

Chapter 3

A customary law of the Afrikaner people of South Africa

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Abstract

This chapter considers the plausibility of an Afrikaans customary law as part of the multiple customary laws in South Africa based on the provisions of section 30 and 31 of the South African Constitution, which recognizes the rights of South Africans to enjoy their culture and participate in their religious cultural and linguistic communities. To contextualize the plausibility of an Afrikaner customary law, this chapter, considers recent decisions of the South African Constitutional Court such as, *City of Tshwane Metropolitan Municipality v Afriforum* [2016 (6) SA 279] (CC) and *Salem Party Club v Salem Community* [2018 (3) SA 1 (CC)], to argue that an Afrikaner Customary Law in South Africa, is important if South Africans are to truly exercise their citizenship rights which are entitlements that flow from the Bill of Rights. This chapter argues that the recognition of multiple customary laws is an affirmation that South Africans are entitled to a culture of their choice.

Keywords: Citizenship; customary law; Afrikaner; South Africa

1. Introduction

This chapter considers the plausibility of multiple customary laws in South Africa in general and an Afrikaner customary law in particular, based on the provisions of sections 30¹ and 31² of the South African Constitution, which recognize the rights of South Africans to enjoy their culture and participate in their religious cultural and linguistic communities. To contextualize, the plausibility of an Afrikaner customary law in South Africa, this chapter considers two recent decisions of the South African Constitutional Court, which are *City of Tshwane Metropolitan Municipality v Afriforum*³; and *Salem*

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¹ Section 30 of the Constitution provides that “ Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights

² Section 31 of the Constitution provides that (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (h) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

³ 2016 (6) SA 279 (CC). Hereafter *Tshwane Metro*.

*Party Club v Salem Community*⁴. This chapter argues that the recognition of an Afrikaner customary law is important if South Africans are to realise their citizenship rights as part of the entitlements that flow from the Bill of Rights of the Constitution of the Republic of South Africa 1996 (1996 Constitution). An Afrikaner customary law is a manifestation that all South Africans are entitled to a culture of their choice.

A previous intervention of mine foresaw this chapter.⁵ In that intervention, I examined the possibility and plausibility of acquiring a new customary law in post-Apartheid South Africa. That intervention assumed the possibility of multiple customary laws in South Africa and was grounded in the provisions of sections 30 and 31 of the Constitution of the Republic of South Africa. I argued in that paper that the widespread assumption that only Black South Africans are entitled to customary law is mistaken. To the extent that the Afrikaner people can be taken to be a cultural linguistic or religious community as envisaged by the Constitution, their culture is protected by the Constitution which includes their normative system. It is of less consequence, it is contended if this normative framework is described as 'customary law' – a term which has been socialized to refer exclusively to Black South Africans- or any other term. In this chapter, I use the term 'customary law' in spite of its popular meaning because it appropriately designates the normative framework of South African communities.

It is important before proceeding to engage in a brief overview of the Afrikaner people. The Afrikaners are an ethnic group of Dutch, German, French and non-European ancestry in South Africa. They are descended predominantly from Dutch settlers who began to arrive in the Cape Area of South Africa in the Seventeenth century. The 2011 South African Census puts the number of white South Africans who speak Afrikaans as a first language as 5.2% of the population. The Afrikaner people dominated South African public life until the demise of Apartheid in 1994 and developed a unique identity which is aptly described by Mads Vestergaard :

...based on the values of God-fearing Calvinism, structure of patriarchal authority (husband and father, priest, school principal, political leaders-all of whom were representing God on Earth); adherence to the traditions invented by the nationalist movement, conservative values as the

⁴ 2018 (3) SA 1 (CC). Hereafter *Salem Party Club*.

⁵ See ES Nwauche " Acquiring a New Customary Law in Post-Apartheid South Africa" 2015(3) 18 *PER* 569

fundamental importance of the nuclear family, heterosexuality and, above all the importance of whiteness.⁶

Afrikaner identity received considerable state support from the Apartheid regime because as Mads Vestergad puts it: 'After 1948, the South African States was used to promote Christian nationalist morals and values, and a normative understanding of Afrikaner identity became entrenched'.⁷ Even though the normative understanding of the Afrikaner people, did not, as argued above automatically become the South African common law but existed largely because of state support it provided inspiration and potential for different aspects of the South African legal system. The Afrikaner identity suffered considerable dislocation with the advent of constitutional rule in 1994. Whatever normative status was achieved before this constitutional epoch merged with the Roman-Dutch/ English common law. All references to 'customary law' post-1994 is to 'Black' customary law. This chapter engages with the lack of recognition of the customary law of the Afrikaner people of South Africa. As stated above to recognise such a customary law is a constitutional requirement and affirms South Africa's legal plurality.

South Africa like most plural states is in a constant articulation of the nature and extent to which it recognises certain cultural peculiarities and differences. Customary law challenges the content of the civic citizenship of a State because customary law challenges the extent to which a State recognises that its civic citizens are also cultural citizens. Customary law represents the cultural dimensions of citizenship and members of a state are at once civic and cultural citizens. One of the legacies of a proper understanding of legal pluralism is that the normative framework of communities exists outside State law even if this is not frequently or recognized at all. The existence of independent legal orders within a legal system challenges the willingness and capacity of the latter to recognize these legal orders and the entitlements of persons who feel obligated to these legal orders and are also citizens of the state. The ethic of pluralism enjoins modern liberal democratic States to attempt within reasonable bounds to recognize all normative frameworks. This process is not antithetical to the centrist unifying pull of nation-building, an objective, that is constructed on the equality of all persons before the law irrespective of their race class or other consciousness. Since no legal system is, completely uniform in its application to all citizens, the recognition of cultural differences is often a path towards fairness and justice. The recognition of difference based on social facts such as age gender religion is important to achieve

⁶ M Vestergad "Who's got the Map? The Negotiation of Afrikaner Identities in Post –Apartheid South Africa" 2001 130 *Daedalus* 19, 20-21.

⁷ N.6, p. 21

justice in a legal system because it allows such legal systems to recognize peculiar facts that determine rights privileges responsibility and liability. Without such recognition, the dignity of citizens is imperiled and their civic citizenship could be diminished. It is therefore of considerable importance that legal systems recognise different customary laws. This point is important because normative orders continue in existence even if the state legal system does not recognise them. Often in many legal system, similar to the South African legal system, there is a continuous struggle by different legal orders for the recognition of their values principles usages and institutions. The fact that the norms of a cultural community is not recognized demands further interrogation rather than supine acceptance and orthodoxy. It is in this context that the rest of the chapter advances a framework for the recognition of Afrikaner customary law.

This chapter is organized, as follows. The next section considers the relationship between and manifestations of civic and cultural identities in South Africa. The following section considers the nature of Afrikaner customary law followed by concluding observations.

2. Citizenship cultural identities and customary communities in South Africa

In this section, I sketch the relationship between citizenship sub-national identities and customary communities in South Africa to justify the recognition of Afrikaner customary law. The first step is to articulate a relationship between South Africa's civic and cultural citizenship and demonstrate how this relationship is one that Afrikaner customary law naturally fits. Section 3 of the South African Constitution provides an understanding of the nature and extent of citizenship in South Africa by declaring, a common South African citizenship; an equal entitlement of all citizens to the rights, privileges, and benefits of citizenship; and equal obligations to the duties and responsibilities of citizenship. Equality is, therefore, the hallmark of South Africa's civic citizenship because a homogenous conception of civic citizenship is important for state-building and the rule of law. The Bill of rights in the South African Constitution is an important framework that defines the rights privileges and benefits for South African citizens. As stated above, the provisions of sections 30 and 31 of the Constitution which are cumulatively regarded as the right to culture, are the foundation of cultural citizenship. Thus South Africans are at once civic and cultural citizens because of the recognition of citizen's right to pursue their cultural orientation and to belong to 'cultural religious and linguistic communities'. Accordingly, South Africans are citizens and possibly members of one or all of the three types of constitutionally recognised

communities. At first blush, a tension between a civic national and cultural sub-national citizenship seems to exist because of potentially conflicting loyalties to the South African state and the constitutionally sanctioned communities. Such tensions are real but surmountable. States recognise that members of cultural communities forge an identity similar to the national identity forged by citizenship and seek to manage such tension by the alignment of diverse cultural tendencies with national civic citizenship. Thus States filter the extent to which persons who can prove a connection to constitutionally sanctioned communities can take advantage of the shared understandings rules values and institutions of their communities. Norms are a key part of the cultural communities whose members feel an obligation to observe. The obligation of the state to respect and recognise customary law which encompasses the norms of a cultural community is an entitlement of cultural citizenship.

The Afrikaner community is a linguistic community because Afrikaans is a significant language⁸ of the Afrikaner people. It is not surprising that the protection of the language rights of the Afrikaner community has been of paramount interest given South Africa's peculiar history. The Afrikaner community have individually and collectively litigated aspects of this right in terms of street names⁹, medium of instruction in tertiary¹⁰ and secondary schools.¹¹ However since many other people from other racial group speak Afrikaans, language is not an exclusive identity which the Afrikaner community would claim. The Afrikaner community is also a cultural community because of a common identity significantly forged by consanguinity and the Afrikaans language. The Afrikaner people as a distinct cultural and linguistic community are a constitutionally protected community and therefore entitled to the enjoyment of and protection offered by their normative framework. To deny this constitutional entitlement fosters a sense of indignity. In addition to their right to culture, the dignity of Afrikaner South Africans recognised as a right and value in the South African constitution is in issue in the recognition of the normative framework they identify with and in appropriate circumstances feel obligated to obey. The fact that historical antecedents and contemporary developments have obscured their customary law does not make Afrikaners less entitled. It is a matter of widespread belief that Afrikaners and other races in South Africa are not entitled to a customary law but to the Roman-Dutch/English common

⁸ Afrikaans is a constitutionally recognized language in terms of s.6 of the constitution.

⁹ See *Tshwane Metro*, note 2.

¹⁰ See for example *Afriforum v University of the Free State* 2018(2) SA 185(CC).

¹¹ See *Head of Department, Mpumalanga Dept of Education v Hoerskool Ermelo* 2010 2 SA 415(CC).

law. To imagine that certain cultural communities are incapable of relying on their own normative framework is to scrub them of their identity.

The legacy of Apartheid which defined the pre-1994 Afrikaner people is a significant obstacle to the recognition of post-1994 Afrikaner identity and community. It is because of the discrimination hardship and hurt systematically and institutionally nurtured by the Apartheid system that race is anathema in South African jurisprudence and to a recognition of the normative framework of the Afrikaner people. The intuitive association of Afrikaner people with Apartheid suggests a fundamental flaw in Afrikaner culture and identity. It stands to reason therefore that aspects of Afrikaner culture that are not linked to Apartheid should be welcome and protected. There is evidence of Afrikaner communities that are organised on racial lines in the post-1994 constitutional republic. A good example is the Orania community in the Free State province which is established to foster Afrikaner culture and ethnicity. With a 2018 population estimate of 1600 made up of Afrikaner people (over 98%), Orania is a symbol of the salience of Afrikaner culture and a need to cater for the norms which Afrikaner people feel obligated to obey even if these norms cannot be asserted within the South African legal system.

The recognition and application of customary law in post-Apartheid South Africa have demonstrated that normative frameworks based on race are not harmful per se. The [continued] and exclusive association of customary law with 'Black' South Africans emphasises the racial basis of such a law¹² yet no one would credibly suggest that 'Black' customary law should be abolished because of its racial foundations. As stated above, customary law is associated with 'Black' South Africans because of South Africa's historical realities. The arrival of Europeans in the Cape in 1652 brought with it aspects of Roman/Dutch law and a concomitant imperative to respond to the rights privileges and entitlements of black South Africans who were organized around a normative framework that has over the years been described as customary law. The recognition of Afrikaner customary law does not belittle 'Black' customary law. In fact, it may well be argued that the recognition of Afrikaner customary law will greatly assist the recognition and development of 'black' customary law in South Africa because 'black' customary law and 'Afrikaner' customary law would be recognized as *different* but equal to the South African common law. For centuries, the Apartheid South African State half-heartedly recognized the norms of the

¹² See M Pietersee "It's a 'Black Thing': Upholding culture and customary law in a society founded on non-racialism" (2001) 17 South African Journal of Human Rights 364. See also TW Bennett Customary Law in South Africa (Juta Cape Town) 40.

majority 'Black' population and in some cases rewrote customary law through codification amongst other mechanisms.¹³

The recognition of Afrikaner customary law will affirm South Africa's plural legal heritage. There is considerable evidence of the recognition of the norms of numerous religious and cultural communities in South Africa¹⁴ which demonstrates the willingness of the South African State to recognise diverse cultural communities. Even though it is settled that customary law applies to 'Black' South Africans, there continue to be contestations of the peoples and communities that are entitled to be so recognised. For example in the recent case of *Lurhani v Premier Eastern Cape*¹⁵ the Eastern Cape High Court recognized the Mpondo people in the Eastern Cape as a cultural community and entitled to enjoy their culture and determine their traditional leadership succession. Concerning the significance of the Mpondo as a cultural community, the Court stated that the Mpondo's rights predate the Constitution which simply recognized these rights. To argue that the Afrikaner community is different from the Mpondo community would stretch constitutional interpretation to an absurd length.

To sum up this part, it is clear that Afrikaner customary law is constitutionally compliant because it is the normative framework of a cultural community. I now turn to sketch the outlines of Afrikaner customary law.

3. The Nature of Afrikaner Customary Law

In this section, I explore the nature of Afrikaner customary law within the parameters of the constitutional framework within which customary law is defined¹⁶ recognized¹⁷ and understood.¹⁸ The experience of 'Black'

¹³ The distinction between 'official' and living customary law in South African customary law can be partly traced to the efforts of the Apartheid South African State to influence the growth of customary law.

¹⁴ See for example *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA); *MEC for Education KwaZulu-Natal v Pillay* 2008(1) SA 474 (CC); *Taylor v Kurstag NO* 2005 (1) SA 362 (W)

¹⁵ [2018] All SA 836 (ECM)

¹⁶ See the Recognition of Customary Marriages Act 11 of 2009 which 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.'

¹⁷ See S. 211(3) of the Constitution which 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."

¹⁸ See for example Moseneke DCJ in *Gumede v President of the Republic* [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.'

customary law will greatly assist the sketch of the nature and extent of Afrikaner customary law.

It would appear that Afrikaner customary law could largely be applicable in the private sphere because this is what is applicable in respect of 'black' customary law. The development and articulation of 'black' customary law in the private law domain is directly traceable to the colonial and Apartheid nation-building efforts. As Roman/Dutch/English law developed to cope with the exigencies of the South African nation-state, customary public law was sidelined or outlawed. By the time the 1996 Constitution recognized customary law as an independent source of legal norms, it was orthodoxy that customary law is relevant only in respect of private law affairs such as marriages¹⁹ matters of succession;²⁰ inheritance; real²¹ and personal property;²² as well as traditional leadership.²³ Even though the recognition of traditional leadership is an outlier in the reality of customary law as private law for black people because of the imperative of indirect rule, there is conceptually no intrinsic normative restriction of the contemplation of customary law. The development of traditional leadership structures suggests that customary public law is still relevant.

In this regard, there are two examples of the relevance of norms of customary public law that is instructive of how to conceive customary law. The first example is traditional religious beliefs and practices intimately connected to governance such as the Zulu First fruits festival commemorated through a ritual killing of a bull that signifies appeasement of the Gods and renewal that is considered important for the good of the Zulu nation.²⁴ A second example is 'Ubuntu' recognized as a governance ethic and which has been used by South African courts to redefine the parameters of human rights such as the right to life;²⁵ the horizontal application of human rights to private law such as contracts;²⁶ and common law principles such as the remedies for defamation.²⁷ These two examples

¹⁹ See for example the Recognition of Customary Marriages Act, note 16.

²⁰ See for example the case of *Bhe v Magistrate Khayelitsha*, 2005 (1) SA 580(CC);

²¹ See for example the Communal Property Associations Act 1996 which declares that it is an Act to enable communities to form juristic persons to be known as communal property associations in order to acquire hold and manage property on a basis agreed to by members of a community

²² See for example the recognition of the customary law of fishing rights. See the recent decision of the Supreme Court of Appeal in *Gongqoose v Minister of Agriculture* 2018(5) SA 104. See also L. Ferris "A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights" 2013 16 (5) PER 555.

²³ See the Traditional Leadership and Governance Framework Act (41 of 2003)

²⁴ See for example *Smit NO v King Goodwill Zwelithini* [2009] ZAKZPHC 75.

²⁵ See the case of *S v Makwanyane* 1995 (3) SA 391(CC).

²⁶ See the cases of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

²⁷ See the case of *Dikoko v Matlala* 2006 (6) SA 235(CC).

illustrate how customary public law has become part of South Africa's public law. Accordingly, it will not be difficult to imagine that aspects of Afrikaner norms of public life would be welcome as part of South African public law. Generally Afrikaner customary law exists without official recognition except to the extent, it has in some ways infiltrated the South African Common law through judges who in one way or the other have translated aspects of Afrikaner communal norms in the localization of principles of Roman-Dutch and English law. It is, however, doubtful that there is a widespread agreement of a normative framework that approximates to Afrikaner customary law. It is, therefore, open to imagination how an application to recognize and protect principles of Afrikaner customary law would fare. The inquiry could delve deeper to ask if Afrikaners have had the benefit of their personal laws determined with respect to norms of the Afrikaner people. The answer to that question appears largely in the negative because Afrikaners like other South Africans except black people have been exclusive subjects of the Roman/Dutch/English law forged out of political considerations economic imperatives and social realities. One such reality is the colonial history of South Africa. The introduction of Roman-Dutch law by Dutch settlers in the nineteenth century was in a sense the introduction of the customary law of Afrikaner people applicable in medieval Europe. The British occupation of the Cape in 1806 led to the introduction of principles of English common law to the legal system applicable in the Cape. Many commentators rightly describe what emerged and has become the South African common law, after the British occupation of the Cape as a mixed system.²⁸ When principles of English common law became part of the South African common law²⁹ or legislation³⁰ many Afrikaner norms disappeared until some of them resurfaced through judicial fiat and legislation. Generally, it would appear that few Afrikaner norms have survived the battle of dominance between English common law and Roman/Dutch law. It is not in doubt that the belief convictions and understandings of the Afrikaner nation has influenced the development of Roman-Dutch/English law which makes it important to discuss the nature and extent of Afrikaner customary law which in the recent past has been greatly facilitated by *Tshwane Metro* and *Salem Party Club*. While these cases dwell on heritage and land rights respectively, other cases have sought to promote the Afrikaans language such as *Afriforum v University of*

²⁸ See for example R. Zimmermann & D. Visser, 'Introduction: South African Law as a Mixed Legal System', in: R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, Kenwyn: Juta 1996, p. 2-30.

²⁹ See for example *Greenberg v Greenberg* 1955 (3) SA 361(A).

³⁰ See for example the following pieces of legislation that introduced aspects of the English common law into South African law:

*the Free State*³¹ that confirm Afrikaner as a constitutional language and the basis of a linguistic community as envisaged by section 31 of the Constitution.

Tshwane Metro and *Salem Party Club* demonstrate how the issues of identity such as heritage language and land foreground and amplify the framework of Afrikaner customary law. Even though these areas of normative concern do not advance or articulate a comprehensive notion of Afrikaner customary law the fact that these cases concern notions of communal identity of the Afrikaner nation and community strongly indicate them as signposts of the normative framework of the Afrikaner nation. The first of these cases is *Tshwane Metro*³² where the Constitutional Court addressed the nature of Afrikaner heritage in a post-Apartheid South Africa. In that case, the court evaluated the complaint of the Afrikaner community that the substitution of Afrikaner names with names of black people by the City of Tshwane Metropolitan Authority was unconstitutional. According to Afriforum, the substitutions were unconstitutional because "The old street names are an historical treasure and a heritage so intimate to the very being of the Afrikaner people that their removal would constitute an infringement of their right to enjoy their culture as envisaged by section 31 of the Constitution."³³ A restraining order granted against the City of Tshwane Metropolitan Authority ordered the Authority to replace and stop removing old street names. The majority of the Constitutional Court discharged the interim interdict for reasons connected with the fact that Afriforum representing the Afrikaner nation did not satisfy the requirement for the issuance of interim interdicts. Several conclusions of the court are important for this chapter. First, the Court affirmed that section 31 of the Constitution, "basically affirms the enjoyment of a cultural, linguistic or religious right of a community and its members provided that right is exercised consistently with all the other provisions of the Bill of Rights."³⁴ Even though the Court wondered how s. 31 'finds application to street names'³⁵ other parts of the judgment sought to answer that question in terms relevant to our discussion. Secondly, Froneman and Cameron JJ, agree with the thrust of the majority judgment but disagree in respect of how to treat colonial racist and apartheid cultural heritage. The dissenting judgment is important for the objectives of this chapter in the manner in which it sets out and discusses an articulation of the framework of Afrikaner customary law. According to the dissenting judgment

³¹ Note 10.

³² Note 3

³³ Ibid, para 27.

³⁴ Para 50. See for example T Bennett *Customary law in South Africa* (2004) 34, 78.

³⁵ *Tshwane Metro*, note 3.

“ On a general principle we think that the Constitution creates scope for recognizing an interest or right based on a sense of belonging to the place one lives, rooted in its particular history, and to be involved in decisions affecting that sense of place and belonging. Whether that strictly falls within the cultural, environmental or citizenship rights in the Bill of Rights or a combination of them still needs to be explored.”³⁶

Thirdly, all three judgments, in that case, agree that Afrikaner cultural rights are not absolute. While the first judgment by Mogoeng CJ justified the name changes by Tshwane Metropolitan Authority as an exercise to accommodate other racial groups who deserve to have their Pretoria streets named after their cultural icons³⁷ the second judgment acknowledges that Afrikaners have a limited right of cultural or historical belonging.³⁸ The third opinion, in *Tshwane Metro*, by Jafta J, points out that following section 31(2) of the Constitution cultural rights, are to be exercised, in a manner consistent with the Bill of Rights. This would rule out ‘... recognition of cultural traditions or interests “ based on a sense of belonging to the place one lives” if those interests are rooted in the shameful racist past.’³⁹ Jafta J gave an example of this ‘shameful racist past’ by specifically mentioning certain names as an offensive name that cannot be justified by the exercise of cultural rights.⁴⁰ Other parts of the judgment of Jafta J characterize the entire Afrikaner history as ‘racist’ and therefore disentitling Afrikaners to cultural rights. For example, Jafta J declares that an interpretation of our Constitution advanced in the second judgment that “ [t]he Constitution creates scope for recognizing an interest or right based on a sense of belonging to the place one lives’ rooted in oppression is untenable’⁴¹

While Jafta J is correct that the internal limitations that define the scope of sections 30 and 31 of the Constitution, requires that ‘these rights may not be exercised in a manner that discriminates unfairly or demeans the dignity of other people’⁴², it seems implausible that the ‘entire’ culture of Afrikaner people during Apartheid is unconstitutional. This is the thrust of the second judgment by Cameron and Froneman JJ. Rather, what is outlawed by the Constitution are ‘racist and oppressive cultural traditions’⁴³ This point is recognized in the third judgment where Jafta J states further that: ‘ in

³⁶ As above, note 3, para 125

³⁷ As above, note 3, para 64.

³⁸ As above, note 3, paras 155-157.

³⁹ As above, note 3, para 169.

⁴⁰ *Tshwane Metro*, note 3, para 170.

⁴¹ *Tshwane Metro*, note 3, para 176. See also JM Modiri “ Race, history, irresolution: Reflections on City of Tshwane Metropolitan Municipality v Afriforum” 2019 De Jure 27.

⁴² *Tshwane Metro*, note 3, para 174

⁴³ *Tshwane Metro*, note 3, para 170

unmistaken terms the Constitution commits our nation to reject all disgraceful and shameful practices and traditions of the apartheid era.¹⁴⁴ It is therefore plausible that some cultural practice and tradition during the Apartheid era could pass this test. Therefore, Afrikaner cultural traditions and practices must undergo constitutional scrutiny to determine whether it passes constitutional muster. It appears obvious that given the scope and meaning of culture that some traditions and practices will qualify as constitutional. Furthermore, the individual sense of culture requires an attenuated interpretation of cultural rights in the peculiar circumstances of each case reviewed against the Bill of Rights in its general or specific tenor. The dissenting judgment wondered at least twice whether the general right 'falls within the cultural, environmental or citizenship rights'¹⁴⁵ Assuming we are to imagine that such a general principle is relevant to cultural and citizenship rights we could proceed to imagine what this means for Afrikaans people on a communal and individual level. *Tshwane Metro* concerns the communal aspects of the general right. The implications of a recognition of a general right based on a sense of belonging to a place one lives rooted in a particular history were recognized an entitling South Africans to a right to be 'involved in a decision involving that sense of place and belonging'¹⁴⁶. Of course, if such a person lies in an Afrikaner community, the entitlement to be involved in decision making would be more pronounced. If such decisions are norms routinely obeyed by Afrikaners, there is little doubt that these would qualify as customary law.

The second case that appears to have reaffirmed the framework of Afrikaner customary law is *Salem Party Club*⁴⁷ where the Constitutional Court grappled with entitlements of Black and White Communities to a piece of land pursuant to the Restitution of Land Rights Act⁴⁸. Cameron J who wrote the unanimous judgment of the Court recognized that a Black Community had formed at the Salem commonage 'lived at and on the Salem Commonage ...in accordance with its traditional rules and conventions. That usage was in accordance with customary law...'⁴⁹ Even though the Court also recognised that a White Community was founded and existed at the Salem Commonage for over two centuries, there is no reference in the judgment to the rules by which that community was governed at least concerning the land. Of course, being a creation of and under the control of the colonial government, White settler communities were governed by the

⁴⁴ *Tshwane Metro*, note 3, para 176

⁴⁵ *Tshwane Metro*, note 3, para 124 and para 128.

⁴⁶ *Tshwane Metro*, note 3, para 128.

⁴⁷ Note 4.

⁴⁸ 22 of 1994.

⁴⁹ *Salem party Club*, note 4, Para 146.

colonial legal system which would apply principles of the South African common law to issues of ownership possession and transfer of the land. If any rules practice conventions and understandings were developed by the Salem community their value would only not be social but are very likely to be enforced by South African courts. For example, if such conventions understandings are reflected in transfer documents

Tshwane Metro and *Salem Party Club* can be read as affirmations of Afrikaner norms which point unmistakably to a normative framework. Accordingly, the rights of Afrikaner people to urge aspects of their cultural heritage as their customary law would involve different aspects of their personal lives for example in the areas of succession inheritance marriage. There is no evidence that South African courts have been urged to enforce Afrikaner Customary law in this personal respect. It would appear that these principles in the course of the development of principles of South African common law, these principles have supplanted if at all, they were recognized of understandings of Afrikaner communal life.

There is a need for considerable ethnographic work to determine the norms of the Afrikaner community which will not be an easy task. One good place to look would be the norms that may have been created by how Afrikaans speaking churches during the Apartheid years aligned with governments of that period⁵⁰ in the public sphere. In that period, it would appear that Afrikaans speaking churches who were in support of the Apartheid government were instrumental in the lives of Afrikaans speaking people through the norms that were developed and promoted to guide the conduct of the lives of ordinary citizens. Whether these norms will survive constitutional scrutiny is a different matter and should not detain us.

5. The Recognition of Afrikaner Customary Law and the 'New' South African Common Law

In this section, I address albeit briefly a broader reason why the recognition of Afrikaner customary law is important for the South Afrikaner legal system. That reason is the contribution that the recognition and application of Afrikaner customary law can make to the development of a 'new' South African common law. The idea of a 'new' South African common law flows from the organic development of a common law that evolves from the interpretation of principles and rules of a post-1994 constitutional legal system. For example, the interpretation of the fidelity of all law to the Bill of Rights mandated by section 8(1) of the Constitution; the development of customary and common law as required by s. 39 (2) of the Constitution

⁵⁰ See generally Oliver, E., 2010, 'Afrikaner Christianity and the concept of empire', *Verbum et Ecclesia* 31(1), Art. #393, 7 pages. DOI: 10.4102/ve.v31i1.393

suggests that a 'new' common law is envisaged in the Post-Apartheid constitutional era. The principles and standards that evolve from judicial review yield a 'new' common law. Arguably, all legal orders in South Africa should be in the contemplation of the South African judiciary in the task of fashioning a 'new' common law. This contribution can only arise by adequate recognition that these legal orders are potentially applicable. There is no imperative that all the principles and rules of these legal orders are applicable and enforceable. The standards set out in the Bill of Rights and other constitutional provisions ensure that the principles and rules of different legal orders that do not pass constitutional muster are inapplicable. Evidence of the interaction of the South African legal system and independent legal orders, can be found in the effect of the recognition that 'Black' customary law is equal to the common law⁵¹ as amplified by the South African judiciary.⁵² Even though there is a considerable opinion that the development of customary law is stunted interpreted and legislated in the image of the common law⁵³ it is incontrovertible that 'Black' customary law has influenced the development of the South African common law. A good example is how the cross over ethic of 'Ubuntu' has developed principles of South African Common law as outlined above. Ubuntu has become a significant foundation of the 'new' South African common law and may not have become so if 'Black' customary law did not receive constitutional imprimatur. Put in another way, there is a possibility that cogent principles of Afrikaner customary law would be useful in the articulation of the 'new' common law. An Afrikaner customary law normalizes the idea that the South African legal system recognizes legal orders alongside centrist national normative frameworks such as the common law. The 'new' South African common law can be meaningful if different legal orders such as Afrikaner customary law continuously nourish and interact with her.

6. Concluding Remarks

One of the fundamental challenges of legal pluralism in any State is the nature and extent of interaction of the normative systems that are directly and indirectly recognized by that system. The issue is not whether South

⁵¹ See for example section 211(3) of the Constitution: "The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. See also *Alexkhor v Richtersveld Community* 2003 (5) SA 460(CC).

⁵² See for example the cases of *Bhe v Magistrate Khayelitsha*, note 20; *Shilubana v Nwamtiwa* 2008 9 BCLR 914(CC) and *Ngweyama v Mayelane* 2013 (4) SA 415 (CC).

⁵³ See for example C Himonga and A Pope "Mayelane v Ngweyama and Minister of Home Affairs: A reflection on wider implications" 2013 *Acta Juridica* 318.

Africa is a plural state as much as it is how far it is willing to go. Two opposing forces underlie the constitutional interaction of state law and other normative systems in South African jurisprudence. On one hand, is a desire for uniformity evident in the centralizing legacy of the common law that is institutionalized through constitutional design through which non State law is recognized and interpreted through the lens of state law. An opposing principle speaks to an understanding and recognition of normative difference expressed by non- State law and such recognition within state law. South African jurisprudence exhibits both tendencies. An Afrikaner customary law challenges the South African legal system as to its willingness to recognize normative orders that equally deserving. The idea that customary law is not restricted to Black South Africans is already a matter of reality. Recently, the applicant's sought unsuccessfully in *Women's Legal Centre Trust v President of the Republic of South Africa*,⁵⁴ to expand the meaning of 'customary law' in the Recognition of Customary Marriages Act to include 'and customs and usages of Islam traditionally observed among Muslim peoples of South Africa and which form part of the religion and culture of those peoples'.⁵⁵ It is clear that similar readings of the meaning of customary law will not abate.

The recognition and promotion of Afrikaner customary law is a challenge of a plural South Africa where membership of a cultural community is concurrent with South African citizenship. If South African citizens are entitled to be governed by the common law designed to apply to all citizens, they are also entitled to their customary law that is a recognition of their cultural difference. Plural legal systems have to contend with this diversity through all manners of intervention. The first step is to acknowledge this plurality.

⁵⁴ [2018] 4 All SA 511 (WCC).

⁵⁵ See para 273. 1.1 of founding affidavit of Women's Legal Centre Trust v President of the Republic of South Africa, Available at <http://wlce.co.za/wp-content/uploads/2017/8/Muslim-Marriages-Founding-Aff-Part-2-.pdf> (Accessed 19th January 2019)

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