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Pulling apart? Treatment of pluralism in the CEDAW and the Maputo Protocol

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1 Introduction

The United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes that discrimination against women does not arise only from formal laws; from 'state action' narrowly defined. Discrimination against women is also produced and sustained by stereotypes and beliefs contained in other moral codes such as community customs and religious norms. Hence Articles 2(f) and 5(a) place obligations on states to take legislative and other measures to 'modify' or 'abolish' such stereotypes or ideas of inferiority or superiority of men and women so as to achieve the CEDAW's objective of eliminating all forms of discrimination against women. But does the text of the CEDAW suggest that elimination of discrimination against women necessitates wholesale displacement of these other moral codes? Or does it suggest that the convention recognizes that in some instances achievement of substantive equality for women may require recognition and upholding of some principles and practices embodied in those other moral codes?[1]

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[1] A number of scholars studying the lived realities of different groups of women against the background of international legal protection against gender discrimination have emphasized the need for research that puts gendered understandings about people's local experiences, problems and practices in a continuous dialogue with evolving human rights principles so as to find a way out of the seemingly contentious relationship between women's human rights and legal pluralism. See A. Hellum, S. S. Ali and A. Griffiths (eds.), *From Transnational Relations to Transnational Laws: Northern European Law at the Crossroads* (Farnham: Ashgate, 2011). See also A. Hellum, J. Stewart, S. S. Ali and A. Tsanga (eds.), *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking*

This chapter explores this question by examining in detail the position that the CEDAW Committee has taken in instances that have brought this question to the surface. Following this introduction, section 2 will examine what has emerged as the CEDAW Committee's preferred approach. This will be contrasted in section 3 to the approach taken in the framing of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Section 4 will explore the manner in which selected East and Southern African (ESA) states have approached the issue of legal pluralism,[2] in particular the striking of a balance between sanctioning the operation of customary and religious laws and ensuring protection against gender-based discrimination in recent constitutional reforms. Section 5 examines cases in which women have, in essence, asked the courts to affirm their entitlements under customary laws and practice, sometimes in circumstances that require the courts to affirm customary norms or practices that raise questions as to their compatibility with human rights.

The concluding section reflects on the appropriate feminist response when confronted with the difficult choice of when to affirm plural normative orders as securing justice for women on terms that they value, and when to reject such a path on account of its potential negative long-term effect in sustaining a context in which meaningful choice is structurally constrained. Which of the paths helps us to ask the right questions: the CEDAW Committee's approach, the Maputo Protocol approach or neither?

2 Pluralism under the CEDAW

Articles 2 and 5 of the CEDAW (particularly 2(f) and 5(a)) have been variously identified as the provisions that get to the heart of what must be done

(Harare: Weaver Press, 2007) [hereinafter Hellum *et al*., *Human Rights*]; C. Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?', *Harvard International Law Journal* 41:2 (2000) 381–417.

[2] The term 'legal pluralism' has been understood at two levels. At the first level it refers to the coexistence of two or more legal orders, as in post-colonial contexts where the same subject matter may be governed by various laws drawing from different sources. For instance, statutory laws on family law coexist with family laws drawn from custom or from religion, and all of these multiple sources are recognized as law. At the second level 'legal pluralism' is understood as a phenomenon that goes beyond post-colonial settings. It is simply a broadened understanding of the category 'law' as encompassing norms emanating from multiple norm-generating sites, the state being simply one of those sites, as opposed to a state-centric view of law. See J. Griffiths, 'What is legal pluralism', *Journal of Legal Pluralism and Unofficial Law* 24 (1986) 1–56.

in order for the object and purpose of the CEDAW to be realized, namely the elimination of all forms of discrimination against women.[3] Arguably, all the measures spelled out in Article 2(a) through to 2(e) are measures that states already had an obligation to undertake prior to the CEDAW by virtue of non-discrimination and 'equal right of men and women to the enjoyment of rights' clauses in previous international human rights documents.[4]

The hallmark of the CEDAW comes with Article 2(f) moving state obligation beyond the comfort zone of availing individual rights to redress for individual discrimination, to requiring transformative cultural change that deals with systemic discrimination.[5] This is no doubt in recognition of the fact that without such deep-reaching cultural transformation, there can be no genuine equality between the sexes.[6] Any gains secured through legal change could unravel or have effects contrary to what was envisaged.[7] This call for transformative cultural change is reinforced through Article 5(a), which places on States Parties an obligation to 'take all appropriate measures' to 'modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

The text of Article 5(a) is clear that:

(1) the goal is the elimination of prejudices (wrongful stereotypes) and customary practices premised on subordination of either sex, or on stereotyped gender roles; and
(2) the state is to take *all appropriate measures*, meaning that no limit is placed on the range of options available to the state as it works toward that goal.

The framing of Article 5(a) has earned both criticism for being broad and ambiguous, and acclaim for allowing flexibility and adaptability to new

[3] See Holtmaat, this volume; Cusack, this volume; CEDAW General Recommendation No. 20, *Reservations to the Convention* (11th Session, 1992); CEDAW General Recommendation No. 25, *On temporary special measures* (30th Session, 2004). See also R. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', *Virginia Journal of International Law* 30 (1990) 643–712.

[4] See, for instance, Article 3 of the International Covenant on Civil and Political Rights and Article 3 of the International Covenant on Economic, Social and Cultural Rights.

[5] See Holtmaat, this volume.

[6] See Cusack, this volume.

[7] See Holtmaat, this volume.

situations.[8] In my view, the bottom line is that whichever option (or range of options) the state chooses must be shown to be progressive, in the sense of making progress toward – not away from – the goal.

It would not be inaccurate to say that religious and customary laws and practices on family relations have been regarded as the primary address for ideas of superiority or inferiority of women and men (read the subordination of women), and for stereotyped gender roles. The legal systems of most post-colonial African states give explicit recognition to these plural normative orders, and therefore they operate not as parallel informal legal systems, but are officially sanctioned by the state's legal system. The CEDAW Committee in several instances gives the impression that the very fact that these normative orders are officially sanctioned to operate is in itself a violation of the CEDAW. Notwithstanding the broad language of Article 5(a) and the apparent flexibility given to states in choice of tools, the CEDAW Committee's interpretation suggests that the Committee's preferred approach when confronted with practices that it considers to be inconsistent with gender equality but which are sanctioned by religious or customary norms is one of:

(a) legislation as the predominant intervention; and
(b) legislation that is prohibitory in nature; and
(c) prohibitory legislation that is immediate rather than gradual.

This is essentially an abolitionist approach.[9] The main body of this section proceeds to substantiate the claim that the CEDAW Committee has taken an abolitionist approach, by referring to specific CEDAW Committee documents, mainly General Recommendation No. 21 and Concluding Observations on periodic reports submitted by selected ESA States Parties.

2.1 General Recommendation No. 21

General Recommendation No. 21 was issued in 1994 and it focused on elaborating states' obligations with respect to ensuring equality in marriage and family relations. The CEDAW Committee identifies three Articles as central to equality in marriage and family relations: Article 9 on nationality, Article 15 on equality before the law and Article 16 on marriage.

[8] See Cusack, this volume.
[9] See Nyamu, 'How should human rights and development respond'.

The Committee noted the prominent role of personal or customary law in the area of marriage and family relations. Throughout the General Recommendation, these personal or customary law systems are spoken of largely as a negative force. What is emphasized is their tendency to restrict women's rights to equal status and responsibility within marriage.[10] There is no suggestion that these norms and practices can play any role in achieving the objectives of the CEDAW.

In commenting specifically on Article 16, the Committee notes that there are a variety of family forms, but all of these, whether based on formal law, custom or religion, must accord women equality 'both at law and in private'.[11] The Committee then takes on the issue of polygamy. Even though the text of the CEDAW does not refer to polygamy, the Committee is unequivocal in holding that polygamous marriage 'contravenes a woman's right to equality with men and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged or prohibited'.[12] The Committee goes on to castigate states whose constitutions guarantee equal rights and yet those same states 'permit polygamous marriages in accordance with personal or customary law'. The Committee takes the view that such states violate the constitutional rights of women, and are also in violation of Article 5(a) of the CEDAW.

This position was echoed in a General Comment by the Human Rights Committee in 2000.[13] The Committee starts by noting that 'the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes'.[14] The Committee then notes that equal exercise of the right to marry implies that polygamy is incompatible with the principle of equality of rights between men and women.[15] The Committee underlines this conclusion as follows: 'Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, *it should be definitely abolished wherever it continues to exist*.'[16] Both Committees assume, first, that polygamy is always non-consensual and, secondly, that the only appropriate response is to legislate against it.

[10] See, for example, General Recommendation No. 21, paras. 14, 15 and 17.
[11] *Ibid*., para. 13. [12] *Ibid*., para. 14.
[13] UN Human Rights Committee, General Comment No. 28, *Equality of Rights Between Men and Women* (2000), available at: www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument (last accessed 28 March 2012).
[14] *Ibid*., para. 5. [15] *Ibid*., para. 24.
[16] *Ibid*., para. 24. Author's emphasis.

There is an apparent change of tone one year later. As a follow-up to General Recommendation No. 21, the CEDAW Committee commissioned its Secretariat in 1995 to prepare analysis of Article 2 of the Convention. In the Secretariat's opinion, Article 2(f) read together with Article 5(a) implies that the state must employ public means to address discriminatory customs and practices.[17] The Secretariat notes that some of these discriminatory practices are deeply rooted, but nonetheless emphasizes the state's duty to exercise due diligence to prevent them and deal with them. The Secretariat also notes that although the Convention specifically mentions legislation as one of the means to be employed in achieving such change in customary and religious practices, legislation is not the only means. Other administrative, policy and educational measures can be employed. The Secretariat rightly understood that it can prove futile to use legislation as the only or the predominant strategy with respect to some practices such as polygamy.[18]

However, this change of tone appears not to have taken root, because a review of the CEDAW Committee's Concluding Observations on states' reports from the East and Southern African region suggests a retreat to the 'immediate legislative abolition' approach.

2.2 Review of the CEDAW Concluding Observations on polygamy in East and Southern African states' reports

A review of Concluding Observations made concerning seven East and Southern African states' reports shows that the Committee expresses serious concern that the states allow continued existence of laws (customary and religious) that allow polygamy.[19] States that have taken no steps at all

[17] See CEDAW/C/1995/4, available at: www.un.org/esa/gopher-data/ga/cedaw/14/1995–4.en (last accessed 13 February 2013).

[18] Kenya's criminal law, as well as formal legislation on marriage, creates the offence of 'bigamy'. The offence is committed when a person who has been married under statutory law enters into a customary or religious marriage during the subsistence of the statutory marriage, or vice versa. The law prescribes a prison sentence of five years with or without hard labour (see section 43, Marriage Act; section 171, Penal Code). Despite these provisions, there is no record of anyone ever having been charged with the crime of bigamy. Even when it becomes evident to a court during divorce proceedings that one of the parties is already in a customary marriage, the court simply makes note of this and does not invoke section 43 to punish the offence. See, for instance, *Ann Njogu* v. *John Warui Weru*, High Court of Kenya at Nairobi, Divorce Cause No. 129 of 2005, available at: www.kenyalaw.org (the official website of the Kenya National Council for Law Reporting) as 2007 eKLR (electronic Kenya Law Reports).

[19] This overall approach taken in CEDAW's Concluding Observations finds resonance with that taken in the UN Human Rights Committee's Concluding Observations on the

to address the issue, as well as states that have made some attempts – legislative, administrative or aimed at social education – are equally rebuked in stylized language contained in a standard stern paragraph that is administered to all with the slightest variation. Nothing in this stylized language suggests appreciation of the differentiated circumstances of each state, nor the varying levels of effort at reform. It only reinforces the conclusion that, in the view of the CEDAW Committee, nothing short of immediate legislative prohibition will do, an attitude that narrows the scope of possible actions envisioned in Article 5(a). This attitude also discloses a lack of appreciation of the fact that in dealing with practices that are defended as cultural (whether the defence has deep-seated widely shared justification or is merely rhetorical), social education and mobilization may often be 'a better initial mechanism for change than starting out with the pursuit of legislative reform'.[20]

At the CEDAW Committee's 39th session in 2007, and at the 48th session in 2011, the Committee took issue with the treatment of polygamy in Kenya's draft legislation on marriage and marital property, in particular that the Draft Marriage Bill provides that two forms of marriage will be recognized in Kenya – monogamous and polygamous – and proceeds to provide for a procedure for conversion of polygamous or potentially polygamous marriages into monogamous marriage, provided certain conditions are met.[21]

The Committee also took issue with the draft legislation on matrimonial property which, if enacted, will be the first time that the Kenyan Parliament has taken action to clarify spouses' rights to property.[22] The draft

issue of polygamy and other marriage practices deemed inconsistent with Article 3 of the International Covenant on Civil and Political Rights. See, for example, UN Human Rights Committee, Concluding Observations with respect to the following African countries: Gambia, 12/08/2004 CCPR/CO/75/GMB, para. 18; Cameroon, UN Doc. CCPR/C/79/Add 116 (1999) para. 10; Algeria, UN Doc. CCPR/C/79/Add95 (1998) para. 13; Libya UN Doc. CCPR/C/79/Add 101 (1998), para. 17; Senegal UN Doc. CCPR/C/79/Add 82 (1997) para. 12; Nigeria UN Doc. CCPR/C/79/Add 65 (1996), para. 25.

[20] A. M. Tripp, *The Politics of Women's Rights and Cultural Diversity in Uganda* (Geneva: United Nations Research Institute for Social Development, 2000) at 3.

[21] Sections 4 and 5 of Draft Marriage Bill (2007). Polygamous or potentially polygamous marriages may be converted into monogamous ones provided at the time of conversion there is only one wife. The fact that no provision is made for conversion of a monogamous marriage into a polygamous one indicates that the state is signalling a preference for monogamous unions, which would be consistent with Article 6 of the Maputo Protocol.

[22] The draft legislation secures each spouse's matrimonial property by requiring spousal consent for any transaction involving property designated as matrimonial. Each spouse is presumed to have an equal interest in the matrimonial home, regardless of the respective contributions made by each spouse. A spouse is protected from eviction from

law addresses marital property rights in both monogamous and polygamous marriages. With respect to polygamous marriages, it makes elaborate provisions, spelling out the rights of each wife by order of seniority as follows:[23]

(a) matrimonial property acquired by the man and the first wife shall be owned equally by the man and the first wife only, if the property was acquired before the man married the second wife;
(b) matrimonial property acquired by the man after the man marries a second wife shall be regarded as owned equally by the man, the first wife and the second wife, and the same principle shall be applied to any subsequent wife or wives.

The section goes on to clarify that where it is clear by agreement or by conduct that certain property is exclusive to a particular wife, then the other wives will not be presumed to have an interest in it.

The Committee took the view that the approach taken in this draft legislation did not send a signal that the government was discouraging polygamy. Instead, it was creating a legal framework for it, which amounts to facilitating it. The Committee therefore urged the Kenyan government to 'address harmful cultural and traditional customs and practices, such as the use of the bride price and polygamy, more vigorously'.[24] The Committee called on the Kenyan government to 'implement measures aimed at eliminating polygamy, as called for in the committee's General Recommendation No. 21 on equality in marriage and family relations'.[25]

Four years later, at its 48th Session (January/February 2011), the CEDAW Committee reiterated its concerns in much the same words, decrying the persistence of 'harmful practices including … polygamy' and that the State Party had not taken 'sustained and systemic action' to

the matrimonial home. Non-monetary contribution is expressly recognized. These basic principles are a major leap forward from the current state of the law. In resolving marital property disputes courts currently resort to the English Married Women's Property Act of 1882, which is applicable to Kenya by virtue of section 3 of the Judicature Act 1967, the law that spells out the sources of law that Kenyan courts may apply. For a detailed discussion of trends in judicial decision-making in this contentious and highly discretionary area of law see C. Nyamu Musembi, '"Sitting on her husband's back with her hands in his pockets": commentary on judicial decision-making in marital property cases in Kenya' in A. Bainham (ed.), *The International Survey of Family Law* (Bristol: Jordan Publishing, 2002) 229–42.

[23] Section 11, Draft Matrimonial Property Bill (2007).

[24] CEDAW 39th Session, 2007, CEDAW/C/KEN/CO/6, para. 22.

[25] *Ibid*. at para. 43.

modify or eliminate such stereotypes and negative cultural values and harmful practices'.[26] Specifically, the Committee expressed concern that the Draft Marriage Bill did not prohibit polygamy.[27]

Uganda's Draft Domestic Relations Bill approaches the issue of polygamy in exactly the same manner as Kenya's draft bill.[28] The only notable difference is that Uganda's draft legislation spells out conditions that a husband must fulfil before he is legally permitted to marry an additional wife, and a procedure for verifying compliance with those conditions.[29] The Committee's Concluding Observations with respect to Uganda express concern about persistence of 'harmful practices, including polygamy, early marriages and the bride price'. The Committee concludes that the Ugandan government has not taken 'effective and comprehensive action' to modify or eliminate these negative traditional values and practices.[30]

While the CEDAW Committee makes it clear that nothing short of elimination of polygamy will suffice, the Kenyan and Ugandan governments appear to have taken an approach aimed at gradual phasing out of polygamy (by providing for conversion of polygamous into monogamous marriages but not the reverse), and more importantly at extending equal protection of the law to all women,[31] not just those who are in a position to opt for a monogamous relationship.

[26] CEDAW 48th Session, 2011, CEDAW/C/KEN/CO/7, para. 17.

[27] *Ibid*., para. 45.

[28] See sections 19, 64 and 70 of Uganda's Draft Domestic Relations Bill.

[29] See section 31. A husband's application for a marriage licence for a subsequent marriage under Islamic or customary law must attach a declaration stating that he has the economic means to ensure that the current level of maintenance to his wives and children will not drop; that he has made provision for a separate matrimonial home for the subsequent wife (except where the wives have agreed to live together); and that he is able to give the same treatment to all the wives. Section 32 requires full disclosure of his property ownership, indicating individual and matrimonial. Third parties are allowed to object to the grant of the licence (section 37), and he may appeal to the court if the marriage registrar declines approval.

[30] CEDAW/C/UGA/CO/7, para. 19.

[31] At the same time the approach taken by the Kenyan and Ugandan governments challenges the narrow construction of the 'equality before the law' provision in the CEDAW (Article 15). The Article only speaks of 'equality with men before the law'. The male standard limits the understanding of unequal protection before the law to mean only those instances where men receive protection to the exclusion of women, or better protection than women. Yet there are situations where only certain categories of women will be denied protection or accorded inadequate protection relative to other categories of women, as is the case with women in polygamous unions in contexts where the formal law currently pretends that those unions do not exist.

With respect to Malawi, the Committee expresses concern about the existence of multiple marriage regimes and the discriminatory provisions that persist in the laws governing marriage and family relations. The Committee is 'particularly concerned that customary law allows polygamy'.[32] The Committee does not mention that out of all the states reviewed, Malawi comes closest to the Committee's preferred approach: Malawi is the only African state whose draft legislation explicitly outlaws polygamy.[33] Instead the Committee only expresses concern about delay in enacting the draft legislation in question, then subjects Malawi to the same assessment as the other states, in the standard phrase about lack of a 'systemic and sustained' strategy by the state to modify or eliminate harmful traditional practices, patriarchal attitudes and stereotypes.

The CEDAW Committee's Concluding Observations with respect to Tanzania similarly express concern about the persistence of harmful traditional and cultural practices, listing polygamy alongside practices such as female genital mutilation and bride price. The Committee is particularly concerned that not only customary law, but also section 10 of the Law of Marriage Act of 1971, allow polygamy while the same Act prohibits women from having more than one husband, and that 'proposed amendments to the Law of Marriage Act will not criminalize polygamy'.[34] The Committee urges the state to take 'sustained and systemic action' to modify or eliminate these harmful traditional and cultural practices in accordance with Article 2(f).[35]

Zambia is issued with a similarly worded call for 'sustained and systemic action' to eliminate stereotypes and harmful practices, which include polygamy and other discriminatory customary and religious practices that are permitted by virtue of Article 23(4) of the Zambian Constitution.[36]

[32] CEDAW/C/MWI/CO/6, para. 42.

[33] See Malawi Law Reform Commission's Draft Marriage, Divorce and Family Relations Bill (2005). Section 17 states: 'No person shall be married to more than one spouse.' However, the proposed ban on polygamy will not apply retrospectively to existing polygamous marriages. The government introduced the Bill into parliament in 2010 and then withdrew it, citing concerns expressed by Parliamentarians and promising to reintroduce it after revisions. It has not been reintroduced. See Centre for Human Rights and Rehabilitation, *Alternative Report for the Review of Republic of Malawi by the Human Rights Committee* (January, 2011), available at: http://chrr.ultinets.net/wp-content/uploads/2011/01/CHRR-submission-to-the-Human-Rights-Commitee.pdf (last accessed 19 June 2012).

[34] CEDAW/C/MWI/CO/6, para. 146.

[35] CEDAW/C/TZA/CO/6, paras. 117 and 118.

[36] CEDAW/C/ZMB/CO/5–6, para. 13.

Lesotho's report asserts that polygamy is an acceptable customary practice, but that it is on the decline. The government then goes on to argue that nonetheless, customary law contains safeguards against potentially negative financial and emotional consequences for wives and children, for instance by requiring that existing spouses be consulted and that separate property be designated for each household.[37] The government indicates that it only needs expanded capacity and increased financial resources to monitor adherence to these customary safeguards. In response, the Committee expresses 'serious concern' about the 'persistence of harmful norms, practices and traditions, patriarchal attitudes and deep-rooted stereotypes' and 'the state party's limited efforts to address such discriminatory practices directly … in particular polygamy and bride price'.[38] In paragraph 39(c) the Committee makes explicit what, in its view, would amount to addressing such practices 'directly': 'prohibit polygamy in accordance with the Committee's General Recommendation No. 21'.

There is no indication that the Committee is willing to engage Lesotho on the measures it proposes to employ in order to show why the Committee regards those measures as limited. Rather, the Committee makes it clear that nothing short of immediate prohibition will suffice.

In Botswana's report the government itself decried the subordinate status imposed on wives under customary and religious law, citing several practices, and lamenting that although polygamy was abolished under the Common Law, it was still sanctioned by some religions.[39] In response to this, the Committee demanded to know whether the government had any comprehensive plan to deal with the obstacles identified and attributed to customary and religious laws. The CEDAW Committee's engagement with the government of Botswana departs from the script, in the sense that rather than take on individual issues such as polygamy, the Committee takes on Botswana's Parliament for its failure to repeal a constitutional clause that accords customary and religious laws a special status that ensures they cannot be challenged as being discriminatory, despite court rulings that the clause in question is inconsistent with the equality clause. Exemption clauses will be the subject of discussion in section 4, so we will not dwell on them here.

To conclude this section, it is accurate to observe that the CEDAW Committee appears to be taking the position that unless a state has

[37] CEDAW/C/LSO/1–4, paras. 94 and 95.
[38] See CEDAW, Concluding Observations, CEDAW/C/LSO/CO/1–4, at para. 20.
[39] CEDAW/C/BOT/3, para. 118.

legislated against polygamy and other practices that are viewed as embodying negative gender stereotypes, any other measures taken fall short of Articles 2(f) and 5(a), which amounts to interpretive narrowing of the scope for state action anticipated by the two Articles. The fact that states that have made attempts to address the practices are condemned in equal measure and in almost identical language with those that have made no attempt, suggests lack of genuine effort at constructive engagement on the part of the CEDAW Committee. The very existence of pluralism is in and of itself viewed as inconsistent with Articles 2(f) and 5(a) of the CEDAW, suggesting that in the view of the Committee, unless moral codes premised on religious and cultural norms are displaced, it is impossible to secure equality for women.

The next section contrasts this approach to that adopted in the text of the Maputo Protocol.

3 Pluralism in the Maputo Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted by the African Union in 2003, and came into force in 2005. As of the end of 2011 it had been ratified by 30 Member States of the African Union, and signed by 46 of the total membership of 53.[40] The Protocol was the result of about a decade and a half of work by women's human rights advocates. The Protocol supplements the African Charter's limited provisions on gender equality and women's rights.[41] It requires states to take measures to outlaw gender discrimination in all spheres and take corrective action against such discrimination through measures such as laws and development plans.

In terms of subject matter, the Protocol has coverage similar to that of the CEDAW, but there are distinct ways in which it frames rights within an

[40] For ratification status, see www.achpr.org/instruments/women-protocol/ratification/ (last accessed 14 February 2013).

[41] The Charter only mentioned women in one clause of one Article (18(3)), lumping women's rights together with protection of family and upholding of culture, which, according to gender equality advocates, 'has its ambivalences toward women's rights'. See, for example, M. Munalula, 'Changing the customary law standard of gender justice: the additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' in M. O. Hinz and H. K. Patemann, *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (Berlin: Lit, 2006) 167–82.

understanding of the specific socio-cultural context of Africa.[42] Examples include the following:[43]

- The Protocol goes beyond the CEDAW to expressly provide for a right to be free from violence, including unwanted or forced sex (Articles 3 and 4). Among other measures, the Protocol calls upon states to undertake peace education and social communication aimed at eradicating 'elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women'. This is particularly relevant to practices of non-consensual (often under-age) marriages justified as part of culture.
- A call on states to prohibit and condemn harmful practices that have a negative effect on the human rights of women, including (but not restricted to) practices justified on culture, such as female genital mutilation and scarification (Article 5).
- Protection of widows from inhuman, degrading or humiliating treatment, as well as guaranteeing their right to consensual remarriage, their right to inherit and remain in the matrimonial home, and their automatic right to custody and guardianship of their children subject to the principle of the best interests of the child (Articles 20 and 21). This provision is attentive to past and current research exposing widowhood practices across sub-Saharan Africa, such as routine eviction from the matrimonial home, which practices contravene women's human rights.[44]

[42] I find little to persuade me in critiques that have accused the Protocol of taking no account of African realities, such as D. M. Chirwa, 'Reclaiming (wo)manity: the merits and demerits of the African Protocol on Women's Rights', *Netherlands International Law Review* 53:1 (2006) 63–96. For articles analyzing the Protocol in relation to the CEDAW and the African Charter, see D. Olowu, 'A critique of the rhetoric, ambivalence and promise in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', *Human Rights Review* 8:1 (2006) 78–101; M. Ssenyonjo, 'Culture and the human rights of women in Africa: between light and shadow', *Journal of African Law* 51:1 (2007) 39–67; F. Banda, 'Women, law and human rights in Southern Africa', *Journal of Southern African Studies* 32:1 (2006) 13–27.

[43] The examples highlighted here have a bias toward family relations. There are other provisions that illustrate the Protocol's wider coverage of issues, dictated by its particular attention to past and current issues that have defined the specificities of the African context, such as provisions on 'a right to peace' and rights of women connected to armed conflict and post-conflict reconstruction (Articles 10 and 11).

[44] See, for example, Women and Law in Southern Africa Research Trust (WLSA – Zimbabwe), *Inheritance in Zimbabwe: Laws, Customs and Practices* (Harare: SAPES Press, 1994); WLSA Research Trust, *Picking up the Pieces: Widowhood in Southern*

- Special protection of elderly women (Article 22), in view of recent worrying trends of violence targeted at elderly women in the pretext of ending witchcraft, which cuts against the celebrated African ethic of respect for the elderly.[45] Related to this is the special protection of women with disabilities (Article 23) who are similarly vulnerable to structural discrimination and violence that readily finds an excuse in misinformed attitudes justified on a vague reference to culture.[46]

The examples above speak to instances in which the Protocol's coverage goes beyond the CEDAW's express provisions on account of contextualization of contemporary African realities. However, there are some provisions that go beyond differences in coverage and contextualization to suggest lack of congruence between the CEDAW and the Protocol.

The first example concerns the approach to culture in the two documents. While the Protocol calls on states to take measures against practices and attitudes defended as culture that go against the rights of women, the Protocol also provides for women's right to live in a 'positive cultural context' (Article 17). The provision places a duty on the state to ensure enhanced participation of women in the formulation of cultural policies at all levels (Article 17). In this respect, the Protocol differs radically from the CEDAW because the latter only refers to 'culture' with negative connotations: as an impediment to the full realization of equality for women, and as something that the state needs to take measures to eliminate.

Another example is the Article on marriage, specifically the approach that the Protocol takes to the issue of polygamy. Article 6 of the Protocol is similar to Article 16 of the CEDAW in placing emphasis on full and free consent, and on equal rights of spouses. However, unlike the CEDAW,

Africa (Harare: WLSA Research Trust, 1995); Okech-Owiti, N. Karuru, W. Mitullah and K. Mubuu (eds.), *Research Report on Inheritance Laws and Practices in Kenya* (Nairobi: Women and Law in East Africa WLEA, 1995); U. Ewelukwa, 'Post-colonialism, gender, customary injustice: widows in African societies', *Human Rights Quarterly* 24 (2002) 424–86. See also Ikdahl, this volume.

[45] See, for example, HelpAge International, 'No country for old women' (2012), available at: www.helpage.org/newsroom/features/no-country-for-old-women/ (last accessed 8 June 2012).

[46] See, for example, the myths and practices surrounding albinism. Campaign organizations have taken up the issue. For information on these see www.underthesamesun.com; http://sas.albinism.org; and www.albinismfoundationea.com (last accessed 8 June 2012).

the Protocol chooses not to remain silent on the issue of polygamy. The Protocol does not follow the path charted by the CEDAW Committee's General Recommendation No. 21, nor in the Concluding Observations discussed above, by calling for measures that legislate against polygamy. Rather, the Protocol simply calls on states to enact legislation signalling that monogamy is the *encouraged* and *preferred* form of marriage, while at the same time ensuring that 'the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'.

In General Recommendation No. 21 and in the Concluding Observations discussed above, the CEDAW Committee takes the position that polygamy contravenes a woman's right to equality and urges States Parties to *discourage and prohibit* such marriages on account of the serious emotional and financial consequences they entail for women and their dependants. On this issue the CEDAW and the African Protocol appear to be at loggerheads, the latter apparently taking the pragmatic position that whether or not polygamy sits comfortably with gender equality, the women already in these relationships should not be denied protection of the law in their family relations.[47]

As the discussion of the Concluding Observations shows, it appears that the ESA countries that have attempted any reform at all are reading from the Protocol's script rather than the CEDAW's. The following section examines the direction that the recent wave of constitutional reform in the region has taken, with respect to the question of establishing a legal framework for legal pluralism. In other words, how has the question of balance between equality (specifically gender equality) and recognition of religious and cultural diversity been answered in the recently enacted constitutions of the East and Southern African states?

4 Pluralism in recent constitutional reforms in the ESA region

Pluralism defines most post-colonial legal systems, particularly in the areas of marriage and family relations. Post-independence constitutions in all of the ESA countries contained a standard clause exempting 'personal law systems'[48] from constitutional prohibition of discrimination,

[47] For a similar conclusion as to pragmatism in the Protocol's chosen approach, see Ssenyonjo, 'Culture and the human rights of women in Africa' at 57.

[48] A term used to refer collectively to customary and religious laws relating to matters of personal status such as marriage, divorce, adoption, burial and succession to property.

effectively sanctioning conduct that would otherwise be regarded as discriminatory for the sole reason that it was justified on personal law. The standard post-independence constitution model was, therefore, that personal law enjoyed 'supra-constitutional' status.

The historical context that explains these exemption clauses has been well documented,[49] and it relates to the independence bargain in the various states. The imminence of independence spawned factionalism among the several national groups, each seeking special constitutional entrenchment of its specific group interests as a precondition to agreeing to any post-independence constitutional arrangements.

In Kenya the pluralism clause can be attributed largely to the demands of the Sultan of Zanzibar on behalf of the Muslim minority who inhabited the ten-mile coastal strip. The strip was part of the Sultan's territory and jurisdiction prior to British colonial rule in East Africa. The British then negotiated with the Sultan in 1895 for a lease of the ten-mile coastal strip. At the dawn of independence in the early 1960s, the incoming post-colonial government wished to have the strip officially annexed as part of the territory of post-independent Kenya. The Sultan was in a strong bargaining position because he could well have refused to renounce his sovereignty, thereby withdrawing his participation in the constitution-making process and precipitating a political crisis by precluding a merger of the coast with the rest of mainland Kenya.[50] His only demand was that his former subjects be guaranteed freedom to practise their religion as well as the continued operation of the Kadhi's courts that apply Muslim law with respect to personal law matters such as marriage, divorce and inheritance.[51]

The final language of the constitutional clause that was negotiated to accommodate the Sultan's demands was not, however, restricted to Muslim personal law. It was framed broadly so as to cover all systems of personal law – religious and customary – already operating

[49] Y. Ghai, 'Independence and safeguards in Kenya', *East African Law Journal* 3 (1967) 177–217; Y. Ghai and P. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi and New York: Oxford University Press, 1970).

[50] Ghai, 'Independence and safeguards in Kenya' at 184–7.

[51] *Ibid*. at 185. The agreement also enumerated other guarantees such as the right to teach Arabic in Muslim primary schools, the continued legal validity of land titles issued to coastal inhabitants (mostly Arabs) by the British Crown under the 1908 Land Titles Ordinance, and a guarantee that all administrative officers in predominantly Muslim areas would be Muslims.

in the country. The clause was seen as important in enabling minority groups to preserve their identity, customs and traditions in the face of a government dominated by the two largest ethnic groups (Luo and Kikuyu) and that was perceived as being centralist and 'impatient with diversity'.[52]

As further safeguard, the pluralism clause was placed in the fundamental rights chapter of the Constitution, making it an entrenched provision. This meant that it could only be amended by a special majority in Parliament – three-fourths of the votes of all the Members of Parliament.[53] Thus, Kenya's independence Constitution contained section 82(1), which defined and prohibited discrimination; but this was followed by two qualifications that are relevant to the issue of personal laws. The first qualification was contained in section 82(4)(b), which provided that the anti-discrimination clause would not apply 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law'. The second qualification was contained in section 82(4)(c), which provided that any law that was enacted to be applied to persons of a particular race or 'tribe of customary law' would not be held to be discriminatory.

Across English-speaking sub-Saharan Africa the specific history of personal law exemption clauses may vary, but the language is very similar to that used in Kenya's independence Constitution.

Recent constitutional reforms have seen the demise of personal law exemption clauses from the constitutions of Uganda,[54] Ghana,[55] Malawi

[52] *Ibid*. at 195.

[53] *Ibid*. at 214.

[54] The 1967 Constitution contained exceptions similar to Kenya's section 82(4). See Ministry of Gender and Community Development, *Women and the 1995 Constitution of Uganda* (Kampala: Government of Uganda, 1995). See also H. F. Morris and J. S. Read, *Uganda: The Development of its Laws and Constitution* (London: Stevens, 1966) at 174. These were removed in the 1995 Constitution.

[55] Article 17(4)(b), Constitution of the Republic of Ghana (1992). While the provisions of the Zambian and Zimbabwean Constitutions contain terminology that is virtually identical to the Kenyan Constitution's section 82(4), the Ghanaian Constitution provision is different. It does not expressly provide constitutional immunity to the operation of personal laws. It simply reserves to Parliament the power to enact legislation for 'matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law', which power when exercised shall not be regarded as discriminatory.

and Kenya, but the clause remains in the constitutions of other countries such as Botswana,[56] Zambia,[57] Zimbabwe[58] and Lesotho.[59]

I have argued elsewhere that through these exemption clauses the state, though seemingly adopting a 'hands-off' approach, actually sanctions negative discrimination by denying access to constitutional remedies to those aggrieved by treatment that is justified as having a basis in personal law.[60] By according supra-constitutional status to personal law, the state privileges the views of those able to assert private power to define customary or religious norms in ways that disadvantage weaker social groups. By closing the avenue of constitutional challenge, the state is overtly endorsing, or at the very least acquiescing in, the establishment and preservation of asymmetrical social arrangements by denying some people within a community or sub-group a voice in shaping social norms.

It is this constitutional model, and not the mere existence of multiple family law systems, that the CEDAW Committee ought to be concerned about. This is because through this constitutional exemption of personal law from scrutiny, states have availed themselves of a ready excuse for doing nothing to redress the discriminatory impacts of the application of religious and customary law.[61]

[56] Section 15(4), paragraphs (c) and (d), Constitution of Botswana (1966). At the 45th Session of the CEDAW Committee (2010) the Botswanan government maintained that it saw no need to review (let alone repeal) the exemption clause as some court cases had interpreted that clause in conjunction with section 3 of the Constitution to conclude that only customary and religious norms that are consistent with the Constitution would be upheld. If that is truly the case, then what purpose is served by retaining the clause? Should legislation not simply encode that judicial interpretation by removing the clause altogether?

[57] Section 25(4) paragraphs (b) and (c), The Constitution of Zambia (1971). Zambia has made unsuccessful attempts at constitutional review. The latest draft of the proposed constitution, however, proposed to retain the exemption clause intact. The CEDAW Committee took issue with this in its Concluding Observations at its 49th Session (July 2011). See CEDAW/C/ZMB/CO/5–6, para. 14.

[58] Article 23(3) paragraphs (a) and (b), The Constitution of Zimbabwe (Revised, 1996). See also discussion of these constitutional provisions in W. Ncube, 'Defending and protecting gender equality and the family under a decidedly undecided Constitution in Zimbabwe' in J. Eekelaar and T. Nhlapo (eds.), *The Changing Family: International Perspectives on the Family and Family Law* (Oxford: Hart Publishing, 1998) 509–28 at 516.

[59] Article 18(4) paragraphs (b) and (c), The Constitution of Lesotho (1993, Revised 2000).

[60] See Nyamu, 'How should human rights and development respond'; Nyamu Musembi, 'Sitting on her husband's back'.

[61] There are examples across the region of courts invoking personal law exemption clauses to make decisions that are manifestly against the idea of equality in the CEDAW. In these cases, the judges acknowledge the discriminatory nature and impact of a customary or religious practice, but proceed to rule that the exemption clause means that the court can

The 1990s' wind of democratic change and its accompanying constitutional and legal reforms made it clear that this was no longer tenable; hence the shift in a significant number of countries to a model that attempts to balance recognition of personal law systems with the upholding of constitutional principles of equality and non-discrimination. It is important to note that in none of the ESA countries has the pendulum swung to the extreme position of elimination of personal law systems altogether. Rather, provision is made for retaining and promoting those aspects of personal law/cultural systems that are seen as compatible with democratic principles, primarily equality, while filtering out aspects perceived as negative.

Uganda's 1995 Constitution, for instance, strikes a balance that is explicitly between women's rights (Article 33) and the right to practise culture (Article 37). Article 33(6) prohibits 'laws, cultures, customs and traditions which are against the dignity, welfare or interest of a woman or which undermine their status'.

Ghana's 1992 Constitution provides through Article 26 the right to practise one's culture, but also prohibits 'all customary practices which dehumanize or are injurious to the physical and mental well-being of a person'.

Malawi's 1994 Constitution requires Parliament to enact legislation 'to eliminate customs and practices that discriminate against women'.[62] However, some analysts have pointed out that the Constitution may have limited its own ability to achieve this aim by virtue of Article 26, which provides for the right to 'participate in the cultural life of his or her choice'. This is because the framing of Article 26 gives it an absolute quality, without indicating that the right to practise one's culture may be limited, for instance if certain aspects of the practice of culture are found to constitute discrimination.[63] However, it could also be argued plausibly that such an absolutist reading of Article 26 is pre-empted by Article 44,

do nothing about the discrimination. For examples of such cases see the Zimbabwean case of *Venia Magaya* v. *Nakayi Magaya*, Civil Appeal No. 635/92, Judgment No. S.C. 210/98 (delivered on 16 February 1999). See also the Kenyan case of *Virginia Edith Wambui Otieno* v. *Joash Ougo & Omolo Siranga, Kenyan Appeal Reports*, 1 (1982–88) at 1049. For further discussion of the case, see Nation Newspapers, *S.M. Otieno: Kenya's Unique Burial Saga* (Nairobi: Nation Newspapers, 1987). See also D. W. Cohen and E. S. Atieno Odhiambo, *Burying S.M.: The Politics of Knowledge and the Sociology of Power in Africa* (London: James Currey, 1992).

[62] Article 24(a), Constitution of the Republic of Malawi (1994).

[63] L. Mwambene, 'Reconciling African customary law with women's rights in Malawi: the Proposed Marriage, Divorce and Family Relations Bill', *Malawi Law Journal* 1 (2007) 113–22.

which lists among the rights to which there is to be no derogation, restriction or limitation the right to equality and the right to freedom of conscience. In addition, Article 44(2) is a general clause to the effect that the only limitations on rights that will be recognized are 'those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society'.

It is therefore accurate to conclude that the Malawi Constitution is among the constitutions that attempt to provide for a balance between recognition of cultural rights and the right to equality, including gender equality.

Similarly, Kenya's 2010 Constitution marks a clear departure from the exemption contained in section 82(4). Article 2 on the supremacy of the Constitution makes this absolutely clear by adding clause 2(4): 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency.'

Article 45(4) gives Parliament the power to enact legislation that retains the recognition of 'marriages concluded under any tradition, or system of religious, personal or family law', and non-statutory norms and institutions for regulating family relations. However, in the 2010 Constitution these non-statutory norms and institutions are only given recognition 'to the extent that any such marriages or systems of law are consistent with this constitution'. The 'supra-constitutional' status that personal law systems enjoyed under the old Constitution has been stripped away.

This means that any application of such non-statutory norms and the operation of any institution under these systems must be consistent with the Constitution, including the Bill of Rights with its strong provisions on equality and non-discrimination (Article 27). Parliament cannot enact a law whose effect would be to exempt them from constitutional scrutiny. The legislative power given by Article 45(4) is by no means a door to the return of section 82(4).

However, an exemption in modified form does remain for Muslim personal law, but it is much more narrowly tailored than the blank cheque that was section 82(4). Article 24(4) of the 2010 Constitution provides as follows:

> The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

The phrase 'to the extent strictly necessary' anticipates a process of scrutiny to determine whether an exemption is warranted in each specific situation. Secondly, the exemption can only relate to a specific case before the Kadhi's court. It is not a blanket exemption of all Muslim personal law in all forums. When read together with Article 170(5), which requires that in order for the Kadhi's court to have jurisdiction over a case, the parties must be people who profess the Muslim faith and who also *submit to the jurisdiction of the Kadhi's courts*, it can be concluded that the Constitution of 2010 goes a long way to remedy the gagging of dissent that was contained in the previous section 82(4).

The formulation of Article 170(5) gives the possibility of opting out of the Kadhi's courts' jurisdiction altogether, while Article 24(4) makes it clear that discrimination is not an automatic corollary of the application of Muslim personal law. This is potentially empowering for Muslim women: they could opt out of the Kadhi's courts, or they could seize upon the opportunity presented by Article 24(4) to challenge discriminatory approaches to the application of Muslim personal law, thereby working for gradual transformation of the institutions that apply Muslim personal law.

But for the narrow exemption with regard to application of Muslim personal law, Kenya's constitutional framework for accommodating pluralism now closely resembles the South African model. In South Africa's post-apartheid Constitution, customary laws and the exercise of traditional authority are accorded constitutional recognition, but they are expressly subjected to scrutiny for compatibility with constitutional principles.[64]

This review of recent constitutional reforms in ESA countries establishes that the dominant practice is consistent with the approach taken by the Maputo Protocol, namely the recognition of a right to culture, alongside the opening up of possibilities to challenge and weed out negative norms and practices that are justified on culture. None of the reforms take the direction suggested by the CEDAW Committee, namely that the very existence of pluralism is itself an impediment to gender equality, or

[64] See Article 211(1), Constitution of the Republic of South Africa (as adopted by the Constitutional Assembly on 8 May 1996): 'The institution, status and role of traditional leadership, according to customary law, are recognized subject to the constitution.' Section 211(3) states: 'The courts must apply customary law when that law is applicable, subject to the constitution and any legislation that specifically deals with customary law.'

that reform is only possible through immediate legislative prohibition of specific practices sanctioned by personal law systems. By striking the kind of balance envisioned in these constitutional provisions, it is possible for a gradual sifting to occur: those aspects seen as enhancing rights and equality will be safeguarded, while those seen as inimical to rights and equality will be challenged.[65]

5 Pluralism in the courts: women's agency in defining culture and rights

> Imagine that a man slaps a woman in rural KwaZulu-Natal, South Africa. At the same time, another man slaps a woman in a popular neighbourhood in Khartoum, and yet a third does the same in a classroom at the Sorbonne in Paris. All three women protest: the woman in Paris that her rights have been violated, the woman in Khartoum that her dignity has been violated, and the woman in KwaZulu-Natal that custom has been violated. Every victim protests. But the language of protest is different in each case. How is one to understand this difference? Is not the starting point of protest to take power at face value, and to question its claim and thus legitimacy?[66]

The approach taken by the CEDAW Committee is one that positions 'culture' and 'rights' as polar opposites, the former being conceived of largely as a negative force that impedes realization of rights. Such an

[65] These constitutional provisions have been tested in litigation by individual women, often assisted by women's rights organizations. See, for example, cases discussed in M. Ndulo, 'African customary law, customs, and women's rights', *Indiana Journal of Global Legal Studies* 18:1 (2011) 87–120. However, the focus in such litigation tends to be on challenging specific cultural practices as contrary to women's human rights, giving the impression that culture is always on the opposing side to rights. There is little reference to instances in which women have employed the medium of culture to claim their rights. This is the case in other contexts as well, beyond the African context. See, for example, cases discussed in F. Raday, 'Traditionalist religious and cultural challengers – international and constitutional human rights responses', *Israeli Law Review* 41 (2008) 596–634. For discussion of cases in both categories (i.e. those in which women are challenging negative deployment of culture, as well as cases in which women are relying on culture to articulate their claims), see R. Odgaard and A. W. Bentzon, 'Rural women's access to landed property: unearthing the realities within an East African setting' in Hellum *et al*., *Human Rights*; J. Stewart and A. Tsanga, 'The widow's and female child's portion: the twisted path to partial equality for widows and daughters under customary law in Zimbabwe' in Hellum *et al*., *Human Rights* 407–36.

[66] M. Mamdani, 'Introduction' in M. Mamdani (ed.), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture* (Cape Town: David Philip Publishers, 2000) 1–13.

approach leaves no possibility of common ground, and has been questioned.[67] Such an approach effectively suggests that in order for women to access rights, the moral codes that they live by have to be displaced first. As another commentator has put it, 'African women would have to first strip themselves of culture before enjoying their rights.'[68]

But the Maputo Protocol and the approaches taken in recent ESA constitutional reforms suggest that culture can be a resource that enhances the claiming of rights, and possibly the expansion of the domain of rights. This last section explores the question: have women made use of culture as a resource in their claim-making? Or, to draw from Mamdani's scenarios in the quote above, have women employed custom as their chosen language of protest? Framing the question in this manner marks a deliberate departure from the more common approach where litigation around women's rights and culture focuses on challenging specific cultural practices as inconsistent with gender equality.

In exploring this question in the context of formal litigation in courts, this section of the chapter will examine selected cases in which women have asserted rights, drawing directly or indirectly from constitutional protection of the right to practise one's culture. In the context of Kenya, this right was not expressly provided for until the 2010 Constitution came into force.

So far, in only one case has a woman relied on the constitutional protection of the right to culture to make a claim: in the 2011 case of *Monica Jesang Katam* v. *Jackson Chepkwony & another*.[69] The case involved the practice colloquially labelled in legal texts as 'woman to woman' marriage.

Some background on the practice is necessary for understanding the case and the analysis that follows. The practice is found in several communities across the African continent.[70]

[67] See, for example, A. An-Na'im and J. Hammond (eds.), *Cultural Transformation and Human Rights in Africa* (London: Zed Books, 2002); C. Nyamu Musembi, 'Are local norms and practices fences or pathways? The example of women's property rights' in A. An-Na'im and J. Hammond (eds.), *Cultural Transformation and Human Rights in Africa* 126–50; T. Nhlapo, 'The African customary law of marriage and the rights conundrum' in M. Mamdani (ed.), *Beyond Rights Talk and Culture Talk* 136–48.

[68] S. Tamale, 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa', *Feminist Legal Studies* 16:1 (2008) 47–69 at 55.

[69] High Court of Kenya at Mombasa, Succession Cause No. 212 of 2010. Available at www.kenyalaw.org (as eKLR, 2011).

[70] In Kenya the practice has been documented in the following communities: Kamba, Kikuyu, Kisii, Kuria and various Kalenjin sub-tribes such as Nandi and Kipsigis. See

The typical scenario is that an older woman finds herself unable to have biological children or has only daughters, which disadvantages her in a context where property is handed down through male descendants, and women's own position in relation to property is dependent on their position in relation to male kin. Custom allows the childless or 'sonless' woman to enter into an arrangement with a younger woman, upon an exchange of gifts with her family, who then bears children for her. In some communities the older woman, if married, needs her husband's approval, and in others it is her autonomous decision.

In some situations the practice is prompted not by inability to bear children, but on account of an older single woman having independently acquired wealth. Woman-to-woman marriage is the route that custom offers such a woman toward relative autonomy in deciding who inherits her wealth. This was more common in trading societies such as the Ibo and Dahomey, where such women would thereby establish their own lineage, and their property and social status would be transmitted through that lineage.[71]

Children born to the younger woman are regarded as belonging either to the lineage of the older woman's husband (where the older woman is married), or to the older woman's lineage of birth, where the older woman is single, or to her own independent lineage, in societies that made provision for that. Any children born to the younger woman prior to the marriage (and she will often have had children as this serves as a guarantee of her fertility) will also belong to her new family, if the necessary compensation is paid to her parents in order for the children to be transferred to the new lineage.

In some communities it is the older woman who decides with whom the younger woman will have sexual relations. In other communities

E. Cotran, *Casebook on Kenya Customary Law* (Milton Park: Professional Books, 1987). Various Kenyan court cases are also discussed here. See note 74. See also J. Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (New York: Vintage Books, 1965); R. S. Oboler, 'Is the female husband a man? Woman/woman marriage among the Nandi of Kenya', *Ethnology* 19:1 (1980) 69–88. The practice has been documented in about forty pre-colonial African societies, with some continuing to the present era. See J. Cadigan, 'Woman-to-woman marriage: practices and benefits in Sub-Saharan Africa', *Journal of Comparative Family Studies* 29 (1998) 89–98; B. Greene, 'The institution of woman-marriage in Africa: A cross-cultural analysis', *Ethnology* 37:4 (1998) 395–412. See also I. Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (London: Zed Books, 1987), discussing woman-to-woman marriage with respect to Ibo society in Nigeria.

[71] Greene, 'The institution of woman-marriage in Africa'.

the younger woman has a free hand in deciding. In some communities a specific man from the lineage of the older woman's husband (where she is married) or her own lineage (where she is single), or any man among her acquaintances, is designated to biologically beget children with the younger woman. In any case the man in question acquires no rights over the children. His role is purely biological. The children bear the name of the new family's lineage. Thus the label 'woman-to-woman' is not altogether accurate as no sexual relations take place between the two female parties.

The practice has historically received the expected condemnation from religious quarters.[72] Beyond religious quarters it is generally criticized as retrogressive and out of step with modernity. Organizations working on women's rights have had nothing to say about this practice and will rarely include it on their lists of 'harmful cultural practices'. This is either because they do not consider it as serious enough compared to other abuses, or for reason of not wanting to be on the same side of the issue as religious bodies, who often take positions opposed to gender equality.

The relative decisional autonomy accorded to the older woman in some communities robs the narrative of the simplicity of one-dimensional sexual subordination of women by men. No doubt sexual subordination sets the background context for the practice, but it certainly is not the only dimension of the narrative.

Although I have encountered one case of a young woman fleeing from such a relationship,[73] the majority of cases involving this practice are brought by younger women petitioning the court to affirm the validity of the custom, give recognition to the relationship and affirm their entitlements flowing from the relationship. The cases all involve disputes with the older woman's kin over property. Invariably, such relatives seek to displace the younger woman's claim either by arguing that the practice of woman-to-woman marriage no longer exists in their culture, or that it was not carried out in strict adherence to tradition, or that the

[72] The church constitutions are silent on this, as are the by-laws that I could find, yet it is common knowledge that the mainstream denominations (Anglican, Presbyterian and Baptist) have consistently opposed the practice, and various denominations have excommunicated women (and any husbands involved) who were found to have engaged in the practice. Informal discussion with Dr. Henry Mutua, Theologian, Africa International University (Nairobi, Kenya), 10 June 2012.

[73] *Maria Angoi* v. *Marcella Nyomenda*, High Court of Kenya at Kisii (Aganyanya Ag. J.), Civil Appeal No.1 of 1981 (reproduced in Cotran, *Casebook on Kenya Customary Law*).

younger woman was only taken in as a servant and that there was really no marriage.[74]

Such cases have been reported since the 1990s. What is unique about the *Monica Katam* (2011) case is that it is the only one decided after the 2010 Constitution was adopted, and thus the only one that invokes the constitutional recognition of 'culture' as part of the national values and principles laid out in Article 11(1) as the basis for her claim. An 85-year-old unmarried woman died, leaving a substantial estate (valued at over 2 million Kenya Shillings, which is roughly 25,000 USD). Monica Katam, a 35-year-old mother of two teenage sons, had been living with her and taking care of her for over three years. She applied for letters of administration over the estate, describing herself as the 'widow' of the deceased, having been married to her according to Nandi customary law, which permitted woman-to-woman marriage. The older woman's nephew and niece (brother and sister, the children of her sister) sought to defeat Monica's claim by producing a will allegedly written by the deceased, which the court ruled was a forgery. The relatives further denied that a woman-to-woman marriage had existed between the two women, arguing that Monica was 'only a servant'. They also tried to discredit her claim by arguing that the custom of woman-to-woman marriage was no longer practised among the Nandi. The younger woman and her family were, however, able to prove with clear witness testimony,[75] written agreements signed and thumb-printed publicly between Monica's family and the older woman's family, as well as photographs, that the requisite customary ceremonies had taken place, both for her betrothal and marriage, as well as for the 'adoption' of her two sons by the older woman.

[74] For examples of cases falling along this spectrum of counter-arguments see *Millicent Njeri Mbugua* v. *Alice Wambui Wainaina*, High Court of Kenya, Civil Appeal No. 50 of 2003 (Nyeri) (eKLR 2008); *Maroa Wambura Gatimwa* v. *Sabina Nyanokwe Gatimwa and five others*, Kenya Court of Appeal, Civil Appeal No. 331 of 2003 (Kisumu) (eKLR 2010); *Mule Ndeti* v. *Ngonyo Sila*, Kenya Court of Appeal, Civil Appeal No. 128 of 1997 (Nairobi); *In the Matter of the Estate of the late Tapkigen Mase, & Philip Biegon & Emmy Chemutai* v. *Joseph Kipngeno Chepkwony*, High Court of Kenya, Succession Cause No. 23 of 2002 (Kericho) (eKLR 2006); *Serah Muthee Munyao* v. *Ruth Mueni Kitundu*, High Court, Probate and Administration Cause No. 42 of 2002 (Machakos); *In re Estate of Ngetich*, High Court, Probate and Administration Cause No. 29 of 1996, *Kenya Law Reports* 2003:84. All cases are available at: www.kenyalaw.org, the official website of the Kenyan National Council for Law Reporting.

[75] Including testimony of the objectors' maternal cousin, who testified to the first objector's (nephew's) presence at the ceremonies, which was also proven by production of photographs.

In recognizing her claim to the estate, the judge went into great detail to understand the custom in practice, citing previous court decisions that have recognized the practice, as well as ethnographic material on the community in question – the Nandi.[76] The judge then observed:

> Indeed, contemporary social systems, for instance, in the shape of current practices in the domain of family among the Nandi, are, I think, to be regarded as aspects of culture which will rightly claim protection under Article 11(1) of the Constitution of Kenya, 2010.

Even though the language of Article 11(1) is not framed so as to directly confer a 'right to culture', the judge interpreted it to mean that it embodied the principles that should guide the court 'in considering the implications of the woman-to-woman marriage in this case'.

So is this customary marriage practice contrary to gender equality? In the words of General Recommendation No. 21 of the CEDAW, does it have 'serious emotional and financial consequences'? Such a negative consequence is not self-evident in every case. Indeed, in some cases – certainly in the *Monica Katam* case and others cited above – the financial consequences at least favoured her and her sons. For the older woman who gets to decide to whom to bequeath her property, this appears to be an expression of relative autonomy. However, it cannot escape notice that the whole institution is premised on valuing women only for their reproductive capacity. The older woman is forced to resort to this customary practice in order to secure her own position in a male-defined inheritance system, as well as escape the stigma of childlessness or 'sonlessness'.[77] The younger woman has been sought out only on the basis of her demonstrated ability to bear children and provide labour, and she enters into it to aid her own and her children's escape from poverty and the stigma of illegitimacy.

In accounts that portray the practice as empowering for women,[78] the practice is cited as one way in which women get to occupy gender positions

[76] Among the material cited extensively in the judgment are Oboler, 'Is the female husband a man?' and Cotran, *Casebook on Kenya Customary Law*.

[77] Arguably, relative to other options for dealing with childlessness or 'sonlessness' in customary settings, this one at least gives the older woman a voice in the decision. For discussion of this topic, see A. Hellum, *Women's Human Rights and Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Harare and Oslo: Mond Books, 1999).

[78] Greene, 'The institution of woman-marriage in Africa'; Amadiume, *Male Daughters, Female Husbands*.

that are otherwise conceived of as male (e.g. 'husband'). The practice is therefore a deconstruction of the socially constructed notion of gender, and illustrates the potentially empowering flexibility of gender roles in traditional African societies.[79] A less optimistic reading of the practice, however, is that it affirms power as having a male gender,[80] but only carves out exceptional circumstances in which those who are biologically female are allowed to access power. Even this reading is only from the perspective of the older woman. From the perspective of the younger woman, it is difficult to read power (in the sense of her empowerment) into the relationship. Indeed, in some communities the terminology for woman-to-woman marriage translates as buying a slave.[81] Typically the younger woman is drawn from categories of socially disadvantaged women, for instance those widowed or divorced at a young age,[82] or single mothers, invariably from poor backgrounds.

In view of this double-edged effect or interpretation of the practice, what stance should (African) feminists take in relation to disadvantaged women's invocation of their rights under such a custom? These women are able to secure their own and their children's customary entitlement to family property, but by virtue of relying on an institution that values them only for their productive and reproductive labour, while perpetuating the maleness of power. This kind of case offers more opportunity for engagement than an issue such as polygamy, which probably oversimplifies the issue for feminists by accentuating the sexual subordination angle. Woman-to-woman marriage foregrounds an intergenerational and class-based subordination as well, permitting an intersectional analysis that is closer to social reality.

A similar dilemma is raised by cases in which daughters rely on customary recognition of entitlement in order to claim a share of family resources. These claims are not made in the language of equal entitlement with their brothers. Rather, they tend to be made in the restricted language of 'use rights' (as opposed to outright ownership), implicitly accepting a lesser category relative to the outright ownership presumed to be conferred on their brothers. These claims tend to be made in the language

[79] Greene, 'The institution of woman-marriage in Africa'; Amadiume, *Male Daughters, Female Husbands*.

[80] See Greene, 'The institution of woman-marriage in Africa'. See also D. O'Brien, 'Female husbands in southern Bantu societies' in A. Schlegel (ed.), *Sexual Stratification: A Cross-Cultural View* (New York: Columbia University Press, 1977) 99–108.

[81] Greene, 'The institution of woman-marriage in Africa'.

[82] *Ibid*.

of the dutiful or caring daughter who therefore deserves to benefit from the elderly parents' property (or estate, in the case of inheritance claims). This language contrasts with the automatic entitlements of sons that vest as a matter of right and need not be earned through duty.

Such scenarios are documented in several writings that have engaged with the issue of women's property rights in a context of pluralism. Although some of these documented claims have been made in court,[83] the vast majority are presented in informal dispute resolution forums and are therefore recorded in empirical research.[84] Odgaard and Bentzon[85] profile some such claims in village-level forums in two districts in Tanzania inhabited by members of the Hehe ethnic group. The authors found that among fathers there was strong recognition of daughters' (including married daughters') claims to land in their natal (birth) villages. The authors 'uncovered numerous examples of daughters' who had successfully relied on informal intra-family and other village-level forums to enforce land rights granted to them by their fathers in their natal villages.[86]

Stewart and Tsanga also refer to research conducted by Women and Law in Southern Africa Research Trust (WLSA) in the 1980s and 1990s in Zimbabwe, which documents a strong customary basis for a 'right of return' for married daughters, entitling them to support from their natal families, which invariably meant a right to occupy, build on and use land.[87] Empirical research in Eastern Kenya also found a level of support for daughters' customary entitlement to land and livestock in their natal

[83] See for example *Chihowa* v. *Mangwende*, 1987 (1) ZLR 228 SC (Zimbabwe Supreme Court). In this case the daughter in question insisted on her right to be appointed heir under customary law, and to be held to the same obligations as any customary heir. See also *Ephraim* v. *Pastory* (High Court of Tanzania, 1990, available at 87 *Int. L. Rep.* 106 (1992)). In this case a daughter had inherited land from her father and then sold it outside the clan. A relative challenged her right to sell the land outside the clan, arguing that as a woman she had no right to dispose of the land. She successfully asserted her customary right to do so subject to the same restriction as any male clan member: the customary right of redemption by any of her kinsmen.

[84] Examples include Odgaard and Bentzon, 'Rural women's access to landed property'; Stewart and Tsanga, 'The widow's and female child's portion'; C. Nyamu, 'Gender, culture and property relations in a pluralistic social setting' Doctor of Juridical Studies (SJD) Dissertation, Harvard Law School (2000); C. Nyamu Musembi, 'Why engage with local norms and institutions? The case of women's property rights in rural Kenya', *East African Journal of Peace and Human Rights* 9:2 (2003) 255–89.

[85] Odgaard and Bentzon, 'Rural women's access to landed property'.

[86] *Ibid*. at 221.

[87] Stewart and Tsanga, 'The widow's and female child's portion'. Also addressed in Damiso and Stewart's chapter in this book.

families.[88] Empirical research among the Taita of Kenya's coastal region also documents a well-established custom of 'gifting' land to a daughter, which guarantees her user rights for the lifetime of her parents, regardless of her marital status. The user rights might even survive after her parents' death if she is able to negotiate successfully with her brothers.[89]

All these scenarios present a double bind similar to that presented by woman-to-woman marriage. On the one hand, without the customary basis for their claim, these women would be at the mercy of arbitrary actions of male kin, depriving them of access to resources crucial to their livelihoods. On the other hand, the custom in question rests on an underlying status differentiation between the entitlements of daughters and those of sons: between those perceived as having permanent membership in the family and those whose membership is transient and their claims therefore contingent; between those in whom property rights vest automatically and those whose property rights must be negotiated and justified; between those who are entitled and those who are pitied.[90]

Is the making of claims in this bounded context an endorsement or reinforcement of the underlying status differentiation? Some feminists would most likely argue that it is. Yet wholesale rejection of customary norms and practice on property for this reason spells the very real possibility of destitution (both economic and social) for some women for whom this is the only basis for entitlement. Which path should an African feminist take in these contexts? We reflect further on this issue in the conclusion.

6 Conclusion: what course of action for African feminists?

The dilemma posed by the cases discussed above is parallel to the one posed by Cusack in her chapter in this volume concerning gender stereotyping: what is the appropriate feminist response in situations where measures are undertaken that confer tangible and immediate benefits on

[88] Nyamu, 'Gender, culture and property relations'; Nyamu Musembi, 'Why engage with local norms and institutions?'

[89] See G. C. Mkangi, *The Social Cost of Small Families and Land Reform: A Case Study of the Wataita of Kenya* (Oxford: Pergamon Press, 1983); M. M. Mwachofi, 'Land reform in Taita: a study of socio-economic underdevelopment in a Kenya district', Bachelor of Arts Dissertation, University of Nairobi (1977).

[90] Nyamu, 'How should human rights and development respond'.

women, but that rest on a stereotyped understanding of gender roles and therefore pose long-term negative consequences?[91]

It falls upon African feminists to discern the potential for expansion of the spaces for women's agency, even when (especially when) those spaces appear to be constrained by an ideology of gendered subordination. Ideology can be contested and eroded, albeit gradually, sometimes through overt protest, and sometimes through subtle but deliberate institutionalization of divergent social practices.[92] This path is more likely to enable 'enhanced participation of women in the formulation of cultural policies at all levels' and help realize African women's right to live 'in a positive cultural context'.[93]

It is not too late for the CEDAW Committee to get involved and help steer a global component of this project. However, this will only be possible if the CEDAW Committee gets back on the briefly trodden path charted by its Secretariat's 1995 report. That report, as discussed above, interpreted the combined effect of Articles 2(f) and 5(a) to mean that the state had diverse means at its disposal in fulfilling its obligation of positive transformation of customary and religious practices to align with gender equality. The Secretariat rightly understood that the two clauses did not dictate a narrow focus on legislation, let alone simply prohibitory legislation. The CEDAW Committee can draw inspiration from the Maputo Protocol's approach in order to engage African states in a less stylized and more productive dialogue on legal pluralism: one that reflects an in-depth understanding of each country's context and each country's milestones along the path toward transformed gender relations.

[91] To illustrate this dilemma, Cusack cites the South African Constitutional case of *President of the Republic of South Africa* v. *Hugo*, 1997(4) SA 1 (CC). The president issued a pardon to female but not male prisoners, justifying such action on the need for women prisoners to be available to care for their children. The benefit to female prisoners is obvious, but so is the stereotyping of the childcare role as belonging to women and not to men.

[92] See S. Hirsch and M. Lazarus-Black, 'Introduction – Performance and paradox: exploring law's role in hegemony and resistance' in S. F. Hirsch and M. Lazarus-Black (eds.), *Contested States: Law, Hegemony and Resistance* (London: Routledge, 1994) 1–31; S. E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006); A. Hunt, 'Rights and social movements: counter-hegemonic strategies', *Journal of Law and Society* 17:3 (1990) 309–28; S. F. Moore, 'Uncertainties in situations, indeterminacies in culture' in S. F. Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978).

[93] Article 17, Maputo Protocol.