

# The Expression of Cultural and Religious Practice: A Constitutional Test

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## 1. Summary

Various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approach adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understanding of equality.

The jurisprudence of the courts make clear that the proper reach of the equality right must be determined by reference to the society's history and the underlying values of the Constitution. It has been observed that a major constitutional object is the creation of an non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a concept of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.

The question is, how does the state, in limiting religious freedom, conform to the standards of an open and democratic society based on human dignity, equality and freedom? The hope is that the conclusion of this paper will then be able to be extended to more controversial cases, in particular, involving limits on the right to freedom of expression, culture and belief.<sup>1</sup>

### 1.1 Introduction

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<sup>1</sup> Demise Meyerson, *Rights Limited: Freedom of Expression, Religion and the South African Constitution*.

Discrimination of freedom of faith, confession and culture is admissible if it does not harm the rights of others, and/or the rights of the believer. Despite the fact that the freedom is admissible if it does not harm others and/or the believer, the state can limit the freedom of faith, confession and culture, but the state should justify the limitation thereof. The state should compare the rights and interests that in precise conditions are opposed to each other.<sup>2</sup> On the basis of such comparison the state should ascertain the side the rights and interests deserve more protection. It should be determined in accordance with relevant and prevailing circumstances of each and every case, that is, each case will be decided on its merits.

## 2. Secularism and Religion

The conflicts that arise in relation to the “place” of religious symbols in the public sphere, do not only reflect most of the dilemmas that liberal democracies face in the attempt to reconcile constitutionalism and religion through adherence to secularism in the public place. The actual challenge is on the legitimacy of the dominant conception of constitutionalism and its nexus to the principle of secularism.

Religious symbols in the public schools typically raise two sets of conflicts. The first set of conflicts arises over the extent to which the right to wear religious symbols and clothes can be limited in the name of other rights and principles of equal constitutional value. The second type of conflict arises when a religious symbol, such as the crucifix or the crèche, is used as a “public language” of identity by State authorities. In this case, unlike in the first type of conflict, the contested symbol represents the dominant religion and not that of minority group.<sup>3</sup>

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<sup>2</sup> Ketevan Kalandadze, Academic Manager, Caucasus School of Law, Caucasus University, Georgia, US. Religion and Constitution of Georgia, delivered at International Association of Law Schools, *Conference on Constitutional Law September 11-12, 2009 Washington DC* <http://www.ialsnet>

<sup>3</sup> Susanna Mancini, Professor of Public Comparative Law, The Law School of the University of Bologna, Italy. Between Crucifixes and Veils: Secularism and Religion as Guarantors of Cultural Convergence delivered at International Association of Law Schools, *Conference on Constitutional Law September 11-12, 2009 Washington DC* <http://www.ialsnet>.

In practice, however, controversies have arisen exclusively in relation to the right of pupils belonging to religious minorities to wear their symbols and have almost exclusively concerned Islamic Schoolgirls.

The controversy around the “Hijab”, piece of clothing worn by the Islamic faith women, in many western countries, allows the perspective of how political traditions influence law and legal solutions adopted by the countries. In France, for instance the law prohibits the use of any ostentatious religious symbols in public schools. In the United States of America there is no law that prohibits the use of the Islamic veil in public schools.

Other European countries have given attention to the issue, to include countries of Islamic majority such as Turkey, where the debate is intense. The interesting part of the debate is the discussion on the reasons that justify the different conclusions that arise from the same political tradition. The point relies on the relationships between the State and the Churches and freedom of religion. The Anglo-Saxon republican tradition and the French republican tradition, that have common basis, diverge when the issues refer to religious and cultural differences in the public scope.

“Repression of and discrimination against minorities is as old recorded history itself. The Supreme Court of India held in a famous national anthem case that ‘Our tradition teaches tolerance, our philosophy preaches tolerance, our constitution practices tolerance’. Let us dilute it”.<sup>4</sup>

The conflict that arises in relation to “the place” of religious symbols in public and / or schools sphere and its dilemmas, is articulated in the South African landmark case. The case forced South African jurisprudence to focus and to attend to the complexity of cultures and the problems associated with the accommodation of religious belief and practice in constitutional democracies.

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<sup>4</sup> Prof Faizan Mustafa Vice-Chancellor National Law University, Orissa India. Religious Conversion, Re-Conversion and India Constitution, delivered at International Association of Law Schools, *Conference on Constitutional Law September 11-12, 2009 Washington DC* <http://www.ialsnet>.

## 2.1 *Pillay v Kwa Zulu-Natal MEC of Education and others*<sup>5</sup>

### 2.2 The background

Appellant's daughter who was a learner at Durban Girls High School ("the school") returned from the school holiday in the first week of the fourth term in the year 2004 wearing a nose stud, having had her nose pierced during the holiday. The school's code of conduct provides that, in respect of jewellery, earrings-plain round studs/sleepers may be worn with one in each ear lobe at the same level and further that no other jewellery may be worn except a watch.

Third Respondent, Principal : Durban Girls High School sought an explanation from Appellant for her daughter's decision to wear the nose stud. Appellant, in response, stated that she allowed the piercing for several reasons including the fact that this is a time honoured tradition. She and her daughter come from South Indian family that has sought to maintain a cultural identity by respecting and implementing the traditions of the women before them.

Usually, a young woman, upon her physical maturity, would get her nose pierced, as an indication that she is now eligible for marriage. While this physically orientated reasoning no longer applies, they do still use the tradition to honour their daughters as responsible young adults.

After her sixteenth birthday, her grandmother will replace the current gold stud with a diamond stud. This will be done as part of a religious ritual to honour and bless her daughter. It is also a way in which the elders of the household bestow worldly goods including other pieces of jewellery upon the young women. This serves not only to

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<sup>5</sup> AR 791/05 [2006]. See also Iain T Benson *The Case for Religious Inclusivism and the Judicial Recognition of Religious Associational Rights: A Response to Lenta*, *Constitutional Court Review* 2008 at 299, "what is said here about moral positions applies equally to religious and cultural beliefs in a public school setting such as *Pillay*. Simply put, convictions emanating from religious beliefs ought to be at no disadvantage in terms of public respect by comparison to belief sets that emanate from non-religious convictions".

indicate that they value their daughters but is in keeping with Indian tradition, that their daughters are the Luxmi (goddess of prosperity) and Light of the house.

The Appellant and her daughter have adhered to this tradition and her daughter wears a nose stud. From this perspective she cannot and will not impose a double standard on her daughter. Her daughter is not wearing the nose stud for adornment and / or fashion purpose. Family traditions are handed down from generation to generation, not taken up as a trend.

### 2.3 Decision against the wearing of the nose stud.

On 2<sup>nd</sup> February 2005 Fourth Respondent, Chairperson SGB : DGHS took a decision that Appellant's daughter should not be allowed to wear the nose stud. This decision was to take effect on 4<sup>th</sup> April 2005.

Appellant then addressed a letter to First Respondent, Kwazulu-Natal MEC of Education appealing and asserting that Fourth Respondent, Chairperson SGB : DGHS's decision was a violation of her daughter's constitutional rights to practice the religious and cultural traditions of her choice especially when they are common practice to the rest of her family and that this right takes precedence over any school code particularly when it is not related to, nor has any bearing on, the actual manner, attitude and conduct of the learner at school<sup>6</sup>.

Second Respondent, Schools Liaison Officer in a letter dated 6<sup>th</sup> May 2005 replied on behalf of First Respondent, Kwazulu-Natal MEC of Education refusing Appellant's appeal. In endorsing the decision of the Fourth Respondent, Chairperson SGB : DGHS

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<sup>6</sup> Iain T Benson "The Case for Religious Inclusivism and the Judicial Recognition of Religious Associational Rights : A Response to Lenta, *Constitutional Court Review* 2008 at 295 The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. The conversation have many voices".

Second Respondent, School Liason Officer wrote that “Schools are not obliged, as it is unreasonable to expect them, to accommodate all idiosyncratic practices.”

In the letter dated 13<sup>th</sup> May 2005 Third Respondent, Principal : Durban Girls High School advised Appellant that the nose stud should be removed. Appellant’s daughter was accordingly given until Monday 23<sup>rd</sup> May 2005 to remove the nose stud, failing which the matter would be referred to Fourth Respondent, Chairperson SGB : DGHS for disciplinary action to be taken against Appellant’s daughter.

The rebuff from Respondents prompted Appellant, as complainant, to institute proceedings and seek the following order, in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>7</sup>

- Interdicting and restraining Third Respondent, Principal: Durban Girls High School from violating her daughter’s right to equality or conducting unfair discriminatory practices against her, on the grounds of religion, conscience, belief and culture.
- Directing First Respondent, Kwazulu-Natal MEC for Education to access progress made by the Third Respondent, Principal: Durban Girls High School to achieve the goal of transformation

After hearing the evidence of Appellant, Dr. Rambilass and Mrs. A Martin, who were the only witnesses who testified, in the Durban Equality Court, the Court decided as follows:

- the school’s action against Appellant’s daughter were reasonable and fair in the circumstances.
- the school did not discriminate or unfairly discriminate against Appellant’s daughter.
- Appellant’s daughter’s wearing of the nose stud was in violation of the school’s code.

The Court further held that:

- The preparation of the code of conduct, in schools, is a requirement imposed on the governing body of a public school by section 8 (1) of the South Africa Schools Act.<sup>8</sup>

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<sup>7</sup> 4 of 2000 hereinafter called “ the Equality Act”

- 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,<sup>9</sup> and the – Government Gazette.<sup>10</sup>

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 Constitution<sup>11</sup> 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*<sup>12</sup>

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*<sup>13</sup>

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<sup>8</sup> 84 of 1996 hereinafter called “the School Act”

<sup>9</sup> 776 of 1998

<sup>10</sup> 1890 dated 15 May 1998 hereinafter called “the guideline”

<sup>11</sup> The Constitution of the Republic of South Africa Act 108 of 1996

<sup>12</sup> (1998) ZACC 1; 1998 (2) SA 363 (CC)

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.<sup>14</sup>

The Court held that the School Act states, in its preable, 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.<sup>15</sup>

## Conclusion

The constitutions' guarantee of religious and cultural freedom extends 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, religions 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

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<sup>13</sup> (1998) ZACC 15; 1999 (1) SA 6 (CC)

<sup>14</sup> *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.

<sup>15</sup> Krieger 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 -----."



secularism and its ability to solve religious conflicts in pluralistic societies is increasingly contested.<sup>16</sup>

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<sup>16</sup> Susanna Mancini, *Between Crucifixes and Veils : Secularism and Religion as Guarantors of Cultural Convergence* referred to in page 3 of this paper.