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Pluralism in Ghana: The Perils and Promise of Parallel Law

Johanna E. Bond
Washington and Lee University School of Law, bondj@wlu.edu

JOHANNA BOND*

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Recently, the Archbishop of Canterbury suggested that Great Britain establish an Islamic civil court system that would operate alongside the traditional civil system.[1] The Archbishop emphasized the need for such a parallel system in the context of family law.[2] In the days that followed the Archbishop's controversial statements, a public furor prompted him to clarify—and retreat from—his message.[3] The Archbishop's proposal reflects a contemporary struggle that is occurring in many parts of the global north and south, in many context-specific variants.[4] At their core, these conflicts reflect the

* Associate Professor of Law, Washington and Lee University School of Law. Special thanks to Elizabeth Bruch for her comments on an earlier draft of this Essay, Megan Holbrook for research assistance, and the editorial board of the *Oregon Review of International Law* for hosting this symposium.

1 John F. Burns, *Top Anglican Seeks a Role for Islamic Law in Britain*, N.Y. TIMES, Feb. 8, 2008, at A10.

2 *Id.*

3 *Id.*

4 *See, e.g.*, Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1 (2004); Brenda Opperman, *The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United*

sometimes competing values of multiculturalism and gender equality.

Many states have recognized that minority groups require accommodation to protect them from domination by the majority.[5] Some states have responded by implementing accommodationist policies that cede jurisdiction over certain matters, such as family law, to the minority group.[6] Many multicultural theorists have embraced accommodation as the best way to protect minority groups from oppression by the state.[7] A number of feminists, however, have raised concerns that these accommodationist policies actually increase the vulnerability of women within those accommodated minority communities.[8] Ayelet Shachar, for example, observes: "Well-meaning accommodation policies by the state, aimed at leveling the playing field between minority communities and the wider society, may unwittingly allow systematic maltreatment of individuals within the accommodated minority group."[9]

States, 17 HASTINGS WOMEN'S L.J. 65 (2006); Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and 'Personal Laws,'* 4 INT'L J. CONST. L. 181 (2006).

5 *See generally* Jeff Spinner-Halev, *Feminism, Multiculturalism, Oppression and the State*, 112 ETHICS 84 (2001). *See also*, Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385 (2000) [hereinafter Shachar, *Power Hierarchies*].

6 Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363 (2007) (discussing the costs of religious deference in the United States); MacKinnon, *supra* note 4; Johanna Bond, *Constitutional Exclusion and Gender in Commonwealth Africa*, 31 FORDHAM INT'L L.J. 289 (2008) [hereinafter Bond, *Constitutional Exclusion*] (describing a handful of Commonwealth African countries that have specifically exempted family law from constitutional non-discrimination protection).

7 *See, e.g.*, Chandran Kukathas, *Are There Any Cultural Rights?* 20 POL. THEORY 105 (1992); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994).

8 *See, e.g.*, Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285 (1998) [hereinafter Shachar, *Group Identity*]; Bond, *Constitutional Exclusion*, *supra* note 6; MacKinnon, *supra* note 4; Wilson, *supra* note 6; Madhavi Sunder, *Piercing the Veil,* 112 YALE L.J. 1399, 1403 (2003) ("[W]omen's human rights activists are piercing the veil of religious sovereignty."). *Compare* Leti Volpp, *Feminism versus Multiculturalism,* 101 COLUM. L. REV. 1181 (2001) [hereinafter Volpp, *Feminism*] ("[T]o posit feminism and multiculturalism as oppositional is to assume that minority women are victims of their cultures.").

9 Shachar, *Power Hierarchies*, *supra* note 5, at 386.

The organizers of this symposium posed the question: "When people have multiple affiliations to place across scales, how should their citizenship be characterized?"[10] The struggle to balance the concerns of cultural groups and the equality rights of individual group members stems from the recognition that people may value their affiliations with both the state and the local community. Contemporary plural legal systems present an opportunity to explore how individuals reconcile multiscalar relationships with both the state legal system and more localized, community-based legal systems. In many jurisdictions in Commonwealth Africa, jurisdiction over family law is divided or shared between the state and local groups. Because the stakes of family law matters are often exceedingly high for women, they must attempt to enforce their rights in both arenas. In short, women must fight for gender equality rights across scales.[11]

In her book *Multicultural Jurisdictions*, Ayelet Shachar has made a valuable contribution to the theoretical debates surrounding state accommodation of multiculturalism.[12] Shachar's theory is grounded in the important insight that women have complex identities and multiple affiliations, including the state and the community. She rejects the characterization of women as strongly affiliated with one at the expense of the other. With respect to the intersectional nature of women's identity, Shachar and I agree. Her theory, however, places too great an emphasis on women's ability to choose between the jurisdiction of the state and the community. This choice of jurisdiction, in Shachar's view, will create market-based incentives for the community and the state to be more responsive to women's rights. She is, in my view, overly optimistic about women's unfettered ability to choose a jurisdiction and about the effect of such jurisdictional competition.

Because any theory is best evaluated as applied in specific cases, this Essay explores the application of Shachar's theory to

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10 Description of symposium, Editors, *Oregon Review of International Law*, February 14, 2008 (on file with author).

11 This is true not only of women, but also of sexual minorities, religious minorities, and other minority populations.

12 AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001) [hereinafter SHACHAR, MULTICULTURAL JURISDICTIONS].

the Ghanaian legal system. As a post-colonial plural legal system, Ghana provides a useful case study that includes both state accommodation in some areas of family law and uniform state laws in other areas of family law. Although only one example, Ghana has attempted to reconcile the needs of its ethnic communities to enjoy some level of self-regulation and the need of the state to protect the individual rights of all Ghanaians.

The Ghanaian legal system is a plural one in which customary, religious, and statutory law all govern in certain areas of the law, such as family law.[13] As such, most women interact with the legal system on many different planes, at times subject to statutory law and at other times subject to customary or religious law. In addition to the different sources of law in Ghana, women also engage with the law at multiple levels, including local, national, and international. They encounter the law across multiple scales and as members of multiple communities.

This Essay begins with a description of Shachar's primary theoretical contributions to the debate surrounding multiculturalism and feminism. Part I also briefly describes Ghana's plural legal system, with a focus on marriage law and intestate succession law. Part II applies the major tenets of Shachar's theory to the Ghanaian legal context. This section concludes that the application of the theory in Ghana is complex and raises some doubt about its universal applicability.

As explored in this Essay with reference to Ghana, Shachar attempts to promote equality across scales, including both protection for minority groups from domination by the state and protection for the most vulnerable members within those minority groups. By recognizing and building upon the notion that women have complex, multifaceted identities which often include affiliation with both community and state, Shachar

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13 Akua Kuenyehia, *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 388 (2006) [hereinafter Kuenyehia, *Intestate Succession*]. This Essay deals primarily with statutory and customary family law. Couples in Ghana may also marry according to Islamic law. The Marriage of Mohammedans Ordinance requires registration of Islamic marriages and divorces. Akua Kuenyehia, *Women and Family Law in Ghana: An Appraisal of Property Rights of Married Women*, 17 U. GHANA L.J. 72, 76 (1986–1990) [hereinafter Kuenyehia, *Appraisal of Property Rights*]. Men married according to Islamic law may take up to four wives. Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 FORDHAM INT'L L.J. 259, 283 (2001).

makes a valuable theoretical contribution to the literature on multiculturalism.[14]

Her theory, however, has several shortcomings. First, the theory builds upon an overly compartmentalized typology, in which Shachar depicts different models of shared jurisdiction as discrete and separate models. In reality, as the case study of Ghana will illustrate, states may embrace overlapping and interconnected models of jurisdiction. Second, she relies on an unrealistic conception of women's agency and overestimates the institutional response to the exercise of that agency. The biggest difficulty in the application of the theory is its reliance on women's ability to exit, or partially exit, from one jurisdiction in favor of another; a task that is not easily accomplished in many legal contexts, including Ghana. Shachar's theory does not adequately account for the social constraints that limit women's choice of jurisdiction. Third, despite the fact that the number of women opting out of customary marriage and divorce law in favor of statutory law is small, one would expect to see some, albeit slight, modification of the customary law system in favor of equality rights. To date in Ghana, there has not been a discernable response within the customary law system. Although empirical study is necessary to make anything but the most tentative conclusions in this regard, Shachar's suggestion that competitive market forces will result in increased enjoyment of women's rights has not born fruit in Ghana. Lastly, the Essay also argues that an exclusive focus on this jurisdictional choice, at least in the Ghanaian context, obscures the many other sites of resistance through which women protest and challenge the normative content of both customary and state-sponsored law.

I
THE CONTOURS: THE THEORETICAL AND LEGAL LANDSCAPES

Often concessions by the majority made in an effort to preserve or accommodate minority culture leave certain members within the minority group vulnerable to exploitation or oppression.[15] Ayelet Shachar calls this phenomenon the

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14 Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49 (2005) [hereinafter Shachar, *New Modes*].

15 This insight applies not only to women, but to sexual, religious, ethnic, and other minority groups subject to discrimination.

"paradox of multicultural vulnerability."[16] Certainly, there is value in accommodating minority culture, but this cannot happen at the expense of the most vulnerable minority group members.

This tension has been the subject of much feminist analysis.[17] Shachar's contribution lies not in identifying the tension, but in recommending a unique institutional response to it.[18] Feminists have long resisted the notion that women must choose between their culture and their equality rights.[19] Indeed, feminists have

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16 Multicultural accommodation presents a problem, however, when pro-identity group policies aimed at leveling the playing field between minority communities and the wider society unwittingly allow systematic maltreatment of individuals within the accommodated group—an impact which in certain cases is so severe that it can nullify these individuals' citizenship rights. Under such conditions, well-meaning accommodation by the state may leave members of minority groups vulnerable to severe injustice within the group, and may, in effect, work to reinforce some of the most hierarchical elements of a culture. I call this phenomenon the *paradox of multicultural vulnerability.*

SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 2–3 (emphasis in original).

17 Volpp, in particular, contributed greatly to moving the discourse beyond the feminism/multiculturalism binarism. She states, "[p]itting feminism against multiculturalism has certain consequences: It obscures the influences that in fact shape cultural patriarchy, and masks the level of violence within the United States." Volpp, *Feminism*, *supra* note 8, at 1181. *See also* Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations,* 52 EMORY L.J. 71 (2003) [hereinafter Bond, *International Intersectionality*] (arguing that the human rights framework must recognize the complexity and multiplicity of women's identities, specifically as members of cultural and religious communities and as equality-seeking women); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

18 *See infra* notes 25–34 and accompanying text.

19 Shachar characterizes the primary theoretical responses to the paradox of multicultural vulnerability as the "re-universalized citizenship" response and the "unavoidable costs" response. By "re-universalized citizenship," Shachar refers to privileging individual rights in a conflict between individual and group rights, thereby asking women to forsake their culture in favor of enforcing their individual rights. This theoretical response leads to the "secular absolutist" legal model, in which the state maintains its authority or jurisdiction over minority group members. *See* Eric J. Mitnick, *Individual Vulnerability and Cultural Transformation*, 101 MICH. L. REV. 1635, 1649 (2003) (citing SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 72–78). Shachar's "unavoidable costs" describes a theoretical response in which proponents advocate that the state refrain from intervening in the rights of cultural minorities. The inevitable vulnerability of some minority group members is, therefore, an "unavoidable cost" of preserving cultural identity. *Id.* at 68–70. According to Shachar, this theoretical response gives rise to

challenged the notion that culture, which is often defined as minority culture, is antithetical to the enjoyment of equality rights.[20] Around the world, feminists are exploring the ways in which culture embodies equality, the ways in which dominant cultures have escaped feminist criticism, and the ways in which women are working to increase equality within their own cultural traditions.[21] As many have done before her, Shachar rejects the either/or dichotomy of culture versus rights.[22] Instead, she proposes an institutional structure that "strives for the reduction of injustice between groups, together with the enhancement of justice within them."[23]

Within the multicultural accomodationist state, jurisdiction or control over certain issues, such as family law, has been seen as a concession to the minority group. Shachar suggests that we should not approach jurisdiction as an either/or question of authority.[24] Under this model, both the state and the minority group may exercise "joint governance" or shared control over certain substantive areas. Shachar's model of joint governance is one in which jurisdiction is divided such that neither the state nor the minority group has exclusive control over a subject area such as family law. In Shachar's model of "transformative accommodation," the state and the minority group "compete for the loyalties" of citizens who are responsive to the authority of both the state and the minority group of which they are members.[25]

One of the foundational principles of "transformative accommodation" is the allocation of authority along "sub-matter" lines.[26] The state and the minority group divide

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the "religious particularist" legal model, which grants cultural minorities greater autonomy and discourages state intervention. *Id.* at 71.

20 Volpp, *Feminism*, *supra* note 8, at 1181.

21 Sunder, *supra* note 8; Bond, *International Intersectionality*, *supra* note 17. *See also* Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000); L. Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575 (1995); Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483 (2002).

22 Shachar, *Power Heirarchies, supra* note 5, at 405.

23 SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 4.

24 Shachar, *Power Heirarchies*, *supra* note 5, at 418.

25 SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 122–26.

26 *Id.* at 119.

jurisdiction over sub-categories of issues or "sub-matters."[27] According to Shachar, "[t]he fact that power can be divided along sub-matter lines *within* a single social arena makes it possible to have a more creative, nuanced, and context-sensitive allocation of jurisdiction."[28] The example of marriage law is illustrative. The minority community may, for example, have an interest in regulating entrance into and exit from the community through the institution of marriage.[29] The state, by contrast, may wish to regulate the distribution of assets within marriage or divorce.[30] As such, jurisdiction may be divided along "demarcating" and "distributive" aspects, or sub-matters, within marriage.[31]

Shachar defines another significant feature of transformative accommodation as the "no-monopoly" rule: "[N]either the group nor the state can ever acquire exclusive control over a contested social arena that affects individuals both as group members and as citizens."[32] In fact, individuals must have the opportunity to elect an alternative jurisdiction at certain intervals or "reversal points."[33] Shachar's emphasis on "clearly delineated choice options" reflects her position that this competition between sources of authority will force the state and the group to be more responsive to the needs of vulnerable groups members.[34]

Shachar discusses existing models of joint governance, all of which are, in her view, inadequate in some way. The first example involves powersharing across levels of government, as in the federal system, "where power is allocated between several sub-units and among different branches and levels of government."[35] The federal system of joint governance may provide greater autonomy for communities that are territorially based.[36] The federal system, through a national constitution, also

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27 *Id.*

28 *Id.*

29 *Id.* at 119–20.

30 *Id.* at 120.

31 *Id.*

32 *Id.* at 121.

33 *Id.* at 122–26.

34 *Id.*

35 *Id.* at 92.

36 *Id.*

provides protection for the most vulnerable within those more autonomous groups.[37] Shachar rejects federal-style accommodation, noting that it "seems to offer only a limited promise to vulnerable group members as well as to cultural minorities that are not regionally concentrated or nationally defined . . . ."[38]

Shachar describes the second form of joint governance as "temporal accommodation," in which jurisdiction is divided between the state and the minority group according to a hierarchy of temporally-based interests.[39] Shachar illustrates temporal accommodation by discussing the example of a community for which the early education of its children is central to the continuation and well-being of the community.[40] In a context of temporal accommodation, the community group might enjoy jurisdiction over education until children reach a certain age, at which time, the state would assume educational jurisdiction.[41] Shachar raises a number of concerns about the implementation of temporal accommodation, including a concern that either the state or the community group may take action during its period of jurisdictional control that proves harmful or "irreversible" when the other entity later assumes jurisdiction.[42]

Shachar's third form of joint governance is "consensual accommodation," in which individuals in the minority community may choose either the jurisdiction of the state or the jurisdiction of the minority group.[43] In the context of family law, "[t]his one-time choice of legal framework will govern the individual's relevant affairs from the beginning to the end of her intimate relationship in a given family."[44] This form of joint governance, however, forces a one-time jurisdictional choice that may have "unforeseen consequences" for the individual years

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37 *Id.* ("[L]ike other sub-units, [community or nomoi groups] are also subject to certain overarching constraints applicable to all governmental levels within the system, such as compliance with basic constitutional principles.").

38 *Id.* at 96.

39 *Id.*

40 *Id.*

41 *Id.* at 97 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

42 *Id.* at 102–03.

43 *Id.*

44 *Id.* at 103.

later.[45] It also allows the state to abdicate responsibility for vulnerable group members.[46]

Within the model of "contingent accommodation," the state cedes jurisdictional authority over certain substantive areas that the minority group considers of paramount importance to its cultural identity.[47] Despite this concession of authority, however, the state maintains minimal standards to which the minority group remains subject.[48] "If a group fails to meet these minimal standards, the state may intervene in the group's affairs and override its jurisdiction by applying the state's residual powers."[49] Shachar expresses concern regarding when this oversight, or, in her words, "reversal of responsibility," will take place, how "minimal standards" will be defined, and who will define the standards.[50]

In lieu of the models above, Shachar proposes transformative accommodation as a way to divide jurisdiction between the state and the community. Although Shachar's theory of transformative accommodation is an innovative approach to a complex and entrenched problem, I differ with Shachar with respect to the potential of transformative accommodation to affect change in the Ghanaian legal context. The crux of her theory is that market pressure, as expressed by a choice of one jurisdiction over another, will force positive change in the jurisdiction that was not chosen. In Ghana, as in many places around the world, women face a great deal of pressure in exercising choice concerning family law issues. An expressed jurisdictional preference, therefore, does not reflect agency in a pure form. In addition, the narrow focus on jurisdictional preference obscures the many other forms of agency that women exercise on a daily basis, in Ghana, as elsewhere.

Customary law in Commonwealth Africa primarily regulates familial relationships.[51] It consists of largely unwritten rules or laws that may be applied by traditional leaders or, in some cases,

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45 *Id.*

46 *Id.* at 108.

47 *Id.* at 97.

48 *Id.* at 109.

49 *Id.*

50 *Id.* at 112.

51 Kuenyehia, *Intestate Succession*, *supra* note 13, at 387.

by the courts.[52] Throughout the colonial period in Ghana, the British colonial authorities maintained a plural system of laws.[53] In some cases, the colonial authorities imported British law, often called the "received" law, to govern all people living in the colony.[54] In other cases, specifically cases involving family law, the colonial authorities allowed a plurality of laws to govern. In other words, statutory law, customary law, or Islamic law might govern a particular family law dispute.[55] In most family law cases under the colonial administration, race was a deciding factor in determining which system of law to apply. For example, in a family law dispute between two whites, the courts would apply the "received" or British law.[56] By contrast, in a family law case involving two black disputants, the courts would often attempt to apply the relevant customary or religious law, except when there was a specific statutory override of customary or religious law.

Although traditional leaders resolved many customary law cases locally, the cases that did reach the colonial courts contributed to a distortion and ossification of customary law.[57] Because customary law was, in some cases, filtered through a colonial lens, the substantive content of the law was necessarily distorted.[58] In addition, when the colonial courts attempted to ascertain and record the content of customary law, it was

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52 Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 33, 38–39 (2003); *see also* Bond, *Constitutional Exclusion*, *supra* note 6, at 296. The Ghanaian Constitution defines customary law as "the rules of law, which by custom are applicable to particular communities in Ghana." GHANA CONST. art. 11, § 3 (1992).

53 Kuenyehia, *Intestate Succession*, *supra* note 13, at 388 ("[L]egal pluralism in its most classic form in Africa is a product of colonization.").

54 *Id.* ("Under these various systems of laws, customary and religious law governs family issues while statutory law governs everything else.").

55 CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA 42 (1997) [hereinafter WOMEN OF THE WORLD].

56 Alice Armstrong et al., *Uncovering Reality: Excavating Women's Rights in African Family Law*, 7 INT'L J.L. & FAM. 314, 322 (1993) ("[C]ustomary law applied to Africans while the received law applied to non-Africans.").

57 *See id.* at 327; Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 842 (2000).

58 *See, e.g.*, RHODA E. HOWARD, HUMAN RIGHTS IN COMMONWEALTH AFRICA 190 (1986) ("[T]he British introduced formal land registration in the names of individual, not lineage, title-holders and, because of their own cultural biases, registered land only in men's names.").

transformed from a flexible system of "living" customary law to a more rigid, fixed understanding of customary law, as articulated by the British authorities.[59]

Although Portugal was the first European nation to colonize Ghana, the British formally declared the creation of the British Crown Colony of the Gold Coast in 1874.[60] A nationalist movement gained momentum in the 1940s and 1950s, resulting in a 1956 request from the Ghanaian government for independence.[61] Ghana gained independence from British colonial rule in 1957, making it the first post-colonial independent state in Africa.[62]

The post-colonial government in Ghana preserved the plural legal system for family law, which is still operative today. As a result, a Ghanaian couple wishing to marry today has the choice to marry according to statutory law, pursuant to the Marriage Ordinance; customary law, pursuant to local custom; or Islamic law, pursuant to the Marriage of Mohammedans Ordinance.[63] A woman's rights and duties in marriage vary significantly depending upon the type of marriage into which she has entered.

Ghanaian family law tracks Shachar's theory in the sense that jurisdiction over certain family law matters is divided between the state and the community according to sub-matter lines. In Ghanaian family law, customary law governs the vast majority of marriages, regulating entrance into and exit from various cultural communities.[64] By contrast, the state controls the distributional aspects of marriage, as they relate to inheritance,

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59 Because it can be difficult to ascertain what the [customary] law is, judges who are tasked with interpreting customary law often turn to prior judicial articulations of customary law or descriptions of the law in academic texts. This leads to a misunderstanding of customary law as ossified or fixed in time rather than as a flexible, evolving system of law.

Bond, *Constitutional Exclusion*, *supra* note 6, at 296.

60 VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA (Johanna Bond ed., 2005).

61 Nana K.A. Busia, Jr., *Competing Visions of Liberal Democracy and Socialism*, *in* HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS 53 (2003).

62 WOMEN OF THE WORLD, *supra* note 55, at 32.

63 Akua Kuenyehia points out, however, that even marriages contracted under statutory law should be described as "combined customary and statutory," since most statutory marriages are "preceded or followed afterwards by performance of all the essential rites of a valid marriage under customary law." Kuenyehia, *Appraisal of Property Rights*, *supra* note 13, at 74.

64 Fenrich & Higgins, *supra* note 13, at 268.

through application of the Intestate Succession Law. Thus, jurisdictional authority is allocated loosely along the sub-matter lines of the demarcating and distributive functions of family law, consistent with Shachar's theory of transformative accommodation.[65] Ghanaian marriage law, however, is not divided perfectly along sub-matter lines. In the context of membership or the demarcating function of family law, there is not a complete concession to community groups; the state offers a statutory alternative in the form of the Marriage Ordinance.

A. Membership/Demarcating

The notion of "family" is a central socio-legal organizing principle in Ghana.[66] In Ghanaian society, the family "denotes a large social group of people all tracing descent from a common ancestor, male or female."[67] Some Ghanaian ethnic groups are matrilineal, meaning that the members are "lineally descended in a direct female line from a common female ancestor."[68] In patrilineal systems, descent follows a male line. In both patrilineal and matrilineal systems, however, it is the male descendants who are entitled to the rights that flow from lineage.[69]

A valid marriage under the Marriage Ordinance requires the consent of both parties. Unlike in customary law marriages, in which marriage is considered an agreement between two families,[70] the Marriage Ordinance emphasizes the individual consent of the parties to the marriage. Prior to the marriage, the

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65 SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 51; *see also supra* text accompanying note 12.

66 Akua Kuenyehia & Esther Ofei-Aboagye, *Family Law in Ghana and Its Implications for Women*, *in* WOMEN & LAW IN WEST AFRICA 23 (1998).

67 *Id.*

68 *Id.*

69 Although the matrilineal system is based on relationships to common female ancestors, matrilineal does not imply matriarchal; men usually occupy the positions of authority within this system. For example, the wofa, or mother's brother, is typically the head of the smaller family unit. He is the guardian of dependent women and children within the extended family and will often have a very close relationship with his sisters' children.

Fenrich & Higgins, *supra* note 13, at 271–72.

70 W.C. Ekow Daniels, *The Impact of the 1992 Constitution on Family Rights in Ghana*, 40 J. AFR. L. 183, 185 (1996) (noting that marriage "was seen not so much as a contract between the individuals directly concerned but as one between the two groups or families of individuals whom they represent").

couple must obtain a certificate from the marriage registrar or marriage officer.[71] Statutory marriages under the Marriage Ordinance are considered legally monogamous marriages.[72] In practice, however, men in Ordinance marriages sometimes maintain additional wives or unofficial concubines.[73]

The majority of marriages contracted in Ghana are customary law marriages.[74] The precise requirements for a valid customary law marriage vary by ethnic group.[75] There are some similarities, however. All customary marriages in Ghana, for example, are potentially polygamous.[76] All are viewed as an agreement between families rather than individuals.[77] As such, the consent of an individual to the marriage is not always required.[78] Indeed, many girls are given in marriage, or betrothed, at birth or an early age, although the actual marriage does not occur until the girl reaches puberty.[79]

In some parts of Ghana, ethnic groups require the payment of brideprice, which is a transfer of cash, livestock, or other property from the groom's family to the bride's family as part of the marriage agreement.[80] Bernice Sam, a Ghanaian women's rights lawyer and scholar, notes that brideprice was originally merely symbolic but "is now seen as the purchase of a wife."[81] Sam also points out that demands for bridewealth force some young men to postpone marriage, leading to higher rates of

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71 Kuenyehia, *Appraisal of Property Rights*, *supra* note 13, at 75.

72 WOMEN OF THE WORLD, *supra* note 55, at 42.

73 "Also commonplace are liaisons which do not rise to the level of concubinage. As Ms. Rosaline Obeng-Ofori of Actionaid explained, '[m]en do not commit adultery in customary marriages because they are free to have relations with any woman they choose.'" Fenrich & Higgins, *supra* note 13, at 275.

74 A 1991 study estimated that approximately eighty-six percent of Ghanaian marriages were customary law marriages. Ulrike Wanitzek, *Integration of Personal Laws and the Situation of Women in Ghana: The Matrimonial Causes Act of 1971 and Its Application by the Courts*, 1991 THIRD WORLD LEGAL STUD. 75, 78 (1991).

75 Kuenheyhia & Ofei-Aboagye, *supra* note 66, at 25.

76 WOMEN OF THE WORLD, *supra* note 55, at 42.

77 Fenrich & Higgins, *supra* note 13, at 273.

78 *Id.*

79 Kuenheyhia & Ofei-Aboagye, *supra* note 66, at 26.

80 *Id.*

81 Bernice Sam, *Discrimination in the Traditional Marriage and Divorce System in Ghana: Looking at the Problem from a Human Rights Perspective*, *in* VOICES OF AFRICAN WOMEN: WOMEN'S RIGHTS IN GHANA, UGANDA, AND TANZANIA, *supra* note 60, at 205, 212.

cohabitation and concubinage, "in which women have no rights."[82]

Under customary law marriage, different rights and duties attach to the husband and wife. The husband has a duty to maintain his wife, including the provision of medical care.[83] A husband's failure to maintain his wife is one of the few grounds for women to divorce under customary law.[84] A customary law marriage confers upon the husband exclusive sexual access to his wife. A customary law wife is also expected to provide domestic services to her husband.[85]

B. Distributive

In 1985, the Ghana Legislature enacted the Intestate Succession Law, a law that applied uniformly across the various marriage law systems.[86] In other words, the law applied regardless of the type of marriage into which a couple had entered. The memorandum that precedes the law identifies providing greater protection for surviving spouses as the law's primary goal.[87] The legislature designed the law to give a larger

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82 *Id.*

83 Kuenheyhia & Ofei-Aboagye, *supra* note 66, at 31.

84 *Id.*

85 In the well-known 1959 case of *Quartey v. Martey*, Justice Ollenu observed that, according to customary law, "it is the domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life." [1959] Ghana L. Rep. 377. Accordingly, "any proceeds of this joint effort of man and wife . . . are by the customary law the individual property of the man." Courts have applied rules of equity to depart from this interpretation of customary law in the years since *Quartey v. Martey* was decided. Kuenyehia, *Appraisal of Property Rights*, *supra* note 13, at 82.

> Certainly the courts have come a long way from the *Quartey v. Martey* situation where property acquired by a husband with the assistance of his wife was considered the sole property of the husband. The application by the courts of rules of equity does seem to alleviate the situation somewhat, but it still leaves wives at the mercy of judges and their interpretation of case law and also their understanding of rules of equity.

Id.

86 For an excellent and comprehensive discussion of the 1985 Intestate Succession Law, see Fenrich & Higgins, *supra* note 13.

87 Memorandum from the Provisional National Defense Council Regarding Law 111 (also known as the 1985 Intestate Succession Law) (1985) (on file with the author).

portion of the deceased's estate to the surviving spouse than was normally the case under customary law.[88]

The statute applies only to property not disposed of in a valid will and to property that is the self-acquired property of the deceased.[89] It does not apply to any lineage property.[90] The law references only one spouse; in cases of polygamy the courts have interpreted the law "as granting the household chattels and one house to all the wives and children as tenants-in-common."[91] Although uniform in its application, the law still preserves a small degree of customary law. Under the law, "most of the estate passes to spouses, children and parents," but a small portion passes to a customary heir.[92]

Before enactment of the 1985 Intestate Succession Law, customary law largely controlled.[93] In matrilineal ethnic groups, the wife of a deceased man was not considered part of his matrilineal family and had no inheritance rights.[94] Within the matrilineal tradition, the deceased man's children likewise inherited nothing from their father's estate. Similarly, in patrilineal systems, a surviving wife did not inherit her husband's

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88 JOHANNA O. SVANIKIER, WOMEN'S RIGHTS AND THE LAW IN GHANA 76 (1997). Svanikier observes:

> Formerly, when a man died intestate in Ghana, the customary law of inheritance from the area he came from, was applied to his estate with often dire consequences for the widow. Frequently, a larger portion of his estate was inherited by his customary successors on behalf of the extended family rather than by his spouse and children. This clearly discriminated against women. The government acknowledged this and the growing importance of the nuclear family in Ghana, by passing the Intestate Succession Law, 1985 (PNDCL 111) to alleviate this problem and provide a uniform intestate succession law applicable throughout the country irrespective of the class of the intestate or the type of marriage contracted by him or her.

Id. at 76–77.

89 Fenrich & Higgins, *supra* note 13, at 283.

90 *Id.*

91 *Id.* at 288–89.

92 Gordon R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFRICAN L. 118, 126 (1985).

93 Prior to 1985, "intestate succession for Ordinance marriages was governed by the ordinance itself, which provided that two-thirds of the estate would be distributed in accordance with the laws of England in force on November 19, 1884 and one-third in accordance with the provisions of customary law." Fenrich & Higgins, *supra* note 13, at 283.

94 SVANIKIER, *supra* note 88, at 86.

estate.[95] Her children, however, did have inheritance rights as part of the patrilineal line.

Prior to 1985, custom required that the customary successor maintain a surviving widow and her children out of the deceased husband's estate. This obligation has lost saliency over time as the nuclear family has assumed more cultural prominence.[96] Customary successors often failed to provide surviving widows with financial support out of the deceased's estate. Despite the existence of the statute today, many intestate succession disputes are still settled according to customary law.[97] In fact, "[i]t is not uncommon to find widows who have been thrown out of their matrimonial homes upon the death intestate of a husband."[98]

By enacting the law in 1985, the state made a determination that it should intervene into the affairs of various ethnic groups to establish a law of uniform application governing intestate succession. There was an earlier, state-level discussion concerning the development of a uniform marriage law.[99] The state, however, declined to enact a uniform marriage law at that time. The state thus made a decision to exert control over some of the distributive aspects of marriage through the intestate succession law and to maintain deference to communities in the demarcating aspects of marriage by declining to enact a uniform marriage law. Although this division of jurisdiction was not the result of negotiation between the state and community groups, as Shachar envisions, the result is, nevertheless, an example of joint governance.[100]

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95 Kuenyehia, *Appraisal of Property Rights*, *supra* note 13, at 85.

96 SVANIKIER, *supra* note 88, at 76.

97 Fenrich & Higgins, *supra* note 13, at 269 ("[T]o the extent that people lack knowledge of the law or the resources to enforce it, customary law still governs the distribution of estates.").

98 Kuenyehia, *Intestate Succession*, *supra* note 13, at 393.

99 "In May 1963, a Bill on Uniform Marriage, Divorce and Inheritance rules was published but never enacted. . . ." Wanitzek, *supra* note 74, at 77.

100 Regarding this jurisdictional negotiation, Shachar states, somewhat vaguely:

> Because of the careful balance that needs to be struck in each arena, it will be necessary to negotiate the precise jurisdictional boundaries between competing authorities such as the group and the state. And more often than not, both parties will naturally work to reach an agreement that maximizes their respective interests.

SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 128.

II
EXIT, AGENCY, AND MARKET PRESSURE IN GHANA

Although the demarcating and distributive functions of family law in Ghana approximate divided or shared jurisdiction, Ghanaian family law highlights the limitations of Shachar's theory. Shachar presents her typology in the form of clearly separated theoretical models. Most plural legal systems, however, are not so neatly compartmentalized. When looking at a particular legal system, therefore, there is some spillover between Shachar's conceptual "boxes." Structurally, the Ghanaian family law system contains minor elements of almost all of the joint governance regimes that Shachar rejects. It also contains elements that resemble Shachar's preferred model of transformative accommodation. In practice, the typology cannot be as rigid as Shachar would have us believe.

With respect to federal-style accommodation, Ghana does allow ethnic communities to define the requirements of marriage. As such, community groups, which are often loosely tied to geographic areas, enjoy some degree of autonomy to determine the elements of a valid marriage and thereby regulate entrance into the community through marriage. Although these community units do not function as states *per se*, they enjoy the autonomy to determine marriage law for community members and yet, in Shachar's words, "they are also subject to certain overarching constraints applicable to all governmental levels within the system, such as compliance with basic constitutional principles."[101] The Ghanaian system thus resembles, in small part, federal-style accommodation.

Within the Ghanaian system, there is also a temporal determinant for state involvement in family matters. Although some aspects of family law may be governed by community rules, or customary law, certain triggering events, such as the death of a spouse intestate, justify state involvement under the 1985 Intestate Succession Law.[102] The triggering event, although by its very nature unspecified at the time of marriage, functions as a temporal limit on community autonomy.

Ghanaian women make a one-time choice of jurisdiction at the time of marriage, consistent with the model of "consensual

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101 *Id.* at 92.

102 *See, e.g., id.* at 99.

accommodation." Although this jurisdictional choice does not extend to matters related to intestate succession, it determines many of the rights and duties that women enjoy during the lifetime of the marriage. To call this a "choice" in the purest sense is misleading. In patriarchal societies the world over, women's choices are circumscribed to varying degrees.[103] The decision to marry according to one system of law is rarely the exclusive choice of the woman. She may, in fact, have little bargaining power to negotiate the relevant system of law.[104]

Some couples inevitably make this jurisdictional decision with unforeseen consequences in later years. For example, the family of a woman who marries according to customary law may pay bridewealth in the form of cash or livestock. This bridewealth payment may make it difficult for her to divorce according to customary law as she, or her family, may be required to repay the brideprice to the husband's family as part of the divorce agreement. Many families are simply unable to do so. Thus, the woman may find herself trapped in a violent or otherwise abusive marriage as a result of her jurisdictional choice years earlier. The "one shot" nature of this jurisdictional choice and the sometimes harmful ramifications of that choice make it more consistent with Shachar's model of consensual accommodation than with her preferred model of transformative accommodation.

If the Ghanaian legal system were, indeed, a true reflection of transformative accommodation, the state would presumably cede full control over marriage requirements to community groups. Because a relatively small proportion of women are married under statutory law, the Ghanaian system is one of *de facto* deference to communities. Thus, although the system lacks a formal division along sub-matter lines, there is a rough division of jurisdiction along demarcation, or membership, and distributive lines. As such, the system reflects the "no monopoly

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103 *See, e.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

104 Tracy Higgins makes a similar point, observing that Ghanaian women may feel that they lack the power to insist on the completion of full marriage rites, which would ensure some legal protection. Tracy Higgins, *A Reflection on the Uses and Limits of Western Feminism in a Global Context*, 28 T. JEFFERSON L. REV. 423, 442 (2006).

rule" in the sense that neither the community nor the state maintains exclusive control over family law.[105]

A. Overemphasis on Exit

The Ghanaian system reflects a reasonable, albeit imperfect, application of two of the three requirements for transformative accommodation: division of jurisdiction along sub-matter lines and the no-monopoly rule, which requires that neither the community nor the state retains exclusive jurisdiction over family law.[106] The problem arises when one attempts to apply the "clearly delineated choice options" requirement of transformative accommodation. As Eric Mitnick points out, it is difficult to premise a theory on jurisdictional choice when choice, in fact, remains elusive for many women.[107] Rejecting a community's jurisdiction or, in the case of Ghana, choosing statutory law over customary law, necessitates a partial exit, symbolic or real, from that community, an exit for which there can be great personal costs attached.[108]

Because women are the bearers and reproducers of cultural identity, many communities are highly invested in preserving limited roles for women within society. As Seyla Benhabib observes, "[w]omen and their bodies are the symbolic-cultural

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105 According to Shachar:

> The "no-monopoly rule" requires certain aspects of a given dispute to be within group jurisdiction, as well as linked to aspects within state jurisdiction. For instance, the group authority may prevail over the demarcating aspects of family law while the state authority may prevail over its distributive aspects. Such a process of division along sub-matter lines allows the group to draw on traditions of lineage rules and distinct personal status laws, while allowing the state to address the societal concerns surrounding distribution . . . .

SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 121.

106 For a discussion of shared jurisdiction in the United Republic of Tanzania, see Mark J. Calaguas, Cristina M. Drost, & Edward R. Fluet, *Legal Pluralism and Women's Rights: A Study in Post-Colonial Tanzania,* 16 COLUM. J. GENDER & L. 471 (2007).

107 Mitnick, *supra* note 19, at 1659 ("For a model to be premised on competition to be effective, individuals must not only have clearly delineated choice options but also the capacity to exercise such options.").

108 For example: "[A] woman's insistence on the completion of marriage rites in order to protect her legal status may be viewed by the community as inappropriate or—even worse—as signaling that she is insufficiently pliable in the face of her potential husband's demands." Higgins, *supra* note 104, at 442.

site upon which human societies in script their moral order."[109] Because of communities' tight hold over women's traditional roles, it is particularly difficult for women to opt out of community membership by choosing the jurisdiction of the state over that of their communities.[110] As Mitnick observes, "a model premised on individual agency in a multicultural context must, at a minimum, provide for the sort of social, educational, and financial resources at-risk group members require to recognize, and take advantage of, jurisdictional options."[111]

Within the theory of transformative accommodation, "reversal points" allow women an opportunity to change jurisdictions if the initial jurisdiction is failing to protect their rights. In the Ghanaian context, one such reversal point is provided by the Matrimonial Causes Act (hereinafter the MCA), which allows women in customary marriages to seek resolution of their divorce proceedings pursuant to statutory law.[112] Although the MCA primarily applies to statutory marriages, it can be applied in customary law marriages upon application by one of the parties. "The Act applies to polygamous—that is, customary and Islamic—marriages *only on application* by one of the spouses."[113] An individual married under statutory, customary, or Islamic law could, theoretically, avail themselves of the divorce procedures and remedies under the MCA.[114] In practice, however, most people seeking

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109 SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 84 (2002).

110 Susan Moller Okin, *"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 206 (2002) ("[I]n many cultural or religious groups on whose behalf liberal theorists have argued for special rights or exemptions, women are far less likely to be able to exercise the right of exit.").

111 Mitnick, *supra* note 19, at 1660.

112 Matrimonial Causes Act, 1971, Act 367, § 41(2) (Ghana). The relevant part of the Act states, "On application by a party to a marriage other than a monogamous marriage, the court shall apply the provisions of this Act to that marriage . . . ." *Id.*

113 Wanitzek, *supra* note 74, at 79.

114 It should be noted, however, that the MCA still allows courts to consider the relevant customary law in making a decision under the MCA. Section 41(2) provides: "[T]he court may—have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements . . . ." Matrimonial Causes Act, 1971, Act 367, § 41(2)(a) (Ghana).

dissolution of marriage pursuant to the MCA have been married according to statutory law.[115]

Despite the existence of this reversal point, Ulrike Wanitzek's research reveals that few women in customary marriages seek to apply the MCA in divorce.[116] Wanitzek's research suggests that a small percentage of the eighty percent of women in customary marriages today seek to apply the MCA in their divorces.[117] These statistics suggest that partial exit from the traditional community, even one that might yield a greater share of marital property at the dissolution of the marriage, is difficult for most women.[118]

Although empirical research is necessary, this emphasis on exit suggests a significant vulnerability in Shachar's theory. By relying too heavily on women's ability to choose alternate jurisdictions and thereby "exit" from their cultural communities, albeit temporarily and selectively, Shachar underestimates the difficulties for women faced with that choice.[119] The long-standing feminist critique of liberalism's emphasis on choice (and, by extension, Shachar's emphasis on choice) suggests that we must interrogate the constraints that may systematically limit

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115 *Id.*

116 Wanitzek reports:

> Out of the seventy-three matrimonial cases evaluated, sixty-one were concerned with Ordinance marriages and marriages contracted abroad, nine with customary marriages, and three with Islamic marriages. Thus, although Ordinance marriages cover only a small percentage of marriages contracted in the country, they appear to be in the majority of matrimonial cases dealt with under the MCA. Customary law marriages, on the other hand, representing the vast majority of marriages in the country, appear only in a small minority of these cases; they are mostly not dealt with under the MCA.

Wanitzek, *supra* note 74, at 84.

117 *Id.*

118 There is still a great deal of discretion in the distribution of property at divorce, so it is difficult to make generalizations about the motivations of parties.

119 Shachar states, for example:

> [O]ne important way of encouraging the group and the state better to serve their citizens, each in its respective sub-matter of authority, is to provide citizens with viable mechanisms for exercising choice: by delegating to them the ultimate power to determine whether to "switch" their jurisdictional loyalty from the original power-holder to the rival power-holder.

SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 122–23.

choices and explore how the constraints operate differently for women.[120]

Women exercise agency, in Ghana as elsewhere, but often within the confines of choices that are circumscribed by a patriarchal social and legal system.[121] As Tracy Higgins observes: "[E]mphasizing and exploring the gendered nature of the constraints helps to reveal the social meaning of women's choices."[122] Shachar recognizes that the constraints exist, but does little to correct for their existence within her theoretical model.[123]

One should not assume that women would make the choice of state jurisdiction over the jurisdiction of their local communities. In the context of post-colonial Ghana, statutory marriage law is associated with the colonial administration, which first imported this "received" law to benefit British colonial administrators and, as Akua Kuenyehia describes, to bring law to a population that the British viewed as "lawless."[124] In the context of marriage law, one commentator noted that "the Ordinance marriage is seen as the 'white man's system of marriage.'"[125] As such, it is

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120 Higgins sums it up nicely by asking, "Can we account for the constraints of a patriarchal social system without entirely denying women's agency?" Higgins, *supra* note 104, at 440.

121 Kathryn Abrams calls this "partial agency," *supra* note 103, at 360.

122 Higgins, *supra* note 104, at 443.

123 SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 55–56. In fact, Shachar observes, "[t]he 'right of exit solution' . . . throws on the already beleaguered individual the responsibility to either miraculously transform the legal-institutional conditions that keep her vulnerable or find the resources to leave her whole world behind." Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64, 80 (2000). Paradoxically, her theory of transformative accommodation is based on the ability of women to partially exit their communities' jurisdiction. She states,

> [i]f they systematically fail to address the concerns of group members who bear a disproportionate burden of the costs of accommodation, and these members are granted at least minimal (educational or material) resources through the state's exercise of authority in its designated sub-matters, then these "peripheral" members can, perhaps for the first time, pose a real threat of selective exit.

SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 12, at 124–25.

124 Kuenyehia, *Intestate Succession*, *supra* note 13, at 389.

125 Wanitzek, *supra* note 74, at 82.

neither neutral nor valueless. On the contrary, it is culturally loaded.[126]

Commentators often portray statutory law as the preferred, modern, egalitarian expression of citizenship in contrast to customary law, which is sometimes characterized as "backward" and uniformly regressive.[127] Although there are certainly times when statutory remedies afford Ghanaian women greater rights protection, as is the case with the Intestate Succession Law, there is a cost when customary law is reflexively cast as anachronistic and regressive.[128] Under such conditions, women may find it even more difficult to exit, fully or partially, by rejecting customary jurisdiction and risking the ostracism attendant to disloyalty.

I am also considerably more skeptical than Shachar in assessing the potential of such exit to force a competitive change. Although the number of Ghanaian women who marry according to statutory law is relatively low, one would expect to see some response to this "partial exit" within customary marriage law. These reversal points, according to Shachar's theory, create a competitive system to which the community and the state respond by increasing equality within the respective family law systems in an effort to retain members who are loyal to the jurisdiction. According to Shachar, the threat of members exiting or opting out of the jurisdiction will lead to increased equality for vulnerable group members. As noted, however, women may have difficulty freely exercising this choice of jurisdiction. In addition, customary law has seemingly remained impervious to the competitive pressure caused by women opting for statutory marriage instead of customary or religious marriage. As Eric Mitnick has pointed out, the competitive pressure, to the extent it exists, appears to be unidirectional.[129]

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126 Fenrich & Higgins note that there is some status and privilege attached to Ordinance marriages, *supra* note 13, at 282.

127 Sunder, *supra* note 8, at 1415 ("By placing itself temporally after religion—and, as we shall see, as a philosophical response to the problem of religion—in one swift move, religion is constructed as law's past.").

128 Kuenyehia, *Intestate Succession*, *supra* note 13, at 388 ("Customary law has the tendency to discriminate against women, especially in the areas of marriage and inheritance . . . . [but] it is extremely important that one be very cautious when making value judgments about customary laws and practices.").

129 Mitnick, *supra* note 19, at 1658.

There is no corresponding pressure on the state to adapt its laws to be more egalitarian.

B. Privileges State and Community

Shachar's theory privileges the state and the community as foci of analysis. This has the effect of de-centering the Ghanaian woman, who should figure prominently in the analysis. Shachar's theory grows out of a concern for women's multidimensional identities. Because she recognizes that women may strongly identify as community members and as "citizens" of the state, her theory attempts to preserve both aspects of identity. As such, Shachar attempts to respect the multidimensionality of women's lives.[130] Her overriding emphasis on the community and the state, however, undermines this theoretical concern about intersectionality. Her emphasis on structural remedies within the community and the state has the effect of de-centering the individual woman who is a member of both entities.

The institutional and procedural focus of the theory also elides the plight of the individual woman and shifts the focus away from the substantive outcome of her rights contest. In addition, the theory emphasizes institutional relationships between the state and the local group, focusing on the ways in which each will respond to market-based pressures when women choose one jurisdiction over another. At an analytical level, this focus on institutional responses detracts from the analysis of the individual woman's agency and the societal constraints that limit the exercise of that agency.

C. Tension Between Exit and Voice

By focusing only on women's ability to "vote with their feet," or opt out of one jurisdiction in favor of another, Shachar minimizes the important ways women are more active agents of

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130 Leti Volpp has recently criticized the equation of citizenship with equality. Because citizenship is defined as the absence of culture (which is, in turn, defined as the absence of equality), Volpp, rightly, objects to this schema. Volpp states: "Recent scholars of multiculturalism have turned to concepts of citizenship as a solution to the dilemma raised by conflicts over culture. But these concepts of citizenship . . . replicate the presumption of a culture-less 'citizenship'—and thus constitute an ironic choice of solution to the problem of cultural difference." Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 571 (2007).

change. Ghanaian women have agitated for different, more egalitarian interpretations of customary law at the local level. They have used litigation to challenge discriminatory state laws at the national level. They have become increasingly involved at the international level, exerting greater influence on the content of international human rights law.

By focusing narrowly on women's exit or partial exit from their communities as expressed through jurisdictional choice, we lose sight of many other forms of women's resistance to discrimination at the community, state, and international levels. In addition to the more formal expressions of resistance discussed above, women engage in daily acts of resistance that are not easily quantified and less easily observed. Within their communities, a number of Ghanaian women are, for example, organizing to raise awareness about domestic violence.[131] This may take the form of support for or intervention on behalf of an individual woman and may have the effect of changing local social mores over time.

We should not discount these daily acts of resistance simply because they are less visible than a woman who opts out of community jurisdiction in favor of the jurisdiction of the state for the solemnization of her marriage or who brings a constitutional challenge to reform customary law. Although these visible acts of protest are invaluable, they are not the only form of women's rights activism at the community level. If we privilege jurisdictional choice to the exclusion of other forms of activism, we risk a reductionist view of Ghanaian women as victims of culture who only rarely protest cultural significations and roles by opting out of community jurisdiction.

Reliance on this cultural "opt out," of course, begs the question whether women should be asked or expected to exit from their communities in order to access a potentially, although by no means uniformly, more egalitarian legal system.[132]

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131 *See, e.g.*, The Ark Foundation, Ghana, http://www.arkfoundationgh.org/index.htm.

132 Anne Hellum observes that both customary and common law disadvantage women:

> [B]oth customary and common law pose problems for women in their struggle for resources to maintain themselves and their children. A major problem is that by linking access to economic resources such as child maintenance and property to the institution of marriage, both customary and common law defines women's entitlements through male relationships.

Shachar's model, in which vulnerable group members, namely women, must partially exit from their community's jurisdiction in order to leverage the competitive aspect of transformative accommodation, asks a great deal of women by encouraging partial exit rather than transformation from within those communities. Women should not have to exit from their communities to affect change.[133] A more promising alternative is to increase women's voice across scales. In other words, women should have a greater say in the normative content of customary law, national law, and international law. In Ghana, customary law is subject to the constitution. Women may bring a constitutional challenge to push the public dialogue concerning the normative content of customary law toward national and international equality norms.[134]

In Ghana, women are organizing to raise awareness of women's rights within communities.[135] Through these local efforts, women are able to engage with customary norms and, over time, to reshape those norms that are discriminatory. There is increasingly more support for women's participation at the level of regional human rights law. African women played a significant role in the drafting of the Protocol on the Rights of Women (the Maputo Protocol),[136] and provisions in this regional

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> Women who don't conform to this patriarchal norm, such as single, cohabiting, and divorced mothers, are thus placed in a disadvantageous position.

Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 LAW & SOC. INQUIRY 635, 643 (2000).

133 Okin notes:

> Even the bare availability of exit for such practical dissenters, though, is insufficient to gain them what others may take for granted: the choice between exerting a fair share of influence within their cultural group and exiting from it if they should find any of its beliefs or practices unduly constraining.

Okin, *supra* note 110, at 226.

134 This is not the case in all Sub-Saharan African countries. *See generally* Bond, *Constitutional Exclusion*, *supra* note 6, at 289.

135 *See, e.g.*, WiLDAF Ghana Strategic Plan, 2005–2007, *available at* http://www.wildafghana.org/Strategic%20Plan.doc.

136 The African Commission mandated the Special Rapporteur [on the Rights of Women in Africa] and two other Commissioners to convene a working group to draft an additional protocol on women's rights . . . . In addition to the work of the Special Rapporteur and her group on drafting the Protocol,

human rights treaty reflect a commitment to increase women's voice in determining the normative content of customary law.

The Maputo Protocol, for example, requires not only that women "have the right to live in a positive cultural context" but also the right to "participate at all levels in the determination of cultural policies."[137] Traditionally, women have been excluded from the channels through which cultural meaning and customary law were defined and articulated. Without the means to engage with, dispute, or challenge cultural meaning, women lack a voice in determining the normative content of the very law that regulates many of the most significant aspects of identity: relationships to family, land, and community. The Maputo Protocol thus subtly shifts the focus away from the relationship of the individual to the state and emphasizes the collective voice of women within their cultural communities.

CONCLUSION

Although empirical study is necessary, the competitive threat of wide-scale jurisdictional defection among Ghanaian women does not appear to have led to progressive changes in the customary law of marriage and divorce. Perhaps, with low numbers of Ghanaian women opting for statutory marriage and divorce, we simply have not reached a tipping point at which competition will yield greater equality across legal systems. Whatever the potential of market-based competition, women should not be expected to choose between conformity with customary norms or exit from their communities. The emphasis in Shachar's theory on women exercising agency at certain "reversal points" minimizes the numerous ways in which Ghanaian women engage in activism to challenge discriminatory laws. Women's activism cannot, as a theoretical or practical matter, be reduced to casting a jurisdictional vote with their feet.

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contributions to the drafting process also came from within the OAU Women's Unit and civil society.

FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS IN AFRICA 68 (2005).

137 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Sess. of the Assemb. of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 AFR. HUM. RTS. L.J. 40, *entered into force* Nov. 25, 2005.