

The right to freedom of religion: an apparently misunderstood aspect of legal diversity in South Africa¹

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1 INTRODUCTION

Demands expressed locally and internationally for the recognition of legal pluralism² are bound to have an effect on the enforcement of personal law in South Africa, especially in the light of sections 15, 30, 31 and 39(1) of the Constitution of the Republic of South Africa³ ('the Constitution').

In my view, one of the best definitions of legal pluralism comes from John Griffiths. He defines legal pluralism as follows:

'Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. "Legal pluralism" refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping 'semi-autonomous social fields' [a] situation of legal pluralism ... is one in which law and legal institution are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all multifarious social fields present, activities which may support, complement, ignore or frustrate one another ...'⁴

Based on John Griffiths's definition of legal pluralism, this article rejects the premise that legal pluralism is recognised under South African law.⁵ In view of the non-recognition of religious legal systems as part of South African law, it cannot be logically argued that South African law recognises legal pluralism.

- 1 Revised version of the paper presented at the annual Conference of the Congress of the Society of University Teachers of Law, University of Free State, January 2005.
- 2 In the context of this article, the words 'legal pluralism' has the same meaning as 'legal diversity'.
- 3 Constitution of the Republic of South Africa, 1996. See also Article 27 of The International Covenant on Civil & Political Rights; See also The Universal Declaration of Human Rights G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). These instruments emphasise the need to recognise religious and linguistic communities' rights to practise their culture, religion and customs free from unfair discrimination by governments and in certain circumstances, by individuals.
- 4 Griffiths J 'What is legal pluralism' in *Journal of Legal Pluralism* (1986) NR 24 at 38–39. See also a similar definition by Sezgin Y 'A new theory of legal pluralism: The case of Israeli religious courts'. Paper presented at the Association for Israel Studies, 19th Annual Meeting, April 27–29 2003, San Diego, CA at 6. See also Masaji C 'Other phases of legal pluralism in the contemporary world' *Ratio Juris*, Vol.11, No.3, September (1998) 228; Hooker M.B *Legal Pluralism: An introduction to Colonial and Neo-Colonial Laws*. (1975) 6.
- 5 For further arguments on this topic, see the discussion by Van Niekerk G 'Legal pluralism' in Bekker, Rautenbach & Goolam *Introduction to legal pluralism in South Africa* 2nd ed (2006) 3-14. See also Van Niekerk G 'The plurality of legal domains in South Africa: the state's historical legislative intrusion into the Field of Urban Popular Justice and Customary Law' in Scharf W & Nina D (eds) *The other law: Non-state ordering in South Africa* (2001).

Legal pluralism refers to the legal system where people are allowed to freely decide and choose the law under which they want to be judged.⁶ This means that a legal system where people are judged by a system of 'uniform law' is contrary to the concept of legal pluralism. Therefore, it may be reasonably argued that the legal system in South Africa is based on legal parallelism, as opposed to legal pluralism.⁷ That is, the fact that African customary law is recognised alongside civil law, and no other personal law system has been given the same legal recognition, proves that there is no legal pluralism in South Africa. This is so despite the freedoms protected in the Constitution.

At its very onset, the Constitution acknowledges that

'[w]e the people of South Africa ... [b]elieve that South Africa belongs to all who live in it, united in our diversity. We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'⁸

The cornerstone of South Africa's Constitution is the Bill of Rights. Given South Africa's long history of colonialism, political and social discrimination, and following the political transformation that took place in the early 1990s, it is appropriate that all persons in the country should be able to choose under which systems of private law they want to be judged. That is, no particular personal systems should be given preferential treatment over others. This will guarantee the same legal treatment and recognition of personal legal systems other than African customary law.

This article argues that despite the fact that everyone has a right to freedom of religion under section 15 of the Constitution, the section does not adequately afford people the right to practise their religions freely, as people would understand that right. That is, the freedom of religion clause should be interpreted in a manner that would guarantee linguistic and religious communities the right to have their private law matters regulated in accordance with the personal laws of their choice, provided they do not conflict with the spirit and values of the Constitution.

In the context of this article, and considering the above definition of legal pluralism, personal law may be defined as a system of law recognised by a particular community as binding, either in accordance with the prescripts of a recognised religion, faith or rules of an established and recognised custom.

In the last part of this article, a comparative analysis of foreign legal systems is undertaken in order to identify a suitable model concerning the incorporation of legal pluralism into South African law.

6 See generally chapter XXXVIII titled 'Personal law' in Gibbon E *The decline and fall of the Roman Empire* (1776) (available at www.panarchy.org/gibbon/law).

7 Note that sections 211 and 212 of the Constitution require that the courts must apply customary law. No specific mention is made concerning the application of religious law in a similar manner.

8 See generally the preamble to the Constitution.

2 CONSTITUTIONAL PROTECTION OF THE RIGHT TO RELIGIOUS FREEDOM

Section 15(1) of the Constitution provides that: 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'. It is understandable that groups observing distinctive cultural and religious traditions should demand legal protection for their particular customs and systems of personal law, as long as their respective personal laws and customs do not violate other provisions of the Constitution.⁹ This is a right guaranteed by section 15(1) of the Constitution. The extent to which the right to freedom of religion is misunderstood and/or erroneously applied by the courts in matters concerning legal diversity in South Africa is discussed below.

2.1 The extent of the right to freedom of religion

While section 15(1) guarantees the right of every person to belief or hold an opinion, subsection 15(3) clearly draws a distinction between freedom of belief, on the one hand, and the right to practise such belief or religion on the other. This section indirectly restricts the right of any person to practise his or her religion. Section 15(3)(a) reads:

'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.'

Section 15(3)(a) is a negative right (as opposed to a positive right) because there is no compulsion on the part of the legislature to legally recognise religious practices and religious law. Instead, the legislature has a choice not to pass any law at all that will recognise religious practices or law.

It is submitted that the Constitutional protection of 'freedom of conscience, religion, thought, belief and opinion' only protects the religious belief, but does not recognise the observance of the rules of the religion (that is, religious law). What is actually not protected by the section is the practice (that is, the conduct) associated with the observance of religious law. In most instances, belief and practice cannot be separated because belief leads to the practice based on that belief. For example, if a man and a woman belong to X religion, they have a constitutional right to believe in and belong to X religion, they may enter into a marriage in accordance with the rules of X religion.¹⁰ To marry in terms of X religion means that they actually put their religion into practice. However, if the marriage is in accordance with X religion, it may not be legally recognised in South Africa because it is not a civil marriage (that is, a marriage entered into in accordance with the provisions of the Marriage Act 25 of 1961). It is submitted that their marriage in accordance with X religion

⁹ See s 15(3) (b) of the Constitution.

¹⁰ See s 30(1) of the Marriage Act 25 of 1961 which reads: 'In solemnizing any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister ...'. See also s 3(1) of the Marriage Act *supra* which reads: 'The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion'.

should be legally recognised, where it does not violate any other provision of the Constitution.

As will be argued under Part 3 of this article, the Supreme Court of Appeal, in the case of *Ismael v Ismael*¹¹, defined a civil marriage in accordance with Christian values, holding that the marriage law in South Africa is rooted in Christianity, and that any marriage which did not comply with such values was invalid.

2.2 The defect in section 15 of the Constitution

The problem is, however, that the distinction between the practice of one's religion and the right of belief goes to the root of personal law. The *Qur'an*, for instance, provides that:

'To each among you, we have prescribed a law. And a clear way.'¹²

'The *hukm* (rule, injunction, and prescription) belongs to God alone.'¹³

'And it may happen that you dislike a thing which is good for you and that you like a thing that is bad for you. Allah knows but you do not know.'¹⁴

The above quote implies that, according to some religions, the lawmaking powers belong to God alone. Consequently, religion or belief and the law associated with that religion or belief are inseparable. Therefore, it may not be always religiously permissible to ignore religious legal rules in favour of secular law because this means that the individual would actually be violating his or her own religion. In the example given in 2.1 above, a man and woman whose religion is X, may not be religiously permitted to conclude their marriage according to Y religion because this would mean that they actually practise religion Y, which is a different religion – a religion that may be opposed to their own – and, therefore, considered sinful. Similarly, they may not conclude a civil marriage because it would be in conflict with their religious rules. Put differently, the right to freedom of religion in so far as the right to practise one's religion is concerned, is rendered useless, because such a right is limited only to the protection 'belief' which inseparable from the 'practice' of that belief. It must be noted, however, that although the Marriage Act¹⁵ appears to be secular in nature, the courts have interpreted the Act in a manner that would legally invalidate all personal marriage laws that do not comply with the Christian faith, particularly, because of the requirement that all 'civil marriages' must be monogamous.¹⁶

Thus, the question is whether it is possible for a person to belong to a religious group, and to have the freedom of religion as guaranteed under section 15 of the Constitution without the legal recognition and protection of the right to put that religion or opinion into practice? Obviously, a Muslim considers himself bound by *Shari'ah* without exceptions; a Jewish person is bound by the *Torah*; and a Hindu by the *Vedas*, and so on. In all these examples the

11 1983 (1) SA 1006 (A)

12 Qur'an Al-Ma'adah 5:48

13 Qur'an 6:57

14 Qur'an 2:216

15 *Ibid.*

16 *Ismael v Ismael supra*

religious legal systems concerned are considered to be divine by all their respective members and, therefore, considered to be the supreme law of the religion concerned. In most religions, no exceptions can be made in favour of secular law or any other system of law that contradicts religious law.¹⁷

It is absurd to have any other interpretation of section 15 other than to conclude that section 15(1), read with sections 15(2) and 15(3), guarantee both the freedom of belief, and the freedom to practise that religion. This conclusion is based on two main reasons: Firstly, section 15(3) automatically prohibits any religious legal rule or practice of religion that violates any provision of the Constitution. Although this section seems unnecessary since it is the repetition of the supremacy clause in the Constitution, its purpose seems to be to ensure that the legislature will not codify unconstitutional religious law. The point is that this section obviously does not affect the Constitutional recognition of any religious belief or the practice of religious law that is not contrary to the Constitution.

Secondly, section 15(3) also seems unnecessary because it does not assist in the protection of religious freedom but simply provides that the Legislature may not be prevented by any other law from recognising systems of religious or personal law. That is, the correct interpretation of section 15 is that freedom of religious belief and freedom to practise any law associated with any such religion or belief, should be regarded as protected in the Constitution. Consequently, all aspects of religious law, such as *Shari'ah*, Hinduism, Jewish and Christian laws, and other personal laws, currently form part or should be regarded as forming part of the South African legal system where they are not inconsistent with Constitution. When interpreting common law, the courts should interpret section 15 to include both the right to freedom of belief, and the right to practise that belief. Any other interpretation will defeat the objectives of the section. The current attitudes of the courts when interpreting section 15 are discussed below. It is apparent that the courts are not in favour of adopting a liberal interpretation by protecting both belief and practice of that belief according to the principles of the relevant personal laws, even if those personal laws do not violate the Bill of Rights.

3 THE ATTITUDE OF THE SOUTH AFRICAN COURTS

If the above interpretation of freedom of religion in South Africa is correct, why do the South African courts continue to refuse to legally recognise and enforce religious law – in particular, to legally recognise religious marriages?¹⁸

17 See for instance Isaiah 33:22: which provide that the Lord is our judge, lawgiver and king. See also Genesis 49:10 (This applies to both Christian and Jewish religions). See also Qur'an 2:216. Concerning the position under the Hindu law and religion, see generally Misra S 'Sources of Law in Hindu and Muslim Jurisprudence – A Comparative study' 10 & 11 *Islamic & Comp. L.Q.* 165 (1990-1991).

18 See the following cases: *Ismael v Ismael* 1983 (1) SA 1006 (A); *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA (SCA); *Ryland v Edros* 1997 (2) SA 690 (C); *Daniels v Campbell and Others* 2004 (7) BCLR 735 (CC); *Kalla and Another v The Master and Others* 1994 (4) BCLR 79 (T); *Pillai v Pillai* 1963 (1) SA 542 (D); *Moola & Others v Aulsebrook & Others* 1983 (1) SA 687 (N); *Ramayee v Vandiyar* 1977 (3) SA (D); *S v Venget-samy* 1972 (4) SA 351 (D).

The interpretation clause in the Constitution obliges the courts to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' and to 'promote the spirit, purport and objects of the Bill of Rights'. For instance, African, Muslim and Hindu religious and customary laws have not shared the prestige enjoyed by civil law concerning the protection of human rights.¹⁹ Clearly the courts have come to realise the inconsistencies in their application of the Bill of Rights pertaining to personal law (particularly religious law). Despite this, the courts have constantly refused to legalise religious marriages. In *Ryland v Edros*, the court had to consider whether public policy depended on the views of the majority Christian religion under the current Constitutional dispensation. The court concluded

'it is quite inimical to all the values of the new South Africa that the courts should only brand a [Muslim marriage] contract as offensive to public policy if it is offensive to the values which are shared by the community at large, by all right thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case, the views (or presumed views) of only one [Christian] group in our plural society were taken into account'.²⁰

Despite this observation, the courts still refused to give legal recognition to Islamic marriages. Similarly, in holding that that the consequences of any contract resulting from an invalid Muslim marriage may be recognised under certain circumstances, the court, in *Amod*,²¹ found that the new Constitution ushered in a new value system based on equality, religious freedom and dignity (as opposed to the *boni mores* of society or public policy). Mahomed CJ observed:

'The insistence that the duty of support which such a serious *de facto* monogamous marriage imposes on the husband is not worthy of protection, can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993'.²²

19 Although the South African common law is a hybrid system of law, consisting partly of Dutch law, Roman law, and English law, religious law has been completely marginalised. Human rights and interpretation of law have for decades been restricted to the provisions of this hybrid system. Although the courts have in the past applied some aspects of African traditional jurisprudence in their judgements, such trends are scarce. See, for example, the case of *S v Makwanyane* 1995 (3) SA 391 (CC) which applied the notion of *ubuntu*. Much of customary law was declared *contra bonos mores* in terms section 11(1) of the Black Administration Act 38 of 1927. This section was repealed, but was re-enacted in section 1(1) of the Law of Evidence Amendment Act 45 of 1988 which reads: 'Any court may take judicial notice of the law of a foreign state and of indigenous law insofar as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or similar custom is repugnant to such principles'. Hindu and Muslim personal law were constantly either rejected on the grounds of public policy, or ignored on the basis of legal technicality by the South African courts. See *Ismail v Ismael supra*; *Seedat's Executors v The Master (Natal) ibida*; *Kalla and Another v The Master and Others* .

20 *Ibid* at 89.

21 1999 (4) SA 1319 (SCA)

22 *Ibid*.

Also in *Amod*,²³ the court expressly refused to recognise the Islamic marriages. Coming back to the question presented earlier: why do the South African courts continue to refuse to legally recognise and enforce religious law? The best answer is to be found in *Ismail v Ismail*.²⁴ In this case, the court had to decide whether the consequences of a Muslim marriage, which is still legally unrecognised because it is regarded as potentially polygamous and therefore contrary to public policy, could be legally enforced upon divorce. Van Reenen J made the following observation:

'The marriage law of the State is rooted in Christianity whereas the union of plaintiff and defendant is based on a non-Christian faith. At the advent of Protestantism marriage was secularised and passed under the control of the State. However, although as a result of the advent of Protestantism marriage was secularised, the countries of the Reformed Church retained the idea of its being of divine institution in its general origin'.²⁵

Ismail's case was decided a decade before the Constitution with the Bill of Rights came into effect in South Africa, yet the courts have consistently refused to recognise religious marriage law other than Christian marriages. Immediately after the Interim Constitution came into operation, the court, in *Kalla v The Master*²⁶ said that potentially polygamous marriages may contravene the gender equality principle:

'Apart from that, the principle of gender equality embodied in sections 8(2) and 119(3) and constitutional principles I, III and V (read with section 232(4)) may well lead to the conclusion that polygamous (and potential polygamous) marriages are as unacceptable to the *mores* of the New South Africa as they were to the old'.²⁷

Also in *Amod*, the court consciously refused to deal with the issue of the validity of a Muslim religious marriage under the current constitutional dispensation, arguing that the duty of spouse support does not depend on the validity of a marriage:

'For the purposes of the dependant's action the decisive issue is not whether the dependant concerned was or was not lawfully married to the deceased, but whether or not the deceased was under a legal duty to support the dependant in a relationship which deserved recognition and protection at common law'.²⁸

4 COMPARATIVE ANALYSIS

The purpose of Part 4 of this article is to compare the South African model with the legal systems of other countries, particularly those countries that have incorporated personal law into their mainstream legal system concerning all matters pertaining to family law. The British and Indian models are considered. The Indian model is chosen due to similarities concerning the religious rights in the Indian Constitution with the South African Constitution. The British experience is relevant because South Africa inherited British common law.

23 1999 (4) SA 1319 (SCA)

24 *Ibid*.

25 *Ibid* at 1009C (par 20)

26 1994 (4) BCLR 79 (T)

27 *Ibid* at 89 (per Dijkhorst J)

28 *Ibid* at par 25

4.1 The British experience

During the 1970s the Union of Muslim Organisations of the United Kingdom and Eire resolved to seek official recognition of a separate system of Muslim family law which was meant to apply automatically to Muslims in the United Kingdom.²⁹ The resolution was, nevertheless, rejected by the British government.³⁰ While there may have been a number of reasons attributable to the rejection, it would seem that there were four main reasons that contributed to the resolution being regarded as 'not appropriate'.³¹

First, the resolution ran counter to the English tradition of a unified system in family matters irrespective of origins, race or creed. Second, there seemed to have been a practical difficulty of working out which system of Muslim law would be applicable since there are several schools of thought in Islam, mostly determined by the country in which it was practised. Third, would cases be decided by the existing civil courts or by specially established religious courts staffed exclusively by Muslims? The difficulty related to the controversy surrounding the interpretation of points of Muslim law by non-Muslim judges who would not be fit to do so. Fourth, to the Western mind, Muslim family law contains a number of principles that violate the fundamental rights and freedoms set out in the international conventions, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights to which the United Kingdom is a party. This is in relation to discrimination against women on the following grounds by permitting: polygamy, forced marriages, marriages of girls below puberty, divorce by a unilateral repudiation by the husband (*talaaq*), and the ban on Muslim women marrying non-Muslim husbands.

The Constitution provides for the recognition of diversity and requires the legislature to enact laws that recognise, to a certain extent, religious and personal systems of family law.³² African customary law has already received such recognition,³³ and this did not cause many of the above problems because any person who does not want to be bound by customary may apply for a letter of exemption from customary law.³⁴ The same rule may be applied to any system of personal law in South Africa. Further, the Constitution recognises courts other than the civil courts. For instance, courts of traditional leaders staffed by traditional leaders who perform judicial functions are cur-

29 Poulter S 'The Claim to a Separate Islamic System of Personal Law for British Muslims' in Mallat C & Connors J *Islamic family law, Arab & Islamic Laws series* (1990) at 147.

30 See generally Fournier P 'The reception of Muslim family laws in western liberal states' in *Dossier 27: Canadian Council of Muslim Women* (December 2005) available at www.wluml.org/english/

31 See generally Poulter S (fn 29 above) at 157–159.

32 See the Preamble read with section 15(3) of the Constitution *supra*.

33 See s 211 and s 39 the Constitution *supra*; Black Administration Act 38 *supra*; Law of Evidence Amendment Act *supra*; Recognition of Customary Marriages Act *supra*; Traditional Leadership and Governance Framework Act 41 of 2003.

34 See s 31(1) of the Black Administration Act *supra* which reads: 'In any case in which he may deem fit, the Governor-General may grant to any Black a letter of exemption exempting the recipient from Black law and custom'.

rently operative in South Africa.³⁵ Furthermore, the courts have already pronounced on the relevance and the applicability of some of the finer points of personal law, and have applied the system to which the litigants belong. In *Ryland v Edros*, the court followed and applied the Islamic law in accordance with the Sunni jurisprudence as it was practised in the Cape.³⁶

Lastly, the South African Constitution prohibits any form of unfair sex and religious discrimination.³⁷ The South African legal system is now based on acceptance and protection of differences. It is important that this constitutional value finds its way through legislation that is required by the Constitution.

4.2 The Indian experience

Perhaps the best model for the development of personal laws and religious laws in South Africa are the developments made during post-colonial India. As stated above, this is mainly because post-colonial India passed a Constitution with a Bill of Rights, similar (in many respects) to that of the South African Constitution. Further, India recognises all forms of personal laws in private matters³⁸ – something which South Africa has not yet done. Article 15 of the Constitution of India reads:

'15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them ... (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

In India, the distinction between religious personal law, on the one hand, and secular law on the other, was introduced in 1772 by the British administrators.³⁹ While recognising that secularism had to be the cornerstone of the Indian State policy, the Constitution of India made both secularism and the commitment to legal pluralism its governing ideology.⁴⁰ Further, while commercial, civil, and criminal matters are regulated according to secular law, family law matters, such as marriage and divorce, inheritance and succession are regulated in accordance with religious personal laws.⁴¹ The Indian model proves to be the best model for South Africa as both the Indian and the South African Constitutions contain provisions protecting cultural and religious rights, and personal legal systems.

35 See sections 12, 20, 21A and 31 of the Black Administration Act *supra*. In particular, s 12(1) (a) provides: 'The Minister may authorize any Black chief... to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction' and section 20(1) reads: 'The Minister may by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed ... any offence at common law or under Black law and custom ...'.

36 *Ryland v Edros supra*. See also *Taylor v Kurtstag* NO and Others 2005 (7) BCLR 705 (W) at 706

37 See s 9 of Constitution.

38 See s 2 of the Hindu Marriage Act 25 of 1955.

39 Narain V 'Women's rights and the accommodation of "Difference". Muslim Women in India' 8 S. Cal. Rev. L. & Women's Stud. (1988) 43 at 49

40 *Ibid* 49

41 The process known as the "Islamization of Muslim law and Sanskritization of Hindu law." See generally Narain, V (Fn 39) 45. See also Solanki G 'Beyond Citizenship: State-Society Relations and Gender Justice in India' Paper presented at the 2006 Annual Conference of the Canadian Political Science Association, York University, Canada 1-3 June 2006.

5 CONCLUSION

Considering all the issues discussed above, one is bound to conclude that the South African courts have failed to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Further, the courts have failed to 'promote the spirit, purport and objects of the Bill of Rights' by not recognising that religious personal law (or at least religious family law) has become part of the mainstream legal system in South Africa. Furthermore, the courts have failed to protect the right of different peoples' to practise their religion by not recognising that the right to freedom of religion includes not only the mental aspects of belief, but also freedom to practise and have legal protection of the rules of their religion. By favouring the rules of the Christian faith, the courts have unfairly discriminated against other religions. To rectify these omissions, and to deal with such problems in a free and democratic society based on freedom and fundamental human rights, the courts must develop laws to reflect legal diversity and legal pluralism as contemplated in section 15 of the Constitution. This view is also supported by Van Niekerk as follows: 'Different laws have different functions to fulfil, functions for which they are best suited. "Other laws" need not of necessity be in conflict with state law; they may complement state law and direct the development of state law in harmony with basic values underlying non-state legal and social systems'.⁴² Clearly, there is a need for recognition of legal pluralism concerning matters of private law. This would be in compliance with the right to freedom of religion as guaranteed in the Constitution, considering the fact that everyone has a right to follow a religion of their choice.

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⁴² Van Niekerk G 'The plurality of legal domains in South Africa: the state's historical legislative intrusion into the Field of Urban Popular Justice and Customary Law' in Scharf W & Nina D (eds), *The other law: non-state ordering in South Africa* (2001) at 36.

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