

Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women

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I. INTRODUCTION¹

Recent developments illustrate an increasing awareness of the status of women's rights in Africa.² This awareness is reflected in the Constitutive Act of the African Union ("Constitutive Act"),³ and, more significantly, in the 2003 adoption of an additional Protocol to the African Charter on Human and Peoples' Rights ("African Charter")⁴ on the Rights of Women in Africa.⁵ Thirty African states have signed the Protocol on Women's Rights ("Protocol") and, as recently as October 26, 2005, Togo became the fifteenth nation to ratify the Protocol—the last ratification necessary to enter the Protocol into force.⁶

As indicated by the drafting process, the Protocol models the structure and the presumptions underlying the African Charter and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").⁷ The Protocol takes the broad view that the economic

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1 This Article draws in part from research that the author began in January 2005 while working at Equality Now, a nonprofit organization in Nairobi, Kenya.

2. Vincent O. Nmeielle, *A Decade in Human Rights Law: Development of the African Human Rights System in the Last Decade*, 11 HUM. RTS. BRIEF 6, 8 (2004).

3. Constitutive Act of the African Union OAU Doc. CAB/LEG/23.15 (May 26, 2001) (transforming the Organization of African Unity into the African Union).

4. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]. The African Charter has been ratified by all fifty-three member states of the Organization of African Unity/African Union. Cristof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN. ST. L. REV. 679, 683 (2004).

5. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, *available at* http://www.achpr.org/english/_info/women_en.html [hereinafter Protocol].

6. Benin, Cape Verde, Comoros, Djibouti, Gambia, Lesotho, Libya, Malawi, Mali, Namibia, Nigeria, Rwanda, Senegal, and South Africa were the first fourteen nations to ratify the Protocol. *Victory for Women's Rights in Africa*, PAMBAZUKA NEWS, Oct. 27, 2005, *available at* <http://www.pambazuka.org/index.php?id=30080>.

7. 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).

and social well-being of women is contingent on rights to equality, health, education, and political participation in economic, electoral, and customary institutions. The Protocol could serve as a blueprint for African governments, engaged in revising their national constitutions and in passing new equality legislation, to incorporate a more fulsome recognition of women's rights in these documents.

Borrowing from CEDAW and other international documents, however, may benefit some provisions in the Protocol more than others. Labor rights in the Protocol are framed by the rights to equal pay, to freedom from harassment in the workplace, and to equal opportunity for securing benefits and promotions. Property rights, as in CEDAW, are dispersed throughout the articles of the Protocol and primarily address rights to ownership and to inheritance.

Although these protections are important, the Protocol missed an opportunity to redefine labor in the context of women's exclusion from land. In Kenya, economic resources are tied to rights of property ownership and to access to land for subsistence and trade farming. The Protocol's labor and property rights perpetuate a division between "informal" and "formal" employment without addressing the ways in which African women's work may be undervalued or underreported. While the Protocol makes constructive references to rights in the "informal sector" and women's "economic activities," it does not tie these rights to land usage or rights to be free from discriminatory customs.⁸ These definitional and conceptual shortcomings are coupled with enforcement problems reflected in the Protocol's regional counterpart, the African Charter, and its international counterpart, CEDAW. Unless the Protocol is interpreted in a manner that addresses these concerns, it may only have a marginal impact on the current human rights obligations in the areas of labor and land and provide no new means or new reasons for enforcing the obligations that already exist in these areas.

II. WOMEN'S RIGHTS AND HUMAN RIGHTS UNDER THE AFRICAN UNION

Legal instruments of the African system largely ignored women's rights until recent years.⁹ The 1963 Charter of the Organization of African Unity ("OAU") made no mention of women.¹⁰ African nations designed the region's primary human rights document—the African Charter—in 1981 to protect state sovereignty.¹¹ The African Charter references women only twice: Article 2 includes sex in a broad non-discrimination clause and Article 18(3) requires states to eliminate "every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in

8. Protocol, *supra* note 5, art. 13.

9. Murray, *supra* note 7, at 253.

10. Charter of the Organisation of African Unity, 47 U.N.T.S. 39 (entered into force Sept. 13, 1963).

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

international declarations and conventions.”¹² Subsequent African legal instruments continued to frame women’s rights as rights related to family protection rather than to gender equality.¹³ As will be discussed further, grouping the rights of “the woman” and “the child” together in legal instruments mirrors the approach of Kenyan employment law that protects “women and juveniles” in industrial work places.¹⁴ Even though many African nations had already signed CEDAW,¹⁵ the Protocol sought to address this paternalism more particularly by seeking to strengthen women’s control over their role as child bearers and the role they play in their communities as a whole.¹⁶ However, in seeking to loosen the constraints that custom often imposes on women, the Protocol takes an approach that seems focused more on “filling the gaps” in the African Charter (and, in some ways, within CEDAW) than on addressing the complexities more contemporarily understood to affect the economic position of women.

A. *The African Union and Women’s Rights*

The African Union’s (“AU”) foundation treaty, the Constitutive Act, included the “promotion of gender equality” as a core principle of the new Union.¹⁷ In support of this principle, the AU created the Women’s Unit within the AU Secretariat. In addition, the AU focused on the position of women as connected to development issues. The AU’s development program, the New Partnership for Africa’s Development (“NEPAD”), refers to women’s rights in its mission statement and cites promoting gender equality as one of its primary objectives.¹⁸

But the generality of NEPAD’s promises is similar to the AU’s rhetoric regarding women’s rights: the AU fails to support or adequately fund its women’s rights initiatives.¹⁹ Enforcement mechanisms, such as the state-reporting system (whereby states make oral reports before the African Commission, the body that monitors the African Charter) and the judicial system (where cases are brought before the African Commission), are not widely used to promote or protect the rights of women.²⁰

12. See African Charter, *supra* note 4, art. 2, 18(3).

13. See Heyns, *supra* note 4, at 687–88 (2004) (arguing that “the lumping together of women and children” perpetuates “outdated stereotypes”).

14. See discussion of Kenya’s Employment Act *infra* pp. 244–45

15. United Nations Division for the Advancement of Women, CEDAW: States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 28, 2006).

16. See Protocol, *supra* note 5, art. 14 (rights to health and reproductive rights), art. 9 (rights to representation in the political and decision-making process).

17. Constitutive Act of the African Union, *supra* note 3, art. 4(l).

18. THE NEW PARTNERSHIP FOR AFRICA’S DEVELOPMENT (NEPAD) (Oct. 2001), ¶¶ 49, 67, 68, 118–19, available at <http://www.uneca.org/nepad/>; Wing & Smith, *supra* note 11, at 69.

19. See generally RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO AFRICAN UNION (2004) (tracking the development of the African Union and its policies regarding human rights).

20. Murray, *supra* note 7, at 270.

B. *The Process and Purpose of Drafting the Protocol*

Non-governmental organizations (“NGOs”), such as the Women in Law and Development in Africa (“WILDAF”) and the African Centre for Democracy and Human Rights Studies (“ACDHRS”), sought to address these problems by lobbying for a legally binding instrument that would provide an alternative, stronger platform for women’s rights. In July 1995, the Assembly of Heads of State and Government agreed to consider adopting a Protocol to the African Charter and appointed experts from the African Commission to draft the Protocol.²¹ Commissioners, as well as a few NGO representatives, prepared a Draft Protocol in 1997.²² After comments from the AU, the African Commission produced a final document in September 2000, and the Second African Union Summit adopted the Protocol in July 2003.²³

Despite the Protocol’s roots as an activist campaign, the African Commission did not widely consult other African organizations in the drafting process. Consequently, the Protocol is little known outside of the small cadre of organizations that lobbied for its creation.²⁴ The ability of activists to use the Protocol as a tool for African women is, thus, compromised by their lack of information about the document. This, in turn, may weaken the ability of local groups to use the Protocol in ways specific to their communities’ needs.

More importantly, the closed drafting process was at odds with the two major purposes of the Protocol. The first aim of the Protocol was to create an Africa-specific instrument for women’s rights under the African Charter. The African Commission noted that “the African Charter [as the] sole juridical instrument at the regional level in charge of promotion and protection of human rights does not offer enough [] specific guarantees as regards women’s rights in Africa.”²⁵ The second aim of the Protocol was to consolidate existing international standards and “to allow African governments to fulfil the international commitments [to which] they have subscribed.”²⁶ The problem is that the Protocol itself does not delineate how these two objectives can be accomplished by one instrument. In the context of land and employment rights, exemplified by events in Kenya, international documents like CEDAW may not adequately address the ways in which African women seek income through farming and trade. As will be discussed below, the discrimination that African

21. *Resolution of the Ordinary Session of the Assembly of Heads of State and Government*, AHG/Res.240 (XXXI) (1995).

22. Murray, *supra* note 7, at 262.

23. *Id.*

24. *Id.* at 263. A notable exception is the work of Equality Now, Regional Office (Nairobi), which began a campaign in 2001 to urge states to ratify the Protocol by relying on partnerships with women’s rights NGOs in other African countries. See Press Release, Equality Now, African Women’s Coalition Launches Campaign Calling on Governments to Ratify the Protocol on the Rights of African Women (June 29, 2004), available at http://www.equalitynow.org/english/pressroom/press_releases/coalition_20040629/coalition_20040629_en.html.

25. See Murray, *supra* note 7, at 263.

26. *Id.* at 263–64.

women face in the informal sector is perpetuated by the link between law and custom, a complexity which the Protocol seems to fail to address.

III. EMPLOYMENT DISCRIMINATION AND LAND RIGHTS

The definition of employment at the most general level—an activity for which one receives payment²⁷—needs some elaboration in the African context. Employment for women in Africa is characterized by subsistence and small-scale farming, and their participation in informal trade is connected to agriculture, as opposed to what might be normally understood as paid labor. This “unpaid” work is typically tied to women’s duties as mothers and wives, and to their community and familial relationships. African women’s agricultural labor, including subsistence and small-scale farming, will be referred to as “informal” labor and is distinguished from formal or salaried/contractual work. It is in this “informal” labor context that African human rights instruments, of the kind that the Protocol aims to be, could usefully qualify and add to the existing international obligations of African states by framing labor rights not only in terms of salaried employment, but also as work in and for the home. Yet the Protocol adheres to a definition of labor that overly differentiates between employment and agricultural work. The rights related to employment focus on equal pay and on freedom from harassment—rights important in the context of a salaried position but of little consequence for women deriving income from land or trade. In this regard, the Protocol is limited in its ability to address the obstacles that women face in developing and owning land and the impact of these obstacles on women’s ability to sustain a livable wage. Before analyzing the provisions regarding labor and employment in the Protocol more carefully, it is useful to explore the context in which many African women perform their labor.

A. Problems with Underreporting of Women’s Employment

As expressed by one woman in Ethiopia: “No [East African] woman is unemployed. Only a few are paid.”²⁸ Although specific employment patterns diverge across Africa, regional patterns seem to exist: 80% of African women do agricultural work,²⁹ which is the mainstay of most East African economies, and few women perform salaried professional and clerical work.³⁰ Sub-Saharan African countries, like Kenya, reflect similar employment patterns: women are largely excluded from formal, paid employment and they consti-

27. For example, the International Labor Organization (“ILO”) has defined employment as “an activity within a given occupation and specified time from which a person earns a living.” Tihitina Legesse, *Women and Employment in Ethiopia*, REFLECTIONS, Dec. 2001, at 75, 75.

28. *Discussion and Debate: Women and Employment in Ethiopia*, REFLECTIONS, Dec. 2001, at 86, 87.

29. Aderanti Adepoju, *The Demographic Profile: Sustained High Mortality & Fertility & Migration for Employment*, in GENDER, WORK & POPULATION IN SUB-SAHARAN AFRICA 17, 23 (Aderanti Adepoju & Christine Oppong eds., 1994).

30. *Id.*

tute almost half of the agricultural workforce³¹ and 70% to 80% of all subsistence farmers.³² The chief reasons cited for women's exclusion from the formal sector are lack of education,³³ poor mobility, restrictions on reproductive choice, and workplace discrimination.³⁴

The ways in which labor is described may exclude and undervalue work in the informal sector—characterized by small-scale trade, domestic services, and craftwork.³⁵ National labor censuses and studies by the International Labor Organization (“ILO”) routinely underestimate the contribution of women to the work force: “official and unofficial estimates of the female labour force in Africa are highly suspect and in many instances hardly believable.”³⁶ Factors identified by Richard Anker as contributing to an under-inclusive definition of “work” are poorly timed research that does not take into account the seasonal and agricultural nature of women's work, the use of a minimum hours criterion, the focus on finding the “main” labor source when women engage in several forms of labor (including household labor), and problems in training researchers to be sensitive to divergent cultural practices.³⁷

One means of addressing Anker's findings is to define, and, thus, measure, labor in ways that capture the timing and the scope of women's work. Although the definition of labor is becoming broader, researchers continue to fail to ask what kinds of work women are doing and how value should be ascribed to that work.³⁸ More particularly, researchers struggle to gauge accurately what impact domestic contributions through subsistence farming, trade, and manufacturing crafts for the home have on family income and national economy.³⁹ Luisella Goldschmidt-Clermont suggests that researchers measure the value of return of women's agricultural and domestic labor in terms of income, products, or other tangible goods for the household.⁴⁰

31. Wing & Smith, *supra* note 11, at 48.

32. Esther Mwangi, *Not Yet Paradise: Women, Environment and Sustainable Development in Africa*, in SUSTAINABLE DEVELOPMENT, GOVERNANCE, GLOBALIZATION: AFRICAN PERSPECTIVE 132, 134 (Heinrich Boll Foundation ed., 2002).

33. Adepoju, *supra* note 29, at 23. Only 37% of African women are literate. Only 41% of girls between the ages of fifteen and nineteen are in primary and secondary school. Wing & Smith, *supra* note 11, at 48.

34. Adepoju, *supra* note 29, at 30–31. Research traditionally associates the migration of a female with the migration of her spouse. Recent trends indicate more women move to urban areas in search of better wages. However, research also concludes that women who move to cities for salaried employment are often subjected to discrimination (based on sexist hiring practices) and economic exploitation.

35. Alemnesh Haile Mariam, *Women in the Informal Sector in Ethiopia*, REFLECTIONS, Dec. 2001, 94, 97. One source estimates that women's contribution to the unpaid market is equivalent to eleven trillion U.S. dollars in labor revenue. Legesse, *supra* note 27, at 80.

36. Richard Anker, *Measuring Women's Participation in the African Labour Force*, in GENDER, WORK & POPULATION IN SUB-SAHARAN AFRICA 64, 74 (Aderanti Adepoju & Christine Oppong eds., 1994).

37. *Id.* at 70–71.

38. *Id.*

39. Luisella Goldschmidt-Clermont, *Assessing Women's Economic Contributions in Domestic & Related Activities*, in GENDER, WORK & POPULATION IN SUB-SAHARAN AFRICA 76, 85 (Aderanti Adepoju & Christine Oppong eds., 1994).

40. *Id.* at 82.

B. Agriculture as Employment

Research into the practices of Sub-Saharan women shows that most derive income by “produc[ing] directly a proportion of their required consumption good . . . between crops grown for sale and self provisioning.”⁴¹ This small-scale farming is a combination of subsistence farming and farming for profit. For African women working in the informal, agricultural sector, their labor shifts with the needs of the season and is often temporary and underpaid. As reported in 1991, in twenty-six African countries, between 80% and 97.8% of all economically active women worked in agriculture.⁴²

The sex-specific roles of many African familial traditions permeate how agricultural work performed by women is valued. The types of farming that are considered culturally valuable, like farming from larger plots of land primarily for market, is performed largely by men, whereas small-scale or family-based subsistence farming, comprising most of East African farming, is undervalued and done by women.⁴³ Women often “retain a very substantial responsibility for a wide variety of domestic tasks” and “are increasingly to be found working for their neighbours in return for food rather than wages.”⁴⁴ Researchers have attributed the sex segregation of agricultural work to the “complex set of rights that household members have in relation to assets and labour, as well as to income and subsistence.”⁴⁵ Women’s work is often seen as an obligation owed to the family, not as value created for the family. Research shows that most of a woman’s income goes toward family expenditures, while up to ninety percent of a man’s income is spent for himself.⁴⁶

Considerations of cultural practice are also important because they are one of the key reasons for women’s lack of control over agricultural resources. In its 2003 report to the Kenyan government, the CEDAW Committee noted, “discriminatory customs and traditional practices remain prevalent in rural areas, thus preventing women from inheriting or acquiring ownership of land.”⁴⁷ There is a stark contrast between women’s lack of land ownership and their contributions to land development. For example, in Uganda, women comprise 70% to 80% of the agricultural work force, and contribute 80% of food production, yet own only 7% of the land.⁴⁸

41. Ann Whitehead, *Wives & Mothers: Female Farmers in Africa*, in GENDER, WORK & POPULATION IN SUB-SAHARAN AFRICA 35, 41 (Aderanti Adepoju & Christine Oppong eds., 1994).

42. Mwangi, *supra* note 32, at 134.

43. See generally Whitehead, *supra* note 41.

44. *Id.* at 41.

45. *Id.* at 39.

46. Wing & Smith, *supra* note 11, at 50.

47. Committee on the Convention on the Elimination of All Forms of Discrimination Against Women, 592nd and 593rd meetings (Jan. 15, 2003), CEDAW/C/SR.592 and 593, recommendation 223, 1995.

48. Committee on the Convention on the Elimination of All Forms of Discrimination Against Women, Third Periodic Report of States Parties: Uganda (July 3, 2000), CEDAW/C/UGA/3 at 57.

IV. NATIONAL LEGAL FRAMEWORKS: KENYA AS AN EXAMPLE

Problems of underreporting and undervaluing the majority of work performed by women are as prevalent in Kenya as they are elsewhere in Africa. The role of family and culture is a powerful influence on the public recognition of Kenyan women's economic rights. Women constitute 75% of Kenya's agricultural work force, farming mostly for subsistence.⁴⁹ However, only 1% of women in Kenya own the land on which they work.⁵⁰

Kenya's employment laws and anti-discrimination measures are based on the common law. As such, they provide for equal pay and equal access but not for greater agricultural autonomy or protection for those women self-employed in trade or craft industries. This is particularly worrisome because Kenyan women's responsibility for small-scale farming is increasing as more men move to urban areas in search of paid employment.⁵¹ This migration pattern means greater responsibility and less security for women because they will no longer have the contribution of income from their husbands if their husbands move in search of work. As will be shown, the combination of Kenyan statutory law, constitutional rights, and customary law further complicates issues related to women's employment and land rights.

A. *The Employment Act*

Employment in Kenya is governed by the Employment Act of 1984.⁵² The Employment Act does not include an anti-discrimination provision and deals mostly with minimum wage standards, maximum hour requirements, and workplace safety measures. Part IV of the Employment Act governs employment of "women and juveniles" in the "industrial sector," defined as mines, factories, construction work, and transport of passengers by road, rail, or inland waterway.⁵³ The relevant provisions prohibit women from working "between the hours of 6:30 p.m. and 6:30 a.m. in an industrial undertaking" except in "cases of emergencies which could not have been controlled or foreseen"⁵⁴ None of these restrictions apply to families working together, unless the employment is "by its nature or the circumstances . . . dangerous to the life, health or morals of the persons employed therein"⁵⁵ Women are also mentioned in Part II of the Employment Act, "Conditions of Employment," which guarantees women two months maternity leave, "provided

49. Jacqueline Adhiambo Oduol, *Do Customary Issues Have a Role to Play in a Modern Constitution?*, in PERSPECTIVES ON GENDER DISCOURSE: GENDER AND CONSTITUTION-MAKING IN KENYA 38, 45 (Asegedech Ghirmazion et al. eds., 2002).

50. *Id.*

51. *Id.* at 38.

52. The Employment Act (1984) Cap. 226. (Kenya).

53. *Id.* § 24(2)(a-d).

54. *Id.* § 28(1). "No female shall be employed on underground work in a mine" except when in management, health or welfare services, in the course of studies, or non-manual occupation. *Id.* § 30(a-d).

55. *Id.* § 24(1).

that a woman who has taken . . . leave [] forfeit[s] her annual leave in that year.”⁵⁶

As in Article 18(3) of the African Charter, women's rights in Kenya's Employment Act are connected to children's rights or family responsibilities, emphasizing that women's rights continue to be associated with protections for the family. The Employment Act does not address women's rights in informal employment. In light of these deficiencies, the Kenyan Government appointed a task force in 2001 to review Kenya's labor laws and to make recommendations for revisions to the Employment Act.⁵⁷ Proposed changes included adding anti-discrimination and equal pay for equal work provisions, treating sexual harassment as an allegation of misconduct subject to disciplinary action, and shifting the burden of proof to the employer in allegations of unfair dismissal.⁵⁸ These reforms speak to sexual harassment and pay equity, but they do not address employment that is not salaried or contractual. For example, in Kenya's Rift Valley, local flower farmers, who are primarily women, would not receive the benefit of most labor protections under Kenya's Employment Act because their work is seasonal and not contractual. As a consequence, it is difficult for these women to contest their wages and to challenge poor working conditions, which includes exposure to pesticides and other dangerous chemicals.⁵⁹

B. Constitutional Rights and Reform

The Kenyan Constitution, ostensibly, protects women from discrimination where the Employment Act does not. The non-discrimination statement in the Kenyan Constitution resembles the non-discrimination statements in most modern constitutions. Article 70 states that “every person in Kenya is entitled to the fundamental rights and freedoms of the individual,” whatever the person's “sex.”⁶⁰ Article 82 further states that “no law shall make any provision that is discriminatory either of itself or in its effect,” defining discrimination as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by . . . sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not.”⁶¹ In addressing the discriminatory “effect[s]” of laws, the Kenyan Constitution includes a disparate impact standard, a powerful tool for challenging employment practices that burden groups disproportionately. The Kenyan High Court recently allowed a

56. *Id.* § 7(2).

57. Kenyan Commission on Human Rights, *Proposed Labor Laws and Their Effect on Business*, NGUZO ZA HAKI, Sept. 2004, at 33, 33.

58. *Id.* at 34.

59. Mwangi, *supra* note 32, at 139.

60. CONSTITUTION, Art. 70 (1998) (Kenya).

61. *Id.* Art. 82.

woman to bring a case, under the Constitution's equality provisions, against an employer who dismissed her after learning that she was HIV positive.⁶²

But the Constitution's non-discrimination provision is extremely limited because it does not apply to "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" in the application of customary law.⁶³ In the case cited above, the same HIV-infected woman, with Article 82's sanction, could be legally excluded from inheriting land or from entering a family occupation. For women in the informal sector, their access to land is governed by family custom—rights in marriage and rights to property—where the practices that discriminate against women are personal laws.

The Kenyan government recognizes problems with its existing constitutional framework and is currently drafting a new constitution.⁶⁴ Activists for women's rights seek to eliminate the exceptions to the Kenyan Constitution's non-discrimination rights and to change women's employment and property rights through new constitutional language.⁶⁵ The draft non-discrimination statement now prohibits discrimination based on marital status or pregnancy and recognizes social and economic rights.⁶⁶ Despite work on a new constitution and on a revised Employment Act, in Kenya, arguments for women's rights are continually balanced against arguments for cultural self-determination.⁶⁷

C. Customary Law and Land Law

Labor rights in paid employment address only a small segment of Kenyan women because land ownership and usage—although subject to civil statutes—are largely determined by customary practices. As already noted, because Kenyan women are overrepresented in agricultural trades, they are most affected by customs that govern land use.⁶⁸ Under customary law, or law particular to tribal affiliations, women are effectively prevented from owning land.⁶⁹ Women's freedom to use land is inhibited by customary or tribal laws dictating what crops may be planted. Upon divorce or separation from their husbands, or upon the death of their husbands, women can be denied property rights in their land and homes.

Custom remains a powerful force not only because of the inapplicability of Article 82's equality and non-discrimination rights to customary law, but also because national land law has done little to protect women's property inter-

62. Tim Curry, Nerina Cevra & Jennifer Podkul, *Updates from the Regional Human Rights Systems*, 12 HUM. RTS. BRIEF 26, 26–27 (2004).

63. CONSTITUTION, *supra* note 60, Art. 82(4).

64. Section 26(2) of the Constitution of Kenya Review Act (2001) governs the process of writing a new constitution for Kenya.

65. Immaculate Kassait, *A New Constitution for Kenyans: An Empty Promise?*, in WOMEN AT CROSSROADS, FEDERATION OF WOMEN LAWYERS 2004 ANNUAL REPORT 19, 23–26 (2004).

66. *Id.* at 24.

67. Oduol, *supra* note 49, at 41.

68. *Id.* at 38, 45. Custom varies among the over forty ethnic groups in Kenya. *Id.* at 38.

69. Wing & Smith, *supra* note 11, at 39.

ests. Property is categorized as land held in trust by the government, land owned by the government, or land owned privately. In the last twenty years, the government sold much of its trust land under a system of registration. Under the Registered Land Act, the registrant is entitled to absolute ownership, free from all claims or interests asserted by third parties. Thus, with respect to family land, registration extinguishes women's secondary rights to land access and usage.⁷⁰

Registration is the point where custom and statutes intersect: tradition caters to men as the registrant because men have typically represented their families in public affairs. The majority of registered land is thus registered in men's names.⁷¹ In order to claim legal ownership, a woman must either register the family land in her own name or register jointly with her spouse, which happens rarely.⁷² After land is registered in a husband's name, the husband, as sole owner of the family land, can sell the property without consulting his wife and can even eject his wife from the land.⁷³

Beyond the registration system, property rights are also interlinked with marital status and succession.⁷⁴ The Married Women's Property Act of 1882 governs civil or state marriage in Kenya.⁷⁵ Under the Married Women's Property Act, there is no presumption that a married couple jointly owns land.⁷⁶ However, as established by common law, a woman retains ownership of property she owned before her marriage. She is also entitled to property she contributed to during her marriage and to property acquired in part through her income. However, the current statutory scheme does not explicitly recognize a woman's non-monetary, domestic contribution to land, although courts have been more willing to recognize such contributions.⁷⁷ Even if women's ownership of land is statutorily allowed, she may be discouraged from asserting this right. An unmarried woman may use her family's land (usually held in her father's name) but may claim no permanent use or ownership rights to the land.

Kenya's succession laws were consolidated under the Law of Succession Act, which follows the common law model of passing property to the surviving

70. MARJOLEIN BENSCHOP, RIGHTS AND REALITY: ARE WOMEN'S EQUAL RIGHTS TO LAND, HOUSING AND PROPERTY IMPLEMENTED IN EAST AFRICA?, 152-53 (2002). Past holdings by the High Court suggest that a registrant may be able to hold land in "customary trust." *Id.* at 153.

71. *Id.* at 47.

72. *Id.* at 152. For example, data from Cameroon indicate that less than ten percent of women have the land certificates necessary to prove ownership of land. Mwangi, *supra* note 32, at 134.

73. BENSCHOP, *supra* note 70, at 151. Co-ownership is more frequently accomplished for women through co-operatives or land buying companies that pool resources and, then, distribute shares in the land to its members. *Id.* at 152.

74. *Id.* at 157-59. Statutes regarding divorce only apply to monogamous marriages, and, thus, are not applicable to many Islamic and customary unions. *Id.* at 161.

75. *Id.* at 159.

76. *Id.* at 152.

77. *Id.* at 161-62. Kenyan courts have given women the right to show contributions to property, made subsequent to marriage. Women also retain the right to control land that was legally theirs prior to marriage. *Id.* at 160-61.

spouse.⁷⁸ However, because Article 82 of the Kenyan Constitution allows custom to dictate succession, many Kenyan communities continue to use a patrilineal system of inheritance in which property is passed to the deceased's male child(ren) rather than to his wife. If the deceased does not have any male child(ren), the deceased's property is largely treated as if it belonged to an unmarried man; as a result, a woman who works and uses the land for her and her family's livelihoods can be deprived of ownership, and, ultimately, control of the land at the death of her husband.⁷⁹

V. PROMISES AND PROBLEMS: THE PROTOCOL, LABOR, AND LAND

As noted in the discussion of Kenya's legal framework, writing a new constitution, revising the Employment Act, and attempting to influence customary practices are arduous tasks that are not done in concert with each other. These reform strategies fail to address how women's exclusion from decision-making in their families and communities, as well as the status of the informal workforce, are part of a larger problem. The Protocol may, on one hand, offer more comprehensive solutions than piecemeal legislative reform. The Protocol includes protections for women's rights to economic independence, to own and manage land, and to equal partnership in making decisions about property, regardless of marital status. Many of these protections challenge laws and customary practices regarding land ownership, marriage, divorce, and succession. However, it is not clear that the Protocol sets out consistent and enforceable standards that will prove more effective in changing labor and land practices. Closer examination of the Protocol reveals that it may fall into familiar traps where women's labor rights are concerned, despite the fact that it covers a broad range of rights and makes a valuable contribution to existing human rights standards. First, rights in informal employment are only referenced briefly in the Protocol, appearing to be more of an afterthought than an attempt to redefine labor in an African context.⁸⁰ Second, it is not clear how the Protocol's more abstract rights to culture and to equality can be used to better protect women's interests.⁸¹ Finally, the Protocol relies on enforcement structures that have already proven inadequate.⁸²

A. *The Benefits of the Protocol as Applied to Kenyan Land and Labor*

1. *Equality and Culture*

The Protocol prohibits laws that discriminate both in form and in effect. Article 2 states that governments "shall combat all forms of discrimination against

78. *Id.* at 163–64.

79. *Id.* at 168.

80. See Protocol, *supra* note 5, art. 13.

81. See *id.*, arts. 2, 17.

82. *Id.* arts. 25–26.

women through appropriate legislative, institutional and other measures,”⁸³ including “curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.”⁸⁴ Article 2 of the Protocol conflicts with Kenya’s constitutional sanction of personal and customary laws’ discrimination against women. Thus, Article 2 could be used to argue that Kenya’s constitutional exception for discrimination by personal laws needs to be amended to “combat all forms of discrimination.” If such an amendment were adopted, it could affect the operation of the Kenyan land registration system which, although not facially discriminatory, disproportionately favors men as traditional decision-makers in land matters.

In addition to the more general prohibition against discrimination, the Protocol also makes clear that custom is not an excuse for policies or practices that are harmful to women. Article 2(2) imposes a duty on states to “achiev[e] the elimination of harmful cultural and traditional practices.”⁸⁵ Although Kenya’s customary patrilineal inheritance system is currently not subject to the Kenyan Constitution’s equality provisions, bestowing a deceased’s land only on his sons would offend the principles underlying Article 2 of the Protocol. The responsibility of African states to modify harmful cultural practices is reiterated in Article 5 of the Protocol which requires that states “prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.”⁸⁶ Moreover, the Protocol creates a positive, freestanding right for women “to live in a positive cultural context and to participate at all levels in the determination of cultural policies.”⁸⁷ For Kenya, this would require a review of succession laws and their impact on women; if those laws are complemented by discriminatory, customary practices, the Protocol suggests that the Kenyan Parliament has a responsibility to legislate against those customs.

However, the Protocol does not make clear how rights to equality and to freedom from cultural stereotypes would apply in the labor context. Unlike rights set out in more specific detail (such as the right to equal wages),⁸⁸ Article 5(b) of the Protocol arguably narrows the meaning of cultural rights by referencing the practice of female genital mutilation (“FGM”),⁸⁹ and, more generally in 5(d), “forms of violence, abuse and intolerance.”⁹⁰ It seems clear from these references that the Protocol drafters did not have economic injury in mind when contemplating cultural rights, but rather, were

83. *Id.* art. 2(1).

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

85. *Id.* art. 2(2).

86. *Id.* art. 5.

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

88. *Id.* art. 13(b).

89. *Id.* art. 5(b).

90. *Id.* art. 5(d).

focused on physical or psychological harm. This is apparent in the solution to harmful practices that Article 5(c) suggests: “support to victims . . . through basic services” and “counseling as well as vocational training.”⁹¹ Counseling may meet the needs of victims of abuse, but has little value in helping those hurt financially by customary practices.

2. *Employment and Land*

Women’s economic rights are mainly addressed in Article 13 of the Protocol. Economic rights are described as rights to “equal opportunities in work and career advancement and other economic opportunities.”⁹² The Protocol focuses mainly on rights in the formal sector, such as rights to equal pay, to benefits, and to freedom from sexual harassment. Article 13, however, takes a more innovative approach to employment rights by referencing the value of women’s work in the home⁹³ and in the informal sector.⁹⁴ Article 13’s requirement that states “take the necessary measures” and “create conditions to promote and support” informal trades and domestic labor at least recognizes the ways in which women’s economic well-being and their work in the informal sector are related.

Although Article 13 contemplates “protection and social insurance for women working in the informal sector”⁹⁵ and recognition of “economic value of the work of women in the home,”⁹⁶ it deals primarily with state duties regarding “equal opportunities in work and career advancement and other economic opportunities.”⁹⁷ The focus of the article is clearly on women’s equality in salaried employment, with rights to “equality of access to employment,” “equal remuneration,” and “transparency in recruitment, promotion and dismissal” listed first and constituting the majority of the text of Article 13.⁹⁸ There is little reference to the relationship between women’s income and their rights to property. Had the nexus between land rights and income been a primary concern, Article 13 would have spelled out more rights for informal workers—such as a right to full possession of land after an enumerated number of years worked on the land, or a right to a portion of the income derived from land, or a right to safe working conditions for domestic or home laborers—rather than focusing on the rights to freedom from sexual harassment and to equal pay. In fact, earlier versions of the Protocol did not even give explicit protection to contractual rights or to the administration of prop-

91. *Id.* art. 5(c).

92. *Id.* art. 13.

93. Article 13(e) obliges the state to “create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector.” *Id.* art. 13(e).

94. Article 13(h) strengthens this protection by creating an obligation to “take the necessary measures to recognise the economic value of the work of women in the home.” *Id.* art. 13(h).

95. *Id.* art. 13(f).

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

97. *Id.* art. 13.

98. *Id.*

erty.⁹⁹ The rights for elderly women and women with disabilities include a provision for “access to employment and professional [and for women with disabilities, “vocational”] training,” but not for economic development in the informal sector. The Protocol’s lack of focus on the rights of informal workers is disappointing given the unambiguous research, discussed in previous sections, indicating that African women work primarily in agriculture and that their work is crucial to national economies.

Article 19(c) of the Protocol, concerning women’s rights to a sustainable environment, may address women’s contributions in the informal sector. Article 19(c) obliges states to take all appropriate measures to “promote women’s access to and control over productive resources such as land and guarantee their right to property.”¹⁰⁰ Additionally, under Article 19(f), states must reduce the “adverse effects of the implementation of trade and economic policies”¹⁰¹ on women. It is hoped that language such as this will have a “mainstreaming” effect, forcing states to consider whether their economic and environmental policies will create greater hardship for women. But additional language may be needed to reflect and address the extent of women’s participation in informal markets, tying Article 13 and Article 19 together. Instead of being treated as an ancillary concern, African women’s income from land should define and shape their labor and employment rights.

3. *Marriage and Succession*

Article 6 of the Protocol, addressing women’s rights in marriage, stresses the right of wives to make decisions in partnership with their husbands. Article 6(j) explains that “during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.”¹⁰² According to Article 7, regarding women’s rights in divorce, including their right to child custody, “in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.”¹⁰³ Article 21 of the Protocol guarantees widows “the right to an equitable share in the inheritance of the property of [their] husband[s],” “the right to inherit, in equitable shares, their parents’ properties,” and “the right to continue to live in the matrimonial house,”¹⁰⁴ even upon remarriage.¹⁰⁵

The Protocol’s inclusion of a woman’s right to “acquire her own property and to administer and manage it freely” is not new. Women in countries like Kenya, under the common law and the Married Women’s Property Act, are

99. See Murray, *supra* note 7, at 265.

100. Protocol, *supra* note 5, art. 19(c).

101. *Id.* art. 19(f).

102. *Id.* art. 6(j).

103. *Id.* art. 7(d).

104. *Id.* art. 21.

105. See *id.* (“In the case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.”).

already able to own property. Article 6(j) does not address women's rights to use of property because it makes administering and managing property contingent upon ownership. The use of the term property throughout the article is indicative of an approach that views property as that which is already owned, not as land used for subsistence income. As in the employment rights context, this conception conflicts with findings that show that it is women's access to land, both in and out of marriage, that is limited.

Article 7 of the Protocol, addressing women's rights in divorce, fails to consider a wife's domestic contribution to property.¹⁰⁶ Courts in Kenya have been more willing to allow equal division of property based on a wife's contribution to the home and rearing of children.¹⁰⁷ The Protocol, therefore, may fail to elucidate the standards toward which national courts are currently moving. In addition, problems with vague language, such as Article 6(e)'s right of women to "choose their matrimonial regime,"¹⁰⁸ and unexplained methodology, such as using traditional conceptions of the term "property," might inhibit effective enforcement of the Protocol.

B. Enforcing the Protocol

The draft Protocol reflected the structure of the African Charter and attempted to interpret each article as related to women by using international standards like those found in CEDAW.¹⁰⁹ If the purpose of the Protocol was to create an "African CEDAW," then there should have been more discussion about what an African approach would look like in light of African women's experiences. As argued above, the Protocol does not clearly stake out new and imaginative ground in the area of employment and income. Instead, it incorporates provisions from the African Charter and CEDAW without thought as to why some rights are included but others are not and without thought as to how the Protocol fits together as a whole. The result may be a structure that lacks consistency.¹¹⁰ For example, the Protocol, in Article 10, includes a right to peace that mirrors a similar provision in the African Charter, yet the Protocol does not substantively consider indigenous rights like the African Charter does.¹¹¹ In other areas, the Protocol adds to existing international standards.¹¹² Article 12 of the Protocol includes a "right to education and training,"¹¹³ whereas CEDAW only refers to rights to "education."¹¹⁴ Perhaps this

106. *See id.* art. 7.

107. In a recent case, the Kenyan High Court considered a wife's pain during the birth of her children to be a "contribution" to the marriage. Interview with Faiza Mohammed, Dir., Equality Now, in Nairobi, Kenya (Jan. 7, 2005).

108. Protocol, *supra* note 5, art. 6(e).

109. Meeting of Experts on the Draft Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, Nov. 12–16, 2001, *Report of the Meeting*, Expt/Prot.Women/Rpt.(I), ¶ 110.

110. *See Murray*, *supra* note 7, at 269.

111. *Id.* at 265.

112. *Id.* at 266.

113. Protocol, *supra* note 5, art. 12.

114. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res.

inconsistency is due to the ways in which terms in the Protocol vary from those in CEDAW.¹¹⁵ The rights in CEDAW are usually phrased as “states parties shall . . .” and “states parties . . . shall ensure to women, on equal terms with men, the right . . .”¹¹⁶ However, the Protocol adopts a variety of approaches, framing some provisions as state duties, “states shall ensure . . .,”¹¹⁷ and others as positive rights applicable without state action.¹¹⁸ An inconsistent approach is noteworthy insofar as it suggests a lack of vision for actual implementation of the rights of the Protocol; if states’ obligations under the Protocol are unclear, then debate will focus on the nature of states’ obligations under the Protocol, rather than whether states have met the standards of the Protocol.

It also is difficult to determine how the Protocol will supplement existing methods of enforcement.¹¹⁹ Now that the Protocol has the requisite number of signatures for ratification, it will be interpreted by the African Commission—the same body interpreting the African Charter—and perhaps one day by the AU Court.¹²⁰ The problem, however, is that all African states are parties to the African Charter but not all states will be party to the Protocol. This may have unintended consequences: the African Commission or AU Court may find it unnecessary to use the African Charter to protect women’s rights because the Protocol exists.¹²¹ But, if the AU Court fails to consider the African Charter as a women’s rights document, the African Charter’s equality and anti-discrimination jurisprudence for women might go undeveloped.

Whereas the African Charter and CEDAW allow parties to make specific and detailed reservations, there is no express provision on reservations in the Protocol. A number of African states have ratified CEDAW with a long list of reservations.¹²² It is unlikely that states with extensive reservations under CEDAW would commit to the Protocol without exception. Some African states already registered objections to certain provisions of the Protocol at

34/180, at 193, 34 U.N. GAOR Supp. No. 46, U.N. Doc. A/34/36 (Sept. 3, 1981) [hereinafter CEDAW].

115. See Murray, *supra* note 7, at 265.

116. See CEDAW, *supra* note 114.

117. Protocol, *supra* note 5, art. 6.

118. See, e.g., *id.* art. 4(1) (“Every woman shall be entitled to respect for her life . . .”).

119. See Murray, *supra* note 7, at 269–71.

120. In 1998 the Assembly of Heads of State and Government of the Organization of African Unity adopted a *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, OAU/LEG/MIN/AFCHPR/PROT (I) (June 9, 1998), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/africancourt-humanrights.pdf>. In December 2003, Comoros became the fifteenth state to ratify the Protocol, the last ratification required to enter the Protocol into force. Press Release No. 121/2003, African Union, The Protocol on the African Court on Human and Peoples’ Rights to Come into Force Soon (Dec. 26, 2003), available at http://www.africa-union.org/News_Events/Press_Releases/121protocol%20on%20African%20Court%20to%20come%20into%20force.pdf.

121. Murray, *supra* note 7, at 270.

122. Wing & Smith, *supra* note 11, at 58. See *General Recommendation No. 4: Reservations to the Convention*, CEDAW Committee, U.N. Doc. A/42/38 (Apr. 12, 1987) (evidencing the significant number of reservations State Parties have imposed on the treaty).

the drafting meetings.¹²³ This seems like a fundamental problem in the Protocol: states that would normally object to some provisions of the Protocol do not have the means to do so. Such a limitation on states may lead to a wholesale rejection of the document by countries that do not agree with a set of the Protocol's provisions.

The Protocol might add to states' monitoring duties by including a provision related to compliance by national law enforcement. Article 25 guarantees an appropriate remedy for violations of the Protocol: "State parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."¹²⁴ This provision is promising because it pressures parties to make the rights under the Protocol effective in national courts. The utility of the rights in the Protocol, however, remains uncertain.

Despite problems with incorporating a sufficient enforcement mechanism in the Protocol, reform efforts continue to focus on the need of African states to incorporate international duties under CEDAW. The CEDAW Committee stated that any new Kenyan Constitution "should provide for the applicability of international conventions ratified by the State party," such as the incorporation of CEDAW into domestic law.¹²⁵ Likewise, the World Summit for Social Development encouraged ratification and full implementation of CEDAW in East Africa.¹²⁶ While the value of ratifying documents like CEDAW is not at issue here, for the purposes of this discussion it is worth noting that problems arise when activists focus all their energies on adopting these documents without shoring up gaps in how these documents address more localized concerns.

The Protocol may not adequately comprehend how employment is experienced in East Africa because it does not address the complexity of women's identity. Whereas CEDAW covers a broad range of issues, it does not deal with how sources of oppression, such as racism, colonialism, and classism overlap with sexism.¹²⁷ For example, CEDAW (and the Protocol) set forth general guarantees for promoting equality and reducing cultural stereotypes as well as more specific rights in the workplace. However, to revise the common law basis by which labor is defined (such as by salaried employment) and to change the property practices so that women have better access to land ownership means re-conceptualizing the manner in which the private and public

123. See Murray, *supra* note 7, at 269.

124. Protocol, *supra* note 5, art. 25.

125. CEDAW Committee, *supra* note 47, recommendation 205.

126. *The Copenhagen Consensus: A Summary of Principal Commitments of the World Summit for Social Development*, compiled by the International Council on Social Welfare (ICSW) (1995), Commitment 5(f) [hereinafter World Summit for Social Development].

127. Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 96 (2003).

elements of women's lives intersect. This is not to say that treaties like CEDAW have not been instrumental in helping advance a vision of equality that is less formalistic and more expansive, where states may be held responsible for human rights obligations.¹²⁸

International documents like CEDAW, unlike regional arrangements, have difficulty incorporating a more particular understanding of how women are affected by contextual and geographical factors and how factors like social class, religion, and ethnicity contribute to discrimination against women.¹²⁹ Globalization is an area where an intersectional approach is useful because women's experience of labor discrimination cannot be divorced from their racial or class marginalization.¹³⁰ This tension is particularly acute when motherhood and the classically labeled private dimension are at issue. In this context, "women are often constructed as the cultural symbols of the collectivity, of its boundaries, as carriers of the collectivity's 'honour' and as its intergenerational reproducers of culture."¹³¹ In groups concerned with the preservation of their identity, women are often the "symbolic bearers of the collectivity's identity and honour," where departure from custom is perceived as a threat to group honor.¹³² If women are imagined as the transmitters of group identity, then efforts to encourage rights which are at odds with community roles can be threatening. Women's role and identity within groups is complicated by this duality: an identity that is formed in part by group characteristics and an identity that is often subjugated because of a group's norms or because of group decisions that undervalue women's interests.¹³³

Perhaps a more descriptive analysis needs to be built into human rights instruments like the Protocol. The CEDAW Committee's procedure of reviewing state party reports gives the Committee leeway to explore the complexity of women's interests in the context of race or ethnicity.¹³⁴ However, the weakness of CEDAW enforcement measures undermines the Committee's work more generally. A better approach may be to take the contextual approach of the CEDAW Committee, and of those measures described below, and use it to inform the interpretation of the Protocol. The Protocol provides for monitoring, in Article 26,¹³⁵ mirroring the African Charter, which requires states to provide details on the status of women's rights when making a re-

128. *Id.* at 82.

129. *Id.* at 103.

130. Some of the more glaring examples include women employed by multi-national corporations being forced to endure pregnancy tests, inadequate working conditions, and sexual violence and harassment. *Id.* at 126–27.

131. NIRA YUVAL-DAVIS, *GENDER AND NATION* 67 (1997).

132. *Id.* at 45–46.

133. Lois West, *Feminist Nationalist Social Movements: Beyond Universalism and Towards a Gendered Cultural Relativism*, 15 *WOMEN STUD. INT'L E.* 563, 575 (1992).

134. Bond, *supra* note 127, at 142–43.

135. Protocol, *supra* note 5, art. 26(1).

port under the African Charter. However, the reporting obligations have not yet been utilized to strengthen women's rights.¹³⁶

C. Reform Measures as Examples

The Protocol promises to address inequality as it affects women's lives, but then offers rights that do not adequately address the ways in which women's economic interests depend on rights to own and cultivate land. In more recent years, international organizations working in economic development have stressed the need to reform property laws and rewrite policies governing access to agricultural finance. Recommendations from various international bodies concentrate on rights with measurable outcomes, marking an approach that might be better suited to addressing the complex relationship between work, land, custom, and sex discrimination.

For example, at the Seventh African Conference on Women, the African Development Bank issued a set of recommendations to promote sex equality through policy impact assessments, poverty reduction strategies, and state and private actor responsibility agreements.¹³⁷ These recommendations are complemented by the African Development Bank's pledge "to recognize that economic empowerment covers realities that vary according to the group of women."¹³⁸ More specific recommendations of the conference include strategies to "provide women with more means of production where their land rights are recognized," increase management training, increase access to bank loans, and counter discrimination women face from lending and financing institutions.¹³⁹ Commitments under the Declaration of the World Summit for Social Development emphasize specific rights in the area of self-employment or small-scale employment. Recommendations include securing equitable access to income and work for women, promoting fair distribution of work opportunities, strengthening workers' rights, especially the equal treatment of women, removing obstacles to credit, property holding, and inheritance, and increasing recognition of women's contribution through domestic work.¹⁴⁰

Some national initiatives also aim to promote equality through laws that give women additional and more concrete rights to land access and ownership. The Village Land Act of Tanzania (2001) recognizes equal access to property and creates proportional representation for women on local land boards.¹⁴¹ The Ugandan Constitution, amended in 1995, creates a state duty to ensure that women have an equal right to own and use land, regardless of custom.¹⁴²

136. Murray, *supra* note 7, at 270.

137. Seventh African Conference on Women (Beijing +10), *Report of Thematic Group Session 10: Economic Empowerment of Women* (2004), recommendation 2.1 (on file with the author).

138. *Id.*

139. *Id.* recommendation 3.1.

140. World Summit for Social Development, Copenhagen, Den., Mar. 6–12, 1995, *Copenhagen Declaration on Social Development*, commitments 1, 3, 5, U.N. Doc A/CONE.166/9.

141. Mwangi, *supra* note 32, at 136.

142. *Id.*

The passage of Uganda's Land Act (1998) gives wives the right to occupy, to access and to live on family land, and to withhold consent on transactions that would affect family land, regardless of whether wives own the family property.¹⁴³ Eritrea, Namibia, South Africa, and Uganda have included affirmative action and quota schemes for women on agricultural boards.¹⁴⁴ Ethiopia enacted a national policy that entitles women to participate in formulating government policy on property and employment rights.¹⁴⁵

African states passing sex-sensitive policies still struggle to implement and monitor reforms. In these countries there remains "a disjuncture between national policy commitments to the integration of gender in development and the budgetary allocations that are necessary to realise these commitments."¹⁴⁶ This, again, connects to the familial relationships and community networks that shape much of women's access to vital resources, an area that most proposed reforms fail to consider in tandem with employment rights. As in the context of AU policies promoting women's rights, rhetoric about women's equality seems unsupported by resources or strategies that question the larger cultural framework. In this way, the Protocol may have missed an opportunity to encourage states to "build[] gender concerns into the design of development policies and programmes [and therefore support] more equitable, efficient, and sustainable development."¹⁴⁷ One could imagine that an instrument on women's rights might have tied AU funding to the progressive realization of women's economic rights or stressed greater involvement in decision-making where land and the role of custom is involved. Such an instrument could have emphasized and supported the state parties' role in creating alternative rights to government-subsidized land or alternative compensation for domestic and small-scale agricultural activities.

The Kenyan Equality Bill, proposed but not passed, illustrates a way to address the gap between rhetoric and enforcement. Members of the Parliament proposed an Equality Bill that contained a comprehensive anti-discrimination section and provisions for equality in rights to employment and property.¹⁴⁸ The Equality Bill includes rights familiar in the employment discrimination context, such as prohibitions on discrimination in advertising for employment, in conditions and terms of employment, in opportunities for promotion, and in benefits.¹⁴⁹ However, the draft Equality Bill links these rights to property rights.¹⁵⁰ In addition to equality in leasing and disposing of land, it also provides "accessible and reasonable accommodation of any development of land

143. *Id.* at 65–66.

144. *Id.*

145. *Id.*

146. *Id.* at 137.

147. *Id.* at 137–38.

148. The Equality Bill, No. 28 (2002), KENYA GAZETTE SUPPLEMENT NO. 81 pts. II(7), (12).

149. *Id.* pt. II(7). In an interesting addition to classic employment laws, the Equality Bill would have obliged employers to provide breastfeeding time for mothers and would have expanded maternity leave from two months to ninety days. *Id.* pt. II(7)(g)–(h).

150. *Id.* pt. II(12).

or property” and equality in the “enjoyment of matrimonial property.”¹⁵¹ These innovations would arguably strengthen the protection of usury rights to land on which the majority of Kenyan women rely.¹⁵² More importantly, women’s rights attuned to the experiences of their beneficiaries further a larger, and more substantial goal: “to challenge and change the male standard, to recreate reality from a woman-centered perspective.”¹⁵³

VI. CONCLUSION

Writing legal instruments that accommodate the local context in which rights are exercised is difficult. A human rights instrument that applies across several states, like the Protocol, will sacrifice specificity in the name of broadly applicable rights. This dilemma is particularly acute when, despite legal reform, laws continue to sanction the cultural practices that discriminate based on sex. On the one hand, generalizing about community practices can lead to stereotypes and can be based on incomplete information. On the other hand, particularizing culture can ignore the broad social pressures that shape people’s decisions.

Although the Protocol makes some progress in addressing these issues, its provisions and means of enforcement may miss an opportunity to forge innovative and productive relationships with national governments. A more tailored instrument that works with and encourages laws, like Kenya’s Equality Bill, could better contend with questions of how equality for women and equal distribution of land are different, how a human rights instrument modeled on CEDAW could encapsulate a redistributionist vision for society, and what rights are important to income generation and self-employment. But, in falling short of answering these questions, the Protocol inadvertently replicates the mistake of its predecessors: powerful words without functional meaning.

151. *Id.* pt. II(12)(d),(g).

152. This language is tempered by a limitations section that provides a defense for discrimination if the discriminatory act is “reasonable and justifiable in the circumstances.” *Id.* pt. III(18)(1). The factors to be considered in determining reasonableness are the purpose, nature and extent of the discrimination, the relationship between the discrimination and its purpose, and whether less restrictive means are available. *Id.* pt. III(18)(2).

153. Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 806 (1990) (questioning feminism’s over-reliance on equality to achieve “self-definition and self-determination” for women).