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

Rachel Rebouché

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

Rachel Rebouché\*

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## *I. Introduction*

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

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

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

Drafted over eight years, the process for creating the document was marked by stops and starts, political compromise, and the influence of a strong movement lead by non-governmental organizations (NGOs). The text of the Protocol reflects the central purposes of those who lobbied for a regional instrument that focused on women's rights.<sup>4</sup> First, the Protocol sought to fill in the gaps in the region's central human rights instrument—the African Charter on Human and Peoples' Rights (the Charter).<sup>5</sup> The Charter only references women's equality in two places<sup>6</sup> and was rarely

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

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

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

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

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

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

used to support women's rights.<sup>7</sup> Second, proponents of a Protocol sought to create ownership for women's rights in a context where rights are often criticized as elitist or as challenging cultural norms.<sup>8</sup> As has been noted, "[I]t is the first instrument of its kind . . . developed by Africans, for Africans."<sup>9</sup> Drafters proposed creating an 'African CEDAW'<sup>10</sup>—a document that would temper the Charter's allegiance to tradition, morals, and custom with language that would have the legitimacy of international human rights law but would still address women's lived experiences in a way that would imbue rights with local purchase and relevancy.<sup>11</sup> The Protocol attempts to accomplish these goals in a number of ways. The Protocol draws heavily from CEDAW and other international documents, and it includes much of what is already protected in international and regional instruments. In addition, the Protocol (particularly its early drafts) broadens the rights in the Charter and includes rights that are not found in CEDAW or in the Charter.

This Article examines the drafting of an 'African CEDAW'<sup>12</sup> and concludes that it was a very fragmented process with consequences for the efficacy of the Protocol as a whole. Part I provides an overview of the drafting process including a brief critique of the main shortcomings of that

7. See VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICES, AND INSTITUTIONS* 133–34 (2001) (stating that before the Protocol, the African Commission on Human and Peoples' Rights had never investigated women's rights issues using its Article 48 power under the Charter.; see also Bronwen Manby, *Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1–7*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE*, 1986–2006, 171, 181 (Rachel Murray & Malcolm Evans eds., 2008) (noting that the discriminatory aspects of customary law and citizenship law have been the focus of litigation on the national and international level). Moreover, the Commission has not decided a case concerning women's rights. Danwood Mzikenge Chirwa, *Reclaiming (Wo)manity: The Merits and Demerits of the African Protocol on Women's Rights*, 53 *NETHERLANDS INT'L L. REV.* 63, 70 (2006).

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

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

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

11. Report of the Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights of Women in Africa ¶ 110, Nov. 12–16, 2001, [http://www.chr.up.ac.za/hr\\_docs/african/docs/oau/oau10.doc](http://www.chr.up.ac.za/hr_docs/african/docs/oau/oau10.doc) (last visited Feb. 19, 2010) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

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

process. Part II highlights the dominant influences underpinning the Protocol by way of textual examples. My analysis reveals a lack of cohesiveness in the final document that can be traced back to a lack of vision for the instrument and suggests ways the patchwork approach to the Protocol may shape its future interpretation. Part III focuses on the health and reproductive rights in Article 14 in light of the Protocol's theoretical contradictions. Three problems are analyzed: the failure of the Protocol to highlight how various articles relate to reproductive health rights (such as HIV prevention and early marriage), the narrow construction of a broader right to health (including, as well as independent of, reproductive health), and the dual rejection and embrace of women's roles as mothers. This last tension in particular—the intersection of the elimination of stereotypes found in formal and substantive equality models and the promotion of a positive cultural context for women—best illustrates tensions in the theoretical influences that underpin the Protocol. I conclude on an optimistic note. Although the Protocol may have missed opportunities to approach women's reproductive health more holistically and critically, the interpretation of the Protocol moving forward can be supplemented with defining principles that were underdeveloped in its drafting.

### *I. The Drafting Process and Its Difficulties*

#### *A. The Intended Purposes of the Protocol*

The Protocol was created following a broader movement to protect women's rights at the regional level.<sup>13</sup> Nowhere is this clearer than in the Constitutive Act of the African Union, the treaty that dissolved the Organization of African Unity (OAU) and created a new regional body.<sup>14</sup> While the Constitutive Act focuses on sovereignty (promoting unity, peace, and setting out the limits of intervention in state's affairs), it also acknowledges women in a way that the Charter<sup>15</sup> and OAU's Charter do

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

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

15. The Charter focused on the protection of state sovereignty. Adrien Katherine

not.<sup>16</sup> For example, the Preamble speaks to a united and strong Africa through partnerships with civil society, "in particular women."<sup>17</sup> Specifically, Article 4(1) includes the enumerated goal—the "[p]romotion of gender equality."<sup>18</sup>

It was in this spirit of enthusiasm for women's rights that national, regional, and international NGOs approached the OAU about a Protocol to the Charter. The process took shape in 1995 when the Women in Law and Development in Africa (WiLDAF) co-hosted a seminar with the African Commission on Human and Peoples' Rights (the Commission).<sup>19</sup> Participants passed a resolution calling for a Protocol to the Charter<sup>20</sup> and the appointment of a Special Rapporteur on the Rights of Women.<sup>21</sup> In its 31st Ordinary Session in 1995, the Organization of African Unity Assembly of Heads of States and Government agreed to invest in the project of drafting a Protocol.<sup>22</sup>

Advocates could have revised the Charter rather than drafting a Protocol,<sup>23</sup> but advocates started from the premise that the Charter was too

Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 33, 58 (2003).

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

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

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

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

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

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

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

23. Before the Protocol, Article 18 read in conjunction with Article 2 had been interpreted as conferring the rights found in international documents like CEDAW (such as a state duty to modify customs that discriminate). See Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and African Society and Culture*, 44 *AM. U. L. REV.* 1351, 1371 (1995) (explaining how one country's realization that certain cultural norms and traditions are counterproductive to women's rights and legislation may be required to rectify the

difficult to amend.<sup>24</sup> Not only would obtaining agreement among a majority of member states on new language be challenging,<sup>25</sup> but advocates believed that passing the number and scope of amendments necessary to cure the Charter's deficiencies would be daunting.<sup>26</sup> The Charter explicitly refers to women in only two places. Article 2 includes the category of sex in the non-discrimination clause,<sup>27</sup> and Article 18(3) states: "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."<sup>28</sup> Some have argued that these two provisions, taken with the non-gendered equal protection guarantee in Article 3<sup>29</sup> and the deference accorded to international standards in Articles 60<sup>30</sup> and 61,<sup>31</sup> imply broader protection for women's rights in the Charter.<sup>32</sup>

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problems).

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

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

26. See NMEHIELLE, *supra* note 7, at 244. (summarizing a dominant argument that "the Charter, as a document that is inspired by the virtues and the values of African civilization, cannot *per se* be an effective tool to protect the rights of women in view of the role of women in the traditional African family").

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

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

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

30. Article 60 states in full:

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

*Id.* art. 60.

31. Article 61 states in full:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international

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

For those supporting a new protocol, the structure of Article 18, the only article of the Charter that refers to "women" was emblematic of the

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norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

*Id.* art. 61

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

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

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

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

36. Article 29 states in pertinent part:

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

*Id.* art. 29.



Charter's recognition of gender in terms of family roles. First, Article 18(3) marries women's rights with rights related to the rights of children.<sup>37</sup> Other international human rights documents have taken a similar position; the American Convention on Human Rights<sup>38</sup> is one example.<sup>39</sup> This approach has been heavily criticized for being at odds with protections for individual autonomy and equality between men and women as envisioned by international human rights documents like CEDAW that focus on the elimination of stereotypes.<sup>40</sup> Furthermore, Article 18(1) focuses on the protection of the family as the "natural unit and basis of society," and obliges the states to "take care of its physical health and moral."<sup>41</sup> Article 18(2) further requires the state "to assist the family which is the custodian of morals and traditional values recognized by the community."<sup>42</sup> The Charter does not define morals or values or which community is to define them and how. And the Charter does not indicate how the state is to help families protect those poorly-defined values.

A generous reading of Article 18 offered by at least one scholar is that it imposes a duty on states to "create societal conditions in which families

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

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

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention . . . .

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

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

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

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

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

might flourish."<sup>43</sup> But the type of family that the Charter might envision, as a unit grounded in tradition and community norms, may be fixed. The protection of the Charter may not extend to any configuration of the family; rather, the document protects only those families that are in step with conceptions of community norms that value male-headed, heterosexual households.<sup>44</sup> Even if the recognition of what would help families flourish includes an appreciation for the rights of women in the family, many have highlighted that cultural morals and values are often in tension with women's rights.<sup>45</sup> The demarcation of family roles in customary law or in community practice has been a point of conflict between the agenda for women's equality and many African customs. Custom that is patriarchal in the true sense of the word—such as rules that confer property ownership and decision-making to men exclusively, for example—has been criticized as oppressive and antithetical to equality.<sup>46</sup> This is not to ignore the rich literature that questions the dichotomy between culture and equality.<sup>47</sup> But situating women's human rights as contingent on family identity supports some advocates' worst fears that women will feel pressure to conform to traditional expectations for wives and mothers. As the last Part of this Article highlights, the identification of women as family members and the prevalence and strength of that association in many African cultures stigmatizes single women or women without children as well as

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

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

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

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

47. Scholars such as Tracy Higgins have studied custom that both empowers and limits women's agency. *See* Mukasa, *supra* note 9, at 48 (describing how a lack of cultural influence on women's rights and weak political policies that recognize gender equality both contribute to the problems in achieving autonomy for women).

overemphasizes women's caretaking role.<sup>48</sup> The problem of stereotyping remains—that the protection of women's rights is tied to their roles in families as wives or mothers.<sup>49</sup>

The project of writing a Protocol was intended to mitigate some of these tensions by acknowledging the importance of African cultural traditions and promoting those values which complement women's rights to equality and dignity. This meant creating ownership of the document, which drafters sought to do by (1) emphasizing women's participation in writing the Protocol and (2) focusing on women's roles in creating community and cultural practices and values.<sup>50</sup> Advocates also highlighted issues ignored by the Charter (and the Commission) by incorporating rights enumerated in international documents like CEDAW, but changed the wording to acknowledge the practices of various African communities. For instance, the right of consent to marriage and to the equality of spouses,<sup>51</sup> drew attention to women's rights *within* community and family but used language suited to an African regional instrument.<sup>52</sup>

### *B. History of the Drafting Process*

With these motivations in mind, in 1997, two years after the WiLDAF meeting, members of the Commission convened a working group of experts to write a first draft of the Protocol.<sup>53</sup> This group consisted of Commission members, representatives from African NGOs, and international observers.<sup>54</sup> One commentator noted that the working group did not appear to have any sense of the Protocol's ideal or desired content.<sup>55</sup> Although the first draft tried to mirror the structure of the Charter, expanding as well as

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

49. *See id.* at 91 (explaining the role of motherhood and noting the how custody is awarded to mothers and fathers based on the age and sufficiency of the child).

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

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

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

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

54. *Id.*

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

adding rights, overall it looked like a "wish list" of areas to end discrimination against women and focused on issues related to family life, violence, and cultural practices.<sup>56</sup> The 1997 draft was then submitted to the Commission for comments.<sup>57</sup> At this point, NGOs that had reviewed the draft took an active role in moving the process forward, but were less involved in debating the substance of the text. The International Commission of Jurists (ICJ) hosted a workshop in late 1997 to help facilitate NGOs' comments on the draft and passed a resolution calling for completion of the drafting process.<sup>58</sup> The NGO lobby met with some success—the Commission met with the ICJ, WiLDAF, and other organizations to amend the draft and set the terms for the appointment of a Special Rapporteur on the Rights of Women.<sup>59</sup> In July 1998 at the Commission's 23rd Session, the Commission formally endorsed the appointment of the Special Rapporteur and selected a Commissioner as Rapporteur to shepherd the drafting process.<sup>60</sup> The Special Rapporteur convened another working group of experts to consider the draft.<sup>61</sup> In so doing, she was criticized for failing to seek wide consultation. Commentators noted that she excluded many NGOs, observers, and state representatives by only seeking input from government representatives of seven of fifty-three states.<sup>62</sup>

In the next year the Commission adopted a draft Protocol<sup>63</sup> (as revised by the Special Rapporteur) and sent the draft to OAU for consideration.<sup>64</sup> The 1999 draft consisted of twenty-three articles and focused on discrimination, the elimination of harmful traditional practices, and violence against women, as the previous draft had.<sup>65</sup> What is striking is that despite two years of movement (the mobilization of civil society and the appointment of a Special Rapporteur) the draft's substance had not changed

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56. *Id.* at 68–69.

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

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

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

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

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

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

all that much. The noticeable difference was that the draft was organized more like CEDAW in that it addressed areas of public or private life where women were subject to discrimination or disparate treatment and relied less on the structure of the Charter.<sup>66</sup> The Commission had made only a few amendments at this stage: It revised the language to emphasize the rights of the girl-child, added provisions on the elderly and the disabled, and put forward an absolute prohibition of polygamy.<sup>67</sup> The draft was sent to the OAU in 2000.

The OAU Women's Unit sought to amend the draft—to add language from African regional instruments (of significance was the incorporation of the then-draft Convention on Harmful Traditional Practices<sup>68</sup>) and to gather and incorporate the input of Member States.<sup>69</sup> The Southern African Development Community also suggested changes to the provisions on violence, temporary measures, and states' ability to make reservations.<sup>70</sup> The draft shifted between organizations, each adding and deleting language of certain rights. There was very little communication among the bodies revising the draft or with civil society.

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

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

67. *Id.* at 73.

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

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

70. *Id.* at 75–76.

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

the final draft), states' abilities to limit women's right to pass their nationality on to their children; and the right to control fertility.<sup>72</sup>

Fights that had been settled in prior discussions were rehashed, sometimes with differing results, and perspectives that had been absent from initial meetings resurfaced at various points with discordant effects. The most controversial issue was polygamy. Issues that cut to the heart of family roles and tradition—polygamy being an example—were the focus of debates at the Experts Meeting.<sup>73</sup> The 1997 draft had condemned polygamy but did not prohibit it where all parties consented. But the 1999 draft included an absolute prohibition of polygamy, largely due to NGO pressure.<sup>74</sup> In 2001, participants at the Experts Meeting could not agree on polygamy and left three options bracketed in the 2001 draft. The third option, which prefers monogamy but does not require it and emphasizes consent in polygamous relationships, was finally chosen at a second Experts Meeting in 2003.<sup>75</sup> Rachel Murray notes that the discussion on polygamy reopened a debate that had been settled in OAU documents and in CEDAW General Recommendation 21.<sup>76</sup> For example, CEDAW's General Recommendation 21 had concluded that polygamy "contravenes a woman's right to equality with men, and . . . ought to be discouraged and prohibited."<sup>77</sup>

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72. See BANDA, *supra* note 8, at 71 (discussing the controversial nature of provision granting certain rights to women).

73. *Id.* at 76.

74. *Id.* at 74.

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

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

77. Paragraph 14 of General Recommendation 21 states in full:

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

Committee on the Elimination of Discrimination against Women Thirteenth Session, *General Recommendation No. 21, Equality in Marriage and Family Relations*, ¶14, 49th

There was little continuity between drafts of the Protocol. More fundamentally, the inability to reach a consensus until the very last stage of drafting shows how contentious the treatment of family and culture were. At the conclusion of the 2001 Experts Meeting, delegates agreed that further review of a revised draft was needed, as disagreement among states continued to exist. Participants agreed to meet again at a second Experts Meeting, but in 2002, two meetings were scheduled and cancelled for lack of a quorum. NGOs met in June 2002 and passed the "Durban Declaration," which called for expedient adoption of the Protocol and effective participation of government experts.<sup>78</sup> At a subsequent meeting in January 2003, a coalition of NGOs developed a strategy for completing the Protocol.<sup>79</sup> Organizations pooled their comments in a collective markup of the 2001 draft and focused on incorporating international standards already ratified by countries at the experts' table.<sup>80</sup>

Sally Engle Merry has noted similar strategies employed by advocates drafting international treaties. In her scholarship on treaty and declaration drafting, she notes that reaching a consensus is the driving force of states' and civil society's discussions, despite resulting in vague and wordy documents.<sup>81</sup> The consensus she describes is rarely evidence-driven and is more focused on inserting text from other international or regional documents to which states have already agreed.<sup>82</sup> The process, she concludes, conceals and perpetuates intractable differences between states.<sup>83</sup>

Civil society did not address those differences, but instead pushed for an end to the drafting process.<sup>84</sup> NGOs directed their attention toward their own governments and pushed for ministers and state representatives to

Sess., Supp. No. 38, U.N. Doc. A/49/38 (Apr. 12, 1994).

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

79. *Id.*

80. *Id.*

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

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

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

84. This is not to imply that the fear that the Protocol would not be finished was illegitimate. At some point, advocates had to make the decision whether to fight ideological battles or to move the process of drafting to its conclusion.

commit to a second Experts Meeting to complete the Protocol. In March 2003, well over a year after the first Experts Meeting, a second Experts Meeting resulted in textual changes to the 2001 draft, but few substantive changes. The following disagreements are noteworthy: Libya, Mali, Senegal, and Togo objected to the right to decide the number and spacing of children even though the same language is found in CEDAW and those states are signatories to CEDAW without reservations;<sup>85</sup> Tunisia and Sudan objected to the minimum age of marriage; and Burundi, Libya, Senegal, and Sudan objected to the health and reproductive rights in Article 14 generally.<sup>86</sup>

Immediately following the second Experts Meeting, the Protocol was adopted by the Second African Union Summit on July 11, 2003.<sup>87</sup> Women's rights organizations launched a wide-scale campaign for ratification so that the Protocol would come into force.<sup>88</sup> The African Union supported this campaign, as demonstrated in the 2004 adoption of a Solemn Declaration on Gender Equality in Africa, which reinforces provisions found in the Protocol. The Protocol came into force on November 25, 2005, with the ratification of Togo—the fifteenth state to sign and ratify the Protocol.<sup>89</sup>

### C. *What the Drafting Process Suggests*

Advocates for a Protocol looked to on international human rights documents. The Protocol was viewed as a way "to allow African governments to fulfill the international commitments [to which] they have subscribed."<sup>90</sup> Drafters primarily relied on CEDAW, but also looked to the Universal Declaration on Human Rights, the International Covenant on

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

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

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

88. *Id.*

89. *Id.*

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



Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on Population and Development (ICPD), and the Beijing Platform of the Fourth World Conference on Women (Beijing Platform).<sup>91</sup> But the resulting text based on these influences "waivers between being an interpretation of the [Charter] for women on the one hand, and a collection (not a comprehensive one) of some existing international standards on the other."<sup>92</sup>

As noted above, the first draft looked like a list of rights that attempted to mirror the structure of the Charter.<sup>93</sup> As the process evolved, the Protocol began to look less like the Charter and to rely more on language from international documents that African states had ratified in order to give the Protocol a wider scope.<sup>94</sup> At one stage, the OAU added rights to complement regional instruments, and at another stage, government experts amended text to reflect compromises on issues such as polygamy, property division upon divorce, and the right to pass nationality on to children.<sup>95</sup>

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

This criticism is not intended to undermine the many ways in which the Protocol goes beyond the international standards on which it is premised. Discussed in greater depth below, the health and reproductive rights in Article 14 provide an example: The limited right to an abortion moves beyond the ICPD, Beijing Platform, and CEDAW. But the Protocol

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

92. *Id.* at 264.

93. *Id.*

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

95. *Id.* at 73–75.

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

97. *Id.* at 269.

fails to meet existing international standards as well. For example, the Protocol is out of step with developments in the global recognition of reproductive rights and with CEDAW.<sup>98</sup> Article 14's "right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS" is inconsistent with international and regional treaties that recognize women's particular vulnerability to and needs resulting from HIV infection.<sup>99</sup>

This incoherent vision could be the result of certain characteristics of the drafting process. There seems to have been varying participation by NGOs and government experts, and more importantly, their influence surfaced at different times. It appears that NGOs had much more influence over the first drafts, but that this influence did not necessarily carry over into the debates at the Experts Meetings.<sup>100</sup> The strength of the civil society lobby appears to have been in the campaign to ratify the Protocol and not in negotiating the nuances of its final content.

The drafting shows a failure to consider how the various purposes of the Protocol—regional accountability and international legitimacy—were to converge into a process aligned with a set of defined principles and rights that supported the document's larger purpose. A treaty drafted contemporaneously, the United Nations Convention on the Rights of Persons with Disabilities (the Convention), shows a very different trajectory.<sup>101</sup> Drafters of the Convention began with eight principles and the recognition that although the rights of persons with disabilities were protected elsewhere in international law, the particular needs and voices of persons with disabilities continued to be undervalued or unrecognized.<sup>102</sup>

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

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

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

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

102. These principles are:

(a) Respect for inherent dignity, individual autonomy including the freedom to

At the beginning of the writing process of the Convention, an Ad Hoc Committee considered proposals for what a comprehensive, international convention would look like based on a holistic approach that took into account the fields of social development, human rights, and non-discrimination. The Ad Hoc Committee held its first session over ten working days in which many of the thorny questions about the Convention's purpose and structure were debated and solidified. Difficult conversations helped build consensus in the first session, resulting in agreement among participants (which included a host of member states and NGOs) to eight sessions in which they would work together to negotiate the substance of the Convention based on the eight foundational principles.<sup>103</sup>

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

As Part II will demonstrate, the Protocol is comprised of a patchwork of theoretical traditions. A document drawing from the text of various documents will inevitably carry with it the influences of those texts. Part II will demonstrate how the Protocol's drafting resulted in a set of rights whose underlying purposes may conflict or contradict each other. The aim of the next Part is not to suggest that various understandings of women's

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

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

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

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

rights cannot sit together or inform each other.<sup>105</sup> Instead, my purpose is to reveal the competing influences that might undermine the effectiveness of the Protocol going forward, particularly in the area of health and reproductive rights. As explained in Part III, the result may be a document whose text does not necessarily set a course for addressing the most complex issues that African women face.

## *II. Theoretical Underpinnings of the Protocol*

The Protocol incorporates various insights of feminist legal theories that are represented in regional and international women's rights instruments from the last thirty years. As Johanna Bond highlights, the main influences on the Protocol—CEDAW and the Charter—draw from documents with very different normative goals.<sup>106</sup> CEDAW came to life in an era focused on formal equality, and the Charter is arguably a product of an anti-colonialist movement that valued nationalism and cultural identity.<sup>107</sup> Part I's discussion of the clash between equality and culture makes clear that an attempt to incorporate both perspectives may also entrench some of the debates among feminist theorists. In this Part, I will describe the influence of liberal, dominance, and cultural feminism on the Protocol and note its relevance to Article 14.

### *A. Formal and Substantive Equality*

The Protocol, like the text of CEDAW, is based on the goal of equality and is aligned with the goals of liberal feminism.<sup>108</sup> Article 1(f) of the

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

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

107. *Id.*

108. For a concise and useful account of liberal feminism's central tenets, see Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J. L. & GENDER 277, 280–81 (2008). Dixon notes liberal feminism's attention to the disadvantage attached to men's and women's biological and thus gender roles. *Id.* Note also that CEDAW, as originally conceived, shows the imprint of liberal feminism. General Recommendations and the reports

Protocol mirrors Article 1 of CEDAW in its definition of discrimination,<sup>109</sup> and Article 2 of the Protocol emphasizes the duty of the state to eliminate discrimination and promote equal protection in language similar to that of Article 2 of CEDAW.<sup>110</sup> Provisions on marriage (excluding clauses on polygamy and registered marriages, which are discussed below) are framed in terms of equal rights. For example, Article 6 of the Protocol speaks of the state's duty to "ensure that women and men enjoy equal rights and are regarded as equal partners in marriage" in a fashion similar to CEDAW and the ICCPR.<sup>111</sup> The Protocol's property rights in marriage mirror the common law's understanding of separate property, as evidenced by equal rights to acquire and manage property—to decide how to manage one's affairs.

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from the CEDAW Committee reveal a changing appreciation for how women's rights issues are understood.

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

CEDAW Article 1 reads:

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

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

110. Article 2(1) of the Protocol, like Article 2 of CEDAW, sets out the duties of States' Parties in regard to combating discrimination "through appropriate legislative, institutional and other measures." Protocol, *supra* note 1, art. 2(1). CEDAW Article 2(f)—"To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women", CEDAW, *supra* note 10, art. 2(f),—is expanded upon in Protocol Article 2(2), Protocol, *supra* note 1, art. 2(2).

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

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

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

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.<sup>116</sup>

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

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

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

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

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

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

117. *Id.* art. 12.

The Protocol positions discrimination as a problem not only for the state but also for private and community actors. This approach is consistent with CEDAW, which has been interpreted to reach all manner of discriminatory laws and practices regardless of whether such conduct is caused by the state.<sup>118</sup> Article 14 also reflects CEDAW's influence by emphasizing a state duty to "provide adequate, affordable and accessible health services . . . to women especially those in rural areas."<sup>119</sup> Article 14's emphasis on access to services, especially for marginalized women, places importance on equality in the result and mirrors language that is found in the ICPD and the Beijing Platform.<sup>120</sup> But as Part III will show, the reference to services may lack the scope of its international predecessors.

The Protocol, however, incorporates rights that deviate from an equality approach—a consequence of compromises made during the Protocol's drafting. Algeria, Egypt, Morocco, and Tunisia argued against "equal rights" and for the principle of complementarity—the idea that laws should reflect the distinct roles of women and men that align religious and traditional norms.<sup>121</sup> For example, adding the word "equitable" to the description of property rights following divorce, separation, or annulment in Article 7(d) reflects a major debate at the 2001 Experts Meeting.<sup>122</sup> The concept of equity also appears in the description of a widow's share of inheritance in Article 21.<sup>123</sup>

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

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

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

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

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

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

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

### *B. Dominance Feminism and the Treatment of Violence*

Other language in the Protocol is distinctly driven by dominance feminism, which reflects the post-CEDAW attention given to the sexual exploitation of women and deep debates among feminists about the role of state power and the sources of women's oppression.<sup>125</sup> Dominance feminism explains women's inequality as a product of "a system of sexual subordination in which men define themselves as subjects, and women as objects."<sup>126</sup> The Protocol reflects the approach of dominance feminism with its emphasis on protecting women from violence, including state violence (such as in conflict or war), family or intimate violence, violence or harassment in public institutions, and cultural violence.<sup>127</sup> For example, the right to dignity in Article 3 focuses on dignity as freedom from "any exploitation or degradation of women" and "protection of women from all forms of violence, particularly sexual and verbal violence."<sup>128</sup> The Protocol reaches beyond CEDAW and regional instruments in its extensive treatment of violence, causing one commentator to note that the provisions

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

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

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

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

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



addressing abuse or exploitation of women is where "the Protocol comes into its own."<sup>129</sup>

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

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

Other provisions of the Protocol also criminalize certain practices and invoke the power of the law (or the state)s to protect women<sup>134</sup>—a strategy

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

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

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

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

133. *Id.*

134. For example, Article 6(d), requires marriages "to be recorded in writing and registered in accordance with national laws, in order to be legally recognized." *Id.* art. 6(d). Banda notes that this might undermine the many marriages on the continent that are not registered. Banda, *supra* note 109, at 76. See also Protocol, *supra* note 1, art. 7(a)

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

### C. Cultural Feminism and Gender Differences

The Protocol was also influenced by cultural feminism, which seeks to value and protect the differences (biological and social) that make women distinct from men.<sup>139</sup> Unlike dominance feminism, which situates gender differences in terms of the perpetuation of male power, and unlike liberal feminism, which explains disparate treatment based on gender as unjust, cultural feminism embraces roles traditionally aligned with women (like motherhood) and argues that injustice is the result of devaluing those roles. The Protocol recognizes a standalone right for pregnant or nursing women

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(requiring that "separation, divorce or annulment of a marriage shall be effected by judicial order").

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

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

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

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

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

or women in detention to an environment "suitable to their condition and the right to be treated with dignity."<sup>140</sup> In a similar vein, Article 4(j) ensures no death penalty is inflicted on pregnant or nursing women,<sup>141</sup> and Article 13(h) seeks to "recognise the economic value of the work of women in the home."<sup>142</sup> These articles protect particular sub-populations of disadvantaged women—the elderly, the disabled, and "women in distress," which includes poor women and "women heads of families."

Related to reproductive rights, Article 14(2)(b) protects mothers directly by creating a state duty to "establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding."<sup>143</sup> The language, like that for pregnant women in detention, carves out special protection for mothers. This could be troubling for both dominance and liberal feminism. Liberal feminism could object to relying on a stereotype of maternal health needs for women or marginalizing other reproductive health needs (like treatment of STIs or screening for cervical cancer). Dominance feminism could view the caretaking role as a product of a private/public distinction that works to women's disadvantage and men's advantage. But cultural feminism could exist on a common ground with the language of the Protocol using a substantive equality analysis: Because many women act in a caretaking role and the majority of women become mothers, the Protocol should recognize that reality of women's lives and cater to it.

The Protocol does not appear to favor one reading over another. However, the Protocol does seek to temper the culture/equality debate in one regard: Cultural feminism may be more aligned with the approach taken in the Charter, which acknowledges the primacy and importance of custom and tradition to communal identity. The contribution of cultural feminism is to recognize women's important role in maintaining and shaping that tradition.<sup>144</sup> This approach is reflected in Article 17, which, like the Charter, tries to promote respect for women's roles within their communities. The first clause of Article 17 creates the right to a "positive

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

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

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

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

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

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

Differing theoretical vantage points will yield different interpretations of the Protocol. The following Part will show how these influences may be at cross purposes in interpreting the Protocol's treatment of health and reproductive rights.

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

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

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

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145. *Id.* art. 17.

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

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

sexually transmitted infections; the right to be informed of one's health status and the health status of one's partner; and the right to have family planning education.<sup>148</sup>

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

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

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

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

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

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

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

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

to experience sexual pleasure.<sup>154</sup> The Protocol could have acknowledged that the cultural barriers to eliminating circumcision are rooted in communities that value female chastity or sexual submission.<sup>155</sup> Linking the rights in Article 5 to the right to healthy sexual development could have tempered the emphasis on violence previously described. Similarly, the prohibition on early marriage could have been explicitly connected to the health risks associated with early childbirth and to the loss of sexual and reproductive decision-making it entails for many girls.<sup>156</sup> A more integrated approach could have linked the rights in ways that could have strengthened their substantive content. The Protocol fails to build upon the growing consensus that reproductive health issues are related to socio-economic as well as civil and political rights for women.<sup>157</sup>

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

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154. See REBECCA COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS* 263–66 (2003) (describing how female circumcision is deeply embedded in the practices of several East and West African communities).

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

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

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

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

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

and information, including in the area of sexual and reproductive health."<sup>160</sup> Most significantly, the Charter itself relies on a "best attainable" standard in Article 16<sup>161</sup> as does Article 14 of the African Charter on the Rights and Welfare of the Child (ACRWC), which recognizes the right to "the best attainable state of physical, mental and spiritual health" and sets out a number of state duties in furtherance of the best attainable standard.<sup>162</sup>

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

One example where a better standard for health might have been useful is in the Protocol's treatment of HIV/AIDS. The rights to self-protection from HIV and to know a partner's HIV status were added at the 2001 Experts Meeting but have been criticized as far too narrow in light of the scope of the HIV epidemic.<sup>164</sup> International documents have addressed HIV in terms of a right to the highest attainable standard of health, as well as to dignity and equality.<sup>165</sup> This standard means more than recognizing

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

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

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

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

164. See Banda, *supra* note 109, at 81 (questioning how many women would dare ask their partners if they were infected with HIV).

165. See COOK, *supra* note 154, at 12 (examining the expanding definition of reproductive health in international law). It is also strange that there is no language that link women's inequality with susceptibility to HIV, as the CEDAW Committee has.

the right to non-discrimination based on one's health status; the highest attainable standard of health has been interpreted as active government participation in seeking the most effective treatments for those living with HIV and in stemming the spread of HIV. Additionally, the right to dignity (as interpreted in the South African context, for example<sup>166</sup>) implies there is a role for state and private actors to counteract the stigma that has attached to HIV historically.

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

As noted in Part I, the special protection for women as mothers is one of the main points of criticism of the Charter,<sup>170</sup> and it is one that created tension in earlier international documents.<sup>171</sup> The Protocol's language may reaffirm women's maternal role (based in part on the ACRWC) despite emphasizing autonomy-based rights, such as a right to decide the number and spacing of one's children. The Protocol seeks to embrace women's

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

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

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

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

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

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



special role as mothers by protecting pregnant and nursing women. Article 14 emphasizes pre-natal, delivery, and post-natal health and nutritional services for women during pregnancy.<sup>172</sup> This observation is not intended to minimize the importance of pre-natal and post-natal care for women or to ignore its recognition in international human rights law, such as the Article 12 right to health in CEDAW, which almost exclusively focuses on maternal health.<sup>173</sup> But the Protocol appears to cut against the stereotype of women as mothers in several places. One instance is the right to decide "whether to have children," which complements the right to decide the number and spacing of children (language taken from CEDAW).<sup>174</sup> Perhaps this language could have been expanded: Article 14, which speaks to a reproductive health agenda concerned with family planning, could have included language that more directly related to sexual and procreative autonomy or well-being.<sup>175</sup>

Serving as a counterintuitive example of the implicit support of maternal stereotypes, the right to an abortion may inadvertently align with a pro-natalist vision for women. Article 14(2)(c) identifies a right to medical abortion for women for whom it is popularly accepted that motherhood may be unwanted—women who are victims of rape, incest, or sexual assault. The striking aspect of Article 14(2)(c) is the right to medical abortion for the women whose physical or mental health is at risk. This provision for mental health stands in contrast with most of the abortion laws in Africa, many of which recognize no right to an abortion on that ground (or any of the grounds stated in Article 14(2)(c) for that matter).<sup>176</sup> That being said,

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

173. Article 12 of CEDAW reads:

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

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

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

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

176. See Chad Gerson, *Toward an International Standard of Abortion Rights: Empirical Data from Africa*, 18 PACE INT'L L. REV. 373, 377 (2006) (conducting an

the right to a legal abortion because of a risk to mental health is justified on the same grounds as the right to an abortion for a woman who has a sympathetic reason—mental infirmity—for not wanting to become a mother.<sup>177</sup>

The Protocol could have tried to uncouple stereotypes about women by including text that recognized the rights of those women who are not mothers or wives. For instance, what would creating a positive cultural context under Article 17 look like for those women who choose not to mother? Instead, the Protocol is better characterized as accepting the "benevolent" stereotype of women as caretaker<sup>178</sup> and lacks critical engagement with the ways that stereotypes conflict with rights rooted in language of self determination.

#### IV. Conclusion

The tension between the elimination of stereotypes and the special recognition of motherhood and has long been at the center of the feminist debate. Article 14 may have missed an opportunity to tie together the elimination of stereotypes, women's role in the family, and reproductive and sexual health in a way particular to an African context. This may have been especially important to young women and girls whose rights are scattered throughout the Protocol in inconsistent ways.<sup>179</sup> Moreover, the Protocol could have framed reproductive rights within broader objectives, such as the elimination of poverty and disease<sup>180</sup> and the reform of colonialist laws.<sup>181</sup>

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empirical study of the tolerance of abortion in African states); see also Banda, *supra* note 109, at 82 (questioning whether Article 14(2)(c) will be enforced because of the variation in member states' laws on abortion).

177. Article 14(2)(c) refers to a "medical abortion," which is administered only in the first trimester of pregnancy. Protocol, *supra* note 1, art. 14(2)(c). This may limit the clause's application to second or third trimester abortions.

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

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

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

181. See Charles Ngwena, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective*, 32 J. L. MED. & ETHICS 708 (2004) (showing the

This Article, though critical of the Protocol in many ways, is not fatalistic about its potential promise. Bold and clear application of the implementation and interpretation clauses could ensure that the Protocol evolves into a responsive instrument for women. Article 26 creates a duty to "indicate the legislative and other measures undertaken for the full realisation of the rights [of the Protocol] in a state's periodic reports submitted in accordance with Article 62 of the African Charter."<sup>182</sup> There is room for the same powerful lobby that helped bring the Protocol into force to help shape the ways in which states interpret and implement Protocol provisions. The caveat in Article 31—that "[n]one of the provisions of the . . . Protocol shall affect more favourable provisions . . . in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties"<sup>183</sup>—could be the platform by which Protocol provisions are measured against future innovations in women's human rights thinking. Finally, in according the power to interpret the Protocol to the African Court on Human and Peoples' Rights (ACHPR) (which is not yet operational), Article 27 creates room to imbue a new institution that has a clean slate with a sense of responsibility for the development of women's rights.

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

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imprint of colonial legacies on current abortion laws in southern Africa); *see also* Odinkalu, *supra* note 16, at 11 (noting that new bills of rights have not been followed by the repeal of colonial era legislation).

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

183. *Id.* art. 31.