

THE RIGHT OF LEARNERS TO WEAR RELIGIOUS AND CULTURAL SYMBOLS TO SCHOOL—WHEN IS JEWELRY NOT JUST JEWELRY?

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INTRODUCTION

The question of whether or not learners should be permitted to wear religious or cultural symbols to school is not a new one in South Africa. For many in South Africa, the matter was finally settled by the Constitutional Court (hereinafter CC) judgment of *MEC for Education: KwaZulu-Natal v Navaneethum Pillay*.¹ This Article will critique the judgment and argue why it should not be regarded as the final word on the matter.

In *Antonie v Governing Body, Settlers High School and Head Western Cape Education Department*,² matters associated with religious and other symbolic freedom of expression were placed before the South African courts.³ In the *Antonie* case, a school suspended a learner for contravening the school's Code when she elected to wear a Rastafarian hairstyle hidden beneath a knitted cap in school colors.⁴ The High Court reversed the suspension on the basis that the learner's right to freedom of expression had been infringed.⁵ The High Court found that

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1. *MEC for Educ.: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) (S. Afr.) (hereinafter *Pillay*).

2. *Antonie v Governing Body, Settlers High Sch.* 2002 (4) SA 738 (Western Cape High Ct.) (S. Afr.).

3. *Id.*

4. *Id.* at 740.

5. *Id.* at 743I-44A.

freedom of expression could include the right to express oneself in various forms of outward expression including, but not limited to, clothing and hair.⁶ The High Court further found that this right would be protected insofar as it did not lead to “material and substantial disruption in school operations.”⁷ In overturning the learner’s suspension, the High Court was influenced by the need to inculcate into South African society “mutual respect including respect for one another’s convictions and cultural traditions.”⁸ Schools may not refuse school admission on the basis of race and, likewise, may not expel students for trivial infringements of a school’s Code of Conduct (hereinafter Code).⁹

Mawdsley and De Waal have stressed the vital role schools play in promoting social values.¹⁰ Schools should be encouraged to accommodate the diversity of religious and cultural traditions that permeate South African society. In this context, the *Antonie* case was correct and cannot be questioned. It was thus surprising that the matter of schools accommodating religious and cultural symbols arose before the South African courts again in the *Pillay* case.

I. THE HISTORY OF THE *PILLAY* CASE

Pillay also involved religious and cultural symbolism.¹¹ In *Pillay*, a Hindu learner wore a nose stud to signify her religion and culture.¹² The wearing of the stud was in direct contravention of the Code of her school, Durban Girls’ High School (hereinafter “DGHS”).¹³ The case began in the Equality Court, progressed through the High Court, and was finally resolved by the Constitutional Court.¹⁴

The matter was argued on the basis that the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁵

6. *Id.*

7. *Id.* at 738.

8. *Antonie*, (4) SA at 742.

9. STU WOOLMAN & BRAHM FLEISCH, *THE CONSTITUTION IN THE CLASSROOM: LAW AND EDUCATION IN SOUTH AFRICA, 1994–2008* 199 (Pretoria Univ. Law Press 2009).

10. Ralph Mawdsley & Elda de Waal, *Symbolism in Education: A Comparative Legal Analysis of Symbolism, Language and Culture in the United States and South Africa*, 41 DE JURE 561 (2008).

11. *Pillay*, (2) BCLR 99 (CC) (S. Afr.).

12. *Id.*

13. *Id.*

14. *Pillay v MEC for Educ., KwaZulu-Natal* 2006 (6) SA 363 (EqC) (S. Afr.); 2006 (10) BCLR 1237 (N) (S. Afr.); 2008 (2) BCLR 99 (CC) (S. Afr.).

15. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

had been infringed.¹⁶ The plaintiff-respondent argued that the learner's religious and cultural rights had been denied by the school's refusal to grant her an exemption from the Code that would have permitted her to wear the nose stud in school.¹⁷ The Equality Court found for the school and upheld the prohibition.¹⁸ This determination was based upon the fact that Pillay's mother had signed the Code and thus undertook to ensure her daughter complied with its terms when she was admitted to the school.¹⁹ The High Court found for the learner, overturned the Equality Court ruling, and stated that school codes of conduct "undermine[] the value of religious and cultural symbols and send[] learners the message that religious beliefs and cultural practices do not merit the same protection as other rights or freedoms."²⁰ The matter was referred to the CC.²¹

Chapter 2 of the Constitution of South Africa²² specifically provides for the protection of freedom of conscience, religion, thought, belief, and opinion,²³ as well as freedom of expression.²⁴ Furthermore, individuals are guaranteed the right to enjoy, *inter alia*, their culture.²⁵ Thus, the matter clearly related to constitutional issues and leave to appeal the finding of the High Court to the CC was granted.²⁶ The Governing Body Foundation (GBF), Natal Tamil Vedic Society Trust (NTVS) and the Freedom of Expression Institute (FXI) were admitted as *amici curiae* in the CC.²⁷

Before hearing the appeal, the CC was confronted by a number of issues raised by the parties. First, the Department of Education (the Department) purported to withdraw from the matter before the CC on the basis that the matter was moot because Pillay would have completed her schooling by the time the case was finally decided.²⁸ Furthermore, the Department argued that the revised National Guidelines on School

16. *Pillay*, (2) BCLR ¶ 28.

17. *Id.* ¶ 29.

18. *Id.* ¶ 14.

19. *Id.* ¶ 14.

20. *Id.* ¶ 35.

21. *Id.* ¶ 25.

22. S. AFR. CONST. 1996 ch. 2.

23. S. AFR. CONST. 1996 ch. 2, § 15(1).

24. S. AFR. CONST. 1996 ch. 2, § 16(1). In fact, there are four provisions in the Constitution dealing with culture and six with religion. (Culture: §§ 9, 30, 31, and 32; and religion: §§ 9, 15, 30, and 31).

25. S. AFR. CONST. 1996 ch. 2, § 31(1).

26. *Pillay*, (2) BCLR ¶ 35.

27. *Id.* ¶¶ 22–24.

28. *Id.* ¶¶ 32–35.

Uniforms of 2006,²⁹ issued by the Department subsequent to the commencement of the legal proceedings, had altered the legal landscape within which any subsequent matter would arise.³⁰

Second, the Department submitted that the *Pillay* matter was not a matter to be determined within the provisions of the Equality Act since there was no clearly identified dominant group that received better treatment than she did.³¹ It was the Department's contention that the matter was clearly related to freedom of religion and should never have gone before the Equality Court.³² On this point, the Department stressed that Pillay had not given evidence on her own behalf, a factor that it alleged should fatally flaw her case.³³ Finally, the Department argued that, if there was discrimination, it was not unfair because the Code was a result of a consultative process, it was important to the discipline and good order of the school, Pillay's mother agreed it to, and it did not prevent Pillay from wearing the stud outside of school hours.³⁴

Pillay's mother supported the view that her daughter's completion of school and the new guidelines made the present case moot.³⁵ She proceeded to argue that the case had been correctly instituted in the Equality Court, as the Equality Act does not require proof of a comparator or "dominant group" for the institution of a case, but rather that a rule imposes disadvantages that could be viewed as discrimination.³⁶ She denied the claim that her daughter's failure to testify flawed her case as the issue had not been raised under cross-examination in either of the earlier proceedings.³⁷ Furthermore, Pillay's mother stated that there was no evidence that an exemption granted to Pillay would in any way detrimentally affect the discipline, good order and quality education offered by the school.³⁸ Importantly, Pillay's mother asserted that although the case was premised upon the right to equality, she also sought to independently assert her daughter's right to freedom of religion and of expression.³⁹

29. South African Schools Act (84/1996): National Guidelines on School Uniforms, Government Notice (GN) 173, in Government Gazette (GG) 28538 of 23 February 2006, available at www.greengazette.co.za (hereinafter S. Afr. Schools Act 84)

30. *Pillay*, (2) BCLR ¶¶ 20-21.

31. *Id.* ¶ 25.

32. *Id.*

33. *Id.*

34. *Id.* ¶ 26.

35. *Id.* ¶ 28.

36. *Pillay*, (2) BCLR ¶ 28.

37. *Id.*

38. *Id.*

39. *Id.*

The issue of culture was introduced to the CC by the NTVS and FXI, who alleged that it should be treated in the same manner as religion.⁴⁰ They also indicated that, in their view, the right to freedom of expression was a relevant consideration in interpreting the Equality Act.⁴¹

The CC first addressed the issues of mootness and the failure of the applicant to first seek a ruling from the Supreme Court of Appeal before bringing the matter before it.⁴² The CC ruled that since two courts had heard the matter and there were indeed issues that the CC would ultimately be required to hear, there was no real value in requiring the parties go to the further expense of appealing first to the Supreme Court of Appeal.⁴³ It further found that a case is only moot when it presents no live controversy and the judgment would simply amount to an advisory opinion on an abstract legal principle.⁴⁴ In making this finding, the CC referred to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁴⁵ and *JT Publishing (Pty) Ltd v Minister of Safety and Security*.⁴⁶ Although Pillay had completed school, it was in the interests of justice for the CC to hear the matter as the CC's decision may be of practical value to others.⁴⁷ The CC listed the nature and complexity of the issue, the nature and extent of the practical effect an order might have, and the need to resolve disputes between courts as relevant factors to be considered in determining whether it should hear the matter.⁴⁸

The CC determined that the National Guidelines on School Uniforms had not truly altered the legal landscape since compliance with them is not mandatory.⁴⁹ The case was found to raise important issues relating to the protection of religious and cultural rights, both within, and possibly also outside, the school environment.⁵⁰ Furthermore, the judgment may well have practical implications for

40. *Id.* ¶ 29.

41. *Id.*

42. *Pillay*, (2) BCLR ¶¶ 30-35.

43. *Id.* ¶ 31.

44. *Id.* ¶ 32.

45. *Nat'l Coal. for Gay & Lesbian Equal. v Minister of Home Affairs* 2000 (2) SA 1 (CC) (S. Afr.).

46. *JT Publ'g (Proprietary) Ltd v Minister of Safety & Sec.* 1997 (3) SA 514 (CC) (S. Afr.).

47. *Pillay*, (2) BCLR ¶ 32; *Indep. Electoral Comm'n v Langeberg Municipality* 2001 (3) SA 925 (CC) (S. Afr.); *AAA Invs. (Proprietary) Ltd v Micro Fin. Regulatory Council & Another* 2007 (1) SA 343 (CC) (S. Afr.).

48. *Pillay*, (2) BCLR ¶ 32.

49. *Id.* ¶¶ 33-34 (citing S. Afr. Schools Act 84 § 8(3)).

50. *Pillay*, (2) BCLR ¶ 35.

persons other than Pillay.⁵¹ The CC thus determined to hear the matter.⁵²

II. THE CONSTITUTIONAL COURT'S DECISION IN *PILLAY*

Chief Justice Langa, from whose judgment the reasoning of the CC appears, delivered the CC judgment.⁵³ The CC found that although the Equality Act's constitutionality was not in question, the matter fell squarely within the scope of the provisions of that Act and not the Constitution.⁵⁴ Thus, the CC focused on the Equality Act and section 9 of the Constitution, not section 15, dealing with freedom of religion, belief and opinion,⁵⁵ or section 30, dealing with language and culture,⁵⁶ of the Constitution.⁵⁷ This was important as the Constitutional prohibition on unfair discrimination on the grounds of religion or culture, found in sections 9(3) and 9(4), is mirrored in section 6 of the Equality Act, which had never before been considered by the CC.⁵⁸

In holding Pillay to have been unfairly discriminated against, the CC stated the following five findings:

(1) The Code of the school, coupled with the refusal to grant Pillay an exemption allowing her to wear the nose stud resulted in discrimination.⁵⁹ It made much of the fact that it was the Code that forced Pillay to apply for an exemption and that the failure to grant such an exemption upon application had caused the matter to be brought before the courts.⁶⁰ The CC lamented the absence from the Code of clear measures to determine the circumstances under which an exemption could be sought and granted, as well as an appropriate mechanism to deal with applications.⁶¹

51. *Id.*

52. *Id.*

53. *Id.* ¶ 104 (Moseneke DCJ, Madala, Mokgoro, Ngcobo, Nkabinde, Sachs, Skweyiya, Van der Westhuizen J. and Navsa A J. concurred. O'Regan J. gave a separate judgment in which she took issue with some of the reasoning applied to the arrival at the majority decision. Her judgment will be addressed *infra* Part VI.).

54. *Id.* ¶ 38.

55. S. AFR. CONST. 1996 ch. 2, § 15(1) ("Everyone has the right to freedom of conscience, religion, thought, belief and opinion.").

56. S. AFR. CONST. 1996 ch. 2, § 30 ("Everyone has the right to use the language and to participate in the cultural life of their choice, but no one [*sic*] exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.").

57. *Pillay*, (2) BCLR ¶ 39.

58. *Id.*

59. *Id.* ¶ 35.

60. *Id.* ¶¶ 37-38.

61. *Id.* ¶¶ 36-38.

(2) A comparator did exist for purposes of the Equality Act in the form of those persons whose religious and cultural beliefs were not compromised by the Code.⁶² The CC avoided the question of whether or not a comparator would be required in all cases.⁶³

(3) The applicable ground of discrimination is sincerely held religious and cultural beliefs.⁶⁴ The Code is unequal in its impact, supporting mainstream and historically privileged forms of adornment and excluding minority and historically excluded forms of adornment.⁶⁵ The CC stated this compromised the neutrality of the Code.⁶⁶

(4) School codes of conduct are not neutral in effect but have disparate impact on students, denying historically disadvantaged students the freedom to adequately express themselves, forcing them to exist in an environment in which they feel excluded or marginalized.⁶⁷

(5) The CC was not required to look at freedom of expression in this case, beyond taking it into account as a factor in determining the fairness of the discrimination.⁶⁸

III. CULTURAL AND RELIGIOUS PRACTICES AND BELIEFS

The *Pillay* court distinguished between religious and cultural practices and beliefs.⁶⁹ It indicated that, although religious practices and beliefs were ordinarily associated with the faith of an individual, and cultural practices and beliefs with the beliefs and traditions of a community, there is a strong overlap between the two.⁷⁰ Sadly, the CC did not offer any guidance on the boundaries of culture in this case.⁷¹ It instead found that the wearing of the nose stud had both cultural and religious significance to Ms. Pillay.⁷² The CC arrived at this conclusion after assessing religious significance on the basis of her sincerely held personal beliefs,⁷³ a purely subjective assessment, and the cultural significance on the basis of an assessment of the importance of the

62. *Id.* ¶ 44 (O'Regan J., dissenting judgment, took a different view on the appropriate comparator, see *infra* Part VI.).

63. *Pillay*, (2) BCLR ¶ 44.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Pillay*, (2) BCLR ¶¶ 46-52.

70. *Id.* ¶¶ 46-52, 60.

71. *Id.* ¶¶ 47-48.

72. *Id.* ¶ 60.

73. *Id.* ¶¶ 52, 58-60.

symbol to her identity as part of a particular community, a somewhat more objective process.⁷⁴

Thus, it would seem that cultural convictions are portrayed in the individual's active participation in a group's practices and traditions that are fundamentally important to the individual's sense of dignity and their cultural identity as a member of a particular community. If it is determined that culture gives meaning to the individual, then the right to practice that culture is constitutionally protected.⁷⁵

It was in relation to the assessment of the sincerely held beliefs of Ms. Pillay, both cultural and religious, that the applicants raised the issue of her failure to testify on her own behalf.⁷⁶ They alleged that no finding of discrimination could be made in a case where she, herself, had offered no testimony as to her personal beliefs.⁷⁷ The CC determined that, although it was desirable that the person whose religious or cultural beliefs are at issue present evidence of their beliefs in person, in matters involving children, the testimony of adults may suffice.⁷⁸ The CC acknowledged that the proceedings would have been enriched by Pillay presenting evidence, given her age and level of maturity, but ultimately found that the failure to testify did not fatally harm her case.⁷⁹

The CC further found that the testimony of the parties and expert witnesses, combined with Pillay's defiance of the Code in the wearing of the nose stud in the face of considerable pressure to comply, supported the view that she sincerely viewed the nose stud as part of her religion and culture.⁸⁰ The CC also considered that Pillay wore the nose stud as a voluntary act, symbolizing her adherence to the South Indian Tamil Hindu culture and the Hindu religion.⁸¹

Despite the voluntary nature of wearing the nose stud, the practice was still protected under both the Constitution and the Equality Act because of its centrality to Pillay's sense of identity and dignity, which is, in turn, central to equality.⁸² The CC made much of the need to

74. *Id.* ¶¶ 52, 54 (Note one of O'Regan's most compelling departures from the majority judgment relates to the use of this assessment technique. See *infra* Part VI.).

75. *Pillay*, (2) BCLR ¶ 54.

76. *Id.* ¶ 55.

77. *Id.*

78. *Id.* ¶ 56.

79. *Id.* ¶¶ 56-57.

80. *Id.* ¶¶ 58 & 89-90.

81. *Pillay*, (2) BCLR ¶ 60.

82. *Id.* ¶¶ 60-64. Human dignity cannot be achieved in the absence of freedom. *Vryenhoek v Powell* 1996 (1) BCLR 1 (CC) at ¶ 49 (S. Afr.). One element of freedom is the entitlement of respect for the voluntary religious and cultural practices we choose to

promote diversity rather than to simply permit it.⁸³ It stated that to only protect mandatory beliefs and practices falls short of the constitutional objective to truly celebrate diversity.⁸⁴ The CC thus had no hesitation in finding that Pillay had been discriminated against on the basis of both religion and culture.⁸⁵

Once the CC had determined that there had been discrimination on the basis of the sincerely held religious and cultural beliefs of Pillay, the CC had to determine whether the discrimination was unfair.⁸⁶

IV. UNFAIR DISCRIMINATION

The CC then required the applicants to discharge the burden of proving that the discrimination was fair.⁸⁷ In arriving at this decision, the CC relied upon sections 13(2)(a) of the Equality Act and 9(5) of the Constitution.⁸⁸

The Equality Act provides for the determination of unfairness in section 14 and lists factors that make the scope of this section wider than section 9 of the Constitution.⁸⁹ These factors include “whether the discrimination impairs or is likely to impair human dignity,”⁹⁰ “the impact or likely impact of the discrimination on the complainant,”⁹¹ the complainant’s social position,⁹² “whether he or she suffers from patterns of disadvantage” or is a member of a group that has so suffered,⁹³ “the nature and extent of the discrimination,”⁹⁴ “whether the discrimination

participate in. Furthermore, the CC stated that such an approach accorded respect to these practices, a commitment to diversity, a break with the intolerance and exclusion had previously characterized South Africa’s past. *Pillay*, (2) BCLR ¶ 65. The CC stressed that this approach accords with that taken in other foreign jurisdictions. *Id.* This protection, the court found, should extend to both religious and cultural practices. *Id.* ¶ 66. In fact, the CC went so far as postulating that the protection of voluntary cultural practices may be even more important than religious practices. *Id.*

83. *See Pillay*, (2) BCLR ¶¶ 39-44.

84. *Id.* ¶ 62. This was the first occasion on which the issue of protection of voluntary beliefs and practices, both religious and cultural, had arisen before the South African courts.

85. *Id.* ¶¶ 55-56.

86. *Id.* ¶ 63.

87. *Id.* ¶ 69.

88. *Id.*

89. Promotion of Equality and Prevention of Unfair Discrimination Act 4, ch. 3, § 14(3), Government Notice (GN) 136 in Government Gazette 20876 of 9 February 2000, available at www.polity.org.za (hereinafter Promotion of Equality Act); S. AFR. CONST. 1996 Ch. 2 §9(5).

90. Promotion of Equality Act § 14(3)(a).

91. Promotion of Equality Act § 14(3)(b).

92. Promotion of Equality Act § 14(3)(c).

93. Promotion of Equality Act § 14(3)(c).

94. Promotion of Equality Act § 14(3)(d).

is systematic,⁹⁵ and whether the discrimination serves any legitimate purpose.⁹⁶ The court must also consider “whether and to what extent the discrimination [complained of] achieves its purpose”⁹⁷ and whether that same purpose can be achieved by a less restrictive and disadvantageous means.⁹⁸ The mandatory or voluntary nature of the practice was considered by the CC to be one of the factors that required consideration in determining the fairness of the discrimination complained of.⁹⁹

Pillay alleged that the school was obliged to afford her religious and cultural practices reasonable accommodation and called upon the CC to determine what steps by the school would have constituted “reasonable accommodation,” as required by the Equality Act, in the present case.¹⁰⁰ The CC considered this concept.¹⁰¹ The concept is not unknown in South African law and can indeed be found in the Equality Act where it is stated that, “failing to take reasonable steps to accommodate the needs of people ‘based on their race, gender or disability’ constitutes unfair discrimination.”¹⁰²

It also requires the government to develop codes and guidelines to provide for reasonable accommodation¹⁰³ and permits courts to require such reasonable accommodation of groups or classes of persons.¹⁰⁴ Sections 14(3)(i)-(ii) list reasonable accommodation as one of the factors to be considered in deciding upon the fairness of discrimination on one of the listed grounds.¹⁰⁵ Reasonable accommodation thus requires the state or an institution, in this case the school, to take positive measures to facilitate the individual’s enjoyment of their rights and to prevent their marginalization in certain circumstances.¹⁰⁶

In considering reasonable accommodation, the CC emphasized the need to reasonably accommodate for, *inter alia*, religion, disability and other instances where the norm is departed from and diversity needs to be promoted.¹⁰⁷ The difficult question is how far must the state or the

95. Promotion of Equality Act § 14(3)(e).

96. Promotion of Equality Act § 14(3)(f).

97. Promotion of Equality Act § 14(3)(g).

98. Promotion of Equality Act § 14(3)(h).

99. *Pillay*, (2) BCLR ¶ 67.

100. *Id.* ¶ 71.

101. *Id.* ¶ 72.

102. *Id.*

103. *Id.* ¶ 71.

104. *Id.*

105. *Pillay*, (2) BCLR ¶ 72.

106. *Id.* ¶ 73.

107. *Id.* ¶¶ 74–75.

institution go in reasonably accommodating diversity?¹⁰⁸ The CC decided to follow the Canadian approach that requires the state or institution to do more than simply exert a negligible effort to accommodate.¹⁰⁹ It said this would align with the spirit of the Constitution.¹¹⁰ Furthermore, such an approach would require the court to look at the circumstances in each case and may require a type of proportionality test weighing competing interests.¹¹¹ Therefore, determining reasonable accommodation would require the court to weigh the importance of the practice to Pillay against the hardship that might be caused to the school in permitting it.¹¹²

The school argued that Pillay had been reasonably accommodated, despite the fact that Pillay's mother had: signed the school's Code, the result of an inclusive consultative process, on her daughter's admission to the school in 2002;¹¹³ signed a declaration that she had undertaken to ensure her daughter's compliance with the Code;¹¹⁴ and knowingly permitted her daughter to pierce her nose and to wear a gold stud in the piercing when she returned to school after the September school holidays in 2004, in direct contravention of the terms of the Code.¹¹⁵

The school had allowed Pillay to wear the stud for a short period in order that the piercing could heal and the stud be removed and reinserted without any risk that the piercing would close.¹¹⁶ In this way, it had accommodated the religious and cultural practices of Pillay.¹¹⁷ It was further argued that the refusal on the part of the applicants to accede to Pillay's mother's repeated requests for the school to reconsider did not violate her constitutional right to practice her religious and cultural traditions since she was able to exercise her rights outside of school hours.¹¹⁸ The school indicated that exemptions to the Code are made on religious grounds, but that Pillay did not qualify for such an exemption because her mother had indicated the voluntary

108. *Id.* ¶ 76. In attempting to answer this question, the CC examined the court's approach to reasonable accommodation in *Prince v Pres. of the Law Soc'y, Cape of Good Hope* 2002 (3) BCLR 231 (CC) ¶ 42 (S. Afr.) per Ngcobo J, as well as foreign jurisprudence relevant to the topic. See *Pillay*, (2) BCLR ¶ 76.

109. *Pillay*, (2) BCLR ¶ 76.

110. *Id.*

111. *Id.*

112. *Id.* ¶ 79.

113. *Id.* ¶ 4.

114. *Id.*

115. *Pillay*, (2) BCLR ¶ 5.

116. *Id.* ¶ 6.

117. *Id.* ¶ 17.

118. *Id.* ¶ 85.

nature of the practice and that it was a tradition, and not a religious practice.¹¹⁹

It is against this backdrop that the CC considered the issues of deference towards school governing bodies as having the necessary expertise to determine such matters,¹²⁰ as well as the role of the consultation process associated with the drafting of the Code.¹²¹ The CC found that although governing bodies could rely on the requirement of deference in their area of expertise, it could not do so where an issue associated with an infringement to the right to equality was being determined.¹²² Furthermore, as the school in this case had to prove the fairness of the discrimination, the CC could not possibly defer to its Board of Governor's assessment of the fairness that it was required to prove.¹²³ The CC also applauded the participation of stakeholders in drafting the Code, and the democratic process that had been followed, but stated that this alone did not mean that the "resultant decisions" were immune to constitutional review.¹²⁴ Communities still contain unequal power relations that may result in decisions that discriminate.¹²⁵ That said, the CC was required to assess the importance of the cultural practice in the case to Pillay.¹²⁶ The CC found that to limit Pillay's right to wearing the stud outside of school hours sent the message that her religion and culture were unwelcome at the school.¹²⁷ Furthermore, the CC found that Pillay's adherence to voluntary practices associated with her religion and culture showed that wearing the nose stud was of central importance to her identity.¹²⁸

The CC required schools to accommodate the sincerely held religious and cultural beliefs and practices of scholars.¹²⁹ Thus, in the absence of any threat to standards and discipline within the school, uniformity should give way to permitting scholars to exercise their religious and cultural practices.

The CC stressed that although reasonable accommodation is only one factor to be considered in determining whether discrimination is

119. *Id.* ¶ 12.

120. *Id.* ¶¶ 80–81.

121. *Pillay*, (2) BCLR ¶¶ 82–83.

122. *Id.* ¶ 81.

123. *Id.*

124. *Id.* ¶¶ 82–83.

125. *Id.* ¶ 83.

126. *Id.* ¶ 80.

127. *Pillay*, (2) BCLR ¶ 85.

128. *Id.* ¶ 87.

129. *Id.* ¶ 76.

unfair *per se*,¹³⁰ it is of considerable importance in instances such as this, where the discrimination complained of flows from a rule that is *prima facie* neutral but has the effect of marginalizing portions of society.¹³¹ “[L]ocalized contexts,” such as schools, can easily achieve a balance between competing interests.¹³² For this reason, the CC found *Pillay* to be an apt case for the exercise of reasonable accommodation.¹³³

The CC dismissed the school's allegation that it had reasonably accommodated *Pillay*.¹³⁴ It stated that cultural practices are as important to the individual's identity as religious practices,¹³⁵ and that *Pillay*'s option to move to a school that would accommodate her cultural practices would amount to allowing the school to marginalize certain cultures and religions in an unconstitutional manner.¹³⁶ The NTVS and FXI's arguments were based on the view that the school's approach amounted to an infringement on the right to freedom of expression and that this right was one requiring independent protection as well as being relevant in assessing the unfairness of the discrimination.¹³⁷ The CC declined to make a determination on the issue of freedom of expression, except to say that it may be a factor in judging the fairness of the discrimination.¹³⁸ The CC observed that some practices of religion and culture need to be limited for the greater good, but the more central the practice to the individual's sense of identity, the greater the justification required for its limitation.¹³⁹

The CC rejected the school and GBF's argument that allowing *Pillay* to wear the nose stud would undermine school discipline and negatively affect the quality of education.¹⁴⁰ The CC weighed the legitimate interests of the school against those of *Pillay*.¹⁴¹ It found that *Pillay*'s application did not require it to examine the issue of school uniforms in general,¹⁴² but merely the granting of an exemption to the

130. *Id.* ¶ 77.

131. *Id.* ¶ 78.

132. *Id.*

133. *Pillay*, (2) BCLR ¶ 79.

134. *Id.* ¶¶ 92, 112.

135. *Id.* ¶ 91.

136. *Id.* ¶ 92.

137. *Id.* ¶ 93.

138. *Id.* ¶ 94.

139. *Pillay*, (2) BCLR ¶ 95.

140. *Id.* ¶ 101.

141. *Id.* ¶ 98.

142. *Id.*

rules.¹⁴³ The CC found that Pillay's wearing of the nose stud did not, in any way, compromise the school's discipline or standard of education; in fact, it offered an opportunity to celebrate multi-culturalism.¹⁴⁴

The CC distinguished between cases where the learner wore a nose stud for reasons of religious or cultural belief from those in which the nose stud constituted a simple cosmetic adornment.¹⁴⁵ It also dismissed arguments that the granting of an exemption in this case would open the floodgates, ultimately allowing excessive exemptions and threatening the school's discipline and quality of education.¹⁴⁶ The CC did, however, note that the mother would have been well advised to approach the school before the learner had the piercing, rather than after the fact.¹⁴⁷

The CC stressed that schools were empowered to establish a set of procedures for the application for, and granting of, exemptions to their codes of conduct.¹⁴⁸ Had this been done by DGHS, the matter may have arisen in a less confrontational manner.¹⁴⁹ However, the CC noted that the manner in which this matter arose should not impact negatively on the respect due to Pillay's rights.¹⁵⁰

Hence, the CC found that reasonable accommodation in this case would have been to allow Pillay an exemption.¹⁵¹ It found that schools must make exemptions for sincerely held religious and cultural beliefs and practices.¹⁵² Further, a departure from this approach would be permitted only when demanded by the circumstances of a particular case.¹⁵³

V. THE COURT ORDER

The CC found that the refusal to grant Pillay an exemption from the Code, allowing her to wear the nose stud, amounted to unfair discrimination.¹⁵⁴ It ordered the school's Governing Body to embark upon a consultative process, involving parents, learners and educators,

143. *Id.*

144. *Id.* ¶¶ 102, 104.

145. *Pillay*, (2) BCLR ¶ 106.

146. *Id.* ¶ 107.

147. *Id.* ¶¶ 108-09.

148. *Id.* ¶ 110.

149. *Id.*

150. *Id.* ¶ 111.

151. *Pillay*, (2) BCLR ¶ 112.

152. *Id.* ¶ 113.

153. *Id.* ¶ 114.

154. *Id.* ¶¶ 112, 115.

to amend the school's Code.¹⁵⁵ It was to provide for reasonable accommodation of deviations on religious and cultural grounds and to create a mechanism by which exemptions could be sought and granted.¹⁵⁶ The Department was ordered to pay costs.¹⁵⁷

VI. O'REGAN'S SEPARATE JUDGMENT¹⁵⁸

O'Regan dissented in part from the order of the CC and delivered a dissenting judgment.¹⁵⁹ In her judgment, she gave a brief overview of the role of apartheid in South African education and its aftermath in modern South African schooling.¹⁶⁰ She stressed that DGHS is an integrated school that delivers a quality education to its learners and produces outstanding results.¹⁶¹ This was relevant in making a determination in the *Pillay* case as well as in considering the requirement to accommodate learners in an environment in which they enjoy equal value and respect.¹⁶²

O'Regan examined the provisions of the school's Code within the context of the provisions of the Schools Act.¹⁶³ She stated that the Code was designed to establish a "disciplined and purposeful school environment, dedicated to the maintenance of the quality of the learning process."¹⁶⁴ The Code, in this case, was the product of consultation and the parents of prospective students were required to sign the Code.¹⁶⁵ Despite the absence of an express provision for exemptions, the school headmistress had indicated that exemptions are granted from time to time to accommodate for, *inter alia*, the wearing of traditional mourning bracelets.¹⁶⁶ From the testimony of the headmistress of the school, it appeared to O'Regan that although exemptions had often been granted on the basis of religion, not all exemptions had been based on religious grounds.¹⁶⁷ For this reason it appeared that the basis for granting

155. *Id.* ¶ 117.

156. *See id.* ¶¶ 114-17.

157. *Pillay*, (2) BCLR ¶ 118.

158. The term "judgment" to characterize a dissent is part of South African jurisprudence.

159. *Pillay*, (2) BCLR ¶¶ 120-185.

160. *Id.* ¶¶ 121-125.

161. *Id.* ¶ 125. *See generally* WOOLMAN & FLEISCH, *supra* note 9 (discussing the transformation of South African schools).

162. *See Pillay*, (2) BCLR ¶ 126.

163. *Id.* ¶¶ 127-28.

164. *Id.* ¶ 128 (citing S. Afr. Schools Acts 84 § 8(2)).

165. *Id.* ¶ 129.

166. *Id.* ¶ 130.

167. *Id.* ¶ 131.

exemptions is unclear.¹⁶⁸ In the case of *Pillay*, the application for exemption was interpreted by the school to be based upon family tradition with some religious or cultural overtones.¹⁶⁹ This is why, after seeking expert advice on Hinduism, the Governing Body refused the request.¹⁷⁰

O'Regan then explored the constitutional approach to culture and religion before dealing with the matter of unfair discrimination.¹⁷¹ She stated that she would add nothing further to Langa's comments on freedom of expression.¹⁷² However, she did state that section 9 of the Constitution prohibits discrimination on the basis of religion and culture, but section 15 only entrenches the right to freedom of conscience, religion, belief and opinion, not culture.¹⁷³ Culture is entrenched in section 30.¹⁷⁴ Section 31 provides for the rights of cultural and religious communities.¹⁷⁵ Thus, the Constitution differentiates between culture and religion on the basis of the individualistic nature of religion and the associative nature of culture.¹⁷⁶

This distinction, O'Regan averred, is also reflected in the United Nations International Covenant on Social, Economic and Cultural Rights¹⁷⁷ in which it is clear that cultural identity is a product of membership of a group.¹⁷⁸ She agreed with the majority that there may be an overlap between the two.¹⁷⁹ She opined, however, that religion need not be associative and, in such circumstances, the subjective inquiry regarding whether or not the belief is sincerely held is appropriate.¹⁸⁰ A cultural practice, however, is pursued as a member of a group or a community and the practice needs to be one pursued by a cultural community to garner protection.¹⁸¹

It was thus O'Regan's view that although religion may be associative and culture remains difficult to define, sections 30 and 31 of the Constitution protect cultural rights within the context of the

168. *Pillay*, (2) BCLR ¶ 131.

169. *Id.* ¶ 132.

170. *Id.*

171. *Id.* ¶ 140-148.

172. *Id.* ¶ 140.

173. *Id.* ¶ 141.

174. *Pillay*, (2) BCLR ¶ 142.

175. *Id.*

176. *Id.* ¶¶ 143-44.

177. U.N. Int'l Covenant on Civil and Political Rights art. 27, October 5, 1977, available at 1966 U.S.T. LEXIS 521.

178. *Pillay*, (2) BCLR ¶ 144.

179. *Id.* ¶ 145.

180. *Id.* ¶ 146.

181. *Id.* ¶ 147.

anthropological meaning, which states that these are practices that make life meaningful to a particular community.¹⁸² These practices are seen as associated with human dignity.¹⁸³ They attach to an individual and are protected in circumstances where he or she may feel his or her cultural or religious identity is threatened by larger, more dominant groups.¹⁸⁴ This protection is vital to reinforce the sense of worth of all cultural communities.¹⁸⁵ Such protection will only be afforded in so far as it is not inconsistent with the Bill of Rights.¹⁸⁶ O'Regan went on to stress the dynamic nature of cultural communities and warns against approaching them in the same manner as Customary Law, as this may create a false sense of coherence.¹⁸⁷

O'Regan criticized the approach adopted by the majority in protecting Pillay's sincerely held religious and cultural beliefs because, in her opinion, the approach ignored the associative character of cultural practices.¹⁸⁸ She stated that these practices derive their meaning from their community context.¹⁸⁹ She alleged that the majority's individual approach ignored the need for solidarity between communities in South Africa,¹⁹⁰ and overlooked the need to go beyond tolerance of sincerely held beliefs to a respect for the traditions and cultures that add depth to the individual's identity.¹⁹¹

Thus, O'Regan opined that the Constitution requires courts to give effect to the associative nature of those cultural rights that give meaning to shared practices.¹⁹² It further requires that cultural practices must be based upon human dignity and must underpin the individual's right to live a meaningful life.¹⁹³ This recognition, she stated, must be aimed at furthering the objective of creating a sense of solidarity or unity within the diverse South African society.¹⁹⁴

Applying this approach to the *Pillay* case would require that Pillay prove more than just a sincerely held belief, or that there is a family

182. *Id.* ¶ 150.

183. *Id.*

184. *Pillay*, (2) BCLR ¶¶ 150-51.

185. *Id.*

186. *Id.* ¶ 151.

187. *Id.* ¶ 153.

188. *Id.* ¶ 154.

189. *Id.*

190. *Pillay*, (2) BCLR ¶ 155.

191. *Id.* ¶ 156.

192. *Id.* ¶ 157.

193. *Id.*

194. *Id.*

tradition of following the practice in question.¹⁹⁵ She would need to prove that the practice was one pursued by a broader community of which she was a member.¹⁹⁶ O'Regan was of the opinion that the applicant's evidence and expert testimony clearly indicated that the wearing of the nose stud was a cultural practice amongst Hindu women and that it had no religious significance.¹⁹⁷

O'Regan then indicated that the CC should next have addressed whether or not the failure of the school to grant Pillay an exemption to accommodate her cultural practice placed a burden on her that caused her harm.¹⁹⁸ In making this assessment, O'Regan stated that the majority had erred in its identification of the appropriate comparator and that the correct comparator to be applied here would have been those learners whose cultural practices were accommodated through the granting of an exemption.¹⁹⁹ On applying this comparator, O'Regan agreed with the majority that Pillay had been discriminated against.²⁰⁰ She too found that the discrimination had been unfair on the basis that the school had granted other learners exemptions in similar instances.²⁰¹

She highlighted the failure of the school to spell out clearly, in the Code, the process, procedure and standards required for exemptions.²⁰² In her opinion, the school should have used the opportunity to open a dialogue on cultural diversity.²⁰³ She stressed that the school had failed in its duty to create clear and fair processes for granting exemptions that would promote respect for those seeking exemptions, as well as for school rules, and in facilitating greater understanding and respect for cultural practices of all learners.²⁰⁴

O'Regan bemoaned the absence of testimony by Pillay herself explaining why she regarded the cultural practice as an important aspect of her cultural identity.²⁰⁵ O'Regan stated that had Pillay testified, the school would have been required to weigh her testimony against the effect an exemption would have on the discipline and purpose of the Code within the school environment.²⁰⁶ O'Regan was convinced of the

195. *Id.* ¶ 159-161.

196. *Id.* ¶ 159.

197. *Pillay*, (2) BCLR ¶ 162.

198. *Id.* ¶ 163.

199. *Pillay*, (2) BCLR ¶ 164-65.

200. *Id.* ¶ 166.

201. *Id.* ¶¶ 167-73 (discussing discrimination and unfairness in school exemptions).

202. *Id.* ¶ 173.

203. *Id.* ¶ 173.

204. *Id.* ¶ 176.

205. *Pillay*, (2) BCLR ¶ 177.

206. *Id.* ¶¶ 177-78.

importance and beneficial function of the uniform in the school environment,²⁰⁷ and thus stressed the need to apply a proportionality test in assessing applications for exemptions.²⁰⁸ In light of this, O'Regan felt that the CC should have referred the matter back to the school so that a proper dialogue could be embarked upon.²⁰⁹ As Pillay had completed school, this was impossible in this instance, and thus O'Regan felt no order should have been made.²¹⁰

She disagreed with the majority decision to issue a declaratory order in the terms granted.²¹¹ O'Regan did, however, agree with the majority that the school should be called upon to amend its Code after a consultative process and to provide an opportunity within the curriculum to discuss with learners and other stakeholders, *inter alia*, the granting of exemptions.²¹² A clear process should be established and followed.²¹³

VII. CRITIQUE AND CONCLUSION

There can be no doubt about the importance of the *Pillay* judgment, which addressed issues such as protection of voluntary religious practices and beliefs and the application of the principle of reasonable accommodation of such rights. This said, there are a number of important issues that the judgment fails to address sufficiently. When should matters be brought before the court in terms of the constitutional provisions and when should they be brought under the Equality Act? Where is the boundary between culture and religion? What test should be applied in determining the sincerely held cultural beliefs and practices? When is Freedom of Expression at issue?

What standards should be put in place to prevent the disruption of the school environment by unreasonable requests for accommodation? To what extent should the principles stated above be applicable to private schools? Although the *Pillay* and *Antonie* cases related to state funded schools, they also contain a lesson for private schools, since they too are not permitted to discriminate.²¹⁴ Finally, is refusal to allow the majority of learners the right to wear religious and cultural symbols,

207. *Id.* ¶ 179. *Id.* ¶ 180 (discussing National Guidelines on School Uniforms).

208. *Id.* ¶ 181.

209. *Id.* ¶ 182.

210. *Id.*

211. *Pillay*, (2) BCLR ¶ 183.

212. *Id.* ¶ 184.

213. *Id.*

214. *Id.* ¶ 114 (discussing what the effect of the judgment is, what it is not, and the possible differences in private schools).

such as crucifixes and other Christian symbols, not an infringement of their rights when other religious practices are being accommodated within schools?

Indeed, it would seem that *Pillay's* case may well offer up more questions than it answers. It makes a significant contribution to the current discourse, but a close reading of the judgment would tend to indicate that it will, almost certainly, not be the last word on the matter.

It should be borne in mind that in a pluralistic society the majority can seek protection of their rights in legislation more readily than minorities.²¹⁵ These minorities rely on the Constitution, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 (cultural, religious and linguistic communities) is not a statistical one dependent on counter-balancing of numbers, but a qualitative one based upon respect for diversity.²¹⁶

Indeed, there are a number of constitutional provisions that deal with culture, language and religion.²¹⁷ However, Justice Kreigler has indicated that the state may not be required to fund schools that cater to a specific language, culture or religion.²¹⁸ Woolman and Fleisch question whether or not the South African constitutional framework would accommodate public schools of this nature, and conclude that it possibly would.²¹⁹ They predicate their finding on the mandate of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to build a constitutional democracy founded upon ethnic diversity and pluralism.²²⁰

Pillay's case puts the duty of schools to accommodate the religious and cultural rights of individuals beyond question. Consequently, there is a need to establish a suitable test to determine the cultural practices and beliefs of an individual. The majority view in *Pillay*, that once the individual's identification with the culture is established, the test becomes purely subjective,²²¹ cannot be supported. It is submitted here, that O'Regan's approach to determining cultural beliefs is to be preferred.

215. *Christian Educ. of South Africa v Minister of Educ.* 2000 (4) SA 757 (CC) ¶ 25 (S. Afr.).

216. *Id.*

217. See S. AFR. CONST. 1996 §§ 6, 9, 29, 30, 31, 35, and 235.

218. See *In re: The School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC) ¶¶ 39–42 (S. Afr.).

219. WOOLMAN & FLEISCH, *supra* note 9, at 57.

220. *Id.*

221. *Pillay*, (2) BCLR 99 (CC) (S. Afr.).

The importance of accommodating cultural beliefs and practices within the pluralistic South African society cannot be overestimated. Hence, it was shocking to many South Africans that in 2009 the issue again was raised when the principal of Springs Boys' High School broke a string of mourning beads from around the neck of a learner, Bongani Jiana, denying him the right to mourn his mother's passing in a traditional manner, consistent with his culture and beliefs.²²² The question must be asked, what are the values promoted by a school that cuts from a young man's neck, the symbol of his mourning for his mother's death?

"Symbolism is a powerful instrument for framing the rights and responsibilities of students, parents, school personnel and government in terms of protecting culture."²²³ Hence, no school in South Africa can accommodate for an attitude in which a school principal allegedly tells a student "we do not cater for your culture here, we don't know what your culture is."²²⁴ As in *Pillay*, the intransigence of the school in this case squandered a valuable opportunity to learn about another culture and to exercise tolerance and understanding. Instead, it became a distressing experience for all concerned, and a source of embarrassment. In the end, Jiana did not pursue the matter but changed schools and now attends one that accommodates his culture.²²⁵

In the case of Jiana, the Springs Boys' High School website states emphatically that "[w]hilst there will be tolerance and understanding of any persuasion, no special arrangements will be made to accommodate the different religions. No discrimination or intolerance of any religious denomination will be permitted or allowed."²²⁶

On culture, the website reads, under the title "Expectations": "While this school enrolls learners with diverse cultures and without any discrimination, the school cannot accommodate the vast dissimilarity of expectations, which could *inter alia* include different medical practices/rituals/remedies, contrasting habits or customs, dissimilar beliefs and/or opposing traditions."²²⁷ The Code provides under section 1.14 that "[n]o [j]ewelry or other ornaments may be worn

222. Karen Van Rooyden, *Culture Shock: Principle Turns a Beady Eye on Boy's Tradition*, THE TIMES, JAN. 31, 2009, <http://www.thetimes.co.za/SpecialReports/Schools/Article.aspx?id=929497> (last visited June 2, 2009).

223. Mawdsley & de Waal, *supra* note 10, at 578.

224. Van Rooyden, *supra* note 222.

225. *Id.*

226. *Springs Boys' High School* <http://www.springsboyshigh.co.za/important.htm> (follow "DRAG PAGE"; go to Page 2, ¶ 6) (last visited November 22, 2009).

227. *Id.* Page 2, ¶ 7.

with the school uniform other than wrist watches and medical tags. All items apart from those mentioned will be confiscated. In sporting attire all jewelry must be removed from sight.”²²⁸

It would certainly not appear that the school exercised any religious or cultural tolerance in this matter. The student was discrete in his wearing of the beads and in no way interfered in the educational operations or teaching at the school. Despite this, the school hid behind the wording of the documents on the website in an attempt to justify its actions.

In referring to this matter, Professor C Boonzaaier²²⁹ indicated that a failure to accommodate differences in culture in South Africa “stands in the way of good nationhood and good relations across cultural boundaries.”²³⁰

It might reasonably have been expected that school codes of conduct would be re-examined after *Pillay*; however, this is not happening. Likewise, the public outcry about the principal’s actions toward Jiana has not resulted in any change on the website.²³¹ The National Guidelines on School Uniforms,²³² to which the CC referred in *Pillay*, sets out guidelines that governing bodies must consider in setting rules regarding school uniforms. They also emphasize the educational and social purposes served by school uniforms.²³³ The guidelines were generated, *inter alia*, to ensure access to education and the protection of constitutional rights within schools.²³⁴ Guideline 29 makes specific provisions to assist governing bodies with regards to accommodating for religious and cultural diversity, as well as protecting freedom of expression.²³⁵ Guideline 29(1) suggests that religious and cultural diversity must be considered in drawing up a uniform policy or dress code.²³⁶ Such consideration could include measures to accommodate the religious and cultural beliefs of those whose religious beliefs are otherwise compromised. The question that begs here is why not religious and cultural? Guideline 29(2) calls upon schools to accommodate for obligatory religious practices.²³⁷ Again, the question

228. *Id.* Page 3, ¶ 1.14.

229. Professor of Indigenous Law and Cultural Tourism at University of Pretoria.

230. Van Rooyden, *supra* note 212.

231. *Springs Boys’ High School*, *supra* note 222.

232. Department of Education National Guidelines on School Uniforms, *supra* note 29.

233. *Id.* at *Introduction*, §§ 1, 5, and 6.

234. *Id.* at *Introduction*, §§ 2 and 3.

235. *Id.* at *Other Factors and Issues*, § 29.

236. *Id.* § 29(1).

237. *Id.* § 29(2).

begs, why not obligatory and voluntary and why not both religious and cultural? Guideline 29(3) provides specifically for accommodating for freedom of expression through the wearing of, for example, HIV and AIDS ribbons, but permits schools to prohibit the wearing of gang insignia or political insignia.²³⁸ The guideline also provides that schools should not accommodate any item that undermines “the integrity of the uniform.”²³⁹

It would thus seem that the guidelines do not clarify the matter any further than *Pillay* did. In fact, *Pillay* went further than the guidelines. Furthermore, South Africa cannot simply ban the wearing of any and all religious and cultural symbols to schools as this would amount to a violation of the constitutional rights of learners. Thus, there can be little doubt that *Pillay* will prove to be the beginning of a long dialogue and not the conclusion as might initially have been expected.

238. Department of Education Nation Guidelines on School Uniforms, *supra* note 29, at *Other Factors and Issues* § 29(3).

239. *Id.* § 29(1).