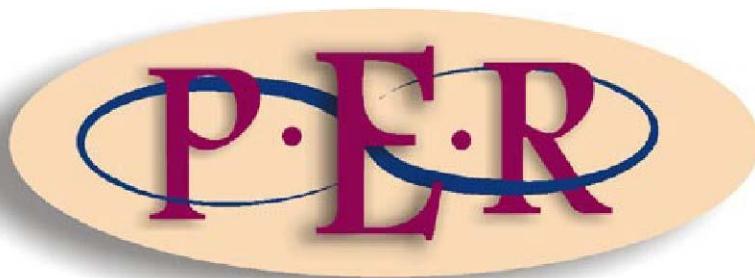


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AFFILIATION TO A NEW CUSTOMARY LAW IN POST-APARTHEID SOUTH AFRICA*

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1 Introduction

This article examines the possibility of the acquisition of customary law in post-apartheid South Africa. Its central argument is that a national civic citizenship entitles South Africans to sub-national cultural identities, which entails being bound by the normative framework of a community of their choice. Even though "customary law" has acquired a technical meaning - as demonstrated below - as the normative framework of "black" communities, this article chooses to define it as representing in addition the norms regarded as obligatory by all cultural, religious and linguistic communities, the existence of which is recognised by section 31 of the *Constitution of the Republic of South Africa*.¹ At the heart of this paper is the evaluation of the possibilities opened up by section 30 of the *Constitution*, which states that every person has a right to participate in the culture of his or her choice. Since customary law is an expression of the culture of communities and is understood as the usages, practices, beliefs, values and institutions of a community,² it would seem possible that the Constitution enables every person to subscribe to the customary law of his or her choice. It is further argued that the realisation of the possibility of changing to a new customary law would be crucial to national development, because it would foster a sense of national inclusiveness. This article

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¹ *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*).

² See the following definitions: Spencer-Oatey *Culturally Speaking* 3: "Culture is a fuzzy set of basic assumptions and values, orientations to life, beliefs, policies, procedures and behavioral conventions that are shared by a group of people, and that influence (but do not determine) each member's behavior and his/her interpretations of the 'meaning' of other people's behavior"; Matsumoto *Culture and Psychology* 16: "...the set of attitudes, values, beliefs, and behaviors shared by a group of people, but different for each individual, communicated from one generation to the next".

argues that the possibility affirms the dignity of all South Africans and would significantly enhance the vision of a truly non-racial society envisaged by the *Constitution*, thus contributing to the development of a just society. On the other hand if it were not possible for people to make such choices, this could result in the hardening of identities and the emergence of different classes of South African citizenship.

At present reality it is generally assumed that South Africans cannot submit themselves to a customary law of their choice, because it is widely assumed that only blacks in South Africa are entitled to follow customary law, as defined by their ethnicity and therefore by blood descent. Thus, for black South Africans their birth defines their ethnicity or tribal affiliation and therefore their customary law, which follows them through life. Accordingly it would appear to be a difficult proposition that black South Africans could change their customary law. Thus a Zulu who desires expressly or by implication to be bound by Sotho customary law could be faced with considerable difficulties despite the promise of section 30 of the *Constitution*. It would appear to be even more difficult for "white" and "coloured" South Africans, who are not entitled to customary law, according to conventional wisdom, to choose a customary law.

The motivation for this article is partly traceable to the Pretoria High Court decision in *Chinese Association of South Africa v Minister of Labour*,³ in which the Chinese Association of South Africa sought an order in the main declaring South African Chinese people as falling within the ambit of the definition of "Black People" in section 1 of the *Employment Equity Act* (EEA) 55 of 1998 as well as section 1 of the *Broad-Based Black Economic Empowerment Act* (BBBEEA) 53 of 2003. The applicants sought in the alternative that this legislation should be declared unconstitutional if Chinese people are excluded from the definition of "Black People". The court's judgment declared Chinese people to be black in terms of the EEA and the BBBEEA. One of the interesting things about this decision is that it was welcomed by the South African Chinese community, who were content to be black if

³ *Chinese Association of South Africa v Minister of Labour* (PHC) unreported case no 59521/2007 of 18 June 2008 (hereafter referred to as *Chinese Association*).

this meant the success of their long struggle to be recognised by the South African legal and political establishment as entitled to the benefits of the black empowerment scheme.⁴ On the other hand, sections of the black community severely criticised this decision and declared that a Chinese person cannot conceivably be a black person.⁵ While a Chinese person has significantly different physical characteristics from a black person, to regard them as the same would suggest that race is a legal and social construction rather than a matter of genetics. Such a thought would seem to be supported by the definition of "Black" in section 1 of the EEA, which defines "black people" as meaning "Africans, Coloureds and Indians", suggesting that the definition is generic rather than genetic.⁶ Important as the administrative classifications of racial categories remain for South Africa,⁷ this article is not directly concerned with these issues but follows another tack, to determine whether a South African Chinese person and any other non-black person could choose to subscribe to Zulu, Xhosa or Sotho customary law in the light of the judicial recognition of their "blackness". It is submitted that they can in terms of section 30 of the *Constitution*, but not in terms of certain statutes considered in section 5 of this article. The nature of cultural relations is such that South Africans are indeed actively engaged in choosing new customary laws as envisaged by section 30 of the *Constitution*. It is therefore incumbent on the legal system to recognise the promise of the *Constitution*.

This article is organised as follows. The next section considers the relationship between citizenship and sub-national identities in a plural state as the basis of the promise of section 30 of the *Constitution*. In part three the article considers the concept of communities and the normative frameworks that can be described as customary law. Part four examines the acquisition and change of customary law in South Africa, while part five uses the examples of customary marriages and

⁴ See for example Erasmus and Stone 2008 *China Monitor* 4.

⁵ See for example APO 2008 <http://www.appablog.wordpress.com/2008/07/02/south-africa-communique-by-black-organisations-pretoria-high-court-judgment-status-of-Chinese-south-africans/>.

⁶ See Erasmus and Stone 2008 *China Monitor* 4.

⁷ See for example McGregor 2011 *De Jure* 111.

customary succession to illustrate the implications of the acquisition and change of customary law.

2 Citizenship and sub-national identities in a plural state

It is generally agreed that citizenship has three meanings - as a matter of legal status; as an entitlement to the participation in legal communities; and as membership in a political community.⁸ The legal conception of citizenship as connecting an individual to a state and determining the rights and duties of that individual to the state encompasses these three meanings.⁹ One of the challenges of citizenship is that it is egalitarian and imagines all citizens as equal before the law.¹⁰ The notion of equality and non-discrimination is thought to strengthen the bonds of loyalty towards the state and the sense of belonging and identity of individuals.

Important as that is, the reality is that the citizens of a state are often diverse in a range of ways, such as in their religion, language geographical circumstances and the different communities that they belong to.¹¹ It is true that when individuals interact with their environment, they create and recreate social facts which reflect their resolutions of the different challenges they face. The notion of culture represents our understanding of the discernible and often concrete manifestations of how citizens interact with their environment. Thus, when individuals manifest their belief in a metaphysical being, we recognise that belief as a religion or a belief system or opinion. The same goes for how citizens are born, die, eat, live, marry, buy property, raise children, build their houses or conserve common resources. One medium through which citizens interact with their environment is through the different communities which they are born into, join and exit as they negotiate their life journey. It is mainly through their shared understandings of values, myths, processes and prescriptions that members of communities bring order to their lives. The recognition of how citizens interact with their communities is therefore an

⁸ See for example Kymlicka and Norman 1994 *Ethics* 352-381; Cohen 1999 *International Sociology* 245-268.

⁹ See for example s 3 of the *Constitution*: "(1) There is a common South African citizenship. (2) All citizens are (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship."

¹⁰ See generally Marshall *Citizenship and Social Class*.

¹¹ See generally Parekh *Rethinking Multiculturalism* 336; Kymlicka *Multicultural Citizenship*.

important means of recognising the cultural identities of citizens and reflects the personal choices they make. Cultural identities ensure that citizens are not homogenized, even if they are equal in the eyes of the law.

A number of important conclusions are evident in this short overview. The first is that culture is a social fact and changes to reflect how individuals interact with their environment. Immutability is therefore not a fundamental attribute of culture, in that the longevity of an understanding or a process is not a defining feature of culture. Secondly, the sense of community implies that it can be organised around different social facts, and no social fact is inherently superior to any other. Allied to this point, therefore, is the need to understand that communities change and cannot, therefore, be considered to be static. Thirdly, the shared understandings of a community can become normative in the sense that its members may feel a sense of obligation towards the communal norms. The field of legal pluralism developed as a response to the recognition that the state is not the only community whose norms are obligatory.¹²

Where the state uses force and other instrumentalities to ensure obedience to its laws, it is often a combination of force, habit and other sanctions that ensures the acquiescence of members of non-state entities within a state. Every state therefore confronts the challenge of reconciling political citizenship with cultural identities. A significant part of this challenge is the extent to which a state would recognise a cultural identity as worthy of protection, thereby accepting the need for a politics of difference. Without the recognition of difference in the cultural life of citizens, their identities would be subsumed under dominant identities.

States approach the reconciliation of the cultural identities of their citizens in many different ways. One way in which liberal democratic states reconcile the tension of cultural identities and political citizenship is through the medium of human rights. The Bill of Rights recognises the cultural identities chosen by citizens either from the circumstances of their birth or by their conscious efforts. Accordingly, many constitutions recognise membership of cultural, religious and linguistic communities

¹² See for example Griffiths 1986 *J Legal Plur* 1-55.

in addition to recognising the right of citizens to choose any culture of their choice. These two broad mechanisms promote cultural identities, since they protect the differences between individuals under the banner of the equality of political citizenship.

The challenge of protecting cultural identities in a modern liberal democracy such as South Africa is how to reconcile liberal multiculturalism, which allows the individual a choice in his sub-national identities, and illiberal multiculturalism, which categorises and classifies individuals into sub-national cultural identities on the basis of antecedent facts such as the circumstances of their birth and obliges each individual to live within such a preordained category.¹³ As stated above, this article examines the extent to which the South African legal system recognises the promises of section 30 of the *Constitution* of an individual choice in cultural matters as a means of resolving the tension between political citizenship and cultural identities. Since the focus of the article is directed at the normative systems of communities, the next part of the article turns to a consideration of communities and their customary law, as the foundation required to facilitate a discussion (in part four of the article) of how South African citizens acquire and possibly change the particular customary law to which they subscribe.

3 Communities and customary law in South Africa

This part of the article examines the application of customary law as the normative framework of communities. Since section 31 of the *Constitution* recognises cultural, religious and linguistic communities,¹⁴ it is important to determine whether or not the normative systems of these communities are also recognised. Assuming for the sake of argument that they are so recognised, how do we describe these normative frameworks? Even though for the purposes of this article the term customary law is defined as the normative systems of communities, it is clear that the term "customary

¹³ See Bekker and Leildé 2003 *IJMS* 121.

¹⁴ The recognition of communal rights is in the context of individual rights since s 31(1) of the *Constitution* provides that "Persons belonging to a cultural religious or linguistic community may not be denied the right, with other members of that community to (a) to enjoy their culture practice their religion and use their language and (b) to form join and maintain cultural religious and linguistic associations and other organs of civil society." See *Nkosi v Bührmann* 2001 1 SA 372 (SCA).

law" has a technical sense defined by South Africa's historical realities. Even though the *Constitution* recognises customary law as a normative system through the provisions of section 211(3),¹⁵ it is also clear that there is no textual connection in the definition of customary law to the communities recognised in section 31(1).

It is plausible to argue that South Africa's socio-economic history is the reason why considerable academic and judicial opinion in South Africa associate customary law with black communities. For example, in wondering whether customary law applies to people other than indigenous Africans Moseneke DCJ in *Gumede v President of the Republic of South Africa*¹⁶ expressed a reality of the South African legal system in saying that only black South Africans are entitled to customary law. It is to be remembered that an early legal connection of customary law with black people is made in the definition of indigenous law in the *Law of Evidence Amendment Act* 1988, which in section 1(4) defines indigenous law as "the law of custom as applied by Black tribes in South Africa". On the other hand, section 1(1) of the *Law of Evidence Amendment Act* 45 of 1988 in which "indigenous law" is mentioned, provides that any court may take judicial notice of indigenous law. Reacting to this provision Professor Kerr believes that it omits the requirement that both parties to the case must be black South Africans if customary law is to apply.¹⁷ The reference to "black people" has been thought to be objectionable,¹⁸ but the change of descriptor of "black" to "indigenous African" or "indigenous people" in later legislation nevertheless clearly refers to black people¹⁹ and deepens the belief that customary law is exclusively meant for black communities.

¹⁵ S 211(3) of the *Constitution* provides that "The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

¹⁶ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 34: "Difficult questions may surface about the reach of customary law, whom it binds and, in particular, whether people other than indigenous African people may be bound by customary law."

¹⁷ See Kerr 1989 *SALJ* 166, 168; Himonga and Bosch 2000 *SALJ* 306, 307; Pieterse 2001 *SAJHR* 364, 380-381.

¹⁸ See Bekker and Rautenbach "Nature and Sphere of Application" 18: "This definition still appears in statute books, but it should be clear that its reference to race is objectionable and therefore it should be scrapped or changed to reflect the democratic values of human dignity, equality and freedom."

¹⁹ This point is also recognised by Bekker and Rautenbach "Nature and Sphere of Application" 18: "It is generally accepted that 'indigenous African peoples' refers to the black population only."

First, the *Recognition of Customary Marriages Act*²⁰ defines customary law as "the customs and usages traditionally observed among indigenous African Peoples of South Africa and which form part of the culture of those peoples." Secondly, the *Reform of the Customary Law of Succession and Regulation of Related Matters Act*²¹ also defines "customary law" as "the customs and practices observed among indigenous African people of South Africa which form part of the Culture of those people". Bekker and Koyana comment on the latter definition as follows:

The phrase seems to confine the operation of the law to South African Africans. By implication it excludes persons who are non-Africans and other people of mixed origin who have entered into customary marriages ... [O]ne may ask: Who are the indigenous people of South Africa? According to anthropologists the only true indigenous people of South Africa are the Khoi-San.²²

Bekker and Rautenbach also say:

It may be argued that to regard white people (Europeans) as intruders in South Africa and Africans as indigenous to South Africa is erroneous The history books show us that the original inhabitants of South Africa are the Khoi and San people, but the other African people are the offspring of immigrants from the north of Africa (at least north of Zambezi) The Africans and Europeans were more or less simultaneous immigrants²³

Even though considerable evidence points to the fact that customary law applies to black people as a result of practice²⁴ and popular belief there is no conclusive proof in reality that customary law applies only to black people. Since the *Constitution* contemplates the existence of various cultural, religious and linguistic communities²⁵ black communities may be part of one or all of these communities. It therefore follows that the normative systems of all of these communities are equally as deserving of protection as, the customary law of black people.

It is important at this point to explore how the normative frameworks of the constitutionally recognised communities have been recognised, articulated or elaborated, with the caution that language and religion are often integral parts of

²⁰ *Recognition of Customary Marriages Act* 120 of 1998.

²¹ *Reform of the Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

²² See Bekker and Koyana 2012 *De Jure* 574.

²³ See Bekker and Rautenbach "Nature and Sphere of Application" 19.

²⁴ See Pieterse 2001 *SAJHR* 381.

²⁵ See *Christian Education South Africa v Minister of Education* 2000 4 SA 7578 (CC) (hereafter referred to as *Christian Education*).

communities. Let us start with the religious communities recognised by a composite reading of sections 15(1)²⁶ and 31 of the *Constitution* and affirmed in a number of cases. In *MEC for Education KwaZulu-Natal v Pillay*²⁷ the Court recognised the customs of a South Indian Tamil and Hindu community in KwaZulu-Natal. In *Hay v B*²⁸ the practices of the Jehovah's Witnesses community were in issue. In *Prince v President, Cape Law Society*²⁹ the practices of the Rastafarian community were in issue. It is important to point out that in these cases and others,³⁰ religious communities urged South African courts to uphold the practices that constitute part of their normative framework, even though these norms are not described as customary law. Thus in *Taylor v Kurstag*³¹ the High Court upheld a Jewish Ecclesiastical Court excommunication order. The recognition of the normative autonomy of religious associations was affirmed in *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa*,³² where the Supreme Court of Appeal affirmed the reluctance of courts to adjudicate doctrinal disputes. In the opinion of the Court, disputes about the internal rules of a church should as far as possible be left to the church, to be determined domestically and without interference from a court.³³ In a telling opinion the Court declared that:

High court judgments such as *Taylor v Kurtstag* and *Wittmann v Deutsche Schulverein, Pretoria* 1998 4 SA 423 (T) appear to accept that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies.³⁴

Clearly the reference to a religious association's rules and decision-making bodies pertains to its normative structure.

²⁶ S 15(1) of the *Constitution* provides that everyone has the right to freedom of conscience religion thought belief and opinion.

²⁷ *MEC for Education KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

²⁸ *Hay v B* 2003 3 SA 628 (T).

²⁹ *Prince v President, Cape Law Society* 2002 2 SA 794 (CC).

³⁰ See for example *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 4 SA 510 (EqC).

³¹ *Taylor v Kurstag* 2005 1 SA 362 (W). See generally Woolman and Zeffert 2012 *SAJHR* 196. Also see *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T); *Mohammed v Jassiem* 1996 1 SA 673 (A).

³² *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2014 ZASCA 151 (29 September 2014) (hereafter referred to as *De Lange*).

³³ *De Lange* para 39.

³⁴ *De Lange* para 40.

The clear recognition of religious communities appears far more settled than that of linguistic communities, even in the face of the constitutional recognition of eleven languages.³⁵ Currie and de Waal argue, for example, that speakers of the Afrikaans language:

... share an important characteristic, but whether the nature of their relationship with each other is sufficient to constitute a community is not clear. Afrikaans speakers do not know each other personally, do not systematically interact with each other and are divided in any number of significant ways such as race class and political affiliation.³⁶

It is to be remembered that many of the constitutionally recognised languages form an integral part of the black communities that are recognised as being entitled to customary law. It is not far-fetched to argue that the Afrikaans people are a community in terms of section 31 of the *Constitution*, and that their normative framework, irrespective of the difficulty in its ascertainment and proof, ought to be recognised within the framework of the South African legal system, even though it is of course plausible that this normative framework approximates to the South African common law. In the same vein the South African Chinese community represents a community whose normative system deserves recognition.

The term "cultural" appears to have been deliberately inserted as a substitute for the term "ethnic" in section 31 of the *Constitution*,³⁷ and could be the basis of the recognition of the normative systems of black communities. Since the definition of culture encompasses the totality of a group's experience, culture comprises more than religion and language and is therefore an appropriate description of black communities, especially where culture, religion and language are used conjunctively. On the other hand it would seem that a broad and disjunctive interpretation of section 31 would focus on the varied meaning of culture and recognise that the *Constitution* envisages communities organised on other social bases that are not language and religion but are yet a reflection of a common intention.

³⁵ See s 6 of the *Constitution*.

³⁶ Currie and De Waal *Bill of Rights Handbook* 629.

³⁷ See *Christian Education* para 23.

An understanding of socialisation and common interest as the basis of a community enables us to appreciate individual choice as a possible basis of membership of a community. We are also enabled to rethink the term "cultural communities" as representing a group of persons with a common interest forged in their interaction with their physical and social environment. We would also understand that culture is constantly evolving as a result of this interaction and is not immutable or static. Section 30 of the *Constitution* implicitly recognises that individual choice constitutes the common interest that is important in the sustenance of communities.

4 Acquisition and change of customary law in South Africa

The last section demonstrated the fact that the *Constitution* as interpreted by the courts recognises at the least cultural, religious and linguistic communities as well as their normative orders, whether described as customary law or otherwise. This section of the article examines how ordinary citizens acquire and change their normative orders. It addresses the divide between the notion that South Africans are what their ancestors are the constitutional provision that South Africans may choose their normative orders.

The manner in which South Africans become members of a community seems linked to their antecedents and their continuing intention. Currie and de Waal write that:

... to prove membership of a cultural religious or linguistic community some concrete tie of affinity must be proved to exist between the individual and his community A person belongs to one of section 31's communities because that person has historical associations with the community and has chosen to maintain those associations.³⁸

It is possible, however, that the historical association in question refers to the circumstances of birth and upbringing through which children's cultural identities are established. In many other cases the cultural identities of parents are passed on to their children just as citizenship is also determined by birth.³⁹ Birth and blood descent determine ethnic affiliations, essentially foreclosing for many people the possibility of changing their ethnic affiliations.

³⁸ Currie and De Waal *Bill of Rights Handbook* 630.

³⁹ See s 2 of the *South African Citizenship Act* 88 of 1995.

Since section 30 of the *Constitution* provides a choice of normative orders it is important to ask if the use of the word "participate" connotes a legal consequence or a sense of non-obligatory and everyday engagement in popular culture, such as listening to music, reading a book or watching a film. The use of "participate" rather than "choose" seems to convey the latter meaning. Academic and judicial opinion urges the former meaning. For example, Bennett rightly argues that, to the extent that individuals are free to participate in the culture of their choice, they have a right to demand admission to the cultural group, so that they may engage in its activities.⁴⁰ In *Mthembu v Letsela*⁴¹ the Court stated that section 31 enables persons desirous of doing so to choose a particular system of customary law. In this way it is possible that some legal consequence would on its own or cumulatively indicate a choice of "customary law" if a citizen speaks a particular language. Even though it is interesting to note that there is no mention of religion in section 30, it would be startling to argue that no legal consequences ensue by joining or exiting a religious organisation. Individual choice is often manifested in the manner in which citizens experience their daily lives. Accordingly, Bekker and Rautenbach urge that "Presently with emphasis on culture of choice it may be said that adopting the ways of life of an African would be a yardstick to test whether Customary Law is applicable or not".⁴² Ngcobo J in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of South Africa*⁴³ listed a number of factors to determine the choice of law which even though seemingly directed at transactional disputes seem appropriate for affiliation to customary law. According to him:

The determination of the choice of law which regulates the circumstances in which indigenous law is applicable involves policy decisions. In particular, it involves a decision on the criteria for determining when indigenous law is applicable. There is a range of options in this regard. The choice of law may be based on, among other things, agreement, the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors.

⁴⁰ Bennett *Customary Law* 87.

⁴¹ *Mthembu v Letsela* 1997 2 SA 936 (T).

⁴² Bekker and Rautenbach "Nature and Sphere of Application" 23.

⁴³ *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).

In this regard it is to be remembered that section 1(3) of the *Law of Evidence Amendment Act*, when identifying the choice of laws between Blacks who are not of the same tribe, puts their agreement as the general rule. It is difficult to separate choice from agreement to be bound by a customary law, which as a product of deliberation indicates a choice made by one or both of the parties. Assuming two Zulu men agree to be bound by Sotho customary law in a transaction, would it be right to hold that Sotho law is inapplicable because the parties are Zulu, as determined by birth? Such a holding would be unconstitutional, since it would deny the parties the right to participate in a culture of their choice. The same consideration would apply where a lifestyle reveals a choice to be bound (or to choose) a particular customary law.

Even though the proposed *Application of Customary Law Bill* drafted as part of the South African Law Commission Report on the Harmonisation of the Common Law and Indigenous Law defines customary law in terms of indigenous African peoples of the Republic⁴⁴ [aka black people], a schema is listed to govern the application of customary law, which relies first on the express or implied agreement between the parties, unless the court is satisfied that it is inappropriate to do so. In the absence of such an agreement the next factor is the law with which the parties or issues have the closest connection. To determine this law, relevant factors include the nature, form and purpose of any transaction between the parties; the place where the cause of action arose; the parties' way of life and, for the purposes of determining interests in land, the place where that land is situated. Accordingly, an African can change his customary law to another customary law and potentially can also abandon a customary law. The question is what does he or she abandon customary law in favour of? In many respects it is the common law that will be a natural destination of a black person who seeks to change his customary law. A good example would be contracting a statutory marriage or making a will.

It would appear that choice in religion is more pronounced than for other cultural identities, because it appears easier to make such a choice. Thus in *Kotze v Kotze*⁴⁵

⁴⁴ S 1 of the Draft Bill in SALC *Project 90*.

⁴⁵ *Kotze v Kotze* 2003 3 SA 628 (T).

the court refused to sanction a settlement agreement between parties to a divorce that stipulated that the child would participate in all activities of the Apostolic Church on the grounds that a reading of section 15 and 18 of the *Constitution* requires the voluntary participation in religious activity, and therefore an agreement that compels a child to participate in a stated religion would infringe the child's right to freedom of religion. In effect, *Kotze* implies that a religious choice made by a child is in the best interest of the child irrespective of the maturity of the child.⁴⁶ Whatever misgivings exist with respect to *Kotze*, for our purposes it is necessary to note that it affirms section 30 of the *Constitution*. It is the possibility of change and the appropriation of a new religious identity that respects the dignity and autonomy of South Africans. For example, the ability to change religions confronts certain theological objections to change and the characterization of such change as apostasy.⁴⁷ Without the possibility of participating in a religion of their choice, citizens would be bound to the decisions of their parents.

It is also important to stress that the right to join one's culture of choice is dependent on the community rules about who may join, as we have seen in respect of religious association. Thus, a community may seek to restrict membership and/or ensure that its core beliefs are maintained. It is well to remember that the internal provisos in section 30 and 31 require the exercise of these rights to be consistent with other provisions of the Bill of Rights.

The next part of the article turns to a consideration of two issues that provide significant illustrations of the possibility of the acquisition of new customary law.

⁴⁶ See Robinson 2004 *TSAR* 202-208. It is to be noted that article 14 of the United Nations *Convention of the Rights of the Child* (1989) provides that all children have the right to think and believe what they want and also to practise their religion, as long as they are not stopping other people from enjoying their rights. The section further provides that Governments must respect the rights of parents to give their children guidance about this right in a manner consistent with the evolving capacities of the child. It is argued by Prof Robinson that international law recognizes the maturity of a child as a key part of the exercise of the right to religion.

⁴⁷ See Lerner 1998 *Emory Int'l LR* 477-562.

5 Customary marriages and succession in South Africa

5.1 Customary marriages

This section of the article explores the issue of customary marriages as an instance in which cultural identity in South Africa is immutable. It would appear that a significant challenge for customary marriages is the possibility of non-black South Africans contracting customary marriages, which arises from the definition of "customary law" and "customary marriage" in the *Recognition of Customary Marriages Act*. A customary marriage is defined as "a marriage conducted in accordance with customary law, and customary law is defined as customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". It would appear, therefore, from a combined reading of the two definitions, that only black (indigenous) people can contract a customary marriage. The requirement by section 3(1)b of the *Recognition of Customary Marriages Act* that the marriage must be negotiated and entered into or celebrated in accordance with customary law strengthens the point that only black South Africans are conceived as capable of contracting customary marriages. Without going into the merits or otherwise of a customary marriage, it would appear that non-black South Africans in apparent customary marriages are in invalid unions. Bekker and Koyana point to the significance of this issue when they draw attention to the effect of proving that a party to a marriage is not an indigenous person.⁴⁸

5.2 Testate succession and customary law

Given the widespread acknowledgement of the freedom of testation,⁴⁹ even under the *Constitution*,⁵⁰ it would be strange were it to be said that a white South African could not choose specific parts of any black customary law as a basis of testamentary disposition. The essence of the freedom of testamentary disposition is

⁴⁸ See Bekker and Koyana 2012 *De Jure* 575.

⁴⁹ See for example Jamneck "Freedom of Testation" 115; *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163.

⁵⁰ See De Waal "Law of Succession" 3G1-3G15; *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C).

a good example of the freedom to choose contemplated in section 30 of the *Constitution*. Even though it would appear that the customary law of succession has been substantially replaced with the common law of succession as a result of the judgment in *Bhe* and the *Reform of the Customary Law of Succession and Regulation of Related Matters Act*, it would appear that section 2(1) of that Act preserves, as Rautenbach argues,⁵¹ certain parts of the customary law of succession because of the cast of that section:

The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession

A necessary and appropriate question is whether a non-Black South African would be without the capacity to bequeath his or her property in accordance with the rules of customary law. As Bennett⁵² recognises, while clear testamentary dispositions would pose no problem, the same cannot be said of value laden dispositions that clearly import customary law rules or require an interpretation based on customary law. How would we approach a bequest by a white South African requiring his son to undergo Xhosa initiation rites as a condition for claiming a gift? Would such a bequest be bad on a general basis, or on the specific basis that white South Africans cannot partake of Xhosa customary law and its initiation rites?⁵³ In this regard, the extensive consideration by Rautenbach⁵⁴ of the possibility that the principle of male primogeniture could be valid in a will could certainly be relevant for all South Africans. If a black South African can incorporate the principle of primogeniture into a will, there is no reason why other South Africans cannot do the same.

To sum up this part, it appears that the promise of choice in section 30 of the *Constitution* has not significantly guided legislation such as the *Reform of the Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009

⁵¹ Rautenbach 2014 *Acta Juridica* 132-159.

⁵² Bennett *Customary Law* 60-61.

⁵³ There are media reports of white South Africans engaged in initiation rights: IOL News 2007 <http://www.iol.co.za/news/south-africa/white-teen-joins-frien-for-xhosa-ritual-1.381376#.VDVxLBZYVm>; BBC News Africa 2013 <http://www.bbc.com/news/world-africa-23284898>.

⁵⁴ Rautenbach 2014 *Acta Juridica* 132-159.

since it appears that only black South Africans can engage in a customary marriage. In another perspective it is evident that section 30 of the *Constitution* would support the freedom of testamentary disposition and allow South Africans the freedom to choose constitutionally permissible rules of customary law.

6 Concluding remarks

It is the possibility of changing one's choice of a system of customary law that emancipates customary law from the significant challenge of racism so ably articulated by Pieterse, who argues that the Constitution's provisions for legal dualism and support for customary law could lead to a violation of the right to equality due to customary law's racialist foundations and its general consequences.⁵⁵ Even though his argument is directed at the inferior status of customary law, it has significance for the right of non-Black South Africans to become affiliated to a customary law. If one's racial status denies one the right to participate in a culture, that denial is certainly racist.

The consequences of making customary law immutable would include the reinforcement of fixed identities, exclusivities and discrimination. A customary law that is reserved for black people only would encourage a discrimination that identified different classes of South Africans, even if unwittingly. We are witnesses to the emergence of a "native" group which appears to be based on race and which is itself based on the differentiation offered by a number of devices, including customary law.⁵⁶ Of more significance is the fact that fixed cultural identities fostered by an immutable customary law lay waste to the concept of citizenship. A truly non-racial South African citizenship would recognise sub-national identities, because section 30 of the *Constitution* allows citizens to choose a normative framework of cultural, religious and linguistic communities if they so wish. What appears to be absent is the realisation that black people are not exclusively entitled to customary law. Other communities are entitled to their "customary law", just as black South Africans are entitled to opt for any customary law of their choice.

⁵⁵ See Pieterse 2001 *SAJHR* 380.

⁵⁶ See for example Mamdani *Citizen and Subject*; Mamdani "When Does a Settler Become a Native?".

Realizing this constitutional provision would be to create a credible path to national integration and away from the Apartheid past. Individual choice would consign sub-national identities to the private realm and significantly reduce or eliminate the involvement of the State in determining and using sub national identities.

The impact of the voluntary appropriation of sub national identities such as customary law would not have a significant impact on the public sector, so that there would be no need to determine that a Chinese person was actually black.

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LIST OF ABBREVIATIONS

APO	African Press Organisation
BBBEEA	Broad Based Economic Empowerment Act
EEA	Employment Equity Act
Emory Int'l LR	Emory International Law Review
IJMS	International Journal on Multicultural Societies
J Legal Plur	Journal of Legal Pluralism and Unofficial Law
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

AFFILIATION TO A NEW CUSTOMARY LAW IN POST-APARTHEID SOUTH AFRICA

ES Nwauche*

SUMMARY

This article examines the possibility that in the post-apartheid South African legal system South African citizens can voluntarily change their customary law and affiliate to a new one in the true spirit of citizenship. The article argues that such a change would affirm the dignity of all South Africans and would significantly enhance the vision of a truly non-racial society envisaged by the *Constitution* and contribute to social justice.

KEYWORDS: Customary Law; Post-Apartheid; Acquisition of Customary Law; Citizenship; Sub-national Identit.

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