences of discrimination along multiple axes of discrimination, such as gender and race or ethnicity.<sup>58</sup> For example, perpetrators of sexual violence in armed conflict often target women for rape based on gender and ethnicity.<sup>59</sup> Recognition of this type of reality led to a better understanding of the intersectional, mutually reinforcing forms of discrimination against women.<sup>60</sup> Consistent with this more nuanced understanding of women's experiences of discrimination, the mainstream human rights movement also began to value the multiple aspects of women's identities, including women's memberships in religious and cultural communities.<sup>61</sup> In its dismissal of culture as a potentially positive aspect of women's lives, CEDAW thus fails to provide states and communities with the tools to effectively mediate or resolve conflicts between gender equality and cultural norms.<sup>62</sup>

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57. In contrast, Article 17 of the Protocol, which gives women the right to live in a "positive cultural context" and the right of full participation in the determination of cultural policies, "empowers African women . . . . This provision provides African women with a tool to address one of the biggest challenges for efforts to implement the CEDAW . . . the co-existence of multiple legal systems with customary and religious law governing personal life and prevailing over positive law and even the constitutional guarantees." MUKASA, *supra* note 13, at 41–42.

58. Cf. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (criticizing the separate nature of race and gender in single-axis antidiscrimination analysis and arguing for multidimensionality); Trina Grillo, Symposium Keynote Address, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) (arguing that intersectionality is necessary to understanding the experience of gender); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that "contemporary legal theory [including gender theory] needs less abstraction and not simply a different sort of abstraction").

59. See Bond, *supra* note 36, at 113.

60. *Id.* at 74–75. See also Penelope E. Andrews, *Globalization, Human Rights and Critical Race Feminism: Voices from the Margins*, 3 J. GENDER RACE & JUST. 373, 382–83 (2000).

61. See Sunder, *supra* note 6, at 1403 (arguing that "on the ground, women's human rights activists are piercing the veil of religious sovereignty" and that "despite law's formal refusal to acknowledge claims of internal dissent, women are nonetheless claiming their rights to challenge religious and cultural authorities and to imagine religious community on more egalitarian and democratic terms").

62. There are, however, several advantages to using CEDAW to promote women's rights. The

The African Charter also fails to offer a meaningful mechanism for women's rights activists in Africa to reconcile the conflicts that sometimes arise between women's equality rights and the right to culture in indigenous African communities.<sup>63</sup> Because the Charter fails to comprehensively protect women's rights, it offers African women's rights activists very little ammunition in the struggle for gender equality.<sup>64</sup> Although the Charter itself is of limited use, another regional human rights instrument, the Protocol, offers new hope to activists in the region. With more expansive rights protections for African women, the Protocol will not only provide a new source for normative rights claims, but will also lead to a broader interpretation of the more limited rights within CEDAW and the African Charter. There are three primary reasons why the Protocol offers significant promise for promoting women's rights in Africa, while simultaneously respecting and promoting cultural rights and, particularly, women's rights to define and redefine the normative content of custom and customary law: regional credibility, strong substantive provisions, and innovative procedural provisions. I discuss each in greater detail in subsequent sections of this Article.

First, the Protocol offers credibility within the region.<sup>65</sup> African women played a large role in drafting and promoting the Protocol; their participation offers a convincing response to charges of Western imperialism.<sup>66</sup> As Rosemary Semafumu Mukasa remarks, "The Protocol is

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CEDAW Committee, for example, is a well-established U.N. institution with a proven track record. Some of the more recent regional instruments, like the Protocol, must rely on new or chronically underfunded institutions for enforcement.

63. See MUKASA, *supra* note 13, at 35 (noting that "[a]nother area of inadequacy stems from the charter's warm and wholesale embrace of African tradition and customs, without taking into account the fact that some of these very traditions discriminate against women").

64. But see *Ephrahim v. Pastory & Another*, [1990] L.R.C. 757 (Tanz. High Ct.), reprinted in HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS 387, 390 (Chris Maina Peter ed., 1997), in which the Tanzania High Court relied on both CEDAW and the African Charter in upholding women's rights against constraints of customary law.

65. See MUKASA, *supra* note 13, at 113–14 ("Significantly, the Women's Protocol is also the outcome of a political negotiation process between African heads of state, giving it an added degree of legitimacy and credibility in comparison to other international agreements—it is an instrument that has been developed by Africans for Africans.").

66. See Fareda Banda, *Global Standards: Local Values*, 17 INT'L J.L. POL'Y & FAM. 1, 17 (2003) (noting that the Draft Protocol to the African Charter on the Rights of Women in Africa was "[a] joint initiative of the African Commission and Women in Law and Development in Africa (WILDAF)," and "was drafted by a working group chaired by the Special Rapporteur on the Rights of African Women," following on the heels of other pro-woman subregional initiatives (footnote omitted)). Banda, however, also notes that nongovernmental organizations ("NGOs") were excluded from the drafting process at various points. FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 75 (2005) ("Although the Special Rapporteur's remit required her to consult with NGOs, there were complaints from civil society, and in particular from West Africa, that they had not been

a homegrown instrument developed by Africans for African women. It legitimises the fight against gender oppression as an African struggle. No longer can detractors claim that women's rights are transplants from the western world with no roots in African values and norms."<sup>67</sup> The concept of the Protocol originated at a meeting jointly sponsored by one of the leading regional women's rights organizations and the African Commission, which forty-four participants from seventeen countries attended.<sup>68</sup>

Second, the Protocol has strong substantive provisions for the protection of women's rights in the region. Alpha Oumar Konaré, chairperson of the African Union Commission, observes, "The Protocol is arguably one of the most progressive and visionary rights instruments for gender equality not just in Africa but internationally."<sup>69</sup> Indeed, the Protocol's substantive rights provisions explicitly value both cultural rights and rights to gender equality.<sup>70</sup>

Third, the Protocol provides an intriguing, but infrequently discussed, procedural right which, if properly operationalized, could lay the foundation for an engaging grassroots discourse that promotes women's voices in the ongoing process of cultural definition and the articulation of customary norms. Article 17 states, "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."<sup>71</sup> By "procedural" right, I am referring not to a formal due process right but rather to a right to be part of a more informal process of defining and articulating cultural norms. The Protocol's procedural provisions open the door for systematic engagement with traditional leaders concerning implementation of women's human rights at

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consulted." (footnotes omitted)). Although not a perfectly inclusive process, the drafting of the Protocol afforded African women more of an opportunity to shape treaty language than that enjoyed by women in the drafting and adoption of the African Charter.

67. MUKASA, *supra* note 13, at 5.

68. BANDA, *supra* note 66, at 67.

69. Alpha Oumar Konaré, *Preface to BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL ON WOMEN'S RIGHTS IN AFRICA*, at viii, viii (Roselynn Musa, Faiza Jama Mohammed & Firoze Manji eds., 2006).

70. For example, Article 17 of the Protocol recognizes the positive aspects of culture and states, (1) "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies," and (2) "States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels." Protocol, *supra* note 12, art. 17. As Mukasa states, "One of the Protocol's greatest strengths is that it is an African instrument that outlaws negative traditional practices and enshrines the right of women to live in a positive cultural context." MUKASA, *supra* note 13, at 5.

71. Protocol, *supra* note 12, art. 17.

the local community level.<sup>72</sup>

Before turning to the shortcomings of CEDAW and the African Charter and to the advantages of the Protocol, however, a few caveats are necessary. First, human rights commentators from the Global North often discuss culture as if it existed only in foreign legal systems, where it operates as a dominating force in the lives of “other” women.<sup>73</sup> Culture implies “other,” and in this popular hegemonic narrative, the West becomes constructed as modern and free of the regressive and oppressive burdens of culture.<sup>74</sup> Women in places like Africa become simplistically characterized as exotic victims of an uniformly regressive culture.<sup>75</sup> There is a clear colonialist and ethnocentric bias in this construction. The second caveat reflects the recognition that talking about culture as conflicting with equality implies that equality and culture cannot be coexistent.<sup>76</sup> This is not true. Equality exists within cultures, but real conflicts do arise; because academics have struggled to reconcile these sometimes competing rights, commentators occasionally leave the impression that they cannot and, in fact, do not coexist.<sup>77</sup> The final caveat I will offer stems from the difficulty

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72. See *infra* Part III.C.

73. See Volpp, *supra* note 42, at 1198 (“The relative status of women across communities is still used to assess the progress of culture. And the discourse of feminism versus multiculturalism assumes that women in minority communities require liberation into the ‘progressive’ social customs of the West. The idea that ‘other’ women are subjected to extreme patriarchy is developed in relation to the vision of Western women as secular, liberated, and in total control of their lives.”); *supra* note 42 and accompanying text.

74. See *id.* at 1198–99 (“[T]he assumption that Western women enjoy complete liberation is not grounded in material reality. Rather, Western women’s liberation is a product of discursive self-representation, which contrasts Western women’s enlightenment with the suffering of the ‘Third World woman.’” (footnote omitted)).

75. Ratna Kapur observes that “the focus on the victim subject . . . encourages some feminists in the international arena to propose strategies which are reminiscent of imperial interventions in the lives of the native subject and which represent the ‘Eastern’ woman as a victim of a ‘backward’ and ‘uncivilized’ culture.” Kapur, *supra* note 41, at 6.

76. See Volpp, *supra* note 42 (criticizing the “feminism versus multiculturalism” dichotomy, which is premised on the assumption that the two are contradictory, as fundamentally flawed and arguing that the dichotomy breaks down when we recognize that feminism exists within communities of color and that gender-subordinating values are also valued and prevalent in Western culture).

77. Some scholars critique the application of a rights discourse to culture, emphasizing that individual autonomy rights inherently undermine a cultural focus on community identity and collective decisionmaking. See Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, Edward A. Smith Lecture for the Harvard Law School Human Rights Program (Mar. 12, 1996), in RADHIKA COOMARASWAMY, *REINVENTING INTERNATIONAL LAW: WOMEN’S RIGHTS AS HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY* 4 (1997) (“Many scholars from the third world argue that human rights discourse is not universal but a product of the European Enlightenment and its particular cultural development. . . . Women are often seen as the symbol of a particular cultural order, as icons of cultural purity. Critics argue that to grant universality to a strong set of women’s rights might undermine the cultural framework of a particular society.”).

of talking about culture in Africa from an outsider's perspective.<sup>78</sup> This is inherently problematic but should not foreclose the possibility of sustained cross-cultural discourse. It is crucial, however, to talk about these issues in a way that is both respectful of and deferential to those women whose daily lives are most directly affected by customary law.<sup>79</sup>

#### A. CEDAW: THE PROBLEMS OF SCOPE AND RESERVATIONS

CEDAW has often proven to be a successful tool for improving women's rights around the world. Activists have used the treaty effectively in legislative reform efforts, test case litigation, and grassroots organizing across the globe.<sup>80</sup> It includes both civil and political rights, and economic, social, and cultural rights.<sup>81</sup> Although it was drafted in the late 1970s, the document included forward-looking language that would later help to dismantle the public/private distinction in international human rights law.<sup>82</sup> CEDAW's inclusion of affirmative action provisions, or "temporary special measures" in the language of the treaty, has opened the door for interpretations of equality that go beyond mere formal equality.<sup>83</sup>

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78. See generally Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (arguing that the current, eurocentric human rights discourse contains a "savages-victims-saviors" subcontext that undercuts the goals of the human rights movement).

79. For the vast majority of women in Africa, customary law serves as the controlling authority in their lives. In Ghana, for example, one study revealed that 80 percent of women were married according to customary law. See Fenrich & Higgins, *supra* note 29, at 284 ("Notwithstanding the existence of . . . alternatives, eighty percent of marriages in Ghana are still celebrated under customary law which makes little provision for widows." (footnote omitted)).

80. See generally U.N. DEV. FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Ilana Landsberg-Lewis ed., 1998) [hereinafter BRINGING EQUALITY HOME].

81. CEDAW, *supra* note 9, art. 1 (affirming the right of all women to equal exercise of "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field). See also Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 266 (2002).

82. See Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 275-76 (2003) ("[CEDAW's] substantive provisions target not only intentional acts of discrimination but acts which effect substantive inequalities; they reach both private and state conduct; and they obligate states not merely to refrain from discrimination but actively to seek to redress and remedy private discrimination against women." (footnote omitted)).

83. CEDAW, *supra* note 9, art. 4 (providing that "temporary special measures aimed at accelerating the de facto equality between men and women shall not be considered discrimination"). The adoption of such measures "requires states parties 'to eliminate all forms of discrimination against women with a view to achieving women's *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms.'" See Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1044-45 (2007) (quoting U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 25: On Article 4, para. 4 (2004), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>). It "proposes evolution beyond the male



Although its successes are noteworthy, CEDAW is not without flaws. As a document drafted in the late 1970s, it largely reflects a “second-generation” feminist understanding of gender as the primary—if not sole—site of oppression.<sup>84</sup> It fails to acknowledge that women may face multiple forms of discrimination, such as that based on, among other things, race, ethnicity, culture, religion, or sexual orientation.<sup>85</sup> Similarly, it does not reflect the multidimensional and intersectional role of African women as both members of their cultural communities and as advocates for gender equality within those communities.<sup>86</sup>

CEDAW, in fact, rarely mentions culture. The only positive reference to culture appears in Article 13, which provides that women should enjoy an equal right to “participate in recreational activities, sports and all aspects of cultural life.”<sup>87</sup> Other references to culture appear in Article 5, which prohibits gender stereotyping.<sup>88</sup> Article 2 contains another passing reference to culture and the states’ obligations to change culture to conform to equality norms.<sup>89</sup> With the exception of Article 13, CEDAW treats culture as a uniformly negative influence on women’s lives. It largely fails to recognize the possibility of a positive culture that benefits women—as well as men—by providing a sense of community and identity that stems from association with others who share foundational values.<sup>90</sup> Sally Engle Merry comments, “When [CEDAW] committee members or the convention invoke culture in CEDAW proceedings, it is more often as an obstacle to change than as a resource or a mode of transformation.”<sup>91</sup> Merry argues that by treating culture as a static obstacle rather than as a fluid source for transformation, as the CEDAW experts sometimes do,

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comparator or reference point as the standard for determining equality.” *Id.* at 1046 (footnote omitted).

84. See *supra* notes 49–50 and accompanying text.

85. See *supra* note 50.

86. See *supra* notes 54, 57 and accompanying text.

87. CEDAW, *supra* note 9, art. 13(c).

88. *Id.* art. 5(a) (stating that states parties agree “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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 men and women”).

89. Article 2(f) of CEDAW requires states parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” *Id.* art. 2(f).

90. See Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 49 (2005) (noting that “minority group members may wish to *benefit* from affiliation with more than one legal and cultural system” (emphasis added)).

91. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 91 (2006). Merry also notes that “[CEDAW] experts tend to see culture as a barrier to women’s human rights.” *Id.* at 90.

members of the CEDAW Committee (“the Committee”) miss a valuable opportunity to reformulate culture in a way that promotes women’s equality rights.<sup>92</sup> CEDAW’s limited view of culture, as expressed in the text of the treaty and by some Committee experts, contributes to backlash against the treaty and interferes with implementation and internalization of gender equality norms in the African region.<sup>93</sup> Indeed, “[a] more nuanced critique of particular practices or gender stereotypes is less likely to evoke nationalist defenses and justifications and more likely to build on local movements of resistance and contestation.”<sup>94</sup>

The Committee has attempted to address the conflict that sometimes arises between culture and equality through its general recommendations to CEDAW’s provisions.<sup>95</sup> Although there is no general recommendation devoted exclusively to the messy issues that arise in the context of equality and culture, the issue does surface within the context of several recommendations. General Recommendation 21, for example, addresses equality in marriage and states, “Whatever form [the family] takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people.”<sup>96</sup>

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92. See *id.* at 91–92 (“When culture is discussed as a resource, or when there is recognition that the goal of the CEDAW process is cultural reformulation, a far more fluid and contested idea is implied.”).

93. See MUKASA, *supra* note 13, at 41 (noting that “CEDAW’s effectiveness is undermined” because it is often “considered to be a Western women’s instrument”); Ravi Mahalingam, *Women’s Rights and the “War on Terror”: Why the United States Should View the Ratification of CEDAW as an Important Step in the Conflict with Militant Islamic Fundamentalists*, 34 CAL. W. INT’L L.J. 171, 195 (2004) (noting that “[t]he most significant reservations to CEDAW have come from Islamic countries,” which have taken “a cultural relativist approach” and “argu[ed] that CEDAW represents the active imposition of western secular values or ‘cultural imperialism’ upon non-western countries” (footnote omitted)). The Protocol, by contrast, explicitly values the positive aspects of culture (in Article 17) and narrowly tailors its critique of custom and culture to those aspects which are “harmful.” See MUKASA, *supra* note 13, at 41 (“Furthermore, Article 17 empowers African women by giving them the right to live in a positive cultural context and to enhance participation in the determination of cultural policies. This provision provides African women with a tool to address one of the biggest challenges for efforts to implement the CEDAW . . .”). The Protocol defines “harmful practices” as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.” Protocol, *supra* note 12, art. 1(g).

94. MERRY, *supra* note 91, at 100.

95. General recommendations “are documents explaining how a particular treaty should be interpreted and applied.” WOMEN, LAW & DEV. INT’L & HUMAN RIGHTS WATCH WOMEN’S RIGHTS PROJECT, WOMEN’S HUMAN RIGHTS STEP BY STEP 170 (Margaret A. Schuler & Dorothy Q. Thomas eds., 1997).

96. U.N. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 21, para. 13 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

Similarly, the general recommendations that address violence against women and female genital mutilation also argue, correctly albeit simplistically, that states should not allow custom or culture to justify these harmful practices.<sup>97</sup> Despite the Committee's willingness to address conflicts between custom and equality in its general recommendations, the treaty itself is less effective than some regional and subregional initiatives, which directly address the potential conflict between culture and equality rights in the text of the treaties themselves and consider the importance of local context.<sup>98</sup>

In addition to these textual shortcomings, CEDAW also suffers from substantive problems. States parties' reservations to CEDAW's substantive provisions often shield family law and customary or religious law from scrutiny by international monitoring bodies, such as the Committee. A large number of states parties have entered significant reservations to the treaty, including some reservations to core treaty provisions.<sup>99</sup> A few states, for example, have made reservations to Article 2 of the Convention, which contains a broad obligation to change laws and practices to conform to the equality standard embodied in the treaty.<sup>100</sup> Many more states have made reservations to Article 16, which obligates states to eliminate

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97. See U.N. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 14 (1990), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom14> (noting that "continuing cultural, traditional and economic pressures . . . help to perpetuate harmful practices"); U.N. Comm. on Elimination of Discrimination Against Women, General Recommendation No. 19, para. 24(e) (1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> ("States parties in their reports should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women . . .").

98. MERRY, *supra* note 91, at 104 ("The [C]ommittee's lack of attention to local situations impedes productive collaboration with grassroots activists . . .").

99. See Anne F. Bayefsky, *General Approaches to the Domestic Application of Women's International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 351, 352 (Rebecca J. Cook ed., 1994) ("[A]lthough over 120 states have ratified the Convention, many have done so conditionally. Approximately 40 states have made a total of roughly 105 reservations and declarations to the convention. Many of the substantive reservations are wide-ranging and profoundly affect the integrity of the Convention."); 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) (noting that CEDAW is "among the most heavily reserved of international human rights conventions").

100. See Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW*, 9 SING. Y.B. INT'L L. 103, 108 (2005) ("As of November 2002, fifty-five State parties had entered reservations to CEDAW. . . . Reservations to CEDAW, however, are most often made on the grounds that national law, tradition, religion or culture are incongruent with some of its articles or principles. Thus, most of the reservations lodged relate to Articles 2, 5 or 16. Article 2 identifies the range of measures that State parties should take to eliminate gender discrimination." (footnote omitted)).

discrimination within marriage and family life.<sup>101</sup> These reservations contravene the “object and purpose” of the treaty and should be discouraged through aggressive objections by other states parties.<sup>102</sup> Otherwise, reservations such as these will continue to hamper implementation of the treaty.

Despite the proliferation of reservations to the treaty, CEDAW has made a positive contribution to women’s rights in the region.<sup>103</sup> Because there have been few women’s rights cases involving challenges to customary law in the region, it is difficult to generalize about CEDAW’s effectiveness in reforming customary law. In some cases, the treaty has clearly proved to be an important resource for women’s rights activists campaigning for legal reform in the region. In others, the treaty has been unpersuasive in domestic courts. The Protocol, however, provides an important new source of women’s human rights law in the region and supplements CEDAW in crucial ways, as I discuss below.

## B. CEDAW IN AFRICAN TEST CASE LITIGATION

The 1990s were a period of explosive constitutional reform throughout Africa.<sup>104</sup> Although some were ineffective, many of the new constitutions

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101. See Yakaré-Oulé Jansen, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 323–24 (2007) (“According to General Recommendation 21 . . . , no reservations can be made to [Article 16, regarding marriage and family planning], as that would be inconsistent with the principles of CEDAW. Yet, as practice has shown, this article is a favorite amongst State Parties when it comes to reservations and declarations of interpretation.” (footnotes omitted)); Marie Egan Provins, Note, *Constructing an Islamic Institute of Civil Justice That Encourages Women’s Rights*, 27 LOY. L.A. INT’L & COMP. L. REV. 515, 522–23 (2005) (noting that even though the committee declared “reservations to Article 16 . . . incompatible with CEDAW and thus impermissible,” “[s]ignificantly, twelve parties have made reservations to CEDAW Article 2 and/or Article 16, explicitly asserting that these provisions are incompatible with Sharia” (footnotes omitted)).

102. Cf. Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT’L & COMP. L. 99, 127 (1995/1996) (noting the “lack of reaction to the reservations by other parties” to CEDAW and arguing that “[s]tate objections to reservations under [CEDAW] are especially important, since they are the principal means of raising questions regarding the permissibility of reservations” and “the Committee lacks authority to compel states to abandon even impermissible reservations” (footnote omitted)).

103. See Claude E. Welch, Jr., *Human Rights and African Women: A Comparison of Protection Under Two Major Treaties*, 15 HUM. RTS. Q. 549, 573 (1993) (“Progress in greater women’s rights in Africa, though slow, can be seen in the application of [CEDAW] and the African Charter.”).

104. See J. Oloka-Onyango, *Constitutionalism in Africa: Yesterday, Today and Tomorrow*, *Introduction to CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES* 1, 1 (J. Oloka-Onyango ed., 2001) (“Recent reverberations of constitutional discourse, engineering and contestation in countries as disparate and diverse as Côte d’Ivoire, Zimbabwe, Senegal, Egypt and Benin, speak loudly to the fact that at the commencement of the twenty-first century, issues of constitutionalism in Africa have gained considerable prominence. . . . Indeed, with only slight

included important human rights guaranties.<sup>105</sup> New constitutions with strong rights protections led to test case litigation to enforce such guaranties. Many of the plaintiffs in gender equality cases arising under the new African constitutions bolstered their gender equality claims with references to international treaties such as CEDAW.<sup>106</sup> For many judges, who were tasked with interpreting the new constitutions, it was useful to appeal to CEDAW as support for some of the region's landmark decisions promoting gender equality.<sup>107</sup>

In *Dow v. Attorney General*, the Botswana High Court considered Botswana's constitutional and international human rights obligations in determining whether a Botswana woman married to a foreign national could pass on citizenship to her children.<sup>108</sup> The plaintiff, Unity Dow, was a lawyer and activist who married an American, with whom she had three children.<sup>109</sup> In 1984, the Botswana legislature passed the Botswana Citizenship Act, which dictated that the nationality of a father of a child

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trepidation, we could describe the present developments as constituting a new epoch in African history—the epoch of the rebirth of constitutionalism.”); H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1275 (2006) (“Postcolonial Africa’s first ever prodemocracy constitutional moment had finally arrived, and the 1990s would be characterized by vigorous constitution-making . . .”); H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 769 (2008) (“[Significant] transitions from presidential autocracy to constitutional democracy . . . took place across Africa over the course of the 1990s.” (footnote omitted)). See also Charles Manga Fombad, *A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions*, PUB. L., Summer 2007, 233, 233 (noting that “[c]onstitutional reforms have dominated all political discourse in Africa since . . . the early 1990s”).

105. Abdullahi Ahmed An-Na'im, *Expanding Legal Protection of Human Rights in African Contexts, Introduction* to HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 1, 18 (Abdullahi Ahmed An-Na'im ed., 2003) (explaining that although most African constitutions protect civil and political rights, for example, many of these rights guaranties are ineffective in their application).

106. Cf. Penelope Andrews, “*Democracy Stops at My Front Door*”: *Obstacles to Gender Equality in South Africa*, 5 LOY. U. CHI. INT'L L. REV. 15, 23 (explaining that in considering cases dealing with equality under the South African constitution, the Constitutional Court of South Africa “has incorporated international human rights law, and in particular [CEDAW], in its interpretation of equality.” (footnote omitted)).

107. See Lisa C. Stratton, Note, *The Right to Have Rights: Gender Discrimination in Nationality Laws*, 77 MINN. L. REV. 195, 232 (1992) (noting that “[p]erhaps the most accessible option” for using international law to challenge discriminatory nationality provisions “is the increased use of international standards in domestic courts to inform and interpret domestic law” (footnote omitted)).

108. *Dow v. Attorney Gen.*, [1991] L.R.C. 574 (Bots.), reprinted in UNITY DOW, THE CITIZENSHIP CASE: THE ATTORNEY GENERAL OF THE REPUBLIC OF BOTSWANA VS UNITY DOW 30 (1995), available at <http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm>. (The case is also reprinted in 13 HUM. RTS. Q. 614 app. (1991)).

109. DOW, *supra* note 108, at 30.

born in Botswana would determine the nationality of the child.<sup>110</sup> Under the Act, the mother's nationality was irrelevant if the child was born in wedlock.<sup>111</sup> Because two of Dow's children were born after 1984, those children automatically acquired the citizenship of their father and were denied Botswana citizenship.<sup>112</sup> Dow challenged the law on the ground that, inter alia, it discriminated against women in contravention of the Botswana constitution.<sup>113</sup> The constitution, however, contained no explicit prohibition against discrimination on the basis of sex.<sup>114</sup> Dow argued, and the Botswana High Court found, however, that the constitution implicitly prohibited sex discrimination.<sup>115</sup> Although Botswana had not yet ratified CEDAW, the court relied on other international women's rights commitments, including the African Charter, and cited the precursor to CEDAW, the 1967 Declaration on the Elimination of Discrimination Against Women.<sup>116</sup>

Similarly, in *Longwe v. Intercontinental Hotels*,<sup>117</sup> Sara H. Longwe,

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110. *Id.* at 30 ("Sections 4 and 5 of the Citizenship Act of 1984 read as follows: '4.(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth[] (a) his father was a citizen of Botswana; or (b) in the case of a person out of wedlock, his mother was a citizen of Botswana.'").

111. *Id.*

112. *Id.* "These two children required residence permits to stay in the country, could leave the country only on their father's passport, would not be allowed to vote, and would be denied the free university education available to citizens." BRINGING EQUALITY HOME, *supra* note 80, at 20.

113. *Applicant's Notice of Motion, Dow*, [1991] L.R.C. 574, reprinted in DOW, *supra* note 108, at 3, 3 (declaring Sections 4, 5 and 13 of the Citizenship Act to be "ultra vires Section 7 of the Constitution of the Republic of Botswana").

114. DOW, *supra* note 108, at 38 (noting that defense counsel had argued that the antidiscrimination provisions of Botswana's constitution related primarily to discrimination on the basis of race).

115. *Id.* at 39 ("[T]he time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex.").

116. *Id.* at 39–40. See also BRINGING EQUALITY HOME, *supra* note 80, at 20–21; Stratton, *supra* note 107, at 230–31 ("The High Court judgment also reflects the success of Dow's strategy of highlighting Botswana's international obligations. When confronted with two plausible constitutional interpretations, the judge cited these obligations as requiring an interpretation consistent with the treaties and with case law from other Commonwealth jurisdictions. . . . In holding for Dow on the claim of degrading treatment, he referred to the definition of discrimination in the Declaration on the Elimination of All Forms of Discrimination Against Women that Dow cited as proof of an evolving standard of the nature of degrading treatment. . . . The judge considered his view strengthened by Botswana's status as State Party to the African Charter of Human And Peoples' Rights, even though he acknowledged that the convention did not compel the ruling." (footnotes omitted)).

117. See Manisuli Ssenyonjo, *Culture and the Human Rights of Women in Africa: Between Light and Shadow*, 51 J. AFRICAN L. 39, 60 (2007) (discussing *Longwe v. Intercontinental Hotels* [1993] 4 L.R.C. 221 (Zambia High Ct.)).

who is a women's rights activist in Zambia, successfully challenged the Intercontinental Hotel's policy of refusing entry to women unless they had male escorts.<sup>118</sup> Longwe was prevented from entering the hotel on at least two occasions—once when she was picking up her children from a party at the hotel and again when she was attending a meeting of a group of women's rights activists at the hotel.<sup>119</sup> The Zambian High Court agreed with Longwe's contention that the hotel's policy discriminated against women in violation of CEDAW and Zambia's constitution.<sup>120</sup>

In cases concerning customary law issues, some courts have found CEDAW provisions, which clearly privilege gender equality over cultural rights, to be unpersuasive.<sup>121</sup> For example, in *Magaya v. Magaya*, the Supreme Court of Zimbabwe was not persuaded by the invocation of CEDAW.<sup>122</sup> In that case, a man died intestate, leaving behind two wives, four children, a house, and some cattle.<sup>123</sup> A local court appointed his daughter from his first wife, Venia Magaya, to be the heir to the estate.<sup>124</sup> Under the relevant customary law, however, men are preferred over women in the inheritance of property.<sup>125</sup> When one of her brothers challenged the appointment, the magistrate court upheld the challenge and appointed him as heir.<sup>126</sup>

On appeal, Magaya argued that the nondiscrimination provisions in

118. *Id.*

119. *Id.*

120. *Id.* Although clearly a victory for women's rights activists in Zambia, including Longwe herself, Longwe commented that enforcement of the decision took a long time. Conversation with Sara Longwe, in Beijing, P.R.C. (Aug. 1995).

121. *See, e.g.,* *Magaya v. Magaya*, [1999] 3 L.R.C. 35 (Zimb.), available at <http://jurisafrika.org/docs/lawreports/Magaya%20v%20Magaya.judgment.pdf>.

122. *See id.* at 41–42 (noting that even if sections 1 and 2 of the Zimbabwe Constitution were interpreted as prohibiting gender discrimination “on account of Zimbabwe's adherence to[] gender equality enshrined in international human rights instruments, there [are] exceptions to the provisions” in section 23(3)(b) of the Constitution, by which certain matters are “exempted from the discrimination provisions” (emphasis omitted)).

123. *Id.* at 38.

124. *Id.* at 39 (“Soon after the death of the deceased the appellant, with the support of her mother and three other relations, went to claim the [heirship] of the estate in [the] community court and it was granted to her.”).

125. *See id.* at 39, 41 (quoting section 68(1) of the Administration of Estates Act as providing, “If any African [who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged,” and stating, “What is common and clear from the above is that under the customary law of succession of the above tribes males are preferred to females as heirs” (citations omitted) (emphasis omitted)).

126. *Id.* at 39.

the constitution should protect her right to inherit.<sup>127</sup> To succeed, however, Magaya had to overcome several constitutional hurdles. First, although Article 11 of the constitution protects fundamental rights regardless of sex, Article 23, which provides nondiscrimination protection, did not include sex or gender as a prohibited ground.<sup>128</sup> Magaya, therefore, asked the Supreme Court to recognize that gender was implicitly included in Article 23. The court briefly assumed *arguendo* that international law, including CEDAW, suggests that Article 23 implicitly includes gender equality.

The court avoided a definitive determination on this issue, however, by perfunctorily deciding that even if Article 23 implicitly included gender discrimination, Magaya's case would fail because other provisions within Article 23 precluded recovery. Those provisions stated that neither issues related to personal law, including succession, nor issues related to customary law would be subject to scrutiny under the nondiscrimination provisions.<sup>129</sup> Magaya's efforts to use CEDAW to persuade the court that she had an equal right to inherit were thus unsuccessful.<sup>130</sup>

In another case involving gender discrimination under a customary law of inheritance, the Tanzanian High Court reached a very different conclusion than the *Magaya* court.<sup>131</sup> In *Ephrahim v. Pastory*, the court concluded that the Haya customary law, which prevented women but not men from selling clan land, was unconstitutional.<sup>132</sup> Although it did not

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127. See *id.* at 41 (“The said rule which prefers m[a]les to females as[] heir to the deceased’s[] estates constitutes [] prima facie discrimination against females and could therefore be a prima f[a]cie breach of the Constitution of Zimbabwe.” (emphasis omitted)).

128. See *id.* The justice quoted the relevant constitutional sections:

(1) Subject to the provisions of this section—

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

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as t[he] result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced . . . .

*Id.* (emphasis omitted). This provision has since been amended to include gender. See CONSTITUTION, Art. 23 (1979) (Zimb.), available at [www.chr.up.ac.za/hr\\_docs/constitutions/docs/ZimbabweC\(rev\).doc](http://www.chr.up.ac.za/hr_docs/constitutions/docs/ZimbabweC(rev).doc).

129. See *Magaya*, [1999] 3 L.R.C. at 41–42.

130. See *id.* at 41 (finding that Zimbabwe’s “adherence to[] gender equality enshrined in international human rights instruments” could not overcome the exemptions from Article 23).

131. See *Ephrahim v. Pastory & Another*, [1990] L.R.C. 757 (Tanz. High Ct.), reprinted in HUMAN RIGHTS IN TANZANIA, *supra* note 64, at 397 (“From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritance of clan land and self-acquired land of their father’s is concerned.”).

132. The respondent in the case inherited clan land from her father in a will; however, the appellant argued that her subsequent sale of the land was void because customary law denied women



extensively analyze the state's obligations under CEDAW or other relevant international human rights law,<sup>133</sup> the court stated that the customary law "fl[ew] in the face of [the Tanzanian] Bill of Rights as well as the international conventions to which [Tanzania is a] signator[y]."<sup>134</sup>

Another case in which CEDAW played a role is *Bhe & Others v Magistrate, Khayelitsha & Others*.<sup>135</sup> In *Bhe*, the Constitutional Court of South Africa contemplated the constitutionality of the customary law rule of primogeniture as applied in cases of intestate succession.<sup>136</sup> The plaintiff, Bhe, brought suit in the interest of her two minor daughters for title to their home—a temporary shelter—and the property on which it stood.<sup>137</sup> This property had been acquired by their father, the deceased, through state subsidies.<sup>138</sup> Under South Africa's Black Administration Act of 1927, however, "the two minor children did not qualify to be the heirs in the intestate estate of their deceased father."<sup>139</sup> The court found that the principle of primogeniture violated the right of women to human dignity as guaranteed by the constitution.<sup>140</sup> In reaching this conclusion, the court explained that the South African constitution was not alone in its emphasis on equality, explaining that "[a] number of international instruments, to which South Africa is party, also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them."<sup>141</sup> The court cited CEDAW, among the instruments, as support for this statement, reinforcing the court's obligation to strike down the rule.<sup>142</sup>

Although CEDAW has been used with mixed success to challenge discriminatory customary laws in Africa, I argue that the Protocol is a critical supplement to CEDAW in the effort to reform customary law in the region. As I will discuss in greater detail below, the Protocol obligates

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the power to sell clan land. *See id.* at 388. The court found that the provision of customary laws was "inconsistent with Article 13 (4) of the Bill of Rights of our Constitution which bars discrimination on account of sex." *Id.* at 397 (footnote omitted).

133. *See id.* at 390 (mentioning in passing the U.N. Charter, CEDAW, and the Protocol).

134. *Id.*

135. *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC) at 633 (S. Afr.), available at <http://www.mangaung.co.za/docs/Shibi%20Case.pdf>.

136. *See id.* at 593.

137. *See id.* at 596.

138. *See id.*

139. *Id.* at 597.

140. *See id.* at 616 ("It is clear . . . that the serious violation by the provisions of [section 23 of the Black Administration Act] of the rights to equality and human dignity cannot be justified in our new constitutional order. In terms of s 172(1)(a) of the Constitution, [section] 23 must accordingly be struck down." (footnote omitted)).

141. *Id.* at 608–09 (footnotes omitted).

142. *Id.* at 609 n.58 (citing CEDAW, *supra* note 9, art. 2(c), (f)).

states to involve women in the ongoing discourse over the normative content of customary law and customary practices. Carefully constructed dialogical processes followed by strategic litigation, when necessary, will encourage states and traditional leaders to reform discriminatory customary laws. CEDAW will likely continue to influence courts in resolving questions of gender inequality, particularly in cases involving discrimination in the public sphere like *Dow*. In cases of discrimination against women in the private sphere, however, the Protocol now supplements CEDAW in crucial ways and provides another compelling source of women's human rights in the region.<sup>143</sup>

### C. SUBSTANTIVE SHORTCOMINGS OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Whereas CEDAW—both in its text and in the Committee's general recommendations—has failed to explicitly value culture in women's lives, the African Charter, in its valuation of culture, has failed to adequately protect women's rights.<sup>144</sup> The right to culture is enshrined in a number of international and regional human rights treaties.<sup>145</sup> Article 27(1) of the Universal Declaration of Human Rights recognizes that “[e]veryone has the right to freely participate in the cultural life of the community.”<sup>146</sup> Article 15.1 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) provides that individuals have the right to take part in

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143. See Mashood A. Baderin, *Recent Developments in the African Regional Human Rights System*, 5 HUM. RTS. L. REV. 117, 120 (2005) (noting that “[t]he substantive guarantees of [the Protocol] . . . differ in a number of ways from those of CEDAW and the Inter-American Women's Convention,” for example, by “expand[ing] the concept of women's rights further than both CEDAW and the Inter-American Convention by covering more than just non-discrimination and by guaranteeing an extensive list of rights”).

144. See MUKASA, *supra* note 13, at 7 (noting that “where the African Charter on Human and Peoples' Rights (ACHPR) went overboard is in its wholesale embrace of African traditions, values and customs without acknowledging that some of these customs and traditions discriminate against and harm women” and that “the African Women's Protocol outlaws traditions such as [female genital mutilation], widow inheritance and child marriages”).

145. For example, the International Covenant on Civil and Political Rights (“ICCPR”) offers protection to cultural rights and provides that people have a right “in community with the other members of their group, to enjoy their own culture to profess and practice their own religion or to use their own language.” International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, pmbl., art. 27, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. See also Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 491–92 (2002) (“Several other treaties and regional instruments recognize the rights to culture.”).

146. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 27, U.N. Doc. A/810 (Dec. 10, 1948).

cultural life.<sup>147</sup> The International Covenant on Civil and Political Rights (“ICCPR”) provides specific protection for members of ethnic, linguistic, or cultural minorities to enjoy their own culture.<sup>148</sup>

Drafted after these international documents, the African Charter built on the existing protection of cultural rights and expanded that protection.<sup>149</sup> The Charter emphasizes cultural rights and attempts to balance fundamental, universal rights on the one hand, and provide an African “fingerprint” in traditional articulations of fundamental rights on the other hand.<sup>150</sup> As such, the Charter embodies a conscious effort to filter traditional human rights through an African lens.<sup>151</sup> Like the ICESCR, the Charter explicitly values cultural rights<sup>152</sup> and, as such, stands in stark contrast to CEDAW.

Although the African Charter offers robust protection of cultural rights, it lacks effective women’s rights guaranties.<sup>153</sup> As Sibongile Ndashe observes, “The absence of cases pertaining to women’s human rights before the African Commission have, for a long time, been a cause for concern and it had been speculated that the unclear and potentially ambiguous provisions of the charter relating to women’s rights were a deterrent.”<sup>154</sup> The Commission has yet to examine a single petition alleging

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147. See International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), Annex, art. 15(1), U.N. Doc. A/6316 (Dec. 16, 1966) (providing that “States Parties to the present Covenant recognize the right of everyone: [] [t]o take part in cultural life”).

148. See ICCPR, *supra* note 145, art. 27.

149. See Angela M. Lloyd, Note, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUM. J. TRANSNAT’L L. 419, 428–29 (1994) (“By addressing both rights and affirmative duties, the African Charter expands the scope of human rights in ways unaddressed by other international human rights regimes.” (footnote omitted)).

150. Makau Mutua argues, “The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa.” Makau Mutua, *The Banjul Charter: The Case for an African Cultural Fingerprint*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 68, 69 (Abdullahi A. An-Na’im ed., 2002).

151. J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?*, 6 BUFF. HUM. RTS. L. REV. 39, 42 (2000) (noting that in the African context the realization of rights “must be expanded to encompass the family and community”). “It is also crucially important not to forget the fact that traditional conceptions of human rights in the African context subsume the interests of the individual to those of the community at large and raise the correlation between human rights and human duties or obligations.” *Id.* at 42–43 (footnote omitted).

152. See *id.* at 58 (“The distinctive character of the African Charter has been extolled by numerous authors, particularly with respect to the recognition of economic, social, and cultural rights.” (footnotes omitted)).

153. See MUKASA, *supra* note 13, at 41 (noting that the Charter affirmed cultural rights and customs that are harmful to women).

154. Sibongile Ndashe, *Strategic Litigation: A Tool for Domesticating the Protocol?*, in BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL, *supra* note 69, at 60, 61.

a violation of women's rights.<sup>155</sup> The Charter has, however, been invoked in conjunction with CEDAW in domestic women's rights litigation, such as the *Dow* and *Ephrahim* cases.<sup>156</sup> Although women's rights activists have relied on the Charter in a handful of cases, the treaty's lack of specificity on women's rights and its emphasis on African cultural values and traditions suggest that its usefulness is limited.

Aside from a general nondiscrimination provision in Article 2 and an equal protection provision in Article 3, the Charter's primary vehicle for the promotion of women's rights is Article 18.<sup>157</sup> Article 18 begins by describing the family as the "natural unit and basis of society" and "the custodian of morals and traditional values recognized by the community."<sup>158</sup> By framing the family as the guardian of traditional values and morals, and by articulating a nondiscrimination right in this limited context, the drafters initially suggest a limited role for nondiscrimination. In more expansive language, however, 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."<sup>159</sup> Article 18 lacks specificity and has been widely criticized as unhelpful for women in the region.<sup>160</sup> "[T]he Charter places emphasis on traditional African values and

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155. Ibrahim Kane, *Harmonising the Protocol with National Legal Systems*, in BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL, *supra* note 69, at 51, 57 ("[I]t is not mere coincidence that that human rights' Commission has not examined a single petition about the violation of women's rights in 16 years.").

156. See *supra* notes 116, 133–34 and accompanying text.

157. See 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) ("The African Charter references women only twice . . .").

158. African Charter, *supra* note 10, art. 18. Article 18 states in relevant part:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral[s].
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. 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.

*Id.*

159. *Id.* art. 18(3). The Charter also instructs the African Commission on Human and Peoples' Rights to "draw inspiration from international law on human and peoples' rights," including, presumably, CEDAW. *Id.* art. 60.

160. See Ssenyonjo, *supra* note 117, at 44. "By ignoring critical issues such as custom and marriage, it has been argued that the Charter inadequately protects women's human rights." *Id.* (footnote omitted). See also BANDA, *supra* note 66, at 66–67 ("Despite the existence of the African Charter and the extensive ratification of CEDAW by African states, it had over time been clear that the issue of gender was not being seriously considered at the institutional level, with little being done by the African Commission, which is responsible for monitoring the Charter, to make states parties

traditions without addressing concerns that many customary practices, such as female genital mutilation, forced marriage and wife inheritance, can be harmful or life threatening to women.”<sup>161</sup> An introductory note to the Draft Protocol explicitly acknowledges that the drafting of the Protocol was, in part, a response to the perceived inadequacy of the Charter’s limited protection of women’s rights.<sup>162</sup>

Because the text of the treaty provides more extensive protection to cultural rights than to gender equality rights, the African Charter fails to adequately protect women’s rights when there is a potential clash between cultural rights and equality rights.<sup>163</sup> By strongly privileging rights to culture over equality rights, the Charter forces women’s rights advocates to look elsewhere for support.<sup>164</sup> As Mukasa observes, one of the Charter’s most significant weaknesses is “the unsatisfactory manner in which it deals with women’s rights.”<sup>165</sup> In contrast to the Protocol, the Charter does not explicitly, or even implicitly, value women’s voices in the localized determination of cultural policies.

CEDAW, too, fails to provide adequate means for resolving heated contests between equality rights and the right to enjoy one’s culture.<sup>166</sup> It largely ignores the issue of culture except where it is seen as uniformly regressive in women’s lives.<sup>167</sup> Ugandan women’s rights activist and feminist scholar Sylvia Tamale suggests that this uniformly regressive view of culture obscures practices that are, in fact, empowering to women.<sup>168</sup> As an example, Tamale discusses the institution of *ssenga*, or “sexual initiation by the paternal aunt,” which is practiced within the Baganda community of

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accountable for gender-based discrimination occurring within their boundaries.”).

161. Ssenyonjo, *supra* note 117, at 44.

162. See BANDA, *supra* note 66, at 67 (“To date, no African instrument relating to human rights proclaimed or stated in a precise way what are the fundamental rights of women in Africa. There is thus a vacuum in the African Charter . . .” (quoting the Protocol drafting process)).

163. See Ito Eze-Anaba, *Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges*, 14 CARDOZO J.L. & GENDER 21, 31 (2007) (noting gaps in the Charter’s gender equality protections, such as the issue of marriage, and noting that “the Charter promoted African traditional values and traditions without due consideration to the harmful effects of some traditional values on women” (footnote omitted)).

164. See MUKASA, *supra* note 13, at 35 (“The charter extols ‘the virtues of historical tradition and the values of African civilisation,’ without addressing its vices, which include [female genital mutilation], child marriages and widow inheritance.” (quoting African Charter, *supra* note 10, pmb1.)).

165. *Id.* at 33.

166. See *supra* note 98 and accompanying text.

167. See *supra* notes 87–91 and accompanying text.

168. See Sylvia Tamale, Makerere Univ., “African Feminism” Taking a “Cultural Turn.” Presentation on the Occasion of the Launch of the African Feminist Forum (Nov. 15–19, 2006), available at [http://www.africanfeministforum.org/v3/files/African\\_Feminism\\_Taking\\_Cultural\\_Turn.pdf](http://www.africanfeministforum.org/v3/files/African_Feminism_Taking_Cultural_Turn.pdf).

Uganda.<sup>169</sup> Although originally focused on men's sexual pleasure, the practice has evolved to allow Baganda women to "negotiate agency, autonomy and self-knowledge about their sexuality."<sup>170</sup> Tamale thus resists the totalizing view of culture as regressive. Significantly, a regressive or limited view of culture leads to a narrow perception of women's self-identity and may create a backlash against women's rights.<sup>171</sup>

The Protocol, by contrast, explicitly values the positive aspects of culture and offers expansive and detailed protection against violations of women's human rights, including those that stem from customary law, tradition, and cultural practice.<sup>172</sup> As such, it strikes an appropriate balance between valuing women's membership in cultural communities and preventing those cultural communities from harming or discriminating against female members. Tamale observes, "[T]he close connection between gender, sexuality, culture and identity requires that African feminists work within the specificities of culture to realize their goals. We need to creatively discard the oppressive aspects of culture and embrace the liberatory ones."<sup>173</sup> The text of the Protocol reflects a similar understanding of the benefits and drawbacks of culture. Moreover, it promotes the notion that women, as social agents, must play a significant role in determining cultural policies. In the context of customary law, it values women's voices in formulating and reformulating cultural norms where other international and regional treaties do not.

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169. *Id.* at 10.

170. *Id.*

171. In her discussion of Swaziland, Sari Wastell provides a compelling example. Wastell describes the vehemence with which many Swazis resisted the country's proposed constitution. "This ambivalence was the result of different and cross-cutting political and cultural factors, but the most important was the fact that human rights discourse, as understood by ordinary Swazis, seemed to express a value system that was opposed to Swazi custom." Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local, Introduction to THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 1, 34 (Mark Goodale & Sally Engle Merry eds., 2007) (discussing Sari Wastell, *Being Swazi, Being Human: Custom, Constitutionalism and Human Rights in an African Polity*, in *THE PRACTICE OF HUMAN RIGHTS*, *supra*, at 320).

172. There is, of course, the difficult issue concerning *who decides* whether a particular cultural tradition is positive or negative. Ideally, local women within the communities that practice the tradition in question will evaluate the costs or benefits of the practice.

173. Tamale, *supra* note 168, at 5 (footnote omitted).

### III. THE POTENTIAL OF THE PROTOCOL: SUBSTANCE AND PROCESS

#### A. REGIONAL CREDIBILITY OF THE PROTOCOL

Compared to CEDAW, the Protocol enjoys substantial regional credibility.<sup>174</sup> The Protocol reflects the voices of African women who played a role in drafting it.<sup>175</sup> As such, it is likely to be a more palatable source of human rights obligations than international treaties that are seen as imports of the West.<sup>176</sup> Although many international human rights compacts were negotiated with little input from those whose countries had been colonized, the Protocol was negotiated directly among many of the stakeholders who seek to apply it in the region. As Abdullahi Ahmed An-Na'im remarks, "Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as victims of colonization, they were not members of the United Nations."<sup>177</sup> An-Na'im accepts the universal applicability of human rights law,<sup>178</sup> but he emphasizes the centrality of local context in the internalization of human rights norms.<sup>179</sup> He recognizes that universal norms may become particularized to the extent that they require localized modes of implementation. He states, "[I]t is reasonable to assume that the prospects for practical implementation of a given regime of human rights as a normative system are related to the degree of its legitimacy in the context of the culture(s) where it is supposed to be interpreted and implemented in

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174. MUKASA, *supra* note 13, at 41 ("While the CEDAW's effectiveness was undermined in some quarters because it was considered a Western women's instrument, the African Women's Protocol is a homegrown instrument developed by Africans for African women.").

175. *Id.* at 29 (noting that nongovernmental organizations "played a pivotal role in [the Protocol's] initiation, elaboration and subsequent adoption").

176. *Id.* at 41. "As an instrument developed by Africans for Africans, [the Protocol] legitimises the struggle against gender oppression as an African struggle." *Id.* at 37.

177. Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13, 15 (1990) (footnote omitted), reprinted in *THE PHILOSOPHY OF HUMAN RIGHTS* 315, 317 (Patrick Hayden ed., 2001).

178. *See id.* at 317 ("Concern for the lack of universal participation in formulating international human rights instruments does not lead me to invalidate those existing instruments.").

179. An-Na'im describes his approach as follows:

I adopt a constructive approach to the problem of the cultural legitimacy of human rights norms. This approach posits that such problems can be overcome through a process of reinterpreting the fundamental sources of Islamic tradition. The proposed new interpretation will have to be undertaken in a sensitive, legitimate manner, and time will be required for its acceptance and implementation by the population at large.

*Id.* at 318. *See also* Elizabeth M. Bruch, *Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669, 680–87 (2006) (offering an excellent description of An-Na'im's approach).

practice.”<sup>180</sup>

The Protocol enjoys regional credibility largely because of the role African women’s rights activists played in drafting the document.<sup>181</sup> In 1996, the African Commission voted to appoint a Special Rapporteur on the Rights of Women in Africa.<sup>182</sup> The Commission later charged the Special Rapporteur and two commissioners with the task of convening a working group to draft a protocol on women’s rights.<sup>183</sup> “As the drafting process went along, input came from [nongovernmental organizations] throughout the continent, government legal experts and the Women’s Unit of the Organization of African Unity.”<sup>184</sup> Although women’s rights activists criticized this early stage of drafting as insular and inaccessible,<sup>185</sup> broader coalitions of nongovernmental organizations (“NGOs”) had an impact on later drafts. “In addition to the work of the Special Rapporteur and her group on drafting the Protocol, contributions to the drafting process also came from within the [Organisation of African Unity] Women’s Unit and civil society.”<sup>186</sup> Drafters incorporated broad concepts of women’s rights, drawing on rights provisions in the Southern African Development Community’s (“SADC’s”) Addendum on Violence Against Women and the African Charter on the Rights and Welfare of the Child.<sup>187</sup>

As with the drafting of most supranational agreements, urban elites largely dominated the process. Like any negotiated instrument, the Protocol reflects this participatory bias and cannot be said to be truly representative of the concerns of all the women on the continent. The divide between sophisticated, urban, elite women and poorer, rural women is very real. Even an effort to include in the drafting process women’s rights organizations that work with this rural population will often be insufficient

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180. Abdullahi Ahmed An-Na’im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN, *supra* note 99, at 167, 171.

181. See MUKASA, *supra* note 13, at 5; Fareda Banda, *Blazing a Trail: The African Protocol on Women’s Rights Comes into Force*, 50 J. AFRICAN L. 72, 73 (2006) (noting input from NGOs in the drafting process).

182. See Banda, *supra* note 181, at 73 (noting that the Special Rapporteur would lead “a working group to look into the matter of African women’s legal disenfranchisement”).

183. BANDA, *supra* note 66, at 68.

184. Banda, *supra* note 181, at 73 (footnote omitted).

185. See Fareda Banda, *Protocol to the African Charter on the Rights of Women in Africa*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS 441, 445 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008) (“The initial lack of extensive consultation was to become a source of tension and unhappiness as the drafting process evolved.” (footnote omitted)).

186. BANDA, *supra* note 66, at 68.

187. See Banda, *supra* note 185, at 446–47 (“Subsequent drafts moved away from an explicit link with the African Charter, embracing . . . the SADC Addendum on violence against women, and also the African Charter on the Rights and Welfare of the Child (ACRWC).” (footnotes omitted)).



to overcome this demographic and experiential bias. The Protocol, therefore, is not unique in this respect.

In addition to concerns about representation in the drafting process, the process also involved substantive drafting difficulties. Several states, including Algeria, Egypt, Libya, and Sudan, attempted to limit the reach of the Protocol's equality provisions.<sup>188</sup> Rights related to sexual orientation were excluded from the final draft.<sup>189</sup> Tunisia and Sudan objected to the provision requiring that the minimum age for marriage be eighteen.<sup>190</sup> The issue of polygamy was particularly contentious, with NGOs proposing an outright ban and states defending the practice as an important right under both customary and Islamic law.<sup>191</sup> The final version included a requirement that states parties encourage monogamy as the preferred form of marriage.<sup>192</sup> Like all negotiated international instruments, some of the Protocol's provisions reflect a compromise between conservative government representatives and consulting NGOs.<sup>193</sup>

Regardless of these compromise provisions, however, the Protocol embodies a progressive vision of women's rights on the continent, one which African women played a significant role in creating.<sup>194</sup> As a regional document, the Protocol mediates between global or international approaches to rights and more localized approaches. The regional and national NGOs that played a role in the drafting process "navigate[d] the divide between the local and the global, translating global approaches into local terms and seeking to give local groups voice in global settings."<sup>195</sup> As such, the Protocol offers an effective rebuttal to those who view human rights, particularly the rights of women, as a hegemonic import from the West.<sup>196</sup>

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188. *See id.* at 447.

189. BANDA, *supra* note 66, at 77–78.

190. *Id.* at 78.

191. *See id.* at 76.

192. Protocol, *supra* note 12, art. 6(c) (“[M]onogamy is encouraged as the preferred form of marriage and . . . the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected . . .”).

193. *See, e.g.*, Banda, *supra* note 185, at 449 (noting the example of the qualified rights of women to pass on nationality to their children under Article 6(h) of the Protocol).

194. *See* Banda, *supra* note 181, at 72 (“The entry into force of the Protocol . . . marked the culmination of years of lobbying for a document which would promote and protect the human rights of the continent’s women by African women’s rights advocates.”). The drafting process largely involved women from the urban elite. Knowledge of the Protocol is still limited in rural areas. Thus, although the Protocol incorporates many of the concerns of African feminists, it should not be understood as a fully representative and inclusive document.

195. MERRY, *supra* note 91, at 104.

196. *See, e.g.*, Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8

## B. SUBSTANTIVE PROVISIONS WITHIN THE PROTOCOL

The Protocol was entered into force on November 25, 2005.<sup>197</sup> As of February 2008, twenty-three countries had ratified the Protocol.<sup>198</sup> Regional, national, and international campaigns continue to increase the number of ratifications and to promote enforcement of the Protocol within national legal systems.<sup>199</sup> These campaigns are especially important for women's rights activists since the Protocol's provisions build on, and in some cases expand, the rights contained in CEDAW.<sup>200</sup> In the case of violence against women, the value of the Protocol lies in the specificity with which it prohibits gender-based violence, extending protection well beyond CEDAW.<sup>201</sup>

BUFF. HUM. RTS. L. REV. 1, 4-5 (2002) ("The international law of human rights . . . seeks the universalization of European cultural, philosophical, and political norms and social structures. . . . In this script of human rights, democracy and western liberalism are internationalized to redeem savage non-Western cultures from themselves, and to alleviate the suffering of victims, who are generally non-western and non-European.").

197. MUKASA, *supra* note 13, at 4. The heads of state and government of the African Union adopted the Protocol on July 11, 2003, but it did not enter into force until fifteen countries had ratified it, which occurred with Benin's ratification on November 25, 2005. *Id.*

198. See Equality Now, Protocol on the Rights of Women in Africa, [http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol\\_en.html](http://www.equalitynow.org/english/campaigns/african-protocol/african-protocol_en.html) (last visited Jan. 13, 2010) ("The countries that have ratified the Protocol as of 26 February 2008 are twenty-three: Angola, Benin, Burkina Faso, Cape Verde, The Comoros, Djibouti, The Gambia, Ghana, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo and Zambia.").

199. See, e.g., Equality Now, <http://www.equalitynow.org/> (last visited Jan. 13, 2010). Equality Now "has for the past two years been coordinating the campaign for popularisation, ratification and domestication of the African Protocol on Women's Rights. It is registered as an NGO in Kenya." BREATHING LIFE INTO THE AFRICAN UNION PROTOCOL, *supra* note 69, app. 1, at 98. Another organization, Association des Juristes Maliennes, has been "involved in the drafting and lobbying for the ratification of the Protocol and continues to undertake activities aimed at popularising the Protocol among their members and other legal practitioners." *Id.* at 95-96.

200. See Fareda Banda, Remarks, *Sex, Gender, and International Law*, 100 AM. SOC'Y INT'L L. PROC. 243, 244 (2006) ("The African Protocol on Women's Rights takes CEDAW as its jumping-off point. . . . Building as it does on CEDAW, it is worth noting that the Protocol contains rights not found within CEDAW . . .").

201. Although CEDAW brings violence against women within its purview through General Recommendation 19, the Protocol specifically addresses harmful traditional practices, which can be a source of violence against women, particularly in rural areas of Africa. Article 5(b) requires states to take action to ensure "prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them." Protocol, *supra* note 12, art. 5(b). See also Banda, *supra* note 200, at 244 ("[T]he Protocol contains rights not found within CEDAW, including those referring to violence against women. (CEDAW has made up for this by way of two general recommendations on violence.) The definition of violence is widely drawn and includes economic harm. Interestingly, pornography and sexist advertising are proscribed. Female genital cutting (mutilation) is explicitly outlawed even when performed in a medical establishment—thus putting paid

The Protocol is a response to many of the substantive gaps of CEDAW and the African Charter,<sup>202</sup> seeking to correct CEDAW's neglect of culture and the African Charter's prioritization of culture to the neglect of gender equality.<sup>203</sup> Neither CEDAW nor the Charter offers a way to effectively address the intersectional reality of women's lives, a reality in which both gender equality and custom and culture have an important role to play.<sup>204</sup> Although not without shortcomings, the Protocol is a significant step forward in terms of meaningfully grappling with the potential conflict between culture and equality.<sup>205</sup>

The Protocol contains a number of innovative provisions that move the culture/equality conversation forward in important ways. First, the Protocol explicitly values culture and custom at the same time that it promotes gender equality, which reflects an understanding of the self as multidimensional, contested, and intersectional.<sup>206</sup> By viewing women both as members of cultural communities and as gender equality-seeking individuals, the Protocol reflects the lived reality of women's existence. As such, it avoids some of the backlash that CEDAW generates by focusing on gender equality to the exclusion of other axes of the oppression of women, such as race, ethnicity, class, sexual orientation, and disability.

In addition to recognizing the positive value of culture and, more specifically, recognizing the right to live in a positive cultural context, the Protocol invalidates cultural practices that have a harmful effect on women.<sup>207</sup> Article 2, for example, requires states parties to combat

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to the idea that it is only a problem if done in an unhealthy environment.”).

202. Fareda Banda describes the origins of the Protocol:

The genesis of the African Women's Protocol can be traced back to a joint NGO/African Commission initiative in 1995. At the instigation of a regional women's NGO, Women in Law and Development in Africa (WILDAF), the African Commission on Human and People's Rights had organized a meeting to discuss the situation of women in Africa. At the meeting it was noted that the widespread ratification by African states of the International Bill of Rights and [CEDAW], all of which protected women from gender-based discrimination, had not greatly improved the lives of women on the continent. It was further noted that although African states had ratified [the African Charter], . . . women's rights on the continent were not being enforced. The result of this non-enforcement was that women were continuing to experience violations of their rights.

Banda, *supra* note 181, at 72 (footnotes omitted).

203. See *supra* note 53 and accompanying text.

204. See *supra* notes 49–52 and accompanying text.

205. See *supra* note 70 and accompanying text.

206. See Protocol, *supra* note 12, art. 17 (providing the right to live in a “positive cultural context” and participate in the formulation of cultural policies); *id.* art. 1(f) (“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.”).

207. See, e.g., *id.* art. 5. Article 1 of the Protocol defines “harmful practices” as “all behaviour,

discrimination against women and includes an obligation to “prohibit[] and curb[] all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.”<sup>208</sup> Article 2 also specifically requires states parties to challenge gender stereotypes and “modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices.”<sup>209</sup>

Article 5, which is entitled “Elimination of Harmful Practices,” is dedicated to the methods states must use to eliminate harmful cultural or customary practices.<sup>210</sup> As such, the Protocol stands in stark contrast to the African Charter, which largely failed to address the potential conflict between the rights to culture and gender equality. Furthermore, while the language of CEDAW indicates that the right to equality trumps cultural rights under that treaty, CEDAW lacks credibility on the issue because it underestimates the importance of culture in women’s lives and dismisses culture as almost uniformly repressive.

Articles 6 and 7 address women’s rights in marriage and divorce, respectively, which are areas of family law in which customary law often controls.<sup>211</sup> A handful of Commonwealth African countries, in fact, have clauses in their constitutions that specifically exclude family law from constitutional nondiscrimination protection.<sup>212</sup> The Protocol, however, makes clear that states have an obligation to conform marriage law—whether customary, statutory, or religious—to the rights guaranties set forth in Articles 6 and 7.<sup>213</sup> Because the Protocol does not require a uniform or integrated system of laws, it represents a balanced approach that allows for the operation of parallel laws but requires that each iteration eliminate gender discrimination with the law.<sup>214</sup>

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attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.” *Id.* art. 1(g).

208. *Id.* art. 2(1)(b).

209. *Id.* art. 2(2).

210. *See id.* art. 5.

211. *See id.* arts. 6, 7.

212. Bond, *supra* note 27, at 290.

213. *See, e.g.,* Protocol, *supra* note 12, art. 6(a) (“States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that . . . no marriage shall take place without the free and full consent of both parties . . .”).

214. For example, the Protocol allows for a plural system of laws to govern marriage and divorce as long as those laws reflect equality norms. *See id.* arts. 6, 7.

Similarly, Article 20 provides special protection for widows,<sup>215</sup> some of whom have traditionally been subject to discriminatory and harmful practices such as the “cleansing” rituals common in Malawi, Zambia, and Kenya.<sup>216</sup> In some circumstances, cleansing rituals require a surviving widow to have sexual intercourse with one of her husband’s relatives following the death of her husband, which exposes her to the violence of coerced sex and the risk of HIV infection.<sup>217</sup> Under the Protocol, however, states must ensure that widows are not subjected to harmful traditional practices, signifying another place in which injurious customs must yield to equality.<sup>218</sup> Although it stops short of requiring “equal” rights for women in inheritance, Article 21 of the Protocol also sets out “equitable” inheritance rights for women,<sup>219</sup> which is another area that customary law has traditionally controlled.

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215. See *id.* art. 20(a) (requiring states parties to ensure “that widows enjoy all human rights” and that they not be subjected to “inhuman, humiliating or degrading treatment”).

216. See Florence Shu-Acquaye, *The Legal Implications of Living with HIV/AIDS in a Developing Country: The African Story*, 32 SYRACUSE J. INT’L L. & COM. 51, 55 (2004) (“As part of [the widow-cleansing] custom, the brother of a deceased husband is expected to have sexual intercourse with the brother’s widow, supposedly to ‘cleansing’ her of her deceased husband’s spirit, usually with no obligation to marry her. . . . After the ‘cleansing’ these women can attend their husband’s funeral or be inherited by their husband’s brother or relative. Not only is such a ritual painful for the women involved, but it is also a volatile means of spreading AIDS.” (footnote omitted)); Sharon LaFraniere, *AIDS Now Compels Africa to Challenge Widows’ ‘Cleansing,’* N.Y. TIMES, May 11, 2005, at A1 (“[In Malawi] and in a number of nearby nations including Zambia and Kenya, a husband’s funeral has long concluded with a final ritual: sex between the widow and one of her husband’s relatives, to break the bond with his spirit and, it is said, save her and the rest of the village from insanity or disease.”).

217. See Shu-Acquaye, *supra* note 216, at 55; LaFraniere, *supra* note 216.

218. Radhika Coomaraswamy, former U.N. Special Rapporteur for Violence Against Women, makes clear that customs that are physically harmful to women must yield to equality rights. See Coomaraswamy, *supra* note 4. Coomaraswamy explains that the “tension between the rights of groups to practice their culture and the rights of women under international human rights norms plays itself out in the everyday life of women across the globe,” and she presents “controversy surrounding female genital mutilation” as an example. *Id.* at 490. Coomaraswamy argues, “Such practices deserve international agitation, international legal sanctions, and international programs and policies to combat the practices so that girls are spared this violence of the most intimate sort, which prevents them from being human in the most wholesome way,” *id.* at 494; “[a]t the same time, however, people should recognize that internationally accepted standards and norms do exist, in defiance of post-modernist tendencies,” *id.* at 513. Coomaraswamy ultimately concludes, “Being sensitive to cultural relativism cannot imply putting hard-won battles on human rights up for grabs. . . . What must be seen as negotiable are the strategies of enforcement and implementation and not the bottom line concept of a woman free and equal. *Id.* at 513.

219. Article 21 states:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.

Protocol, *supra* note 12, art. 21.

These articles of the Protocol offer strong protection for women's equality rights. When there is a perceived conflict between customary law or practice and gender equality, the Protocol overwhelmingly resolves the conflict in favor of equality.<sup>220</sup> Yet it does so within a framework that explicitly values the positive aspects of custom and culture, likely reducing the backlash that often results from external threats to community values and norms.<sup>221</sup> In addition to recognizing the positive value of culture, the Protocol also provides procedural protections that offer women a voice in the determination of cultural policies and practices.<sup>222</sup>

### C. BENEFITS OF THE PROTOCOL'S PROCEDURAL RIGHTS

Article 17 of the Protocol, which states that women have the right "to participate at all levels in the determination of cultural policies,"<sup>223</sup> offers the strongest protection for women's right to engage with and influence cultural policies. Article 17 also requires that states parties "take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels."<sup>224</sup> It is worth noting, however, that the Protocol's drafters could have used stronger obligatory language, such as a requirement that states "ensure" rather than "enhance" the participation of women in the formulation of cultural policies. Although the drafters failed to utilize the most compelling language in this instance, the Protocol's repeated specific mention of "communication" is another discursive method of challenging gender-based stereotypes.<sup>225</sup> These

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220. See BANDA, *supra* note 66, at 81 ("On the issue of culture, the document is firm in its injunction that culture is to be rooted in principles of equality and democracy, and that women are to be consulted about the content of the cultural norms that are to operate within their societies." (citing Protocol, *supra* note 12, pmb., art. 17)).

221. See An-Na'im, *supra* note 8, at 5 ("Those of one cultural tradition who wish to induce a change in attitudes within another culture must be open to a corresponding inducement in relation to their own attitudes and must also be respectful of the integrity of the other culture. They must never even appear to be imposing external values in support of the human rights standards they seek to legitimize within the framework of the other culture.").

222. See Protocol, *supra* note 12, art. 17.

223. *Id.* art. 17(1).

224. *Id.* art. 17(2).

225. 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 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.

*Id.* art. 2(2) (emphasis added). Similarly, Article 4(2)(d) requires that states "actively promote peace education through curricula and *social communication* in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women." *Id.* art. 4(2)(d) (emphasis added).

procedural provisions, which are often overlooked in discussions of women's rights, offer an underutilized vehicle to promote women's engagement with the laws and policies that often determine the outcome of family law disputes.

The emphasis on women's participation in the determination of cultural policies is an attempt to create decisional space for women to interpret and engage with cultural meaning.<sup>226</sup> These provisions reflect an understanding of the importance of women's agency in articulating the normative content of customary law, and they seek to enhance women's participation in the discourse surrounding culture and custom.<sup>227</sup> Because the Protocol does an excellent job of framing gender equality norms in the context of custom and culture, the real discursive value of Article 17 is its potential to engage traditional leaders in the exploration of localized methods for implementation of equality rights.<sup>228</sup>

As I discuss in greater detail in Part V, NGOs have a crucial role to play in operationalizing the Article 17 right of women to participate in the formulation of cultural policies. As Merry observes, "Movement activists, NGO leaders, and government officials create programs and institutions that are a blend of transnational, national, and local elements as they negotiate the spaces between transnational ideas and local concerns."<sup>229</sup> Merry proposes a strategy for NGOs attempting to "translate" ideas between global and local spaces as part of this process. The translation strategy is useful for NGOs seeking to facilitate discourse between, for example, traditional leaders and grassroots women in Africa. Among other things, NGOs should use culturally relevant "images, symbols, and stories" to create a "frame" of discourse. "Frames are . . . ways of packaging and presenting ideas that generate shared beliefs, motivate collective action, and define appropriate strategies of action."<sup>230</sup> Framing strategies will help NGOs to structure the dialogue, introduce ideas that challenge patriarchal traditions, and, when appropriate, search for frames that are culturally resonant.<sup>231</sup> Leaders of NGOs, of course, must acknowledge that organizations are not always inclusive or representative of the communities

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226. See *id.* art. 17; BANDA, *supra* note 66, at 252 (recognizing Article 17 as a reaction against the well-perceived "misuse of culture to deny women their rights").

227. See *infra* Part V.

228. See *infra* Part V.

229. MERRY, *supra* note 91, at 134.

230. *Id.* at 136.

231. Choosing culturally resonant frames is not always appropriate. *Id.* ("This is precisely the problem human rights activists confront: If they frame human rights to be compatible with existing ways of thinking, they will not induce change.").

they purport to serve. In addition, local NGO agendas may actually reflect the priorities of transnational funders rather than those of domestic or local NGO leadership. These challenges of inclusiveness and funder-driven priorities may complicate the efforts of NGOs to implement Merry's vision of global-local translation.

Merry is not alone in her emphasis on the importance of participation. Recent strains of feminist legal and political theory also underscore the importance of procedural, participatory protections.<sup>232</sup> I argue, however, that these participatory, dialogical rights, while important, may lead to outcomes that are a product of power dynamics rather than true deliberation.<sup>233</sup> As a result, I see the value of discourse not in substantively defining equality norms but in exploring localized modes of implementation and acculturating traditional leaders to international human rights norms such as those embodied in the Protocol.<sup>234</sup> It is the discursive search for localized modes of norm implementation, rather than norm definition, that holds the greatest promise for promoting women's equality rights in the region.

#### IV. THE PHILOSOPHY OF PARTICIPATORY RIGHTS

The Protocol's procedural provisions, such as Article 17, embody a deliberative approach to women's rights in customary law and cultural

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232. SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 11 (2002) (“[O]nly those norms and normative institutional arrangements can be deemed valid only if all who would be affected by their consequences can be participants in a practical discourse through which the norms are adopted.”); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 121–22 (2000) (“[I]n a large polity with many complex issues formal and informal representatives mediate the influence people have. For these reasons many recent calls for greater political inclusion in democratic processes argue for measures that encourage more representation of under-represented groups, especially when those groups are minorities or subject to structural inequalities.”). See generally Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043 (2008) (discussing internal inclusion of individual participants as a fundamental requirement of successful participatory constitutionmaking and substantive decisionmaking).

233. According to one scholar, “[A]lthough idealized versions of deliberative democracy require ‘the inclusion of everyone affected by a decision,’ failure to account for the effect of social inequalities [sic] on civic participation and political inclusion can render the norm of inclusion ineffectual.” See Monique Deveaux, *A Deliberative Approach to Conflicts of Culture*, 31 POL. THEORY 780, 785 (2003) (quoting JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 16 (2000)).

234. Cf. MERRY, *supra* note 91, at 219 (“Human rights ideas and feminist ideas are appropriated by national elites and middle-level social activists and translated into local terms. Those who are most vulnerable, often the subjects of human rights, come to see the relevance of this framework only through the mediation of middle-level and elite activists who reframe their everyday problems into human rights terms.”).



practice.<sup>235</sup> In the contemporary conflict over multiculturalism and equality, deliberative democracy theorists have gained traction in recent years.<sup>236</sup> Discourse ethicists and deliberative democrats share a core understanding of “the need to justify decisions made by citizens and their representatives.”<sup>237</sup> Thus, the process of decisionmaking becomes highly significant in mediating the conflict between demands for pluralism and equality.<sup>238</sup> The Protocol’s deliberative, procedural approach complements its strong substantive provisions and allows for a comprehensive advocacy strategy that includes both litigation and localized, discursive political decisionmaking.

Using the lens of deliberative democracy to explore the transformative potential of the Protocol forces one to confront the structural problems, such as power differentials between discursive participants, that are likely to impede equality-promoting discourse at the local level in Africa. This skepticism concerning the effect of power on discourse leads me to conclude that, in the case of localized discussions regarding gender equality within African customary law, efforts to supplement the weak position of particular participants through better procedures—although helpful—will be inadequate. An alternative to relying solely on procedure to promote fair, equality-promoting discourse is to reduce the scope of deliberation.

As I will discuss below, discourse is most helpful not in defining the norms of equality-based customary law but in providing an avenue for discussion of local implementation of such norms. Because significant power disparities typically exist between traditional leaders and rural women, deliberative democracy should be cautiously evaluated as a tool for resolving the rights contests that often arise in the context of gender equality and customary law. For the reasons described below, I conclude

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235. See *supra* text accompanying note 222.

236. See Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism* 1 (Inst. for Advanced Studies, Vienna, Political Sci. Series, Working Paper No. 72, 2000), available at [http://www.ihs.ac.at/publications/pol/pw\\_72.pdf](http://www.ihs.ac.at/publications/pol/pw_72.pdf) (“[T]he new paradigm of democracy, the model of ‘deliberative democracy’ . . . is currently becoming the fastest growing trend in the field.”).

237. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004). Gutmann and Thompson define deliberative democracy as  
a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.

*Id.* at 7 (footnote omitted).

238. Deveaux, *supra* note 233, at 802–03 (“By putting members of cultural communities at the center of debates and decision-making processes about the future of their cultural practices, we express formal respect and equal regard for them as citizens and as members of groups—surely a moral requirement of plural, liberal states.”).

that deliberation is an inappropriate vehicle to determine the content of human rights norms. It is, however, a useful method for facilitating local dialogue about the best way to implement human rights norms and for raising awareness about those norms within traditional communities.

This localized discourse allows for some variation in the modes of implementation, including those that have some resonance within traditional communities.<sup>239</sup> Viewed in this way, discourse helps to acculturate traditional leaders regarding the value of human rights norms, and it facilitates the exploration of common ground between traditional values and human rights norms.<sup>240</sup> I advocate a limited role for discourse ethics in the context of African customary law and equality rights, one that serves not to identify appropriate norms but merely to aid in the internalization of human rights norms, particularly in traditional communities that have long been resistant to such norms.

In addition to limiting the scope of discourse concerning culture and equality, I advocate the use of litigation as a strategic supplement to political discourse.<sup>241</sup> When discourse between traditional leaders and women's rights advocates results in regression in implementing women's human rights, as it inevitably will at times, litigation serves as another critical tool in the activist toolbox. This combination of discourse, focused on norm implementation, and strategic litigation designed to enforce equality rights within customary law holds great promise for women's rights activists in the region.

#### A. DELIBERATIVE DEMOCRACY: AN OVERVIEW

Commentators describe the basic tenet of the theory of discourse ethics, which forms the foundation for deliberative democracy, as the notion that “[o]nly those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a

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239. It is a mistake to assume that a uniform dissonance exists between traditional practices and human rights. Such assumptions risk missing the potential for finding common ground.

240. As Angela Banks describes: “Adaptation is the process by which international legal obligations and norms are translated into local terms through the use of strategic frames. The strategic frames utilized situate the international obligations and norms within the local discursive opportunity structure.” See Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 *FORDHAM INT’L L.J.* 781, 795 (2009) (footnote omitted). “State collaboration with local elites, respected individuals within the local legal, political, economic, religious, and social communities, is often necessary to facilitate adaptation.” *Id.* at 798. See also text accompanying notes 229–31.

241. See generally Bond, *supra* note 27 (arguing that constitutional litigation is a form of dialogic constitutionalism that is helpful in the struggle to achieve women's equality in sub-Saharan Africa).

practical discourse.”<sup>242</sup> Many discourse ethicists imagine a formal system of argumentation between individuals.<sup>243</sup> Other deliberative democrats have expanded notions of discourse to include organizations, the state, and communities among possible dialogical participants.<sup>244</sup> Because conflicts between traditional leaders and grassroots activists in Africa often involve significant power disparities between participants, this expanded recognition of organizational participants opens the door for institutions or organizations to engage in dialogue and potentially to help level the playing field.<sup>245</sup>

Discourse ethicists offer a vision of “an intersubjective procedure of argumentation, geared to attain communicative agreement.”<sup>246</sup> As such, the

242. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 93 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) (footnote omitted). According to Amy Bartholomew, “Ultimately, the thrust of Habermas’s discourse-theoretic approach to legitimacy indicates that the determination and legitimation of human rights standards must rest on public justification and deliberation, aimed at producing mutual understanding, under procedural conditions of freedom, political equality and publicity.” Amy Bartholomew, *Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights*, 9 BUFF. HUM. RTS. L. REV. 25, 46 (2003) (footnote omitted).

243. As Chantal Mouffe notes:

As recalled by Benhabib, the features of such a discourse are the following: “(1) participation in such deliberation is governed by the norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate; (2) all have the right to question the assigned topics of the conversation; and (3) all have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied and carried out.”

CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 86 (2000) (quoting Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in SEYLA BENHABIB, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 70 (Seyla Benhabib ed., 1996)).

244. See Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 358 (2006–07) (explaining that Habermas’s discursive democracy “typically characterizes the conditions for just relations between *individuals*, leading to the creation of governing institutions and the norms those institutions apply” and extending that theory, “as the proper manifestation of self-determination, to interactions between those groups and another collective, namely the state”). “In answering skepticism about the ability of NGOs and social movements to function as will-forming entities in Habermasian democratic discourse, Samhat explained that ‘NGOs and social movements can be *representative* agents . . . in world politics, implementing tasks and aggregating interests and voices for segments of the global polity . . .’” *Id.* at 362 (alterations in original) (quoting Nayef H. Samhat, *International Regimes and the Prospects for Global Democracy*, WHITEHEAD J. DIPL. & INT’L REL., Winter/Spring 2005, at 179, 186)).

245. Miller continues:

Samhat also urges the application of the principles of Habermasian discursive democracy to the interactions between collectives. In mapping the discursive democratic potential of regimes, Samhat noted that “international regimes are the means through which state and non-state actors regulate areas of global life.” He regarded non-state actors operating in this capacity as “group oriented” and referred specifically to “global civil society actors such as [NGOs] and social movements.”

See *id.* at 361–62 (quoting Samhat, *supra* note 244, at 180, 182).

246. SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 28 (1992).

focus is decidedly procedural. Some, like Seyla Benhabib, prescribe the conditions necessary for such argumentation to be successful, including inclusiveness and reciprocity.<sup>247</sup> Benhabib describes these conditions as: “the principle of universal moral respect,” meaning that “we recognize the right of all beings capable of speech and action to be participants,”<sup>248</sup> and “the principle of egalitarian reciprocity,” by which she means “that within such conversations each [person] has the same symmetrical rights . . . to various speech acts, to initiate new topics, [and] to ask for reflection about the presuppositions of the conversation.”<sup>249</sup>

Although discourse ethics is associated with strict proceduralism, these rules convey a substantive vision of fairness within dialogue.<sup>250</sup> Benhabib, among others,<sup>251</sup> notes that substance and process are interrelated and observes, “[A]ssumptions about self, reason and society are the ‘substantive’ presuppositions without which no ‘proceduralism’ . . . can be cogently formulated.”<sup>252</sup> Benhabib, who accepts the general discourse ethics framework previously discussed, adjusts it based on insights from feminist philosophy. For example, many theorists require that dialogic participants shed the particularized experiences that shape their perspectives and, instead, focus on general principles “that all can agree

247. *See id.* (“Furthermore, there is also a shift from the model of the goal-oriented or strategic action of a single agent intending a specific outcome to the model of *communicative action* which is speech and action to be shared with others.”).

248. *Id.* at 29 (emphases omitted).

249. *Id.* (emphasis omitted).

250. “[T]he deliberative conception relies on explicitly moral principles rather than the seemingly neutral ones of aggregative conceptions. Reciprocity is an explicitly moral principle. Deliberation therefore invokes substantive moral claims that may be independent of the preferences citizens put forward.” GUTMANN & THOMPSON, *supra* note 237, at 18–19. Gutmann and Thompson further note:

While deliberation is now happily married to democracy—and Habermas deserves much of the credit for making the match—the bond that holds the partners together is not pure proceduralism. What makes deliberative democracy democratic is an expansive definition of who is included in the process of deliberation—an inclusive answer to the questions of who has the right (and effective opportunity) to deliberate or choose the deliberators, and to whom do the deliberators owe their justifications.

*Id.* at 9–10.

251. Gutmann and Thompson describe the conflict between deliberative democrats who view the theory as procedural or substantive:

This conflict concerns the status of the principles of the theory: should they be procedural or substantive? Pure proceduralism holds that the principles should apply only to the process of making political decisions in government or civil society. Thus the principles should not prescribe the substance of the laws, but only the procedures by which laws (such as equal suffrage) are made and the conditions necessary for the procedures to work fairly (such as free political speech). . . . Deliberative theorists who favor a more substantive conception deny that procedural principles are sufficient. . . . Unjust outcomes, they assume, should not be justifiable on any adequate democratic theory.

*Id.* at 23–24 (footnote omitted).

252. BENHABIB, *supra* note 246, at 7.

on.”<sup>253</sup> Benhabib, however, critiques this notion that the “other” participants in the dialogue shed the particularities of their pasts.<sup>254</sup> As Chantal Mouffe observes, “[I]t is unlikely, given the practical and empirical limitations of social life, that we will ever be able to completely leave aside all our particular interests in order to coincide with our universal rational self.”<sup>255</sup>

Although Benhabib does not eschew moral universals, she encourages respect for “concrete particular others in their narrative contexts.”<sup>256</sup> Rather than endorse the discourse ethicist’s conclusion that only impartiality will lead to reasoned agreement and consensus, Benhabib urges that dialogic participants consider the “other” in all of its messy particularity and contextual history.<sup>257</sup> Through this process of particularized, discursive role reversal, participants will achieve moral respect and understanding.<sup>258</sup> Iris Marion Young takes the critique one step further, however, by arguing that Benhabib is unrealistic in her assumption that role reversal with the concrete other is possible when participants enjoy vastly different positions

253. Habermas believes that self-definition is accomplished intersubjectively, through social interaction with others. Johanna Meehan writes:

Habermas’s appreciation for the intersubjective constitution of identity is expressed in his belief that we become selves through social interaction; we are not first individuals and then social agents who relate to each other; personal identity essentially involves social identity and the constitution of the self is concomitant with the establishment of relationships in the context of a shared lifeworld.

Johanna Meehan, *Autonomy, Recognition, and Respect: Habermas, Benjamin, and Honneth*, in *FEMINISTS READ HABERMAS: GENDERING THE SUBJECT OF DISCOURSE* 231, 240 (Johanna Meehan ed., 1995). See also Iris Marion Young, *Comments on Seyla Benhabib*, *Situating the Self*, 62 *NEW GERMAN CRITIQUE* 165 (1994).

254. Benhabib summarizes the critiques as follows:

Communitarians, feminists and postmodernists have (1) voiced skepticism toward the claims of a “legislating” reason to be able to articulate the necessary conditions of a “moral point of view,” an “original position,” or an “ideal speech situation;” (2) they have questioned the abstract and disembodied, distorting and nostalgic ideal of the autonomous male ego which the universalist tradition privileges; (3) they have unmasked the inability of such universalist, legislative reason to deal with the indeterminacy and multiplicity of contexts and life-situations with which practical reason is always confronted.

BENHABIB, *supra* note 246, at 3.

255. Mouffe, *supra* note 236, at 6.

256. See IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY, AND POLICY* 39 (1997).

257. See BENHABIB, *supra* note 246, at 137 (explaining the importance of “the interpretation of one’s action and maxims in light of the narrative history of the self and others”). Benhabib argues, “[T]he more we are able to think from the perspective of others, all the more can we make vivid to ourselves the narrative histories of others involved.” *Id.*

258. Benhabib notes:

All communicative action entails symmetry and reciprocity of normative expectations among group members. . . . Universalizability enjoins us to reverse perspectives among members of a “moral community” and judge from the point of view of the other(s). Such reversibility is essential to the ties of reciprocity that bind human communities together.

*Id.* at 31–32.

of privilege and oppression.<sup>259</sup>

In the context of African customary law, a discourse about equality norms between traditional leaders and rural, grassroots women illustrates Young's point. Benhabib would urge traditional leader participants to consider the particularities of life as a woman living under customary law. I share Young's skepticism that powerful elite participants, such as traditional leaders, are capable of deep understanding outside of their privileged frame. Effective deliberation, then, aims not to fancifully erase the differences of privilege but to minimize their impact on discourse.<sup>260</sup>

Discourse ethicists also believe that we should reach agreement about the rules that govern us through reasoned argumentation. This reasoning process, in fact, is what gives legitimacy to the governing rules.<sup>261</sup> When dialogic participants provide reasons for their position within an "ideal speech situation," they accomplish three goals. First, the reasons establish participants as active agents in their own governance—as subjects rather than objects of law.<sup>262</sup> Second, they help to define and justify the rules that govern us.<sup>263</sup> Third, they have expressive value; the process of reason giving conveys mutual respect.<sup>264</sup>

## B. THE POWER CRITIQUE

Discourse theory offers a useful starting point in thinking about deliberation and its role in democratic processes. Many discourse ethicists, such as Jürgen Habermas, however, insufficiently theorize the effect of power on discourse. Although Habermas sees freedom from domination as a precondition for the ideal speech situation,<sup>265</sup> he offers little insight into the operation of power in communicative acts. Commentators have noted

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259. See Young, *supra* note 253, at 170 ("The reciprocal recognition by which I know that I am other for you just as you are other for me cannot entail a reversibility of perspectives, precisely because our positions are partly constituted by the perspectives each of us has on others.").

260. See Mouffe, *supra* note 236, at 14 (noting that "if we accept that relations of power are constitutive of the social, then the main question for democratic politics is not how to eliminate power but how to constitute forms of power more compatible with democratic values").

261. See GUTMANN & THOMPSON, *supra* note 237, at 10 ("The general aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics. In pursuing this aim, deliberative democracy serves four related purposes. The first is to promote the legitimacy of collective decisions.").

262. See *id.* at 3 (noting that in various conceptions of democracy "[p]ersons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives").

263. *Id.* at 4.

264. *Id.*

265. See BENHABIB, *supra* note 232, at 107.

that consensus may be reached through communication devices, such as rhetoric, rather than through reasoned argument.<sup>266</sup> “In rhetoric, ‘validity’ is established via the mode of communication—for example, eloquence, hidden control, rationalization, charisma, and using dependency relations between participants—rather than through rational arguments concerning the matter at hand.”<sup>267</sup> Viewed in this way, power—rather than rationality—becomes the central medium through which discourse is accomplished.<sup>268</sup>

On the question of power, critics offer considerable insight into the structural inequalities that may underlie and undermine a particular communication.<sup>269</sup> Discourse ethicists are not unconcerned about power. Some worry about power as a corrupting influence in deliberation.<sup>270</sup> “Practices of deliberative democracy also aim to bracket the influence of power differentials in political outcomes because agreement between deliberators should be reached on the basis of argument, rather than as a result of threat or force.”<sup>271</sup> Most discourse ethicists, however, offer little more than an idealized theoretical speech situation in which such power is theoretically neutralized.<sup>272</sup> Indeed, they generally recognize that this

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266. See YOUNG, *supra* note 232, at 63 (“[I]n his theory of discourse ethics Habermas also aims to distinguish rational speech from rhetoric, the first of which has a communicative and the second a strategic function. . . . Rhetorical speech, on the other hand, aims not to reach understanding with others, but only to manipulate their thought and feeling in directions that serve the speaker’s own ends.” (footnote omitted)).

267. Bent Flyvbjerg, *Ideal Theory, Real Rationality: Habermas Versus Foucault and Nietzsche* 5 (Apr. 2000) (unpublished manuscript, on file with the Political Studies Association).

268. See *id.* “The [Habermasian] neglect of power is unfortunate, because it is precisely by paying attention to power relations that we may achieve more democracy.” *Id.* at 8. As Monique Deveaux writes:

An important limitation of any democratic approach to resolving conflicts of culture concerns the problem of genuine as opposed to purely formal inclusion. Even where political exclusion of some group members, such as women, is not explicit, it may be difficult to ensure that those who have been historically disenfranchised actually participate in deliberation.

MONIQUE DEVEAUX, *GENDER AND JUSTICE IN MULTICULTURAL LIBERAL STATES* 92 (2006).

269. As Michel Foucault states:

The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another. Power is everywhere; not because it embraces everything, but because it comes from everywhere.

1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 93 (Robert Hurley trans., 1978).

270. See DEVEAUX, *supra* note 268, at 106 (“If I am right that struggles over the meaning and validity of contested cultural traditions in liberal states are centrally about the concrete interests of group members and the distribution of power and decision-making authority in these communities, then arguably any sound procedure for mediating cultural conflicts ought to recognize this.”).

271. Iris Marion Young, *Activist Challenges to Deliberative Democracy*, 29 *POL. THEORY* 670, 672 (2001).

272. As Mouffe observes, “Th[e] link between legitimacy and power and the hegemonic order that

idealized communication cannot readily be achieved in current practice.<sup>273</sup>

Young's construction of a fictional dialogue between an activist and a deliberative democrat provides a subtle critique of deliberative democracy.<sup>274</sup> The activist's strong moral convictions about what is right and wrong may lead the activist to reject dialogue, particularly if the other participants are—in the activist's view—oppressive.<sup>275</sup> In the eyes of the activist, “[a]ctivities of deliberation . . . tend more to confer legitimacy on existi[ng] institutions and effectively silence real dissent.”<sup>276</sup> The deliberative democrat regards the activist with some degree of contempt as the activist represents the polarized political power plays that deliberative democracy intends to circumvent.<sup>277</sup>

Young's activist is suspicious of the deliberative democrat's insistence on inclusion, at least in the real-world version of deliberation rather than the idealized theory. Referring to this idealized, theoretical version of discourse, Young remarks, “This is not the real world of politics . . . where powerful elites representing structurally dominant social segments have significant influence over political processes and decisions.”<sup>278</sup> The activist feels the process will never be truly inclusive when deliberation threatens the power, property, or prestige of elites.<sup>279</sup> Even if a deliberative process is formally inclusive, the activist worries that the politically powerful will continue to control the agenda and dominate the discussions.<sup>280</sup> The

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this entails is precisely what the deliberative approach forecloses by positing the possibility of a type of rational argumentation where power has been eliminated and where legitimacy is grounded on pure rationality.” Mouffe, *supra* note 236, at 14.

273. “As ideal, the theory [of deliberative democracy] expresses conditions that often operate as implicit regulative norms guiding social co-operation, but which are never perfectly realized.” YOUNG, *supra* note 232, at 33. As Mouffe observes, “[T]he ideal speech situation is presented as a ‘regulative idea.’” Mouffe, *supra* note 236, at 6.

274. *See generally* Young, *supra* note 271 (revealing the limits of deliberation when institutional power imbalances are present).

275. *Id.* at 673 (“Typically, the activist eschews deliberation, especially deliberation with persons wielding political or economic power and official representatives of institutions he believes perpetuate injustice or harm. He finds laughable the suggestion that he and his comrades should sit down with those whom he criticizes and whose policies he opposes to work out an agreement through reasoned argument they all can accept.”).

276. *Id.* at 675.

277. *See id.* at 674 (“Some who see themselves guided by norms of deliberative democracy might say that activists engage in interest group politics rather than orienting their commitment to principles all can accept. They might also say that the stance of the activist is flatly unreasonable.”).

278. *Id.* at 677.

279. Young suggests, “Where there are structural inequalities of wealth and power, formally democratic procedures are likely to reinforce them, because privileged people are able to marginalize the voices and issues of those less privileged.” YOUNG, *supra* note 232, at 34.

280. *See* Young, *supra* note 271, at 679 (“The activist is more suspicious even of these



discussion is already constrained, the activist avers, through its reliance on extant institutions that embody the structural inequality against which the activist rails.<sup>281</sup>

Young also warns of “hegemonic discourses that may produce false consensus.”<sup>282</sup> Both Young and James Bohman suggest that actual public discourse may suffer from false consensus when structural inequalities impede legitimate discourse through “falsifications, biases, misunderstandings, and even contradictions [in frames of discussion] that go unnoticed and uncriticized largely because they coincide with hegemonic interests or reflect existing social realities as though they are unalterable.”<sup>283</sup> Some critics would go further and assert that “every consensus exists as a temporary result of a provisional hegemony.”<sup>284</sup> At a minimum, every consensus is vulnerable to the charge that it was reached through the exertion of power rather than rational argument.

This is particularly true in the context of dialogue involving traditional leaders and rural women in Africa. Although Article 17 of the Protocol offers a useful way to encourage localized discourse about customary law and to facilitate women’s engagement in the discourse, I advocate a pragmatic approach that reflects the limits of discourse in this context. Theorists like Mouffe, Benhabib, and Young point to discursive limitations such as the inability of participants to shed particularized experiences, the effect of particularized experiences on the exertion of (or inability to exert) power, and the ways in which power operates even in seemingly neutral discursive procedures. These limitations on the transformative potential of discourse suggest that a cautious approach to deliberation is most prudent in the context of African customary law.

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deliberative processes that claim to give all affected by projected policies . . . the opportunity to express their opinions in a deliberative process. In a society structured by deep social and economic inequalities, he believes that formally inclusive deliberative processes nevertheless enact structural biases in which more powerful and socially advantaged actors have greater access to the deliberative process and therefore are able to dominate the proceedings with their interests and perspectives.”)

281. Young writes:

Some public officials and private foundations have become persuaded that inclusive, reasoned extensive deliberation is good for democracy and wish to implement these ideals in the policy formation process. To the extent that such implementation must presuppose constrained alternatives that cannot question existing institutional priorities and social structures, deliberation is as likely to reinforce injustice as to undermine it.

*Id.* at 684.

282. *Id.* at 686.

283. *Id.*

284. Mouffe, *supra* note 236, at 17.

## V. LOWERING EXPECTATIONS OF DELIBERATION: A PROPOSAL

## A. PROBLEMS WITH APPLICATION

## 1. Customary Law and Traditional Leadership

Colonialism changed the role of local, traditional leaders in decisionmaking and the degree to which they engaged in consultation with their constituencies. In the precolonial period, traditional leaders did not act in a formal representative capacity.<sup>285</sup> Their leadership lacked clearly delineated powers and was “both diffuse and all-inclusive.”<sup>286</sup> Traditional leaders were charged with an undefined duty to act in the interests of the people.<sup>287</sup> Traditional leaders typically consulted a group of elders or councilors as part of the decisionmaking process.<sup>288</sup> This consultation allowed a leader to informally take stock of popular opinion, although the leader was not duty bound to do so.<sup>289</sup> The consultative process, in theory, provided a check on “self-interested or capricious action.”<sup>290</sup>

T. W. Bennett describes the changes brought about through the British colonial policy of indirect rule. Through indirect rule, the British colonial authorities consolidated power in some indigenous leaders by “co-opting [them] to the colonial administration.”<sup>291</sup> As a result, the traditional leaders no longer felt the need to consult elders since they had the support of the

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285. See T. W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 68 (1995) (“[A] leader ‘did not normally enjoy a continuing unquestioned right to command[;] . . . his authority had to be continually recreated situationally, in specific contexts. This is expressed in the formula that chiefs could not rule on their own, but only in constant consultation with their councillors and people.’” (quoting W. D. HAMMOND-TOOKE, COMMAND OR CONSENSUS: THE DEVELOPMENT OF TRANSKEIAN LOCAL GOVERNMENT 65 (1975); David Hammond-Tooke, *The “Other Side” of Frontier History: A Model of Cape Nguni Political Progress, in* AFRICAN SOCIETIES IN SOUTHERN AFRICA 230, 248 (Leonard Thompson ed., 1969))).

286. *Id.* at 66–67.

287. See *id.* at 67 (“They were the fathers of their nations and they were talked about in the idiom of kinship. Like parents, African rulers had to care for their people, judge disputes fairly, govern the nation wisely, and provide for the needy.” (footnote omitted)).

288. See *id.* (“A ruler kept in touch with popular opinion through his councillors—the warheads and elders—who were normally senior kinsmen and notable leaders in the community” (footnote omitted)).

289. See *id.* at 67–68 (noting that a leader’s rule was “circumscribed only by a vague duty to act for the benefit of his people” but that “[n]o important decision could be taken without prior consultation”).

290. See *id.* at 68 (noting that councilors “gave voice to popular views” as a means of limiting the leader’s prerogative).

291. *Id.*

colonial administration.<sup>292</sup> Welshman Ncube asserts:

[M]ost of what is today held out as “our” customary law is a “construction” of the colonial judiciary in complicity with some elders of the African society, who redesigned most of what is today presented as customary law so as to increase male authority and control over women and children, to compensate for the loss of their political and social power to the colonial state.<sup>293</sup>

When colonialism ended, many newly independent governments maintained the basic structure of traditional leadership.<sup>294</sup> Although the quality of leadership varies widely as with any political system, some allege that traditional leaders tend to be ineffective and dishonest.<sup>295</sup> Traditional leaders, nevertheless, enjoy considerable respect within local communities.<sup>296</sup>

Some governments, such as South Africa, have a new democratic constitution and have preserved the traditional leadership structure in the constitution.<sup>297</sup> The traditional leadership has not always embraced the values of the new constitution. In the drafting phase, for example, traditional chiefs in South Africa lobbied to exclude personal and customary law from the purview of the nondiscrimination provision in the constitution.<sup>298</sup> They argued that personal law should be shielded from

292. *Id.* Also, as An-Na'im states:

For decades, colonial powers exercised exclusive control over local populations by ruling through a few educated local elite and traditional rulers and the extensive use of divide and rule tactics. All that independence signified in most African states was the transfer of control over authoritarian power structures and processes of government from colonial masters to local elite. Notions of popular participation in governance and accountability of officials at the national and local level were never known to African societies during colonial rule or after independence.

An-Na'im, *supra* note 105, at 13.

293. Welshman Ncube, *The White Paper on Marriage and Inheritance in Zimbabwe: An Exercise in Superfluity and Mischief?*, LEGAL F., No. 4, 1993, at 10, 12.

294. See BENNETT, *supra* note 285, at 69–70 (“[S]carcely any new African state could afford to dispense with [indigenous leaders].” (footnote omitted)).

295. See *id.* at 69 (noting that many indigenous leaders “have a reputation as stooges of the apartheid regime, and many are said to be inefficient and corrupt” (footnotes omitted)).

296. See *id.* at 70 (“Even where deliberative attempts were made to depose or sideline traditional authorities, they continued to thrive. This is because the institution—rather than the individual officeholder—still enjoys considerable public support. . . . [N]otwithstanding its faults, [local government of traditional authorities] is more in touch with community sentiment than the central state. For ordinary people their leaders are a legal and constitutional horizon, a personification of the moral and political order, protection against injustice, unseemly behavior, evil and calamity.” (internal quotation marks omitted) (footnotes omitted)).

297. See Yvonne Mokgoro, *The Customary Law Question in the South African Constitution*, 41 ST. LOUIS U. L.J. 1279, 1288 (1997).

298. See Bond, *supra* note 27, at 323 (citing Saras Jagwanth & Christina Murray, “No Nation Can Be Free When One Half of It Is Enslaved”: Constitutional Equality for Women in South Africa, in THE

constitutional scrutiny, which would have left most South African women without nondiscrimination protection in marriage, divorce, inheritance, and other areas that dramatically affect women's day-to-day lives.<sup>299</sup> A strong and organized women's rights lobby eventually defeated that effort.<sup>300</sup> The conflict, however, illustrates the potential for traditional leaders to reject efforts to empower or give voice to women.

Colonialism resulted in less consultation between traditional chiefs and their constituencies. This reduction in dialogue about the nature and content of customary law meant that decisionmaking was less democratic and more reflective of the desires of individual chiefs and their colonial backers.<sup>301</sup> In addition, colonialism ossified customary law, stunting its natural evolution by recording it in an "official" version recognized by the colonial administration.<sup>302</sup> Both of these historical developments affected the level of discourse concerning customary law and the potential of that discourse to facilitate the evolution of customary law.

## 2. Discourse Ethics Applied: Traditional Leadership and Women's Rights

When deliberation results in consensus, what is the longevity of that decision? Deliberative democracy allows for a "rolling" dialogue in which previously answered questions may be reopened for consideration. According to Amy Gutmann and Dennis Thompson, "Deliberative democracy's provisionality checks the excesses of conventional

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GENDER OF CONSTITUTIONAL JURISPRUDENCE 230, 231 (Beverly Baines & Ruth Rubio-Marin eds., 2005)).

299. See Jagwanth & Murray, *supra* note 298, at 231.

300. See Brenda Oppermann, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65, 78 n.101 (2006) ("In response to [the Congress of Traditional Leaders of South Africa's] proposal to exempt customary law from the Bill of Rights, black women delegates led a fight to oppose it. In addition, when a compromise clause was suggested that limited the right to equality, various rural women's organizations sent submissions opposing the clause." (citing Jill Zimmerman, Note, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197, 206-07 (2001))).

301. See BENNETT, *supra* note 285, at 68 (stating that "indirect rule" under colonialism had the effect of "weakening the checks and balances that had moderated traditional rule" because African leaders "had no need to look to their subjects for acceptance or approval," as "their authority was supported by the full weight of the colonial state").

302. The recording process even resulted in generating "Restatements of Customary Law" in some areas. See Armstrong et al., *supra* note 46, at 327. "Whatever the real motives behind these exercises, they contributed to the ossification process and with the other sources of custom became part of the system of precedent." *Id.* Notably, the version of customary law that was recorded and entrenched was often relayed by traditional authorities and therefore perhaps reflected their interests more than those of the general population. See *id.* at 326-37.

democracy's finality."<sup>303</sup> Deliberative democracy's provisionality, in fact, mirrors the dynamic nature of customary law, making customary law a good conceptual fit for deliberative democracy.<sup>304</sup> Commentators increasingly view African customary law as a "living" law that changes and adapts to new circumstances. As a dynamic system of law and rules, it is particularly well suited to ongoing examination through discourse. The evolving nature of customary law also makes it capable of responding to social, economic, and legal changes. Recognition of this dynamism may encourage traditional leaders to come to the table to explore how best to conform customary law to equality norms and the ways in which traditional, indigenous understandings may complement equality norms.<sup>305</sup>

In addition to being dynamic, customary law is highly contested, which also makes it well suited for democratic deliberation.<sup>306</sup> Customary law is typically unwritten, indigenous law that is passed down from one generation to another. Attempts to codify customary law have been criticized for freezing customary law in a particular iteration. Proponents of living customary law implicitly recognize the contested nature of the law as it is continually evolving.<sup>307</sup> Viewing customary law as a "work in

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303. See GUTMANN & THOMPSON, *supra* note 237, at 19.

304. "[T]he [deliberative democratic] procedures for evaluating and, if necessary, reforming contested cultural customs . . . are democratic and practically grounded; as such, they can generate proposals that are both democratically legitimate and politically viable in their reflection of cultural practices and communities in flux." DEVEAUX, *supra* note 268, at 227–28.

305. For example, in *Shilubana v Nwamitwa*, the Constitutional Court of South Africa considered whether to uphold a royal family's decision to grant a daughter the right to succeed her father's chieftainship title, even though the customary laws of succession followed the principle of male primogeniture. See *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) ¶ 3 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2008/9.pdf>. The chief died without a male heir and was initially succeeded by his brother instead of his eldest child, a daughter. *Id.* The elders modified the rule almost thirty years later to allow the daughter's chieftainship, arguing it was necessary "to bring [the community's] customs and traditions in line with the new constitutional order." *Id.* ¶ 33. Proponents of the decision argued that such change was common in customary law, which is a "flexible, living system of law, which develops over time to meet the changing needs of the community." *Id.* ¶ 35. The court ultimately decided, after balancing the value of community-led change with the need for legal stability and certainty, see *id.* ¶¶ 76–84, that the traditional authorities had the power to develop their customary law in an effort to "affirm constitutional values," see *id.* ¶ 84. The case serves as a prime example of both the dynamic nature of customary law and the ability of customary law to incorporate gender equality norms.

306. Benhabib emphasizes the variable, contested nature of culture. She identifies the following as "faulty epistemic premises" concerning culture:

(1) that cultures are clearly delineable wholes; (2) that cultures are congruent with population groups and that a noncontroversial description of the culture of a human group is possible; and (3) that even if cultures and groups do not stand in one-to-one correspondence, . . . this poses no important problems for politics or policy.

BENHABIB, *supra* note 232, at 4.

307. See Armstrong et al., *supra* note 46, at 314, 327 ("By living law we mean 'the unwritten

progress” lends it to open contestation regarding its normative content and, more importantly, regarding the most effective means of implementing human rights norms within particular communities.<sup>308</sup>

In the context of discussions regarding the normative content of African customary law, Bohman’s and Young’s concerns about false consensus resulting from structural inequalities are magnified.<sup>309</sup> Traditional leaders are primarily male elites who enjoy significant social and political power,<sup>310</sup> which was transformed and cemented with the assistance of the colonial powers.<sup>311</sup> Women who challenge customary norms as violative of gender equality rights often enjoy considerably less political power within their communities. Furthermore, the act of openly challenging custom and tradition exposes those women to increased stigma and ridicule within the community. Unity Dow, who challenged Botswana’s discriminatory nationality law, describes her feelings of ostracism after bringing suit: “The traditionalists charged that I was influenced by foreign ideas and that I was seeking to change their culture. . . . Many women distanced themselves from me.”<sup>312</sup>

If civil society organizations, with or without the help of the state, are successful in bringing together traditional leaders and grassroots women to respectfully deliberate over issues like divorce or inheritance, women may feel empowered and engaged as a result. This depends, in part, on whether participating women feel as though their voices have been heard. At a minimum, participants must strive to achieve Benhabib’s two requirements for effective discourse: universal respect and egalitarian reciprocity.<sup>313</sup>

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irregular, [or] flexible and highly negotiable, custom representing the law governing the actual social life of the people in their day to day lives often changing in response to changing conditions’. Although we understand that there may be debate on whether this constitutes ‘law’, it is clearly the body of rules and actions which has the most effect on the day to day lives of most people, and particularly women.” (citation omitted) (quoting Rwezaura, *supra* note 46)).

308. For example, “third world [feminist] critics are generally loath to accept a static understanding of culture, and often deconstruct popular or state articulations or propagation of culture in an attempt to find room for women to challenge dominant understandings of their culture.” Engle, *supra* note 40, at 64–65.

309. See *supra* notes 232–33.

310. See, e.g., BENNETT, *supra* note 285, at 66 (“Regardless of which colonial title an autochthonous ruler had to bear, in the eyes of his people he was the most important and the most powerful member of his nation.”).

311. See *id.* at 68.

312. Unity Dow, *How the Global Informs the Local: The Botswana Citizenship Case*, 22 HEALTH CARE FOR WOMEN INT’L 319, 326–27 (2001).

313. See BENHABIB, *supra* note 246, at 29. In a more recent volume, Benhabib expands on these normative requirements, specifically in the context of multiculturalism and gender equality, to include egalitarian reciprocity, voluntary self-ascription, and freedom of exit and association. She argues that

Building on the notion of the ideal speech situation,<sup>314</sup> Benhabib stresses that the normative concepts of universal respect and egalitarian reciprocity ensure that everyone has the right to participate in dialogue and that participants are equally entitled “to various speech acts, to initiate new topics, to ask for reflection about the presuppositions of the conversation,” and so on.<sup>315</sup> Given the very real structural inequalities between traditional leaders and grassroots women, civil society organizations, along with the state, must carefully structure the dialogue to minimize barriers to women’s meaningful participation.

## B. LIMITING THE SCOPE OF DELIBERATION

As Monique Deveaux observes:

An idealized model of deliberation that either denies the force of participants’ interests and relative power in determining dialogical outcomes, or else rules out certain kinds of reasons in advance in the hope that these will not impact deliberation, may succeed only in reinforcing the advantages enjoyed by powerful participants in deliberation.<sup>316</sup>

Deveaux’s discomfort with the power dynamics of deliberation leads her to emphasize inclusiveness, strategic negotiation, and compromise in deliberation.<sup>317</sup> Unlike many deliberative democrats, Deveaux concludes that deliberation should be focused on participants’ strategic interests and the potential for pragmatic compromise.<sup>318</sup> I share her skepticism about the potential of deliberation to arrive at truly inclusive consensus, but I differ with Deveaux regarding the strategies for addressing this concern.

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“as long as these pluralist structures do not violate three normative conditions, they can be quite compatible with a universalist deliberative democracy model.” BENHABIB, *supra* note 232, at 19.

314. See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 296 (William Rehg trans., 1996) (“Democratic procedure, which establishes a network of pragmatic considerations, compromises, and discourses of self-understanding and of justice, grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed.”).

315. See BENHABIB, *supra* note 246, at 29.

316. See DEVEAUX, *supra* note 268, at 105–06.

317. See *id.* at 107–12.

318. Deveaux states:

If I am right that struggles over the meaning and validity of contested cultural traditions in liberal states are more centrally about the concrete interests of group members and the distribution of power and decision-making authority in these communities, then arguably any sound procedure for mediating cultural conflicts ought to recognize this. In practical terms, this suggests that reason-giving in deliberation ought not to be restricted to normative claims, nor privilege identity claims, but rather should permit—and even at times foreground—the strategic and pragmatic concerns and needs of cultural members.

*Id.* at 106.

In a radical break from discourse ethicists such as Benhabib and Young, I argue that the best way to limit the effect of power disparities is to limit the *subject matter* of discourse to localized modes of norm implementation. Discourse ethicists, including Benhabib and Young, would balk at the notion that the scope or subject of discourse could or should be limited. As Mouffe observes, “Habermas . . . defends what he claims to be a strictly proceduralist approach in which no limits are put on the scope and content of the deliberation.”<sup>319</sup> For discourse ethicists, as long as the procedural prerequisites are met, there is no need to worry about the outcome.<sup>320</sup> It is precisely because the procedural prerequisites can never be satisfied, however, that I am concerned about substantive outcomes. Because discursive approaches are not exclusively procedural (they are always/also substantive), it is better to accept, quite explicitly, what the substantive boundaries are rather than let the undisclosed/unexamined substance of unrecognized privilege distort the discourse.

Rather than simply encouraging inclusion and focusing deliberation on participants’ strategic interests, I propose limiting the scope of deliberation. Rather than attempting to arrive at consensus through discourse, which is impossible given the very real power disparities at play, I advocate accepting as consensus the regional human rights norms articulated in the Protocol and focusing deliberation on the best ways to implement those norms at the local level. Although this does not neutralize power disparities, it does focus the discourse in a way in which basic human rights norms are not threatened by illiberal discursive outcomes. What is at stake instead is the discussion of the ways in which those norms may be realized at the local level. Throughout this localized discussion of implementation, dialogical participants may find that the human rights norms in question incorporate or resonate with local custom in many ways. Where the two conflict, the actors in the discourse must determine the precise parameters of the right, but the discourse does not question the very existence of the right.<sup>321</sup>

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319. See Mouffe, *supra* note 236, at 5. Mouffe states:

For the habermasians, the process of deliberation is guaranteed to have reasonable outcomes to the extent that it realizes the condition of the “ideal discourse”: the more equal and impartial, the more open the process is, and the less the participants are coerced and ready to be guided by the force of the better argument, the more [sic] the higher is the likelihood that truly generalizable interests will be accepted by all those relevantly affected.

*Id.* at 5–6.

320. See, e.g., Deveaux, *supra* note 233, at 795 (“The emphasis that my proposed model of deliberation and conflict resolution places on democratic legitimacy, and the relative minimalism of the principles to serve as procedural constraints, leaves the outcome of deliberation wide open.”).

321. In some ways, this approach is similar to the European Court of Human Rights’ use of the doctrine of “margin of appreciation,” which gives states some latitude in implementing the rights



To do so, this localized, inclusive deliberation about modes of implementation will inevitably involve discussion of the kind of strategic interests that Deveaux envisions. For example, traditional practitioners of female genital mutilation (“FGM”), many of whom are older women in rural areas, have an economic interest in the continuation of the practice.<sup>322</sup> Of course, many of the practitioners believe deeply in the cultural value of the practice as well. I advocate a localized discourse that focuses on the realization of the right to be free from gender-based violence. That discourse would explicitly include a discussion among participants about (1) ways that the community might preserve the important rite-of-passage ritual without causing physical or emotional pain and, therefore, without contravening international and regional human rights law; and (2) alternative methods of income generation for FGM practitioners. Deveaux is correct in her assessment that strategic interests have a role to play in democratic deliberation,<sup>323</sup> but I argue that the discussion of strategic interests must take place in the context of a discourse that is limited in scope to localized norm implementation and must reflect the Protocol’s commitment to facilitating women’s voices in the dialogue.

In rejecting many of the fundamental tenets of discourse ethics, I align myself more closely with An-Na‘im than with the discourse ethicists discussed herein. An-Na‘im, too, values discourse but is unwilling to abandon rights to the discursive process. He remarks, “I believe not only

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contained in the European Convention on Human Rights. The court enforces implementation of the rights in the Convention but recognizes that there may be some international variation in the specific modes of implementation. *See, e.g.,* Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69, 73 (1995) (“The doctrine holds that in the application of a number of the Convention’s provisions . . . a respondent government should be allowed a measure of discretion. . . . [The Convention organs] should confine themselves to deciding whether the government’s assessment is sustainable, and should not seek to make their own independent re-assessment of the underlying issues.”).

322. *See* EFUA DORKENOO, CUTTING THE ROSE: FEMALE GENITAL MUTILATION: THE PRACTICE AND ITS PREVENTION 50 (1994) (“Part of the reason for the continuation of the practice of FGM lies in the fact that it is an irreplaceable source of revenue for excisors.”).

323. This, too, is a departure from the traditional discourse ethics approach. Discourse ethics and democratic deliberation have traditionally rejected the notion that strategic interests are an appropriate subject of deliberation, preferring instead the search for moral universals. James Bohman observes that all models of deliberative democracy “reject the reduction of politics and decision making to instrumental and strategic rationality.” JAMES BOHMAN, PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY 5 (1996). Deveaux argues:

A model of political deliberation that privileges moral discourse may give individuals and groups ample incentive to present their interest-based concerns in terms of cultural identity claims that may or may not speak to the crux of the issue. . . . [T]he desire to maintain one’s own status or the status of one’s subgroup within the wider community, to shore up one’s position of power vis-à-vis others, or to further one’s own financial gain, do not make for good reasons in moral deliberation.

DEVEAUX, *supra* note 268, at 105.

that universal cultural legitimacy is necessary, but also that it is possible to develop it retrospectively in relation to fundamental human rights through enlightened interpretations of cultural norms.”<sup>324</sup> An-Na‘im explicitly rejects the notion that human rights should be limited to those rights that are acceptable to all peoples in all nations. This “least common denominator” approach unnecessarily restricts rights.<sup>325</sup> Instead, An-Na‘im “accepts the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world.”<sup>326</sup> Because the Protocol enjoys regional credibility and reflects the drafting efforts of African activists, it is one step closer to the cultural legitimacy that An-Na‘im seeks.

Building on An-Na‘im’s work, I argue that the Protocol sets out the normative human rights framework that must then be the subject of discourse at the local level to determine the best, most resonant methods of implementation within a particular community.<sup>327</sup> The Protocol’s human rights framework thus becomes the dialogical starting point, with the goals of discourse being (1) to identify the most effective methods for local implementation of norms and (2) to acculturate communities to respect human rights. In the FGM example above, the localized discourse would focus on implementation of the right to be free from gender-based violence, including discussion of the strategic interests of FGM practitioners and raising awareness about women’s human rights among traditional leaders who might be resistant to human rights norms.

If the structural inequalities inherent in discourse about African customary law are so great, why not forsake discourse altogether? Although I am unwilling to sacrifice women’s human rights to the potentially illiberal outcome of deliberation, I envision a more circumscribed role for dialogue in the context of human rights. Situating the Protocol’s regional human rights norms a priori in discourse and focusing the discourse on implementation of those rights reflect several

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324. See An-Na‘im, *supra* note 8, at 20–21.

325. See *id.* at 21 (“[R]estricting international human rights to those accepted by prevailing perceptions of the values and norms of the major cultural traditions of the world would not only limit these rights and reduce their scope, but also exclude extremely vital rights.”).

326. *Id.* An-Na‘im believes that cultural legitimacy can be enhanced through internal dialogue and the “struggle to establish enlightened perceptions and interpretations of cultural values and norms.” *Id.* at 27.

327. The Protocol has the potential to achieve the goal articulated by An-Na‘im, “to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms.” *Id.* at 21.

discursive assumptions.

First, this approach assumes that localized discourse about the substantive content of human rights has the potential to roll back important rights guarantees. Second, the approach ascribes a privileged place for the Protocol as a regional expression of women's human rights. The assumption here is that the regional drafting process reflects the participation of African women, albeit an urban elite.<sup>328</sup> As such, the Protocol's articulation of rights already reflects a more localized discourse on the substantive content of rights than its international counterparts, such as CEDAW. Third, limiting the scope of deliberation will not eliminate the power disparities that necessitate the approach in the first place. Limiting deliberation to norm implementation merely contains the reach of structural inequalities. Rather than deliberation focused on identifying the core meaning of rights, discourse focuses on the implementation of rights, allowing for slight variation in implementation depending on local realities and strategies. This approach, therefore, recognizes a normative baseline (in the form of the rights articulated in the Protocol) and facilitates localized discourse regarding implementation that informs and is informed by those norms.<sup>329</sup>

One problem remains. If traditional leaders remain hostile to equality-based cultural change, is it realistic to imagine that they would voluntarily engage in constructive dialogue with African feminists? For the dialogic process to work under these circumstances, two institutions must be fully mobilized in support of my version of limited-scope deliberative democracy. First, the state must promote and facilitate the dialogue. Although it is perhaps counterintuitive to involve the state in a dialogic process that is decidedly non-state-centric, the dialogue can be neither truly deliberative nor truly democratic without some procedural safeguards established by the state.<sup>330</sup> Second, civil society, including an active and

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328. The fact that the Protocol reflects the concerns of cosmopolitan, elite African feminists is not an insignificant problem. According to Gayatri Spivak, the solution to this problem lies in privileged feminists learning to remain silent and listen to and learn from their less privileged peers. *See generally* GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* (1999).

329. An-Na'im recognizes that rights dialogue is a two-way street in the sense that internal discourse regarding rights also has the potential to shape the cross-cultural or international conversations regarding the content of rights. *See* An-Na'im, *supra* note 8, at 27 ("Internal discourse relates to the struggle to establish enlightened perceptions and interpretations of cultural values and norms. Cross-cultural dialogue should be aimed at broadening and deepening international (or rather intercultural) consensus.").

330. This assumes a reasonably well-functioning and largely beneficent state. Obviously, this is not always the case.

organized nongovernmental base, must be integrally involved in promoting the (re)examination of cultural norms in light of human rights guaranties.

The only way to ensure that the discourse is inclusive and fair, such that it would induce a rural woman to participate in the dialogue, is to involve the state. The government has an obligation under the Protocol to ensure that women have a right to “participate at all levels in the determination of cultural policies.” Assuming a genuine desire on the part of the state to fulfill its obligations under the Protocol, the state must play a role in organizing and facilitating the dialogue. The role of the state, however, must be facilitative, and representatives of the government must be cognizant of and work to remedy the power disparities that stem from their affiliation with the state.

Civil society also has a role to play to ensure that the discourse is inclusive, fair, and respectful. In the African customary law context, participants in the dialogue will sometimes enjoy alarmingly different levels of power. Traditional leaders represent an elite, largely male group that has benefited from considerable influence at the local level even in the postcolonial period. Rural women in many parts of Africa generally do not enjoy the same status within the community. By organizing women in rural areas and by facilitating the expression of their collective voice, NGOs may be able to level the playing field enough to sustain a constructive dialogue about the normative content of culture and customary law.

Amelia Vukeya, an attorney with the Aids Law Project in South Africa, provides a compelling example of discursive collaboration between the state, civil society, and traditional leaders. The government of South Africa has, in collaboration with NGOs, systematically engaged traditional leaders in dialogue concerning efforts to combat the spread of HIV/AIDS in the country. In its effort to implement the National Strategic Plan on HIV, the government articulated a commitment to “facilitate [and] sustain dialogue with cultural, religious and traditional leaders.”<sup>331</sup> According to Vukeya, the dialogue has been productive and has led to a deeper understanding of the issues on all sides.<sup>332</sup>

Similarly, Merry describes the approach of Merilyn Tahī, director of the Vanuatu Women’s Centre, noting that Tahī works to integrate local

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331. See Amelia Vukeya, *Customs and HIV/AIDS in South Africa: Engaging Traditional Leadership in the Fight Against HIV/AIDS* (Mar. 2010) (unpublished manuscript, on file with author) (adapted from Amelia Vukeya, Presentation at the Fordham Law School Leitner Center for International Law and Justice Conference, *The Role of Customary Law in the 21st Century: African Customary Law Revisited* (Oct. 23–24, 2008)).

332. See *id.*

chiefs into community discussions about domestic violence. Tahi describes “bringing the local chiefs or church pastors into the process, inviting them to meetings, including them in discussions with her . . . and getting them involved in opposing domestic violence.”<sup>333</sup> As Merry observes, “These are examples of efforts to tailor programs to local cultural conditions in a way that recognizes and works through the power relationships of the local community.”<sup>334</sup> At the same time, carefully facilitated dialogue challenges the existing community power relationships by explicitly valuing the contributions of less powerful dialogic participants.

The government role in facilitating this type of dialogue is largely, although not exclusively, architectural. Governments often have more resources than civil society organizations, making it easier for a government to convene or “host” such dialogues. Importantly, this model of systematic engagement with local communities must extend beyond urban areas, thereby increasing the financial cost of the endeavor. Geographic breadth is important, as is strategic incorporation of NGOs.

The active involvement of government and civil society affords some control, albeit limited, over the content and process of discourse. With women’s rights, if NGOs are ensuring women access to, *inter alia*, the process of agenda setting, content control, and methods and rules of discourse, the dialogue will be less likely to produce Young’s and Bohman’s “false consensus.” Civil society organizations must be vigilant in correcting the problem of power disparities through their careful structuring of and engagement with the dialogue concerning customary law. With the careful attention Young advocates, NGOs in Africa may effectively facilitate engagement between women’s rights activists and traditional leaders. To do so, they must go beyond strict, formalized notions of discourse and embrace a healthy skepticism concerning formal argumentation and aggressively counter power imbalances within the discourse.

### C. FLUIDITY AND SYMBIOSIS OF LITIGATION AND POLITICS IN AFRICA

It is neither necessary nor preferable to wholly subvert substance to

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333. See MERRY, *supra* note 91, at 164.

334. See *id.* Merry cautions, however,

There is an important difference between a top-down program seeking to be culturally sensitive in terms of an essentialized idea of culture and a locally controlled program that recognizes the complexity of local cultural ideas but allows local groups to tailor the program to the power dynamics and symbolic resources of the situation in which they work.

*Id.*

process. Because the discourse ethicist's ideal speech situation is unattainable given political realities, a deliberative process may lead to illiberal outcomes. What then? If traditional leaders in Tanzania sit down and deliberate with a group of grassroots women and cannot reach an agreement about how best to implement the substantive norm of gender equality, does a human rights advocate have recourse? Or worse, what if the traditional leaders are successful in steering the discourse away from modes of implementation and toward a rollback of substantive equality rights?

I argue that the juridical process provides a backstop.<sup>335</sup> Likewise, the process of public deliberation in the face of ongoing litigation often creates support for and "buy in" to equality-promoting changes in the law. Benhabib also recognizes the value of a "dual-track" approach in which juridical and political processes complement one another.<sup>336</sup> I take Benhabib's analysis one step further in the African context. I advocate a fluid conception of the relationship between litigation and political discourse. To that end, I make two claims. First, I argue that the line is already blurred; discursive engagement occurs not only in the political, dialogical context but also in the litigation context. Several recent cases from South Africa illustrate the point. Second, I argue that litigation provides an essential corrective to illiberal outcomes resulting from discourse.

If we view discourse as a method of acculturation to and internalization of human rights norms, rather than as a method for defining those norms, we avoid many of the concerns about corruptive power inherent in the discourse ethics model. Although civil society and the state still have a critical role to play in leveling the discursive playing field (to the extent possible), the threat of false consensus is less troubling than it would be if we viewed discourse as defining the relevant human rights norms. Rather, localized discourse should be viewed as an exploration of the best methods to implement extant human rights standards at the local level. As such, the discourse has expressive value; it suggests that careful implementation of human rights norms is desirable and that traditional leaders are valued participants in the discursive effort to implement those norms. Viewed in this way, litigation may legitimately serve as a backstop

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335. In arguing that litigation is an important corrective tool, I recognize that there are many obstacles facing African women who attempt to use the judicial system. See generally WOMEN & LAW IN S. AFR., IN THE SHADOW OF THE LAW: WOMEN AND JUSTICE DELIVERY IN ZIMBABWE (2000).

336. BENHABIB, *supra* note 232, at 106.

to discourse concerning implementation.<sup>337</sup>

I propose a more fluid understanding of the relationship between the two tracks and the role of deliberation in both the juridical track and the political track. Drawing on recent jurisprudence from the South African Constitutional Court, I argue that the Constitutional Court has already begun to blur the lines between deliberative processes and traditional litigation. In the *Bhe* case, the South African Constitutional Court struck down the customary rule of male primogeniture.<sup>338</sup> Not surprisingly, the case generated a great deal of public discussion. Before making its ruling, the Constitutional Court requested an amicus brief from the National House of Traditional Leaders.<sup>339</sup> The Constitutional Court specifically sought to engage traditional leaders in a conversation, albeit a judicially sanctioned one, in which the traditional leaders could express why they resisted a change that would allow women to inherit property on an equal basis with men. Despite the court's efforts to solicit input from the chiefs, the group of traditional chiefs did not submit an amicus brief.<sup>340</sup> Nevertheless, the court signaled that the chiefs should be part of the conversation and responded by inviting them to engage with the court on the subject of the continuing validity of male primogeniture.

In a series of cases involving socioeconomic rights, the South African Constitutional Court has more explicitly invited dialogue—or, in its terms, “engagement”—between civil society and the state. In doing so, the Constitutional Court has invoked deliberative norms.<sup>341</sup> In one housing rights case, the Constitutional Court observed:

In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-

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337. Conversely, if we viewed discourse as a way of defining human rights norms, the notion of litigation as a backstop would so directly undermine the discursive value of the deliberative process as to render it meaningless.

338. *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC) (S. Afr.), available at <http://www.mangaung.co.za/docs/Shibi%20Case.pdf>.

339. *Id.* at 593.

340. *See id.*

341. For a fascinating discussion of “engagement” as a hybrid dispute resolution mechanism, see Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases* (N.Y.U. Sch. of Law Ctr. for Human Rights & Global Justice, Working Paper No. 21, 2008).

active and honest endeavour to find mutually acceptable solutions.<sup>342</sup>

The court's willingness to "engage" the parties in dialogue demonstrates a commitment to deliberation in the context of litigation rather than solely in political decisionmaking. The court also envisioned a role for itself in the ongoing supervision of the engagement process. The court may intervene if the parties fail to demonstrate a willingness to engage or if the results of engagement are "unreasonable." The court, furthermore, endorses a role for civil society organizations that is similar to the one I advocate in this Article. The court stated elsewhere, "Civil society organisations that support the peoples' claims should preferably facilitate the engagement process in every possible way."<sup>343</sup>

For litigation to serve as a backstop to discourse, activists must be able to invoke the progressive rights provisions common in the wave of African constitutional reforms of the 1990s. Elsewhere, I have criticized the constitutions of several Commonwealth African countries for specifically excluding personal or family law from the purview of constitutional nondiscrimination protection.<sup>344</sup> In Lesotho, for example, constitutional equality guaranties do not apply to "adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description."<sup>345</sup> Activists in countries such as Lesotho, which specifically exclude family law from constitutional protection, will experience more difficulty using litigation as an advocacy supplement to facilitated discourse. Those activists will have to turn to international human rights law, including the substantive provisions of the Protocol, if applicable, to argue that the family or customary law in question violates binding international norms.

I have been a vocal advocate of constitutional amendment to eliminate these "exclusionary clauses" and thereby bring family and customary law within the purview of constitutional nondiscrimination protection. I have relied on theories of dialogic constitutionalism to argue that women should use constitutional litigation to challenge and shape personal and customary law. There is dialogic value in the constitutional litigation process itself.

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342. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ¶ 39 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/7.html>.

343. *Occupiers of 51 Olivia Rd. v City of Johannesburg* 2008 (3) SA 208 (CC) ¶ 20 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2008/1.html>.

344. See Bond, *supra* note 27, at 291 ("Although many of the independence constitutions in Commonwealth Africa articulated a commitment to gender equality, the exclusion of personal and customary law from constitutional protection has severely undermined that commitment." (footnote omitted)).

345. CONSTITUTION § 18(4)(b) (Lesotho).



“The constitution becomes an important, although not the only, vehicle through which to redefine and reshape cultural meaning, allowing women to challenge dominant cultural norms without abandoning culture altogether.”<sup>346</sup>

Similarly, in the context of the right to participate in the formulation of cultural policies, litigation plays a crucial role. If discourse fails or leads to illiberal outcomes, advocates may use litigation as a backstop. In other words, they may—indeed, should—explore litigious avenues as an alternative, complementary way to promote women’s equality rights. When carefully facilitated discourse between women’s rights activists and traditional leaders fails, as it will from time to time, litigation provides another avenue to pursue women’s equality rights within customary law.

## VI. CONCLUSION

The Protocol holds great promise to create lasting change for women in countries that have ratified it. Because the Protocol was entered into force as recently as 2005, it is too early to determine if the African Union will effectively implement the treaty.<sup>347</sup> Assuming, at this stage, that the political will exists to implement it, the Protocol provides a crucial vehicle for promoting women’s rights on the continent. The Protocol explicitly values the positive aspects of custom and culture. As such, it recognizes the importance of community membership for women, even as women advocate for equality within their communities. In so doing, it will likely generate less hostility than CEDAW, which is dismissive of positive cultural contexts.

Although imperfect in its substantive coverage, the Protocol fills critical lacunae left by CEDAW and the African Charter. Whereas CEDAW oversimplifies issues of culture and custom, the African Charter fails to adequately protect women’s rights under the treaty. Provisions in the Protocol strike an appropriate balance between culture and equality when conflicts arise, recognizing the positive aspects of culture while invalidating customs that are harmful to women.

Largely unnoticed procedural provisions in the Protocol hold great promise for facilitating women’s critical engagement with the customs and practices that shape their lives. These provisions, if effectively operationalized, will give women a much-needed voice in discussions

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346. Bond, *supra* note 27, at 329.

347. See generally Baderin, *supra* note 143 (discussing human rights developments in Africa).

regarding the normative content of customary law. Insight from political philosophy, particularly from discourse ethics and its critics, demonstrates the need for state and civil society involvement in the architecture of the discourse. Such involvement is necessary to minimize dramatic power disparities between traditional leaders and grassroots, rural women. Through careful and sustained engagement with traditional leaders, such as that envisioned by the Protocol, grassroots women may find a liberating, collective voice in the ongoing examination of customary law.