

DISTINCTION WITHOUT
DIFFERENCE:
THE CONSTITUTIONAL
PROTECTION OF CUSTOMARY
LAW AND CULTURAL, LINGUISTIC
AND RELIGIOUS COMMUNITIES -
A COMMENT ON
SHILUBANA AND OTHERS v.
NWAMITWA

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Introduction

Even though the decision of the South African Constitutional Court (the CC) in *Shilubana and Others v Nwamitwa* ([2008] ZACC 9 (CC), the *Shilubana* case) is commendable because “it promotes gender equality in the succession of traditional leadership, in accordance with the Constitution” (para. 1; for comments on this case see Mmusinyane 2009), this comment is primarily concerned with how the CC deferred to communal norms ordered by the Valoyi Tribe through its customary law. Furthermore even though the *Shilubana* case appears to herald a more sympathetic understanding of customary law, it also reveals the fact that customary law applies exclusively to the black community in South Africa while

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other racial communities are imagined and protected in terms of sections 30¹ and 31² of the Constitution of the Republic of South Africa 1996 (the Final Constitution, FC³). It is the contention of this paper that this distinction is not only wrong but of no significant difference. It is further contended that protection of all racial communities should proceed on the basis of sections 30 and 31 of the FC because the framework of these two sections appears better suited for the protection of all communities if South African courts show a more sympathetic understanding of communal norms and institutions. This comment argues that the *Shilubana* case is a tentative but welcome example of this trend. In the case the CC upheld a decision of the Valoyi Tribe to appoint a woman as a traditional leader. This was a development of its customary law of traditional succession that had hitherto operated on the basis of male primogeniture. In accepting this development the CC did not question the manner of the developed traditional succession even though it was open to the Court either to abolish the traditional institution of chieftaincy or on the basis of the right to equality⁴ to declare that it

¹ 30. 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 31. (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
- (b) 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 Part of the unique transition of South Africa included the adoption of an Interim Constitution in 1993 and a Final Constitution in 1996.

⁴ Section 9 of the FC provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance

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was an elective position to be filled by universal adult suffrage. In recognizing a gender neutral traditional leadership institution, the Court demonstrated that institutions established by communal norms can exist and function on the basis of equality and other rights which are the hallmarks of a liberal constitution.

This comment is organized as follows. The next part undertakes a brief overview of group rights in the FC. Part three considers the exclusive association of customary law with the 'black' community and whether this association has enhanced the group rights of the black community. In part four, the comment undertakes an assessment of the interpretation of the rights of members of cultural, linguistic and religious communities to ascertain how far they advance group rights. Part five in concluding remarks urges a unified interpretation of 'communities' and a more beneficial interpretation of 'group rights' that recognizes that all racial groups have a customary law and deserve a more sensitive recognition of their communal norms.

Group Rights in the Final Constitution

This comment adopts a definition of group rights as meaning those rights which are granted to cultural groups (Oomen 1999). Even though group rights appear to be of different categories (Levy 1997: 75-76), this comment is concerned with the recognition and enforcement of those rules and regulations formulated by social

persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

groups for members' conduct and enforced in a variety of ways. The purpose of this section is to identify any group rights in the FC. The protection offered by sections 30 and 31 of the FC⁵ is an individual right by its cast. However this right may in certain circumstances also qualify albeit indirectly as a group right in the manner in which the right is exercised. In *Christian Education SA v Minister of Education of the Government of SA* (1999 2 SA 83 (CC)), the *Christian Education* case) the nature of the right granted in section 31 is explained by Sachs J:

The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism... the protection of diversity is not effected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practise their own religion (as well as enjoy their culture and use their language). (1999 2 SA 83 (CC): para. 23)

It is thus possible that in the interpretation of sections 30 and 31 of the FC a court can choose whether to privilege community as against individual rights or to interpret communal rights through an individual prism. It appears that since the FC is a strong modern liberal constitution, an interpretation of communal rights from an individual perspective is inevitable.

The rights created by customary law have both an individual and a group dimension. On one hand it may be asserted that the constitutional recognition of customary law⁶ approximates customary law as a group right because this recognition is a promise that the norms (of customary law) developed by (black)

⁵ Above, notes 1, 2.

⁶ FC, s. 211(3) 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.

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communities to order their lives will be recognized by the FC. On the other hand many will deny that the FC recognizes any group right and that a conscious effort was made to exclude substantive group recognition in the FC (Murray and Simeon 2007). On this score customary law can find justification in sections 30 and 31 of the FC (Bennett 2005) to the extent that individual members of (black) communities can urge a court to recognize their (communal) cultural religious or linguistic norms. Constitutional scrutiny of customary law, it follows, should proceed without much deference to the communal norms but with a keen eye to ensuring that individual rights are protected. It is this second reading that appears evident in the case of the FC.

It therefore can be summarized that in the protection offered by customary law and by sections 30 and 31 of the Final Constitution the individual interest appears to be superior to the community interest. This is not surprising since the FC is a modern liberal constitution with a strong individual ethos which the CC has on numerous occasions recognized.⁷ It is therefore open to question not only whether group rights can be found in the FC but also what is the nature of these group rights. This comment proceeds in the next section to examine whether the communal dimension of customary law has been recognized in the constitutional protection of customary law in South Africa.

Is Customary Law only for the 'Black' Community? An Overview of the Recognition of Communal Interests in the Constitutional Protection of Customary Law

This section of the comment first determines whether customary law is by any interpretation reserved exclusively for the 'Black' community and then proceeds to determine how this interpretation affects the recognition of group rights. The recognition of customary law by the FC⁸ is not accompanied by any definition of

⁷ See for example: *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para. 14; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), para. 30.

⁸ See sec 211(3). The CC has held:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the

customary law nor does it textually associate customary law with the ‘Black’ community. The Recognition of Customary Marriages Act 1998 (the Recognition Act) however defines customary law as “Customs and usages traditionally observed among indigenous African peoples and which form part of the culture of those peoples”. This association of customary law with the ‘black’ community is also recognized by the judiciary in cases in which customary law has been in issue. For example in *Elizabeth Gumede v President South Africa and Others* ([2008] ZACC 23, the *Gumede* case) Moseneke DCJ wondered whether “people other than indigenous African people may be bound by customary law” ([2008] ZACC 23, para. 23). Academic opinion assumes the link between customary law and the black community (Pieterse 2001; Kaganas and Murray 1994). Overwhelming evidence therefore associates customary law with ‘Black’ people. There is however no evidence that the term is *exclusive* to them. In other words other peoples in South Africa can also have a ‘customary law’. If the definition in the Recognition Act is acceptable and devoid of its racial association it would appear that the customs and usages observed by other peoples can also form the basis of ‘white’ or ‘coloured’ customary law. In fact the FC is commendable because it does not limit ‘customary law’ to the ‘black’ community. If the practice of the past is anything to go by, the recognition of customary law as applying only to blacks was an assertion of the legal system that other races had no normative system outside the dominant English Common law and Roman-Dutch Law. Social practice, I think, shows otherwise.

There are a number of issues that are important in the constitutional recognition of customary law, including the ascertainment and proof of customary law (Himonga and Bosch 2000; Bennett 2009), that deserve further examination because of the *Shilubana* case. However, the remaining part of this section dwells only on two issues that illustrate the focus of this paper and further justify the assertion that customary law should not be restricted to only the black community. The first is the scope of ‘black’ customary law while the second is the dominant ethos of customary law as it appears from recent cases. With respect to the first issue

Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. (*Alexkor Ltd and Another v Richtersveld Community and Others*, 2003 12 BCLR 1301 (CC), para. 51.)

See also *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 7 BCLR 743 (C) at para. 32.

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attention is drawn to the fact that the content of customary law generated by colonialism and domination is generally restricted to the private and personal, including land because of the critical manner in which land constitutes the private economic realm of members of communities subject to customary law. The obliteration of customary public law was fundamental to the task of subjugating colonized and dominated people. All through Africa, this was one of the important consequences of colonialism. This fact is so total that there is an instinctive association of customary law with personal law - inheritance, succession, marriage, and in certain circumstances chieftancy, customary land tenure and civil wrongs. Furthermore academic literature in South Africa assumes this fact (e.g. Rautenbach 2003; Lehnert 2005). If it is true that the *Shilubana* case is an example of significant deference to communal norms, one of the attendant questions is whether this deference will apply to all facets of customary norm making, public and private. To restrict customary law to the personal and private is to read the FC wrongly. If customary law is what is recognized it must be the whole of that system, again subject to the FC. Disassociating customary law from the 'black' community assists in a significant way in our recognition of how social practices of *all* communities in *all* spheres of endeavor can become part of the legal system.

The next issue is whether the judicial interpretation of the constitutional recognition of customary law reveals a sensitive understanding and recognition of communal interests. The majority judgment of the CC in *Bhe v Magistrate Khayelitsha and Others* (2005 1 BCLR 1 (CC), the *Bhe* case) will assist in this evaluation. The *Bhe* case evaluated the constitutionality of the customary law rule of male primogeniture. The Court held that the rule of male primogeniture was discriminatory and contravened the right to equality contained in section 9(3) and the right to dignity protected by section 10 of the FC, because women (widows and daughters) and extra-marital children were not allowed to participate in the intestate succession of deceased estates. The Court was faced with the problem of deciding what line of action to adopt in the light of this finding. According to Langa DCJ:

In considering an appropriate remedy in this case, various courses present themselves. They are: (a) whether the Court should simply strike the impugned provisions down and leave it to the legislature to deal with the gap that would result as it sees fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary law rules of succession should be developed in

accordance with the “spirit, purport and objects of the Bill of Rights”, or (d) whether to replace the impugned provisions with a modified section 1 of the Intestate Succession Act or with some other order. (2005 1 BCLR 1 (CC), para. 105; footnotes omitted.)

The Court chose to follow option ‘d’ and modified the Intestate Succession Act which provided for succession to the deceased estate by a surviving spouse. The modification to the Act sought to protect partners to monogamous and polygamous customary marriages as well as unmarried women and their respective children. This was to be an interim measure until Parliament enacts a comprehensive regime.

The majority judgment declined to develop the customary law of succession because it felt that this would depend on a case by case development which would be slow and that the uncertainties regarding the rules of customary law would be prolonged (2005 1 BCLR 1 (CC), paras. 111 and 112). The various options considered by the majority judgment are actually a sub-set of one of the two options evident from the judgment, which were either to retain the customary law of succession or to dispense with it. In choosing the Intestate Succession Act, the majority judgment recognised that this could lead to the obliteration of the customary law of succession. If the majority had been minded otherwise, the Court could have proceeded to declare a rule that would give effect to the modified version of the Intestate Succession Act and in addition affirm the concomitant responsibilities of inheritance recognised by customary law. Accordingly surviving spouses and daughters would then inherit the property as heads of family and thereby create family property. The other option was to simply stop the discrimination against women and children and thereby develop the customary law of succession to bring it in line with the rights in the Bill of Rights until comprehensive legislation was enacted. This was an option explored and adopted by the minority judgment of Ngcobo J. which ensures that the concept of family property survives as a key aspect of a communal normative system while satisfying the demands of a modern liberal constitution.⁹ The majority and minority

⁹ The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family head. In this regard it deviates from section 9(3) of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the

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judgments are contrasting examples of what can befall customary law in a modern liberal Constitution. The majority judgment clearly sought to concentrate on the individual while the minority judgment also sought to protect the individual but within norms developed by the community for its survival and vitality. On a confrontation between the individual ethos of the Intestate Succession Act and the communal norms of customary law the latter lost out.

To sum up this part, it can be said that, even if South African courts adopt a more sympathetic understanding of customary law, the result could be the continuance of the many customary laws in South Africa, which appears untidy and undesirable. It is the contention of this paper that communities in South Africa will be better protected by the framework that is established by section 30 and 31 of the FC. It is to that framework that the paper turns to.

An Overview of the Constitutional Protection of Cultural, Linguistic and Religious Communities

In this section this paper sketches a broad overview of the constitutional protection of cultural, linguistic and religious communities in order to assess whether the nature of their protection significantly differs from the protection offered by customary law to 'black' communities. To locate the ensuing discussion in the context of the *Shilubana* case, this part concerns the manner in which the assertion of the internal norms of a cultural, linguistic and religious community have been evaluated and recognised. For many reasons, including space, this comment considers only the protection of religious communities.¹⁰ Religious communities

reference to a male so as to allow an eldest daughter to succeed
to the deceased estate. (2005 1 BCLR 1 (CC), para. 222.)

¹⁰ Although South African constitutional jurisprudence is engaging with these issues, there are no discussions of the manner in which language rights have played out in South Africa. See the following cases: *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T), *High School Ermelo and Anor v The Head of Department: Mpumalanga Department of Education and Others* [2007] ZAGPHC 232 (TPD); Case No 3062/2007 decided 17 October 2007; *Seodin Primary School and Others v MEC of Education, Northern Cape and Others* [2006] 1 All SA 154 (NC); *Laerskool Middleburg en 'n Ander v Departementshoof Mpumalanga Departement van Onderwys, en Andere* 2003 (4) SA 160 (T) 175; *Western Cape*

appear for now to be more involved than others in seeking recognition of their norms. This may not be surprising since religious identity is often fundamental in defining social groups. In general the discussion in this part will show that South African courts have generally not shown enough sensitivity to religious communities, although there are exceptions in certain cases where South African courts have recognized religious communal norms.

Three cases decided by the CC will be used to illustrate the unsympathetic posture of South African courts to religious communal norms. The first is the *Christian Education* case. The facts of this were that a voluntary association, which was an umbrella body of 196 independent Christian schools in South Africa with a total of approximately 14,500 pupils and with the aim “to promote evangelical Christian education”, challenged the South African Schools Act which prohibited corporal punishment. The Association averred that its member schools maintained an active Christian ethos and sought to provide their learners an environment that was in keeping with their Christian faith. It further averred that corporal punishment was an integral part of this ethos and that the blanket prohibition of its use in its schools invaded their individual, parental and *community* rights to freely practise their religion. The Court held that the prohibition of corporal punishment was a justifiable limitation on the exercise of the individual parental and community rights of the appellants. The Court was satisfied that the justification lay in the interest of the State in protecting pupils from degradation and indignity arising from corporal punishment.

If the *Christian Education* case appears understandable given the peculiar violent history of South Africa, the decision of the CC in *Prince v President of the Cape Law Society* (2001 2 BCLR 133 (CC), interim judgment; 2002 2 SA 794 (CC), final judgment, the *Prince* case) may have cast the Court as unwilling to substantively recognize communal religious norms. In that case, concerning the disqualification of a Rastafarian from processes leading to qualification to practice law in South Africa, it was contended that the prohibition of the use and possession of cannabis by section 4(b) of the Drugs Act was unconstitutional because there was no exemption for the use and possession of cannabis for religious purposes in furtherance of the right to freedom of religion, opinion and

Minister of Education and Others v The Governing Body of Mikro Primary School 2006 1 SA 1 (SCA). See the following academic works: Fleisch and Woolman 2007; Bray 2007.

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belief protected by section 15 of the FC.¹¹ It appeared as common cause that the use possession and transportation of cannabis by the Rastafarian community to which Prince belonged was central to the Rastafarian religion, as it was used for healing, communion, ritual, sacred medicinal and culinary purposes. In the opinion of the Rastafarian community their religion would disappear if cannabis were declared illegal. It was contended on behalf of the State that the prohibition was a justifiable limitation on the constitutional rights of freedom of religion opinion and belief.¹² It was argued that an exemption for the Rastafarian

¹¹ The text reads:

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that [continued]
- a. those observances follow rules made by the appropriate public authorities;
 - b. they are conducted on an equitable basis; and
 - c. attendance at them is free and voluntary.
- (3)
- a. This section does not prevent legislation recognising
 - i. marriages concluded under any tradition, or a system of religious, personal or family law; or
 - ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
 - b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

¹² The general limitation clause in the FC is found in section 36 which provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
- a. the nature of the right;
 - b. the importance of the purpose of the limitation;

community was possible but not practicable for a number of reasons, including the difficulty in administering an exemption, the fact that the prohibition aided the war on drugs, and South Africa's international law obligations. The majority judgment agreed with the State. The minority judgment accepted the need for an exemption for Rastafarians on the other hand and argued for a reasonably administered government supervision of the use and possession of cannabis. The principle of reasonable accommodation canvassed in Ngcobo J's minority judgment required the State to bear an extra burden in circumstances in which there is a clash between the law and faith. As Sachs J noted in his judgment concurring with the minority, this principle should operate when the practices do not violate any part of the Bill of Rights (2002 2 SA 794 (CC), para. 149¹³).

The trend in interpreting communal/ group rights through an individual prism was also present in the majority judgment of the CC in *MEC Education Kwa Zulu Natal v Pillay* (2008 1 SA 474(CC), the *Pillay* case). This judgment looked to the sincerely but subjectively held individual views in order to determine a sincerely held religious/cultural norm (Langa DCJ, 2008 1 SA 474(CC), para. 87). O'Regan J in her dissent points correctly to the fact that, with respect to culture and associative religions, the question "...will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community" (2008 1 SA 474(CC), para. 147).

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- c. the nature and extent of the limitation;
 - d. the relation between the limitation and its purpose;
 - and
 - e. less restrictive means to achieve the purpose.

¹³ In fn 10 to this paragraph there is an enumeration of practices that violate the Bill of Rights by Sachs J:

[H]uman sacrifice, the immolation of widows or the stoning of adulterers, violate the Bill of Rights and accordingly are not rendered immune to state action simply on the grounds that they are embedded in religious belief. The sacramental use of dagga on the other hand comes nowhere near to infringing the Bill of Rights. Accordingly, the religious rights which the Rastafari have under section 15(1) of the Constitution are strongly reinforced by their associational rights under section 31.

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In the *Pillay* case the majority and minority judgments are consistent with a modern liberal constitution even though the minority judgment is more sensitive to the religious community. To deny that groups have rights however is really to deny the communal context that facilitates the formation of culture. As Iain Benson notes in his reflection on the *Pillay* case:

A tension always exists between understanding religion in its personal dimensions and broader communal dimensions. Too great a focus on an individual's belief runs the risk of trivialising the communal foundation to which any individual belief is invariably related. It is not too strong a statement to say that *Pillay* gets things back to front.... [T]he religious community creates and nurtures the religious believer. Unfortunately *Pillay* fails to recognise this relationship. (Benson 2008: 302; see also Lenta 2008.)

This comment turns its attention to instances of appropriate recognition of communal religious norms within the framework of the FC. I shall use two examples. The first is the recognition of customary and Islamic marriages while the second is the deference shown to determinations of the sacred and spiritual leadership of religious communities. With respect to marriage, the challenge that faces the South African legal system is its reaction to the 'other' marriages that contemplate multiple spouses and were thus different from the dominant single spouse paradigm. The Recognition Act is legislation pursuant to section 15(3) of the FC¹⁴ and a fitting response to the challenge of the 'other' marriages. Describing the Act, Moseneke DCJ said in the *Gumede* case:

Without doubt the chief purpose of the legislation is to reform customary law in several important ways...Most importantly it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. ([2008] ZACC 23, para. 24. See also Herbst and du Plessis 2008.)

Since it is not true that customary law is built entirely on patriarchy it is therefore possible that by separating status from content customary law can still be

¹⁴ Above, note 11.

legitimate. For example recognising the equal worth of women protects them in many aspects of marriage as the Recognition Act has done and still recognizes alternative forms of marriage including customary marriages. Adequate sensitivity to the reality of Muslim marriages has also been achieved through the relatively recent judicial recognition of some instances of (Muslim) Islamic marriages.¹⁵ In *Daniels v Campbell NO and Others* ([2004] ZACC 14; 2004 5 SA 331(CC)) the CC held that the word ‘spouse’ in section 1 f of the Intestate Succession Act 1987 included the husband or wife in a monogamous Muslim marriage. In *Hassan v Jacobs NO* ([2009] ZACC 19) the CC included the spouses of polygynous Muslim marriages in this definition. It is clear that by recognizing spouses married under Muslim law, it deferred to norms of that law in deciding who was or was not a spouse. If it were a fact that the women in *Daniels* and *Hassan* were not regarded as married under Muslim Law, there would have been no question of considering them as spouses.

The second example is the deference shown to the decisions of spiritual and sacred leadership taken to protect their community. A number of cases reveal the willingness of the South African judiciary to protect communal religious rights in this respect. In *Taylor v Kurstag NO* (2004 4 All SA 317(W)) the Court upheld an edict of a Jewish Ecclesiastical Court effectively excommunicating a member from the Jewish society for failing to comply with its decision. The applicant argued that the excommunication breached his right to freedom of religion and freedom of association. The Court denied the application and held that the edict was a reasonable and justifiable limitation on the rights of the applicant and that rights of the community superseded the rights of the applicant because a failure to enforce the ruling of the Jewish Court would result in inability of the Jewish faith to protect the integrity of Jewish law. In *Johan Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009 4 SA 510(T), [2008] ZAGPHC 269) the Equality Court was prepared to accept that religious bodies were likely to be exempted from compliance with legislation prohibiting unfair discrimination. The complainant in this case had instituted proceedings in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act alleging unfair discrimination on the basis of sexual orientation.

¹⁵ The legislative recognition of Islamic marriages is still pending. A bill – the Muslim Marriages Bill – proposed by the South African Law Reform Commission has not yet appeared.

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It appears from a review of the manner in which religious communities are protected that the CC has exhibited a less than wholehearted willingness to protect group rights. While it is plausible claim that there was a perceptible shift in the *Pillay* case towards a more rounded understanding of the community the fact remains that the group rights of religious communities have been at the mercy of an individual rights reading. It is possible to imagine therefore that the *Shilubana* case heralds a new era where the CC will show a better appreciation of communities and of their norms. This reading is also buttressed by the evidence of lower courts showing appropriate deference to the internal norms of religious communities.

Concluding Remarks: A Unified Interpretation of ‘Community’ and a Beneficial Recognition of Group Rights

A plausible conclusion from a review of sections III and IV is that there is an inadequate recognition of group rights even within the options permissible under the liberal ethos of the FC. If there is no reason why other racial communities cannot have their customary law, this may enable a neutral reading of ‘customary law’ as entitling all racial communities to the recognition of their customary law within the constitutional framework. From this perspective it can be argued that, if the intent of the constitutional recognition of customary law is not to provide better protection for the ‘black’ community relative to other racial communities, all communities can seek protection either by virtue of customary law or by the protection offered by sections 30 and 31 of the FC. This comment contends that the deference shown in the *Shilubana* case heralds an appropriate model for the treatment of communal norms and that, even though the case is concerned with a black community, it is also fitting as a model for protection offered by sections 30 and 31 of the FC. What is important is the notion of communities and a desire to promote the norms within the constitutional framework. It ought to be pointed out that this view does not seek to homogenize the communities and treat all of them in the same way. Already FC 31 speaks of ‘cultural, religious and linguistic communities’ and it is obviously implicit in the understanding of communities that they are different. Each community comes with its own characteristics and these must be clarified before a consideration of the nature of claims it makes or which are made on its behalf.

I dare to suggest that the differentiated meaning of communities in FC 31 appears better than the hotchpotch that is customary law. It is a fact that customary law

differs from place to place and that there is no ‘black’ community but many ‘black communities’.¹⁶ It is due to the homogenizing processes of the common law courts through the use of judicial precedent and judicial notice that there appears to be one (black) customary law in South Africa. If the defining feature of customary law is the usages and practices adopted by a people, it appears that, while many customs and usages may be similar, there will be significant differences that differentiate even the smaller members of major racial groups. Furthermore customary law does not properly represent the distinctive socially constructed groups within a society. For example religion as a common factor may be lost within the rubric of customary law, as is the case of traditional African religions (Amaoh Bennett 2008; Mutua 1999). At first blush it may be thought that black communities might be better off with the constitutional protection of customary law when it seems easier to protect them in terms of sections 30 and 31 of the FC.

The protection of cultural communities contemplates emergent communities beyond those organized around the traditional factors of language, ancestry and religion. A good example is the people including South Africans from diverse ethnic and language backgrounds that live in urban areas (see Foblets and Reyntjens 1998) and socialize because of geographical contiguity and therefore develop common interests which may include the fear of violence. This will include the gated communities in South Africa that may qualify as cultural communities deserving of the protection of the FC section 31. The notion of a community perhaps forces an inquiry into the nature of the community in contention and examines how their claim to normative recognition is reconciled with the letter, spirit and values of the FC.

A non-racial understanding of customary law is important for a more beneficial understanding of ‘communities’ in South Africa. Associating customary law with the black community assumes that the black community is substantially and qualitatively different from other communities in South Africa. This difference is

¹⁶ FC s. 6(1) recognizes at least nine ‘black’ languages - Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, IsiNdebele, IsiXhosa and isiZulu as official languages. It also recognizes English and Afrikaans as official languages. FC s. 6(5) establishes a Pan South African language Board to promote and create conditions for the development and use of the official languages, the Khoi, Nama and San languages as well as to promote and ensure respect for all languages used by communities in South Africa including German, Greek, Gujarat, Hindi, Portugese, Tamil, Tetegu, and Urdu.

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pejorative and degrading since it is conceived in a traditional pre-modern manner. South African blacks are different from other communities just as other communities are different from them. However all these communities live in a post-modern state and there does not appear to be any reason why they ought to be treated differently in a post-apartheid state. An equal treatment of communities according to their distinct characteristics is consistent with a non-racial nation which is the objective of the FC. The FC does not deny the racial identity of South Africans by declaring that South Africa shall be a non racial nation. Rather what is prohibited is a society in which biological ancestry is the fundamental ordering. When FC section 3(1) speaks of a common South African citizenship, it contemplates plural identities/loyalties. Amongst these identities are first, a national identity which is built on an equal entitlement as human beings to the rights, privileges, benefits and duties of citizenship (Mamdani 1998). Another identity can be formed by communities socially constructed on differentiating factors such as race, language and religion which brand communities that nurture, encourage and sustain self-worth and respect. It is these communities that the *Shilubana* case invites us to recognize, promote, respect and protect.

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