RIGHT TO RELIGIOUS FREEDOM AND EQUALITY: CONSTITUTIONAL RIGHTS TO PRACTICE ONE’S RELIGION

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ABSTRACT

The Constitutional right to practice one’s religion is of fundamental importance in an open society. The right to believe or not to believe, and to act or not to act accordingly to his/her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. After 22 years of constitutional democracy in South Africa, the religious rights enjoy eminence among the rights entrenched the Bill of Rights in the Constitution. The National Policy on Religion in Education effectively banned confessional, sectarian religion from public schools but allowed for the teaching of Religion Studies as an academic subject and for religious observances, a condition that these were offered in a fair and equitable manner. It can be asked whether the state has served social justice through this policy and the Constitution.

Keywords: religion, social justice, Constitution, morality, Human Rights, state

INTRODUCTION

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his/her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity.

These two dicta come from judgements of South Africa Constitutional Court and confirmed years into the evolution of constitutional democracy in South Africa, that religious rights enjoy eminence among the rights entrenched on the Bill of Rights in the Constitution.

The preamble of post-apartheid South Africa’s Constitution of 1996 contains references to God in the form of multilingual evocation asking for God’s protection and Blessing¹. Dutch theologian Johannes van der Ven describes this text “as a rhetorical petition prayer”². The Constitution nevertheless enshrines the right to

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freedom of religion. The Bill of Rights contains a number of provisions dealing with religious freedom.

**CONSTITUTION GUARANTEES OF RELIGIOUS AND OTHER RELATED RIGHTS**

A view of constitutional provisions dealing directly with religious rights and freedoms is needed to be able to survey constitutional jurisprudence on the entitlements of religion’s freedom and equality.

Section 9, the equality clause, prohibits unfair discrimination on various grounds including religion and requires national legislation to be enacted to prevent or prohibit unfair discrimination.

Section 15(1) is the Constitution’s most salient freedom of religious clause guaranteeing everyone’s “right to freedom of conscience, religion, thought, belief and opinion”. Equal in status is section 9(10) guaranteeing everyone’s equality before and equal protection and benefit of the law, read with section 9(3) explicitly proscribing unfair discrimination “against anyone” on the grounds of amongst others, religion, conscience and belief. Equality in section 9(1) includes the equality and equal treatment of dissimilar religions and their adherents.4

Section 15 also allows religious observances in state and state aided institutions, provided they follow authority rules, they are conducted on an equitable basis and attendance is free and voluntary and provides for the recognitions of religious legal systems and marriages that are not inconsistent with the Constitution.

Other sections in the Bill of Rights refer to religious freedom and equality in various ways.

Section 15(2)5 allows for the conduct of religious observances at state or state-aided institutions, provided that they take place on an equitable basis, rules made by appropriate public authorities are followed and attendance at the, is free and voluntary. The right to establish at own expense, independent educational institutions including for example, religiously and/or denominationally specific schools is entrenched in section 20(3). Such institutions may not discriminate on basis of race and must be registered with the state.

Section 15(3)6 of the Constitution authorises legislation recognising marriages concluded under systems of religious personal or family law.

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5 Constitution of South Africa, Section 15 (2)
6 Constitution of South Africa, Section 15 (3)
Section 31(10) of the Constitution augments the guarantee of religious freedom rights in section 15(1) and religious equality in section 9(1) and 9(3) with constitutionally entrenched backing to practice religion community. It protects the right of persons belonging to a religious community to practice their religion together with other members of that community, and to form, join and maintain voluntary religious associations.\(^7\)

The Constitution requires the religious and related rights that it guarantees to be construed in context,\(^8\) permeated with the values which are articulated in, or implied by, amongst others, the founding provisions, in Chapter 1 (and especially sections 1 and 2) of the Constitution, section 7’s characterisation and statement of the main objectives of the Bill of Rights, and the preamble of the Constitution. Section 39(1) of the Constitution requires any interpretation of the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and to consider international law.

Section 7(1)\(^9\) of the Constitution characterises, with constitutional authority, the Bill of Rights, as a cornerstone of democracy in South Africa, enshrining the rights of all people on the country and affirming the democratic values of human dignity equality and freedom. Section 7(2) then enjoins the state to “respect protect promote and fulfil the rights in the Bill of Rights.”\(^10\)

Various other provisions of the Constitution relate to religion and religious freedom. Sections 185 and 186 provide for a commission for the promotion and protection of the rights of cultural, religious and linguistic communities.\(^11\) In addition, human rights such as to human dignity\(^12\) the right to freedom of expression\(^13\) and the right to freedom of association\(^14\) relate indirectly to the protection of religious freedom.

**RECOGNITION OF RELIGIOUS OBSERVANCES IN SCHOOLS**

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\(^7\) Constitution of South Africa, Section 9(3)


\(^9\) Constitution of South Africa, Section 7(1)

\(^10\) Constitution of South Africa: Bill of Rights. Section 7


Despite a liberal Constitution, which generously protects individual rights to all who reside in South Africa, in 2002 a South African public school, The Durban High School, denied one of its students, Sunali Pillay, the right to wear a nose stud while at the school. According to the school Sunali was prohibited to wear any jewellery under the requirements of the school’s code of conduct. The school threatened to expel Sunali from school if she continued to wear the nose stud. Prior to the school executing its threat Sunali’s mother brought a discrimination complaint before the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The Equality Court ruled in favour of the school, and an appeal to the High Court its decision was reversed. The school appealed the matter to the Court.

On appeal, the Court modified the balancing test first adopted in *Prince*, which courts should employ to review government and private conduct that effects religious or cultural practices and determine if a practice or belief qualifies for constitutional protection. Under the new test, which was formulated by Langa CJ, the courts are required to determine whether a practice or belief is central to the claimant and whether the claimant is sincere in his/her belief or practice. Though not clearly stated in *Pillay*, the balancing test translates into two (2) parts. Generally under this test a court should only ask the following two questions: The first question is whether the practice sought to be protected is a central feature of the religion or culture, and second, whether the claimant professes a sincere practice or belief.

In the final analysis, the Court held that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for constitutional protection. The court therefore found and ruled that Sunali was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act. It ruled in favour of judging the centrality of a practice with reference only to how important the belief or practice is to the claimant’s religious or cultural identity.

One of the significant effects of the Court adopting a subjective test is that the Court has ensured that almost every practice in respect of which an exemption is sought will be considered important in itself. This is because a claimant simply has to show that he/she honestly believes that the practice in question forms a central part of this/her religion or culture in order of it to be classified as such and to be protected. In these circumstances, it will probably be challenging for most schools or other organisations to justify a decision not to grant a religious exemptions. This means that in practice most schools will grant religious exemptions to all those who apply.

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15 See *Prince* paras 42-43, discussing that it is understandable for courts to enter into a debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice, and found that the use of cannabis was central to the Rastafari religion.
In addition, the Court, as O'Regan J. pointed out in her dissenting judgement, has ignored the fact that cultural practices are associative and not individualistic\textsuperscript{16} and adopted an extremely individualistic approach to the concept of cultural beliefs and practices. Given that most, disputes will likely be resolved at the unfairness stage of the enquiry, it is likely that most schools will whenever faced with an application for religious exemption, have to carry out a proportionally analysis. This is a difficult test and, while the courts may be well placed to carry out such a difficult task, it is unlikely that most schools are well equipped to engage in such analysis. Practically this means that most schools will simply grant religious exemptions to all those who apply.

It should be noted that the \textit{Pillay case} had an impact on South African schools that have rules or school codes that prevented the wearing of other religious or cultural expressions, such as dreadlocks and Muslim headscarves.\textsuperscript{17} The impact of this ruling has caused schools to accommodate learners who wear dreadlocks or headscarves to school, whether for religious or cultural reasons.

\textbf{CHRISTIAN EDUCATION SA \textit{vs} MINISTER OF EDUCATION}

An organisation of concerned Christian parents approached a High Court to strike down section 10 of the South African Schools Act,\textsuperscript{18} which proscribes corporal punishment in any school, public or independent. According to the religious beliefs of the applicants, corporal punishment was a rudiment\textsuperscript{19} in the upbringing of their children. The application was turned down by the high Court and pointed out that the biblical authority on which the applicants relied suggested that only the parents of children (and not teachers in loco parentis) were entitled to administer corporal punishment.\textsuperscript{20} Expressing, such a view brought the court risky close to doctrinal entanglement.\textsuperscript{21}

On appeal to the Constitutional Court\textsuperscript{22} Sachs J. handed down a carefully reasoned judgement dismissing the appeal on the basis that section 10 imposes a

\textsuperscript{16} Pillay para 154. See also Prince para 39, noting that Sec 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights
\textsuperscript{17} See P Lenta “Muslin headscarves in the workplace and in schools” (2007 124 \textit{South African Law Journal} 296, discussing a case where a learner at a Johannesburg school was prevented from attending classes because she wore a headscarf in violation of school rules
\textsuperscript{18} South African Schools Act No 84 of 1996. Department of Education. Archived from the original 18 June 2016. Freedom of conscience and religion at public schools – subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body, if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary
\textsuperscript{20} Christian Education SA \textit{v} Minister of Education of the Government of SA 1999(9) BCLR 951 (SE)
\textsuperscript{21} Farlam (n5) 41-40-41-41
\textsuperscript{22} Christian Education SA \textit{v} Minister of Education 2000(10) BCLR 1051 (CC); 2000(4) SA 757 (CC)
constitutionally acceptable limitation on parents’ free exercise of their religious beliefs. He refrained, however, from expressing any view on whether it is a constitutionally allowable exercise of a religious belief if parents themselves administer corporal punishment to their own children. He also did not really address the question that schools (and teachers) should at any rate be permitted to do in a country where a modern-day constitution, entrenching fundamental rights in accordance with stringent standards of constitutional democracy, is in place.

In a significant postscript to his judgement, Sachs J. lamented the fact that there was no one before the court representing the interests of the children concerned. He thought that the children, many of them in their late teens and coming from a highly conscientised community, would have been capable of articulate expression.

Although both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name.

In spite of the fact that the *Christian Education* had the effect of retraining the free exercise of a religious belief it is a judgement in which the significance of religious and related rights is stated unequivocally.

**THE PRINCE CASE**

Gareth Prince, a consumer of dagga for spiritual and ceremonial purposes as an integral part of practicing his religion as Rastafarian, completed his legal studies and became eligible to be registered as a candidate attorney. He had twice been convicted of the offence of possessing dagga. The Law Society of the Cape of Good Hope refused him registration whereupon he unsuccessfully challenged the society’s decision in the Cape High Court. He appealed to the Supreme Court and it was dismissed and then he lodged an appeal to the Constitutional Court. A divided court dismissed the appeal, but before doing so handed down a significant interim judgement in the case of which Ngcobo J. intimated that neither the applicant nor the respondents adduced sufficient evidence for any court to finally make a decision. *Prince* had to give more evidence as to precisely how and in which circumstances Rastafarians use dagga as part of their religious observances.

The Constitutional Court, however, thought that such circumstances indeed existed in the Prince case, Ngcobo J. explained:

> The appellant belongs to a ministry group. The constitutional right asserted by the appellant goes beyond his own interest – it affects the Rastafari community. The Rastafarian community is not a powerful one. It is a

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23 In terms of s 36 of the Constitution
24 *Christian Education SA v Minister of Education* 2000(10) BCLR 1051 (CC), 2000(4) SA 757 (CC) at par 53
25 *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (CC)
26 *Prince v President, Cape Law Society*, 2001 (2) BCLR 133 (CC)
vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation.

Our religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.\(^\text{27}\)

The Constitutional Court thus made an attempt to accommodate concerns of a vulnerable, religious minority, but did not fully deliver on the promise that its effort held, for its final judgement went against \textit{Prince}.\(^\text{28}\)

In \textit{Prince}, Ngcobo J. correctly stated that “the right to freedom of religion is probably one of the most important of all human rights”.\(^\text{29}\) In the same case, Sachs J. reasoned that “where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile [and not subject to a choice between faith and the law]”.\(^\text{30}\)

In \textit{Prince}, both Ngcobo J. and Sachs J. were not in the minority, and the issue was not the wearing of a nose ring in public school. Rather, the issue was whether or not Rastafari should be accommodated under the general criminal law of South Africa to use marijuana for religious or cultural purposes.

There are several differences between \textit{Pillay} and \textit{Prince}. First in \textit{Pillay}, the practice that was at issue did not fall within the general legal prohibition like in \textit{Prince}, which is why the Court’s analysis did not entail the application of the limitation clause in section 36 of the Constitution. Instead it involved a challenge that a school code violated the Equality Act because it discriminated on the grounds of religion and culture. The grounds upon which the school violated the Equality Act are identical to those in section 9 of the Constitution, and as such the Court’s analysis in \textit{Pillay} was similar to a section 9 analysis. In fact, \textit{Pillay}’s analysis informs much of the current South African interpretation of freedom of religion.

Second, in light of the wide-ranging provision of freedom of religion in the Constitution, \textit{Pillay} could have successfully relied directly on section 15, 31 and 9 of 27 Prince v President, Cape Law Society 2000(7) BCLR 823 (SCA); 2000(3) SA 845 (SCA)
28 Prince v President, Cape Law Society 2002(3) BCLR 231 (CC); 2002(2) SA 794 (CC)
29 Pillay para 48
30 Para 149. See also Prince v South Africa Communication 1474/2006, views on October 207, paras 5.5 and 7.5 where Prince argues that if exceptions to the prohibition of the use of cannabis could be made for medical and research purposes and effectively enforced by the State party, similar exceptions could also be made and effectively enforced on religious grounds with no additional burden on the state party
the Constitution. The reason is that section 15 is wide and covers freedom of conscience, religion, thought, belief and opinion. Section 9 is also wide and binds both state and private actors. What is more, section 9 is in many respects identical to the provisions of the Equality Act, and the Court has said that to that extent possible it has to be interpreted in line with the Equality Act.

DISCUSSION

In Christian Education, which focussed on freedom of religion as the substance of a constitutional right, conceptual accuracy was more the order of the day and the judgement handed down by Sachs J. has indeed become a landmark for definitional orientation in dealing with key concepts in the discourse on religious and related rights in the South African context.

Christian Education is to a large extent the milestone that Solberg could have been. The claimants in this case were not really “religious others” but were part of a mainstream Christianity privileged enough to sustain a system of independent schools. The Constitutional Court showed much genuine understanding for the religious entitlements of the claimants, affording them the consideration of articulate conceptual analysis, but also demarcating them and duly restraining their exercise.

The rather salient “jurisprudence of difference” moment in Christian Education was Sachs J.’s obiter suggestion that the learners involved themselves should have had the opportunity to express their views in court. This judicial afterthought challenged a deep-seated belief, namely, that in really weighty matters, concerning their upbringing and education, children should be seen and not heard.

The Constitutional Court’s insistence, in the interim Prince judgement, that Prince and the Rastafarian community had to be afforded the fullest possible opportunity, to be heard precisely because they are “religious others” signalled an attempt to ensure their quality participation and inclusion in public life. It could not prevent “others” of Prince as outcome of the saga though. The court, in its final judgement, paid serious attention to the question what the possible effects would be of allowing, us religious observance, conduct conventionally regarded as a threat to the good order in society. The court in Pillay had to deal with a similar question in relation to a more limited community, namely a school.

DO WE HAVE FREEDOM OF RELIGION AT PUBLIC SCHOOLS?

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31 See Prince para 112
32 Mhango, M. 2010. Right to recognition and Protection of religion in South Africa
33 For some of the differences between, sec 9 and the provisions of the Equality Act, see Currie & De Waal 267-271
From 1996 to 2003, the issue of religion in public schools was heavily debated in South Africa. Its controversial nature can be inferred from the fact that, while the rest of the education had undergone substantial changes by 1996, the matter of religion within education was held in abeyance until 2003, when the Department of Education saw it way clear to promulgate the *National Policy on Religion and Education (2003)* under the umbrella of the South African Schools Act (Act 27 of 1996). The debate died down somewhat after the promulgation of the Policy, in many cases it was business as usual. These practices did not go unnoticed. Researchers such as Ferguson and Roux (2004), Roux and du Preez (2005) regard such practices as detrimental to effective inclusive praxis. A non-educationist, George Claasen, also threatened to legally prosecute the offending schools, but eventually backed down. The debate on religion in education gained new impetus when Coertzen (2010), mobilised interested parties to become signatories to a new *Manifesto*, one that, was not intended to replace or negate the *Policy* but rather aimed at explicating the religious rights and duties of various religious groupings, as enshrined in the Constitution. All these occurrences attest to the fact that South Africans are not quite satisfied with how the state had dealt with the issue of religious diversity in public education.

In the end, one has to say that justice has been served by the state. It is clear that South Africa made significant strides in the recognition and protection of religious freedom under the Constitution. The banning of sectarian religious education from the schools is to the satisfaction of the secularists and the state itself, but not to the satisfaction of the mainstream religious and religiously conservative parents. The retention of Religion Studies as an academic subject should be to the satisfaction of all since it enriches the school curriculum. Allowing a place for religious observances in schools can also be welcomed by all concerned.

Subject to the Constitution, section 7 and any applicable law, religious observances may be conducted at a public school under the rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and staff is free and voluntary.

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40 Constitution of South Africa, Act 108 of 1996: Section 7