Comparative Religious Accommodation Jurisprudence: Lessons For Botswana

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ABSTRACT

This discussion reviews the religious jurisprudence of a few English speaking countries in which the constitutional systems are comparable with that of Botswana and in which the jurisprudence quite often influences the decisions of the courts of Botswana. The comparative analysis focuses on how the courts ruled and reasoned when approached by religious and/cultural minorities seeking accommodation of their dress and other practices which were deemed inconsistent with a school's uniform code. Lessons are drawn and recommendations are made on how the courts of Botswana should proceed when similar issues reach them for their determination. An argument is made that the courts of Botswana must follow the positive accommodative nature of some of the judgments reviewed herein and reject whatever oppresses minority rights in a liberal democracy.

1 INTRODUCTION

Laws and regulations are often framed in a way that is consistent with the beliefs and values of dominant, mainstream cultural groups rather than of vulnerable minority groups.[1] This holds true in the sphere of education. School uniform requirements in public educational institutions are often crafted in a manner that infringes on the cultural and/or religious practices of the minority in a particular demographic situation.

To protect their right to freedom of religion, members of a minority religion are more often than not forced to approach the courts to vindicate their rights against the tyranny of the majority in order to express religious and/or

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1. Patrick Lenta, *"*Cultural and Religious Accommodations to School Uniform Regulations*",* 1 *Constitutional Court Review* (2008), pp. 259-293 at p.261.

cultural beliefs which are otherwise prohibited by school uniform policies. The courts of Botswana are yet to be seized with such a delicate balancing of rights and interests. However, as Botswana is a common law jurisdiction, decisions of other common law courts would be persuasive as to how the courts of Botswana may rule on those issues raised by conscientious objectors.

This article engages in a comparative analysis of religious freedom jurisprudence. It discusses and/or reviews how the courts of other jurisdictions have approached the issue of the protection of minority religious rights in public schools. The jurisprudence of various common law courts when public school administrators and/or authorities are faced with requests from conscientious objectors for exemptions from the uniform regulations will be the focal point of this article, which hopes to guide Botswana's judiciary in this matter.

The paper seeks to fill in the jurisprudential and academic scholarly gap that exist in this area by making recommendations on how the courts of Botswana ought to approach issues of religious accommodation when brought before them for adjudication.

The comparative analysis will be based on the jurisprudence of a few English-speaking countries as their legal systems and constitutional principles are analogous to those of Botswana, their courts have been required to deal with questions arising from the tyranny of the majority tyranny over the minority in matters having to do with cultural or religious practice in public schools, and their jurisprudence is persuasive to the courts of Botswana. Those countries, in no particular order, are The United Kingdom, South Africa and Zimbabwe.

2 THEORETICAL BACKGROUND

The process and study of legal comparison and its uniqueness and distinctiveness from other disciplines of legal scholarship were properly identified by Auld more than sixty years ago when positing that "Comparative law," to begin with, is somewhat of a misnomer in so far as it suggests a department or special category of rights and duties, wrongs and remedies, as is the case, for instance, when one speaks of "family law."[2] In an attempt to clear this kind of confusion Kleyn and Viljoen define comparative legal research as the study of foreign

2 F.C Auld, "Methods of Comparative Jurisprudence", 8(1) *The University of Toronto Law Journal* (1949), pp.83-92 at p.83.

legal systems for the sake of comparing them with one's own.[3]

Comparative law commonly denotes reference in legal study to the laws of more than one jurisdiction, or to foreign law.'[4] The need for comparative legal analysis in legal scholarship and legal practice was succinctly summarised in the case of *Government of Republic of South Africa* v. *Ngubane,*[5] wherein it was stated that in seeking to do justice between man and man it is at least interesting and sometimes instructive to have some comparative regard to the law of other countries.

The court's reasoning in *Ngubane*[6] was amplified by Smits, who notes that "there can be very good reasons for a court to look at foreign law, in particular where national law does not offer a solution to the case at hand … The increasing use of comparative arguments has more to do with the growing feeling among many courts that it may be counter-productive not to benefit from foreign experience."[7] Valcke states that comparative law has long been recognised as a valuable tool for interpreting and reforming domestic law, harmonising and unifying law trans-nationally, and constructing international law.[8] The comparative analysis of the jurisprudence of certain jurisdictions in the Commonwealth which is the pith of this article are substantively discussed in the immediate section below.

3 SUBSTANTIVE COMPARATIVE JURISPRUDENCE

This section makes a comparative survey of other courts which had grappled with issues of accommodation of religious and/cultural grounds. These jurisdictions are the United Kingdom, South Africa and Zimbabwe. Jurisprudence from the United Kingdom was selected because the Constitution of Botswana is a product of the British legislative process due to Botswana's colonial ties with that country, and the principles contained therein are mostly comparable with the British

3 D Kleyn and F Viljoen, *Beginner's Guide for Law Students,* Juta, Cape Town (2010).

4 H.E Yntema, "Comparative Legal Research: Some Remarks on "Looking out of the Cave", 54 (7) *Michigan Law Review,* (1956), pp.899-928 at p.903.

5 1972 (2) SA 601(A).

6 *Ibid.*

7 J.M Smits, "Comparative Law and its Influence on National Legal Systems" in Reimann M & Reinhard Zimmermann R (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2006, p.487.

8 C Valcke, "Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems", 52(3) *The American Journal of Comparative Law*, (2004), pp. 713-740 at p.715.

principles as scattered through various statutes and common law. Decisions of courts in the United Kingdom might for that reason might prove useful as aids in the interpretation of our constitution. The other two jurisdictions, South Africa and Zimbabwe have similar legal systems with Botswana. The shared general law of application is Roman-Dutch common law. South Africa has a systematic and a meticulous law reporting culture, and most of the reportable Zimbabwean decisions are reported in the South African Law Reports, which are referred to by Botswana courts and legal practitioners daily.

3.1 The United Kingdom

3.1.1 *Mandla v. Dowell Lee*[9]

This case involved Sewa Singh Mandla and his son Gurinder Singh Mandla. The Mandlas were an orthodox Sikh family who wore turbans and did not cut their hair. The first respondent, A.G. Dowell Lee, was the headmaster and principle shareholder of the company that owned the Park Grove School, Birmingham. The second respondent, Park Grove Private School Limited, was the company that owned Park Grove School. In July 1978 the respondents refused to admit Gurinder Singh to the school on the grounds that contrary to school uniform rules he refused to cut his hair and remove his turban. The headmaster's reasons for his refusal were that the wearing of a turban, being a manifestation of the boy's ethnic origins, would accentuate religious and social distinctions in the school which, being a multiracial school based on the Christian faith, the headmaster desired to minimise.

The Mandlas complained to the Commission for Racial Equality that they had been racially discriminated against. The Commission adopted the case and sought a declaration that the defendants had acted contrary to the Race Relations Act 1976 (the Act) by unlawfully discriminating against Gurinder Singh. At first instance the claim was dismissed on grounds that Sikhs were not a racial group for the purpose of the Act and therefore no discrimination had occurred that was contrary to the Act. An appeal to the Court of Appeal was rejected. However, leave to appeal to the House of Lords was granted.

9 [1983] 2 AC 548; [1983] 1 All ER 1062; [1983] 2 WLR 620.

It is noteworthy that the House of Lords decided this case not on the basis of discrimination but on the grounds of religious persuasions and/or practices. The issues for determination were if the Sikhs constituted a race in terms of the Act and hence qualified for protection under the same, and if the school's refusal to admit a Sikh student for wearing a turban was racial discrimination. The House of Lords unanimously held that Sikhs, who are otherwise known to be a religious group, constituted a racial grouping in terms of the provisions of the Act and are amenable for protection under the said Act; and that the decision of the respondents was illegal as it was discriminatory on the basis of race. The court further held that the "no turban" rule was not a requirement with which the applicant boy could comply as it was inconsistent with the practice of Sikhs, and therefore the application of that rule to him by the headmaster was unlawful discrimination.

On *Mandla*, Bacquet comments that when a school uniform policy discriminates against a particular ethnic group on the basis of race or religion the courts have tended to adopt a pluralist stance.[10] However, the readiness of the House of Lords to protect discrimination on religious grounds in schools in the case of *Mandla*[11] was short lived. Looking at its latest jurisprudence on the protection of religious minorities in educational institutions in what would appear like a betrayal to its past jurisprudence.

It is arguable that the decision in *Mandla* was not about religious rights but racial rights. However, it is submitted that the claim in *Mandla* was purely religious, shorn of race, and that the Court of Appeal had correctly held that "Sikhs were not a 'racial group' within the definition of that term in s 3(1) of the 1976 Act since Sikhs could not be defined by reference to … ethnic or national origins". It was common ground that Sikhism is primarily a religion; that the adherents of a religion are not a "racial group" in terms of the1976 Act; and that discrimination in regard to religious practices was not unlawful. The Court of Appeal dismissed the boy's appeal on the grounds that a group could be defined by reference to its ethnic origins within s 3(1) of the 1976 Act only if the group could be distinguished from other groups by definable racial characteristics with which members of the group were born and that Sikhs had

10 S Bacquet, "Manifestation of Belief and Religious Symbols at Schools: Setting Boundaries in English Courts", 4 *Religion and Human Rights,* (2009), pp. 121-135 at p.129.

11 *Ibid*.

no such characteristics peculiar to Sikhs.[12]

In a not very distant past the House of Lords arrived at a decision that was parallel to and arguably irreconcilable with *Mandla* in its judgment in *R (on the application of Begum (by her litigation friend, Rahman)* v. *Headmaster and Governors of Denbigh High School.*[13] As argued above, the substance of the claim to wear a Sikh turban is religious regardless of the statute one is basing one's claim on. Hence, the expectation is that the court would be consistent and protect other religious practices that clash with school uniform requirements in an equal manner.

3.1.2 *R (on the application of Begum (by her litigation friend, Rahman) v. Headmaster and Governors of Denbigh High School*[14]

In this case the claimant was a Muslim female student who attended a mixed-sex, multi-community school which was outside her family's catchment area. The majority of the pupils at the school were Muslims but there were also others from a wide range of faiths. The school regarded a school uniform policy as being in the best interests of the school and as contributing to social cohesion and harmony among the pupils. Female pupils were offered three options for the school uniform. One of those options, which had been devised after consultation with parents, pupils, staff and the local mosques, was the *shalwar kameeze*, a combination of a sleeveless smock-like dress with a square neckline revealing the wearer's shirt collar and tie, and loose trousers tapering at the ankles. Girls were also permitted to wear blue headscarves. The school's dress code was explained to all prospective parents and pupils.

During her first two years at the school the claimant wore the *shalwar kameeze,* but she then decided that it did not comply with the strict requirements of her religious beliefs. One day she arrived at school wearing a *jilbab,* which is a long coat-like garment which effectively conceals the shape of the female body and which is considered to represent stricter adherence to the tenets of the Muslim faith. She was then sent away by the school headmaster to comply with the school uniform regulations. The claimant, with the support of her

12 *Mandla and Another* v *Dowell Lee and Another* [1982] 3 All ER 1108.
13 *Ibid.*
14 [2006] UKHL 15; [2006] 2 WLR 719.

family, was not prepared to compromise. The matter was therefore taken up with various government agencies, without any success on her part.

The claimant applied for judicial review of the decision of the respondents, the school governors, not to admit her to school wearing a *jilbab*, and prayed for a declaratory order to the effect that her exclusion was unlawful because her right to manifest her religion under Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[15] was being limited; and that her right to education under Article 2 of the First Protocol to the Convention had been violated. The judge at the court *a quo* dismissed the claim on the ground that the claimant had not been excluded from school and that even if she had been excluded, there was no limitation of her right under article 9(1), and that any such limitation would in any event have been justified under article 9(2). On appeal the Court of Appeal allowed the claimant's appeal and granted a declaration that she had been excluded from school without following the appropriate procedures and that her rights under article 9(1) had been violated. The school subsequently appealed to the House of Lords, which unanimously reversed the decision of the Court of Appeal.

The House of Lords held that the refusal to accommodate the claimant's version of modest dressing within the teachings of her religion, Islam, did not fall within the already available interventions made by the school. The House of Lords took the view that the fact that Muslim religious leaders were engaged in formulating uniform regulations invalidated any subsequent claims for exemptions.[16] However, this seems to be inconsistent as it was without doubt in the mind of the court that the *hiljab* is a Muslim religious dress. To this end Lord Hoffman held that:

> "I accept that wearing a jilbab to a mixed school was, for her, a manifestation of her religion. The fact that most other Muslims might not have thought it necessary is irrelevant. But her right was not in my

15 Article 9(1) reads: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." Available at http://conventions.coe.int/treaty/en/Treaties/Html/005.htm [date of use: 15 April November, 2017).

16 Lord Hoffmann noted that "In devising a suitable uniform, the school went to immense trouble to accommodate the religious and cultural preferences of the pupils and their families. There was consultation with parents, students, staff and the imams of the three local mosques. One version of the uniform was the shalwar kameez (or kameeze), a sleeveless smock-like dress with a square neckline, worn over a shirt, tie and loose trousers which taper at the ankles. A lightweight headscarf in navy blue (the school colour) was also permitted." At paragraph 44, p.735.

> opinion infringed because there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one … Shabina's discovery that her religion did not allow her to wear the uniform she had been wearing for the past two years created a problem for her. Her family had chosen that school for her with knowledge of its uniform requirements. She could have sought the help of the school and the local education authority in solving the problem. They would no doubt have advised her that if she was firm in her belief, she should change schools."[17]

It seems that it is this common sense approach that immensely influenced the Law Lords in arriving at the decision that the school management had not infringed upon the claimant's rights as alleged. It is suggested that the court's approach and what operated in the minds of the Law Lords could have been the fact that "after all she enrolled at the school knowing its uniform requirement and if objects, she can simply transfer."

The House of Lords held that it is in the discretion of and the sole preserve of school administrators to come up with uniform regulations. It would appear from the language of the court that it was reluctant to interfere in issues of religious exemptions and school uniforms.[18] Furthermore, the House of Lords held that the right to manifest one's religion is not as broad as the claimant had prayed,[19] notwithstanding that the any limitation to the right can occur only under the provisions of the Convention.[20]

Britain's highest court failed to demonstrate how the refusal to accommodate Shabina's dress code was necessary in a democratic society. The reasoning of the court in its attempt to dilute the multi-cultural demographic

17 *Ibid* at para 50.

18 Lord Scott of Foscote held that "…There is not much point in having a school uniform policy if individual pupils can decide for themselves what they will wear. I conclude that the decisions taken by the school with regard to Shabina were unimpeachable by the standards of ordinary domestic law." At paragraph 84.

19 Lord Scott at paragraph 86 held that "Freedom to manifest one's religion" does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs. In *Kalaþ* v *Turkey* (1997) 27 EHRR 552, para 27, the Strasbourg court said that "in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account." And in *Ahmad* v *United Kingdom* (1981) 4 EHRR 126, Para 11, the Commission said that: "the freedom of religion ... may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom."

20 Article 9(2) of the Convention, *op.cit,* note 151 above reads: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

composition of the United Kingdom was inconsistent and incompatible with the judgment of the Lords in *Mandla*[21] who, being knowledgeable of the school's long standing and known Christian traditions, also had the option of seeking admission elsewhere, but was accorded relief by the courts.

The material facts in *Mandla* are almost the same as in *Begum,* yet the court took a totally different approach. The circumstances surrounding both cases are similar in that both were religious objectors to particular school uniforms and had the option of enrolling at other schools. In the former case, the court found it necessary to protect Sikh religious practice and in the latter refused to protect Muslim religious practice.

The ruling in *Begum*[22] was arrived at *per incuriam*,[23] that is to say that the House of Lord should have paid regard to nothing other than the limitation to her manifestation of her religious belief in the context of the statute to which the claimant referred, instead of adopting the nearest convenient common sense approach. It is submitted that the court placed much reliance on the fact that the applicant had alternative schools to consider and enroll in. The question before the court was not whether there are alternative schools prepared to accommodate the student, but whether her rights have been violated. The court did not fully consider if there had been an infringement of the claimant's right, and whether or not such an infringement was justifiable in a democratic society, or whether or not the state would have been burdened unnecessarily or the national interest prejudiced if the plea had been granted. None of these issues seemed to concern the court in making its determination.

It is submitted that the inconsistency of the House of Lords in reaching decisions in two matters, one involving a Sikh and the other a Muslim conscientious objector to school uniform requirements, is substantively discriminatory. The decisions may at face value appear fair in that the statutes under consideration were different and distinct. It is necessary to note, however, that the decision of the House of Lords, though inconsistent with its earlier jurisprudence, was a direct application of the (Strasbourg court) European Court of Human Rights religious

21 *Mandla's Case*, 1982] 3 All ER 1108.

22 *Ibid*.

23 The Court of Appeal in *Morelle Ltd* v. *Wakeling* [1955] 1 All ER 708, [1955] 2 QB 379 stated that as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong.

freedom jurisprudence, most notably, the case of *Leyla Sahin v. Turkey*,[24] where the applicant was a practising Muslim who considered it as her religious duty to wear the Islamic headscarf. She wore the Islamic headscarf during the four years she spent studying medicine at the University of Bursa and continued to do so until February 1998. On 23 February 1998, the university vice-chancellor issued correspondence to the effect that students whose heads are covered, (who wear the Islamic headscarf), and students (including overseas students) with beards must not be admitted to classes and must be deregistered as students. On 12 March 1998, in accordance with the aforementioned circular, the applicant was denied access by invigilators to a written examination on oncology because she was wearing the Islamic headscarf. On 20 March 1998 the secretariat of the chair of orthopaedic traumatology refused to allow her to enrol because she was wearing a headscarf. On 16 April 1998 she was refused admission to a neurology lecture and, on 10 June 1998, to a written examination on public health. The student made an application for judicial review for an order setting aside the decision of the university on the ground that it violated her religious freedom as guranteed under the Turkish Constitution and the European Convention on Human Right.

The litigation went through various levels of the Turkish judicial system without succes on the part of the concerned student. Having exhausted Turkish internal judicial channels, she subsequently made an application to the European Court of Human Rights. The applicant submitted that the ban against the wearing of the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion. She relied on Article 9(1) and 9(2) of the Convention, which respectively protect freedom of thought, conscience and religion, and freedom to manifest one's religion and belief. The Grand Chamber having reiteraited its previous decision in *Ahmad v United Kingdom*[25]held that the freedom of religion as guaranteed by Article 9 is not absolute but subject to the limitations set out in Article 9(2).[26]

24 Application No. 44774/98, Judgement of 10 November, 2005.

25 (1981) 4 EHRR 126.

26 Article 9(2) of the European Convention of Human Rights provides that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."

In assesment of the limitation of the right in *Sahin,* the Grand Chamber applied the three-part test in Article 9(2) and held that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it become accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail, and to regulate their conduct. Having reviewed Turkish national law, the court held that there was a legal basis to interfere with applicant's right. It went on further to note that having had regard to the circumstances of the case and decisions of domestic courts, the court was able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. On the last leg of the test, the court held that in democratic societies in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.

The Grand Chamber went on further to state that in the context of Turkey, the measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were not considered to constitute interference for the purposes of Article 9 of the Convention. Consequently, it was established that institutions of higher education might regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful coexistence between students of various faiths and thus protecting public order and the beliefs of others.

The application was subsequently dismissed, like many other applications before the European Court of Human Rights, one being the case of *Karaduman v Turkey,* in which it was held that "by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence

between students of different beliefs.[27]

In adjudging the limitation of the right to freedom of religion, the European Court places substantial reliance on the political situation of a country, especially in the case of Turkey, to be more specific. The instability and the shaky security conditions which are attributed rightly or wrong to extremist Muslim groups seem to be burdening other Muslims. The anology drawn between manifestation of Islam through the wering of a beard or the *burqa,* for instance, and the perceived threat inherent in fundamental Islam seem to be the rationale for Turkish laws prohibiting beards and *burqas* in schools, most probably in an attempt to suppress the spread of fundamentalism at the expense of genuine Muslim students.

3.1.3 Remarks on the British approach

The attitude of British courts to exemption of plaintiffs from school uniform requirements on the ground of religion is rather unpredictable as a result of the contradictory decisions taken by the House of Lords, as discussed above. It is not clear whether the uniform requirements are genuinely in the discretion of the school authorities and a domain which the courts must avoid, or whether some religions would be afforded due protection by the courts while others would definitely not. It is also not very clear when the Courts would choose to apply jurisprudence of the Strasbourg Court and when they would choose to differ from it.

3.2 The Republic of South Africa

South African jurisprudence has inevitably developed tremendously after the end of Apartheid and the introduction of a new constitutional dispensation, with accent on protection and promotion of human rights for all. The South African Constitutional Court has played a leading role in this process, as have other Superior Courts of record in the exercise of their constitutional jurisdiction. Discussed below are some of the most notable decisions of South African courts

27 (1993) 74 DR 93 at page 108.

on religious accommodation.

3.2.1 *Antonie* v. *Governing Body, Settlers High School and Others* [28]

This was an application for judicial review of an administrative action, seeking an order setting aside the decision of the first respondents that the applicant, a 15 year-old female Rastafari convert, was guilty of serious misconduct and liable to a five-day suspension from school for growing dreadlocks and wearing a hat as per her religious beliefs and practice. The applicant, a minor, with her mother's support, had approached the school headmaster on a number of occasions after the applicant started embracing the Rastafari faith, for permission to wear dreadlocks and a cap as an expression of her religion. When no permission was forthcoming she was prompted by her religious convictions to attend school with a black cap covering her dreadlocks. The school management's attitude was that she was acting in conflict with the school's code of conduct and in defiance of an arrangement negotiated with the applicant's mother that she would not wear a cap with her school uniform.

The applicant was subsequently charged with serious misconduct for defying school rules and authority in that she had acted in an unbecoming manner by wearing headgear and growing dreadlocks according to Rastafarian custom. The school headmaster testified before the school governing body that the applicant had caused "disruption and uncertainty" by her conduct. Her breach of school rules and regulations was particularly disruptive. The applicant and her mother gave testimony to the effect that she had caused no disruption and that her appearance was at all times neat and tidy, and also emphasised her need to express her religious conviction and to develop her individuality. However, at the end of the hearing she was found guilty of serious misconduct as charged.

On review, the court held that the Governing Body had not applied its mind to the regulations because if it had, a finding to the effect that dreadlocks were not prohibited would have been arrived at. Furthermore, the court held that even if, hypothetically, the growing of dreadlocks and wearing of headgear were prohibited by the code of conduct, the failure to comply with the prohibition

28 2002 (4) SA 738.

should not be assessed in a rigid manner as this would make nonsense of the values of tolerance and freedom of expression, which includes the freedom of outward expression as seen in the selection of clothing and hairstyles, attached as a schedule to the Code of Conduct for schools in South Africa. The learned judge further held that such an interpretation would bring it in conflict with the standard of judicial fairness which underpins the Constitution and centuries of common law.

The court further held that the question to be asked was whether or not the prohibition was aimed at promoting positive discipline, and whether non-compliance therewith justified punishment or some form of sanction. Good discipline, it was held, required a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting rather than rejecting and infringing the inherent dignity, convictions and traditions of the offender. It was also necessary to recognize that the offender was entitled to freedom of expression, which may or may not relate to clothing and selection of hairstyles.

The Court also noted that it was a blatant absurdity to categorise the growing of dreadlocks or wearing of a cap as serious misconduct, even if this was prohibited under the code of conduct. The applicant's suspension was therefore set aside. De Waal *et al* correctly noted that this result had grave implications on the right of schools or educational institutions to compel the wearing of school uniforms and the need to respect freedom of expression for learners.[29] It is submitted that the court was correct in holding that regulations pertaining to the wearing school uniforms should not be enforced in a manner that is illogical and results in an absurdity. This case confirmed the supremacy and/or sacrosanctity of human rights and freedom over any other rule or regulation in post-democratic South Africa. This should be the position everywhere.

3.2.2 *MEC for Education: Kwazulu Natal and Others* v. *Pillay* [30]

The facts of this case were neatly summarized thus by Lenta: [31]

29 E de Waal, R Mestry and CJ Russo, "Religious and Cultural Dress at School: A Comparative Perspective", 14 (6) *PELJ*, (2011), pp. 62-95 at p.78.

30 2008 (1) SA 474(CC).

31 P. Lenta, "Cultural and Religious Accommodations to School Uniform Regulations," *op cit* at p. 271.

> "Pillay concerned a claim by a parent of a Hindu pupil at a state school that the failure by school authorities to grant her daughter an exemption from the school's Code of Conduct to permit her to wear a nose stud constituted unfair discrimination on the grounds of religion and culture. The claim was brought under the Promotion of Equality and Unfair Discrimination Act, which prohibits unfair discrimination on the grounds of religion and culture."

The claimant contended that she and her daughter [Sunali] came from a South Indian family that intends to maintain its cultural identity by upholding the traditions of women who had lived before them. The insertion of the nose stud was part of a time-honoured family tradition. It entailed that a young woman's nose be pierced and a stud inserted when she reached physical maturity as an indication that she had become eligible for marriage. The practice today is meant to honour 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 young women. This serves not only to indicate that they value their daughters but is in keeping with Indian tradition that their daughters are the Luxmi (the goddess of prosperity) and Light of the house.

The school consulted with recognised experts in the field of Human Rights and Hindu tradition in order to determine the school's position. The school's headmaster was advised that the school was not obliged to allow Sunali to wear the nose stud. The governing body accepted this advice. Ms Pillay was aggrieved by the decision. The Department of Education supported the school's approach. The school decided that if Sunali did not remove the nose stud by 23 May 2005 she would face a disciplinary tribunal. Sunali did not remove the nose stud and a hearing by the disciplinary tribunal was rescheduled for 18 July 2005. The disciplinary hearing in fact never took place as Ms Pillay took the matter to the Equality Court on 14 July 2005 and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali. The issue before the Equality Court was whether the school's refusal to permit Sunali to wear the nose stud at school was an act of unfair discrimination in terms of the Promotion of Equality and Prevention

of Unfair Discrimination Act.

The school argued that the Code had been drawn up in consultation with the learners' representative council, parents and the governing body. It was a practice of the school that exemptions based on religious considerations should be made from the provision of the Code. The School stated that Sunali was not granted an exemption because Ms Pillay made it clear in a letter that the nose stud was worn as a personal choice and tradition and not for religious reasons.

The Equality Court came to the conclusion that: (a) the school's actions against the claimant's daughter were reasonable and fair in the circumstances; (b) the school did not discriminate or unfairly discriminate against the appellant's daughter; and (c) the claimant's daughter's wearing of the nose stud was in violation of the school's code. The reasoning of the Court *a quo* was that the governing body was obliged in terms of the Schools Act to adopt a code of conduct for learners. The nose stud was jewelry, in terms of the definition in the School's code of conduct. The purpose of the code of conduct was, among other things, to promote discipline, uniformity and acceptable convention among learners. The appellant, although fully aware of the school's code of conduct, ignored it.

On appeal to the High Court,[32] it was held that the indirect discrimination, on the evidence, was not capable of objective substantiation in terms of criteria intrinsic to the educational system. The discrimination as a creature of the uniform code was not authorised by the empowering statute as it failed to accommodate diversity. Such indirect discrimination was, in the court's view, arbitrary, unlawful, unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

The Court held further that the desire to maintain discipline in the School was not an acceptable reason for the prohibition as there was no evidence that wearing the nose stud had a disruptive effect on the smooth running of the School. It was ordered that the decision to prohibit the wearing of a nose stud in school by Hindu/Indian learners was null and void.

The school decided to take the case on a further appeal to the Constitutional Court, being aggrieved by the decision of the High Court.

32 *Pillay* v *MEC for Education, KwaZulu-Natal, and Others* 2006 (6) SA 363 (EqC); 2006 (10) BCLR 1237 (N).

Chief Justice Pius Langa, as he then was, delivering judgment on behalf of the majority on the argument that Sunali should not be granted an exemption on the ground that it would lead to a breakdown in discipline, held that the admirable purposes that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. He further noted that there was no reason to believe, nor had the School presented any evidence to show that a learner who was granted an exemption from the provisions of the Code would be any less disciplined or that she would negatively affect the discipline of others. Indeed, the evidence showed that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education.

The school attempted to argue that expert evidence showed, and this proposition was also accepted by the student's mother, that the wearing of nose studs was not central to the Hindu religion. The majority of the justices of the Constitutional Court cautioned on this point that the "courts should not involve themselves in determining the objective centrality of practices, as this would require them to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. Centrality must be judged with reference only to how important the belief or practice is to the claimant's religious or cultural identity."[33]

The South African Constitutional Court rejected approaches advocated by the European Court of Human Rights and the House of Lords in the *Begum case*,[34] case, which was that due deference and latitude should be given to administrators as experts in their field in determining issues of exemptions on religious grounds from rules of general application. The Court held that this doctrine of a "margin of appreciation" is not a useful guide when deciding either whether a right has been limited or whether such a limitation is justified. Langa CJ on behalf of the majority held that the question of whether or not the fundamental right to equality had been violated in the case before it required the Court to determine what obligations the School bore to accommodate diversity reasonably. The Chief Justice noted:

> "… those are questions that courts are best qualified and constitutionally mandated to answer. This Court cannot abdicate its duty by deferring to the School's view on the requirements of fairness. That approach

33 Lenta *op cit* p. 271.
34 [2006] UKHL 15; [2006] 2 WLR 719.

> is obviously incorrect for the further reason that it is for the School to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove."[35]

The School argued that the nose stud should be treated differently because it was also a popular fashion item. It further contended that even if the nose stud was acceptable, allowing it would necessitate that many undesirable adornments be permitted. This is what is sometimes referred to as the "slippery slope" argument. On the first leg of the argument, Langa CJ held that:

> "Asserting that the nose stud should not be allowed because it is also a fashion symbol fails to understand its religious and cultural significance and is disrespectful of those for whom it is an important expression of their religion and culture. In addition, to uphold the School's reasoning would entail greater protection for religions or cultures whose symbols are well known; those are in fact often the ones least in need of protection. It would also have the absurd result that if a turban, yarmulke or headscarf became part of popular fashion they would no longer be constitutionally protected, while they have constitutional protection as long as they remain on the fringes of society. I accept that the popularity of the nose stud may make it more difficult to determine if a learner is practising her religion or culture or trying to impress her friends. But once the former is established, as it has been in this case, the mainstream popularity of a religious or cultural practice can never be relevant."[36]

On the second leg of the argument the majority rejected outright the slippery slope argument that the necessary consequence of a judgment in favour of Ms Pillay would be that many other learners would come to school with dreadlocks, body piercings, tattoos and loincloths. They were of the opinion that such an argument had no merit in that the judgment applied only to *bona fide* religious and cultural practices. It said little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. It was further noted by the majority of the court that the display of religion and culture in public was not a "parade of horribles" but a pageant of

35 At para 81.
36 At para 106.

diversity which would enrich the country's schools and in turn the country. The court also reasoned that acceptance of one practice did not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it might refuse to permit it.

The Constitutional Court also differed with the House of Lords in *Begum* as regards the effect of extensive consultations with various religious leaders in the formulation of the uniform policy and the fact the applicant knew of the uniform policy before enrolling at the particular school, and could have transferred to another school. The Constitutional Court stated authoritatively that consultation and public participation in local decision-making are good and deserve to be applauded as they promote and deepen democracy.[37] In the context of the Code, this meant that the School community was involved in the running of the School and would acquire a sense of ownership over the Code. However, such a democratic process of public participation, which deserved to be applauded and encouraged in a democratic society, did not immunise the resultant decisions, in effect the opinion of the school community, from constitutional scrutiny and review.

The Constitutional Court upheld the decision of the High Court that the school's uniform code and its refusal to accommodate Sunali's cultural and/or religious practice unfairly discriminated against her and was unlawful and unconstitutional. O'Regan J delivered a dissenting judgment which differed from the majority judgment only in reasoning. O'Regan J differed with the majority view that there was not much difference between culture and religion. She observed that although it was not easy to define a sharp dividing line between the two, it would appear that the Constitution recognised that culture was not the same as religion, and should not always be treated as if it were.[38] The learned judge regarded culture as an associative practice, from which an individual draws meaning and identity from shared or common practices of a group.[39] The basis for these practices might be a shared religion, a shared language or a shared history. She noted correctly that religion, however, need not be associative in that a religious belief can be entirely personal. She further pointed out that the importance of a personal religious belief is more often than

37 At para 89.
38 At para 143.
39 Para 146.

not based on a particular relationship with a deity or deities, and might have little bearing on community or associative practices.

Justice O'Regan observed that it is important to distinguish culture and religion despite the fact that they are both prohibited grounds of discrimination under South African constitutional order for the reason that the tests for determining whether a certain practice was a cultural practice or a sincere religious belief were distinct and very different. She agreed with Langa CJ that a court would not investigate a religious belief; hence her opinion that it was imperative to distinguish it from a cultural practice. She held that a religious belief is personal and need not be rational, nor need it be shared by others, and therefore a court must simply be persuaded that it is a profound and sincerely held belief. A cultural practice on the other hand is not about a personal belief but about a practice pursued by individuals as part of a community. The question would not be whether the practice formed part of the sincerely held personal beliefs of an individual but whether the practice was pursued by a particular cultural community.

Another aspect on which O'Reagan J. differed from the view of the majority was how to identify who was the correct comparator to determine whether or not there had been discrimination in the refusal of exemption by the school authorities. It had been stated in the majority judgment that the comparator was those learners whose sincere religious or cultural beliefs had not been compromised by the school's uniform regulations. However, according to the learned dissenting view, the correct comparator was those learners who had been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who had been denied exemption, like the learner in this case.

Justice O'Reagan further correctly pointed out that those learners who are not afforded an exemption suffer a burden in that they are not permitted to pursue their cultural or religious practices, while those who are afforded an exemption may do so and constitute the correct comparator in her view, because the challenge really related to a failure by the school to afford the learner an exemption. On that point O'Reagan J concluded that the applicant had established that in failing to grant her an exemption to wear the nose-stud in circumstances where other learners had been afforded exemptions to pursue

their cultural practices, the school had discriminated against her.

Justice O'Reagan also stated that the approach to the granting of exemptions should require an exercise in proportionality. The importance of the cultural practice to the learner, including the question of whether or not it needed to be pursued during school hours, would need to be weighed against the effect that the granting of the exemption might have on the important and legitimate principles that support the wearing of a school uniform. In performing this exercise, a school needed to be fully appraised of the cultural importance of the practice. She further observed that given the multiculturalism and developing jurisprudence of tolerance in South Africa, in consonance with the new constitution and the democratic values it expressed, it was inevitable that conflict about a school and its rules should arise from time to time. To deal with that and most importantly as an alternative to litigation the learned judge noted that where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy.

The court applied a three-part test to determine the protectability of the practice of wearing a nose-stud, under which the following questions could be asked:

> "…firstly, whether the source of the applicant's constitutional claim is a recognised religion; secondly, whether the practice sought to be protected is a central part of the religion; and thirdly, whether the applicant's belief in the religious practice is sincere."[40]

Having held that the act in question was discriminatory Justice O'Regan stated that if the learner had still been attending the school it would have been appropriate to refer the matter back to the school to determine the exemption in the light of the considerations set out above. This would have promoted dialogue about culture within the school and would have required the learner to set out why she sought an exemption from the Code of Conduct. She would have had to persuade the school of the importance of the practice to her.[41] It is submitted that Justice O'Regan was to the point in her dissent. There is clearly a need to determine if a certain practice is cultural or religious in order to determine if it

40 See, for example, M.O. Mhango, "The Constitutional Protection of Minority Religious Rights in Malawi: The Case of Rastafari Students", 52 (2) *Journal of African Law*, (2008), pp.218-244 at p.224.

41 Para 182 of the judgment.

is protectable, and there is a difference between the tests applicable to the two.

To conclude the discussion on *Pillay*, it is worth reiterating the sentiments of Du Plessis, who neatly summarised the judgment, its effects and the way forward on religious freedoms by stating that *Pillay* was inspired by what may appropriately be referred to as a jurisprudence of difference which transcends mere tolerance or even magnanimous recognition and acceptance.[42] It is argued by Du Plessis that *Pillay's* case is only a starting point for the debate on religious jurisprudence, a stepping stone for the process of re-introspection and re-analysis of the past jurisprudence of the courts of South Africa in order to equip them to eradicate the weaknesses of today and plan for a better future.[43]

3.2.3 Remarks on the South African Jurisprudence

Based on the above discussion, it can be concluded that the South African courts would readily grant a conscientious objector exemption from school uniform regulations in appropriate circumstance. South African courts are very liberal and progressive in their interpretation of the extent of religious rights and freedoms. Liberal attitudes exhibited by the courts may have been influenced by South Africa's odious political past. The notorious and repressive Apartheid regime was known for its intolerance and serious infringement of human and peoples' rights.[44] For this reason, the South African courts are inclined to give the most generous interpretation of the Constitution and are ready to strike down any law, regulation and/or practice that impairs human rights unnecessarily.[45]

South African courts have consistently rejected the argument by school administrators that a departure from school uniform requirements is likely to affect discipline, learning ability and the general conduct of students and

42 L du Plessis, "Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Constitutional Case-law", 12 (4) *PER [On-line]* (2009), pp.27-28.

43 *Ibid* , pp. 27-28.

44 See O'Reagan's judgment in *Pillay* at para.121.

45 See the case of *Princ*e v *President of the Law Society of Cape of Good Hope* 2002 (2) SA 794 (CC) in which the court refused to grant exemption to a Rastafari applicant who wanted an exemption from the country's drugs and criminal laws to be allowed to use marijuana or cannabis sativa on religious ground on the basis that it is in the interest of public health and order that the uncontrolled use of certain substances be prohibited.

the school atmosphere, as demonstrated in *Pillay*[46] and *Antonie*.[47] It has been suggested that South African courts in this respect appear to be using social science research to expose and outlaw inequity in education,[48] in a manner popularized by the US Supreme Court in the celebrated case of *Brown* v. *Board of Education.*[49] If so, it is commendable that South African courts are following international best practice in this area of human rights adjudication.

It is worth noting that religious exemptions generally would not be given in favour of a conscientious objector in instances where the exemption applied for is in contravention of the basic constitutional values, or contrary to public policy or constitutes a danger to public health.[50] An application for exemption on religious grounds from laws of general application was refused by the Constitutional Court in *Christian Education South Africa* v. *Minister of Education*,[51] a case which, however, was not about school uniforms. The dispute concerned the prohibition by the South African Schools Act of 1996 of corporal punishment in schools. Christian Education of South Africa, representing 196 independent Christian schools, contended that this prohibition violates the right of the parents of its pupils to freedom of religion and that it interfered with the right to establish independent schools, the right to participate in the cultural life of their choice, the right to enjoy their culture and to practise their religion. Liebenberg J in the Eastern Cape High Court rejected these contentions.

On application to the Constitutional Court it was argued that corporal punishment is part of the religious beliefs of parents of its pupils and that the prohibition interferes with their right to religious freedom. The applicants relied on verses in the Bible which instruct Christian parents to use corporal punishment in raising and disciplining their children. Further, they argued that the parents in question had expressly delegated the authority to discipline their children to teachers and that such delegation of authority was in accordance with their religious beliefs. They argued that they administered corporal correction

46 Langa CJ at para 102 stated as follows: "I am therefore not persuaded that refusing Sunali an exemption achieves the intended purpose. Indeed, the evidence shows that Sunali wore the stud for more than two years without any demonstrable effect on school discipline or the standard of education."

47 2002 (4) SA 378

48 M.O Mhango, "Upholding the Rastafari religion in Zimbabwe: *Farai Dzova v. Minister of Education, Sports and Culture and Others*," 8 *African Human Rights Law Journal*, (2008), pp.221-238 at p.236.

49 374 US 497.

50 See generally *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757; 2000 (10) BCLR 1051 and *Prince* v *President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC).

51 Ibid.

in a biblical way and supplied guidelines to the teachers on how to apply it. They claimed that the prohibition of corporal punishment was accordingly unconstitutional to the extent that the parents had consented to it.

The State (the Minister of Education) opposed the appeal and argued that corporal punishment violated the right of the child to human dignity, to equality, to be protected from maltreatment, neglect, abuse or degradation, to be free from violence, and not to be tortured, and the right to be free from cruel, inhuman or degrading treatment. It was argued in opposition that the verses of the Bible that the applicant relied on did not empower or prescribe the use of corporal punishment by teachers, and that in passing the legislation Parliament sought to respect, protect, promote and fulfill the rights in the bill of rights that would be violated by corporal punishment.

The Constitutional Court highlighted the difficulty of striking a balance between religious beliefs and the laws of the land by noting that religious and secular activities were frequently as difficult to disentangle from a conceptual point of view as they were to separate in day-to-day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there was a vast area of overlap and interpenetration between the two. It was in this area that balancing became doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity were religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.[52]

Applying such a delicate balancing test, Sach J (as he was then) noted that no one in this matter contested that the appellant's members sincerely believe that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children. He went on further to hold that while they may no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, parents are not being deprived by the Schools Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Schools Act is limited merely to preventing them from empowering the schools to administer corporal punishment.

52 Para.35 of the judgment.

The court further held that the respondent has established that the prohibition of corporal punishment is part of a national programme to transform the education system in such a way as to bring it into line with the letter and spirit of the Constitution. The creation of uniform norms and standards for all schools, whether public or independent, is crucial for educational development. A coherent and principled system of discipline is integral to such development. This was held to be in consonance with the state's constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation.

The court also observed that the matter before it for determination did not oblige it to decide whether corporal correction by parents in the home, if moderately applied, would amount to a form of violence from a private source and further that it cannot be forgotten that, on the strength of the facts as supplied by the appellant, corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment.

In conclusion, the court held that the rationale for abolishing corporal punishment in schools was part and parcel of a legislative scheme designed to establish uniform educational standards for the country. Educational systems of a racist and grossly unequal character and operating according to a multiplicity of norms in a variety of fragmented institutions had to be integrated into one broad educational dispensation. Parliament wished to make a radical break with an authoritarian and violent past. As part of its pedagogical mission, the Department of Education sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the legislature prescribed a blanket ban on corporal punishment.

In the light of the foregoing and upon analysis of the burden of the State versus that of the conscientious objectors, the court held that the parents were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. These objects could be achieved simultaneously without conflict. What they were prevented from doing was to

authorise teachers, acting in their name and on school premises, to fulfill what they regarded as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools were not prevented from maintaining their specific Christian ethos.

3.3 The Republic of Zimbabwe

3.3.1 *Farai Dzova* v *Minister of Education, Sports and Culture and Others*

The Supreme Court of Zimbabwe has adjudicated on a matter akin to religious exemption from uniform requirements in a public school in the ground-breaking case of *Farai Dzova* v *Minister of Education, Sports and Culture and Others*,[53] in which the issues traversed included the constitutional right to freedom of religion; corollary to practise a religion without unnecessary impairment and/or abrogation; and the right not to be discriminated against on the basis of religion.

The applicant was the father of a six year-old child, Farai Benjamin Dzova. At the beginning of March 2005 the child was enrolled in grade (0) at a pre-school, in accordance with a new education policy requiring that pre-schools should be attached to primary schools so that there should seamless progression of pupils from pre-school to primary school. After graduating from a pre-school, Farai was enrolled at a primary school linked or related to the pre-school he had attended. The child's father claimed that while in pre-school the child's hair was never cut and was kept in what are commonly known as dreadlocks until the child graduated from the pre-school. The applicant claimed to have discussed the matter with the deputy headmaster and the teacher in charge, who maintained that they could not accept the child to continue learning at the primary school if his hair was not cut to a length acceptable by the school. The discussions did not bear any fruit.

On 27 January 2006 a certain Brighton Zengeni brought a letter from the school addressed to the parents of Farai, reminding them that one of the regulations at Ruvheneko Government Primary School as that the hair of all pupils had to be kept very short and well combed, regardless of sex, age, race or religion. The letter was essentially requiring the parents to abide by this

53 Judgment SC 26/07(2007) ZNSC; **2007) AHRLR 189 (ZwSC 2007).**

regulation. If they failed to do so they would be asked to withdraw or transfer their child from the school. Despite continuing engagement and dialogue, which involved various government departments, no common ground was found between the applicant and the school administrators. As a result, the courts were approached to adjudicate on the matter. In his founding affidavit, the applicant stated that the members of his family were practising Rastafarians and they had taken a Nazarite vow.[54] The order prayed for a declaration that the exclusion of the minor student, Farai, and the refusal to let him attend school with his dreadlocks was in violation of his rights guaranteed by section 19(1) of the Constitution of Zimbabwe.[55]

The school regulations which Farai was alleged to have said to have contravened concerning discipline in the school and obedience to the school staff. The Supreme Court held that it could not be argued or suggested that having long hair at the school was indiscipline. Cheda JA delivering a unanimous judgment of the Court held that the act complained of concerned only a manifestation of a religious belief, and was not related to the conduct of the child at school.[56] The Court further held that the regulations were irrelevant in the matter as they were concerned only with conduct in schools while the issue under consideration concerned the right to manifest one's religious beliefs as guaranteed by the constitution.

In conclusion, it was held that the expulsion of a Rastafarian from a school on the basis of his expression of his religious belief through his hairstyle was a contravention of sections 19 and 23 of the Constitution of Zimbabwe. The court further held that the school regulations were not made under the authority of law, and, therefore, it could not logically be argued that they were justifiable in a democratic society under one of the derogations to the protection offered by the Constitution. The court held that such regulations discriminated on the basis of religion. In Zimbabwe, as in other countries, the common view is that

54 See A.J. Garvey (ed.), *The Philosophy and Opinions of Marcus Garvey, or, Africa for the Africans*, Dover, Mass, Majority Press, (1986). On-line version available at http://www.wordowner.com/garvey/chapter3.htm [Accessed on 1 November 2017].

55 Section 19(1) reads as follows: "Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say, freedom of thought and of religion, freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or in private, to manifest and propagate his religion or belief through worship, teaching, practice and observance." Accessed at http://www.parlzim.gov.zw/cms/UsefulResourses/ZimbabweConstitution.pdf [Accessed on 10 November. 2017].

56 Judgment SC 26/07(2007) ZNSC; **2007) AHRLR 189 (ZwSC 2007,** at p.13.

non-discrimination is one of the most cherished values in any democracy.

3.3.2 Brief Remarks on Zimbabwe

The Supreme Court of Zimbabwe in *Farai Dzova's* case further developed the jurisprudence on this topic by suggesting the test for determining whether or not particular beliefs qualify as belonging to a recognised religion.[57] It has been contended that in *Prince*,[58] *In re Chikweche*[59]and *Pillay*,[60] the courts merely assumed and did not demonstrate why Rastafari and Hinduism should be regarded as recognised religions.[61] It is always in the interest justice for the courts to demonstrate why religion should be recognised as such. The case has also been hailed as contributing to the progressive realisation of religious freedoms in Southern Africa and as likely to be followed in other Southern Africa countries where government schools have for many years instituted similar prohibitions or restrictions.[62] It is submitted and contended that one such country is the sub-region's oldest liberal democracy, the Republic of Botswana, where surprisingly the students are still facing problems in manifesting their religious beliefs in public schools.

4. CONCLUDING OBSERVATIONS

There was inconsistency in the decisions of the House of Lords in *Mandla*[63] and *Begum,*[64] where the facts were more or less similar. It has been argued by Lenta that the jurisprudence of the UK House of Lords indicates that it may be prepared in certain circumstances to grant an exemption from school rules to permit the wearing of religious clothing and adornments, although its approach suggests that it is not eager to grant such exemptions.[65] It is

57 *Ibid* at pp.6-8.
58 *Princ*e v *President of the Law Society of Cape of Good Hope* 2002 (2) SA 794 (CC)..
59 1995(4) BCLR 533(ZS).
60 *MEC for Education: Kwazulu Natal and Others v Pillay*, 2008 (1) SA 474 (CC).
61 M.O Mhango, "Upholding the Rastafari religion in Zimbabwe …" 8 *African Human Rights Law Journal*, (2008), pp.221-238 at p.238.
62 *Ibid* at p.237.
63 *Mandla and Another* v *Dowell Lee and Another* [1982] 3 All ER 1108.
64 *R (on the application of Begum (by her litigation friend, Rahman) v. Headmaster and Governors of Denbigh High School*, [2006] UKHL 15; [2006] 2 WLR 719.
65 P. Lenta, "Cultural and Religious Accommodations to School Uniform Regulations",1 *Constitutional Court Review* (2008), pp. 259-293 at p.289.

submitted that not a great deal can be learnt from British jurisprudence since the courts have failed to lay down objective criterion indicating when and how they would grant or refuse to grant exemptions from school rules regarding uniforms. The two decisions are conflicting and make it difficult to state with certainty what the jurisprudence of the House of Lords is. In one instance they were ready to embrace liberal secularism and multiculturalism, yet in another they applied the fundamental secular jurisprudence of the Strasbourg Court, applicable to states having problems with religious extremism or, to be precise, with Islamic fundamentalism. There is little that other courts can learn from such jurisprudence as it stands. It is submitted that British courts could rise to the occasion in granting exemptions from school uniform requirements for adherents of minority religions if the so-called three pronged test was not insisted upon. This test was designed to restrict and/or prevent the abuse of process and the opening of the floodgates of litigation on religious grounds, what has been referred to above as the "slippery slope" scenario, in which students would abuse the provision for exemptions. The South African Constitutional Court demonstrates how such arguments may be discounted.

As has been recognized by the courts in South Africa and Zimbabwe, the importance of religion and the freedoms guaranteeing it to the development of an individual cannot be over-emphasised. It partly for this reason that it is submitted that when faced with litigation hinging on religious exemptions from uniform regulations, Courts in Botswana should be more than persuaded by decisions of Zimbabwean and South African courts. It is submitted that the courts of Botswana should borrow and apply the three-part balancing test in differentiating between meritorious and non-meretricious claims. That is to say, they should determine firstly if the source of the applicant's constitutional claim is a recognised religion; secondly, if the practice sought to be protected is a central part of the religion; and thirdly, if the applicant's belief in the religious practice is sincere. Botswana's courts should be as liberal and accommodative of all religions as democracy and multiculturalism dictates. The courts should embrace and cherish religious diversity in the country and should quash any attempt to discriminate on the basis of religion through the implementation of *prima facie* neutral laws and/or regulations.

The Court of Appeal in *Attorney-General* v. *Dow* held that the courts

in interpreting the provisions of the Constitution of Botswana must pay due regard to the detail of the language employed and to the traditions and usages which have given meaning to such language.[66] One approach contends that knowing that the Bill of Rights in the Constitution of Botswana was greatly influenced by the European Convention of Human Rights, local courts should be conversant with and apply the jurisprudence of the European Court of Human Rights in interpreting the Bill of Rights.[67] It is, however, submitted here the jurisprudence of the European Court of Human Rights on some issues should be applied with discernment and circumscription. Religious accommodation and exemption from school uniform requirements is one such area. It is contended that the European Court of Human Rights has in this area been heavily influenced by European culture and attitudes to religion in the public sphere, informed by the notion that religion is private and belongs exclusively to the private sphere, and that secularity means that the public sphere should be free from any religious practices. This approach is distinguishable from the American approach, which is that the public sphere has a place for all genuine religious beliefs and that it is the duty of the State to create an enabling environment for all religions to thrive without favour.

The other distinguishing factor between European countries and many African countries is that given Africa's colonial past, a liberal interpretation of constitutional provisions may be necessary to redress wrongs of the past. This is true of Botswana where some churches and/or religions were oppressed or even outlawed, as was the Zion Christian Church in the Kgatleng tribal territory,[68] and the Ethiopian Church in GaNgwaketse.[69]

In light of the foregoing, it is submitted that Botswana courts should follow the jurisprudence of the national courts of Zimbabwe, where the Bill of Rights was drafted in exactly the same manner by the British and worded similarly to the European Convention on Human Rights, but where a religious jurisprudence distinct from that of the European Court of Human Rights has

66 [1992] BLR 119 at 153.

67 B.T Balule "An Overview of the Regulatory Framework of the Media in Botswana", in Fombad C.M (ed.), *Essays On The Laws of Botswana*, Juta & Co Ltd, Cape Town, (2007) p.43.

68 See generally C. Maphorisa, "The Zionist village of Lentswe-Ie-*Moriti"*, 13(1&2) *Pula: Botswana Journal of African Studies*, (1999), pp.108-148.

69 See generally O. Kealotswe, "The Rise of the African Independent Churches and Their Present Life in Botswana. Who are the African Independent Churches (AICs): Historical background", 10(2) *Studies in World Christianity* (2004), pp. 205-222.

been developed to suit the multi-cultural, multi-tribal and multi-religious demographic composition of the country. The same holds true for South Africa, whose constitutional history has historical ties with the United Kingdom and where the wording of its Bill of Rights is obviously similar to that of the European Convention, yet such a relic of the past has not stopped its courts from developing a jurisprudence in accord with the national needs.

It is submitted that Botswana has more similarities with Zimbabwe and South Africa than with countries such as Turkey, France and Greece, whose national laws and circumstances have clearly influenced the jurisprudence of the European Court. On the other hand Botswana shares a common law with South Africa and Zimbabwe, that is to say the Roman-Dutch common law. The legal system is closely comparable and the jurisprudence of their courts regarded as highly persuasive. It is thus logical that Botswana courts should follow the jurisprudence of courts of countries with which it shares many legal traditions.

In essence, therefore, it is submitted that the limitation test to be applied in Botswana courts is the one adopted and applied by the South African Constitutional Court in the *Christian Education South Africa case*[70]and the case of *Prince*.[71] This is that the right to practice one's religion should be circumscribed only if there are compelling public interests to be served. Stifling religious manifestations in public schools are not in consonance with the dictates of a democratic society like Botswana's, which prides itself on the diversity of its population, was known for its tolerance even when the sub-region was known for hostility to certain racial grouping, and is currently known for tolerance and the peaceful co-existence of the many tribes found in the country. The same principles should be applied to the diversity of religions.

70 2000 (4) SA 757.

71 *Prince* v *President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC).