

# Fordham Law Review

---

Volume 75 | Issue 2

Article 13

---

2006

## Constitutional Chicken Soup

Tracy E. Higgins

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Tracy E. Higgins, *Constitutional Chicken Soup*, 75 Fordham L. Rev. 709 (2006).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss2/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Constitutional Chicken Soup

### Cover Page Footnote

Professor of Law, Fordham University School of Law; Faculty Director, Crowley Program in International Human Rights. I would like to thank my colleague, Jim Fleming, for conceiving of and organizing this conference and for inviting me to participate, and my co-panelists, Mark Graber, Ran Hirschl, and Mark Tushnet, for their contributions to the panel and for their comments. I would also like to thank Alexandra Scuro for her able research assistance and the editors of the Fordham Law Review for their hard work in organizing this symposium and for their editorial contributions to this essay.

## CONSTITUTIONAL CHICKEN SOUP

Tracy E. Higgins\*

I find myself largely convinced by Professor Ran Hirschl's account in *Towards Juristocracy* of the politics of constitutional entrenchment and the embrace of judicial review.<sup>1</sup> Moreover, his hegemonic preservation thesis<sup>2</sup> does a good job of explaining courts' broad interpretation of those rights going to matters of procedural justice and negative liberties, on one hand, and their failure to advance in significant ways progressive notions of distributive justice on the other. Indeed, the pattern documented in *Towards Juristocracy* confirms empirically what many feminist critics, including this one, have long worried about: the prioritization of a concept of anti-statism and the protection of an expanding private sphere over a concern with hierarchies of private power.<sup>3</sup>

I am, however, left wondering precisely what lessons we can draw from this insight. In his introduction, Professor Hirschl invokes and paraphrases Ronald Dworkin to make the point that "[o]nce we have settled on a given normative meaning of the term 'social justice,' . . . the question of democracy versus constitutionalism . . . becomes an empirical question: What type of fundamental governing principle . . . is likely to produce practical outcomes closest to . . . social justice?"<sup>4</sup>

But I wonder whether the choice is quite that stark; that is to say, either constitutionalism or democracy? We might re-cast it as a choice between

---

\* Professor of Law, Fordham University School of Law; Faculty Director, Crowley Program in International Human Rights. I would like to thank my colleague, Jim Fleming, for conceiving of and organizing this conference and for inviting me to participate, and my co-panelists, Mark Graber, Ran Hirschl, and Mark Tushnet, for their contributions to the panel and for their comments. I would also like to thank Alexandra Scuro for her able research assistance and the editors of the Fordham Law Review for their hard work in organizing this symposium and for their editorial contributions to this essay.

1. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

2. *See id.* at 16.

3. Catharine MacKinnon states the point this way:

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life.

Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 161 (1989); *see also* Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in *Women's Rights, Human Rights: International Feminist Perspectives* 11 (Julie Peters & Andrea Wolper eds., 1995) (applying this argument in the international human rights context).

4. Hirschl, *supra* note 1, at 3.

relying on courts or relying on legislatures for the realization of social welfare rights, but that is not precisely the same as asking whether *constitutionalization* of such rights helps to further them. Focusing on the role of courts, Professor Hirschl has argued that we should not be optimistic about their potential to realize even constitutionally entrenched social welfare rights.<sup>5</sup> On the other hand, we might ask whether constitutionalization coupled with judicial review frustrates the realization of such rights.<sup>6</sup> In other words, would we be better off leaving the realization of social welfare rights entirely to the political process? Here I think the answer is less clear. In discussing this question with my colleague Martin Flaherty, he suggested the principle of constitutionalization as chicken soup: can't hurt, might help.

Along those lines, I would like to discuss *Bhe v. Magistrate*, a case decided in October 2004 by the South African Constitutional Court.<sup>7</sup> This case involved a constitutional challenge to the rule of male primogeniture<sup>8</sup> under African customary law.<sup>9</sup> The case is interesting for the purposes of this discussion because it involves the application of the principle of formal equality (and thus is perhaps an easy case for judicially enforced constitutionalism).<sup>10</sup> And yet it also involves the application of formal equality to customary law, in a setting characterized by the absence of, in Hirschl's words, "hospitable sociocultural conditions,"<sup>11</sup> and may therefore suggest a limit to the reach of judicial review even in the context of so-called first generation rights.

In *Bhe*, the widow and the deceased had lived together as wife and husband for twelve years.<sup>12</sup> They had two children, both girls.<sup>13</sup> The husband had been a carpenter and Ms. Bhe was a domestic worker.<sup>14</sup> They were poor and lived in a temporary informal shelter in Cape Town.<sup>15</sup> Although the deceased had obtained a state housing subsidy that had allowed him to purchase the property on which they lived and to buy materials with which to build a house,<sup>16</sup> he died before the house could be

---

5. See Hirschl, *supra* note 1, at 150 ("[T]he practical impact of constitutionalization on closing the socioeconomic gap between the haves and have-nots . . . has been at best negligible.").

6. See generally Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 *Tex. L. Rev.* 433 (2005).

7. *Bhe v. Magistrate*, 2005 (1) BCLR 1 (CC) (S. Afr.).

8. Male primogeniture refers to the practice under which the estate and role of family head passes to the eldest male child or nearest male relative. A leading expert in South African customary law explains, "[H]eirs must be male, partly because only men have the legal powers necessary to run a family's affairs, but also because the bloodline is traced through males." T.W. Bennett, *Customary Law in South Africa* 335 (2004).

9. *Bhe*, 2005(1) BCLR at 2.

10. See Hirschl, *supra* note 1, at 218.

11. *Id.*

12. See *Bhe*, 2005 (1) BCLR at 13-15.

13. *Id.* at 14.

14. *Id.* at 15.

15. *Id.*

16. *Id.*

built.<sup>17</sup> The estate consisted of the temporary shelter, where Ms. Bhe continued to live with her youngest daughter, the land upon which it was built, the household chattel, and the building materials.<sup>18</sup>

Pursuant to the Black Administration Act,<sup>19</sup> the magistrate invoked the relevant customary norm: the rule of male primogeniture.<sup>20</sup> Because the two children were daughters, the magistrate named the deceased's father as the heir and successor.<sup>21</sup> The father, in turn, planned to sell the property to pay for funeral expenses.<sup>22</sup>

To make a long and complex analysis rather short and simple, the Constitutional Court had relatively little problem concluding that the Black Administration Act was unconstitutional, an overtly racist legacy of apartheid.<sup>23</sup> The Justices then confronted the question of whether customary law should nevertheless govern the disposition of the estate of its own force.<sup>24</sup> Under the South African Constitution, courts must apply customary law when that law is applicable, subject to the Bill of Rights.<sup>25</sup>

17. *Id.* at 15-16.

18. *Id.* at 16.

19. Black Administration Act 38 of 1927 s. 23. The Black Administration Act of 1927 specified that the property of a Black (for which the Constitutional Court now substitutes African) who dies intestate shall devolve in terms of Black law and custom. *Id.* All other estates were governed by the Intestate Succession Act, which codified and updated common law rules for intestate succession, providing for inheritance by the surviving spouse and, importantly for this case, providing equally for all children regardless of birth order or the marital status of the parents. *See* Intestate Succession Act 81 of 1987.

20. *Bhe*, 2005 (1) BCLR at 16.

21. *Id.*

22. *Id.* at 17.

23. *Id.* at 53-54. As Justice Pius Langa explained,

Section 23 [of the Black Administration Act] cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent. . . . What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate.

*Id.*

24. *See id.* at 66.

25. S. Afr. Const. 1996. The Constitution of the Republic of South Africa provides,

### 30. Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

### 31. Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community

(a) to enjoy their culture, practice their religion and use their language; and

....

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

....

The Court thus had to consider whether the applicable customary law principle of male primogeniture violated women's rights to equality and to dignity.<sup>26</sup> It concluded that it did, and, moreover, that the violation could not be justified under the constitution's limitations clause.<sup>27</sup>

So far, this appears to be an easy case for liberal constitutional principles and for the Court. Men can inherit, women cannot—a straightforward violation of formal equality. And this is more or less how the Court saw it. The Court was gentle on customary law, in a sense, pointing out that the rigidity of the statutory scheme of apartheid and the racist ends served by the codification of customary law had undermined its flexibility and capacity to evolve as social norms changed over time, implying at least, that it is more patriarchal than it might have been.<sup>28</sup> In any case, the Court struck it down.

Now, unless we are prepared to lament the demise of a customary standard that disinherited women entirely (and, of course, some have and will),<sup>29</sup> we might agree that this is a good result. But the devil is in the details. What was the appropriate remedy in *Bhe*? What rule should govern this estate and others like it?

Under the circumstances, the Court had several choices. First, it could have struck down the impugned provision and then left it to the legislature to deal with the gap.<sup>30</sup> Second, it could have suspended the declaration of

#### 211. Recognition

....  
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

*Id.*

26. *Bhe*, 2005 (1) BCLR at 82-83.

27. *Id.* Under the South African Constitution, once the Court concluded that the rule of male primogeniture was unfair discrimination on the basis of gender and therefore a violation of section 9(3) of the Bill of Rights, it had to consider further whether that violation could be justified under the limitations clause, section 36(1), in view of the customary successor's duty of support. With respect to this analysis, Justice Langa concluded simply that "the connection between the rules of succession in customary law and the heir's duty to support the dependents of the deceased is, at best, less than satisfactory. . . . The heir's duty to support cannot, in the circumstances, constitute justification for the serious violation of rights." *Id.*

28. *Id.* at 77-79. Justice Langa explained,

At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.

*Id.* at 78-79.

29. See, e.g., Jelili A. Omotola, *Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture*, 15 *Ind. Int'l & Comp. L. Rev.* 115 (2004) (criticizing the prioritizing of constitutional principles of gender equality over African customary law norms).

30. *Bhe*, 2005 (1) BCLR at 89.

invalidity, allowing the unconstitutional rule to govern the distribution of estates pending a legislative response.<sup>31</sup> None of the justices liked either of these options.<sup>32</sup> Instead, the Court decided to come up with a different interim rule.<sup>33</sup> Here, two possibilities existed. The Court might replace the customary norm with a suitably modified version of the Intestate Succession Act<sup>34</sup> (the statute governing estates not governed by the Black Administration Act); or it might replace male primogeniture with a new customary law norm that the Court would develop in a way that “promote[s] the spirit, purport and objects of the Bill of Rights.”<sup>35</sup>

Given these options, ten of the justices declined to fashion their own rule.<sup>36</sup> They agreed that, until the legislature resolves the question of the treatment of intestate succession under customary law in a way that is consistent with the constitution, the Intestate Succession Act should govern.<sup>37</sup> They still had to do some redrafting so that the Intestate Succession Act could accommodate the practice of polygyny, though the Court was careful to reserve the question of its constitutionality.<sup>38</sup>

One justice, Justice Sandile Ngcobo, concurred in part, agreeing that the Black Administration Act was unconstitutional.<sup>39</sup> Moreover, he agreed with the conclusion that the rule of male primogeniture violated the constitutional guarantee of gender equality and could not be justified.<sup>40</sup> He dissented, however, from the Court’s decision to apply the Intestate Succession Act to estates previously governed by customary law via the Black Administration Act.<sup>41</sup> He argued that the Court had an obligation to apply customary law and to participate in the development of customary law in a way that was consistent with the Constitution.<sup>42</sup> Instead of striking

---

31. *Id.*

32. *Id.* at 90-97.

33. *Id.* at 96.

34. *See supra* note 19.

35. S. Afr. Const. 1996 s. 39(2).

36. *See Bhe*, 2005 (1) BCLR at 94-95.

37. *See id.* The Intestate Succession Act provides a share for the surviving spouse but contemplates only one such spouse. Justice Langa explained in his opinion how the Act should govern the distribution among two or more such spouses in polygynous unions. *Id.* at 97-98.

38. *See id.* at 102. The application of the constitutional principles of gender equality in *Bhe* seems to preclude the sanction of polygyny, a system under which men may have multiple spouses but women may not. Yet, the possibility remains that the Court might determine either that such discrimination is not *unfair* and therefore does not violate section (9), or that it comes within the scope of the limitations clause. The latter argument is strengthened by the fact that women in polygynous marriages may be made worse off by the denial of legal recognition to such unions. *See* Recognition of Customary Marriages Act 120 of 1998 ss. 2(3), 2(4); SA Law Commission Report 90 The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages (August 1998) 88.

39. *See Bhe*, 2005 (1) BCLR at 119.

40. *See id.* at 153-54.

41. *See id.* at 181.

42. *See id.* at 177-78; *see also* S. Afr. Const. 1996 s. 211(3) (obliging courts to “apply customary law when that law is applicable”); *id.* at s. 39(2) (providing that “when

down the rule of primogeniture altogether, he would have modified the customary law rule to preserve inheritance by the eldest child, though allowing female as well as male children to succeed to the position of family head.<sup>43</sup> This interpretation of customary law, in his view, would preserve the valuable function of the customary successor while eliminating the gender discriminatory aspects of the rule.<sup>44</sup>

Justice Ngcobo's approach required him to reach the further issue of discrimination based on birth order. Although acknowledging the unfairness, he concluded that it was justified given the important role of the customary successor in managing family property and caring for dependent family members.<sup>45</sup> He conceded that the choice-of-law issues would be difficult, given that race would no longer serve to determine the governing law, but he indicated that they should be resolved on a case-by-case basis in a way that is equitable and consistent with the expectations of the parties.<sup>46</sup>

So, how does this case figure in with respect to the overall juristocracy scorecard? There are several ways to look at it. On one view, the case might illustrate that the entrenchment of norms of equality, even defined rather narrowly in terms of formal legal equality, can have progressive results, disrupting the hierarchy of private power in the traditional family structure.<sup>47</sup> Reading the case in this way suggests that Hirschl may be too pessimistic about the possibilities of constitutionalism implemented through judicial review.

This reading becomes less convincing, however, as one examines more closely the actual consequences of the decision.<sup>48</sup> Our interviews with South African lawyers and representatives of nongovernmental organizations working on gender equality issues suggest that the case has had virtually no impact even on the adjudication of disputes concerning inheritance rights.<sup>49</sup> Although legal services organizations have begun to conduct training sessions for lawyers and magistrates on a limited basis,

---

developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights").

43. See *Bhe*, 2005 (1) BCLR at 181.

44. See *id.* at 137 (discussing the important role of the customary successor).

45. See *id.* at 151.

46. See *id.* at 192-94.

47. See McClain & Fleming, *supra* note 6, at 451 (making this argument regarding the potential of liberal constitutionalism to advance progressive ideals, particularly in the context of gender equality).

48. In May 2006, Professor Paolo Galizzi, Professor Catherine Powell, Ziona Tanzer, and I, along with a group of eight students, completed a year-long research project on the status of women living under customary law and Muslim personal laws. The impact of the Constitutional Court's decision in *Bhe* was one focus of our study. The project culminated in two weeks of intensive fieldwork during which we interviewed more than one hundred men and women. The citations to interview notes that follow are drawn from this project. A complete report of the project will be published in the *Fordham International Law Journal*.

49. See, e.g., Interview with R.B. Mqoke, Professor, Rhodes University, in Pretoria, S. Afr. (May 23, 2006) (notes on file with author). Professor Mqoke noted that "the government [has failed] to explain the changes that have taken place," and that "[n]othing has been done. People live as if there is no *Bhe*. People don't know about it." *Id.*



many estates are administered informally by family members or traditional leaders in rural and semi-urban communities where knowledge of the *Bhe* decision is virtually nonexistent.<sup>50</sup> As a practical matter, this means that a widow's access to her deceased husband's home and property depends on the inclinations of the male heir.<sup>51</sup> If that heir is her son, she will likely remain in her home. If the heir is another male relative, she may well be evicted from the property, particularly if she has no children of her own.<sup>52</sup> In short, looking beyond the opinion itself to consider the conditions on the ground suggests that very little power has been redistributed as a result of this exercise of judicial review.

Perhaps then the case illustrates the marginal significance of constitutional adjudication even of core rights such as equality when the realization of those rights requires the disruption of entrenched cultural practices. In other words, maybe courts are not only bad at enforcing positive rights (such as social welfare rights), but also, in some important contexts, negative rights. On this reading, Professor Hirschl may be too optimistic insofar as he concedes the effectiveness of judicial review in protecting traditional negative rights.<sup>53</sup>

The readings of the *Bhe* decision that I have offered thus far address only the first part of the question I posed initially: Does constitutionalization coupled with judicial review make the realization of social justice more likely? Perhaps not, but the second part of the question is whether it makes it less likely. Professor Hirschl suggests two ways that it might. First, the entrenchment of traditional negative rights (such as the right to property, to take an important example in the South African context) constrains the progressive agenda of democratic institutions by limiting their power to redistribute wealth.<sup>54</sup> Second, the transformation of political questions into

50. See, e.g., Interview with Patrick Pringle, Dir., Queenstown Rural Legal Ctr., in Grahamstown, S. Afr. (May 23, 2006) (notes on file with author) (“[It is i]nteresting that even the paralegals were unaware of the *Bhe* judgment. Where there is awareness, there has been almost a paralytic effect. . . . Magistrates don’t know how to do it. Paralegals don’t even know about it. [There is n]ot even resistance, just ignorance.”).

51. See Bennett, *supra* note 8, at 335 (“[H]eirs must be male, partly because only men have the legal powers necessary to run a family’s affairs, but also because the bloodline is traced through males.”).

52. *Id.* at 347-48. Bennett observes that the widow’s right to maintenance depends on her willingness to remain on the homestead and that the successor has no right to eject her. *Id.* He concedes, however, that “[c]ompliance with support obligations depends, in the first instance, on harmonious relationships.” *Id.* at 349. The vulnerability of the widow was confirmed by our interviews. See, e.g., Interview with Mbolompo community members, in Umtata, S. Afr. (May 25, 2006) (notes on file with author) (noting that “it does happen [that] the widow [does not get] what is due her . . . if the woman has no children and the husband had a concubine who bore children”).

53. See Hirschl, *supra* note 1, at 218.

54. See *id.* at 151. As Hirschl explains, the constitutionalization of rights has done little to combat the widening disparities in fundamental living conditions within and among polities. In fact, the constitutionalization of rights has been associated with precisely the opposite ethos, placing private ownership and other economic freedoms beyond the reach of majoritarian politics and state regulation

legal questions deprives citizens of the opportunity to shape policy. Instead, they “are forced to relinquish their responsibility for working out reasonable and mutually acceptable resolutions of the issues that divide them.”<sup>55</sup>

The first problem is not implicated in *Bhe*. On the contrary, the constitutional principle of gender equality seems to support the progressive reallocation of power and resources. The decision does, however, raise the second problem: the potential usurpation of the democratic process by judges. Indeed, the case could be seen as a textbook example of the handing off of a difficult political question.

In *Bhe*, the very issue of the reconciliation of customary rules of succession with constitutional and common law norms had been the subject of study by the South African Law Reform Commission (SALRC) and had been under consideration by Parliament for several years.<sup>56</sup> A bill was first introduced in Parliament in 1998 that would have accomplished precisely what the Constitutional Court did in *Bhe*, making applicable to all estates the Intestate Succession Act of 1987.<sup>57</sup> The bill met with a hostile reaction from traditional leaders, who criticized both the “Eurocentric” approach of the bill and the lack of consultation that preceded its introduction.<sup>58</sup> Meanwhile women’s groups pressed the urgency of reforming a vitally important and obviously discriminatory aspect of customary law. Ultimately, the original bill was dropped and the SALRC agreed to continue to work toward a reform proposal that would accommodate the concerns of the various groups.<sup>59</sup> Despite the issuance of a further “Discussion Paper” in 2000, the issue had stalled for over five years at the time of the *Bhe* decision.<sup>60</sup>

Under the circumstances, the Court could be forgiven for its impatience. Yet, important questions, including the role of the customary successor in

---

and thereby planting the seeds for greater, not lesser, disparity in essential life conditions.

*Id.*

55. *Id.* at 186.

56. In April 2000, the South African Law Reform Commission published a seventy-five page discussion paper on succession in customary law, which included recommendations for reform and a draft bill. See SA Law Commission Discussion Paper 93 Customary Law (April 2000).

57. See Customary Law of Succession Amendment Bill, 1998, Bill 109-98.

58. See SA Law Commission Discussion Paper 93 Customary Law (April 2000) x-xi.

59. See *id.* at xi.

60. The closing date for comments on the Discussion Paper was September 22, 2000. According to one member of the Commission, Ms. Maureen Moloi, the final report has been drafted and forwarded to the Department of Justice where it awaits referral to Parliament. She speculates that the reasons for the delay relate to the likely political controversy over the legislative reform of the customary law norm of primogeniture and possible implications for the succession of traditional leaders. See Interview with Maureen Moloi, South African Law Reform Comm’n, in S. Afr. (May 29, 2006) (notes on file with author). This issue was expressly excluded from the Discussion Paper, which noted that the Commission’s mandate concerned only the inheritance of estates and provision for surviving spouses and children. See SA Law Commission Discussion Paper 93 Customary Law (April 2000) xvii.

intestate estates, remained to be resolved.<sup>61</sup> Moreover, the reform effort on this issue would likely become a model for reconciling other conflicts between customary law and constitutional principles.<sup>62</sup> The Court was fully aware of the dangers of substituting judicial pronouncements for democratic reform.<sup>63</sup> Indeed, the majority opinion includes an express plea that the judgment not become the final resolution of the matter.<sup>64</sup> Nevertheless, the *Bhe* judgment likely pushed the issue of intestate succession well down on the parliamentary agenda.

If we frame the ultimate question the way that Professor Hirschl (per Dworkin) does—whether democracy or constitutionalism is more likely to promote social justice—we might conclude that the Court stepped in when democracy failed and that social justice was advanced as a result. Yet, given the very marginal impact of the judgment more than a year after it was issued, some speculation about the democratic path-not-taken might be worthwhile. Reaching the result in *Bhe* through democratic channels would have happened (if at all) only after significant mobilization of women across class, ethnic, and religious divides. Although this political mobilization would have been time-consuming, it could have precipitated a more sustained national discussion on the relationship between customary law and the Constitution, a discussion that, until now, has been largely limited to political and legal elites. This discussion, in turn, might have laid the groundwork for a much more widespread understanding and acceptance of a new standard for customary succession and inheritance. Instead, the Court's imposition of the standard from the top down may have short-circuited the creation of this essential political foundation for change.

The majority opinion in *Bhe* may have further compounded this problem by characterizing gender equality as irreconcilable (in this context, anyway) with the norms of customary law.<sup>65</sup> Although Justice Pius Langa is careful to suggest the potential for customary law to evolve in a way that is

---

61. An examination of the experience of the South African Law Reform Commission (SALRC) with the issue reveals how very controversial it is. The first Issue Paper on the subject was published by the Commission in April 1998. The next month, the Department of Justice developed a draft bill which was introduced in Parliament as the "Customary Law of Succession Amendment Bill 1998." The bill would have accomplished the result reached by the Court in *Bhe*—the application of the Intestate Succession Act to everyone. See Customary Law of Succession Amendment Bill, 1998, Bill 109-98.

62. The problem quietly haunting this debate was (and is) the application of primogeniture to the hierarchy of traditional leadership. The Court in *Bhe* carefully bracketed this question. See *Bhe v. Magistrate*, 2005 (1) BCLR 1 (CC) at 82 (S. Afr.).

63. *Id.* at 95–96.

64. See *id.* at 96 ("Any order by this Court should be regarded by the Legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession.").

65. See *id.* at 80 ("The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order." (citations omitted)).

consistent with the Constitution,<sup>66</sup> by declining to participate in the development of customary law the Court conveyed the message that custom must be sacrificed in favor of constitutional values. This analysis reinforces the idea that women who press for change within traditional communities threaten the values that sustain those communities.<sup>67</sup> The lesson is that gender equality is a value alien to traditional communities, one that does not emerge from women's experience of subordination within them but is imposed by external forces.

Finally, I would like to return briefly to the question of constitutionalization itself, apart from the issue of judicial review. Does enshrining rights such as gender equality in a constitution matter even if judicial review is not particularly effective in advancing progressive social change? Here I would like to suggest that, based on our research in South Africa, the answer may be *yes*. Although our interviews were limited and anecdotal on this question, a theme began to emerge with respect to the impact of the constitutional guarantee of gender equality on the relationship between men and women. Specifically, we detected what might be described as a shift in the gender power balance that the interview subjects themselves linked to constitutional change. For example, Mr. M. Similo, the sub-headman for the Ncengane Community in the Eastern Cape, explained to us that "the problem [of domestic conflict]" began in 1994, "when the new government took over. Now a woman has rights, a child has rights. Men do not have rights. . . . After rights were given to women and children, this is when women started to misbehave."<sup>68</sup> Similarly, a man from the Kibi Community in the Limpopo province explained, "You speak of gender equality but it is now the men who are oppressed. . . . This is because of the constitution."<sup>69</sup> The Paramount Chief of the Keerom Village in Limpopo Province explained, "Gender equality promoted by the Constitution creates problems in the family that can lead to divorce. . . . Equality undermines the men's dignity."<sup>70</sup>

Over the course of more than one hundred interviews conducted over a two week period, we interviewed a significant number of men from diverse geographic locations and cultural affiliations who rejected the legitimacy of the constitutional principle of gender equality, and, perhaps more

---

66. *See id.* at 75 (emphasizing that "because of the dynamic nature of society, official customary law as it exists in the text books and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place").

67. For an interesting discussion of this problem in the context of lobolo, or bridewealth, and polygyny, see Victoria Bronstein, *Reconceptualizing the Customary Law Debate in South Africa*, 14 SAJHR 388 (1998).

68. *See* Interview with M. Similo, Sub-headman, Ncengane Community, in Eastern Cape, S. Afr. (May 26, 2006) (notes on file with author).

69. Interview with anonymous man, Kibi Community, in Limpopo Province, S. Afr. (May 25, 2006) (notes on file with author).

70. Interview with Paramount Chief, Keerom Village, in Limpopo Province, S. Afr. (May 23, 2006) (notes on file with author).

importantly, regarded that principle as threatening not merely their own power but the cultural and moral foundations of their social structure. On one hand, one could interpret this evidence as reflecting the “thinness” of South Africa’s constitutional project in the face of widespread cultural resistance. On the other hand, one might also read it as an indication of the Constitution having inserted a small lever against the boulder of the patriarchy. To the extent that men were complaining that their relative status had changed by virtue of the constitution’s recognition of women’s right to equality, some shift in power must be taking place. This reading is confirmed by the few women who also spoke to the issue. Like the men, they described a change, though perhaps not so much a gain in their own power but an opening, a destabilization of men’s power.<sup>71</sup> They understood that the Constitution somehow meant that they should be treated differently, that they should not be subordinate to men, whether or not they could claim those rights in a direct and meaningful way.<sup>72</sup>

This evidence stands as a counterexample to Hirschl’s suggestion that translating political goals into legal rights may frustrate their realization. On the contrary, it suggests that the South African Constitution’s guarantee of gender equality has begun to inform the intimate relationships even of individuals living with little formal attachment to courts or legal culture. In the end, though, this may be an exception that proves the rule in that the significance of the constitutionalization of gender equality emerges not from the potential for its judicial enforcement but from the (sometimes grudging) acceptance of the norm as an aspect of South Africa’s political culture.

---

71. For example, when asked about changes since the new constitution, Elizabeth Moabelo, a woman in her sixties from the GaMatlala Community in Limpopo explained, “We now understand that there is equality but we don’t forget our culture. Sure we’re equal but we still respect what we’ve been taught.” Interview with Elizabeth Moabelo, in GaMatlala, Limpopo, S. Afr., (May 24, 2006) (notes on file with author).

72. Cladice Motona, a seventy-one year old woman from GaMatlala Community in Limpopo stated simply, “Men don’t beat women as much anymore.” Interview with Cladice Motona, in GaMatlala, Limpopo, S. Afr. (May 24, 2006) (notes on file with author).

*Notes & Observations*