

**“TAKE YOUR RIGHTS THEN AND SLEEP OUTSIDE, ON THE STREET”: RIGHTS, FORA, AND THE SIGNIFICANCE OF RURAL SOUTH AFRICAN WOMEN’S CHOICES**

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**ABSTRACT**

Arising out of statements rejecting human rights made by rural women in the north eastern corner of South Africa, this paper questions what rights mean to women in different situations, under what circumstances women claim the enforcement of their rights, and what the answers to the foregoing questions might signify about women’s values and the forms of legal and judicial authority that the women recognize. This paper asks these questions to reveal how the content and process of rights might best be determined and defined in order to ensure that those rights are enforceable in ways that make them of equal value to differently situated subjects. The paper departs from empirical research on women’s real-life rights choices (rejecting, selecting, or embracing human rights) and the ways and forums in which they exercise them (within and outside their immediate communities).

The article draws from emerging scholarship that challenges conventional discourses on rights that are positivistic, rely on a narrow conception of “acceptance” or “rejection” of “bounded” and “essentialized” rights, and foreground institutions. It argues that rights and the forums in which they are asserted are integrally connected and give expression to the range of fundamental values, pragmatic calculations, and bald risks of women. The paper concludes that there is a central (if sometimes arcane) thread that weaves these concerns together—choice. It therefore illustrates the ways in which legal pluralism might offer rural South African women opportunities to realize greater freedom than state centrism by claiming a variety of rights, and uses the problems with the Traditional Courts Bill in South Africa to show the mechanisms by which state and other powers can suppress this freedom.

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## INTRODUCTION

The statement in the title of this paper derives from an interaction I had with a group of women in a “deep rural village” in the South African province of Mpumalanga<sup>1</sup> who, when invited to speak about the law, said that they knew nothing about the law or rights. When I resolved just to sit with them and listen to their conversation, they went on to make important comments about the law. They disclosed their belief that state law does not comport with their values or is not suitable to their circumstances.

At one point, the discussion turned to the illogicality of a particular woman suing her husband for maintenance<sup>2</sup> in the nearby civil court while he lived in the same house as she. The middle-aged woman who first welcomed me to their circle said that she would not sue a person she lived with, for that must be very difficult.<sup>3</sup> Her Mozambican-looking friend agreed that if her husband bought her bread and soap and

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<sup>1</sup> The conversation held in August 2007 was situated within a period of eight months in which I conducted ethnographic research by participant observation within a rural, Swati-speaking South African community situated close to the Swaziland and Mozambican borders. The statements made about this community and its members in this paper are drawn from this research. Sindiso Mnisi, *The Interface between Living Customary Law(s) of Succession and South African State Law* (2010) (unpublished Ph.D. dissertation, University of Oxford) (on file with author).

<sup>2</sup> “Maintenance” refers to child support.

<sup>3</sup> Interview with anonymous group of women, S. Afr. (Aug. 2007) [hereinafter Interview (anonymous women)].

built her a house, then she was happy; what more should she want?<sup>4</sup> The first woman stated that people said this was their right: to sue.<sup>5</sup> A third, older woman said that “they” could keep their rights for “these rights ruin things for us.”<sup>6</sup> She repeated this rejection, adding that now, at her age, “they” come and tell her about rights. She said “they” should leave her alone. “*Malungelo* [rights] are fine for young people like yourself,” she concluded, pointing at me.<sup>7</sup> But the woman who had first befriended me interjected to correct that, even for young women, rights are a problem because they make them think they can disrespect their husbands, saying it is their right.<sup>8</sup> “But then, will your rights take care of you?” she asked, looking me in the eye. “Take your rights then and sleep outside, on the street.”<sup>9</sup>

The last statement seemed, superficially, to represent an outright rejection of rights and, hence, to promote submission to gendered oppression. Yet, when I dug deeper (into both the statement and the community), it raised interesting and important conceptual questions. What did the woman mean by “rights” in that sentence? Did she really believe that the choice was strictly between embracing rights, which would result in having nothing at all (socio-economically speaking), and rejecting rights, thus retaining subsistence and community—a binary that constituted a zero-sum game? Did she therefore choose not to claim *any* rights? Indeed, did she even really see a choice at all?

Aside from this encounter, both in and beyond that community, there were women who were negotiating very different relationships with the formal legal system, human rights, and state judicial forums. A prime example is the Constitutional Court case of *Gumede v. President of the Republic of South Africa and Others*,<sup>10</sup> in which a woman challenged a statute to extend constitutional and common law rights to her customary marriage’s property regime. This example raises several questions: What rights *do* rural South African women claim? Where do they choose to claim them? How much choice is genuinely involved therein? What do the choices of whether to claim rights, where to claim them, and what rights to claim say about these women’s ideas of rights? Namely, could

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Gumede v. President of the Rep. S. Afr. and Others* 2009 (3) BCLR 243 (CC) (S. Afr.).

what appears simply to be rural women's acceptance or rejection of rights actually suggest important exercises of agency?

Given that people often exist in flexible, selective, and negotiated relationships with each legal form, in this paper, I am interested in understanding how people secure justice for themselves in, between, and among the forms of law that constitute both the formal and informal plurality of the South African legal matrix. This paper, therefore, ultimately concentrates on the centrality of choice for enabling women to realize their own freedom, albeit under imperfect conditions, and also highlights the state's responsibilities in making the women's choices effective. Theoretically, I seek to escape the simple conception of rights as constitutionally based silos formulated as quite separate from people's lives, their cultures, and their need of embedded community. I engage with theories that allow for a more dynamic and realistic relationship between rights and culture, grounded in people's real-life experiences and choices.

This paper—situated within empirical research on women's real-life rights, choices, and the ways and forums in which they exercise them—speaks to a wider set of implications pertaining to the nature of law and authority. The paper also concerns formal law's interactions with the women and attempts, such as the Traditional Courts Bill B15-2008, to regulate the avenues through which women access justice. In this context, the paper asks the following questions: What do rights mean to women in different rural contexts? Where do they claim the enforcement of these rights? What does this signify about the women's values and the forms of legal and judicial authority that they recognize? As Nicola Lacey stated, "We should think of rights not just in formal but equally in substantial terms: if the underlying value of rights lies in human equality, we have to think about the content and enforcement of rights in terms of their equal value to differently situated subjects."<sup>11</sup> In response to her apt invitation, this paper asks how we might ensure that rights are of equal value to differently situated subjects, especially rural women. That is, how can we increase rural women's capabilities to secure rights? This paper therefore seeks to establish how rights content and processes might best be determined and defined in order to ensure that they are enforced in ways that achieve these goals.

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<sup>11</sup> Nicola Lacey, *Feminist Legal Theory and the Rights of Women* 1, 31 (2004) (London School of Economics), <http://www.yale.edu/wff/cbg/pdf/LaceyPaperFeministLegalTheory.pdf>.

## I. EMPIRICAL BACKGROUND

In this section, I provide a summary of three empirical accounts—Cases A, B, and C—that form the basis of my argument, which I unpack in subsequent sections. These accounts do not describe all rural women’s experiences; I only use them to begin to understand the contexts of the rights of rural South African women.

### A. CASE A

Case A is formed by the rural women’s statements quoted in the introduction of this paper. While these women *rejected* “formal” rights for reasons that were mostly to do with their finding that exercising such rights alienated the men on whom they depended for survival and security, similarly-placed women were “taking their rights” in order to *avoid* sleeping on the street.<sup>12</sup> With the prevalence of women being dispossessed and evicted by brothers and (ex-)husbands—or, in the context of inheritance disputes, by brothers and in-laws—some of these women used their rights to protect themselves.<sup>13</sup> It appeared that they recognized their rights not only as claims of formal human rights reserved for state-based courts (though, they were claimed there, too), but also as claims of customary rights in their communities (in family, headmen’s and chiefs’ courts).<sup>14</sup>

### B. CASE B

Case B, cited by a young female traditional councilor<sup>15</sup> of the same community as the women in Case A, illustrates how rural women can straddle both contexts in order to claim rights.<sup>16</sup> The councilor described the securing of “rights” in the context of both culture and state

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<sup>12</sup> Interview (anonymous women), *supra* note 3; *see also Gumedé*, (3) BCLR 243.

<sup>13</sup> *See infra* Parts 2.2 and 2.3.

<sup>14</sup> *See generally* Aninka Claassens & Sindiso Mnisi, *Rural Women Redefining Land Rights in the Context of Living Customary Law*, 25 S. AFR. J. ON HUM. RTS. 491 (2009).

<sup>15</sup> “Traditional counselor” refers to a member of the traditional council that is in charge of administering the affairs of the local, indigenous community in relation to which it is legally recognized. Traditional Leadership and Governance Act, 2003, Bill 41-2003 §§ 3, 28.4 (GG) (S. Afr.).

<sup>16</sup> Interview with anonymous traditional council member, S. Afr. (Sept. 2007) [hereinafter Interview (council member)].

law.<sup>17</sup> Speaking on inheritance disputes, she noted that the women who generally use customary law rather than the Magistrate's Court are those whose husbands do not work, at least not in the formal economy.<sup>18</sup> In order to avoid an inheritance dispute, an individual must open a file in the local Magistrate's Court to obtain a letter from the Magistrate that authorizes the individual to access resources in the formal economy.<sup>19</sup> If the deceased's wife has not obtained this letter confirming that the inheritance is hers, members of the deceased's family might open the file and retrieve the inheritance for themselves.<sup>20</sup> By opening the file with the Magistrate Court, the Court can protect the deceased's wife from challenges to her inheritance brought by the deceased's family. If she does not open the file, the deceased's wife does not receive this protection.

The councilor said that these disagreements and contests in the context of succession are very common. The family of a deceased man might turn against his surviving wife if he died and had been working and earning money. The woman might find that her in-laws do not want her to inherit this money. The councilor described one account when, after her husband's death, a woman learned that her husband had another wife in the rural areas who he had married before marrying her.<sup>21</sup> The husband's family used the first wife to chase away the second, "unknown" wife, and the first (customary) marriage was registered *ex post* by the Department of Home Affairs.<sup>22</sup> At the Magistrate's Court, the second (civil) wife produced a marriage certificate. The deceased's family consequently turned against the first wife and asked her how she had been married to the deceased. "Of course, she could not have married him alone," the councilor added.<sup>23</sup>

When the first wife brought her matter before the traditional court, the deceased's family lost because she had "moved into her marital

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Sandra Burman et al., *Protecting the Vulnerable from 'Property Grabbing: The Reality of Administering Small Estates*, 125 S. Afr. L.J. 134, 140–45 (2008).

<sup>20</sup> *Id.* This was also confirmed by the Service Point Official responsible for these registrations at the Magistrate's Court in September 2007. Interview with Service Point Official in Magistrate's Court, S. Afr. (Sept. 2007).

<sup>21</sup> Interview (council member), *supra* note 16. This account is in reference to a man having multiple wives simultaneously: a customary wife and a civil wife. Polygyny is permissible under South African law. Recognition of Customary Marriages Act, 1998, Bill 19539-98 (GG) (S. Afr.).

<sup>22</sup> Interview (council member), *supra* note 16.

<sup>23</sup> *Id.*

home as a wife-to-be with permission” (*ukwendza*).<sup>24</sup> While she had not been *lobola*’d, and thus her customary marriage had not been completed, she had given birth to a daughter who was *lobola*’d and married. (Lobolo is bridewealth: the groom’s family transfers cattle to the bride’s family in the process of marriage. The verb, to pay bridewealth, is *lobola*.) When, on receiving the first wife’s daughter’s *lobolo*, the deceased’s family was supposed to have *lobola*’d the first wife in order to complete her customary marriage, they had enjoyed the cattle themselves instead of handing the cattle over to the first wife’s parents. “The cows were supposed to go and *lobola* her mother; this is what the [customary] law requires,” stated the traditional councilor.<sup>25</sup> The first wife’s family claimed the cows on the grounds that she had not been *lobola*’d and yet, subsequent to her husband’s death, his family had made her wear mourning attire for the deceased and taken her through the customary marriage ceremony (*kumekeza*).<sup>26</sup> The deceased’s family said she should *lobola* herself with the money she was earning from her husband’s death through the formal legal system.<sup>27</sup>

The traditional court found in favor of the first woman because the deceased’s family had broken a number of rules: a woman does not wear mourning attire when she has not yet been *lobola*’d, and “you don’t go through the marriage ceremony when the mother’s cow<sup>28</sup> has not been presented.”<sup>29</sup> The deceased’s family was required to transfer the cattle that had *lobola*’d the first wife’s daughter.<sup>30</sup> Asked about the judiciousness of this law, the councilor spoke of justice without using constitutional rights discourse: “You can’t be expected to stay in a marital home, not be *lobola*’d, give birth and finish and then when your child (whom you birthed) is *lobola*’d the people at her grandmother’s house enjoy the cows while they know that you haven’t been *lobola*’d though you are living there.”<sup>31</sup> She spoke of the woman and her birth family as having rights under living customary law.<sup>32</sup> Case B therefore presents an instance of a rural woman’s interaction with both rights

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> The main cow to be given to the bride’s family in the marriage process is called the “*nsulanyembeti*” (the wiper of tears).

<sup>29</sup> Interview (council member), *supra* note 16.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

enforcement systems (living customary law and state law) available to her in her pursuit of justice, as well as the interplay between the systems themselves.

### C. CASE C

Still elsewhere, women were claiming the recognition and enforcement of their *constitutional* rights not to be thrown out into the street in the state courts. One such case, Case C, was ultimately decided by the Constitutional Court in 2008: *Gumede*.<sup>33</sup> The woman in this case sought enforcement of her formal rights in a state court by challenging state legislation that left her in a particularly vulnerable position due to oppressive versions of customary law codified in her province during apartheid.<sup>34</sup>

Mrs. Gumede challenged subsections 7(1) and (2) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA). She was the only wife of Mr. Gumede and was married to him under customary law for over forty years.<sup>35</sup> Mr. Gumede had filed for divorce and Mrs. Gumede therefore challenged the RCMA for discriminating between customary marriages that had come into existence before and after the Act became operational in 2000.<sup>36</sup> The former were to be regulated in terms of customary law while marriages entered into post-promulgation benefited from the legislation's more equitable marital property regime.<sup>37</sup>

In the province of KwaZulu Natal, where Mr. and Mrs. Gumede had lived all of their lives, customary law was directed by the apartheid codes: the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law.<sup>38</sup> In near-identical wording, their respective sections 20 prescribed that,

The family head is the *owner of all family property* in his family home. *He has charge, custody and control of the property* attaching to the houses of his several wives and may *in his discretion* use the same for his personal wants and necessities, or for general family purposes or for the

<sup>33</sup> *Gumede v. President of the Rep. S. Afr. and Others* 2009 (3) BCLR 243 (CC) (S. Afr.).

<sup>34</sup> *Id.* ¶ 1–2.

<sup>35</sup> *Id.* ¶ 6.

<sup>36</sup> *Id.* ¶¶ 10–14.

<sup>37</sup> *Id.*

<sup>38</sup> KwaZulu Act on the Code of Zulu Law 16 of 1985 (S. Afr.) [hereinafter KwaZulu Act]; Natal Code of Zulu Law R151 of 1987 (S. Afr.) [hereinafter Natal Code].

entertainment of visitors. *He may use, exchange, loan or otherwise alienate or deal with such property* for the benefit of or in the interests of the house to which it attaches, but should *he* use property attaching to one house for the benefit or on behalf of any other house in the family home an *obligation rests upon such other house* to return the same or its equivalent in value.<sup>39</sup>

Section 22 of the Natal Code went on to say that “[t]he *inmates* of a family home irrespective of sex or age shall in respect of all family matters *be under the control of and owe obedience to* the family head.”<sup>40</sup>

Sections 20 of the KwaZulu Act and Natal Code assigned ownership of all of the family property to Mr. Gumede as “family head,” and section 22 of the Natal Code subjected Mrs. Gumede and the other “inmates” of their family home to his control.<sup>41</sup> Therefore, her husband owned all of their property: two houses and appurtenances purchased by Mrs. Gumede, valued at approximately R40,000 (\$5,350).

Recognizing the injustice of the RCMA’s exclusion of women like Mrs. Gumede, the Court found in her favor in accordance with her right to gender equality under section 9 of the Constitution.<sup>42</sup> Case C therefore represents the successful choice of a woman, subjected to distorted versions of customary law that were imposed by legislation, to use state rights and mechanisms for rights enforcement in order to secure justice.

## II. WOMEN CHOOSING WHICH RIGHTS AND WHERE TO PURSUE THEM

The cases above demonstrate different varieties of rights and different attitudes toward rights. Though a limited pool of examples, the case studies evince the fact that women subject to customary law do not feel the same way about rights, the prudence of claiming them, or the avenues for ensuring them. From these cases, I deduce the concepts of rights employed by the women, the values given expression therein, and the import of the spaces within which they decide to pursue those rights.

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<sup>39</sup> *Gumede*, (3) BCLR 243 (CC) at para. 26 (S. Afr.); compare KwaZulu Act § 20, with Natal Code § 20 (emphasis added).

<sup>40</sup> *Id.* § 22 (emphasis added); see *Gumede*, (3) BCLR 243 (CC) at para. 26.

<sup>41</sup> *Gumede*, (3) BCLR 243 (CC) at para. 26.

<sup>42</sup> *Id.* ¶¶ 34, 49.

The contexts in which the women made their assessments are relevant to understanding their conclusions on which rights, values, and forums to access.<sup>43</sup> Cases A and B arose in a deep rural village where women still care for their families' physical needs while they depend on their men to earn an income and send it home (if they are migrant laborers) or, if they are at home, to tend the livestock while the women work the fields. The women produce food for their families and might sell leftover food for income. Almost everyone is poor.<sup>44</sup> Extended families tend to live on the same property or in close proximity.<sup>45</sup> Marriages, as the foundation upon which families and networks are created, are the principal means by which social and economic security is gained, for both the individual in the present and for their progeny in the future.<sup>46</sup> Though they may be declining in number, marriages still most often take place according to cultural traditions and contribute to the formation and strengthening of family alliances. It is in the context of marriage and extended family that one's needs are met. The family—as the grouping primarily responsible for the socialization and accountability of the individual—is implicated in all of an individual's dealings. In this rural village in Mpumalanga, everyone knows almost everyone else and their family history (which is often shared in part), and everyone is in a symbiotic relationship with someone else and their kin. By contrast, the woman in Case C was more mobile between more- and less-rural spaces (the locations of the two houses the ownership of which she contested).<sup>47</sup>

#### A. "RIGHT" CONCEPTS: WHAT ARE RIGHTS?

Before the Constitutional Court, as in Case C, there is only one legitimizing discourse: constitutional rights. In a challenge against state

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<sup>43</sup> See Lacey, *supra* note 11, at 7.

<sup>44</sup> Based on Census data from 2001, I estimate the average income of residents to be between R200 (\$29) and R600 (\$87) per month with about a 35% unemployment rate. See STATISTICS S. AFR., CENSUS 2001: CENSUS IN BRIEF (2003), available at [www.statssa.gov.za/census01/html/CInbrief/CIB2001.pdf](http://www.statssa.gov.za/census01/html/CInbrief/CIB2001.pdf).

<sup>45</sup> See JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT 186–88 (1981); Likhapha Mbatha, *Reforming the Customary Law of Succession*, 18 S. AFR. J. ON HUM. RTS. 259, 269, 274 (2002).

<sup>46</sup> See also COMAROFF & ROBERTS, *supra* note 45, at 118–20; Simon Roberts, *The Kgatla marriage: concepts of validity*, in LAW AND THE FAMILY IN AFRICA 241 (Simon Roberts ed., 1977).

<sup>47</sup> *Gumede v. President of the Rep. S. Afr. and Others* 2009 (3) BCLR 243 (CC) at para. 7 (S. Afr.).

legislation, arguments based on constitutional rights are also the only arguments that will be persuasive. While rights arguments based on customary law will be entertained, the Constitution is clear that the rights embodied in it will always prevail.<sup>48</sup> In the *Gumede* case, the Court seriously contended with the fact that the customary law codified in the legislation at issue was in fact an invention even in its day.<sup>49</sup> Notwithstanding this, the case was decided (as in the earlier case of *Bhe and Others v. Magistrate, Khayelitsha and Others*)<sup>50</sup> in terms of entitlements according to formal law: the right to gender equality.<sup>51</sup> Rights in this context necessarily correlate to duties.<sup>52</sup> The rights are expressed in formal language in the supreme text that is the Constitution, and are subject to particular technical interpretations articulated in court precedents.<sup>53</sup>

By contrast, in Case A, it was evident that the rights the women were dismissing were formal rights. The women, who would in the same breath say that they were entitled to being cared and provided for by their husbands, drew a distinction between that type of right and their constitutionally ordained rights which they perceived as offensive and external to them. “Our rights, we women, are that our husbands maintain us,” said another woman in this community.<sup>54</sup> She drew a distinction between the “good right” articulated by her culture and the “bad right” of formal law, which taught women to be disrespectful and, thereby violate the vital rule of mutual “respect,”<sup>55</sup> which is the quintessential, if amorphous, central principle in the community. The notion that she idealized appeals to the old adage, *muntfu ngumuntfu ngabantfu* (“a person is a person because of, through, and by other people”), commonly referred to as *ubuntu* (humanity).<sup>56</sup>

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<sup>48</sup> S. Afr. Const., 1996 §§ 7(1)–(2), 8(1), 36, 39(2), and 211(3).

<sup>49</sup> *Gumede*, (3) BCLR 243 (CC) at paras. 16–20.

<sup>50</sup> *Bhe and Others v. Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) (S. Afr.).

<sup>51</sup> *Gumede*, (3) BCLR 243 (CC) at paras. 32–36, 49.

<sup>52</sup> Consider “claim rights,” which are correlative to “duties [and] privileges or liberties,” which are correlative to “no-rights,” as defined by Wesley Hohfeld and described by Lacey. Lacey, *supra* note 11, at 16. Furthermore, Ronald Dworkin conceives of “rights as trumps.” *Id.* at 18–19. See also Jennifer Nedelsky, *Reconceiving Rights and Constitutionalism*, 7 J. HUM. RTS. 139, 139 (2008) (discussing the concept of rights as “trumps” and “boundaries”).

<sup>53</sup> However, people can mobilize rights to their own ends. Merry, *infra* note 92, at 68.

<sup>54</sup> Interview with anonymous woman, S. Afr. (Aug. 2007).

<sup>55</sup> *Id.*

<sup>56</sup> See generally Mnisi, *supra* note 1, at ch. 6 (providing a discussion of this principle as it applies to the community).

The woman in Case B straddled two socio-legal realities. On one hand, she was subject to the rural socio-political context wherein her marriage relied upon only social recognition and customary formalities to be legitimate, and, on the other hand, she was subject to the context of the formal economy in which her husband lived and worked. Her husband had failed to take care of her socio-economic interests in his movements between the two socio-legal realities of rural and urban living and their respective requirements. Therefore, she could—and, in fact, had to—simultaneously conceive of her rights as formal (embodied in written legal texts and enforceable by official state institutions) as well as informal (spoken of simply in terms of what is socially just in order to be effected by customary means). She had different rights under both orders, and each sphere significantly affected her. Holding these two realities in tension, she laid claim to both kinds of rights.

First, though inexplicitly claimed, human rights were operationalized in the woman's appeal to state law (a largely foreign legal order) for protection. The laws that permitted her to benefit were the combination of the RCMA and the Constitutional Court decision in *Bhe*.<sup>57</sup> Both make explicit reference to the constitutional right to gender equality.<sup>58</sup> These laws, and their enforcing institutions, provide a necessary backstop against exploitation such as in Case B where the woman was threatened with the denial of financial support from her deceased husband by her in-laws.

Second, the woman also claimed what was hers under living law, as divorced from formal rights. She called for the enforcement of an informal yet normative principle that a woman who has been taken as a wife according to customary procedure and has subsequently fulfilled her marital duties is due to have *lobolo* paid for her by her in-laws in order to perfect her marriage *ex post*. The traditional councilor insinuated that this principle should obviously be law because it is just, and that what the in-laws had tried to get away with was “just not done”; it was inconsistent with respect and humanity.<sup>59</sup>

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<sup>57</sup> Recognition of Customary Marriages Act, 1998, Bill 19539-98 (GG) (S. Afr.); *Bhe*, 2005 (1) SA 580 (CC).

<sup>58</sup> S. AFR. CONST., 1996 § 9.

<sup>59</sup> Interview (council member), *supra* note 16.

## B. "RIGHT" VALUES: WHICH RIGHTS AND WHY?

It would be overly simplistic, even incorrect, to suggest that people wholly accept or reject either their human rights or their informal, culture-based rights. For a number of socio-economic, political, and personal reasons, people will make various choices about which rights to appeal to at different times, depending on the demands of their circumstances and their awareness of the existence of such rights. This begs the question: when do people choose which rights, and why?

For the women in Case A, human rights as they understood them were inappropriate for their circumstances.<sup>60</sup> They saw these rights as contradicting the values that they lived by and sought to share with their community. The women's views differed slightly according to age. The oldest woman saw rights as age-inappropriate for her; these rights arrived too late to make a difference in her life or to be effectively integrated into it.<sup>61</sup> The other women saw rights as a threat to their tangible security, not as grants of greater legal, and therefore *real*, security, which is what rights are claimed to be.<sup>62</sup> The women's reasoning was pragmatic. Their claims were based on the assumption that true, tangible security derives from their embedded realities defined by symbiotic relationships.

In Case B, the woman's successful rights claim permitted under customary law would likely have failed under formal law, which does not provide for such claims. She therefore appealed to customary law, which gave expression to the right most relevant to her in that situation—the right to be *lobola*'d prior to being taken through the marriage rites and made to wear grieving clothes for her husband. The customary law also expressed values that were important to her and her kin. She had been married without following the proper course, and this failure bore spiritual and status implications for herself, her extended family, and her ancestors, as well as her children and neighbors. In contrast, she also took advantage of the state law for the application of a right that she could only *effectively* enforce in state courts: that of inheriting at least part of her deceased husband's death benefits and estate on behalf of her children and herself. This way, she also realized the value of security. Therefore, she exploited the plurality of laws in order to realize a multiplicity of values in the varying rights.

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<sup>60</sup> Interview (anonymous women), *supra* note 3.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Case C also represents what the traditional councilor had implicitly explained as the state's monopoly over certain issues, as in Case B. The ever-expanding hegemony of the formal economy and its strengthening by the force of state law creates the inescapable circumstance that women have to go through state institutions in order to have certain rights realized that exist with and depend upon the state. This can make value discussions redundant because the potency of state law becomes the reason for women's "choice" of state-recognized rights. Yet, this is not to deny state law's ability to express values that resonate with rural women. *Shilubana and Others v. Nwamitwa*<sup>63</sup> features a community that expressly appropriated constitutional rights and values. The community adopted the following resolution to appoint a female chief for the first time:

[T]hough in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution it is now permissible that a female child be heir since she is also equal to a male child.

....

The matter of Chieftainship and regency would be conducted according to the Constitution of the Republic of South Africa.<sup>64</sup>

This case therefore demonstrates the potential of state law to give expression to values that rural people have, even as Cases A and B illustrate the tensions between the values expressed in the state legal system and those subscribed to by people subject to customary law.

### C. "RIGHT" SPACES: WHICH FORUMS AND WHY?

Rights are worth less if they cannot be effectively asserted, contested, recognized, or enforced. Where one chooses to claim enforcement of rights expresses assumptions about whether that institution will share one's values and one's views on the likelihood of a favorable outcome. Therefore, one cannot speak of rights without making reference to the venues in which they are pursued.

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<sup>63</sup> *Shilubana and Others v. Nwamitwa* 2009 (2) SA 66 (CC) (S. Afr.).

<sup>64</sup> *Id.* at para. 4.

The assumption of conventional rights theory tends to be that state institutions will enforce rights,<sup>65</sup> which is consistent with the idea that legal rights come into existence pursuant to the dictates of state institutions.<sup>66</sup> Yet, the concepts of rights adopted by adherents of customary law call this assumption into serious question, for it cannot be denied that extra-statal rights exist and that extra-statal institutions can give these rights effect.<sup>67</sup>

Case B illustrates particularly well that the kinds of rights people seek to claim influence where they go to claim those rights. This case affirms the fact that the term “rights” is loaded with not only the meaning of entitlements as correlative to duties, but also the meaning of the authority by which entitlements are determined and protected. The claimant went to the courts that had the competence and power to deal with the relevant matter, suggesting that she estimated the likelihood of obtaining the enforcement of her rights in each context. On this point, conventional rights theories err in believing that the space in which rights are claimed must be formal and the authority must be institutionalized.<sup>68</sup>

Case A depicts the idea that the primary forum in which to claim one’s right, in terms of living customary law, is the relationship.<sup>69</sup> The women in Case A were rejecting human rights as positioned in Western discourses about rights, primary values, *and* formal court processes.<sup>70</sup> Consider the women’s statements about the woman who went to claim maintenance in the Magistrate’s Court and then returned to live with her husband in the same house.<sup>71</sup> They understood this as an alienating exercise. To them, this was a form of betrayal against her husband because it was an action contrary to the dictates of respect and a way of

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<sup>65</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184–87, 204–05 (1978); see Neil MacCormick, *Law, Morality and Positivism*, in *AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM* 127 (Neil MacCormick & Ota Weinberger eds., Neil MacCormick & Ruth Adler trans., 1982); see generally H.L.A. HART & PENELOPE A. BULLOCH, *THE CONCEPT OF LAW* (Joseph Raz & Penelope A. Bulloch eds., 1994).

<sup>66</sup> Simon Roberts, *After Government? On Representing Law without the State*, 68 *MOD. L. REV.* 1, 1–3. (2005).

<sup>67</sup> See Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40(2) *J. AFR. L.* 152, 152–53 (1996).

<sup>68</sup> See *id.*; see generally DWORKIN, *supra* note 65; MacCormick, *supra* note 65; HART & BULLOCH, *supra* note 65; Roberts, *supra* note 66.

<sup>69</sup> See Woodman, *supra* note 67; see also DWORKIN, *supra* note 65; MacCormick, *supra* note 65; HART & BULLOCH, *supra* note 65; Roberts, *supra* note 66.

<sup>70</sup> Interview (anonymous women), *supra* note 3.

<sup>71</sup> *Id.*

undermining her tangible rights as secured by their marital relationship.<sup>72</sup> Going to local fora—the family, clan, tribe, village, community (all layered and nested relationships within wider circles of community)—would have appeared less antagonistic. In an environment in which socio-economic rights are prioritized—and enforced through mutually dependent relationships—the comments, “if my husband buys me bread and soap, and builds me a house then I am happy; what more should I want?”<sup>73</sup> and “my right is that my husband should take care of my needs,”<sup>74</sup> are not too surprising. Here, unlike the “bad [human] right,” the “good right” is secured symbiotically, not by institutions, but by others within that community.

The women from Case A view institutions as a secondary forum for the articulation and enforcement of rights.<sup>75</sup> More than that, for these women, “foreign” forums require the greatest leap of imagination and faith, not to mention more resources than are ordinarily available.<sup>76</sup> In turn, Case B demonstrates the real, if secondary, role of dispute resolution fora by the woman, in this instance, asserting her living law rights in the customary court. Yet again, it illustrates that the imaginative leap to engage outside courts is possible and sometimes compelled by dire circumstances wherein these courts might serve as lifelines.<sup>77</sup>

In Case C, because official customary law—in other words, state law—created the obstacle, state courts were the only forum that could effectively deal with the complaint. This fits with the conception of rights as things that are claimed from the state, which then provides one with protection against other persons who might attempt to violate one’s rights. Only the Constitutional Court can strike down legislation in terms of the Constitution, and an individual must approach the courts in order to enforce their rights against others.

Necessity as the basis upon which women use state courts should not be overstated, however, for the causal link between the state’s monopoly on certain issues and women’s claims of those rights that are dependent on state sanction is not absolute. For instance, the state’s assumption of sole power over inheritance and marriage has not resulted in full compliance or dependence on its laws or fora to the exclusion of

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Interview (council member), *supra* note 16.

customary law and fora.<sup>78</sup> Even when people are aware of changes in law and their resulting legal entitlements, some still find ways to exclude some of their assets from its remit or to marry, even multiple wives, without registering their marriages or marital property regimes relative to each marriage.<sup>79</sup> In other cases, women with formal rights to maintenance and protections against domestic violence might choose not to have those rights enforced, outside of their customary context, for social reasons that pertain to values they find more compelling than their formal entitlements. For instance, such values may include unrelenting loyalty to family and commitment to social harmony.<sup>80</sup> The legal hegemony of the state is not complete, yet evidently some rural women voluntarily and actively choose state courts over local ones, especially where the latter are patently and egregiously unjust.

### III. ACCOMMODATIVE RIGHTS THEORY

To reconcile women's grounded and contextual concerns with worthy state objectives, it is necessary to consider and develop theory that attempts to satisfy the imperative of dissociating "human rights" and a Western worldview, both rhetorically and practically. As Thandabantu Nhlapo puts it: "[i]f a 'culture of rights' (currently a popular phrase in South Africa) is to take root in such a society—and in a sustainable fashion—the association of human rights with Western thought and a Western world-view in the minds of the general populace does not help. It simply clutters up an already acrimonious debate when disapproval of selected aspects of 'Western' culture seeps into the area of human rights as well."<sup>81</sup>

Emerging literature in feminist jurisprudence and other non-legal social sciences offers compelling new insights by critiquing the assumptions made by conventional legal scholarship, starting from the very foundational question of "what is law" and continuing to consider what law does (and by what means), thus effectively interrogating its

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<sup>78</sup> See Mnisi, *supra* note 1.

<sup>79</sup> *Id.*; see also Burman et al., *supra* note 19, at 136, 145.

<sup>80</sup> Mnisi, *supra* note 1.

<sup>81</sup> Thandabantu Nhlapo, *The African Customary Law of Marriage and the Rights Conundrum*, in *BEYOND RIGHTS-TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE* 136, 137 (Mahmood Mamdani ed., 2000). Having been lectured by community members on the fundamentalized differences between Western and African culture during my fieldwork, I am convinced of the truth of Nhlapo's observation.

value-inneutrality.<sup>82</sup> Legal pluralists' critiques afford both "negotiated orders"<sup>83</sup> and positivistic forms of law legitimacy in their competitive coexistence.<sup>84</sup> Moreover, many permit that legitimacy is not merely a formally determined fact but a social one.<sup>85</sup> Here, I assume that customary law is a form of law equal to state law in its legitimacy and competitive in its influence. I draw from anthropology and feminist legal theory, which necessitate the integration of contextual considerations and capabilities of women with discussions on rights. I focus not only on rights doctrine, but also consider the accessibility and efficacy of rights for all.

Jennifer Nedelsky accurately highlights that the conceptualization of different rights and values may vary depending on the social milieu for which they are determined and interpreted.<sup>86</sup> Claims of universal human rights fail to observe this basic truth: the definition and defense of the social values that we refer to as rights are, at least partly, contextual. The claim that human rights are universal most often rests on the understanding of human rights narrowly conceived in the post-World War II West.<sup>87</sup> Even when it is not a matter of claiming that indigenous communities do not respect persons, these customary groups are therefore denied the possession of their own "human rights."<sup>88</sup> Described as though timeless and immutable, human rights are not often

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<sup>82</sup> See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject to Study*, 7 *LAW & SOC'Y REV.* 719 (1973); John Griffiths, *What is Legal Pluralism?*, 24 *J.L. PLURALISM & UNOFFICIAL L.* 1 (1986); Woodman, *supra* note 67; see generally Lacey, *supra* note 11 (providing a summary of feminist jurisprudence); Mnisi, *supra* note 1, at ch. 2 (providing a discussion of "what is law").

<sup>83</sup> See Roberts, *supra* note 66 (providing an example of a scholar that does not permit "negotiated orders").

<sup>84</sup> See Moore, *supra* note 82; Griffiths, *supra* note 82; Woodman, *supra* note 67; Lacey, *supra* note 11; Mnisi, *supra* note 1.

<sup>85</sup> See Moore, *supra* note 82; Griffiths, *supra* note 82; Woodman, *supra* note 67; Lacey, *supra* note 11; Mnisi, *supra* note 1.

<sup>86</sup> Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *REV. CONST. STUD.* 1 (1993); see also Lawrence Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 *L. & SOC'Y REV.* 217 (1980–81) (discussing the importance of cultural norms and considerations in the law); JANE K. COWAN ET AL., *Introduction to CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* (Jane K. Cowan et al. eds., 2001) (discussing the interrelationship between culture and law).

<sup>87</sup> See Lisa Hajjar, *Human Rights*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 589, 592 (Austin Sarat ed., 2004); Marie-Bénédicte Dembour, *Following the Movement of a Pendulum: Between Universalism and Relativism*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES*, *supra* note 86, at 56, 60.

<sup>88</sup> See generally COWAN ET AL., *supra* note 86, at 1–22.

seen in light of their fluid and variant nature and the diverse manners in which they can be conceptualized and effected.<sup>89</sup>

Yet there is now a wealth of literature that calls for the study of human rights that identifies their simultaneously universal and particular nature.<sup>90</sup> This expanded understanding is conceived of in a number of ways. One way is “vernacularization.”<sup>91</sup> Sally Engle Merry explains:

Human rights is obviously a Western liberal legalist construction, but in the post-colonial world, it is no longer owned by the West. As indigenous groups seek to define a space for themselves in the modern world, they seize and redefine law as the basis for their claims to justice. The law they mobilize is not simply the law of the state or the United Nations but an appropriated notion of law that joins indigenous concepts with state and global law. . . . [T]he colonial law imposed by the West . . . is becoming a vernacular law rather than transnational imperial law.<sup>92</sup>

Merry therefore encourages that human rights no longer be perceived simply as a form of Western cultural imposition but as “an open text, susceptible to appropriation and redefinition by groups who are also players in the global legal arena.”<sup>93</sup>

Another way in which recent theories conceive of rights as simultaneously universal and particular is in terms of assigning value and “rights status” to indigenous concepts of rights. Mahmood Mamdani and other scholars have made the case that rights arise in any context in which there is oppression;<sup>94</sup> thus, customary law has rights as well. “Wherever oppression occurs—and no continent has had a monopoly over this phenomenon in history—there must come into being a conception of rights. In other words, the notion cannot possibly have any

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<sup>89</sup> See Nhlapo, *supra* note 81, at 138; *see generally id.*

<sup>90</sup> *See generally* Mahmood Mamdani, *The Social Basis of Constitutionalism in Africa*, 28 J. MOD. AFR. STUD. 359 (1990); Celestine Nyamu-Musembi, *Towards an Actor-Oriented Perspective on Human Rights*, in INCLUSIVE CITIZENSHIP: MEANINGS AND EXPRESSIONS 31, 31–49 (Naila Kabeer ed., 2005); Sally Engle Merry, *Changing Rights, Changing Culture*, in CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 31, *supra* note 86; Nedelsky, *supra* note 86, at 1.

<sup>91</sup> Sally Engle Merry, *Legal Vernacularization and Ka Ho’okolokoloni Kanaka Maoli, The People’s International Tribunal, Hawai’i 1993*, 19 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 67, 68 (1996).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Mamdani, *supra* note 90, at 359.

fixed and immutable content, whether that given by the American and the French Revolution or that formulated in a number of subsequent charters.”<sup>95</sup> Indeed, Marie-Bâenedicte Dembour writes: “We must accept that there are a number of worthwhile visions for how to achieve human dignity. The problem is that the human rights discourse tends to think of itself as the only one.”<sup>96</sup>

Yet another way of contextualizing and particularizing rights is the reconciliation of Mamdani’s concept of rights born through contest and Merry’s argument for a “concept of culture that allows for agency and contestation in situations with multiple and contradictory cultural logics and systems of meaning.”<sup>97</sup> Celestine Nyamu Musembi reframes rights and duties as articulated—or “vernacularized”<sup>98</sup>—in and through struggles between people competing for certain social goods and benefits.<sup>99</sup> It is for these reasons that rights’ content cannot be purely universal, as this content is shaped by these contextual struggles.<sup>100</sup> It is

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<sup>95</sup> *Id.*

<sup>96</sup> Dembour, *supra* note 87, at 70. By contrast, Thomas Bennett and Gordon Woodman respectively question whether African cultures had human rights or even the word “rights” in their languages. Even if one concludes—as I do from the contexts that I researched—that indigenous notions of rights exist, one must accept that the form of “human rights” widely accepted in international discourse does not take the same conceptual form as that of rights of indigenous orders. I would suggest that, like Western human rights, living law at least aspires to recognize more than just the individual right to dignity, as Bennett contends. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 4 (1995). It seeks to secure some notion of substantive equality (such as between different wives and children); the best interests of the child (a premium is placed on caring and providing security for children); political rights (amongst these is public participation, as in legal cases); and life (inclusive of socio-economic entitlements), amongst other rights, such as the right to be cared for and the right to a good name/standing in the community. Of course, the ultimate goals of civil security and harmonious community are brought into greater focus in the African paradigm, sometimes resulting in a distinct outcome when the rights are applied in specific cases—sometimes the outcome is strictly inconsistent with “human rights.” *See id.* at 4–5; Gordon Woodman, *Customary Law in Common Law Systems*, available at [http://www.vanuatu.usp.ac.fj/sol\\_adobe\\_documents/usp%20only/customary%20law/woodman.pdf](http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/woodman.pdf) (last visited May 28, 2011).

<sup>97</sup> Merry, *supra* note 90, at 45.

<sup>98</sup> Nyamu-Musembi, *supra* note 90, at 36–37.

<sup>99</sup> *See id.* ‘Vernacularization’ refers to the experience where adherents alter conventional human rights in the process of their interpretation and application in and for their particular context. *Id.*

<sup>100</sup> Mamdani, *supra* note 90, at 359 (“The content of rights, as that of democracy, must necessarily vary, not only according to historical circumstances, but also from one social context to another.”); Nyamu-Musembi, *supra* note 90, at 31 (“[R]ights are shaped through actual struggles informed by people’s own understandings of what they are justly entitled to . . . an approach to needs, rights and priorities that is informed by the concrete experiences of the particular actors who are involved in, and who stand to gain directly from, the struggles in question . . . calls for an evaluation of legal principles in terms of their particular effects in a social setting, rather than only in terms of the conceptual coherence of abstract principles.”).

also for these same reasons that, as Nedelsky demonstrates, the defense of formal rights is intimately connected with the processes of their determination.<sup>101</sup>

Like Nhlapo, Lacey identifies the strong interface between rights and values: the hegemony of certain concepts and articulations of rights is coextensive with that of certain values and notions of personhood and freedom.<sup>102</sup> Because human rights most often focus on negative freedoms, they do not represent positive interests and values well.<sup>103</sup> This can create problems for customary communities. As Cowan et al. note, there is a need for “more attention to be paid to empirical, contextual analyses of specific rights struggles.”<sup>104</sup> This paper advances that point in the context of women’s rights.

At the heart of this paper is the question of how to ensure that rural women’s rights can be taken up and realized within the contexts of their circumstances,<sup>105</sup> with human rights being formulated as other than merely individual and formal rights. This question is usefully confronted in the above-cited scholarship. The combined theory proposed by these scholars both universalizes and particularizes rights. The theory says that rights exist universally yet, while their content may be duplicated from one context to another, the struggles of the claimants and processes that take place in their particular circumstances are primarily responsible for defining the terms, boundaries, and content of their rights.<sup>106</sup> Furthermore, there is the question of whether making rights more realizable for variously situated women requires developing the rights of the groups to which these women belong (at least, in the interim).<sup>107</sup> Nedelsky overcomes the competition between the individual and the community suggested by conventional rights discourse by concluding that we should recognize that “what makes autonomy possible is not separation, but relationship.”<sup>108</sup> This means that “dependence is no longer the antithesis of autonomy but a precondition in the relationships . . . which provide the security, education, nurturing, and support that make

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<sup>101</sup> Nedelsky, *supra* note 86, at 4.

<sup>102</sup> See Lacey, *supra* note 11, at 19–23.

<sup>103</sup> *Id.* at 22–23.

<sup>104</sup> COWAN ET AL., *supra* note 86, at 21; see also Lacey, *supra* note 11, at 30.

<sup>105</sup> See Lacey, *supra* note 11, at 7; see also Claasens & Mnisi, *supra* note 14.

<sup>106</sup> See COWAN ET AL., *supra* note 86, at 1; Dembour, *supra* note 87, at 56; See Lacey, *supra* note 11, at 23; Mamdani, *supra* note 90, at 359; Merry, *supra* note 90, at 31; Merry, *supra* note 91, at 67; Nedelsky, *supra* note 86, at 4; Nyamu-Musembi, *supra* note 90, at 31.

<sup>107</sup> Nyamu-Musembi, *supra* note 90, at 39.

<sup>108</sup> Nedelsky, *supra* note 86, at 8.

the development of autonomy possible.”<sup>109</sup> This links with the concept of “*ubuntu*,” thus reinforcing the primary values of the communities that subscribe to it—symbiotic relationship and provision for posterity—thereby offering the reconciliation of formal and customary notions of rights.<sup>110</sup>

#### IV. THE CENTRALITY OF CHOICE OF “RIGHT” CONCEPTS, VALUES, AND SPACES

While Lacey recognizes that the protection of group rights may be necessary to effect individual women’s rights, she seeks to give appropriate weight to the individual’s right to withdraw from her culture.<sup>111</sup> Lacey concludes that a system combining universalism with particularism is probably the best for avoiding a manner of “rights-based essentialism.”<sup>112</sup> My proposal is that, in this context, choice, or maneuverability, is key.

##### A. THE SIGNIFICANCE OF CHOICE

Keebet Von Benda-Beckmann has provided an enlightening account of the phenomenon of forum shopping.<sup>113</sup> She describes how both parties and functionaries in the Minangkabau village she studied engage in negotiations of space, values, and outcomes.<sup>114</sup> Von Benda-Beckman obliquely names the values of harmony (expressed by avoiding disagreement) and belonging (seen in active membership and having people over to your home to share “a communal meal”) as the reasons why the parties and functionaries try to avoid reaching a decision.<sup>115</sup>

In the context of the community where cases A and B arose, I found these values to be a form of “social control at the village level which is strong enough to keep villagers from taking their problems directly to the state courts,”<sup>116</sup> controlling women most of all. As in

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<sup>109</sup> *Id.*

<sup>110</sup> Nhlapo, *supra* note 81, at 142.

<sup>111</sup> Lacey, *supra* note 11, at 33.

<sup>112</sup> *Id.* at 34.

<sup>113</sup> Keebet von Benda-Beckmann, *Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra*, 19 J. LEGAL PLURALISM 117 (1981).

<sup>114</sup> *Id.* at 117.

<sup>115</sup> *Id.* at 130–31.

<sup>116</sup> *Id.* at 143.

Minangkabau, it can be said here that “[t]he state courts are an alternative to dispute processing within the villages. Through their mere availability, they form a threat to the authority of village institutions . . . [a]nd the courts are by no means only a theoretical alternative. Villagers regularly employ courts in their forum shopping, thus demonstrating the relativity of village dispute settlement.”<sup>117</sup> The added reasons given by Von Benda-Beckmann for common avoidance of state courts are cogent even in South Africa. Among these are monetary and time costs, plus the risk of putting significant resources toward a process when the outcome is difficult for the complainant to predict.<sup>118</sup> There is also the impersonal nature of state court adjudication, which leaves parties feeling “as if they have lost all influence on their dispute once it is submitted to the court.”<sup>119</sup>

Women in particular will sometimes choose to neglect or explicitly reject this formal course of action because of the seemingly harsh effects of a firm court judgment when compared to those of the negotiation conducted in their local community.<sup>120</sup> Often, while choosing this, women will legitimately describe themselves as having little choice, as did the women in Case A.<sup>121</sup> A woman who could claim maintenance<sup>122</sup> might choose not to, for instance, because the man against whom she would claim (and thus cause to lose face) is the father of her children, and she would not wish to disgrace him or his name, which is also her son’s name. However, women often do seek some redress, no matter how nominal. In a culture in which one’s individual and family name are of utmost importance, women will pursue justice even if that only amounts to the cleansing of their name. Such solutions tend to be easily “found at the lowest level of authority, and if no solution is found the case [can then be] taken higher up, step by step, until a solution is found.”<sup>123</sup>

Nyamu Musembi also points to the selectivity with which adherents of customary law deal with customary law and, additionally, the important role of people’s knowledge of the legal options available to

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<sup>117</sup> *Id.* at 142.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 143.

<sup>120</sup> *See supra* Parts III.2, III.3.

<sup>121</sup> Interview (anonymous women), *supra* note 3.

<sup>122</sup> *Supra* note 2.

<sup>123</sup> von Benda-Beckmann, *supra* note 113, at 137.

them.<sup>124</sup> Specifically, she notes that this flexibility is one way in which women's rights might be realized.<sup>125</sup> As Filip Reyntjens notes, colonialism skewed rights.<sup>126</sup> This was particularly the case of women's rights, which were diverted away from justice mostly in favor of men through distorted versions of custom.<sup>127</sup> As a consequence, women cannot always obtain relief from within their communities. The ability to pursue justice in a different space may then serve as a lifeline.<sup>128</sup> Indeed, with the introduction of an entrenched Bill of Rights, people's options pertaining to fora, values, and laws have increased.<sup>129</sup> However, Merry observes how "discourses of law are occupying an increasingly central space in debates about social justice,"<sup>130</sup> and Lacey points out that this "center-ing" of (formal) law can potentially be counter-productive.<sup>131</sup> If the critical outcome is greater security and provision for women, the formal legal system is not the only, and may not always be the best, means to this end.

Merry observes "the emergence of a new kind of legal pluralism in which the critical questions are how these systems intersect with one another."<sup>132</sup> The flexibility of the law, and the gaps between two or more systems of law, is crucial to the ability of rural women to secure legal protection and justice according with their individual circumstances. But at a deeper level, the significance of these women's choices is democratic: by fashioning spaces for themselves to develop, choose, exercise, and enforce various rights, they are participating in rights struggles and definition. They are also expressing their perhaps increasingly limited power to hold accountable the institutions to which

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<sup>124</sup> CELESTINE NYAMU-MUSEMBI, *Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 126, 138 (Abdullah. A. An-Na'im ed., 2002).

<sup>125</sup> *Id.*

<sup>126</sup> Filip Reyntjens, *The Future of Customary Law in Africa*, in THE FUTURE OF INDIGENOUS LAW IN SOUTHERN AFRICA: A COLLECTION OF PAPERS AND COMMENTS PRESENTED AT A CONFERENCE HELD UNDER THE AUSPICES OF THE CENTRE FOR INDIGENOUS LAW, UNISA AND VISTA UNIVERSITY AT UNISA ON 21–22 OCTOBER 1991 3, 16 (Joan Church ed., 1993).

<sup>127</sup> Aninka Claassens, *Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act*, ACTA JURIDICA, 2005, at 42, 50.

<sup>128</sup> See RICHARD ROBERTS, LITIGANTS AND HOUSEHOLDS: AFRICAN DISPUTES AND COLONIAL COURTS IN THE FRENCH SOUDAN, 1895–1912 18–20 (2005).

<sup>129</sup> See Merry, *supra* note 91, at 50 ("Human rights offer local communities new ways of defining problems and seeing solutions through various kinds of cultural appropriation."). See generally Claassens & Mnisi, *supra* note 14, at 491.

<sup>130</sup> Merry, *supra* note 91, at 80.

<sup>131</sup> Lacey, *supra* note 11, at 15.

<sup>132</sup> Merry, *supra* note 91, at 79.

they are subject by supporting these institutions if the institutions adequately provide for them and neglecting them if the institutions do not.<sup>133</sup> Ultimately, the prominence of choice, as exercised by the differently situated women in Cases A, B, and C, is particularly interesting because of the tendency of state legislation to enable the suppression of choice by state and other powers instead of supporting it, as the controversial Traditional Courts Bill exemplifies.<sup>134</sup>

#### B. OPENING UP AND CLOSING DOWN AVENUES FOR CHOICE

Customary law continues to play an important role in the lives of many rural South Africans.<sup>135</sup> Hence, traditional courts—as the structures that primarily administer justice in rural South Africa—retain an important role as the first ports of call in many places.<sup>136</sup> In some areas they work well, while in others they are dysfunctional.<sup>137</sup> Part of the problem is the inconsistency in their operation, not necessarily because they take various forms in different settings, but because of insufficient accountability and oversight to ensure that, where they are dysfunctional, they can be remedied and improved.<sup>138</sup> Even in areas where traditional courts do work, there is still the need for greater resources and support for them.<sup>139</sup>

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<sup>133</sup> See generally Claassens & Mnisi, *supra* note 14; Nyamu-Musembi, *supra* note 124; ROBERTS, *supra* note 128.

<sup>134</sup> Traditional Courts Bill, 2008, Bill 15-08 (GN) (S. Afr.).

<sup>135</sup> See ANINKA CLAASSENS & BEN COUSINS, LAND, POWER & CUSTOM: CONTROVERSIES GENERATED BY SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT 4 (2008) (explaining that approximately 16.5 million South Africans (more than a third of the national population) live in communal areas and are therefore subject to some form of traditional leadership and justice).

<sup>136</sup> S. AFR. LAW COMM'N, THE HARMONISATION OF THE COMMON LAW AND INDIGENOUS LAW: TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS 1 (1999); see generally S. AFR. LAW COMM'N, REPORT ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS (2003).

<sup>137</sup> The Law, Race and Gender Research Unit at the University of Cape Town and the Legal Resources Centre have held a number of consultation workshops in 2009–2010 with adherents of customary law throughout the country wherefrom this information was obtained. Records of written and oral submissions made to parliament on the Traditional Courts Bill and the Black Authorities Act Repeal Bill B9-2010 also bear these statements out. This information was analyzed together in my study, *supra* note 1, and further empirical research that I have more recently conducted in KwaZulu-Natal Province.

<sup>138</sup> *Id.*

<sup>139</sup> See *id.*

The Traditional Courts Bill is meant to remedy these and other problems,<sup>140</sup> but it fails to do so. Unfortunately, the Bill reflects inadequate appreciation for the real-life experiences of customary court users.<sup>141</sup> The Bill dismisses most of the recommendations made by the South African Law Reform Commission,<sup>142</sup> which conducted consultations with diverse members of the rural public.<sup>143</sup> The Bill was drafted in consultation with the National House of Traditional Leaders.<sup>144</sup>

Women and children make up most of rural constituents,<sup>145</sup> and often find themselves in a vulnerable position in relation to male-dominated traditional institutions.<sup>146</sup> Women face particular problems in customary courts and are therefore the group most adversely affected by the Bill's failings. Specifically, the Bill fails to protect women for three reasons: (a) the constitution of traditional courts is left unchanged,<sup>147</sup> (b) power is rather centralized to a (most likely male) "senior traditional leader" to the exclusion of other participants who might otherwise participate under customary law,<sup>148</sup> and (c) opting out of traditional court jurisdiction is not permitted.<sup>149</sup> I only concentrate on the last problem—that the Bill forecloses the possibility of choosing where to pursue one's rights, and therefore also forecloses choice regarding what rights to claim, when to claim these rights, and how to claim them. Consequently, the Bill closes off the spaces in which people secure justice—that is, between the cracks.

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<sup>140</sup> See Traditional Courts Bill, 2008, Bill 15-08 (GN) (S. Afr.), pmb. ("[I]t is necessary to transform the traditional justice system, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms; . . . it is necessary to have a single statute applicable throughout the Republic, regulating traditional courts.").

<sup>141</sup> My analysis of the Bill to reach this conclusion is informed by the sources *supra* note 137. See also Chuma Himonga & Rashida Manjoo, *The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa*, 3 MALAWI L.J. 157, 166–67, 172 (2009).

<sup>142</sup> *Id.* at 171.

<sup>143</sup> S. AFR. LAW COMM'N, REPORT ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS, *supra* note 136, at 1.

<sup>144</sup> Memorandum on the Objects of the Traditional Courts Bill, 2008 (Bill 15-08 (GN) (S. Afr.)), § 3.1.

<sup>145</sup> CLAASSENS & COUSINS, *supra* note 135, at 4.

<sup>146</sup> See Claassens & Mnisi, *supra* note 14, at 511–12.

<sup>147</sup> Traditional Courts Bill, 2008, Bill 15-08 (GN) (S. Afr.), cl. 4; Claassens & Mnisi, *supra* note 14, at 511–12.

<sup>148</sup> Cl. 4; Claassens & Mnisi, *supra* note 14, at 510–11.

<sup>149</sup> Cl. 20(c); Claassens & Mnisi, *supra* note 14, at 510–11.

In clauses 5(1) and 6, the Bill gives traditional courts territorial jurisdiction in civil and criminal cases.<sup>150</sup> Clause 20(c) categorically denies rural inhabitants the entitlement to choose their forum by declaring the failure to appear before the traditional court, if summoned, an offense.<sup>151</sup> This contradicts the South African Law Reform Commission's informed recommendation that people be permitted to opt out of traditional court jurisdiction<sup>152</sup> and, instead, supports traditional leaders' arguments that allowing people to opt out would undermine their authority.<sup>153</sup> Yet, by precluding opting out of traditional courts' territorial and subject matter jurisdiction as established by the Bill, it undermines the consensual character of customary law. More importantly, it ignores the fact that maneuverability between diverse fora may increase the accountability of traditional courts by permitting people to avoid certain courts if they are thought to be illegitimate, or certain authorities that are known to be biased. In essence, choice is critical to people's ability, albeit limited and imperfectly exercised, to secure justice for themselves.

### CONCLUSION

This paper examines rural women's relationships with "human rights" to determine how the content of rights might be best determined and defined in order to ensure that they are enforceable in ways that make them of equal value to variously situated subjects. Rural women are significant because they commonly face difficult circumstances. First, the state often does not have sufficient resources and capacity to reach into rural women's communities and homes and fully protect them, so women depend on their families and communities for security. Second, even when the state *can* adequately reach into rural women's communities, it might offer them unappealing solutions because these solutions contradict fundamental values the women hold. Moreover, those values (whether good or bad) might be shared by the people on whom these women depend, sometimes the very same people who are contravening these women's formal rights. Third, state protection often comes at a high monetary, and sometimes relational, cost to rural women, a cost that they cannot afford.

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<sup>150</sup> Cls. 5(1), 6.

<sup>151</sup> Cl. 20(c).

<sup>152</sup> S. AFR. LAW COMM'N, REPORT ON TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS, *supra* note 136, at 32, apps. 3-4, 10.

<sup>153</sup> *Id.* at 32.

This paper also draws attention to additional contextual factors regarding rural women's rights. First, it contends that legal plurality often persists because different legal orders meet different socio-economic (and political) needs. Second, it acknowledges that the state is not yet able to ensure that all traditional courts operate justly. And third, it maintains that, with the diversity of legal practices from one locale to another, there is not the macro-level knowledge of which practices are effective and which are dysfunctional to enable effective regulation. Based on these contextual considerations, this paper makes the case that the people subject to the traditional courts are those best-placed to make the call of whether and when to use the courts for themselves.

Appreciating the value of rights, this paper heeds Lacey's caution: "Interventions within one set of practices often have unseen and sometimes adverse implications for others. . . . The challenge is to try to understand how social institutions interact with each other. . . . For the institutional complexity of the world—the ways in which lives are lived across different practices, and move between different subjectivities—*itself* presents possibilities for, as much as barriers to, change."<sup>154</sup> This paper claims that, given the aptness of Lacey's observation, choice is the means by which the government might protect group identity and culture, but not at the expense of the individual. Recognition of both customary and state norms and authorities while simultaneously allowing individuals to determine for themselves when they wish to appeal to these norms and authorities gives necessary weight to the individual's right to withdraw. It concurrently permits that, for group identities to remain a viable choice, they must be supported and improved in ways that make them an attractive option, and people must be resourced with the necessary information and means to effect their choices.<sup>155</sup> The state does not, by placing the burden of agency on the individuals, rid itself of its responsibility to assist in regulating and supporting traditional forums for positive ends. And, by the same token, the state retains the duty to enable people to choose effectively. This duty on the state includes the need to reconceptualize formal rights so as to make them more accommodating of alternative contexts and realities, and thereby make *formal rights* a more viable option.

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<sup>154</sup> Lacey, *supra* note 11, at 29.

<sup>155</sup> *Id.* at 24 ("[C]hoice is worth little if our circumstances are such that we cannot make it with adequate information, or if we cannot implement it because of lack of access to . . . resources.").

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