

The Expression of Cultural and Religious Practice: A Constitutional Test

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

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

The question is, how does the state, in limiting religious freedom, conform to the standards of an open and democratic society based on human dignity, equality and freedom? The hope is that the conclusion of this paper will then be able to be extended to more controversial cases, in particular, involving limits on the right to freedom of expression¹.

1.1. FIRST AMENDMENT BAGROUND

The first amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The two clauses, the Establishment Clause and Free Exercise Clause, have provided considerable grounds for litigation. One other reference to religion is found in the United States Constitution. Article IV provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

The central purpose of the Establishment Clause is to ensure governmental neutrality in matters of religion. "When government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact².

The Canadian Supreme Court in *R v Big M Drug Mart Ltd*³ made a distinction between an exercise clause and an establishment clause. The relevance of the establishment clause to the

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

² *Gillette v United State* 401 US 437 (1971)

³ 18 DLR (4th)321

question of freedom of religion was carefully canvassed by the Court. It has been suggested that the establishment clause does not simply prohibit coercion but prevents endorsement and acknowledgement by the state of religion⁴.

The Canadian Supreme Court held as follows:

“The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religions belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Canadian Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: Government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a certain sectarian purpose.”⁵

The right of free exercise of religion implies the right to free exercise of non-religion and no one should therefore be coerced into commitment to any religion. Consequently the free exercise clause is sufficient to forbid the state to coerce any minority group into a contrary belief.⁶

1.2 PRINCE v PRISIDENT OF THE LAW SOCIETY, CAPE OF GOOD HOPE AND OTHERS⁷. A SOUTH AFRICAN CASE LAW

This paper will share views and experience on the particular case of allegedly infringements on religious freedom, the right which is protected in section 15(1) of the South African Bill of Rights⁸: “everyone has the right to freedom of conscience, religion thought, belief and opinion.” What counts as a religion is of course, an interesting but difficult question. Providing an answer to it is, however, not strictly necessary for the purposes of this paper. The freedom of religious issues is raised by legislation which limits actions motivated by religious convictions, as well as by legislation which limits the freedom to believe. It is true that the South African Constitution, particularly the Bill of Rights does not explicitly state this limitation, by contrast, for instance, with the European Convention on Human Rights and the International Covenant

⁴ Cachalia et al, *Fundamental Rights in the New Constitution*. See also Kevin “Seamus” Hasson, *The Right to be Wrong: Ending the Culture War Over Religion in America*, Encounter Books, 2005. <http://en.Wikipedia.org/wiki/freedom> of religion

⁵ *R v Big M Drug Mart Ltd* 18 DLR (4th) 321 in Cachalia et al *Fundamental Rights in the New Constitution*

⁶ *Luynch v Donnelly* 465 US 668 (1984) read with *County of Allegheny v Greeter Pittsburgh* ACLU 492 US 573 see also *Everson v Board of Education of the Township of Ewing* 330 US 1 (1947)

⁷ 1998 (8) BchR 976 (c)

⁸ South African Constitution, Act 108 of 1996. See also *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (cc)

on Civil and Political Rights which state the limitation⁹. Article 9 of the European Convention states that everyone has the right to freedom of thoughts, conscience and religion, and to manifest his religion or belief, in worship, teaching, practice and observance. Article 18 of the International Covenant provides that freedom of religion includes the right to manifest one's religion and belief in worship, observance, practice or teaching.

Prince's case, applicant desired to qualified himself to be admitted as an attorney and had fulfilled most of the statutory requirements save for a period of community service in terms of section 2A(a) (ii) of the Attorneys¹⁰

The Law Society of the Western Cape Province declined to register his contract to perform community service with his principal adopting the view that Applicant was not a fit and proper person to be admitted as an attorney, as he had two previous convictions for the possession of dagga and had made it clear that he intended to continue to use dagga in the future. Applicant was an adherent of the Rastafari religion. The Rastafarians use dagga for spiritual, medicinal, culinary and ceremonial purposes which it is alleged form an integral part of the religious practice of adherents of Rastafari religion. Applicant accordingly adopted the stance that the Law Society's decision had the effect of violating the constitutional guarantee of the right to freedom of religion in terms of section 15(1) of the South Africa Constitution¹¹, as well as the guarantee contained in section 31(1) of the South African Constitution which state that no one may be denied the right with other members of a religious community to practice their religion. It was also contended by the Applicant that the decision in question also infringed Applicant's right under section 22 of the Constitution, which provide that one has the right to freely choose his own profession. The Law Society's decision not to register applicant contract to perform community service brought about unfair discrimination against Rastafarians in contravention of section 9(3) of the Constitution.

Applicant launched the instant proceedings in which he sought an order reviewing and setting aside the Law Society's decision and directing it to register his contract of community service. The Minister of Justice and the Attorney-General sought leave to intervene as Respondents in the application and such leave was granted.

⁹ Denis Meyerson, *Limited Rights: Freedom of Religion and the South African Constitution*.

¹⁰ Act 53 of 1979. *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (cc). There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.

¹¹ Act 108 of 1996. *Wittmann v Deutscher Schulverein, Pretoria and Others* 1999(1) BCLR 92 (T), Section 14 of the interim Constitution and section 15 of the final Constitution explain the nature of the right, the word "religion" in these provisions is not neutral but denotes a particular system of faith and worship, "religious observance" is an act of a religions charter. "Religious education" does not constitute "religious observance" even if religious instruction did not amount to religious observance, the Constitutions have conferred on State and State-aided educational institutions the right to conduct religious observances, provided that attendance at such is voluntary that right cannot be nullified e the right to abstain from them but choose not do so.

The background

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

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

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

After her sixteenth birthday, her grandmother will replace the current gold stud with a diamond stud. This will be done as part of a religious ritual to honour and bless her daughter. It is also a way in which the elders of the household bestow worldly goods including other pieces of jewellery upon the young women. This serves not only to indicate that they value their daughters but is in keeping with Indian tradition, that their daughters are the Luxmi (goddess of prosperity) and Light of the house.

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

Decision against the wearing of the nose stud.

On 2nd February 2005 Fourth Respondent took a decision that Appellant's daughter should not be allowed to wear the nose stud. This decision was to take effect on 4th April 2005.

Appellant then addressed a letter to First Respondent appealing and asserting that Fourth Respondent's decision was a violation of her daughter's constitutional rights to practice the religious and cultural traditions of her choice especially when they are common practice to the rest of her family; that this right takes precedence over any school code particularly when it is

¹² AR 791/05 [2006]

not related to, nor has any bearing on, the actual manner, attitude and conduct of the learner at school.

Second Respondent, in letter dated 6th May 2005 replied on behalf of First Respondent refusing Appellant's appeal. In endorsing the decision of the Fourth Respondent, Second Respondent wrote that "Schools are not obliged, as it is unreasonable to expect them, to accommodate all idiosyncratic practices."

In the letter dated 13th May 2005 Third Respondent advised Appellant that the nose stud should be removed. Appellant's daughter was accordingly given until Monday 23rd May 2005 to remove the nose stud, failing which the matter would be referred to Fourth Respondent for disciplinary action to be taken against Appellant's daughter.

The rebuff from Respondents prompted Appellant, as complainant, to institute proceedings and seek an order referred to in paragraph 1 above, in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act no.4 of 2000 ("the Equality Act").

After hearing the evidence of Appellant, Dr. Rambilass and Mrs. A Martin, who were the only witnesses who testified, the court below came to the conclusion that:

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

➤ The preparation of the code of conduct, in schools, is a requirement imposed on the governing body of a public school by section 8 (1) of the South Africa Schools Act 84 of 1996 ("the Schools Act").

➤ The Minister of Education may in terms of section 8 (3) of the Schools Act determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.

➤ The Guidelines for the consideration of governing bodies in adopting a code of conduct for learners were promulgated in Government Notice 776 of 1998 – Government Gazette 1890 dated 15th May 1998 ("the Guidelines").

Conclusion

There can be little doubt about the importance of the limitation in the war on drugs and that war serves an important pressing social purpose, the prevention of harm caused by the abuse of dependence-producing substance¹³. The abuse of drugs is harmful to those who abuse them and therefore to society. The government has a clear interest in prohibiting the abuse of harmful drugs. South Africa has an international obligations to fight the war against drugs subject to the Constitution.

The government objective in prohibiting the use and possession of cannabis arises from the belief that its abuse may cause psychological and physical harm. On the evidence of the experts on both side, it is common cause that cannabis is a harmful drug. However, such harm is cumulative and dose-related. Uncontrolled use of cannabis may lead to the very harm that the legislation seeks to prevent. Effective prevention of the abuse of cannabis and the suppression of trafficking in cannabis are therefore legitimate government goals¹⁴.

The government does not contend that the achievement of its goals requires it to impose an absolute ban on the use or possession of drugs. Nor was it contended that any and all uses of cannabis in any circumstances are harmful. The use and possession of cannabis for research or analytical purposes under the control of the government can hardly be said to be harmful, let alone an abuse of cannabis. Similarly, the use of cannabis for medicinal purpose under the supervision of a medical doctor cannot be said to be harmful. These uses of cannabis are exempted because they do not undermine the purpose of the prohibition.

The most important Section of the South African Bill of Rights is the so-called “limitation clause” laying down, as it does, the conditions under which a right protected by the Bill may permissibly be limited. This paper contributes to the understanding of the limitation clause.

¹³ *Bhulwana and gwandiso*, referred to above. The in *United State v Hardman* 297F3d (10th Cir 2002). The Controlled Substances Act does not and did not before the issuance of the injunction prohibit the plaintiffs from practicing their religion. The 1971 Convention on Psychotropic Substances does not and did not before the issuance of the injunction prohibit the religious use of the UDV’s sacrament, hoasca. *Blake supra*, where the defence of freedom of religion in interposed to a marijuana change, it is not uncommon for the court to assume that the alleged religion is *bonafide* and the defendant is sincerely subscribed to its doctrine. See *United States v Middleton*, 690F2d 820 (11th Cir. 1982).

¹⁴ *Prince’s case*. See also *OCentro Espiritual Beneficiente Uniqo Do Vegetal, et al v John Aschcroft, et al*, at the outset it is important to recognize that the issue before court is not the plaintiff’s right to believe (imposition of the plaintiffs’ free exercise of their religious beliefs. What is at issue is their right to practice their religion. See *Hobbie v Unemployment Appeals Community*, 480 US 136 (1987). Compelling a party to forego a religious practice imposes a substantial burden on that party. Article 18(1) of the United Nation International Covenant on Civil and Political rights ratified by the United States in 1992 provides that everyone shall have the right to freedom of thought, conscience and religion.