

Cultural Symbols and Schools Act : A South African Case Study

* **Hlako Choma**

Senior lecturer and head of department : Public Law,
University of Venda, Law School. Field of expertise
Constitutional Law. LLM (Howard University) LLM
(Georgetown University)

Abstract

Section 9 of the Republic of South Africa Constitution¹ recognises that discrimination against people who are members of disfavoured groups may lead to patterns of group disadvantage and harm. It turns to be unfair, since it builds and entrenches inequality amongst different groups in the society. It is common cause that the school governing body is obliged in terms of the South African Schools Act,² to adopt a code of conduct for learners. The Minister of Education may in terms of section 8 (3) of the Schools Act determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.

1 Introduction

The schools in general enroll learners with diverse cultures and without discrimination, the school cannot accommodate the vast dissimilarity of expectations. The schools cannot accommodate different medical practices, rituals, remedies, contrasting habits or customs, dissimilar beliefs and opposing traditions.

It is generally accepted that in the open and democratic society contemplated by the Constitution³ there must be mutually respectful co-existence between the secular and the sacred. The function of the court is to recognise the sphere with

each inhabits, not to force the one into the sphere of the other. An open and democratic society accommodates and manages difference of intensely held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm.

2 Code of Conduct and the Constitution

The focus of the research paper is on the code of conduct by the schools. It is desirable that the code of conduct must be adopted by the school after consultation with the learners, their parents and the educators of the school. The consultation also involve people drawn from every racial, religious and cultural group in South Africa. The issue, however, is not only whether there was extensive consultation on and support for the code of conduct but also whether it accords with the Constitution, the Schools Act and the Guidelines.⁴ The Constitution prohibits both direct and indirect discrimination, it implies that, any practices whose purpose and object is to discriminate unfairly, or whose effect or impact or outcome, irrespective of the motive or intention, amounts to unfair discrimination.⁵ The importance of accommodating cultural beliefs and practices within the pluralistic South African society cannot be overestimated.

2.1 Code of conduct and the nose stud

The Durban Girls High School's Code of Conduct turned to be a subject matter of litigation in 2004, when a learner returned from the school holiday in the first week of the fourth term in the year 2004, wearing a nose stud. It implies that she had her nose pierced during the school holidays.⁶ The learner and her mother originated from South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women, in particular, the

wearing of nose stud. The culture among others, dictates that a young woman, upon her physical maturity, would allow the piercing of her nose. It would be an indication for her eligibility for marriage. The tradition is currently used to honour the South Indian family daughters as responsible young adults. The learner at Durban Girls High School and her mother adhered to the tradition and worn nose stud. It is common cause that family traditions are handed down from generation to generation, and are not taken up as a trend.

The school's code of conduct provided that, in respect of jewellery, earrings, plain round studs or sleepers may be worn with one in each ear lobe at the same level and further that no other jewellery may be worn except watch.⁷

The Durban Girls High School, Principal requested an explanation from the learner's mother, Mrs. Pillay as to why did she allow her daughter, the learner to wear the nose stud. The learner's mother, Mrs. Pillay in response, stated that she allowed the piercing for several reasons including the fact that it was a time to honour tradition. The Durban Girls High School, Principal took a decision against wearing of the nose stud, and further that Mrs. Pillay's daughter, the learner should not be allowed to wear the nose stud.

Mrs. Pillay, the learner's mother wrote a letter to KwaZulu-Natal MEC of Education asserting that the Chairperson of the School Governing Body of Durban Girls High School's decision was in violation of her daughter, learner's constitutional rights to practice the religious and cultural traditions of her choice especially when the cultural traditions are common practice to the rest of the family. Mrs. Pillay, learner's mother further submitted that the right to practice religious and cultural traditions takes precedence over any school code, in particular, when it is not related to, nor has any bearing on the actual manner, attitude and conduct of the learner at school.

The matter was referred to Magistrate of Durban Equality Court. Mrs. Pillay, learner's mother sought a Court Order in the following terms:

- interdicting and restraining Durban Girls High School, Principal from violating Mrs. Pillay's daughter, the learner's right to equality or conducting unfair discriminatory practices against her daughter, learner, on the grounds of religion, conscience, belief and culture.
- directing KwaZulu-Natal MEC of Education to assess progress made by Durban Girls High School, Principal to achieve the goals of transformation.

The Magistrate of the Durban Equality Court dismissed Mrs. Pillay, the learner's mother's application, and held as follows:

- the school's actions against Mrs. Pillay, learner's mother were reasonable and fair in the circumstances.
 - the school did not discriminate or unfairly discriminate against Mrs. Pillay's daughter, the learner.
 - Mrs. Pillay's daughter, the learner's wearing of the nose stud was in violation of the school's code.
- The Minister of Education may in terms of section 8 (3) of the Schools Act determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.
- The Guidelines for the consideration of governing bodies in adopting a code of conduct for learners were promulgated in Government Notice,⁸ and the Government Gazette.⁹

The matter proceeded to Constitutional Court for final adjudication. O' Regan J sitting in the Constitutional Court highlighted the importance of the issue in *Pillay's case*.

Section 9 of the Constitution¹⁰ was adopted in recognition that discrimination against people who are members of disfavoured

groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair. It builds and entrenches inequality amongst different groups in the society. The drafters realized that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purpose of section 8 and in particular sections (2), (3) and 4.

Langa D P remarked as follows, in *Pretoria City Council v Walker*¹¹

The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) of the Constitution.

Sachs J expressed his views as follows, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*¹²

The present case shows well that equality should not be confused with Uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenisation of behaviour but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society.¹³

The Court held that the School Act states, in its preamble, that the country requires a new national system for schools which, among other things, advance the democratic transformation of society and combat all forms of unfair

discrimination and intolerance, protect and advance the diverse culture and languages. According to the Guidelines, the school must protect, promote and fulfill the rights identified in the Bill of Rights, including respect for one another's convictions and cultural traditions. As the impugned provision of the school's code of conduct violates cultural and religious rights of Appellant and her daughter, it does not serve a legitimate or an authorised purpose and it is therefore unfair.¹⁴

2.2 Morning beads

It must be understood that South Africa is a multicultural country. The protection of symbols in South Africa is framed by constitutional provisions. The South African constitutional Bill of Rights contains protection for freedom of conscience, religion, thought, belief and opinion.

Symbolism is a primitive but effective way of communicating ideas.

The State announces rank, function and authority through crowns and maces, uniforms, black robes the church speaks through the Cross, Crucifix, the alter and shrine and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones.¹⁵

It is well known that Africans have different mourning cultures. Some after losing a member of the family will wear black clothes for a year or so, in particular women who have lost their husbands. Men will attach a small black cloth on their shirts after passing on of their wives, and these may be extended to their children. It is done for a certain period of time.

Public schools have been identified as the “the primary vehicles for transmitting the values on which society rests”,¹⁶ which means that school board members, administrators and teachers responsible for managing the schools have the difficult task of determining which symbols are appropriate for the schools education mission.¹⁷

The issue similar to the one that arose litigation at Durban Girls High School at Springs Boys’ High School in 2009 however, there was neither litigation nor court involvement. It came as a shock to many South Africans when the Principal of Springs Boy’s High School broke a string of mourning beads which were around the neck of a learner, Bongani Jiana.¹⁸ The learner, Bongani Jiana was mourning his mother’s passing on in a traditional manner. The mourning was in accordance with the learner, Bongani Jiana’s culture and belief. It is submitted that the matter is similar to the one that raised concerns in *Pillay’s ease* and that if proper considerations were accorded to the learner, Bongani Jiana’s matter, the Principal of Spring Boy’s High School would have been successfully interdicted and/or restrained from braking a string of mourning beads which were around the neck of a learner, Bongani Jiana. It must be further noted that some of these shocking and traumatic cases could not be adjudicated at the courts, for example, Constitutional Court since the effected persons were indigents and could not afford legal services of lawyers. Interestingly, the mourning beads was not visible enough to attract attention of fellow students and/or teachers at Springs Boy’s High School. It may be contended that the mourning beads was less violative to the School Code. Be that as it may, the mourning beads was consistent with the learner, Bongani Jiana’s culture and belief.

Conclusion

The constitutions' guarantee of religious and cultural freedom extend to groups as well as individuals, and that the rules enforcing that guarantee should not reflexively favour individual interests over the rights of groups. Conflicts over majority and minority symbols reveal an increasing blurring of the line between secularism and religion. On the one hand, religious have become "deprivatized", and seek a wider role in the public sphere as well as in the political arena. On the other hand, the neutral character of secularism and its ability to solve religious conflicts in pluralistic societies is increasingly contested.¹⁹

References

1. Act 108 of 1996. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
2. 84 of 1996
3. Act 108 of 1996
4. *S v Makwanyane and Another* 1995 ZACC 3; 1995 (3) SA 391 (CC)
5. *Pretoria City Council v Walker* 1999 ZACC 1; 1998 (2) SA 363 (CC)
6. *Pillay v KwaZulu – Natal MEC of Education* 2006 6 SA 363 (EC)
7. *Pillay* referred to above
8. 776 of 1998
9. 1890 dated 15 May 1998 hereinafter called "the guideline"
10. The Constitution of the Republic of South Africa Act 108 of 1996
11. (1998) ZACC 1; 1998 (2) SA 363 (CC)
12. *Kwazulu-Natal MEC for Education v Pillay* 2008 1 SA 474 (CC) paras 141 – 148. Justice O' Regan's reasons view religion individualistically and fail to accord religion an appropriate associational dimension, Constitutional Court Review Volum 1 2008, article by Ian T Benso The Case for Religious Inclusivism and The Judicial Recognition of Religious Associational Rights: A Response to Lenta 302 footnote 18.
13. Kriegler J in *S v Makwanyane and Another* (1995) ZACC 3; 1995 (3) SA 391 (CC) at para 210 stated that "At the very least the reasonableness of a provision which files directly in the face of an entrenched right would have to be cogently established.....".

14. Kriegler J in *S v Makwanyane and Another* (1995) ZACC 3; 1995 (3) SA 391 (CC) at para 210 stated that “At the very least the reasonableness of a provision which files directly in the face of an entrenched right would have to be cogently established.....”.
15. *West Virginia Board of Education v Bernette* 319 US 624 1943, quoted in de Waal E *et al* *Symbolism in Education: A comparative legal analysis of symbolism, language and culture in the United States and South Africa* 261 2008 *De Jure* 562
16. *Plyler v Doe* 457 US 202 221 (Ed Law Rep 953) 1982
17. De Waal *et al* referred to above at 562
18. <http://www.thetimes.co.za/PrintEdition/Article.aspx?id/=929497>(accessed 6/02/2009). See CMA Nicholso *The Right of Learners to Wear Religious and Cultural Symbols to School – When Jewellery not Jewellery. Conference for Law Teachers July 2009 University of Natal Pietermaritzburg Campus*
19. Susanna Mancini, *Between Crucifixes and Veils : Secularism and Religion as Guarantors of Cultural Convergence*, Internationals Association of Law Schools, 11-12 September 2009 Washington DC USA