

CEDAW IN SUB-SAHARAN AFRICA: LESSONS IN IMPLEMENTATION

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INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹ has proven to be a critical tool in the struggle to improve women’s rights around the world. The treaty “is one of the most widely ratified human rights treaties” in the world.² Despite its widespread ratification and its

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1. Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

2. Marta R. Vanegas & Lisa R. Pruitt, *CEDAW and Rural Development: Empowering Women with Law from the Top Down, Activism from the Bottom Up*, 41

prominence in the global fight for gender equality, the United States is among fewer than ten countries around the world that have not ratified the treaty.³ This symposium focuses on the ratification debate within the United States and asks, most importantly, what might be gained from ratification? The answer to this question is complex and requires us to explore the challenges involved in implementation of the treaty. In this Article, I offer a glimpse of some of the challenges in implementing CEDAW in sub-Saharan Africa in an effort to more fully understand both the transformative potential and the limitations of the treaty as it is applied in one particular regional context.

Part I of the Article provides a brief background on the treaty. Part II offers a concise overview of some of its most critical provisions. Part III provides a glimpse of some of the most important women's rights test cases within the region, illustrating the impact that CEDAW has had through litigation. Part IV explores CEDAW's contributions to law-reform efforts to improve women's rights. Part V focuses on the ways in which CEDAW has contributed to increased public awareness concerning women's rights. Finally, Part VI examines some of the limitations of the treaty and contrasts CEDAW with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol or the Protocol).⁴ Part VI concludes that CEDAW has had a significant positive impact on women's rights in the region, including the influence of the treaty on the drafting of the Maputo Protocol. The CEDAW Committee has much to gain from an analysis of the similarities and differences between the two instruments, including the ways in which the Maputo Protocol explicitly values the role culture can, and often does, play in women's lives. A more nuanced understanding of culture and intersectionality will only enhance CEDAW's effectiveness in the

U. BALT. L. REV. 263, 266 (2012) (“[T]he Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] is one of the most widely ratified human rights treaties in history.” (footnote omitted)).

3. *Fast Facts About CEDAW*, CEDAW 2012, <http://www.cedaw2012.org/index.php/press-room/fast-facts-about-cedaw> (last visited Mar. 21, 2014) (noting that the following 7 nations “have NOT ratified CEDAW” as of 2013: “the United States, Iran, Somalia, Sudan, South Sudan,” Palau, and Tonga).

4. PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA, *adopted on July 11, 2003* [hereinafter PROTOCOL], *available at* <http://www.law.georgetown.edu/rossrights/docs/pdfs/AF-Women.pdf>.

region. Maximizing the effectiveness of the treaty will be important for the United States if it decides, as it should, to ratify CEDAW.

I. CEDAW: ITS HISTORY AND BACKGROUND IN BRIEF

The adoption of the Convention on the Elimination of All Forms of Discrimination against Women⁵ by the United Nations General Assembly in December of 1979, and its subsequent entry into force in September of 1981, marked a significant milestone in the international struggle for women's human rights.⁶ The Convention, often referred to as an "international bill of rights for women," materialized after decades of advocacy efforts on the part of women's rights activists, diplomats, and U.N. officials to ensure equal rights for women.⁷

The Commission on the Status of Women (CSW), initially established as a subcommittee of the Commission on Human Rights in 1946, played perhaps the most fundamental role in paving the way for the adoption of CEDAW.⁸ The CSW, tasked with presenting recommendations to ensure the enjoyment of equality of rights for women, drafted the Declaration on the Elimination of Discrimination against Women,⁹ a precursor to CEDAW, which the General Assembly adopted on November 7, 1967.¹⁰

Building upon the Declaration and determining that a binding treaty was necessary for full implementation and assurance of equal rights for women, the CSW, in collaboration with a working group of the Third Committee of the General Assembly, drafted the text of what would become the Convention on the Elimination of All Forms

5. CEDAW, *supra* note 1.

6. Christine Chinkin, *Thoughts on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, in WITHOUT PREJUDICE: CEDAW AND THE DETERMINATION OF WOMEN'S RIGHTS IN A LEGAL AND CULTURAL CONTEXT 5, 5 (Meena Shivdas & Sarah Coleman eds., 2010) (noting that "CEDAW is a revolutionary document for women for reasons both at the time of drafting and in the way it has evolved").

7. *Id.*; Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Progress Achieved in the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination against Women*, ¶¶ 1, 16, U.N. Doc. A/CONF.177/7 (June 21, 1995) [hereinafter *Progress Achieved*].

8. *Progress Achieved*, *supra* note 7, ¶¶ 9-12.

9. Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263(XXII), U.N. Doc. A/RES/2263(XXII) (Nov. 7, 1967).

10. *Id.*

of Discrimination against Women.¹¹ The General Assembly adopted the draft convention in Resolution 34/180 by a unanimous vote.¹² The Assembly subsequently passed Resolution 54/4 in October of 1999, establishing an Optional Protocol that allows individual complaints to be made against States parties for violations of the Convention.¹³

As of December 2013, there were 187 States parties to CEDAW, 104 of which are also parties to the Optional Protocol.¹⁴ Although nearly all nations have ratified CEDAW, many nations have entered reservations to the Convention, some of which include reservations that the CEDAW Committee considers to be incompatible with the object and purpose of the treaty.¹⁵ Currently, more than seventy-five nations have entered reservations to CEDAW with common reservations as to Articles 2 and 16 of the Convention, which have been held by the Committee to be core provisions of the treaty.¹⁶

II. SUBSTANTIVE PROVISIONS OF CEDAW

CEDAW defines discrimination against women broadly. The treaty defines discrimination against women as 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.¹⁷

The treaty prohibits not only distinctions that intentionally discriminate but also those that have the “effect” of discriminating

11. *Progress Achieved*, *supra* note 7, ¶ 12.

12. *Id.*

13. G.A. Res. 54/4, art. 2, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

14. Rep. of the Comm. on the Elimination of Discrimination against Women, 54th Sess., Feb. 11–Mar. 1, 2013, at 65, U.N. Doc. A/68/38, GAOR; 68th Sess., Supp. No. 38 (2013).

15. *Reservations to CEDAW*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (last visited Mar. 21, 2014).

16. *See id.* (“Articles 2 and 16 are considered by the Committee to be core provisions of the Convention.”); *Declarations, Reservations, and Objections to CEDAW*, U.N. WOMEN, www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last visited Mar. 21, 2014).

17. CEDAW, *supra* note 1, at 16.

against women. This language significantly expands the potential reach of CEDAW.¹⁸

Article 2 requires that States parties condemn discrimination and use the legal system to aggressively combat discrimination in all its forms. Article 2's reach goes beyond the discriminatory acts of the state and requires that States parties take measures "to eliminate discrimination against women by any person, organization or enterprise."¹⁹ Article 2 also requires States parties to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."²⁰

Article 5 condemns gender stereotyping and requires that States parties take appropriate measures "[t]o modify the social and cultural patterns . . . [that] are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."²¹ Article 16 is another highly significant provision that relates to discrimination in the family.²² Other provisions permit affirmative action,²³ combat trafficking in women,²⁴ promote women's equality in public life²⁵ by encouraging women's representation in non-governmental organizations²⁶ and development planning,²⁷ particularly for rural women;²⁸ and prohibit

18. See IWRAW ASIA PACIFIC KNOWLEDGE PORTAL, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 6 (2009), available at <http://www.iwraw-ap.org/convention/doc/cedaw.pdf> ("[CEDAW's definition of discrimination] is useful because it helps us identify the weaknesses of formal or so called neutral laws and policies. A law or policy may not have the intention of denying a woman the enjoyment of rights but if it has the effect of doing so then it constitutes discrimination.").

19. CEDAW, *supra* note 1, at 16.

20. *Id.*

21. *Id.* at 17.

22. *Id.* at 20 (noting that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," and further mandating protection of a number of specific rights such as "[t]he same right to enter into marriage" and "[t]he same rights and responsibilities as parents").

23. *Id.* at 16; see also Rep. of the Comm. on the Elimination of Discrimination against Women, 30th Sess., 31st Sess., Jan. 12–30, 2004, July 6–23, 2004, ¶¶ 15, 16, 18, U.N. Doc. A/59/38, Annex I; GAOR, 59th Sess., Supp. No. 38 (2004).

24. CEDAW, *supra* note 1, at 17.

25. *Id.*

26. *Id.*

27. *Id.* at 19.

28. *Id.*

discrimination in nationality rights,²⁹ education,³⁰ employment and social security,³¹ health care,³² social and economic life,³³ and legal capacity.³⁴

Although it is comprehensive, CEDAW fails to protect against some forms of discrimination that had not yet gained international attention at the time of its drafting. For example, CEDAW fails to explicitly provide protection for members of the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community.³⁵ CEDAW also fails to provide explicit protection against gender-based violence. The CEDAW Committee, however, issued a general recommendation, General Recommendation No. 19, which brings violence against women within the purview of the Convention by explicitly identifying gender-based violence as a form of discrimination.³⁶ The next three Parts will analyze the implementation of CEDAW and its successful utilization in challenging discrimination through domestic litigation, law reform,

29. *Id.* at 17.

30. *Id.* at 17-18.

31. *Id.* at 18.

32. *Id.* at 19.

33. *Id.*

34. *Id.* at 20.

35. *But see* Aleksandra Djordjevic, *Has the International Human Rights Paradigm Failed Lesbian, Gay, Bisexual and Transgender People? If So, What Can Be Done to Fix It?* 45 n.94 (Apr. 2013) (unpublished LLM thesis, University of British Columbia) (“CEDAW Committee issued General recommendation No. 28 on the core obligations of state parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women . . . in 2010, which was meant to clarify the meaning [of] Article 2 of the CEDAW convention. This article regulates the right of women to be free of discrimination and, according to it, ‘[t]he discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.’ This shows that the committee has decided to include sexual orientation under the category of sex. Sexual orientation was considered in some of its concluding observations. CEDAW also reacted to the situation in Uganda in 2010 and recommended that its government should adopt anti-discrimination legislation and decriminalise homosexuality.” (citations omitted) (quoting Rep. of the Comm. on the Elimination of Discrimination against Women, 46th Sess., 47th Sess., 48th Sess., July 12–30, 2010, Oct. 4–22, 2010, Jan. 17–Feb. 4, 2011, ¶ 18, U.N. Doc. A/66/38, Annex III; GAOR, 66th Sess., Supp. No. 38 (2010))).

36. Rep. of the Comm. on the Elimination of Discrimination against Women, 11th Sess., Jan. 20–30, 1992, at 1-6, U.N. Doc. A/47/38; GAOR, 47th Sess., Supp. No. 38 (1993) (noting that discrimination against women includes gender-based violence—violence directed against a woman because she is a woman or violence that affects women disproportionately).

and public education before turning to a discussion of the challenges and limitations of the Convention.

III. TEST CASE LITIGATION

Domestic courts within Africa have, at times, cited to CEDAW in important women's rights test cases.³⁷ In several of the early, high-profile women's rights cases in Africa, female plaintiffs challenged facially discriminatory laws or policies. Two of these early cases represent significant victories for women's rights advocates within the region: *Dow* and *Longwe*.³⁸ In the 1990s, a handful of high-profile cases challenged discrimination in the private sphere and proved more difficult for women's rights plaintiffs to prevail. The *Magaya* case,³⁹ described below, is a 1999 Zimbabwe case in which a woman unsuccessfully challenged a discriminatory customary law, relying on domestic law and CEDAW.⁴⁰ Several more recent cases from the early 2000s suggest that there may be cause for hope with respect to women's rights challenges to discriminatory laws, even customary laws, which were long considered beyond the reach of women's rights litigation.⁴¹ As this brief sampling of cases suggests, reliance on CEDAW in domestic women's rights cases within the sub-Saharan region has been somewhat successful, particularly in cases challenging a law or regulation in the public sphere.

37. See, e.g., *Longwe v. Intercontinental Hotels*, (1992) 4 L.R.C. 221 [HC] (Zam.), reprinted in TANZANIA WOMEN JUDGES ASSOCIATION, CASE LAW MANUAL 132, 148 (2013), available at www.tawjatz.org/wp-content/uploads/2013/02/Case-Law-Manual.pdf.

38. See *infra* Sections III.A-B.

39. *Magaya v. Magaya*, (1999) 3 L.R.C. 35 [SC] (Zimb.), available at http://jurisafrika.org/docs/customarylaw/vii_Magaya_v_Magaya_judgment.doc.

40. Choice Damiso & Julie Stewart, *Zimbabwe and CEDAW Compliance: Pursuing Women's Equality in Fits and Starts*, in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW 465 (Anne Hellum & Henriette Sinding Aasen eds., 2013) [hereinafter WOMEN'S HUMAN RIGHTS] ("The Court found that customary law was not subject to the operation of the equality provisions in section 23[,] . . . despite arguments urging the application of non-discrimination principles derived from international instruments including the CEDAW.").

41. See, e.g., *Bhe v. Khayelitsha* 2005 (1) SA 580 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/17.html>.

A. Unity Dow v. Attorney General of Botswana

The case of *Unity Dow v. Attorney General of Botswana*⁴² illustrates the role that international women's rights instruments played in such test cases. *Dow* involved the Botswana Citizenship Act of 1984, which in accordance with Tswana customary law, determined the nationality of children born within Botswana by reference solely to the father's nationality, regardless of the mother's citizenship.⁴³ *Unity Dow*, a Botswana citizen, had married an American man and had three children, two of whom had been born and raised in Botswana after the adoption of the Citizenship Act.⁴⁴ Under the 1984 Act, *Dow's* children were denied Botswana citizenship due to their father's foreign-national status and as a result, were forced to travel only on their father's passport and were ineligible for the free university education available to citizens.⁴⁵ *Dow*, a lawyer and activist, challenged this law before a Botswana High Court, arguing that it discriminated against women and violated the equal protection provisions in the Botswana Constitution.⁴⁶ Despite the fact that the anti-discrimination provision within the Botswana Constitution did not explicitly prohibit discrimination on the basis of sex, the High Court held that this prohibition on sex-based discrimination was implicit within the spirit of the Constitution and thereby declared certain provisions of the Citizenship Act unconstitutional.⁴⁷ In reaching this decision, the High Court referenced international instruments that should have persuaded Botswana to invalidate the Act, including the 1967 Declaration on

42. [1991] L.R.C. 574 (Bots.), reprinted in *UNITY DOW, THE CITIZENSHIP CASE: THE ATTORNEY GENERAL OF THE REPUBLIC OF BOTSWANA VS UNITY DOW 30* (1995), available at <http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm>.

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

44. *Id.*

45. U.N. DEV. FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 20 (Ilana Landsberg-Lewis ed., 1998) [hereinafter BRINGING EQUALITY HOME].

46. *Unity Dow*, [1991] L.R.C. 574, reprinted in *THE CITIZENSHIP CASE*, *supra* note 42, at 30; BRINGING EQUALITY HOME, *supra* note 45, at 20.

47. *Unity Dow*, [1991] L.R.C. 574, reprinted in *THE CITIZENSHIP CASE*, *supra* note 42, at 38 (noting that defense counsel had argued that the antidiscrimination provisions of Botswana's constitution related primarily to discrimination on the basis of race).

the Elimination of Discrimination against Women, stating “[i]t is . . . difficult if not impossible to accept that Botswana would deliberately discriminate against women in its [Constitution] whilst at the same time internationally support non-discrimination against females or a section of them.”⁴⁸

The Court of Appeal subsequently affirmed the High Court’s decision.⁴⁹ In so doing, it relied on international commitments Botswana had made respecting women’s rights, and it noted that at the time the Botswana Constitution was drafted, Botswana was entering the “comity of civilised nations” influenced by instruments such as the Universal Declaration of Human Rights.⁵⁰ Despite this victory for women’s rights, the Citizenship Act of 1984 was not officially amended until 1995, when Botswana was in the process of ratifying CEDAW.⁵¹

B. Longwe v. Intercontinental Hotels

In *Longwe v. Intercontinental Hotels*,⁵² Sara Longwe, a women’s rights activist in Zambia, brought suit against the Intercontinental Hotels Corporation for turning her away from one of its hotels under its policy prohibiting entry to any woman unaccompanied by a male.⁵³ Longwe had been turned away from one of the Intercontinental hotels on at least two occasions—once when she was picking up her children from a party at the hotel and again when she was attending a meeting of a group of women’s activists at the hotel.⁵⁴

Before the High Court of Zambia, Longwe argued that this policy discriminated against women and thereby violated the anti-discrimination provisions of the Zambian Constitution as well as international instruments, such as CEDAW, to which Zambia was party.⁵⁵ While acknowledging that CEDAW would be of use to Zambian courts in cases in which domestic law is not on point, the

48. *Id.* at 40.

49. Att’y Gen. v. Unity Dow (2001) AHRLR 99 (Bots. Ct. App. 1992), reprinted in TANZANIA WOMEN JUDGES ASSOCIATION, *supra* note 37, at 78, 129.

50. *Id.* at 117-18.

51. BRINGING EQUALITY HOME, *supra* note 45, at 21.

52. (1992) 4 L.R.C. 221 [HC] (Zam.), reprinted in TANZANIA WOMEN JUDGES ASSOCIATION, *supra* note 37, at 132.

53. *Id.*

54. BRINGING EQUALITY HOME, *supra* note 45, at 23; Interview with Sara Longwe, in Beijing, China (Aug. 1995).

55. BRINGING EQUALITY HOME, *supra* note 45, at 23-24.

Court in *Longwe*'s case held that it need only look to the freedom of movement and assembly provisions of the *Zambian Constitution* to determine that the hotel's policy was illegally discriminatory.⁵⁶ Regarding the proper role of international treaties in domestic jurisprudence, the court stated:

Before I end, I have to say something about the effect of International Treaties and Conventions which the Republic of Zambia enters into and ratifies. The African Charter on Human Rights and People's Rights and the Convention on the Elimination of All Discrimination against women etc (ante) are two such examples. It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.⁵⁷

Thus, despite the Court's avoidance of international law in its determination of the *Longwe* case, the opinion emphasized the role and importance of such international obligations, including CEDAW. As such, *Longwe* has been referenced by other courts in decisions relying upon international law to strike discriminatory laws.⁵⁸

C. *Ephrahim v. Pastory* and Another

*Ephrahim v. Pastory*⁵⁹ involved a challenge to a Tanzanian statute that incorporated customary law and the interpretation of the Constitution, which did not explicitly prohibit discrimination based upon sex.⁶⁰ Plaintiff Holaria Pastory had inherited a plot of clan land from her father and, due to financial necessity, had sold this property.⁶¹ Her nephew subsequently applied to the primary court to have the sale declared void as illegal under Haya customary law,

56. *Id.*

57. *Longwe*, (1992) 4 L.R.C. 221, *reprinted in* TANZANIA WOMEN JUDGES ASSOCIATION, *supra* note 37, at 148.

58. *See, e.g.*, *Rono v. Rono*, (2008) 1 K.L.R. 803, 812-14 (C.A.K.) (Kenya), available at http://www.kenyalaw.org/family/case_download.php?go=71975090857579640119382 (discussing *Longwe*'s emphasis on the importance of international law in analyzing domestic litigation).

59. *Ephrahim v. Pastory*, (1990) L.R.C. 757 [HC] (Tanz.), *reprinted in* HUMAN RIGHTS IN TANZANIA: SELECTED CASES AND MATERIALS 387, 387-88 (Chris Maina Peter ed., 1997).

60. *Id.*; BRINGING EQUALITY HOME, *supra* note 45, at 21.

61. *Ephrahim*, (1990) L.R.C. 757, *reprinted in* HUMAN RIGHTS IN TANZANIA, *supra* note 59, at 387.

which prohibits women from selling clan land.⁶² The primary court granted the nephew's application and ordered Pastory to refund the profits that she had received from the sale.⁶³ Pastory appealed to the district court arguing that the Laws of Inheritance of the Declaration of Customary Law of 1963, which include the limitation on women's property rights under Haya law, are unconstitutionally discriminatory and violate the Bill of Rights, which had been adopted into the Tanzanian Constitution in 1984.⁶⁴ The district court agreed with Pastory, overturning the decision of the primary court and finding that Pastory had equal rights as clan men to sell the land that she had inherited.⁶⁵ Pastory's nephew, Ephrahim, appealed to a High Court of Tanzania at Mwanza.⁶⁶

In holding the Declaration of Customary Laws of 1963 unconstitutional, the High Court relied upon Tanzania's international obligations as persuasive evidence that the prohibition of discrimination on the basis of sex should be implicitly read into the Constitution via the Bill of Rights.⁶⁷ The Court found that the Constitution had explicitly incorporated Article 7 of the Universal Declaration of Human Rights, which prohibits discrimination against women, and noted that Tanzania had ratified CEDAW and the African Charter on Human and People's Rights, both of which prohibit discrimination on the basis of sex.⁶⁸ The Court stated:

The principles enunciated in the above named documents[, including CEDAW, the UDHR, and the African Charter.] are a standard below which any civilised nation will be ashamed to fall. It is clear from what I have discussed what the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.⁶⁹

62. *Id.* at 388.

63. *Id.* at 387-88.

64. *Realising Universal Rights in National Jurisdictions*, in WITHOUT PREJUDICE, *supra* note 6, at 145, 175-76; BRINGING EQUALITY HOME, *supra* note 45, at 21.

65. *Realising Universal Rights in National Jurisdictions*, *supra* note 64, at 175.

66. *Id.*; see Ephrahim, (1990) L.R.C. 757, reprinted in HUMAN RIGHTS IN TANZANIA, *supra* note 59, at 387.

67. See *Realising Universal Rights in National Jurisdictions*, *supra* note 64, at 175-76; see also BRINGING EQUALITY HOME, *supra* note 45, at 21.

68. Ephrahim, (1990) L.R.C. 757, reprinted in HUMAN RIGHTS IN TANZANIA, *supra* note 59, at 390.

69. *Id.*

The High Court thus held that, in accordance with the Tanzanian Bill of Rights and Tanzania's international obligations prohibiting discrimination based on sex, "Section 20 of the 1963 Rules of Inheritance barring women from selling clan land" would be modified such that "males and females would have equal rights to inherit and sell clan land."⁷⁰

D. *Magaya v. Magaya*

In some African countries, such as Kenya and Zimbabwe, the post-colonial constitutions included what I have called exclusionary clauses, which specifically exclude customary law and family or "personal" law matters from scrutiny under constitutional gender-equality guarantees.⁷¹ In other words, despite the existence of equality provisions, these constitutions concurrently contained exclusionary clauses that shielded from constitutional equality challenges laws deemed customary or familial.⁷²

In 1999, the Supreme Court of Zimbabwe validated that country's exclusionary clause in the case of *Magaya v. Magaya*,⁷³ causing outrage among domestic and international women's rights advocates.⁷⁴ In *Magaya*, the Court found that the relevant customary

70. *Realising Universal Rights*, *supra* note 64, at 175-76 ("Section 20 of the 1963 Rules of Inheritance barring women from selling clan land . . . was now taken to be modified and qualified such that males and females would have equal rights to inherit and sell clan land. Likewise the rules under the Bukoba Inheritance Rules entitling a woman to only usufructuary rights with no power to sell inherited clan land were equally void and of no effect.").

71. See Johanna E. Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 *FORDHAM INT'L L.J.* 289, 292-93 & n.22, 305-06 & n.88 (2008).

72. For example, Lesotho's Constitution includes a provision guaranteeing equality on the basis of sex and other protected categories. It also includes, however, the following provision, which exempts family and customary law from the non-discrimination protection:

Subsection (1) shall not apply to any law to the extent that that law makes provision . . . with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons . . . or for the application of the customary law of Lesotho with respect to any matter in the case of person[] who, under [the] law, are subject to that law . . .

LESOTHO CONST., § 18(4) (1993).

73. *Magaya v. Magaya*, (1999) 3 L.R.C. 35, 42 [SC] (Zimb.).

74. David M. Bigge & Amélie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 *HARV. HUM. RTS. J.* 289, 289 (2000).

law, which denied women's inheritance rights, was not subject to the equality provisions in the Constitution.⁷⁵ The Court made this conclusion "despite arguments urging the application of non-discrimination principles derived from international instruments including the CEDAW."⁷⁶ *Magaya* was one of a number of cases before and during the 1990s that used constitutional exclusionary provisions to hinder the use of CEDAW and other equality instruments in challenging discriminatory practices that took place in the so-called "private" sphere to which family relations and property law issues were often relegated.⁷⁷ Fortunately, as in the *Bhe* case discussed below, courts have more recently reversed this trend, more frequently allowing women to successfully challenge discriminatory customary laws under international and domestic equality provisions.⁷⁸

E. *Bhe v. Khayelitsha*

In *Bhe v. Khayelitsha*,⁷⁹ the Constitutional Court of South Africa examined "the constitutionality of the customary law rule of primogeniture as applied in cases of intestate succession."⁸⁰ One of the three plaintiffs involved in the case, Bhe, brought suit in the interest of her two minor daughters for title to the home and property that had been acquired by their deceased father.⁸¹ Under § 23 of the Black Administration Act and the Act's regulations and § 1(4)(b) of the Intestate Succession Act, "the two minor children did not qualify to be the heirs in the intestate estate of their deceased father."⁸²

The Court agreed with Bhe that the customary law of male primogeniture violated the right of women to human dignity as guaranteed by the Constitution of South Africa and struck down the relevant sections of the Black Administration and Intestate

75. *Magaya*, (1999) 3 L.R.C. at 35, 42.

76. Damiso & Stewart, *supra* note 40, at 454, 465.

77. Johanna E. Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509, 515-16 & n.35, 531-32 (2010).

78. See discussion *infra* Section III.E.

79. *Bhe v. Khayelitsha* 2005 (1) SA 580 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/17.html>.

80. *Id.*; Bond, *supra* note 77, at 533.

81. CONSTITUTIONAL COURT OF S. AFR., MEDIA SUMMARY 2 (Oct. 15, 2004), available at http://www.uio.no/studier/emner/jus/jus/JUS5910/v13/undervisningsmateriale/bhe-case_south-africa_summary.pdf.

82. *Bhe* 2005 (1) SA at paras. 1, 16; see Bond, *supra* note 77, at 533.

Succession Acts as unconstitutional.⁸³ In reaching its decision, the Court relied in part on the international obligations to which South Africa was a party, stating:

Having regard to these developments on the continent, the transformation of African communities from rural communities into urban and industrialised communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discrimination, namely: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African (Banjul) Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights. In particular, CEDAW requires South Africa to ensure, amongst other things, the practical realisation of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitutes [sic] discrimination against women.⁸⁴

Mokgadi Lucy Mailula, a judge of a High Court of South Africa, noted the significance of the *Bhe* decision, stating that *Bhe* “has ramifications which reach beyond the facts of the case, in the sense that, here, the court was required to weigh a long-established cultural norm against a gender issue. And the gender issue prevailed.”⁸⁵ Mailula goes on to note that *Bhe* represents “a successful negotiation of culture.”⁸⁶

F. *Rono v. Rono* and *Ntutu*: Kenya's Inheritance Cases

In 2005, in the case of *Rono v. Rono*, the Kenyan Court of Appeal relied on the Kenyan Constitution, the African Charter, and CEDAW to redistribute the deceased's property according to principles of gender equality.⁸⁷ In *Rono*, three sons claimed that they should inherit a larger portion of their father's estate than their sisters, since “according to Keiyo traditions, girls have no right to inheritance of their father's estate.”⁸⁸ In rejecting the sons' claims to a greater share of property, the judge noted, “I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relat[ed] to discrimination which

83. See Bond, *supra* note 77, at 533.

84. *Bhe* 2005 (1) SA at para. 209 (footnotes omitted).

85. See Mokgadi Lucy Mailula, *Gender, Culture and the Law: The South African Experience*, in WITHOUT PREJUDICE, *supra* note 6, at 75, 80.

86. *Id.*

87. *Rono v. Rono*, (2008) 1 K.L.R. 803, 811-14, 816 (C.A.K.) (Kenya).

88. *Id.* at 805, 807-08.

this appeal raises, cannot be fully addressed by reference to domestic legislation alone.”⁸⁹

The court’s decision in *Rono* was influential in the 2008 case of *In re Estate of Ntutu* in which the Kenyan High Court at Nairobi applied the Law of Succession Act rather than Masai customary law.⁹⁰ The customary law would have denied distribution of the estate to the daughters of the deceased.⁹¹ Relying on gender-equality principles in constitutional and international law, the court recognized the statutory law as the applicable law.⁹² The Court further held that even if Masai customary law were applicable, the Court would consider it “repugnant to justice and morality” and would invalidate it on that basis.⁹³

Both *Rono* and *Ntutu* were highly significant decisions for the development of women’s rights within Kenya. These cases also reflect the role that international law can play in litigation involving sex discrimination under customary law. Both courts carefully considered international human rights law, including CEDAW, in their decisions to strike discriminatory customary law in matters of inheritance.

IV. LAW REFORM

CEDAW has also helped to improve women’s rights in Africa through constitutional and legislative reform. In Uganda, for example, women’s rights groups relied on CEDAW as an organizing tool in their efforts to enshrine gender equality in the 1995 Constitution.⁹⁴ Similarly, the constitutional reform process in Kenya reflects a focus on CEDAW in the constitutional drafting process.⁹⁵

89. *Id.* at 814, 816.

90. *In re Estate of Ntutu*, (2008) e K.L.R. 1, 5-9 (H.C.K.) (Kenya).

91. *Id.* at 2.

92. *Id.* at 7-9.

93. *Id.* at 9.

94. See TSJEARD BOUTA, GEORG FRERKS & IAN BANNON, GENDER, CONFLICT, AND DEVELOPMENT 83 (2005) (noting that “CEDAW served as a starting point for rewriting Uganda’s constitution” and that women’s non-governmental organizations (NGOs) “referred to CEDAW as establishing a minimum acceptable standard” when drafting proposals for the new constitution).

95. See ANDREW BYRNES & MARSHA A. FREEMAN, THE IMPACT OF THE CEDAW CONVENTION: PATHS TO EQUALITY 25 (2011), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/9219/WDR2012-0014.pdf?sequence=1> (noting that the 1997 amendment to Article 82(3) of the constitution (adding sex to the categories of prohibited discrimination) was “in

Beyond constitutionalism, CEDAW has also influenced the drafting of domestic law and policy in many countries. For example, the Department of Justice in South Africa relied on CEDAW in the process of drafting its Gender Policy. The drafters of the policy note the importance of CEDAW, listing the treaty “as one of the primary ‘guiding principles’ that is to inform the transformation of the South African legal system.”⁹⁶ In addition, South Africa adopted the Domestic Violence Act 116 of 1998, explicitly acknowledging that the legislation is designed in part to honor the government’s commitments under CEDAW.⁹⁷ Similarly, in accordance with CEDAW’s requirements, Zambia adopted a National Gender Policy and established a Gender in Development Division to work towards the elimination of discrimination against women.⁹⁸

In 2007, the CEDAW Committee recommended to the government of Sierra Leone that it prioritize the enactment of legislation promoting gender equality.⁹⁹ Shortly after the CEDAW Committee’s recommendation, Sierra Leone passed three significant pieces of legislation, known collectively as the “Gender Acts.”¹⁰⁰ They include the Registration of Customary Marriage and Divorce Act (2009),¹⁰¹ the Devolution of Estates Act (2007), and the Domestic Violence Act (2007). All three acts represent important gains for women’s rights. The Registration of Customary Marriage and Divorce Act requires consent from both parties to the marriage and sets the minimum age for marriage at eighteen years of age.¹⁰² The Devolution of Estates Act promotes equality in inheritance

response to the State’s ratification of the Convention and other international treaties”).

96. BRINGING EQUALITY HOME, *supra* note 45, at 32.

97. Domestic Violence Act 116 of 1998 pmb. (S. Afr.).

98. Rep. of the Comm. on the Elimination of Discrimination against Women, 26th Sess., 27th Sess., Jan. 14–Feb. 1, 2002, June 3–21, 2002, ¶ 227, U.N. Doc. A/57/38; GAOR, 57th Sess., Supp. No. 38 (2002).

99. Rep. of the Comm. on the Elimination of Discrimination against Women, 37th, Sess., 38th Sess., 39th Sess., Jan. 15–Feb. 2, 2007, May 14–June 1, 2007, July 23–Aug. 10, 2007, ¶ 358, U.N. Doc. A/62/38, Annex IV; GAOR, 62d Sess., Supp. No. 38 (2007).

100. LISA DENNEY & AISHA FOFANA IBRAHIM, VIOLENCE AGAINST WOMEN IN SIERRA LEONE: HOW WOMEN SEEK REDRESS 6 (Dec. 2012), *available at* <http://www.refworld.org/pdfid/523ac7a94.pdf>.

101. While the Registration of Customary Marriage and Divorce Act of 2009 was introduced in 2007, it was not signed into law until 2009.

102. Registration of Customary Marriage and Divorce Act of 2009 § 2(1) (Act No. 1/2009) (Sierra Leone).

matters.¹⁰³ The Domestic Violence Act obligates the state to protect victims of domestic violence and defines violence broadly enough to encompass marital rape.¹⁰⁴

These are but a handful of examples of CEDAW's influence in the area of legislative reform. Speaking more broadly of CEDAW's impact on legislation, Savitri Goonesekere, who is a former member of the CEDAW Committee, remarks that "[t]he Committee's concluding comments on the need for a holistic review of family law, and its critique of discrimination, have clearly provided an impetus for many countries to repeal received colonial law, transform customary laws, and initiate a process of local law reform based on commitments to CEDAW."¹⁰⁵

V. PUBLIC EDUCATION

Perhaps CEDAW's greatest influence in Africa has been in the areas of public awareness and public education. Countless non-governmental organizations (NGOs) have used CEDAW as a grassroots organizing tool to educate communities about women's rights. The treaty provides an excellent overview of women's rights in all sectors of life and includes women's rights across the lifespan, thereby presenting a useful tool for NGOs to utilize in their women's rights education campaigns.

NGOs in Cameroon, for example, found CEDAW to be an effective tool to raise awareness of women's rights among traditional leaders in that country.¹⁰⁶ In 2007, NGOs summarized CEDAW and created a training manual entitled *CEDAW Made Easy*, which they used to "empower [traditional leaders] to use the Convention to bring about concrete improvements in the lives of women in their communities."¹⁰⁷ In addition, UNESCO has produced a pocket-sized book titled *Passport to Equality*, which explains and reproduces CEDAW and has been distributed around the world in nineteen

103. See generally Devolution of Estates Act of 2007 (Act No. 21/2007) (Sierra Leone).

104. *CEDAW Success Stories*, UNIFEM, http://unifem.org/cedaw30/success_stories (last visited Mar. 21, 2013); see also Domestic Violence Act of 2007 (Act No. 20/2007) (Sierra Leone).

105. Savitri Goonesekere, *Universalizing Women's Human Rights Through CEDAW*, in *THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN* 52, 52, 60 (Hanna Beate Schöpp-Schilling & Cees Flinterman eds., 2007).

106. *CEDAW Success Stories*, *supra* note 104.

107. *Id.*

different languages with the goal of raising awareness of women's rights.¹⁰⁸ Many NGOs have conducted gender-rights awareness and training programs on CEDAW, and some have utilized radio and television to spread the word about CEDAW to the general public. For instance, the European Union and United Nations Development Program's (EU/UNDP) Gender Programme "contributed towards a wider awareness and understanding of women[']s rights and the concept of gender equality" in Swaziland through its distribution of CEDAW in siSwati and by airing radio and television series on women's rights.¹⁰⁹

CEDAW's General Recommendation 19 and the U.N. Declaration on the Elimination of Violence against Women also became important consciousness-raising tools when campaigns against gender-based violence took center stage in the 1990s and have continued to be useful for anti-violence movements. For example, advocacy groups in Ghana utilized CEDAW to raise awareness about gender-based violence and mirrored the standards of General Recommendation 19 in Ghana's 2007 Domestic Violence Act.¹¹⁰ According to Ghanaian scholars, "[p]rior to the championing of issues related to gender-based violence, public discourse on domestic violence was absent because it was largely seen as a private issue unworthy of documentation, literature, or statistics."¹¹¹

Despite the progress that CEDAW has made possible in the realms of domestic litigation, law reform, and public education on gender equality, the Convention's potential has been undermined by several weaknesses in the treaty and with its implementation. It is these challenges to which we now turn.

108. SECTION FOR WOMEN & GENDER EQUAL., UNESCO, PASSPORT TO EQUAL., at i, 1 (2006), available at http://www.unifem.org/attachments/products/PassportToEquality_eng.pdf.

109. *EU/UNDP Gender Programme on CEDAW Implementation Comes to an End*, U.N. DEV. PROGRAMME: SWAZILAND (Feb. 10, 2011), available at <http://www.undp.org.sz/index.php/archives/program-articles/135-gender-archived-articles/199-eu-undp-gender-programme-on-cedaw-implementation-comes-to-an-end>.

110. Preview of RAISING UP THE ROOF: ACTIVISTS CONSTRUCT WOMEN'S HUMAN RIGHTS USING CEDAW 3 (Sept. 3, 2009), available at http://docs.mak.ac.ug/sites/default/files/RaisingUpTheRoof_preview.doc.

111. *Id.*

VI. LIMITATIONS OF CEDAW

The Convention was drafted in the late 1970s, during a time when the dominant discourse within the global women's movement focused on discrimination against women *qua* women.¹¹² At the time of CEDAW's drafting, much feminist theory and advocacy focused on formal equality between women and men.¹¹³ CEDAW's obligations nevertheless transcend that limited focus and include provisions that focus on substantive equality.¹¹⁴

Despite CEDAW's inclusion of provisions promoting substantive equality, the treaty's text reflects a narrow focus on gender-based discrimination in isolation from other related, intersecting forms of discrimination. In the early 1990s, feminists of color within the United States and women's rights activists in the global south began to expose the intersections between race and gender bias within the women's rights and women's human rights movements.¹¹⁵ Activists and scholars began to recognize the many ways in which discrimination might occur simultaneously along different axes of identity such as gender, race, ethnicity, sexual orientation, religion, or class.¹¹⁶ The analysis of the intersection of multiple personal and societal factors on the experience of discrimination came to be called *intersectionality theory*.¹¹⁷

112. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 19 (3d ed. 2013) ("The claim was simply stated and understood: Because women were the same as men in all relevant respects, they deserved access to all public institutions, benefits and opportunities on the same terms as men.").

113. *Id.*

114. Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, at i, 14 (IWRAW Asia Pac. Occasional Paper Series, Paper No. 14, 2009), available at http://www.iwraw-ap.org/publications/doc/OPS14_Web.pdf (discussing the concept of substantive equality and its role in CEDAW).

115. See generally, e.g., Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"*, 40 HOW. L.J. 619 (1997); Kimberlé Williams Crenshaw, *Gender-Related Aspects of Race Discrimination*, U.N. Doc. EGM/GRD/2000/WP.1 (2000); Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39 (Rebecca J. Cook ed., 1994).

116. See, e.g., Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 17 (1995).

117. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against*

Intersectionality theory, in fact, opened the door for a more nuanced understanding of identity, constituted simultaneously of multiple ethnic, economic, cultural, and societal associations.¹¹⁸ This more complex notion of women's identity also reflected the understanding that women could enjoy privilege based on one marker of identity and be a victim of discrimination based on another identity marker.¹¹⁹ This increased appreciation for the complexity of identity also meant that women should not be asked to simply choose between their desire for gender equality and their membership in a particular religious or ethnic community, for example.¹²⁰ Exit from religious or ethnic communities whose standards fail to conform to gender equality standards remains an option for women. Women who value equality, however, may refuse to exit and may choose to work toward the promotion of equality within their communities instead.¹²¹

The CEDAW Committee's understanding of intersectionality theory and its impact on women around the world is evolving. At times, the Committee still appears somewhat reductionist in its view of women as one-dimensional victims of custom and culture.¹²² This is not universally true, however. The language of CEDAW itself insinuates this approach, since two of the three references to culture in the Convention treat it as regressive.¹²³ On this point, CEDAW scholar and commentator, Andrew Byrnes, counters:

While it is certainly the case that much of the discussion around matters of culture and tradition in the CEDAW context focuses on the negative impact on women's enjoyment of human rights, that is hardly surprising, given that the purpose of the Convention is to respond to violations of

Women of Color, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

118. Johanna E. Bond, *Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 108-09 (2003).

119. *Id.* at 109.

120. See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1409 (2003).

121. See *id.* at 1411-12.

122. See SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 130 (2d ed. 2009).

123. The brief positive reference to culture in the Convention appears in Article 13, which provides that women should enjoy an equal right to "participate in recreational activities, sports and all aspects of cultural life." CEDAW, *supra* note 1, at 19; see also Bond, *supra* note 77, at 519-20.

women's human rights, and a goal of the reporting procedure is to identify shortfalls and difficulties with a view to addressing them.¹²⁴

Sally Engle Merry demonstrates the Committee's rather blunt approach to culture. Merry notes that the U.N. treaty bodies' "tendency to see culture as a problem is enhanced by their commitment to a model of legal rationality, an idea that is incompatible with celebrating local cultural complexity."¹²⁵ Merry discusses the CEDAW Committee's problematic approach to the practice in Fiji of *bulubulu*, which is a custom in Fijian culture for reconciling disputes.¹²⁶ In recent years, the practice has been used to persuade prosecutors to drop rape charges and to convince magistrates to mitigate sentences.¹²⁷ The contemporary application of the custom in this context is highly detrimental to women and must obviously be curtailed. There should, however, be a nuanced analysis of custom, including its possible benefits to women—if any. According to Merry, in the case of *bulubulu*, the Committee demanded to know if the custom had been completely abolished without creating any discursive space for the recognition of its possible merits or for acknowledging how the tradition has changed over time.¹²⁸

The Maputo Protocol, on the other hand, offers a more nuanced approach to culture and tradition. The Maputo Protocol categorically rejects harmful cultural traditions.¹²⁹ At the same time, Article 17 of the Protocol states, "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."¹³⁰ The Protocol explicitly values the positive aspects of culture while simultaneously condemning those manifestations of culture that are harmful or discriminatory to

124. Andrew Byrnes, *The Committee on the Elimination of Discrimination against Women*, in *WOMEN'S HUMAN RIGHTS*, *supra* note 40, at 27, 58-59.

125. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology along the Way)*, *POL. & LEGAL ANTHROPOLOGY REV.*, May 2003, at 55, 71.

126. *Id.* at 68-69.

127. *See* MERRY, *supra* note 122, at 127.

128. *Id.* at 129.

129. *See* PROTOCOL, *supra* note 4, art. 2(1)(b) (including the obligation to "prohibit[] and curb[] all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women"). Article 2 also includes an obligation of states "to modify the social and cultural patterns of conduct of women and men . . . with a view to achieving the elimination of harmful cultural and traditional practices." *Id.* art. 2(2).

130. *Id.* art. 17.

women.¹³¹ One must not underestimate the signaling value of articulating a positive role for culture in women's lives.

Because the Protocol explicitly values the positive aspects of culture and cultural identity, women are less likely to feel as though they are forced to choose between their identities as members of cultural, racial, ethnic, or religious communities and their identities as rights-seeking individuals who are committed to gender equality. The Protocol, therefore, comes closer to reflecting the reality that cultural, racial, ethnic, and religious identity intersects with gender identity in meaningful ways in women's lives.

Although CEDAW's influence can be felt in the text of the Protocol, the Protocol takes a more nuanced approach to culture and tradition, explicitly acknowledging the positive role that it can play in women's lives. As such, the Protocol has the potential for greater resonance among women's rights activists in the region and around the world. Indeed, women should continue to play a role in shaping and re-shaping culture and tradition in ways that reflect a steadfast commitment to gender equality. The Protocol, in fact, explicitly supports women in this endeavor.

CONCLUSION

The architecture and influence of CEDAW is evident in the text of the Maputo Protocol. The Protocol, therefore, stands as yet another example of the many ways in which CEDAW has improved the lives of women in sub-Saharan Africa. CEDAW has played a role in critical test case litigation, law reform and constitution drafting, and public awareness and rights education. CEDAW's success in promoting women's equality through test case litigation has been mixed, with early successes confined to rights contests involving the public sphere. Unity Dow's successful challenge to facially discriminatory nationality legislation in Botswana is an example of these early successes. Cases from the 1990s, such as *Magaya*, challenging discrimination in the private sphere of family law where customary law often controls, were less successful. More recent cases out of South Africa and Kenya, including the *Bhe* case and the *Ntutu* case, respectively, offer hope that customary law will not shield personal or family law cases from constitutional scrutiny.

131. Article 5 of the Protocol obligates States parties to "prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards." *Id.* art. 5.

The Maputo Protocol also highlights a limitation of CEDAW, however. In contrast to CEDAW, the Protocol's explicit treatment of culture and tradition as potentially positive and healthy may resonate more strongly with women who value both equality and membership in a cultural community. The Maputo Protocol offers insight that could be useful to the CEDAW Committee as it attempts to navigate difficult and entrenched conflicts concerning women's human rights.

