Recognising Religion: Emerging Jurisprudence in South Africa

Mtendeweka Mhango
University of Witwatersrand

Abstract

This paper examines the emerging jurisprudence with respect to religion in South Africa. The paper submits that South African jurisprudence has matured and will likely shape the jurisprudential trend in Southern Africa. The paper briefly discusses the history of the religious freedom under the apartheid government of South Africa, and argues that the laws passed during apartheid government were inclined towards Christian religious values and that to some extent this has persisted in post-apartheid jurisprudence. The paper also discusses the current judicial interpretations of the freedom of religion under the South African Constitution. In this regard, the paper examines the decisions in *Prince, Pillay* and *Popcru*, and their impact on human rights and the transformative agenda of the South African society.

Introduction

In an introduction section of a 1998 law review article, Richard Blake and Lonn Litchfield made the following statement:

> While South Africa's human rights record has historically been the poorest in southern Africa, its abolition of apartheid and its new constitutional dispensation has made it a leader

> in democracy for other Southern African nations. While some Southern African countries are regressing in their commitments to democracy and human rights, South Africa is boldly moving ahead. There is certainly an opportunity for South Africa to set the jurisprudential trend in terms of religious freedom case law in Southern Africa. There have not been many recent freedom of religion cases in Southern African courts, nor has there been much academic writing about religious freedom in Southern Africa. (1998: 516-517)

Perhaps one of the reasons that explain the above observations is that many of the Southern African countries underwent a period of transition from dictatorship or one party rule to democracy in the 1990s. Moreover, most cases involving the freedom of religion would rarely reach the courts to set any jurisprudential trend. However, since the above statement was made a number of academic writings have been published on religious rights in Southern Africa (see Mhango 2008b; Heyns and Brand 2003; Fourie 2003). Further, a number of important cases involving freedom of religion have been decided in South Africa.[1] First, in 2002 the South African Constitutional Court (Court) decided *Prince v President of the Law Society of the Cape of Good Hope* (*Prince*), where it ruled that a Rastafari lawyer was not entitled to an exemption to use marijuana as part of his religious and cultural practice.[2] Second, in *Member of the Executive Council for Education: Kwazulu-Natal and Others v Pillay* (*Pillay*) the Court decided that a high school learner was entitled to an exemption under a school code of conduct to wear a nose ring as part of her religious and cultural tradition.[3] Lastly, in *Department of Correctional Services and another v POPCRU and others* (*Popcru*) a full bench of the Labour Appeal Court ruled that the employer unfairly discriminated against prison security guards on the grounds of religion and culture when they were dismissed for refusing to cut their dreadlocks for religious and cultural reasons.[4]

This paper examines the emerging jurisprudence with respect to religion from the above three cases in South Africa. This examination demonstrates how South African jurisprudence has matured and will likely shape the jurisprudential trend in Southern Africa. The paper is organized into four sections. Section one is introductory. Section two briefly discusses the history of the religious freedom under the apartheid government of South Africa. It argues that the laws passed during the apartheid government were inclined towards Christian religious values, and that this inclination to some extent persists in post-apartheid jurisprudence. This historical discussion demonstrates the social context from which the freedom of religion jurisprudence emerged, and speculates on the impact of this

context on the Court and current interpretations of freedom of religion in South Africa. Section three discusses the current interpretation of the freedom of religion under the South African Constitution. It examines the recent decisions in *Prince, Pillay* and *Popcru*, and their impact on human rights and the transformative agenda of the South African society. Section four encompasses the final thoughts and conclusions.

Freedom of Religion or Christian Bias Under the Apartheid Government?

South Africa's constitutional history before 1994 is characterized by the rise of parliamentary sovereignty as a theory of governance. In this regard, Professor Dugard has argued that "parliamentary sovereignty is the starting point of any discussion about rights in South Africa" (Dugard 1978: 14). Under this theory of governance, courts were required to tolerate the decisions of the political majority in parliament, which enjoyed a monopoly of power with all other organs of state being subordinate to it (Currie and De Waal 2001: 44, 64). More importantly, parliament could make or unmake any law it chose without any substantive restriction from the courts (2001: 44). The only restriction was that courts could strike down acts of parliament if procedural requirements were not sufficient.[5] Therefore, parliament had considerable autonomy to pass legislation without concern that any other organ of state could invalidate or test such legislation against human rights standards. This prompted Professor Pieterse, in his study about the post-apartheid South Africa, to argue that "ironically in South Africa than elsewhere, the legislature has become the least powerful branch of government" (Pieterse 2004: 383; Currie and De Waal 2001: 96; Motala 1995:516).

Therefore, while the law in South Africa included the Union Constitution, this was not the supreme law and did not incorporate a bill of rights. Under the Union Constitution, human rights could be infringed by the state without recourse from the courts. Among the rights that were infringed was the freedom of religion under the leadership of the ruling National Party. It was Tamara Lave, who reminded us that when the National Party came to power in 1948 and officially introduced apartheid as a national governing policy, it declared its legitimacy on religious grounds with the moral support of the Dutch Reformed Church (Church) (Lave 1994: 483, 500, noting that in 1948, the Church accepted a report called *Racial and National Apartheid in the Bible*, which was the first attempt to justify apartheid based on the Bible). As a result, some statutes during the apartheid era had a manifest Christian preference. In his concurring opinion in *State v Lawrence,*[6] Justice Sachs said the following about the state's religious bias in pre-democratic South Africa:

> In the pre-constitutional era there were a number of statutory provisions with a religious foundation that in no way purported to maintain neutrality in relation to different confessional alignments. According to Professor JD Van der Vyver, writing in 1986, (i) in cases where the legislature ... expressed a particular religious preference it ... clearly sided with Christianity. He points out that the Publications Act 42 of 1974 seemingly subjected the entire censorship system to the dictates of Christian morality. Furthermore, primary and secondary education in public schools for white children was based on the principle of Christian national education, while education in black schools had to have a Christian character. A further indication of Christian bias in the law was that the crime of blasphemy applied to the slandering of the God confessed by Christianity only.[7]

Additionally, legal commentators have observed that the apartheid government enacted other statutes with a profound Christian preference (Blake and Litchfield 1998: 520-521; Lave 1994: 501). These statutes included the Immorality Act of 1927 and Prohibition of Mixed Marriages Act 55 of 1949, which forbade inter-racial intercourse and inter-racial marriage between blacks and whites respectively (for further discussion of the implementation of these apartheid laws, see Monteith 2006: 38-52). Blake and Litchfield have noted that the objective of these statutes was to protect Christian doctrines and practice (Blake and Litchfield 1998: 521). They point to the Publications Act, which was invoked to protect a Christian view of life; the bias in religious instruction in public schools; and the Sunday observation statutes which required adherence to the Christian Sabbath as well as other Christian holy days; and that only Christian oaths were deemed adequate in criminal tribunals (1998: 521). They also point to the enactment of the Group Areas Act, which created different residential areas for different races, and the Populations Registration Act 1950, which classified all South Africans into particular racial groups. The common feature in all these statutes is that they were endorsed by the Church. At the Cape Synod of 1949, the Church supported the statutes that banned inter-racial sex and marriage when Dominee Vorster stated:

> We felt very strongly that we had to preserve our identity, because that is a God-given right that every man has, the black man, the coloured, and the white. God created us differently,

> and it is to the honour of God that we must preserve that difference. We felt so strongly that we pointed out to people that God gave mankind Ten Commandments and one of them said Honour thy father and mother. That means it is not just a matter of being obedient to your parents. You must also honour your parents and preserve their identity too. (Lave 1994: 502)

It is submitted that this Christian preference has not been completely removed even following the advent of the new Constitution founded upon freedom, equality and human dignity. Instead, it could be argued that the State continued to sustain statutes that advance Christian values and practices in the early years under the new constitutional dispensation. This paper demonstrates that the case law under discussion reflects a move to reverse this practice.

One of the first cases decided by the newly established Court involving freedom of religion was *Lawrence.* In this case, certain provisions of the Liquor Act 27 of 1989, which prohibited the sale of liquor on Sunday and other significant Christian days were challenged on the basis that their purpose was to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holy days. There were three opinions written in this case. Then Chief Justice Chaskalson, wrote the majority opinion while Justice O'Regan wrote the dissenting opinion, and Justice Sachs concurred with the majority. A plurality of six justices of the Court found that the Liquor Act did not violate section 14 of the Interim Constitution, which protected freedom of religion.[8] The disagreement between the majority and dissent focused on whether there was an element of coercion against a licensee's right to entertain religious beliefs as they might choose, or to declare their religious beliefs openly under the Interim Constitution.[9] The majority's view was that there was no coercion because no evidence existed to support the finding that the Liquor Act interfered with the licensees' freedom of religion. According to the Court, none of the licensees were compelled to observe the Christian Sabbath or constrained from entertaining any other religious beliefs as they might choose.[10] The Court also reasoned that the Liquor Act did not compel any person to open or close business on Sundays.[11] Despite this, there were some areas of agreement between the majority and minority opinions. The area of agreement that this paper is particularly concerned with is the Court's characterisation of the preferred status of Christianity in apartheid South Africa. The following brief discussion of *Lawrence*, which was not contested by the justices, focuses on the pronouncements made by Justice O'Regan concerning the status of Christianity under the apartheid era.

In her dissenting opinion, Justice O'Regan concludes that the legislature's purpose in enacting the definition of closed day was not a secular one.[12] O'Regan reasoned that "even if the purpose was secular that would not be the end of the matter."[13] In her view, the question in each case will not be limited to the purpose alone, but a combination of whether the overall purpose and effect of a provision constitutes a violation of freedom of religion.[14] While the South African Constitution is not premised on a strict separation between church and state, Justice O'Regan relied heavily on US Supreme Court cases interpreting the US Constitution, which is premised on the separation between church and state. In her reliance on US case law, Justice O'Regan appears to infuse the purpose and effect the test otherwise known as the lemon test, developed by the US Supreme Court, into South African law.[15] Justice O'Regan further and correctly reasoned that although it was permissible under South African constitutional law for the state to allow religious observances in public institutions, the state was not permitted to favour one religion over another. Instead, Justice O'Regan observed that "the state was required to act even-handedly in relation to different religions."[16] She explained that the requirement of equity in the notion of freedom of religion as expressed in the Interim Constitution was a rejection of past practice in which Christianity enjoyed a preferred status under the apartheid government in many areas of life; and that no longer would such explicit endorsement of one religion over others be permitted under the new constitutional dispensation.[17] According to O'Regan, it was not possible to read the closed day provisions in the Liquor Act as not having the unjustified effect of offending the Interim Constitution.[18] She emphasized that the conclusion was inescapable that the closed days were selected because of their religious significance for Christians, and that the inevitable effect was to give a statutory endorsement and dominance to Christianity but not to other religions.[19] It is in this historical context that Pieter Fourie has argued that the dominance of Christianity amongst the religions was widely regarded as the norm in South Africa (Fourie 2003: 100). This influence of apartheid has continued to shape the law in post-apartheid South Africa, where the starting point remains Christian. But, there may also be deeper issues at play that Professor Grace Davie argues, in the context of Britain, relate to the sociological and historical reality. Davie says:

> Christian nominalism remains a more prevalent phenomenon than secularism. Nor should the fact that belief in this country derives primary from Christian and largely protestant culture be taken for granted. Christian assumptions and Christian

> vocabulary remain important even if the content has altered quite significantly. (Davie 1994: 76)

Since there is no difference between British and South African Christian nominalism, Davie's observations above are applicable to South Africa where Christian assumptions continue to be the cause of most the controversial religious cases that end up in the courts. However, it is fair to say that courts in South Africa began to confront these Christian based assumptions in the mid-1990s.

Religious or Cultural Exemptions in South Africa

Since *Lawrence,* the Court has on a few occasions interpreted the freedom of religion provisions in the Constitution. In this section, I examine two recent cases and their impact on South African jurisprudence with respect to religion. Though not clearly stated in these cases, the Court has adopted a three prong balancing test to review conduct that unlawfully affects religious beliefs or practices and to determine which beliefs qualify for constitutional protection. Generally, under this test, which was first formulated in *Prince* and later modified in *Pillay*, a court will ask the following questions. First, whether the source of the applicant's constitutional claim is a recognized religion;[20] second, whether the practice sought to be protected is a central part of the religion,[21] and third, whether the applicant's belief in the religious practice is sincere.[22]

Limitation of Religious or Cultural Freedom

One of the first cases, in which the Court ruled to limit freedom of religion by applying the three prong balancing test is *Prince.* In *Prince*, the plaintiff was a devout Rastafari and citizen of South Africa. He converted to Rastafari in 1988 by adopting the vow of the Nazarene. As a symbol of his conversion, the plaintiff began to wear his hair in dreadlocks and observe the dietary and other commands of the religion.[23] For instance, as part of his religion, he partook in the use of marijuana at religious ceremonies. He also stated that he "uses [marijuana] by burning it as incense or smoking it in private at home as part of his religious observance."[24]

In addition to his religious conviction, the plaintiff was a law graduate and was employed by the Legal Aid Clinic at the University of Cape Town. At the time of this litigation, the plaintiff was pursuing a Master of Laws degree on a part-time basis. As part of his wish to qualify as a legal practitioner, he entered into a required contract of community service for one year with his principal at the Legal Aid Clinic.[25] However, the Secretary of the Law Society

of the Cape of Good Hope (Law Society) refused to register his contract. The refusal was based on the Law Society's opinion that the plaintiff was not a fit and proper person in terms of the Attorneys Act 53 of 1979 because he had two previous convictions for possession of marijuana and had made clear his intentions to use marijuana in the future.[26] The plaintiff challenged the decision of the Law Society arguing that it violated his freedom of religion under sections 15(1), the predecessor to section 14 of the Interim Constitution, and 31 of the Constitution. These provisions provide:

> Section 15(1): Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
>
> Section 31: Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community: (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Both the High Court and Supreme Court of Appeal dismissed his lawsuit.[27] He then appealed to the Court, challenging the constitutionality of the Drugs and Drug Trafficking Act 104 of 1994 (Drugs Act) and the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) in so far as they fail to provide an exemption from criminal prohibition in the case of persons requiring to possess and use marijuana for religious or cultural purposes. His appeal was dismissed by a narrow majority of the Court.[28]

There were two opinions written in this case. Former Chief Justice Chaskalson wrote the majority opinion and Justice Ngcobo the minority opinion. Legal commentators have observed that the disagreement between the majority and minority focused on the application of the limitation clause under section 36 of the Constitution (Currie and De Waal 2005: 344-346; Gibson 2012: 333). The majority in *Prince* held that the use of marijuana by Rastafari adherents cannot be sanctioned without impairing the state's ability to enforce its statutes in the interests of the public and to honour its international obligations; that the failure to make provisions for an exemption to the possession of marijuana by Rastafari is reasonable and justifiable under section 36 of the Constitution. However, there were a number of areas of agreement between the minority and majority opinions in relation to the recognition of the Rastafari religion with which this paper is particularly concerned. The following discussion of the decision in *Prince* primarily focuses on the background set out in the minority opinion

by Justice Ngcobo. It is submitted that, while Ngcobo's opinion is the most preferred opinion and focus of this paper in terms of its background analysis, the majority opinion also deferred to the background analysis set out in Ngcobo's opinion.[29] Therefore, it is unnecessary for this paper to distinguish between the majority and minority opinions in the discussion that follows because these matters were not in dispute among the justices in *Prince*.

In addressing the first question under the balancing test adopted in *Prince* (whether Rastafari is a religion), the Court unanimously observed that "it is not in dispute that Rastafari is a religion that is protected by sections 15 and 31 of the Constitution" (Taylor 1984: 1605).[30] However, the Court noted that what "was in issue was the practice of the Rastafari religion that requires its adherents to use marijuana."[31] In effect, the Court pronounced that Rastafari is a constitutionally recognized religion in South Africa. As a result of the first pronouncement, the Court felt less obliged to engage in a detailed discussion of the religious status of Rastafari except for a brief account of its history and origin.[32] Presumably, however, if the Court had been dealing with an unfamiliar religious group, it would have likely explored into the questions of recognition in great detail before addressing the second prong of the test.

In addressing the second prong of the test (whether the smoking of marijuana is a central part of the Rastafari religion), the Court ruled that it "is undesirable for courts in South Africa to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice."[33] It found that such dispute was not present in *Prince.* The Court justified this ruling when it remarked that:

> Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their belief are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith.[34]

The Court's remarks regarding the second prong of the test should be welcomed when applied in circumstances where a religion is familiar to a court, such as in *Prince*. It is submitted, however, that the centrality of the religious practice, for which protection is claimed, is a relevant factor for courts to consider because it could be crucial to the success and validity

of a claim.[35] The underlying principle supporting this consideration is the observation that an action that restricts a practice central to a religion successfully limits the practice of that religion. Therefore, in my view courts should extend greater protection to practices that are deemed central to a religion. Some commentators have urged that the ultimate inquiry must be subjective and look to whether "for this particular Rastafari the practice at issue is central to the practice of his religious beliefs" (O'Brien and Vaughan 2002: 239). Despite the refusal to inquire into the centrality of the use of marijuana in the Rastafari religion, the Court was unanimous in ruling that the use of marijuana is central to the practice of the Rastafari religion.[36] The implication from the court's reasoning is that the question of centrality of a religious practice is susceptible to viable judicial inquiry and that, given the appropriate set of facts, the Court may expressly examine this question in the future. In fact as will be demonstrated later in the context of *Pillay* and *Popcru* the courts have pronounced into the centrality of a religious or cultural practice.

The last question addressed by the Court was the sincerity of the plaintiff's Rastafari beliefs. In addressing this question, the Court accepted that "there is no question about the genuineness of the plaintiff's religious belief because he has demonstrated that he is a bona fide member of the Rastafari religion."[37] This finding was presumably based on the fact that the plaintiff demonstrated knowledge of the history and tenets of Rastafari, and the Court felt no need to examine the sincerity of his beliefs. It is important to note that the purpose for inquiring into the sincerity of a claimant's religious beliefs for which protection is claimed is to screen unreliable claims (O'Brien and Carter 2002: 235-238). Like in South Africa, courts in the United States have relied on this examination and have viewed it as a proper subject of judicial scrutiny.[38] This examination is also present in the jurisprudence of the European Commission on Human Rights (O'Brien and Carter 2002: 235). The advantage of this examination is that it enables courts to distinguish between real and sham Rastafari in a society where not all who have dreadlocks are Rastafari and not all Rastafari have dreadlocks. In fact, Rastafari have argued that "you don't have to have dreadlocks to be a Rastafari, it is rather one's conception that makes them a Rastafari" (Heritage 1999).

The *Prince* decision raises a number of important socio-political changes. The following paragraph discusses four of them. First, the Court unequivocally recognised that Rastafari is a religion and that its adherents are part of the South African society protected under the Constitution; that the fact that "Rastafari are a small and marginalised group means that the bill of rights is of a particular significance to them."[39] From a socio-political context, this recognition and pronouncement by the Court is important because it says that

there are other religions other than Islam, Judaism, and Christian religions that are recognised and protected in the South African society; that minority religions like Rastafari should not be rejected or discriminated against, but welcomed and celebrated under the new constitutional dispensation. This is an important development in the Court's jurisprudence in light of South Africa's previous history of Christian bias. Furthermore, the effect of the *Prince* decision on Rastafari adherents is that it reinforces their sense of dignity and recognition in the society that they are part of. Additionally, it reaffirms South Africa as an open and democratic society based on human dignity, equality and freedom. Since *Prince,* schools, employers and other organisations have exemplified a renewed commitment to recognising the Rastafari religion and its practices, and have in many respects accommodated the views of Rastafari into the market place of ideas.[40]

Second, *Prince* reflects a significant shift from Christian preference towards providing recognition to non-Christian religious groups that continue to face persecution in many parts of the Southern African region like South Africa and Zimbabwe (Mhango 2008: 220-238), and Malawi (Mhango 2008: 218-220; Gumba 2012). Despite the plaintiff not being successful in *Prince*, it is without doubt that the Court was mindful of the persecution of Rastafari during apartheid and considered this case as an opportunity to reverse the past and send a message of recognition. It is decisions like *Prince* and others like it which enhance the position of those, during the drafting of the Constitution, who insisted on the creation of a specialised constitutional court. Some constitutional scholars writing in the early history of the constitutional reforms in South Africa observed that some of the framers feared that unlike the new legislature and executive, the judiciary would continue to be dominated by the same views that prevailed under the old regime (Currie and De Waal 2001: 270-274). To some framers, the old members of the judiciary lacked the political legitimacy to perform the politically controversial task of constitutional adjudication and transformation of South Africa (Currie and De Waal 2001: 270-274). According to Currie and de Waal, some framers viewed the judiciary as complicit in enforcing apartheid statutes and saw the need for the judiciary to share responsibility with the other branches of state for the policies of segregation and apartheid and the denial of human rights that accompanied the implementation of those policies (2001: 270-274).

In light of this social-political history, there were clear social pressures in *Prince* for the Court to challenge mainstream religious views and to be seen as promoting religious diversity. On this point, it is important that the Court agreed to hear the case and confront mainstream religious views. It is equally important that the Court was narrowly divided over the question of whether Rastafari should be granted the right to use marijuana for religious

or cultural purposes. The Court could have refused to hear the matter on the basis that there was no prospect of success in the matter.[41] In fact, it could be argued that since *Prince*, the Court has been reconstituted and that if it, in its current form, were to be given an opportunity to decide this question again there is a possibility that the Court would reverse *Prince.*[42] This argument is informed by the possibility that the current Court may be composed of justices with different judicial philosophies than when *Prince* was decided. Moreover, since *Prince* there has been some significant legal developments in favour of legalising the use of marijuana for religious purposes. In 2008, the Italian Supreme Court in a case similar to *Prince* ruled in favour of the Rastafari adherent (Gibson 2012: 336).

Third, there was an international rationale for the Court's decision in *Prince*. The Court highlighted South Africa's international obligation under international law in the fight against drug related crimes, including the trade of marijuana, as a basis for upholding the impugned legislation. Clearly, the Court was reluctant to ignore the realities and interests in the fight against drug trafficking in deciding whether a right such as religion or culture could outweigh those interests. It ruled against the plaintiff and found that the Drugs Act and Medicines Act were not invalid because there were no other less restrictive means to achieve the state's interests. It is important to point out that one of the uniquenesses of the Constitution is the requirement it places on courts to consider both binding and non-binding international law when interpreting the Constitution.[43] This requirement played a major role in the Court's rationale to justify the limitation on freedom of religion in *Prince.* However, Mathew Gibson has criticised the Court's reliance on South Africa's international obligation in the fight against drug trafficking as a basis of its decision in *Prince* arguing that such remarks "further stereotype Rastafari and are discriminatory" (Gibson 2012: 334-335).

Lastly, *Prince* presents a legal strategic opportunity for future litigants. As pointed elsewhere, the plaintiff's challenge was that the Drugs Act and Medicines Act were overbroad and thus unconstitutional. The plaintiff did not dispute the legitimate government interest which it sought to achieve by prohibiting the possession and use of marijuana by the general public, except that such legitimate purpose, he argued, could be achieved by less restrictive means. Justice Ngcobo appropriately described the issue before the Court when he said:

> We are not called upon to decide whether the legislature's general prohibition on the use and possession of cannabis is consistent with the Constitution or not. Equally, we are not called upon to decide whether the use and possession of

> cannabis should be legalised. Finally, we are not called upon to determine what exemption should be granted to the appellant or to fashion any exemption. What we are called upon to decide is whether the impugned provisions are overbroad.[44]

In light of the above description, the Court limited its discussion to whether the relevant provisions of the Drugs Act and Medicines Act were unconstitutional. It left open the question of whether the Drugs Act and Medicines Act are unconstitutional in their entirety. Thus, it is possible that a future litigant could successfully attack the Drugs Act and Medicines Act in their entirety. A future litigant could also successfully challenge the state's interest in prohibiting the possession and use of marijuana by adults. Similar interests were challenged in *Ravin v State,*[45] where the Alaska Supreme Court held that "possession of marijuana by adults at home for personal use is constitutionally protected under the right of privacy"[46] because the state could not "meet its substantial burden and show that the proscription of marijuana in the home is supportable by achievement of a legitimate state interest" (Winters 1998: 315; Brandeis 2012: 175).[47] The Supreme Court did not see the requisite close and substantial relationship between the state's asserted interest in protecting the public from the dangers of marijuana use and the means chosen to advance that interest in a form of state statute prohibiting all possession and use of marijuana.[48] According to the Supreme Court, a blanket marijuana prohibition simply went too far and the available scientific evidence did not "justify intrusions into the rights of adults in the privacy of their homes."[49] Furthermore, the state's marijuana ban was also out of line with what the Supreme Court portrayed as a basic tenet of a free society: "the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large."[50] While the plaintiff in *Prince* lost in the final analysis, the Court granted protection to another religious minority member and expanded the scope of the freedom of religion and culture in *Pillay.*

Promotion of Religious and Cultural Freedoms

Despite adopting a liberal Constitution, which generously protects individual rights to all who reside in South Africa, a South African public school, the Durban Girls High School (the School), denied one of its students Sunali Pillay the right to wear a nose ring at the School. According to the School, Ms Pillay was prohibited to wear any jewellery under the requirements of the School's code of conduct. The School threatened to expel Ms Pillay from School if she continued to wear the nose ring. Prior to the School executing its threat to expel Ms Pillay, her mother, brought a discrimination lawsuit

before the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). The Equality Court ruled in favour of the School, and on appeal to the High Court, its decision was reversed. The School appealed the matter to the Court.

On appeal, the Court modified the balancing test first adopted in *Prince,* which courts should employ to review government and private conduct that invade religious or cultural practices and determine if a practice or belief qualifies for constitutional protection. Under the new test, which was formulated by Chief Justice Langa, the courts are required to determine whether a practice or belief is central to the claimant, and whether the claimant is sincere in their belief or practice.[51] Furthermore, unlike in *Prince*, the *Pillay* Court ruled that constitutional protection to a sincere practice or belief, which is central to a religion or culture, will be granted regardless of whether the practice or belief is mandatory or voluntary.[52] The Court reasoned that the "fact that people choose voluntary to adhere to a practice rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity."[53]

The Court further justified that the "protection of voluntary as well as mandatory practices conforms to the Constitution's commitment to affirming diversity; that differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it, and that this falls short of our constitutional project which not only affirms religious diversity, but promotes and celebrates it."[54] In the final analysis, the Court held that whether a religious or cultural practice is voluntary or mandatory is irrelevant at the threshold stage of determining whether it qualifies for constitutional protection.[55] Therefore, it found and ruled that Ms Pillay was discriminated against on the basis of both religion and culture in terms of section 6 of the Equality Act.

According to the Court, the difficult question under the first prong of the test is whether centrality of a practice should be determined and based on an objective or subjective standard, and to further enhance religious pluralism it ruled in favour of judging the centrality of a practice with reference only to how important the belief or practice is to the claimant's religious or cultural identity (Tribe 1978: 864).[56] What is relevant, according to the Court, is not whether a practice is characterized as religious or cultural or whether it is voluntary or obligatory but its meaning to the person involved (Tribe 1978: 864). Tribe has correctly advocated for a similar method and points out that "the ultimate inquiry in these matters must look to the claimant's sincerity in stating that the conflict is indeed with a tenet central for that individual" (1978: 864). Other commentators have also argued in favour of a subjective standard of review in these matters.[57]

One of the significant effects of the *Pillay* Court adopting a subjective test is that the Court has ensured that almost every practice in respect of which an exemption is sought will be considered important in itself. This is because a claimant simply has to show that he or she honestly believes that the practice in question forms a central part of his or her religion or culture in order for it to be classified as such and protected by the laws of South Africa. In these circumstances, it will probably be a significant challenge for most schools or other organisations to justify a decision not to grant a religious or cultural exemption (Dyani and Mhango 2009: 499). In their commentary on the effects of *Pillay*, Dyani and Mhango have observed that in practice most schools or organisations will probably grant religious or cultural exemptions to all those who apply (2009: 499). In addition, the *Pillay* Court, as Justice O'Regan pointed out in her dissenting judgment, has ignored the fact that cultural practices are associative and not individualistic, and adopted an extremely individualistic approach to the notion of cultural beliefs and practices.[58]

Furthermore, by protecting both voluntary and mandatory cultural and religious practices the Court has significantly extended the range of beliefs and practices encompassed by the right not to be unfairly discriminated against. An important consequence of this ruling, as Dyani and Mhango observe, is that very few claims for religious or cultural exemptions will be excluded at the threshold stage of the enquiry (2009: 500). A number of claims, therefore, will have to be resolved at the unfairness stage of the enquiry, which means that the threshold stage of the enquiry has been rendered largely redundant and that it will probably not play a principal role in the unfair discrimination enquiry under the Constitution or Equality Act. Given that most disputes will likely be resolved at the unfairness stage of the enquiry, most schools will, whenever faced with an application for religious exemption, have to carry out a proportionality analysis.[59] This is a sophisticated analysis and while the courts may be well-placed to carry out such a difficult task, it is unlikely that most schools and other organisations are best equipped to engage in such analysis. Practically, this probably means that most schools or organisations will simply grant religious exemptions to all those who apply.

It should be noted that *Pillay* is likely to have an impact on Southern African schools and other organisations that have rules that prevent the wearing of religious or cultural expressions such as dreadlocks (Mhango 2008: 218-220) or Muslim headscarves and others religious or cultural attires (Lenta 2007: 296). While the Court, in its commitment to the doctrine of avoidance, pointed out that this matter is likely to be different in private schools, in reality the impact of this decision is more likely to be similar for both private and public schools in South Africa. One reason for this is that unlike many

older constitutions such as the United States Constitution, the Constitution is binding on both private and public actors (Currie and De Waal 2005: 43; Chemerinsky 2001: 401-447).[60] It is submitted that the impact of this ruling will probably cause such schools and other organisations to accommodate learners or employees who have dreadlocks or done headscarves to school or at work whether for religious or cultural reasons.[61] If *Pillay* was not clear enough about the scope of the freedom of religion and culture in South Africa, it is my view that *Popcru* has brought certainty about these freedoms.

Free Exercise in the Employment Context

Popcru is an important case to the growing jurisprudence with respect to religion in South Africa. The case was an appeal by the Department of Correctional Services (DCS) from a decision of the Labour Court. In the case, the respondents (five correctional officers) were employed by the DCS.[62] In December 2007 the five correctional officers were dismissed on the basis that they had wore dreadlocks and refused to cut them when ordered to do so.[63] All the affected correctional officers had dreadlocks for some years (in the workplace) before they were ordered to cut them. Sometime in January 2007, when ordered to cut their dreadlocks, three of the affected officers responded that they had embraced Rastafari and the instruction to cut their dreadlocks infringed their freedom of religion and constituted unfair discrimination on grounds of religion. Three other officers advanced cultural defenses for refusing to cut their dreadlocks. They argued that the order to cut their dreadlocks infringed their right to participate in the cultural life of their choice and thus discriminated against them on the basis of culture.

The correctional officers were charged with violating the DCS dress code in a disciplinary process that followed their refusal to cut their dreadlocks. Paragraph 5.1 of the impugned dress code read as follows:

> 5.1 Hairstyles: The following guidelines are down [sic] for the hairstyles of all departmental officials. In judging whether a hairstyle is acceptable, neatness is of overriding importance.
>
> 5.1.1 Hairstyles: Female Officials
>
> 5.1.1.1 Hair must be clean, combed or brushed and neat at all times (taken good care of). Unnatural hair colours and styles, such as punk, are disallowed.
>
> 5.1.2 Hairstyles: Male Officials
>
> 5.1.2.1 Hair may not be longer than the collar of the

> shirt when folded down or cover more than half of the ear. The fringe may not hang in the eyes.
>
> 5.1.2.2 Hair must always be clean, combed and neat at all times (taken good care of).
>
> 5.1.2.3 Hair may not be dyed in colours other than natural hair colours or out (sic) in any punk style, including 'Rasta man' hairstyle.[64]

At the end of the disciplinary hearing, the officers were found guilty. They were dismissed with immediate effect.

Following their dismissal, the officers brought a cause of action against DCS in the Labour Court, which ruled that the officers had been discriminated against on the basis of gender not cultural or religious basis, and that their dismissals were automatically unfair.[65] During the trial, the officers testified as to their sincerely held religious and cultural practices. This testimony was never contested. The Labour Appeal Court summarized this evidence as follows: none of the officers wore dreadlocks at the time they joined the DCS because they had not at that stage began to subscribe to Rastafari religious and cultural practices.[66] Over the years, three of the officers became attracted to Rastafari and converted to it. They observed the various practices of Rastafari, including the growing of dreadlocks. The other two officers grew dreadlocks as part of traditional Xhosa practices related to healing arts and rituals of the culture. A traditional healer was invited as an expert. He testified that in the spiritual healing tradition of Xhosa culture, dreadlocks are a symbol that a person is following the calling that comes from his forefathers. Hence, the main contention of the officers was that their dismissal amounted to unfair discrimination on the grounds of their religion, belief or culture.

In reversing the Labour Court decision, a full bench of the Labour Appeal Court observed that the officers grew dreadlocks because of their religious and cultural practices which they held sincerely. The Labour Appeal Court further observed that courts will ordinarily not be concerned with the validity or correctness of the beliefs of the relevant religion or culture, so long as they are good faith beliefs sincerely held by the concerned individuals. This observation is informed by the two pronged test adopted in *Pillay,* which examines whether the practice sought to be protected is a central part of the religion or culture, and whether the plaintiff's belief in the religious or cultural practice is sincere. Despite all the elements of this test being present, the Labour Appeal Court was puzzled that the Labour Court ruled that the

officers did not establish direct or indirect discrimination on the grounds of religion or culture.

In order to resolve whether there had been unfair discrimination on proscribed grounds, the Labour Appeal Court pronounced that it had to determine whether there has been any differentiation between employees, which imposes burdens or withhold benefits from certain employees, on one or more proscribed grounds. It found that the dress code introduced differentiation in respect of hairstyles, which is not facially neutral because Rastaman hairstyles are directly prohibited among male officers. In the Labour Appeal Court's view, the dress code makes a distinction between male and female officers. Male officers are not allowed to wear Rastaman hairstyle, while female officers are allowed.[67] The Labour Appeal Court also remarked that it is those male officers whose sincere religious or cultural beliefs are not compromised by the dress code, as compared to those whose beliefs or practices are compromised. In its view, the norm embodied in the dress code is not neutral but enforces mainstream male hairstyles at the expense of minority and historically excluded hairstyles like dreadlocks. According to the Labour Appeal Court, this places a burden on male officers who are prohibited from expressing themselves fully in a work environment where their practices are rejected and not completely accepted.

The Labour Appeal Court addressed the question of whether Rastafari practices and traditions of Xhosa spiritual healing are entitled to constitutional protection. It answered this question in the affirmative and reflected that the Court has accepted that Rastafari is a religion entitled to protection under the bill of rights; that spiritual practices of Xhosa culture were similarly entitled. And that there is no dispute between the parties that the wearing of dreadlocks is a central feature of Rastafari and form of personal adornment resorted to by some who follow spiritual traditions of the Xhosa culture.[68] Emphasising the reluctance in examining the validity of religious or cultural practice, the Labour Appeal Court added that when such examination is undertaken courts apply a subjective standard because the quality and freedom of religion and culture protects the subjective belief on an individual provided it is sincerely held. One of the questions that *Pillay* determined, in relation to the standard of determining the centrality of a religious or cultural practice, was that centrality of a practice should be determined based on a subjective standard rather than objective standard (Dyani and Mhango 2009: 495, 499).[69] According to the *Pillay* Court, what is important is what the practice or belief means to the concerned individual.[70] It is for this reason that the Labour Appeal Court emphasised the subjective and not objective standard.

However, the Labour Appeal Court pronounced that in rare cases, courts

will apply an objective standard, particularly in relation to cultural practices of an associative nature.[71] The latter pronouncement should be viewed in light of the disagreement between the majority and minority opinions in *Pillay*. The minority in *Pillay* criticized that the majority had ignored the fact that cultural practices are associative and not individualistic in nature, and cautioned against an individualistic approach to associative practices. This disagreement was not germane to the resolution of the issues in *Pillay*, but the minority opinion was at best forward looking. In other words, even if the majority had conceded to Justice O'Regan's minority views in *Pillay*, the outcome in *Pillay* would not have changed. Justice O'Regan was simply cautioning the Court not to make broad statements of the law but ensure that the line between individual and associative practices is maintained. Thus, the Labour Appeals Court's pronouncement about the rare use of objective standard in relation to associative practices is arguably reflective of its agreement with the minority views of O'Regan; that where appropriate a distinction will be maintained between individual religious or cultural practices on the one hand and associative practices on the other. Unfortunately, South African courts have not yet decided a case that involved purely associative religious or cultural practices to test Justice O'Regan's views and the dictum by the Labour Appeal Court.

Another important inquiry undertaken by the Labour Appeal Court involved whether there were any measures carried out by the DCS to reasonably accommodate the officers. In addressing this question, the Labour Appeal Court began by acknowledging that there is a measure of deference it had to provide to authorities who are statutorily required to run the security organs of state, but that that deference had to be tempered by a concern that the fundamental right to equality has not been violated.[72] The Labour Appeal Court highlighted that the Court has repeatedly expressed the need for reasonable accommodation when considering matters of religion and culture. Thus, it explained that employers should avoid putting religious and cultural adherents to the burdensome choice of being true to their faith at the expense of being respectful of the management prerogative and authority.[73]

The Labour Appeal Court rejected the DCS's suggestion that short hair was preferred because it offered greater protection against assaults by inmates by leaving them with less hair to grab during an assault.[74] It said this suggestion cannot be taken seriously because it did not apply to women and there was no evidence that such events are genuine or recurring threats outweighing the rights to equality and dignity.[75] In the mind of the Labour Appeal Court, the DCS's prohibitions simply "reinforce the impression that dominant or mainstream hairstyles are favoured over those of marginalised religious and cultural groups."[76] The Labour Appeal Court failed to understand how the

prohibition of dreadlocks contributes positively to the issues of discipline, security, probity, trust and performance, which were the focal concerns of the DCS. Based on this, it found that there is no rational connection between a ban on dreadlocks and the achievement of greater probity by officers at the prison, and no rational basis to the apprehension that dreadlocks lead to ill-discipline. Therefore, the Labour Appeal Court concluded that the reasons of the Labour Court to rejecting the claims of discrimination on religious and cultural grounds do not withstand scrutiny.

Conclusion

In *Prince,* Justice Ngcobo correctly stated that the right to freedom of religion is probably one of the most important of all human rights.[77] In the same case, Justice Sachs reasoned that "where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile, and not subject believers to a choice between their faith and the law."[78] In *Prince*, both Ngcobo and Sachs were not in the majority, and the issue was not the wearing of a nose stud in public school. Rather, the issue was whether or not Rastafari should be accommodated under the general criminal laws of South Africa to use marijuana for religious purposes.

There are several notable differences among *Prince, Pillay* and *Popcru*. First, in *Pillay* and *Popcru* the practice that was at issue did not fall within the general legal prohibition like in *Prince,* which is why the Court's analysis did not entail the application of the limitation clause in section 36 of the Constitution. Instead, *Pillay* involved a challenge that a School code violated the Equality Act because it discriminated on the grounds of religion and culture. The grounds upon which the School violated Equality Act are identical to those in section 9 of the Constitution, and as such the Court's analysis in *Pillay* was similar to a section 9 analysis. In fact it is from this connection that *Pillay's* analysis informs much of South Africa's current interpretation and scope of the freedom of religion. Similarly, *Popcru* involved a challenge that DCS's dress code violated the Labour Relations Act 66 of 1995 and Employment Equity Act 55 of 1998 unfair discrimination clauses therein.[79] However, the analysis in *Popcru* was similar to the analysis under both the Equality Act and section 9 of the Constitution.

Second, in light of the wide-ranging provision of freedom of religion in the Constitution, both *Pillay* and *Popcru* could have successfully relied directly on section 15, 31 and 9 of the Constitution. The reason is that section 15 is wide and covers the freedom of conscience, religion, thought, belief and opinion. Section 9 is also wide and binds both state and private actors. What more is

that section 9 is in many respects identical to the provisions of Equality Act and the Court has said that to the extent possible it has to be interpreted in line with Equality Act (Currie and De Waal 2005: 267-271).

Based on the foregoing, it is clear that South Africa has made a lot of strides in the recognition and protection of religious freedoms under the Constitution. The scope of this protection has recently been widened in *Pillay* and *Popcru* to include both voluntary and involuntary religious or cultural practices at school and the workplace. While the Court's interpretation has been criticised for its effects of individualising cultural rights and potential to obscure the associational nature of cultural rights, no criticism has been levelled against the Court's interpretation of the scope of religious or cultural rights. The dissent's argument in *Pillay* dealt with the interpretive treatment of culture and religion; that culture and religion are separate constitutional concepts and should be treated separately.[80] The Labour Appeal Court appears sympathetic to this dissenting view that it would employ an objective test in the future and appropriate cases. What is clear is that any future cases will be informed by this emerging jurisprudence.

Notes

1 For example, *Christian Education South Africa v Minister of Education,* 2000 (4) SA 757 (CC); *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 TPD; *Taylor v Kurtstag NO and Others* 2005 (7) BCLR 705 (W); *Worcester Muslim Jamaa v Valley and Others* 2002 (6) BCLR 591 (C).

2 2002 (2) SA 794.

3 *Member of the Executive Council for Education: Kwazulu-Natal and Others v Pillay*, 2008 (2) BCLR 99 (CC).

4 *Department of Correctional Services and another v POPCRU and others* [2012] 2 BLLR 110 (LAC).

5 *Harris v Minister of Interior*, 1952 (2) SA 428 (A); *Collins v Minister of Interior*, 1957 (1) SA 552 (A)(upholding the validity of the Separate Representation Voters Act of 1951); and *Minister of the Interior v Harris* 1952 (4) SA 769 (A) (holding that Parliament could only amend the entrenched provisions of the Union Constitution by complying with the procedural requirements on constitutional amendments).

6 *State v Lawrence*, 1997 (10) BCLR 1348 (CC).

7 Id at 1395-1396.

8 Section 14 of the Interim Constitution was replaced with section 15 of the Constitution of the Republic of South Africa 1996. It protected freedom of religion and provided as follows: "(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning. (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary. (3) Nothing

in this Chapter shall preclude legislation recognizing- (a) a system of personal and family law adhered to by persons professing a particular religion; and (b) the validity of marriages concluded under a system of religious law subject to specified procedures."

9 *Lawrence* at 1387.
10 Id at 1383-1406.
11 Id.
12 Id.
13 Id.
14 Id.
15 See *Lemon v. Kurtzman,* 403 US 602 (1971). For a discussion of the lemon test see Bodensteiner (1990: 409) (defending the lemon test); Marks (1993: 1153) (arguing that despite clear opposition in the past to the continued use of the lemon test by the Court, the Justices were once again unwilling to replace the lemon test. Discussing the history of the lemon test, the use of the lemon test was given stronger support than in recent decisions which indicated that the lemon test would be replaced); Kilroy (1997: 701); Alembik (2006: 1171) (completely rejecting the lemon test and suggests accepting one of its modified versions). For criticism of the lemon test see, Starr (1988: 477) (advising against strict adherence to judicial doctrines without regard to the values of the Constitution); and Esbeck (1990: 543).
16 *Lawrence* at 1385.
17 Id at 1385-1386.
18 Id (found contravention of section 14 of the Interim Constitution, which was not justified). See also concurring opinion of Justice Sachs (holding that the Liquor Act infringed the Interim Constitution but found that the infringement was sanctioned by section 33 of the Interim Constitution) at 1402-1405.
19 Id at 1386.
20 *Prince*, at 804 and 813.
21 *Prince* at 813.
22 *Prince* at 813-814.
23 *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 (8) BCLR 976, 980 (C).
24 Id at 980.
25 His only outstanding requirement to becoming an attorney was a period of community service in terms of sec 2A (a)(ii) of the Attorneys Act 53 of 1979. Id at 979.
26 Id.
27 See *Prince*, note 2 and *Prince v President of the Law Society of the Cape of Good Hope and Others* 2000 (7) BCLR 823 (SCA).
28 *Prince*, supra note 2. See also *Prince v South Africa* (2004) *African Human Rights Law Reports* 105 (ACHPR 2004) (where Gareth Prince brought his claim against South Africa before the African Commission for Human and Peoples Rights which generally upheld the decision of the Court and found no violation of the complainants' rights as alleged); and *Prince v South Africa* communication no 1474/2006, views adopted on 31 October 2007, paras 7.1-7.5 (where Prince lodged a complaint with the Human Rights Committee alleging South Africa's continued violation of articles 18, 26 and 27 of the International Covenant on Civil and Political Rights. While the Committee concluded that the complaint was

admissible, on the merits it ruled that the facts before it did not reveal a breach of articles 18, 26 or 27 of the covenant).

29 *Prince*, supra note 2 at 830.

30 Id at 804-813, citing *In re Chikweche* 1995 (4) SA 284, 288-289 (ZS) *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988); *Crown Suppliers (Property Services Agency) v Dawkins* [1993] ICR 517, 519-520 (CA).

31 *Prince*, above note 2 at 804.

32 Id at 238-239.

33 Id at 813.

34 Id.

35 See *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *People v. Woody*, 394 P.2d 813 (Cal. 1964) (where the centrality of the religious practice was crucial to the resolution of the claim); and *Pillay*, supra note 3 at 126.

36 *Prince*, above note 3 at 813-14.

37 Id.

38 See *United States v. Ballard* 322 U.S. 78 (1944) (explaining that sincerity is a proper subject for judicial scrutiny).

39 *Prince* at para 112.

40 For example, recently a community television station, Soweto Television has devoted a weekly one hour airtime to a programme hosted by a Rastafari where Rastafari are able to discuss issues relevant to their movement and the society at large.

41 *Legal Soldier (Pty) Ltd and Others v Min of Defence and Others; Min of Defence v Potsane and Another, 2001 (11) BCLR 1137* (2002 (1) SA 1) (CC) (dismissing the case because there was no prospect for success).

42 Four of the justices who were in the majority have retired. These are Justice Ackermann, Justice Kriegler, Justice Goldstone and the late Justice Chaskalson.

43 See section 39(1) (b). See *State v Makwanyane* 1995 (6) BCLR 665 (CC) (holding that courts must consider both binding and nonbinding international law when interpreting the Constitution).

44 *Prince*, note 2 at para 31.

45 *Ravin v. State,* 537 P.2d 494, 496 (Alaska 1975).

46 Id at 511.

47 Id at 504.

48 Id at 511 (holding that "we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of or ingestion of marijuana or possession of it in the home for personal use").

49 Id.

50 Id.

51 See *Prince* note 2 at para 42 (discussing that it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice, and found that the use of cannabis is central to the Rastafari religion).

52 *Pillay* at 119.

53 Id. See also *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that free exercise of rights were violated by the denial of special vegetarian diet when inmate's beliefs are sincerely held, regardless of whether Seventh Day Adventist Church required vegetarianism); *Martinelli v. Dugger,* 817 F.2d 1499, 1503-OS (11th

Cir. 1987) (holding that although the prisoner must be sincere in his religious beliefs, there is no requirement that the beliefs be held by a majority of the members of the particular religion in order to attract constitutional protection).

54 *Pillay* at 119.

55 Id at 120.

56 Id at 115.

57 See O'Brien and Carter (2002: 238-241) where they criticise the decision of the Grand Court of the Cayman Islands in *Grant v. J.A. Cumber Primary 1999 Cayman Islands Law Reports 307*, in which it relied on the evidence of an expert witness to conclude that because not all Rastafari grow dreadlocks the growing of dreadlocks is not in itself a central or fundamental tenet of their religion, in favour of a subjective standard. They argue that the court in *Grant*, by treating the expert testimony as conclusive ignored the more vital question: whether for this particular Rastafari the growing of dreadlocks was central to the practice of his religious beliefs? Since he was prepared to forego a normal school education for his child rather than shave the child's locks it seems reasonable to presume that it was central. See also Dyani and Mhango (2009: 486).

58 *Pillay* at 146. See also *Prince* at 247 (noting that Section 31(1) (a) of the Constitution emphasises and protects the associational nature of cultural, religious and language rights).

59 See *Makwanyane* at 708 (explaining that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. According to the Court, this is implicit in the general limitation clause of the Constitution, and the fact that different rights have different implications for democracy means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis). See also *Prince* at 249 (explaining that "the proportionality analysis in the context of freedom of religion entails the balancing of government interests against the individual right to freedom of religion. For instance in *Prince,* the Court explained that the proportionality analysis in that case must relate to whether the failure to accommodate the appellant's religious belief and practice by means of the exemption can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality").

60 Chemerinksy discusses the state action doctrine, which holds that the bill of rights in the United States Constitution only applies to State action; that private individuals and entities are not required to comply with the Constitution. The work also discusses some exceptions to the state action doctrine. See also *Pillay* at 111.

61 For a discussion and application of the wisdom in *Pillay*, see *Department of Correctional Services and another v POPCRU and others* [2012] 2 BLLR 110 (LAC); and *POPCRU and others v Department of Correctional Services and another [2010] 10 BLLR 1067* (LC).

62 *Popcru* at 113.

63 Id.

64 Id at 115.

65 See, *POPCRU and others v Department of Correctional Services and another* [2010] 10 BLLR 1067 (LC).

66 Id at 116.
67 Id at 120.
68 Id.
69 Dyani and Mhango explain that the Court ruled in favour of judging the centrality of a practice with reference only to how important the belief or practice is to the claimant's religious or cultural identity. Further explaining that for a learner to be accommodated, they will have to demonstrate the following: first that the wearing of cultural or religious attire is a central feature of their religious or cultural practice. The advantage for the learner seeking accommodation is that this analysis is based on a subjective standard. In other words, a learner will only have to show that the practice for which they seek an exemption or accommodation is central to their personal religious or cultural belief. See also *Pillay* para 52-88.
70 Id.
71 Id.
72 Id at 125-126.
73 Id at 126.
74 Id.
75 Id.
76 Id at 127.
77 *Prince* at para 48.
78 See, *Prince* at para 147-150. See also *Prince v South Africa* Communication No. 1474/2006, views adopted on 31 October 2007, paras 5.5 and 7.5 (where Prince argues that if exceptions to the prohibition of the use of cannabis could be made for medical and research purposes and effectively enforced by the state party, similar exceptions could also be made and effectively enforced on religious grounds with no additional burden on the state party; that the failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates his freedom to manifest his religion and unlike others he has to choose between adherence to his religion and respect for the laws of the land).
79 *POPCRU* 10 BLLR 1067 (LC) at 1068-1070.
80 *Pillay* at 142.

Case Law

Antonie v Governing Body, Settlers High School and Others 2002 (4) SA 738 TPD
Christian Education South Africa v Minister of Education, 2000 (4) SA 757 (CC)
Collins v Minister of Interior, 1957 (1) SA 552 (A)
Crown Suppliers (Property Services Agency) v Dawkins [1993] ICR 517, 519-520 (CA).
POPCRU and others v Department of Correctional Services and another [2010] 10 BLLR 1067 (LC)
Department of Correctional Services and another v POPCRU and others [2012] 2 BLLR 110 (LAC)
Harris v Minister of Interior, 1952 (2) SA 428 (A);
In re Chikweche 1995 (4) SA 284, 288-289 (ZS)
LaFevers v. Saffle, 936 F.2d 1117, 1119 (10th Cir. 1991)
Legal Soldier (Pty) Ltd and Others v Min of Defence and Others; Min of Defence v Potsane and Another, 2001 (11) BCLR 1137 (2002 (1) SA 1) (CC)

Lemon v. Kurtzman, 403 US 602 (1971)
Martinelli v. Dugger, 817 F.2d 1499, 1503-OS (11th Cir. 1987)
Member of the Executive Council for Education: Kwazulu-Natal and Others v Pillay, 2008 (2) BCLR 99 (CC)
Minister of the Interior v Harris 1952 (4) SA 769 (A)
People v. Woody, 394 P.2d 813 (Cal. 1964)
Prince v President of the Law Society, Cape of Good Hope and Others 1998 (8) BCLR 976, 980 (C)
Prince v President of the Law Society of the Cape of Good Hope and Others 2000 (7) BCLR 823 (SCA)
Prince v South Africa, Human Rights Committee, Communication no 1474/2006, views adopted on 31 October 2007
Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794.
Prince v South Africa (2004) African Human Rights Law Reports 105 (ACHPR 2004)
Ravin v. State, 537 P.2d 494, 496 (Alaska 1975)
Reed v. Faulkner, 842 F.2d 960, 962 (7th Cir. 1988)
State v Lawrence, 1997 (10) BCLR 1348 (CC).
State v Makwanyane 1995 (6) BCLR 665 (CC)
Taylor v Kurtstag NO and Others 2005 (7) BCLR 705 (W)
United States v. Ballard 322 U.S. 78 (1944)
Wisconsin v. Yoder, 406 U.S. 205 (1972)
Worcester Muslim Jamaa v Valley and Others 2002 (6) BCLR 591 (C).

Constitutions

Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)
Constitution of the Republic of South Africa 1996
Union Constitution 1909

Legislation

Attorneys Act 53 of 1979
Employment Equity Act 55 of 1998
Drug Trafficking Act 104 of 1994
Immorality Act of 1927
Labour Relations Act 66 of 1995
Liquor Act 27 of 1989
Medicines and Related Substances Control Act 101 of 1965
Populations Registration Act 1950
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Prohibition of Mixed Marriages Act 55 of 1949
Publications Act 42 of 1974

Works Cited

Alembik, Marcia. 2006. "The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis." *Georgia Law Review*, 40, 4, pp. 1171-1208.
Blake, Richard and Lonn Litchfield. 1998. "Religious Freedom in Southern African: The Development of Jurisprudence." *Brigham Young University Law Review*, 1998, 2, pp. 515-562.

Bodensteiner, Ivan. 1990. "The Lemon Test, Even With all its Shortcomings, Is Not the Real Problem in Establishment Clause Cases." *Valparaiso University Law Review*, 24, pp. 409-416.

Brandeis, Jason. 2012. "The Continuing Vitality of Ravin v State: Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of their Homes." *Alaska Law Review*, 29, 2, pp. 175-236.

Chemerinsky, Erwin. 2001. *Constitutional Law*. Gaithersburg: Aspen Law and Business.

Currie, Iain and Johan de Waal. 2001. *The New Constitutional and Administrative Law*. South Africa: Juta.

_____. 2005. *The Bill of Rights Handbook*. South Africa: Juta

Davie, Grace. 1994. *Religion in Britain since 1945*. United Kingdom: Blackwell Publishers.

Dugard, John. 1978. *Human Rights and the South African Legal Order*. Princeton: Princeton University Press.

Dyani, Ntombizozuko and Mtendeweka Mhango. 2009. "The Protection of Religious Freedom under the Promotion of Equality and Prevention of Unfair Discrimination Act: MEC for Education, Kwazulu-Natal and Others v Pillay." *Journal of Contemporary Roman-Dutch Law*, 72, p. 486.

Esbeck, Carl, 1990. "The Lemon Test: Should It Be Retained, Reformed, or Rejected?" *Notre Dame Journal of Law, Ethics and Public Policy*, 4, 3&4, pp. 513-548.

Fourie, Pieter. 2003. "The SA Constitution and Religious Freedom: Perverter or Preserver of Religion's Contribution to the Public Debate on Morality?" *International Journal of Bible, Religion and Theology in Southern Africa*, 82, pp. 94-107.

Gibson, Mathew, 2012. "Rastafari and Cannabis: Framing a Criminal Law Exemption." *Ecclesiastical Law Journal*, 12, 3, pp. 324-344.

Gumba, Steve. 2012. "Schools Reject Rastafarian Pupils." *Malawi Daily Times* (22 September 2012).

Heyns, Christof and Danie Brand. 2000. "The Constitutional Protection of Religious Human Rights in Southern Africa." *Comparative and International Law Journal of Southern Africa*, 33, 1, pp. 53-95.

Heritage, Morgan. 1999. "Don't Haffi Dread." In *Don't Haffi Dread*. New York: VP Records.

Kilroy, Robert. 1997. "A Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of Resenberger v Rector and Visitors of University of Virginia." *Cornell Journal of Law and Public Policy*, 6, 3, pp. 701-751.

Lave, Tamara Rice. 1994. "A Nation at Prayer, a Nation in Hate: Apartheid in South Africa." *Stanford Journal of International Law*, 30, pp. 483-524.

Lenta, Patrick. 2007. "Muslim Headscarves in the Workplace and in Schools." *South African Law Journal*, 124, 2, pp. 296-319.

Marks, Wirt. 1993. "The Lemon Test rears its Ugly Head Again: Lamb's Chapel v Center Moriches Free School District." *University of Richmond Law Review*, 27, pp. 1153-1171.

Mhango, Mtendeweka. 2008a. "The Constitutional Protection of Minority Religious Rights in Malawi: the Case of Rastafari Students." *Journal of African Law*, 52, 2, pp. 218-244.

_____. 2008b. "Upholding the Rastafari Religion in Zimbabwe: Farai Dzvova v Minister of Education Sports and Culture and Others." *African Human Rights Law Journal*, 8, 1, pp. 220-238.

Monteith, Mary. 2006. *Understanding Apartheid*. Cape Town: Oxford University Press.

Motala, Ziyad. 1995. "Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order." *South African Law Journal*, 112, 3, pp. 502-518.

O'Brien, Derek and Carter Vaughan. 2002. "Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism." *Journal of Law and Religion*, 18, 1, pp. 219-249.

Pieterse, Marius. 2004. "Coming to Terms with Judicial Enforcement of Socio-Economic Rights." *South African Journal on Human Rights,* 20, 3, pp. 383-417.

Starr, Kenneth. 1988. "The Establishment Clause." *Oklahoma Law Review*, 41, 3, pp. 477-488.

Taylor, Timothy B. 1984. "Soul Rebels: the Rastafarians and the Free Exercise Clause." *Georgetown Law Journal*, 72, 5, pp. 1605-1635.

Tribe, Laurence H. 1978. *American Constitutional Law*. New York: Foundation Press.

Winters, Andrew S. 1998. "*Ravin* Revisited: Do Alaskans Still Have A Constitutional Right to Possess Marijuana in the Privacy of Their Homes?" *Alaska Law Review*, 15, 2, pp. 315-344.