

# ValpoScholar

## Valparaiso University Law Review

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Volume 44  
Number 4 *Symposium on The Civil Rights of  
Public School Students*

pp.1015-1034

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*Symposium on The Civil Rights of Public School Students*

### Legitimation by Constitution (and the News from South Africa)

Frank I. Michelman

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#### Recommended Citation

Frank I. Michelman, *Legitimation by Constitution (and the News from South Africa)*, 44 Val. U. L. Rev. 1015 (2010).

Available at: <https://scholar.valpo.edu/vulr/vol44/iss4/1>

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# Symposium, *The Civil Rights of Public School Students*

## 2009 Edward A. Seegers Lecture

### LEGITIMATION BY CONSTITUTION (AND THE NEWS FROM SOUTH AFRICA)

Frank I. Michelman\*

*Where frequent, obdurate, reasonable disagreement over the wisdom and the justice of statutes and government decrees is an accepted fact of political life, justification for the force of law may come to rest on the idea that the laws and decrees, however sharply and reasonably contested, gain a kind of immunity against justified complaint from the fact of their having issued in compliance with the terms of a good, right, or accepted constitution. My lecture will draw from recent events and debates in South Africa, in a consideration of possible limits (or objections) to such a constitution-based principle of political justification.<sup>1</sup>*

How do we justify the force of law to people at large, in countries where populations often find themselves divided over whether the law is truly right and as it ought to be? As you can see from my little blurb for this talk, reproduced above, my title “Legitimation by Constitution” refers to a certain line of thought that often crops up in both academic and lay discussions of this question. My blurb calls this a “constitution-based principle” of legal justification, and it says that my lecture will submit this idea to testing by recent events and debates in South Africa.

That promise will be kept. Before I finish, I will be suggesting how current happenings in South Africa suggest certain limiting conditions on the prospects for legitimation by constitution. By way of illustration,

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\* Robert Walmsley University Professor, Harvard University. Thanks to the Edward A. Seegers Lecture Series, and to the Dean, Faculty, and students of the Valparaiso University School of Law, for the opportunity to share these thoughts and for gracious hospitality.

<sup>1</sup> Reprinted just above is my advance billing for the Edward A. Seegers Lecture, delivered on November 13, 2009, at Valparaiso University School of Law. I offer the Lecture text as given, expanded slightly in a few places. I have added footnotes only for purposes of attributing quoted material and exemplifying current South African controversies—and in a few spots, to indicate where fuller discussion of some themes and ideas may be found.

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I will spend some time reflecting on the status and treatment, in South African constitutionalism's New Deal, of African indigenous law.

Doing so should fit the occasion, because the question of respect for indigenous law—or what is often called “customary” law—is very much a question of civil rights.<sup>2</sup> To those South Africans whose lives are wrapped up with traditional ways of living, South Africa's Constitution guarantees important civil rights of cultural association and self-determination. At the same time, the Constitution guarantees to everyone in the country civil rights of equality and freedom from discrimination. One might think, especially here, of the fraction of “everyone” who are women,<sup>3</sup> but of course men, too, have direct stakes (I mean, apart from the stakes that all citizens hold in matters of basic justice) in the question of the civil rights of members of traditional communities.<sup>4</sup> South African officials, judges included, face the challenge of discovering, constructing, or inducing a potential for compatibility between respect for traditional forms and practices of life and law and civic equality regardless of sex or gender. Recent work of the South African Constitutional Court is interestingly suggestive along these lines, and I will examine it.

First, though, I need to take some time unpacking the idea of legitimation by constitution, so that we will be able, by the end, to see how South Africa's indigenous-law question relates to it. Systems of legal ordering always invite a question of justification or legitimacy.<sup>5</sup> We want to understand how to justify the demands we make on each other in the name of the law. Demands, I mean, that we back with threats of force; demands we make for everyone's regular compliance with the laws of the country, and of course that includes compliance by those

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<sup>2</sup> The Lecture was scheduled as a curtain-raiser for a day-long conference on “Civil Rights in the Obama Era.”

<sup>3</sup> For an introduction to the apparent tensions in South Africa between claims to civil equality and to respect for indigenous law, and for citations to major South African sources, see generally Penelope E. Andrews, *Who's Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 UTAH L. REV. 351.

<sup>4</sup> Consider, for example, current controversy over the constitutional and other appropriate limits, if any, on oversight by state health and police authorities of the conduct of ritual circumcision by traditional leaders and communities. See, e.g., *Chiefs at Odds With Youth Over Circumcision*, THE HERALD ONLINE, Nov. 10, 2009, <http://www.theherald.co.za/article.aspx?id=496080>; *Judgment in Forced Circumcision Case*, LEGALBRIEF TODAY, Oct. 14, 2009, <http://www.legalbrief.co.za/article.php?story=20091014084902414> (last visited Mar. 24, 2010).

<sup>5</sup> For a fuller presentation of the idea of legitimation by constitution, and its association with a branch of contemporary liberal political philosophy, see Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MOD. L. REV. 1 (2003). A full set of citations to my writings on this topic can be found in Frank I. Michelman, *Reply to Ming-Sung Kuo*, 7 I-CON 715, 715 n.1 (2009).

who might not like or approve of all the laws that get made. One answer to this sort of question, which has apparently proved appealing in many contemporary societies, is that demands for legal compliance are justified as long as the laws in question issue from a general system for lawmaking and legal administration—a constitutional regime—that everyone can fairly be called on to accept.

On this view, justification for the force of a law depends on whether that law issued from what we may call a “legitimation-worthy” constitution. To call a constitution legitimation-worthy, in this sense, is to say that its prescriptions, including both its procedural provisions for democratic government and its substantive requirements of respect for basic rights, have a special kind of merit. Namely, they cast a mantle of moral probity over enforcement against everyone of approximately all of the laws that come properly out of the system they constitute. A legitimation-worthy constitution is one whose terms are such as to allow you or me to say, with clear conscience, that any law whose process of enactment, and whose content, pass muster under that constitution’s requirements can ipso facto be deemed a law that all within range have good enough reason to accept, even if they disagree with it. Such a proposition, if accepted, diverts the burden of justification from the particular law in question to the legally constituted political system that produced it.

“Well, but how is that supposed to help?” you might ask. In societies as culturally and otherwise diverse as the ones we are talking about, mustn’t we expect disagreement over what should have gone into the constitution, no less than disagreement about the merits of one or another piece of current legislation? In response, theorists may suggest reasons why that need not be so. For one thing, they may say, constitutions are primarily about procedures for lawmaking and other aspects of governance, not the substantive contents of laws, and people who have trouble agreeing about the substantive merits of specific laws may find it a lot easier to agree on what qualifies as a fair process for democratic governance and public decision-making. Additionally, when constitutions do talk about people’s substantive rights, they usually do so at a pretty high level of abstraction. They speak, for example, of a right of “equality before the law.” It seems that just about everyone can agree on a constitutional commitment to equality before the law and actually feel reassured by that commitment, even if they know they will not agree on all the relevant, concrete issues of implementation, such as affirmative action, for example. And so, maybe we all can call upon each other to accept that a given constitution contains an apt and fair set of general, framework rules for governance in a diverse population of free

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and equal persons whose various aims, hopes, and projects will often come into conflict.

Now, try this on for size:

*The Republic of South Africa is . . . [a] democratic state founded on the following values:*

*(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*

*(b) Non-racialism and non-sexism.*

*(c) Supremacy of the constitution and the rule of law.*

*(d) Universal adult suffrage, . . . regular elections and a multi-party system of democratic government . . . .*

That comes from the section on founding values of the republic in South Africa's current Constitution.<sup>6</sup> You can rest assured that the rest of the document is more or less aptly drafted to carry out the program. In fact, it has supported constitutional rulings and (where required) resultant legislation prohibiting the death penalty,<sup>7</sup> abolishing the crime of sodomy,<sup>8</sup> upholding affirmative action,<sup>9</sup> instituting gay marriage,<sup>10</sup> extending social security benefits to non-citizens,<sup>11</sup> tightly restricting residential evictions,<sup>12</sup> recasting and expanding AIDS treatment policy,<sup>13</sup> and enforcing multi-cultural tolerance in schools,<sup>14</sup> among other things (and the recital could go on and on). The Constitution's chief expositor, South Africa's Constitutional Court, has achieved, over the first fifteen years of its existence, a remarkable international reputation and standing, not only as one of the world's notably skilled, informed, and adept constitutional tribunals, but as one of those whose work helps to set terms and standards for constitutional adjudication around the globe. Sound good?

Today, in South Africa, one picks up rumblings of the possibility of constitutional failure. I do not mean rumblings only on the right, from observers who find themselves disturbed and alarmed by rulings of the

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<sup>6</sup> S. AFR. CONST. 1996, s 1.

<sup>7</sup> See *S. v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.).

<sup>8</sup> See *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1999 (1) SA 6 (CC) (S. Afr.).

<sup>9</sup> See *Minister of Fin. v. Van Heerden*, 2004 (6) SA 121 (CC) (S. Afr.).

<sup>10</sup> See *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.).

<sup>11</sup> See *Khosa v. Minister of Soc. Dev.*, 2004 (6) SA 505 (CC) (S. Afr.).

<sup>12</sup> See, e.g., *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (CC) (S. Afr.).

<sup>13</sup> See, e.g., *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.).

<sup>14</sup> *M.E.C. for Educ., KwaZulu-Natal v. Pillay*, 2008 (1) SA 474 (CC) (S. Afr.).

kinds I have mentioned. I also mean rumblings from what can only be called the left, as I'll explain soon. Some people are having serious second thoughts about South Africa's constitutional "miracle" – as it was called in those heady years of the nineties when it seemed to the world that South Africa had, by an amazing feat of constitution-creation, transformed itself into the southern hemisphere's model constitutional-democratic regime.<sup>15</sup> Please do not misunderstand me. I am not here as a doomsayer. I am not among the rumblers. But the rumbles are there, and they demand attention from all who strive to understand the puzzle of legitimation by constitution.

In South Africa, today, one hears intimations of crisis. Thoughtful observers notice "disturbing signs pointing towards the decline of constitutionalism," including worries over whether the governing authorities may have "failed to internalise the precepts of the constitutional state."<sup>16</sup> Prominent figures voice doubts about the future of the rule of law and constitutional government in that country.<sup>17</sup> Observers talk of a "spiral of despondency" among jurists, accentuated by a recent spate of withdrawals by some highly regarded judges from consideration for appointment to the country's top courts.<sup>18</sup>

I cannot here describe, in any detail, the recent events that have apparently helped to spark and spread these concerns. They have included controversial prosecutions of high officials;<sup>19</sup> also some resulting very public and ugly brawls, not only among constituted branches of the state, but among judges and between courts.<sup>20</sup> There is

<sup>15</sup> See, e.g., HASSAN IBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* 3 (1998).

<sup>16</sup> Francois Venter, *Liberal Democracy: The Unintended Consequence – South African Constitution-Writing Propelled by the Winds of Globalisation*, S. AFR. J. ON HUM. RTS. (forthcoming).

<sup>17</sup> See Adam Dodek, *State v. Zuma: The Future of Constitutional Democracy in South Africa*, 3 J. P. POL. L. 121, 128 (2009) (writing of an impending "battle over constitutionalism"); *De Klerk warns of bending Constitution to the will of the ANC*, LEGALBRIEF TODAY, Oct. 13, 2009, available at <http://www.legalbrief.co.za/article.php?story=20091013083540332> (last visited Mar. 24, 2010) (reporting remarks of former President F. W. De Klerk, expressing concern about partisan-political take-over of the Constitution).

<sup>18</sup> See *Judges Caught in 'Spiral of Despondency'*, LEGALBRIEF TODAY, Sept. 18, 2009, <http://www.legalbrief.co.za/article.php?story=20090918085146901> (last visited Mar. 24, 2010); Franny Rabkin, *Another Judge Gives Up On JSC Interviews*, BUS. DAY, Sept. 17, 2009, available at <http://www.businessday.co.za/Articles/Content.aspx?id=81678> (last visited Mar. 24, 2010).

<sup>19</sup> For an account of events surrounding the prosecution, on charges of corruption, of Jacob Zuma, see Dodek, *supra* note 17.

<sup>20</sup> For reviews of the most prominent inter-judicial controversy, see Theunis Roux, *The South African Constitutional Court and the Hlophe Controversy*, International and Comparative Perspectives on Constitutional Law, Paper Delivered at Centre for Comparative Studies 21st Anniversary Celebration, Melbourne, (Nov. 27, 2009); Penelope

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also deep controversy over the conduct of the body which acts as the country's agency for judicial discipline and for screening judicial appointments, both in response to those brawls<sup>21</sup> and in producing its most recent slates of nominees for high judicial office.<sup>22</sup> Also, South Africa has witnessed a barrage of disturbingly intemperate, even physically threatening, outbursts from some social leaders displeased by court proceedings.<sup>23</sup> Legislative initiatives from the government<sup>24</sup> and statements from high-ranking officials,<sup>25</sup> are found by some observers to convey both a contempt for judicial independence and a hostility toward the judiciary, or at least that part of it that acts as the main, judicial keeper of the Constitution.

This recent turmoil surely reflects tensions and anxieties that go back a long way, some of them clearly and sadly divisive along lines of race, class, and culture.<sup>26</sup> There have been tensions over the pace at which, and the means by which, the higher judiciary and upper ranks of the legal profession are being repopulated by the formerly-excluded and subjugated peoples;<sup>27</sup> tensions over moves by the government to take control of judicial administration and training;<sup>28</sup> tensions over the role of the courts in prodding and steering constitutionally-committed social development and resource redistribution;<sup>29</sup> tensions over judge-led

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Andrews, *The Judiciary in South Africa: Independence or Illusion* 30–33 (Working Paper, 2008), available at <http://ssrn.com/abstract=1279225>.

<sup>21</sup> See, e.g., Franny Rabkin, *Hlophe Decision a 'Threat to the Rule of Law'*, BUS. DAY, Oct. 15, 2009, available at <http://www.businessday.co.za/Articles/Content.aspx?id=84037> (last visited Mar. 24, 2010) (reporting reactions to the decision of the Judicial Service Commission not to proceed with a full investigation of charges and counter-charges between Judge Hlophe and the justices of the Constitutional Court).

<sup>22</sup> See, e.g., Editorial, *Sitting in Judgment* MAIL & GUARDIAN ONLINE, Sept. 25, 2009, <http://www.mg.co.za/article/2009-09-25-sitting-in-judgment> (last visited Mar. 24, 2010).

<sup>23</sup> See Andrews, *supra* note 20, at 33–34; Dodek, *supra* note 17, at 133; *Malema Doesn't Budge on Zuma Remark*, MAIL & GUARDIAN ONLINE, June 21, 2008, <http://www.mg.co.za/article/2008-06-21-malema-doesnt-budge-on-zuma-remark> (last visited Mar. 24, 2010).

<sup>24</sup> See, e.g., Sello Alcock, *Tackling Transformation of the Judiciary*, MAIL AND GUARDIAN ONLINE, June 12, 2009, <http://www.mg.co.za/article/2009-06-12-tackling-transformation-of-the-judiciary> (last visited Mar. 24, 2010).

<sup>25</sup> See Moshoeshoe Monare, *Zuma Takes Aim at Top Judges*, THE STAR, Apr. 9, 2009, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=6&art\\_id=vn20090409050224266C609125](http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20090409050224266C609125) (last visited Mar. 24, 2010).

<sup>26</sup> See Andrews, *supra* note 20, at 34–35.

<sup>27</sup> See *id.*; Prakash Naidoo, *The Judiciary: Trying Times*, FINANCIAL MAIL, Oct. 23, 2009, <http://secure.financialmail.co.za/09/1023/cover/coverstory.htm> (last visited Mar. 24, 2010).

<sup>28</sup> See Andrews, *supra* note 20, at 28–30; Venter, *supra* note 16.

<sup>29</sup> See, e.g., Bernard Ngoepe, *Choosing New Custodians of Our Constitution*, TIMES LIVE, Aug. 30, 2009, available at <http://www.timeslive.co.za/sundaytimes/article34943.ece> (last visited Mar. 24, 2010) (Bernard Ngoepe is a South African high court judge-president).

intrusions, in the name of the Constitution and its progressive-liberal values, into entrenched, customary forms of social life;<sup>30</sup> and so on.

As I tick off that list of sore points, you might think that those don't seem to go beyond the stresses that would necessarily have to attend any process of conversion of the old, absolutist, apartheid state into a new, egalitarian, constitutional-democratic society. Sure, South Africa is enduring the obduracy of poverty, of deprivation, of crime. The pace of promised redistributions of access can seem slow; it *is* slow. The country suffers from the persistence of suspicion and mistrust across racial and cultural divides, and doubtless that is aggravated by the country's failure, so far, to transcend one-party government and achieve the multi-party, democratic contestation promised by the Constitution.<sup>31</sup> And sure, these conditions are bound to generate a certain amount of resentment, anxiety, and bad temper. But what they signal are failures and shortfalls of public administration and of societal mobilization, not a crisis of law or of the Constitution.

Something like that would be the view of many, maybe most, informed South Africans,<sup>32</sup> and I harbor no conviction to the contrary. One does, however, notice the presence in the conversation of trends of thought more radically inclined, toward asking whether current rifts might possibly stem from deep faults of the Constitution. The faults suggested pertain both to constitutional substance and to the processes by which the constitution was created and brought into force.<sup>33</sup> On the side of substance, one finds charges of failures of justice and failures of fitness. The Constitution simply fails, some say—and fails largely by reason of its westernized constructions of human rights—to carry out the

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<sup>30</sup> See, e.g., *id.*; *supra* note 4.

<sup>31</sup> See S. AFR. CONST. 1996, s 1(d) (including, among the founding values of the Republic, a commitment to “a multi-party system of democratic government, to ensure accountability, responsiveness and openness”).

<sup>32</sup> See, e.g., *Dispute Hasn't Placed Judiciary in Crisis*, DAILY DISPATCH ONLINE, Sept. 23, 2009, <http://www.dispatch.co.za/article.aspx?id=347040> (last visited Mar. 24, 2010) (reporting remarks of Johan Froneman, a widely respected judge, since then appointed to the Constitutional Court).

<sup>33</sup> For a crisp summary of recent colloquy concerning alleged faults in the Constitution, its origins, and its administration, see Kenneth Walker, *At the Heart of South Africa: A Constitution and a Court*, 4 CARNEGIE REP. no. 2 (Spring 2007), available at <http://www.carnegie.org/reporter/14/constitution/index.html>. Recent, thoughtful essays by law professors Francois Venter and Henk Botha start out by asking whether an “apparent deterioration in South African constitutionalism” should be “ascribed to the manner in which the Constitution was written” (Venter), or whether “the roots of the current malaise” are to be found in “the constitution-making process itself” (Botha). Venter, *supra* note 16; Henk Botha, *Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa's Constitution-Making Experiment* Paper delivered at the International Workshop on Constitution-Making, University of Glasgow, May 27–28, 2009.



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first, most necessary task of restorative justice, which is re-vesting full possession of the country, and unhindered sovereignty over it, in the peoples whose land and living space it once was, prior to a long series of unjust colonial and imperial acts of dispossession.<sup>34</sup>

One aspect of this injustice, the argument continues, is the Constitution's move to take its stand on liberal rights that clash with deep-seated, identity-fixing cultural contexts and, more generally, to enact for the country a westernized, individual-centered idealization of social relations that is alien to the more communalistic disposition, characteristically African, that runs deep in the practices, customs, minds, and feelings of the bulk of the population.<sup>35</sup> A constitutional project lacking in justness and fitness is doomed from the start, some critics may be taken to suggest. Others, not in contradiction of the first group, place more emphasis on faults they perceive in the Constitution's processes of origination, which some see as having been externally pressured, tactical, elite-dominated, legalistic and juridified, only shallowly populist and participatory, and insufficiently so to ground the sort of popular buy-in from Day One that these critics suggest may be essential for prospects of long-term constitutional legitimacy.<sup>36</sup>

Questions of this kind, about the justice and fitness for all the people of South Africa of the Constitution and its birthing, enter a rich and important set of debates in constitutional theory and political analysis.<sup>37</sup> We cannot really pursue those themes in earnest today, however. Instead, the focus now must shift to the view of critics who, finding no fault with the Constitution that the country so triumphantly embraced in 1994, trace the current malaise to alleged misreadings and misapplications of the people's constitutional program by officials and by judges, very much including the Constitutional Court.

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<sup>34</sup> See M.B. Ramose, *In Memoriam; Sovereignty and the "New" South Africa*, 16 GRIFFITH L. REV. 310 (2007); Mogobe B. Ramose, *An African Perspective on Justice and Race*, POLYLOG themes 3 (2001), <http://them.polylog.org/3/frm-en.htm> (last visited Mar. 24, 2010).

<sup>35</sup> See, e.g., Ramose, *In Memoriam; Sovereignty and the "New" South Africa*, *supra* note 34; Ramose, *An African Perspective on Justice and Race*, *supra* note 34; Jean Comaroff & John Comaroff, *The Struggle Between the Constitution and "Things African,"* WISER REV., No. 1, p. 6 (July, 2004), available at <http://wiserweb.wits.ac.za/PDF%20Files/review-no1.pdf> (last visited Mar. 24, 2010).

<sup>36</sup> Concerns of this kind are taken up for examination by Venter, *supra* note 16, and Botha, *supra* note 33.

<sup>37</sup> Some of the fruits, including essays cited above by Venter and Botha, are collected in CONSTITUTIONAL LEARNING: ESSAYS TOWARDS A CRITICAL APPRAISAL OF CONSTITUTION-MAKING AND CONSTITUTIONALISATION AS LEARNING PROCESSES (provisional title) (Johan Van der Walt ed., forthcoming). A leading precursor is JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995).

In the recent verbal hostilities, the Constitutional Court has certainly taken its share of flak. The Court receives complaint for excessive intrusion into governmental operations<sup>38</sup> (and also, I might add, for the opposite fault of excessive reticence<sup>39</sup>); for failure to institute effective dialogue between itself and the citizenry; for constitutionalizing an extremity of liberal permissiveness (as the critics see it) in the areas, for example, of crime control and of sex that the critics apparently doubt the Constitution truly calls for;<sup>40</sup> and for a want of urgency about the vital necessity of integrating indigenous African values into the development of South African constitutional law.<sup>41</sup>

I report the circulation of such views; I do not endorse them. That the Constitutional Court should have come in for some degree of such complaint was inevitable. As is necessarily true when constitutions are drafted in conditions of sharply opposing social stakes and opinions, the drafting of this one had to make use of some highly visible postponements in order to keep the main constitutional negotiation from going off the rails. By “postponements,” I mean decisions by the drafters to leave certain divisive issues to be dealt with in the future by the country’s political and judicial authorities. Most famously, the drafters deliberately ducked the question of the constitutionality of the death penalty and left it for the Constitutional Court to decide, the so-called “Solomonic solution.”<sup>42</sup> But that is only one among several salient instances.

The Constitution requires and promises an equitable redistribution of land and natural resources,<sup>43</sup> and it simultaneously guarantees security of property holdings against uncompensated expropriation.<sup>44</sup> The Constitution guarantees everyone’s access to adequate food, water, health care, and housing,<sup>45</sup> and it simultaneously describes the state’s corresponding obligation in terms of “reasonable . . . measures” to be

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<sup>38</sup> See *supra* note 29.

<sup>39</sup> See, e.g., Jackie Dugard, *Court of First Instance? Towards Pro-Poor Jurisdiction for the South African Constitutional Court*, 22 S. AFR. J. HUM. RTS. 262 (2006); Sandra Liebenberg, *Water rights reduced to a trickle*, MAIL & GUARDIAN ONLINE, Oct. 21, 2009, <http://www.mg.co.za/article/2009-10-21-water-rights-reduced-to-a-trickle> (last visited Mar. 24, 2010).

<sup>40</sup> Such complaints appear (for example) in Ngoepe, *supra* note 29.

<sup>41</sup> See, e.g., Hlophe Calls for Africanisation of SA Law, MAIL & GUARDIAN ONLINE, July 10, 2009 <http://www.mg.co.za/article/2009-07-10-hlophe-calls-for-africanisation-of-sa-law> (last visited Mar. 24, 2010).

<sup>42</sup> See *S. v. Makwanyane*, 1995 (6) BCLR 665 (CC), ¶¶ 22–25 (S. Afr.).

<sup>43</sup> See S. AFR. CONST. 1996, s 25(5).

<sup>44</sup> See *id.* s 25(2)(b), (3).

<sup>45</sup> See *id.* ss 26(1), 27(1).

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taken “within its available resources.”<sup>46</sup> The Constitution guarantees respect and protection for cultural self-determination<sup>47</sup> and for indigenous law and leadership,<sup>48</sup> and it simultaneously guarantees the protection of every person’s equality before the law and freedom from unfair discrimination, naming sex-based discrimination as presumptively unfair.<sup>49</sup>

You might think you see puzzles or contradictions lurking in some or all of those pairings of constitutional commitments. You might be right. You can be sure, though, that the contradictions did not result from blindness on the drafters’ part. Obviously, they reflect the drafters’ recognition of intractable complexity in the issues involved, and a more-or-less desperate decision by them to rely on politicians, lawyers, and judges, working in context, in good faith and over time, to come up with pragmatic resolutions that all parties could find decent and acceptable – if, sometimes, only barely or even bitterly so. No one ever would have imagined that the Constitutional Court could work its way through these entanglements without raising sharp complaints from some or another group of stakeholders.

And, no surprise, the Court has not succeeded in doing that. The question, though, is whether it has found ways, or bids fair to find ways, of doing sufficient justice to all sides of these controversies to redeem (if I may now revert to the opening part of this lecture) the legitimization-worthiness of the Constitution entrusted to its care.

And that brings me, then, to the matter of civil rights law that I have said would provide the core of this talk. I will focus on one case decided by the Constitutional Court, under the name of *Bhe*.<sup>50</sup> The *Bhe* case involves a feature of indigenous law that property lawyers call “male primogeniture.” It is a feature that comes into play in deciding the inheritance of property from a person who dies without leaving a will. Male primogeniture means, first, that only males get to inherit. It also means that only one person succeeds to all the property – that person being the eldest male member of the class of survivors closest in blood relationship to the deceased. Typically, that will be an eldest son, but it can also be a father, uncle, nephew, or cousin.

Before getting further into the *Bhe* case, I need to fill you in a bit more on some relevant constitutional texts. Section 8, the so-called application clause, stipulates that the Bill of Rights applies to “all law,”

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<sup>46</sup> See *id.* ss 26(2), 27(2).

<sup>47</sup> See *id.* ss 30, 31.

<sup>48</sup> See *id.* s 211. Sections 30, 31, and 211 are more fully described and discussed below.

<sup>49</sup> See *id.* s 9(3).

<sup>50</sup> See generally *Bhe v. Khayalitsha Magistrate*, 2005 (1) SA 580 (CC) (S. Afr.).

which seemingly must include customary law. Section 30, on language and culture, gives to everyone the right to “participate in the cultural life of their choice,” but the text immediately goes on to add that no one is licensed to do so “in a manner inconsistent with any provision of the Bill of Rights.” Section 31, on cultural communities, gives members of cultural communities the right to “enjoy their culture;” but, again, the section immediately goes on to say that this does not grant any exemption from other provisions in the Bill of Rights. Section 9, the equality clause of the Bill of Rights, gives everyone a right against “unfair discrimination,” and it specifically defines discrimination on grounds of sex or gender to be unfair, by a rebuttable presumption.

One constitutional provision outside of the Bill of Rights has a direct bearing on the *Bhe* case. Section 211 guarantees the operation of systems of customary law under traditional leadership, and it furthermore directs the state’s regular courts to apply customary law wherever applicable. Again, however, the text immediately goes on to say that this is to be done only “subject to the Constitution.”<sup>51</sup>

Let us now come to the case of *Bhe*. For the sake of simplicity, clarity, and speed, I am going to alter the factual and legal background a little, but not in any way that is material to our discussion. A man to whom Ms. Bhe was married at the time died without having made a will. The couple had been living and working in the city of Cape Town with their two young daughters, in a shack on land to which the husband held the title. He also owned some personal property, including building materials for a permanent home. Some or all of these assets had been acquired through the joint efforts of the deceased and Ms. Bhe. The magistrate in the case (a state judicial official roughly equivalent, for our purposes, to a probate judge) awarded the entire estate away from Ms. Bhe and her daughters, to the decedent’s nearest living male relative, who happened to be his father. The magistrate thus acted in accordance with what he took to be the applicable rule of African customary law, male primogeniture. He did so despite the father’s declared intention of selling away the land where Ms. Bhe and her daughters had been living,

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<sup>51</sup> S. AFR. CONST. 1996, s 211(1). To make the survey complete, we should note that the Constitution establishes a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, to which it assigns important powers and duties of research, education, mediation, and advocacy. See S. AFR. CONST. 1996, s 185; Lumphert Chilwane, *Commission Takes Up Dispute Over Bull Ritual*, BUSINESS DAY, Dec. 18, 2009, available at <http://www.businessday.co.za/Articles/Content.aspx?id=89843> (last visited Feb. 9, 2010) (reporting on the Commission’s initiative to achieve mutual understanding between Animal Rights Africa and the Zulu traditional leadership in regard to an annual first-fruits ceremony involving the killing of a bull).

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in order to repay himself for the expenses of his son's funeral, leaving Ms. Bhe and her girls to live who knows where, or how.

Now, that is not how the estate would have gone under the state's general Intestate Succession Act, the standard law that applies to cases of intestacy outside the customary-law situation. *That* law provides for sex-neutral inheritance; it places spouses and children first in line, ahead of their in-laws and grandparents; and it divides estates equitably among the surviving spouse and children. And so you might be asking yourself: On what fair basis could a magistrate decide that this was a customary-law situation to be governed by male primogeniture, rather than one to be governed by the standard law of the state? In general, the answer would have to be that it was because the couple had entered their marriage under customary law, or had otherwise been living as a part of a traditional community. In those conditions, the combined effect of section 30 (granting people rights to participate in the cultural life of their choice) and section 211 of the Constitution (providing for the operation of customary legal systems and directing state judges to apply customary law where applicable) does, indeed, appear to be that the magistrate must decide the line of inheritance from Ms. Bhe's deceased husband in accordance with customary law.

But, of course Ms. Bhe went to court claiming that the customary rule at issue in this case, the rule of inheritance by males only, is unconstitutional. (By direction of section 8, remember, the Bill of Rights applies to "all law"). As you might expect, given my description of the relevant constitutional texts, the Constitutional Court agreed with that proposition. Customary law, the Court said, "is protected by and subject to the Constitution in its own right", as "an integral part of our law;" but, still, customary law must "first and foremost answer[] to the contents of the Constitution."<sup>52</sup> The Court concluded that "[t]he exclusion of women from inheritance on the grounds of gender is a clear violation" of the Constitution's guarantee, in section 9, against sex-based discrimination.<sup>53</sup>

The Constitution directs the Court to declare invalid any law that it finds to be inconsistent with constitutional requirements.<sup>54</sup> But the Court, in this case, could not simply do that and stop. That would have left a gap in the customary law; there would have been no rule, then, to govern inheritance in the customary law situation. So what did the Court do? Using power that the Constitution grants it to craft just and equitable remedial orders,<sup>55</sup> the Court decreed that succession to

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<sup>52</sup> *Bhe*, (1) SA 580 ¶¶. 41, 43.

<sup>53</sup> *Id.* at ¶ 91.

<sup>54</sup> See S. AFR. CONST. 1996, s 172(1)(a).

<sup>55</sup> See *id.* s 172(b).

property in the customary law situation would be governed by the state's regular rules of inheritance,<sup>56</sup> unless and until Parliament should legislate some different solution (which would, of course, itself have to pass constitutional muster).

Here we reach an important point. The Court had been urged to adopt a different form of remedy, which arguably would have signified a greater depth of commitment to the respected status of customary law and its future place in the lives of the people. The Constitution contains an important section 39(2) directing courts, when applying common or customary law, to construe and develop that law in line with "the spirit, purport and objects of the Bill of Rights."<sup>57</sup> Just as American courts are expected to revise and adjust common law rules in response to changes in society and in prevailing societal values and understandings, so the judges in this case might have treated the customary rule of male primogeniture. Rather than simply discarding the rule as impossibly sexist and out of step, the Court might have done the customary rule the honor—so to speak—of treating it as no less worthy than, say, some outmoded rule in the common law of contract of judicial attention and care to bring it into line with the evolution in social conditions and values represented by the Constitution.

Exactly that course was urged by one of the Court's eleven members. Interestingly, that single dissenter from the Court's remedial order was Justice Sandile Ngcobo, who has just recently become the Chief Justice, replacing the retired Justice Pius Langa, who wrote for the majority of ten in the *Bhe* case. Justice Ngcobo would have had the Court develop the primogeniture rule, but also preserve it. He would have done this by simply removing the reference to males.<sup>58</sup> That would result, for example, in having the eldest surviving child, regardless of gender, succeed to the entire estate, without any allowance for a surviving spouse or division with other children—a result quite different from what happens under the state's standard rules of inheritance.

We will come back soon to Justice Ngcobo's remedial proposal. Before we do, we must take note that, as a matter of fact, the majority's opinion in *Bhe* lays the groundwork for exactly such a proposal. That groundwork essentially consists of two propositions, which both opinions, the majority's and Justice Ngcobo's, explain with care. First, the primogeniture rule arose in a state of society and a cultural context in which it served a benign purpose, but which have largely passed out of

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<sup>56</sup> See *Bhe*, (1) SA 580 at ¶ 136(6).

<sup>57</sup> See S. AFR. CONST. 1996, s 39(2).

<sup>58</sup> See *id.* at ¶¶ 218–22 (Ngcobo, J., concurring in part and dissenting in part).

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existence.<sup>59</sup> Second, in the absence of positive assistance from the state's judicial and legislative bodies, the customary law available for application in the state courts of South Africa is blocked from the normal path of evolution to keep up with changes in society.<sup>60</sup>

As the opinions explain, the rule of inheritance by male primogeniture arose within a strongly communal and familial form of social life. It was a part of a system containing ample safeguards for fairness and welfare, based on the cohesion and stability of extended family groups on which everyone depended for production, sustenance, and emotional support. Property—of which by far the most important component was pastoral and agricultural land—was, in substance, collectively owned. As nominal holder of the title, the extended family head administered the patrimony for the welfare of the family unit as a whole; he held the title, so to speak, in trust for the family. When a family head died, the “heir”—as we call this person today, somewhat inaptly—stepped into his shoes and assumed all the obligations attached to the headship role. Dependents of the deceased, or maybe better call them family constituents, continued as family constituents of the successor. The successor acquired the duty to ensure the maintenance and support of all members of the family, and to administer the estate to that end only. As Justice Ngcobo further explains, there was a real reason (granting that one could not call it a purely gender-neutral reason) for preferring males as successors to family headships. Women, upon marriage, were expected to leave their natal families and join the families of their husbands, and would not, therefore, be suitably situated for headship responsibility toward their families of birth.<sup>61</sup>

Needless to say, and as both opinions emphasize, the world has changed drastically since then, in ways that the facts of the *Bhe* case perfectly typify. In the words of the majority:

Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires

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<sup>59</sup> See *id.* at ¶¶ 75–76, 80, 83–84 (majority opinion); *id.* at ¶¶ 156–74, 188–90 (Ngcobo, J., concurring in part and dissenting in part).

<sup>60</sup> See *id.* at ¶¶ 82, 84–90 (majority opinion); *id.* at ¶¶ 153–55, 175–77 (Ngcobo, J., concurring in part and dissenting in part).

<sup>61</sup> See *id.* at ¶ 174 (Ngcobo, J., concurring in part and dissenting in part).

the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.<sup>62</sup>

In short, for what is doubtless a majority of that fraction of today's South Africans who retain, in many ways, their attachment to traditional ways and customary legal institutions, the male primogeniture rule is simply out of whack. It does not work. Originally a part of a scheme for social solidarity and collective security, it has turned into an engine of rank unfairness and abuse.

Why, then, has there been no internal evolution of the body of customary law to reflect these changes? The answer given by both opinions in the *Bhe* case is that such development may well have taken place; but any such development will have occurred indigenously—in non-formal, off-record ways that fail to make the changes readily visible, as general rules of law to be applied by outsider, state tribunals such as the magistrate's court. The problem is one of deviation of the living law on the ground from the law frozen in the books. During the nineteenth century, so-called African customary law was codified in rule form by colonial treatise writers and legislators, and the result has been to lock in its tracks what the state's tribunals have since been able to recognize as customary law. As the *Bhe* majority writes, with obviously sincere sympathy and regret, "[t]he outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner."<sup>63</sup>

We are now in a position to attempt an assessment of the *Bhe* majority's rejection of Justice Ngcobo's proposal that the Constitutional Court should develop—and, by doing so, should respect and preserve—the customary law of inheritance; that is, by recasting primogeniture into a gender-neutral form. One obvious objection to that, noticed by Justice Ngcobo himself, is, again, the change in social conditions. In the *Bhe* case, for example, awarding the entire estate, outright, to the elder of the two young sisters would make no sense and do no justice.<sup>64</sup> In such a situation, hardly non-typical, the state's standard rules for administration and division of intestate property will do a much better job.

That, however, does not seem to have been the majority's primary reason for declining to make the Constitutional Court the default developer of the content of customary law. For the majority, that suggestion seemed to pose an insuperable difficulty of evidence.

<sup>62</sup> *Bhe*, (1) SA 580 at ¶ 80 (majority opinion).

<sup>63</sup> *Id.* at ¶ 90.

<sup>64</sup> *See id.* at ¶ 241 (Ngcobo, J., concurring in part and dissenting in part).



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Whatever the development was to be, it should reflect what the majority called “the true content of customary law as it is today.”<sup>65</sup> And, given the indigenous, non-formalized nature of customary legal change, and the uncertainties and disputes that necessarily must attend such processes, the majority seemed to doubt its capacity, by the normal means of judicial evidence-taking, to decide what is now to stand as an authoritative rendition of the current state of customary law. The majority was also concerned that an inevitably protracted and piecemeal process of judicial verification of indigenous legal change would result in an unacceptable postponement of the urgent, civic claims of women to nondiscriminatory treatment. Pending any action from Parliament, the best they could do right away, the majority thought, was to order application of the state’s standard rules to cases of inheritance in a customary law situation.<sup>66</sup>

Not so, said Justice Ngcobo, we can do better. First, we must gender-neutralize the customary rule of primogeniture. But then, second, instead of a wholesale throw-over of the traditional form of inheritance by one person of entire family estates, which may still be just right for some traditional, rural families and communities, we must leave it to the parties concerned to decide whether to endorse that form of inheritance or, instead, to choose division under the state’s standard rules. And, in case of the parties’ inability to agree, we must direct the state’s magistrates to decide which form of inheritance should apply in the case at hand, having regard to what would be fair and equitable in the circumstances.<sup>67</sup> To be sure, said Justice Ngcobo, that would result, sometimes, in differing treatments for inheritance, depending on whether the matter falls inside or outside the customary law situation. But this kind and degree of legal pluralism, he added, is dictated by the Constitution’s recognition of the rights of communities to live and be governed by indigenous law. It is, he said, “a recognition of our diversity, which is an important feature of our constitutional democracy.”<sup>68</sup>

In developments subsequent to the *Bhe* decision—I think especially of a striking decision called *Shilubana*<sup>69</sup> involving the rules of succession to customary community leadership—there are clear signs that the Constitutional Court as a whole really shares the dispositions for which

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<sup>65</sup> *Id.* at ¶ 109 (majority opinion).

<sup>66</sup> *See id.* at ¶¶ 110-16.

<sup>67</sup> *See Bhe*, (1) SA 580 at ¶¶ 229-34, 236-39 (Ngcobo, J., concurring in part and dissenting in part).

<sup>68</sup> *Id.* at ¶ 235.

<sup>69</sup> *Shilubana v. Nwamitwa*, 2009 (2) SA 66 (CC) (S. Afr.).

Justice Ngcobo spoke out in *Bhe*.<sup>70</sup> I mean a disposition to heed and to encourage internal development of the old ways by the communities themselves, so that they, themselves, work out an understanding of the tradition's true reflection of the Constitution's paradigm of rights; plus a judicial disposition to conduct serious, evidentiary inquiries, in litigated cases, into the contemporary content of the living customary law; plus a disposition to shoulder, when necessary, the judicial responsibility of directly developing indigenous law to keep it in tune with the Constitution.<sup>71</sup> The Constitutional Court, today, under Justice Ngcobo's leadership, might be described as poised to exert itself to the utmost to give maximum possible space and respect to customary law, within outer bounds laid down by the Bill of Rights.

Suppose that is truly the case and the rest of the South African state judiciary, government, and Parliament, will do their best to follow suit. Where would that leave the concerns I mentioned earlier, about a deep and de-legitimizing failure of justice and fitness in the Constitution, by reason of a massive, imposed displacement of African indigenous social ideals by a Eurocentric-liberal system based on an essentially contestational, as opposed to solidaristic, form of democratic politics, and on respect and protection for an individualistic conception of human dignity, as opposed to the pursuit of collective being?

By posing that question, I mean to redeem my promise to tie up South Africa's indigenous law debate with the theoretical proposition of legitimation by Constitution. The question—crudely put—would be whether the asserted clash between the African and the European social and political outlooks is so deep and drastic that one group or the other is, inevitably, going to experience a profound disaffection for, and

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<sup>70</sup> See *Gumede (born Shange) v. President of the Republic*, 2009 (3) SA 152 (CC) (S. Afr.) (declaring invalid a statutory codification of a gender-discriminatory, customary-legal scheme of marital property, while noting both the "fossilization" of customary law wrought by the codification and the judicial obligation to develop customary law in harmony with the Constitution, where not blocked by statute from doing so). See generally *id.* at ¶¶ 16, 18, 20–21, 29.

<sup>71</sup> All of these dispositions are manifest in *Shilubana*, (2) SA 66. In that case, unlike in *Bhe*, the Constitutional Court did see fit, as prompted by Constitution Section 39(2), to develop customary law in keeping with the spirit, purport, and objects of the bill of rights. The Court did not, however, do so in a way that put it into the position of dictating to the community a gender-neutralizing alteration in the community's indigenous law of succession to rulership. Rather, the Court intervened at a secondary level, that of the community's rules for accomplishing customary legal change. The Court engineered a development of the secondary rules so as to remove a procedural blockage, thus enabling plausibly identified, traditional authorities to put into effect a pending, contested, gender-neutralizing revision of the primary succession rule.

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disengagement from, this Constitution (and, perhaps, from any constitution that might have been written for the country).

On a purely speculative level, it seems to me that one could go either way with this. Assume, first, that the courts and the government can succeed in conveying a credible, honest commitment to go as far as the Constitution allows in respecting and nurturing indigenous law and can do so, in the words of Yvonne Mokgoro, a recently retired South African justice, “creatively, strategically, and with ingenuity,” with a view to the rise of “a new indigenous law and jurisprudence” that can meet “the demands of constitutionalism”<sup>72</sup> while also, reciprocally, helping to shape a new, distinctively “South African constitutional value system.”<sup>73</sup> Then, maybe, bearing in mind the obvious advantages to everyone from stable and decent government in South African territory, the disappointment, disagreement, and frustration suffered by the losers in these disputes—whichever side they may be on—need not and will not deepen and harden into the kind of profound disaffection from the system that threatens legitimacy.

But what if we assume, instead, that those critics are right who say that the Constitution’s refusal to submit the country, unconditionally, to total, political-cultural Africanization (whatever we think that might mean in practice) is an ultimately non-assimilable failure of both simple justice to the colonially dispossessed peoples in the area and fitness to their deeply ingrained visions of society? On that premise, it could seem that no possible notion of legitimation by constitution—and certainly not by *this* Constitution—can work for South Africa.

Whether that would turn out, ultimately, to be good or bad news for some or all South Africans is a question at the core of some of the debates that I have, all too sketchily, been trying to describe. In either case, though, it may not be altogether encouraging news for political theories of legitimation by constitution. Because, one might ask—and South Africans may want to ponder seriously—which constitution will be legitimation-worthy in South Africa, if this one is not?

Of course, we cannot exclude, a priori, that the answer to that question is “none.” If we find that prospect unwelcome, we might want to consider whether we do best to think of the Constitution as a one-off done deal, a sealed and settled contract to be abided by until

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<sup>72</sup> Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, Paper delivered at the first Colloquium Constitution and Law held at Potchefstroom, South Africa, (Oct. 31, 1997), available at <http://ajol.info/index.php/pej/article/view/43567/27090> (last visited Mar. 24, 2010).

<sup>73</sup> Yvonne Mokgoro, *The Customary Law Question in the South African Constitution*, 41 ST. LOUIS U. L.J. 1279, 1280 (1997).

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overthrown – or, rather, to think of it as a project, a work in progress, the legitimacy and success of which do now, and will always, rest in the care and keeping of a society whose constitution it is still (or, rather, might or might not still be) in a state of becoming.