

# DEEP LEGAL PLURALISM IN SOUTH AFRICA: JUDICIAL ACCOMMODATION OF NON-STATE LAW

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## Introduction

South Africa has been portrayed as a 'rainbow nation' by Archbishop Tutu in describing post-apartheid South Africa.<sup>1</sup> The expression was used again by President Mandela in his first month in office when he stated publicly:

Each of us is as intimately attached to the soil of this beautiful country as are the famous jacaranda trees of Pretoria and the mimosa trees of the bushveld - a *rainbow nation* at peace with itself and the world.<sup>2</sup>

There can be no doubt that the expression 'rainbow nation' was, and still is, a spoken metaphor for South African unity, intended to unify the greatly divided South African nation at a time when strict divisions existed between racial groups,

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<sup>1</sup> Between 1948 and 1994 the then ruling National Party pursued its policy of separate development, notoriously known as apartheid. During this time Afrikaner nationalism was rife and cultural and religious groups were kept separated from one another, simply because individuals belonging to the various groups were considered not to be culturally (or racially) equal.

<sup>2</sup> Own emphasis. Quoted in Manzo 1996: 71.

especially between white and black people. Nevertheless, apartheid may have been abolished but the fibre of South African society remains splintered along cultural and religious lines. The legal system of South Africa used to symbolise and, to a certain extent, still symbolises this divide. The state law is a mixed, or at least, a dual legal system that consists of the common law<sup>3</sup> applying to all South Africans except in circumstances where the African customary law<sup>4</sup> is applicable. Determining when the common law and when the customary law will be applicable is no easy matter. Individuals often find themselves in overlapping and even contradictory situations originating from different legal systems, and the courts have to determine which law is applicable to a certain set of facts through the application of the choice of law rules (Bennett 2006: 17-27).

But there is more to this than meets the eye. Some forms of non-state law have emerged as a reaction to some of the injustices caused by the colonial laws. For example, in the area of criminal law, so-called people's courts have applied alternative methods of unofficial dispute resolution developed as a reaction against

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<sup>3</sup> The common law is a conglomeration of European laws, chiefly a mixture of Roman-Dutch law and English common law, which has been developed by means of legislation and judicial decisions. One of the features of the South African legal system is the fact that it is largely uncodified. Every lawyer knows that he or she has to consult various sources to find the law. These sources include legislation, precedent, Roman-Dutch law, custom, customary law, modern legal textbooks and the Constitution. According to Girvin 1996: 95 the mixed legal system in South Africa owes a great deal to the earlier judges of South Africa.

<sup>4</sup> African customary law is the various laws observed by indigenous communities and can be found in scholarly textbooks, legislation, judicial decisions and custom. In *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 51 the Court stated: "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 Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution." For similar viewpoints, see *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44; *Mabuza v Mbatha* 2003 4 SA 218 (C) para 32; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) para 43.

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the (perceived or real) inaccessibility and unfairness of the Western<sup>5</sup> courts (Bennett 2004: 151-160). In other areas, for example in family law, members of cultural and religious communities previously forced to live together as a result of apartheid observe certain aspects of their own laws which are generally not recognised by South African law (Van Niekerk 2001: 349-361). Although both of these examples are manifestations of 'deep legal pluralism',<sup>6</sup> it is especially the last example that forms the focal point of this discussion.

One could blame apartheid for the existence, and even expansion, of non-state law ('the other law') in the context of family law, and thus for the phenomenon of legal pluralism in South Africa, or one could even go back so far as to blame it all on colonialism.<sup>7</sup> Whatever the rationale for the survival of deep legal pluralism in South Africa, legal pluralism is more than a simple juristic peculiarity; it is a reality that is closely interwoven with the daily lives of all South Africans. The legal fraternity is faced with the complexities of legal pluralism on a daily basis. Both the 1993<sup>8</sup> and the final<sup>9</sup> Constitution of South Africa, in guaranteeing cultural

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<sup>5</sup> The common law is characterised as 'Western' as it shares commonalities with other legal systems belonging to the Romano-Germanic and Common Law families.

<sup>6</sup> Legal pluralism may be interpreted in different ways. In a South African context, the discussion of Van Niekerk 2006: 5-14 and 2008: 208-220 is followed. She argues that the narrow interpretation of legal pluralism in the context of family laws is the co-existence of officially recognised state laws, whilst deep legal pluralism can be regarded as the factual situation which reflects the realities of a society in which various legal systems are observed, some officially and others unofficially. In South Africa, the common and customary law embodies official legal pluralism, whilst those two 'official' legal systems, together with all other 'unofficial' legal systems (eg Hindu law, Jewish law and Muslim law) embody 'deep' legal pluralism.

<sup>7</sup> The colonials tolerated at first and later applied African customary law to a certain extent. During the time of apartheid people belonging to other cultures were forced to live together in close-knit communities, thereby encouraging the formation of a group identity which, to a large extent, remains even today.

<sup>8</sup> Constitution of the Republic of South Africa 200 of 1993.

<sup>9</sup> Constitution of the Republic of South Africa, 1996. The final Constitution is

and religious rights, provide that the state may pass legislation recognising systems of personal and family law consistent with and subject to other provisions of the Constitution. These constitutional provisions do not compel the government to give legislative recognition to some forms of non-state law relating to culture or religion, neither do they create a right to have a particular cultural or religious system of personal law recognised (Moosa 1996: 354). In other words, there is no responsibility on the government to incorporate cultural or religious forms of non-state law into state law, and so far government and the legislature have mostly remained silent on these issues.<sup>10</sup>

However, the judiciary, in particular the Constitutional Court, has been less passive in affording individuals belonging to religious or cultural groups protection where needed. The relevant cases deal mostly with legal pluralism issues in the context of human rights law, and read like a jurisprudential chronicle reflecting the changing values of a diverse society on the move. This article discusses the change in judicial policy regarding aspects of non-state religious family law and the contribution of the judiciary to the acknowledgement of deep legal pluralism in South Africa. The modest aim of this contribution is not to give a full picture of South Africa's jurisprudence on these issues up to date, or to compare the situation in a global context.<sup>11</sup> In the discussion that follows the emphasis will be on

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supreme law and is not numbered in the same way as the other statutes. All references in this contribution are to the final Constitution unless indicated otherwise.

<sup>10</sup> In July 2003 the South African Law Reform Commission published a report proposing the enactment of legislation recognising certain aspects of Muslim law. Their final report contained a draft Recognition of Muslim Marriages Bill but to date this Bill has not been transformed into legislation and as a result Muslim marriages do not form part of state law as yet – see South African Law Reform Commission 2003: 110.

<sup>11</sup> Section 39(1)(b) of the Constitution quoted in the next paragraph compels a court to consider international law when interpreting the Bill of Rights. South Africa also follows a dualist approach to the incorporation of international law, which in essence requires the formal transformation of international law into domestic law. See Dugard 2005: 47-48. Although this contribution does not include a discussion of South Africa's international treaty obligations, it is fitting to refer briefly to the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) which South Africa ratified in

jurisprudence dealing with religious family laws, and more particular Muslim family law, produced by their adjudication of claims by Muslim parties that recently culminated in the benchmark judgment *Hassam v Jacobs*.<sup>12</sup> In doing so, the difference in the courts' approach before and after apartheid, and the factors influencing it, will be identified and discussed. This jurisprudence, it will be argued, clearly demonstrates that the judiciary's accommodation of religious and cultural diversity is acknowledging and even endorsing the existence of deep legal pluralism in South Africa.

### Setting the Stage for Deep Legal Pluralism in South Africa

As already indicated, South African state law does not recognise the laws of other cultural or religious legal systems, such as Muslim law or Jewish law. The respective communities observe their legal rules in the private sphere and observances thereof are overseen by religious institutions, such as the Beth Din for Jews and the Jamiat-ul-Ulama for Muslims. The institutions' pronouncements are only binding *inter partes*, and dissatisfied parties cannot approach the South African courts to enforce or appeal their findings (Rautenbach, Goolam & Moosa: 2006: 151).

Over the years there have been numerous attempts by religious communities, especially the Muslim community, to have at least certain aspects of their personal laws recognised.<sup>13</sup> These communities find support for their argument that South

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1993. It is notable that some Muslim countries have ratified the Convention with reservations, especially by accepting the Convention only to the extent that its provisions are compatible with Islam.

<sup>12</sup> 2009 (5) SA 572 (CC) (the *Hassam* case). In this case the applicant (the surviving wife) was married to the deceased in accordance with Muslim rites. The deceased was also married to a second wife without the knowledge of the applicant. The executor refused to recognise the surviving wife as a spouse of the deceased because of the deceased's second marriage. The question was whether a Muslim wife, involved in a polygynous Muslim union, could be regarded as a spouse in terms of the Intestate Succession Act 81 of 1987.

<sup>13</sup> The majority of Muslims who first arrived in the former Cape Colony were brought from the Dutch colonies in the East Indies (now Indonesia), the coastal

Africa must give recognition to aspects of other legal systems in the text of the Constitution. Section 15(1) of the Constitution recognises everyone's right to freedom of conscience, religion, thought, belief and opinion, whilst section 15(3)(a) further provides for conditional legislative recognition of certain aspects of cultural and religious family law and/or personal legal systems. Section 15(3) of the Constitution is an important provision in the context of legal pluralism and has been utilised in discussions in favour of legal pluralism on a number of occasions. It reads as follows:

- (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.

Recognition in terms of this provision must be consistent with other provisions of the Constitution and it must be construed in the context of the interpretation clause which reads as follows (section 39):

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regions of Southern India and Malaysia as slaves, convicts and political exiles. Later they were also imported from India to work on the sugar plantations of the former Natal province, and some of them also came as businessmen. Although the Dutch colonials prohibited the practise of Islam in public places or the conversion of heathens or Christians to Islam, the English colonials gave Muslims religious freedom in 1806. Today Muslims constitute about 2% of the total population of South Africa. In 1996 there were 553 584 Muslims in a population of 40 583 573 people in South Africa (statistics provided electronically by the Central Statistical Services on 24 February 2000). There are also other statistics available that differ somewhat from the statistics of the Central Statistical Services. The difference is, however, of no great importance. See Moosa 1996: 39-40. More recent statistics are not available. Most South African Muslims are members of the Sunni school but there is a small number of individuals who had converted to the Shi'a school. For more information, see Mahida 2010.

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- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The interpretation clause has been instrumental in displacing to some extent the traditional approach to interpretation of 'literalism-cum-intentionalism'<sup>14</sup> with purposive interpretation.<sup>15</sup> In general the judiciary is eager to steer away from the traditional interpretation mechanisms, remarkably also in the area of legal pluralism, as will be illustrated later. In *Daniels v Campbell*<sup>16</sup> Justice Sachs

<sup>14</sup> This expression is borrowed from Du Plessis 2008: 32.29-41, who explains that it refers to the alliance between determining the intention of the legislature and finding the literal meaning of a specific provision.

<sup>15</sup> Currie and De Waal 2005: 148 explains the meaning of purposive interpretation as follows: "[It] is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values."

<sup>16</sup> 2004 (5) SA 331 (CC) (the *Daniels* case). This case dealt with the legal status of a Muslim wife in the context of family law and the question was whether a spouse married according to the tenets of the Muslim faith could be regarded as a spouse in terms of the Intestate Succession Act 81 of 1987 and/or as a survivor in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The answer of the Court to both questions was positive and both Acts were developed to make provision for the surviving spouse of a *de facto* Muslim union. The Court, however, refrained from expressing its viewpoint on the legal status of Muslim wives involved in a *de*

interpreted section 15(3)(a) in the context of the founding constitutional values (human dignity, equality and freedom) and concluded that the section permits the recognition of 'marriages concluded under any tradition or a system of religion, personal or family law.' He held that the-

... founding values as given expression in the Bill of Rights now provide the context within which legislation must be construed. The interpretive injunction contained in section 39(2), namely, that when interpreting any legislation courts must promote the spirit, purport and objects of the Bill of Rights, must be understood in this context (at para 55).

Justice Sachs (at para 56) also pointed out that the common and customary law (the state law) must be developed and legislation interpreted to be consistent with the Bill of Rights<sup>17</sup> and international obligations to reflect the 'change in the legal norms and the values of our [South African] society.'

In the context of religious and cultural family law a number of other constitutional provisions, mostly classified as human rights provisions, are also important to qualify, strengthen and contextualise religious and cultural diversity, for example:<sup>18</sup>

- the preamble to the Constitution recognises the diverse character of South African society and declares that 'the people of South Africa ... believe that South Africa belongs to all who live in it, united in our diversity';
- section 9(1) guarantees everyone's equality before the law and equal protection and benefit from the law and must be read with section 9(3), which prohibits direct or indirect unfair discrimination in the public or private sphere on one or more grounds, including ethnic or social origin, colour, religion, conscience, belief, culture or language;
- section 10 emphasises that everyone has inherent dignity which must be respected and protected;

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*facto* polygynous Muslim union.

<sup>17</sup> The Bill of Rights is contained in Chapter 2 of the Constitution.

<sup>18</sup> See also Du Plessis 2008: 380-384 and 2009: 11-14 for a discussion of the constitutional provisions which are relevant to this debate.

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- section 15(1) is the most important freedom of religion clause guaranteeing everyone's 'right to freedom of conscience, religion, thought, belief and opinion.' Together with section 15(3), allowing for legislative recognition of religious and cultural marriages and other personal legal systems outside the mainstream legal system, it forms a strong basis for the emergence of legal pluralism in South Africa.
- section 30 provides that everyone has the right to participate in the cultural life of his or her choice;
- section 31 deals directly with culture and provides that all persons have a right to enjoy and practise their religion together with other members of that community; and
- section 185 makes provision for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

Equally important in the context of legal pluralism are the so-called operational constitutional provisions, which include the following:

- section 7(1), which characterises the Bill of Rights as a cornerstone of democracy, enshrining the rights of all people in South Africa and affirming the values of dignity, equality and freedom; and section 7(2), which commands the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights';
- section 8(1), which applies the Bill of Rights to all law and binds the judiciary, legislature, executive and other organs of state, and also section 8(3), which enjoins the development of legislation or the common law to give effect to a right in the Bill of Rights;
- section 38, which allows for aggrieved persons to approach a court for the protection of their rights; and
- section 39 (quoted above), which prescribes a new approach to constitutional and legislative interpretation.

In the context of cultural and religious family laws, these provisions have played and will continue to play an important role in the adjudication of legal pluralism issues, as will be illustrated in the following paragraphs.

## Emergence of Deep Legal Pluralism Through Case Law

Before democratic changes were brought about, the principle of parliamentary sovereignty and limited powers when it came to the evaluation of legislation prevented the courts from developing the law, even when fairness dictated otherwise. This is no longer so. South African courts have the power to develop the law and must do so without fear and prejudice to 'promote the spirit, purport and objects of the Bill of Rights.' The South African Constitution declares that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice' (section 165(2)).

A value-laden Constitution opened the doors for judicial engagement with the phenomenon of deep legal pluralism and gave the courts the opportunity to bring about change in the judicial policies regarding the same. A perusal of the case law illustrates that there are various factors that played a role in the judiciary's acknowledgement of deep legal pluralism in South Africa. The discussion that follows attempts to pinpoint these factors by comparing, by way of illustration, the approach of the judiciary post 1994 with their approach before 1994.<sup>19</sup> The case law selected for consideration is a mere sample from an array of cases dealing with typical legal pluralism issues and focuses generally on adjudication of aspects of Muslim family law.

### *New approach to legislative interpretation*

The first noticeable change in the approach of the courts relates to their method of legislative interpretation brought about by the interpretation clause in the Constitution (section 39 quoted above). According to the orthodox method of interpretation (the 'literalism-cum-intentionalism' approach) the courts' paramount rule is to ascertain the intention of the legislature by looking at the ordinary grammatical meaning of the words used in the statutory provision, except if doing

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<sup>19</sup> Besides the commencement of the 1993 Constitution, 1994 is the date hailed as the beginning of the new democracy in South Africa. It was also the date when the first democratic elections were held, and the date on which the former President Mandela came to power and the African National Congress (ANC) became the governing political party.

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so 'would lead to an absurdity so glaring that the Legislature could not have contemplated it.'<sup>20</sup> Although some courts, most notably those of the Supreme Court of Appeal, still favour this approach to legislative interpretation, it is generally accepted that the Constitution provides a new framework for legislative interpretation. In *Nortje v Attorney-General of the Cape*<sup>21</sup> it was stated that-

... it is no doubt correct to say that the constraints imposed by the traditional rules of interpreting statutes result in too restrictive and 'legalistic' an approach to legislation of this kind and will frustrate both contemporary and future Courts' efforts to accommodate changing social dynamics over the years (page 471).

The Constitution is a value-laden document which requires promotion and application and, as pointed out in the *Nortje* case (page 471), it provides a set of societal values to which the law must conform. However, many questions remain unanswered. For example, which and whose values are we talking about? From whose point of view are these values evaluated, and what about the dangers of cultural relativism?<sup>22</sup> In a nutshell, one could say that South Africa has a diverse community of constitutional interpreters, most notably the judges, involved in the constitutional discourse (Botha 2006: 26-27) and different approaches are the order of the day rather than the exception. Furthermore, if one considers the fact that most of the members of the judiciary were and still are the products of rather similar South African law schools, why then is there such a great a difference between the pre and post apartheid judgments pertaining to legal pluralism issues? The difference could be attributed to the fact that the multicultural composition of the judiciary has changed considerably, and that this fact evidently has shaped and is still shaping the (legal) culture.

One could illustrate the problem by referring to pre-1994 case law dealing with the recognition of Muslim unions. For a very long time the South African courts refused to recognise the validity of Muslim unions and their consequences because

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<sup>20</sup> *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273.

<sup>21</sup> 1995 (2) SA 460 (C) (the *Nortje* case).

<sup>22</sup> For example 'muti'-killings in order to harvest human body parts for traditional medicine. See Rautenbach 2007: 519.

of their potentially polygynous nature.<sup>23</sup> The *locus classicus* in this regard dates back more than eighty years, *viz.* *Seedat's Executors v The Master (Natal)*<sup>24</sup> where the Court refused to recognise the validity of the Muslim union because of its potentially polygynous nature and declared that-

[p]olygamy [polygyny] vitally affects the nature of the most important relationship into which human beings can enter. *It is reprobated by the majority of civilized peoples, on grounds of morality and religion*, and the Courts of a country which forbids it are not justified in recognizing a polygamous union as a valid marriage (pages 307-308 - italics added).

The words uttered by the Court, *viz.* 'the majority of civilized peoples, on grounds of morality and religion' clearly illustrate the point in question. Who is the 'majority of civilized' people that influences the court's decision that a polygamous union is contrary to this country's morals? It is tempting to conclude that the Court's words reflected its own beliefs, customs and ethics which were relative to the individual judge within his own social context, thus reflecting a kind of cultural relativistic approach.

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<sup>23</sup> Polygyny is a form of polygamy where a man has more than one wife. Although the majority of cases use the terminology 'polygamy' or 'polygamous', it is in actual fact 'polygyny' or 'polygynous' they had in mind. In the case of traditional Muslim law, a man is allowed to marry up to four wives. Goolam, Badat and Moosa 2006: 266.

<sup>24</sup> 1917 AD 302 (the *Seedat's* case). In this case the testator lived in India where he married his first wife according to Muslim rites. After he obtained domicile in South Africa he re-visited India and married his second wife also according to Muslim rites. Upon his death in South Africa it turned out that the testator had a will executed in South Africa bequeathing his estate to executors in trust to realise and to distribute it between his two wives and his children according to the Muslim law of succession. The question as to the validity of the second marriage did not come into question (probably because the litigants knew they had a lost case) but the argument was that the first marriage was a valid marriage, because it was valid in India. The court based its non-recognition of the first marriage on the principle that 'no country is under an obligation on grounds of international comity to recognize a legal relation which is repugnant to the moral principles of its people' (see page 307).

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The viewpoint in the *Seedat's* case represented the stance of the courts for many years to come<sup>25</sup> and it was still the attitude twenty seven years ago in *Ismail v Ismail*<sup>26</sup> where the Court held that there was no justification to deviate from the line of decisions refusing to give effect to the consequences of polygynous unions in the almost seventy years preceding it. The court came to the conclusion that Muslim unions must be regarded as void on the grounds of public policy. What exactly the standard for public policy at that stage was can be found in the court's explanation of the meaning of the concept of 'public policy,' which is closely connected with terms such as *boni mores, mores* or morals, terms which have a narrow and a wide meaning (pages 1025-1026). Widely construed, when the concept *boni mores, mores* or morals is used in connection with conduct, it refers to conduct which is morally or sexually reprehensible. However, narrowly interpreted, it can be defined as 'the accepted customs and usages of a particular

<sup>25</sup> Some of the decisions have been referred to in the *Ismail* case referred to in the next note. See also Denson 2009: 250-263 and Rautenbach 2004: 121-152 for a discussion of some of the cases.

<sup>26</sup> 1983 1 SA 1006 (A) (the *Ismail* case). The union between the spouses was celebrated and terminated in accordance with the tenets and customs of the Muslim faith. The wife claimed payment of arrear maintenance, delivery of deferred dowry and the return or payment in lieu of the return of certain jewellery. Her action was founded upon Muslim customs. Council for the wife argued that previous cases considered the mores of society which, at that stage, regarded all non-Christian cultures to be 'barbaric and uncivilised and all tenets of non-Christian cultures which clash with Christian concepts as immoral even within the framework of relative culture and religion.' Council was of the opinion that times had changed and that the mores of modern times no longer accommodated this stance, but indeed had become more tolerant towards polygynous unions - see pages 1008 - 1014. Council for the husband argued, on the other hand, that the customs relied upon by the wife were *contra bonos mores*, unreasonable and in conflict with the laws of South Africa, and that the wife's cause of action had to fail - see pages 1014-1017. The Court *a quo* upheld the exception of the husband on the grounds that the union was potentially polygynous and against the public policy. The wife appealed against this decision. On appeal the Court held that the union was void on the grounds of public policy, and so were the customs and contract which flowed therefrom. As a result the claims instituted in terms of the 'void' Muslim union failed.

social group that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation' (page 1025H). The court found that a Muslim union 'can be regarded as being *contra bonos mores* in the wider sense of the phrase, *viz.* as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society'; thereby marginalising everybody not compliant to the morals of only one religious group, most probably Christianity, that sets the standard for public policy.

The *Seedat's* and *Ismail* cases, including those cases in between which were bounded by the *stare decisis* rule,<sup>27</sup> emanated from a time when the sovereignty of the South African parliament was not debatable, long before the commencement of a new constitutional order under a supreme<sup>28</sup> and justiciable Constitution, and during a time when segregation between racial groups was the order of the day. The *Ismail* case was the last judgment on the issue of a Muslim union before the 1993 Constitution came into operation, followed by the final Constitution. These two Constitutions changed the playing field considerably. One has to agree with the words of Judge Cameron in *Holomisa v Argus Newspapers Ltd*<sup>29</sup> that '[t]he Constitution has changed the "context" of all legal thought and decision-making in South Africa' (page 618C-D). The change in legal thought and decision-making, especially regarding judicial interpretation, is evident in a number of constitutional court decisions pertaining to legal pluralism issues.

Although section 39 of the Constitution led to a new approach to interpretation, especially regarding human rights issues, it does not necessarily mean that there is always a deviation from orthodox methods; it can also involve a re-evaluation of those methods. For example, in the *Daniels* case the court had to determine if a Muslim wife can be regarded as a 'spouse' in terms of South African common law. The court found that linguistically the word 'spouse' in its ordinary meaning includes parties to a Muslim marriage and that such a reading would correspond to

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<sup>27</sup> According to this rule, courts must abide or adhere to principles established by decisions in earlier cases, especially those higher up in the hierarchy.

<sup>28</sup> Section 2 of the Constitution confirms the supremacy of the South African Constitution and reads: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

<sup>29</sup> 1996 (2) SA 588 (W).

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the way the word is generally understood and used. According to the court-

[i]t is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse' than to include them. Such exclusion as was effected in the past did not flow from courts giving the word 'spouse' its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting.

These words revert back to the age-old argument that a judge cannot be impartial to the society and political climate in which he or she operates. It is generally expected from a 'good judge' (the interpreter) to be impartial and tolerant, especially in adjudicating matters before court but it is difficult to bring this idea in line with the contents of most beliefs, since the 'truth,' as viewed in many beliefs, creates a conviction which necessitates subjective criticism and even intolerance to a certain degree. We also need to bear in mind that practising legal science (legal pluralism included) is a human activity and can therefore not be entirely objective, unininvolved, value free or value neutral (Van der Walt 2002: .55-58). The law must be understood as a set of social rules but there should be no doubt that the social rules cannot be 'set' (or fixed). They change as the demands of society change. In addition, factors such as the values of the founding values of the Constitution, politics and the cultural context of the judge have to have an influence on judgments. How else can one explain the fact that there is often more than one dissenting judgment but only one set of facts? The set of social rules which dominated during the apartheid era certainly influenced methods of interpretation, just as present-day judges are influenced by contemporary societal values. Most recently, in the *Hassam* case (paras 24–25), the Constitutional Court referred to this change in approach to legislative interpretation under the influence of section 39 of the Constitution. The Court agreed with the *Daniels* case where the latter stated that '... [d]iscriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution (para 20)'.

On a few occasions the Courts observed that legislative interpretation was 'construed in the context of a legal order that did not respect human dignity, equality and freedom of all people' (for example, the *Daniels* case para 25). There is no doubt that the context (socially<sup>30</sup> and legally<sup>31</sup>) that influences legislative interpretation has changed considerably. The South African Constitution recognises and endorses diversity, and this fact must influence the orthodox approach to legislative interpretation too. In the *Daniels* case (para 28) the Court pointed out that an interpretive approach that endorses the 'new ethos of tolerance, pluralism and religious freedom' will ensure the achievement of the progressive realisation of transformative constitutionalism.<sup>32</sup> Such an approach is also in line with the aim of the final Constitution to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. (see preamble).'

Du Plessis (2009: 11) argues that contemporary South African jurisprudence dealing with religious freedom and equality can be referred to as 'a jurisprudence of difference.' He finds his cue in the workings of the political theorist, Young, who has referred to the phenomenon of social diversity as 'a politics of difference.' She explains that a goal of social justice is social equality and makes it clear that-

[e]quality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported

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<sup>30</sup> Social changes include the abolition of apartheid and the promotion of cultural and religious diversity.

<sup>31</sup> The most important change was the commencement of the 1993 Constitution, followed by the final Constitution.

<sup>32</sup> The South African Constitution is regarded as a transformative document and the concept of transformative constitutionalism has been utilised in a variety of contexts and meanings, denoting some or other form of transformation from the old to the new. See also, for example, Klare 1998: 14; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae 2006 (2) SA 311 (CC) para 232; S v Mhlungu 1995 (3) SA 867 (CC) para 8; S v Makwanyane 1995 (3) SA 391 (CC) paras 9, 301 - 302.*

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substantive opportunity for all to develop and exercise their capacities and realise their choices (Young 1990: 173).

It could be argued that for Muslim spouses (both the husband and the wife or wives) social justice is achievable only when they have achieved full participation and inclusion in the state's major institutions, such as full access to the courts, the unqualified protection of the law, and the recognition of aspects of their family law. Young's understanding of social equality is in line with the Constitutional Court's comprehension of an individual's freedom and dignity to participate voluntarily in religious and cultural practices. According to *MEC for Education, Kwazulu-Natal v Pillay*<sup>33</sup> a necessary element of freedom and of dignity is an 'entitlement to respect for the unique set of ends that the individual pursues' (para 65). In line with this argument one could argue that true social equality is achievable only if one has the freedom to live according to the laws of your own legal system. In other words, the laws of a country should be interpreted to reflect the different peoples living in it. Although it may be argued that social justice is only achievable by the participation and inclusion of the group (Muslim community) in the major institutions, the question remains whether such participation and inclusion necessarily means social justice for the individuals to whom some of group's practices may be discriminatory? Saying 'yes' may create the impression that collective rights (for example, the right to practice your religion in connection with other members of the group) are superior to individual rights (for example, the right to equality between the sexes). Put differently, in recognising the right of the Muslim community to receive official recognition of its legal system,<sup>34</sup> conflict may be created between typically collective rights and

<sup>33</sup> 2008 (1) SA 474 (CC) (the *Pillay* case). This judgment of the Constitutional Court is regarded as a groundbreaking decision regarding cultural and religious rights in South Africa. A Hindu learner, Sunali, was forbidden by her school to wear a nose stud because it was banned by the Code of Conduct of the particular school. Sunali and her mother were not satisfied with the decision of the school and initiated legal steps against the school which ended up the Constitutional Court. The Constitutional Court found that a combination of the school's refusal to grant Sunali an exception to wear her nose-stud and the provisions of the Code of Conduct resulted in unfair discrimination. See Du Plessis 2008: 379, 396-407 for a discussion of the case.

<sup>34</sup> However, one has to keep in mind that Islamic law is not a unified legal system but that it consists of all the laws of various Muslim schools which may differ

individual rights. The example under discussion so far comes to mind, *viz.* the situation where a Muslim husband has the advantages of polygyny, whilst a Muslim wife has to be content with only one husband and the disadvantages of polygyny. One may argue that polygyny is fundamentally anti-women and that equal regard of the values of a pluralistic society in a particular legal system does not necessarily mean gender equality.

*New ethos informing the boni mores*<sup>35</sup>

Linking up with the new approach to legal interpretation is the question as to which ethos informs or should inform the *boni mores*. In line with the narrow definition of *boni mores* the moral values of a social group were defined narrowly to include only one social group in previous jurisprudence (see *Ismail* case at pages 1025-1026). Christianity was generally regarded as the source of all values, and the fundamental values of other major religions, such as those of the Muslim faith, were not regarded as informing the *boni mores*.

In contrast to the ethos that informed the *boni mores* before the new constitutional order, the current constitutional dispensation necessitates a re-evaluation of the whole situation. As pointed out in *Ryland v Edros*<sup>36</sup> public policy is a question of

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considerably. This aspect may also hamper the process of recognition of Muslim law in South Africa quite considerably.

<sup>35</sup> Concepts such as 'public policy,' '*boni mores*,' 'mores' and '*contra bonos mores*' are used by the judiciary and legal scholars alike and it is not always clear if there is a difference in the meaning of these concepts. In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 71 the Court refers to this problem but indicates that these concepts can be used interchangeably to illustrate when something is against the *mores* of society and when not. However, the problem is, and always was, the question as to which society one has to refer to. As proclaimed in *South African Breweries Ltd v HE Muriel* (1905) 26 NLR 367: '... public policy is a very unruly horse and once you get astride it you will never know where it will carry you.'

<sup>36</sup> 1997 (1) BCLR 77 (C) (the *Ryland* case. The union between the spouses was celebrated and terminated according to the tenets and custom of the Muslim faith. The husband instituted an action in a South African court to evict his ex-wife from the house they shared but she defended the action and instituted a counter-claim, based on the 'contractual agreement' constituted by their Muslim union. In terms

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fact which can change only if there is a change in the facts on which it is based. The 1993 Constitution<sup>37</sup> brought about a change in the factual position and required a reappraisal of the basic values on which public policy was based at that time. If the 'spirit, purport and objects' of the 1993 Constitution were in conflict with public policy, as expressed in the *Ismail* case, there had to be a change in the public policy. In considering whether or not the underlying values of the 1993 Constitution were in conflict with the traditional views on public policy, the Court concluded that it could not be said that the contract arising from a Muslim union was 'contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society,' or was 'fundamentally opposed to our principles and institutions' as expressed in the *Ismail* case. The Court based its decision, *inter alia*, on the fact that in the *Ismail* case the viewpoints of only one group in a multi-cultural society had been taken into consideration, and held:

[I]t is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those 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 (para 707G).

The Court also referred to the principles of equality, diversity and the recognition of South African society as a multi-cultural society. These principles were among the values that underlined the 1993 Constitution (and that permeate the final Constitution). In the Court's opinion these values 'irradiate' the concept of public policy that the courts have to apply (paras 707H-709A). Accordingly the Court held that the Muslim union, as well as the contract arising from the union, was not *contra bonos mores*, and as a result the *Ismail* case no longer 'operates to preclude a court from enforcing' contractual claims such as those brought by the parties in this case. It is important to point out that the question of polygyny was not important to this case, because the union between the parties was *de facto*

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of the contract they agreed that their marriage and matter flowing therefrom would be governed by Muslim personal law. One of the issues the Court had to decide on was whether the *Ismail* case barred the husband and wife from relying on this contract which forms the basis of their Muslim union. The Court found that the contract between the parties was indeed valid and enforceable.

<sup>37</sup> The case was decided when the 1993 Constitution was still in operation.

monogamous. As a result the question of gender (in)equality in the case of polygyny was never discussed but only equality in the context of tolerance and accommodation of communities with different societal values.

In *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)*<sup>38</sup> the Supreme Court of Appeal confirmed the new direction taken in the *Ryland* case and again found that there was an 'important shift in the identifiable *boni mores* of the community' which 'must also manifest itself in a corresponding evolution in the relevant parameters of application in this area (para 23)'. Before the enactment of the two Constitutions, the courts qualified the *boni mores* by referring to the societal norms of only one group but now they recognise the fact that the South African society is diverse with different societal norms. What is 'wrong' to one society is not necessarily 'wrong' to another. This shift in the *boni mores*, reflecting the different societal norms, must be reflected in the approach of the courts towards the customs of other religions. Against this background the Court held that it 'is inconsistent with the new ethos of tolerance, pluralism and religious freedom' not to recognise the claim of a Muslim wife for damages for loss of support' (para 20) and concluded that '[t]he inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced (para 23)'.

The new ethos informing public policy when the consequences of unrecognised Muslim unions are in issue continued to prevail in a number of consecutive decisions and reached a high point in the *Hassam* case where the Court reiterated that '... the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy ... in contrast to the rigidly exclusive approach that was based on the values and beliefs of a limited sector of society ... (para 26)'.

The new direction taken by some courts reflects a healthy and much needed transformation from a *divided pluralistic society* into one that is *united in its*

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<sup>38</sup> 1999 (4) SA 1319 (SCA) (the *Amod* case). Mrs Amod, whose husband had been killed in a motor collision, lodged a claim against the Accident Fund for damages for loss of support. The Accident Fund argued that their union could not be regarded as a valid marriage and that it was thus not responsible to honour the claim against them, since it was liable only in the case of valid marriages.

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*diversity*, as declared in the preamble of the South African Constitution. To put it in another way, social equality, and thus quality equality, is achieved by acknowledging that 'for all to develop and exercise their capacities and realise their choices' (as Young described it above) it might be necessary to allow for and recognise difference under the law. However, a word of caution must be added here; accommodating legal pluralism must never be an obstacle to the protection of individual human rights, especially gender rights.

*New approach to diversity: celebration of difference<sup>39</sup>*

As already pointed out, the cultural policies of the former South African government were based on racial segregation (or apartheid). Legislation was designed to keep society divided along racial lines, resulting in unequal development of various cultural groups. The law was applied to force separation in society, publicly and privately, and amounted to a form of social engineering.<sup>40</sup> These policies were infamous and, for obvious reasons, widely criticised and globally resented.

As explained in the introduction, there is another context where the law gave, and still gives, legal effect to diversity in the private sphere, noticeable in the mixed nature of the South African legal system. Customary law was initially ignored by the colonials, then tolerated, and eventually recognised, albeit with certain reservations and in certain conditions only. It is now part and parcel of, and on a par with, the common law of South Africa.<sup>41</sup> One might have an uneasy feeling that this situation, where different laws apply to different people, is nothing more than a manifestation of the old apartheid system, but the fact that there is an

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<sup>39</sup> The expression 'celebration of difference' is borrowed from Du Plessis 2009: 9 where he discusses the development of South African jurisprudence regarding religious freedom and equality, which he calls the 'celebration of difference.'

<sup>40</sup> For example, the Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriage between persons of different races, the Group Areas Act 41 of 1950 partitioned South Africa into areas allocated to different racial groups, and the Population Registration Act 30 of 1950 formalised racial classification.

<sup>41</sup> For a brief historical discussion of the recognition of customary law in South Africa, see Olivier 2009: 12-28, and also note 4 above.

element of individual choice present today, which is based on the right and freedom associated with cultural or religious choices, probably saves the day.<sup>42</sup> However, such an argument is not trouble-free. The question remains whether this freedom (cultural and religious) can be exercised by an individual, or is an individual's choice constrained by the individual's affiliation to a group? Even in this modern day and age it is doubtful whether people, especially women, subject to religious or cultural legal systems other than the secular system, really have an option to choose between alternative legal systems.

An unreserved adoption of legal pluralism may also have the effect that discriminatory provisions in unrecognised personal laws continue to be in force due to narrow and doubtful judicial interpretations and the neglect to enforce the concept of social justice in favour of women. In this regard one can refer to the number of South African cases dealing with the legal status of Muslim marriages, where it is often the wife that institutes matrimonial action on the basis of her Muslim union concluded in accordance with Muslim rites, whilst the husband is the one that contends that the rites in question were 'either *contra bonos mores*, unreasonable or in conflict with laws which were unalterable by [marriage] agreement' (*Ismail* case). In defence of the South African courts, especially since 1994, it must be pointed out that their approach to accommodate legal pluralism, rather than to negate it, were largely due to the fact that the aggrieved parties in the proceedings have been discarded women who needed legal protection.

Although apartheid belongs to the past, South Africa remains challenged by the fact that it is home to a pluralistic society whose cultural fabric has been shaped by a number of factors, including ethnicity, language, religion, culture, politics and the economy.<sup>43</sup> This reality makes it difficult for government to create 'a single

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<sup>42</sup> However, Sezgin 2009: 273-297 convincingly illustrates how a post-colonial state such as Israel used legal pluralism to exclude Arabs in the nation-building process. See also Sezgin 2004: 199-235 for a political analysis of legal pluralism in Israel.

<sup>43</sup> Demographically, the South African population can broadly be divided into the following population groups: Africans 79,6%, Coloureds 8,9%, Indian/Asian 2,5% and Whites 8,9%. These groups can be subdivided even further depending on the ethnicity, language, religion and origins of a particular group. See Statistics South Africa, Statsonline: The Digital Face of Stats SA, available at <http://www.statssa.gov.za/publications/P0302/P03022007.pdf> (accessed 3 June

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South African identity without marginalising culture.<sup>44</sup> Similar debates exist in the legal sphere and the South African legislature also struggles with the question as to whether to diversify or unify.<sup>45</sup> The South African Constitution accepts diversity and recognises that to promote diversity it may be necessary to create express provisions for difference. This new approach towards difference or diversity is reflected in contemporary legislative and judicial policies as illustrated hereafter.

*(a) New legislative policy*

In line with the constitutional values there has been a clear shift in legislative policy in providing for the recognition of religious unions or aspects thereof, other than common law and customary law marriages, in certain circumstances. Examples include:

- the Civil Proceedings Evidence Act 25 of 1965 recognises religious marriages for the purposes of the law of evidence (section 10A);
  - the Criminal Procedure Act 51 of 1977 recognises religious marriages for the purposes of the compelling spouses as witnesses in criminal proceedings (section 195(2));
  - the Special Pensions Act 69 of 1996 defines a 'dependent' to include a spouse to whom the deceased was married under any Asian religion (section
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2008). In terms of religious affiliation, about two-thirds (79%) of South Africans are Christian, mainly Protestant. Other prominent religions include Islam (2%), Hinduism (2%) and Judaism (2%). About 15% of the population practises no religion at all. See Central Intelligence Agency, *The World Fact Book*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html#Econ> (accessed 30 June 2008). South Africa has 11 official languages. According to the 2001 census, isiZulu is the mother tongue of 23,8% of the population, followed by isiXhosa (17,6%), Afrikaans (13,3%), Sesotho (9,4%), and English and Setswana (8,2% each). The least-spoken indigenous language in South Africa is isiNdebele, which is spoken by 1,6% of the population. In addition to these official languages, several local and foreign dialects are also spoken in South Africa. See Statistics South Africa 2004: 8-12.

<sup>44</sup> Du Plessis 2006: 13.

<sup>45</sup> See, for example, Rautenbach 2006b: 241-264; Rautenbach 2008: 119-132.

- 31(b)(ii));
- the Demobilisation Act 99 of 1996 defines a 'dependent' to include a spouse to whom the deceased was married in accordance with the tenets of a religion (section 1(vi)(c));
  - the Value Added Tax Act 89 of 1991 recognises religious marriages for the purposes of tax exemptions in respect of goods imported into South Africa (Schedule 1 to the Act);
  - the Transfer Duty Act 40 of 1949 exempts property inherited by the surviving spouse in a religious marriage from transfer duty (section 9(1)(f) read with the definition of 'spouse' in section 1);
  - the Estate Duty Act 45 of 1955 exempts property accruing to the surviving spouse in a religious marriage from estate duty (section 4(q) read with the definition of 'spouse' in section 1); and
  - the Birth and Deaths Registration Act 51 of 1992 defines marriage to include all marriages concluded according to the tenets of any religion provided that the relevant marriage is recognised by the Minister (section 1(2)(a)).

These few examples show that the South African legislature recognises the fact that there are aspects of other legal systems, most notably family law, in need of recognition or regulation, especially if the relevant aspects fall outside the reach of existing legislation. If that were to be achieved, these aspects would no longer fall outside the scope of state law but would instead form part of it. On the face of it, recognising or regulating some aspects of other religious or cultural legal systems but refusing to give recognition to these legal systems, or at least, to give recognition to these marriages, seems to be an anomaly which is difficult to defend. Although it may be argued that the legislation listed above recognises religious marriages for practical reasons, the confusion is indicative of the plurality of the South African society. And it is conspicuous that most of the examples given above deal with economic considerations benefiting the state.

Parliament and the legislature have been less enthusiastic in taking steps towards the legislative recognition of Muslim unions as valid marriages. Although the South African Law Reform Commission proposed a Draft Bill on the Recognition of Muslim Marriages, included in their Report (2003: 110-133), which was consequently submitted to the Minister of Justice and Constitutional Development in July 2003, there has been no legislative recognition to date. This situation has led to some frustration, and in May 2009 the Women's Legal Centre Trust lodged an application for direct access to the Constitutional Court to seek an order

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declaring that the president and parliament had failed to fulfil their constitutional obligations to enact legislation that recognises Muslim marriages. The case was reported as *Women's Legal Centre Trust v President of the Republic of South Africa*,<sup>46</sup> but the Court held that the obligation to enact legislation to fulfil the rights in the Bill of Rights does not fall on the president and parliament alone and that it is not in the interest of justice to allow the Women's Legal Centre Trust direct access to the Court. In this particular case it would have been best to have the benefit of other courts' insights and to have a multistage litigation process where issues can be isolated and clarified. Until the legislation as proposed in the Draft Bill has been enacted, the South African courts will be the forum to approach if aggrieved Muslim parties want to seek redress for the hardships caused by non-recognition of the validity of their unions.

(b) *New judicial policy*

In line with the shift in legislative policy, there are a number of South African cases where cultural and religious diversity has been affirmed, even beyond mere tolerance, and in actual fact recognised and promoted.<sup>47</sup> According to Du Plessis (2008: 377) the jurisprudence, especially that of the Constitutional Court, that deals with the assertion of religious and related entitlements-

... has increasingly been interrogating, with transformative rigour, 'mainstream' preferences and prejudices regarding the organisation of societal life, inspired by the desire to proceed beyond – and not again to resurrect – all that used to contribute to and sustain marginalisation of the Other.<sup>48</sup>

Although cultural and religious freedom has an element of choice or the freedom to choose and presupposes the right or freedom to be different, it is not easy to determine or define how the law should deal with these differences. Legal science

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<sup>46</sup> 2009 (6) SA 94 (CC).

<sup>47</sup> Du Plessis 2008: 376-408 discusses some of these examples.

<sup>48</sup> Du Plessis 2008: 376 refers to this process as memorial constitutionalism. In other words, it reflects the need to come to terms with South Africa's notorious past and to fulfill guarantees of a transformed future.

(legal pluralism included) is a human activity and can therefore not be entirely objective, uninvolving, value free or value neutral. The founding values of the Constitution have shaped and continue to shape how the judiciary deals with pluralistic issues in South African society. The earlier part of this article has provided a preview of the change in judicial policy regarding religious and cultural diversity in a family law context. Although the change in policy can largely be attributed to the enactment of a normative, value-laden Constitution aspiring to transform South African society from a state of intolerance to one of celebration of difference, one should be mindful of the fact that a Constitution is merely a legal text which would become mere paper law if not used properly by the executive, judiciary, legislature and all spheres of government. In this regard, judicial engagement from the outset is quite commendable, in matters of cultural and religious diversity especially.

A perusal of the case law since early times illustrates how judicial policy has evolved from intolerance towards potentially polygynous Muslim unions (*Seedat's* case) to acceptance of *de facto* monogamous Muslim unions (*Daniels* case), and finally the acknowledgement of the consequences of polygynous Muslim unions (*Hassam* case). Clearly this is an indication of legal development through judicial activism, albeit to a limited extent. It is also important to note that these cases did not recognise the validity of Muslim unions but rather gave protection to the parties of these unions by developing the South African common law. For example, in the *Hassan* case the common law understanding of spouse was developed to include the wives of a deceased Muslim in order to allow for them to inherit from the intestate estate of the deceased.

An interesting point worth mentioning comes from this decision of the Constitutional Court, *viz.* the *Hassam* case, where the Court issued a disclaimer: '[i]t should ... be emphasised that this judgment does not purport to incorporate any aspect of Sharia law into South African law (para 17).' This remark is something of an anomaly, because in giving recognition to certain aspects or consequences of a Muslim union, the Court indirectly incorporates those aspects or consequences into South African law. Thus, it does not make sense to say the parties to a Muslim union (monogamous or polygynous) are spouses in terms of the Intestate Succession Act 81 of 1987 but that this 'recognised' fact does not mean that aspects of Sharia law are *not* incorporated into South African law. Surely it implies quite the opposite: if one recognises aspects of another legal system, those aspects are inevitably incorporated into the legal system that recognised them. The courts are probably cautious not to create the impression

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that they are overstepping their lawmaking boundaries and, considering this, the comment of the Constitutional Court is understandable. The courts are aware of the dangers of 'lawfare' and have to develop a jurisprudence that is balanced enough to give the government and the legislature the space to do their job but at the same time to ensure that justice is served to those who need it.

The new legislative and judicial policy regarding the recognition of aspects of Muslim law has generally led to an improvement in the lives of Muslims, especially Muslim women, and measures up to the standard that Dworkin (1978: 22) sets for sound public policy, *viz.* that it is-

... that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change).

*(c) Human Rights Based Approach in Protecting the Rights of Cultural and Religious Communities*

As explained before, judicial accommodation of deep legal pluralism has advanced along the lines of human rights to a large extent. If there is one thing about the Constitution that every South African knows, it is that it gives you justiciable rights. The abundance of human rights jurisprudence illustrates this fact. Human rights litigation in the context of cultural and religious rights is the order of the day, but not all of the cases deal with non-state family law. Although section 15(3) of the Constitution does not create a right to have aspects of non-state family law recognised, other provisions in the Bill of Rights provide the opportunity for the accommodation of legal pluralism through the recognition of aspects of religious and cultural legal systems. The Constitution accentuates the values of human dignity, reaching equality, and the expansion of human rights and freedoms (sections 1 and 7). Apart from this, the Bill of Rights contains several rights that need to be protected and promoted, for instance human dignity (section 10), equality (section 9), religion and culture (sections 15, 30 and 31), freedom of expression (section 16) and just administrative action (section 33). Most of these rights will come under discussion in religions and culture but not all of them will be dealt with in this contribution.

In the *Hassam* case the Court was at pains to stress that the case was not concerned with the constitutional validity of polygynous Muslim unions but with the question of whether or not the exclusion of Muslim spouses from the protection of legislation (in this case the Intestate Succession Act 81 of 1987) boils down to a violation of the rights of the spouses. Almost inevitably, the right to equality comes into play. The argument is usually that the exclusion of Muslim spouses from the protection normally afforded to spouses validly married is an infringement of the right to equality (section 9 of the Constitution). Here the comparator is the legal position of a spouse married in terms of South African law which is usually more favourable than her Muslim counterpart. In other words, if the non-recognition of the Muslim union places the wife in a position inferior to her common law counterpart, then it amounts to unfair discrimination which is unconstitutional. However, the situation is more complex than it appears. By recognising the fact that there are religious and cultural unions in South Africa, which do not comply with the common law requirements, the court gives recognition to some of the effects of deep legal pluralism and thus opens the door for official recognition of gender discrimination which is a built-in aspect of polygyny. They must therefore be very cautious not to allow legal pluralism to justify gender discrimination.

The courts dealt with equality issues on numerous occasions and the equality jurisprudence had ample time to develop a comprehensive set of principles.<sup>49</sup> In *Harksen v Lane*<sup>50</sup> (para 5) the Constitutional Court developed the well-known multi-stage inquiry to determine the constitutionality of a discriminating provision.<sup>51</sup> The first step is to determine if the impugned provision or conduct differentiates between people or categories of people. If the answer is no, there is no violation of section 9. If, however, the answer is yes, the second step is to determine if the differentiation amounts to unfair discrimination. This requires a two-stage analysis, namely:

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<sup>49</sup> According to Dworkin 1978: 22 a 'principle' is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'

<sup>50</sup> 1998 (1) SA 300 (CC).

<sup>51</sup> This explanation is based on the author's discussion of the test in Bekker, Rautenbach and Goolam 2006: 165-166.

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- (a) does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;
- (b) if the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, the complainant will have to establish unfairness. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If at the end of the two-stage enquiry the differentiation is not found to be unfair, there will be no violation of section 9. If, however, the discrimination is found to be unfair then a determination will have to be made as to whether or not the provisions can be justified under section 36 (the limitation clause) of the Constitution.

This enquiry was also applied in the *Hassam* case. The court found that the exclusion of Muslim spouses of polygynous Muslim unions from the definition of spouse contained in the Intestate Succession Act 81 of 1987 unfairly discriminates against Muslim spouses on the grounds of gender, religion and marital status. There is no justification for such discrimination and as a result the relevant provision in the Intestate Succession Act is unconstitutional and must be rectified to include spouses from monogamous and polygynous Muslim unions. The Court declared that at the enactment of the Intestate Succession Act-

... the only marriages to which the legislature sought to afford protection were civil marriages recognised under the Marriage Act. We must now consider the meaning of the word 'spouse' in the [Intestate Succession] Act in light of its current place and effect in South Africa and particularly its effect on Muslim communities. ... [The word 'spouse'] ought to be read through the prism of the Constitution (para 45).

The right to equality is not the only right that comes into play when the protection

of cultural and religious rights is concerned. For example, the right to dignity is often utilised, individually or together with other rights, to illustrate a violation of rights. This was also the situation in the *Hassan* case. The Court held that a narrow interpretation of the word 'spouse' that excludes Muslim spouses from the Intestate Succession Act would 'violate the widow's rights to equality in relation to marital status, religion and culture and would therefore violate her right to dignity (para 48).' Put in another way, it means that dignity qualifies equality. If the widow's right to dignity is impaired by discriminatory actions (for example, her exclusion from legislative protection), it leads to inequality and thus warrants constitutional protection. Other rights that have been utilised in the human rights debate include the rights associated with culture and/or religion (sections 15, 30 and 31) and also freedom of expression (section 16).

### Concluding Remarks

The interaction between religious and cultural communities within a political system has for a considerable time been one of the most important causes of social problems. As a result of historical developments and the diverse nature of the South African society, deep legal pluralism is a reality in South Africa. While the executive, legislature and legal scholars struggle to come to terms with this phenomenon, the courts have to deal on a daily basis with the harsh consequences of people still adhering to the legal rules of their 'unrecognised' legal system. One could argue that the co-existence of a plurality of legal systems is undesirable or even impractical and that integration or harmonisation is the only way forward. However, such a viewpoint would not reflect the reality. Some writers have argued that an interactive process through the intervention of the courts and/or the legislature can create a harmonised result where discord between legal systems is removed but the differences remain, thus endorsing instead of vetoing legal pluralism (Van Niekerk 2008: 209).

The contribution of the courts towards creating a transformed society where the rights and freedoms of an individual are protected and promoted cannot be underestimated. Dworkin (1998: 1-6) explains that '[l]awsuits matter in another way that cannot be measured in money or even liberty' and points out that judges undeniably 'make new law' every time they give a judgment with influential value. Despite the disclaimer in the *Hassam* case (para 17) that the development of the word 'spouse' to include the multiple wives of a Muslim husband does not incorporate any aspect of Muslim law into South African law, there is no doubt in

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my mind that this piecemeal recognition of aspects of Muslim law acknowledges and even endorses the phenomenon of deep legal pluralism in South Africa. In the long run, judicial acknowledgment of aspects of Muslim law might lead to the transformation of deep legal pluralism (non-state law) into official legal pluralism (state law pluralism).

In the wake of a transformative Constitution, various factors have been conducive in allowing the judiciary to deviate from earlier decisions that refused to recognise aspects of other religious and cultural legal systems, *viz.* a new approach to legislative interpretation, a new ethos informing the *boni mores*, a new attitude to cultural and religious diversity, a new approach towards human rights protection, and the changes in the legislative and judicial policies. These factors should not be viewed in isolation. As evident from the discussion the factors overlap and even qualify each other, for example, the change in *boni mores* also contributes to the change in legislative interpretation methods and *vice versa*.

In the wake of cases such as the *Daniels* case and the *Hassam* case debates have been taking place on the legal status of cultural and religious non-state laws formerly consigned to the private sphere as 'things' that cultural and religious communities do in the privacy of their homes. The Constitutional Court's viewpoint is that religious and cultural diversity must not be tolerated as a 'necessary evil' but be affirmed 'as one of the primary treasures of our nation' (*Pillay* case para 92). At this point, such affirmation proceeds along the line of the right to equality which is regarded by the Constitutional court as something that does not require identical treatment but 'equal concern and equal respect' (*Pillay* case para 103). However, it is important that one should not lose sight of the fact that it is not only religious and cultural communities that demand equal concern and equal respect for their non-state laws but also individuals forming these communities. The fact that one chooses to be a member of a community living according to laws outside the mainstream legal systems, can never be sufficient motivation for human rights infringements within these communities. In other words, legal pluralism should never be used as a tool to defend or to continue with human rights violations.

Elsewhere this author (Rautenbach 2006b: 241) compared the phenomenon of legal pluralism in India with South Africa and came to the conclusion that the South African common law should be harmonised with the other personal legal systems that are in operation (unofficially and officially). South Africa should opt for one unified secular legal system that applies to all, regardless of culture or religion,

whilst providing for differences based on culture and religion. For example, a uniform code for intestate succession that provides for the devolution of property of a deceased who is involved in polygynous marriages should be enacted. In recent times this has indeed happened with the amendment of the Intestate Succession Act 81 of 1987 to make provision for the inclusion of spouses of polygynous customary and Muslim marriages.

The harmonisation of various laws will require a ‘testing’ of the constitutionality of the rules of other personal legal systems. It will therefore be necessary to reach consensus on the content of the rules that must be recognised. The participation of the relevant religious and cultural communities in the process of determining the constitutionality and content of the relevant rules is indispensable. It is, however, ultimately the responsibility of the legislature to ensure that the aspirations and ideals of the South African Constitution, which include equality and human dignity for all, are realised. The courts must be the final protectors who will ensure that the new legislation satisfies the provisions of the new constitutional order. Nevertheless, judicial accommodation of aspects of cultural and religious laws undoubtedly led to the endorsement of deep legal pluralism in South Africa and it is highly unlikely that this process will be reversed. A fact which is in all probability frightening to those who believe that true unity is only possible through unification and harmonisation.

It is important to remember that the law reflects the mores of society but that it changes slowly, so that it is inclined to reflect the mores of society as they were in the past rather than in the present. Perhaps one could argue that we have communities of people in South Africa with conflicting mores, some of which are archaic, and that the differences are likely to be elided in the near future under the pressure of globalisation, for instance. In that case it would seem to be attractive to accept the existence of different legal regimes in different communities of the population for the time being. But as none of these groups is discrete (the process of globalisation being well advanced in some areas) there would so often be cases where dispute would arise as to which regime should be applicable that it would not be practical to accommodate a number of different systems simultaneously. We therefore need to abide by one single system - that much is obvious - and debate should be about the mores that inform the system rather than about whether or not we should have a plurality of systems.

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