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SIGNIFICANT DEVELOPMENT IN RECENT SOUTH AFRICAN CONSTITUTIONAL  
CASE-LAW**

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## RELIGIOUS FREEDOM AND EQUALITY AS CELEBRATION OF DIFFERENCE: A SIGNIFICANT DEVELOPMENT IN RECENT SOUTH AFRICAN CONSTITUTIONAL CASE-LAW<sup>1</sup>

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### 1 Introductory observations

The constitutional right to practice one's religion ... is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society.<sup>2</sup>

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.<sup>3</sup>

These two *dicta* come from judgments of South Africa's Constitutional Court and confirmed, five years into the evolution of constitutional democracy in this country, that religious rights enjoy eminence among the rights entrenched in the

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1 An adapted version of a paper presented at the First International Consortium for Law and Religion Studies (ICLARS) Conference "Law and religion in the 21<sup>st</sup> Century: Relations between States and Religious Communities" University of Milan, 22-24 January 2009. The paper was originally entitled *State and Religion in South Africa: Problems, Perspectives and Recent Developments*.

2 *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) at par 25 per Ngcobo J.

3 *Christian Education SA v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC) at par 36 per Sachs J. The court continued to motivate this general proposition about the importance of religious and related rights as follows: "Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries."

Bill of Rights in the Constitution.<sup>4</sup> This is commensurate with the high value historically (and presently) ascribed to religious and related rights in free, open and democratic societies worldwide. The modest aim of the present contribution is not to try and give a full picture of South Africa's constitutional jurisprudence on these rights to date, or to identify similarities and differences with the position and with events elsewhere in the world.<sup>5</sup> In the discussion that will follow the emphasis will be on jurisprudence of mainly the Constitutional Court, engendered by its adjudication of the (seemingly) eccentric claims of 'religious Others' and culminating in the benchmark judgment in the case of *KwaZulu Natal v Pillay*<sup>6</sup> (hereafter *Pillay* case). It will be shown that this judgment not only represents a high point in the adjudication of constitutional entitlements of religious (and cultural) Others, but also has the potential to contribute significantly to the growth of a jurisprudence sensitive to both the predicaments and legitimate constitutional entitlements of unconventional, 'non-mainstream' claimants of religious rights and freedom. This jurisprudence, it will be argued, has the makings of a *jurisprudence of difference* taking its cue from what some political theorists have referred to as a *politics of difference*.<sup>7</sup> What this means will be explained in section 4 below.

## 2 Constitutional guarantees of religious and related rights

A bird's-eye view of constitutional provisions dealing directly with religious rights and freedoms is needed to be able to survey constitutional jurisprudence on the entitlements of religious Others.

Section 15(1) is the Constitution's most salient freedom of religion clause guaranteeing everyone's "right to freedom of conscience, religion, thought,

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4 Ch 2 of the *Constitution of the Republic of South Africa* 1996 (hereafter the Constitution).

5 For full(-er) account cf eg Farlam "Freedom" 41-3.

6 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC).

7 Young *Justice*.

belief and opinion". Equal in status and significance is section 9(1) guaranteeing everyone's equality before and equal protection and benefit of the law, read with section 9(3) explicitly proscribing unfair discrimination "against anyone" on the grounds of, amongst others, religion, conscience and belief. 'Equality' in section 9(1) doubtlessly includes the equality and equal treatment of dissimilar religions and their adherents.

Other provisions in the Bill of Rights qualify, amplify, contextualise and direct the basic section 15(1) and sections 9(1) and 9(3) entitlements to religious freedom and equality in various ways:

- 2.1 Section 15(2) allows for the conduct of religious observances at state or state-aided institutions, provided that they take place on an equitable basis,<sup>8</sup> rules made by appropriate public authorities are followed<sup>9</sup> and attendance at them is free and voluntary.<sup>10</sup>
- 2.2 The right to establish and maintain, at own expense, independent educational institutions – including, for instance religiously and/or denominationally specific schools – is entrenched in section 29(3). Such institutions may not discriminate on the basis of race, must be registered with the state and must maintain standards not inferior to those at comparable public educational institutions.
- 2.3 Section 15(3)(a) of the Constitution authorises legislation recognising marriages concluded under systems of religious personal or family law.
- 2.4 Section 31(1) of the Constitution augments the guarantee of religious freedom rights in section 15(1) and religious equality in sections 9(1) and 9(3) with constitutionally entrenched backing to practice religion

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8 S 15(2)(b).

9 S 15(2)(a).

10 S 15(2)(c).

communally, that is, as a "group activity or pursuit".<sup>11</sup> Persons belonging to a religious (or cultural) community, it is stated, *may not be denied the right* to practice their religion (and enjoy their culture),<sup>12</sup> and to form, join and maintain religious and cultural associations and other organs of civil society.<sup>13</sup> Constitutional provision is furthermore made for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to monitor the realisation of section 31 entitlements.<sup>14</sup>

2.5 The Constitution requires the religious and related rights that it guarantees to be construed *in context*, permeated with the values which are articulated in, or implied by, amongst others, the founding provisions (in Chapter 1 (and especially sections 1 and 2) of the Constitution, section 7's characterisation – and statement of the main objectives – of the Bill of Rights, and the Preamble to the Constitution.

2.6 Section 39(1) of the Constitution requires any interpretation of the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and to consider international law. Foreign law *may* be considered. According to section 39(2) legislation must be interpreted and the common and customary law developed in a manner that promotes the spirit, purport and objects of the Bill of Rights.

2.7 Section 7(1) of the Constitution characterises, with constitutional authority, the Bill of Rights, as a cornerstone of democracy in South Africa, enshrining the rights of all people in the country and affirming the democratic values of human dignity, equality and freedom. Section 7(2)

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11 Farlam (n 5) 41-3. *Cf* also Du Plessis 2002 *NGTT* 214-229.

12 S 31(1)(a).

13 S 31(1)(b).

14 S 185 of the Constitution.

then enjoins the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".

2.8 All rights entrenched in the Bill of Rights are limitable pursuant to stipulations of a general limitation clause (section 36) requiring limitations to be (only) in terms of law of general application; reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and compliant with explicitly spelt out exigencies of proportionality.<sup>15</sup> Rights-specific limitations are, however, not thereby precluded and can be effected by constitutional provisions other than section 36 and even by the very provision guaranteeing the right in question. Religious and related rights can furthermore, in terms of section 37(4) of the Constitution, be suspended during a duly declared state of emergency.

### **3 Adjudicating the constitutional entitlements of 'religious Others': the broad picture up to and including *Pillay***

#### **3.1 *S v Lawrence; S v Negal; S v Solberg*<sup>16</sup>**

Ms Solberg, an employee at a Seven Eleven chain store, was convicted of contravening section 90(1) of the *Liquor Act*<sup>17</sup> proscribing wine sales on Sunday. She challenged the constitutionality of the said provision contending that it infringed, amongst others, the right to freedom of religion<sup>18</sup> of those citizens who, like herself, do not, on religious grounds, object to such sales. The Constitutional Court had a golden opportunity to hand down a benchmark

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15 When limiting a right the following factors must be taken into account so as to comply with proportionality (s 36(1)(a)-(e)): "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

16 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC). Hereafter the *Solberg* case.

17 Act 27 of 1989.

18 At the time entrenched in s 14(1) of the (transitional) *Constitution of the Republic of South Africa* Act 200 of 1993, the precursor to s 15(1) of the present Constitution.

judgment on religious rights, but due to certain adverse circumstances this was not to be. First, the full record of the evidence before the court *a quo* was not before the Constitutional Court because the appellant did not follow the proper procedure bringing her case to the latter forum. Second, the *Solberg* case was not perceived as really dealing with religious freedom, but rather with commercial interests. Solberg, in the first place, challenged section 90(1) as an infringement of her right to participate freely in economic activity.<sup>19</sup> The Constitutional Court unanimously held that there was no merit in this challenge. This left Solberg with a challenge based on the protection of the right to freedom of religion, a concern she had most certainly not seriously contemplated when she sold wine on a Sunday.

Six justices of the court agreed that the said challenge could not be upheld, but were divided 4-2 on the reasons for this finding. Three justices thought that the challenge should be upheld, but agreed, on a significant issue of constitutional interpretation, with the deviate view of the minority of two judges in the group of six. (These three plus two judges will be referred to as 'the five', and the remaining judges dismissing the appeal as 'the four'.)

Chaskalson P, speaking on behalf of the four, held that since Solberg's challenge was based on the freedom of religion clause in the transitional Constitution (section 14(1)), it required the court's consideration as a matter of religious free exercise only and not of religious equality and non-discrimination, as contemplated in sections 8(1) and (2) of that Constitution, too.<sup>20</sup> Taking his cue from a *dictum* in the Canadian case of *R v Big M Drug Mart Ltd*,<sup>21</sup> Chaskalson P said the following about religious free exercise:

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19 A right at the time explicitly guaranteed in s 26 of the transitional Constitution but wholly absent from the 1996 Constitution.

20 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) at par 99-102.

21 (1985) 13 CRR 64 at 97. Chaskalson P elaborated as follows: "I cannot offer a better definition than this of the main attributes of freedom of religion. But as Dickson CJC went on to say freedom of religion means more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of religion may be impaired

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

He understood freedom of religion as primarily an individual's right not to be coerced to do anything against her or his religious beliefs (or non-beliefs) – a right to be respected, in other words, and possibly protected, but hardly prone to promotion and fulfilment by the state.<sup>22</sup>

O'Regan J, articulating the concerns of the five, held that the guarantee of a right to freedom of religion at any rate entails entitlement to an even-handed treatment of religions and their adherents. In her view section 90(1) unjustifiably encroached on the right to religious freedom. Sachs J and Mokgoro J agreed that there was such an encroachment, but thought that it constituted a constitutionally justifiable limitation to the right in question, and therefore did not render section 90(1) unconstitutional.<sup>23</sup>

O'Regan J disagreed with the four's contention that issues of religious equality were not up for consideration in *Solberg*, stating that the Constitution requires more from the legislature than that it refrain from coercion.<sup>24</sup>

It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion.

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by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord's Day Act did; it compelled believers and non-believers to observe the Christian Sabbath" (*S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) at par 92).

22 To use the terminology of s 7(2) of the Constitution. It must be added, in all fairness, that the transitional Constitution in terms of which the *Seven Eleven Case* was adjudicated, contained no provision akin to s 7.

23 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (CC); 1997 (4) SA 1176 (CC) at par 165-179.

24 *Ibid* at par 128.

It may be mentioned in passing that the *Solberg* court was unanimous on one issue of considerable significance (though not immediately relevant to the present discussion), namely the absence, in the (transitional) Constitution, of an 'establishment clause' erecting a wall of separation between church and state.<sup>25</sup> This has remained the position under the 1996 Constitution.

### **3.2 *Christian Education SA v Minister of Education***<sup>26</sup>

An organisation of concerned Christian parents approached a High Court to strike down section 10 of the *South African Schools Act*,<sup>27</sup> which proscribes corporal punishment in any school, public or private/independent. According to the religious beliefs of the applicants, corporal punishment was a rudiment in the upbringing of their children. The High Court turned down the application and pointed out that the biblical authority on which the applicants relied suggested that only the parents of children (and not school officials *in loco parentis*) were entitled to administer corporal punishment.<sup>28</sup> Expressing such a view brought the court riskily close to doctrinal entanglement.<sup>29</sup>

On appeal to the Constitutional Court<sup>30</sup> Sachs J handed down a carefully reasoned judgment dismissing the appeal on the basis that section 10 imposes a constitutionally acceptable limitation<sup>31</sup> on parents' free exercise of their religious beliefs. He refrained, however, from expressing any view on whether it is a constitutionally allowable exercise of a religious belief if parents themselves administer corporal punishment to their own children. He also did not really address the question what schools (and teachers) should at any rate be permitted to do in a country where a modern-day constitution, entrenching

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25 *Ibid* at par 99-102.

26 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC). Hereafter the *Christian Education* case.

27 Act 84 of 1996.

28 *Christian Education SA v Minister of Education of the Government of SA* 1999 (9) BCLR 951 (SE).

29 Farlam (n 5) 41-40 - 41-41.

30 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC).

31 In terms of s 36 of the Constitution.

fundamental rights in accordance with stringent standards of constitutional democracy, is in place.

In a significant postscript to his judgment, Sachs J lamented the fact that there was no one before the court representing the interests of the children concerned.<sup>32</sup> He thought that the children, many of them in their late teens and coming from a highly conscientised community, would have been capable of articulate expression:

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

It would therefore have been advisable, he opined, to have appointed a *curator ad litem* to represent the interests of the children whose contribution would have "enriched the dialogue".

In spite of the fact that *Christian Education* had the effect of restraining the free exercise of a religious belief, it is a judgment in which the significance of religious and related rights is stated most unequivocally – as appears from the tenor of the second of the two *dicta* cited at the beginning of this article.<sup>33</sup>

### 3.3 *The Prince Saga*<sup>34</sup>

Gareth Prince, a consumer of *cannabis sativa* (or 'dagga') for spiritual, medicinal, culinary and ceremonial purposes as an integral part of practising his religion as Rastafarian, successfully completed his legal studies to a point where, qualification-wise, he became eligible to be registered as a candidate

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32 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC); 2000 (4) SA 757 (CC) at par 53.

33 *Cf n 1 supra*.

34 *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C); *Prince v President, Cape Law Society* 2000 (7) BCLR 823 (SCA); 2000 (3) SA 845 (SCA); *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) (hereinafter the interim *Prince* judgment); *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC) (hereinafter the final *Prince* judgment, and generally referred to as the *Prince* case).

attorney doing community service. He had twice been convicted of the statutory offence of possessing dagga, however, and this raised doubts about his fitness and propriety to be so registered, especially in the light of his declared intention to continue using dagga for religious purposes. The Law Society of the Cape of Good Hope refused him registration whereupon he unsuccessfully challenged the society's decision in the Cape High Court.<sup>35</sup>

Prince appealed to the Supreme Court of Appeal.<sup>36</sup> His appeal was dismissed and he then lodged an appeal with the Constitutional Court. A divided court eventually dismissed the appeal with a 5-4 majority,<sup>37</sup> but before doing so handed down a significant interim judgment<sup>38</sup> in the course of which Ngcobo J intimated that neither the applicant nor the respondents had - in the course of the litigious proceedings commencing in the Cape High Court – adduced sufficient evidence for any court finally to decide the crucial controversies involved in the case. From Prince the court needed more evidence as to precisely how and in which circumstances Rastafarians use dagga as part of their religious observances. From the respondents the court needed evidence elucidating the practical difficulties that may be encountered should Rastafarians be allowed to acquire, possess and use dagga strictly for religious purposes. The case was postponed in order to give both sides the opportunity to gather and adduce the required evidence. This was quite an extraordinary procedural concession in a final court of appeal, since parties are normally required to adduce all relevant evidence at the time when an action is brought in the court of first instance. Only in rare circumstances are litigants allowed to adduce additional evidence on appeal. The Constitutional Court, however, thought that such circumstances indeed existed in the *Prince* case. Ngcobo J explained:

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35 *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C).

36 *Prince v President, Cape Law Society* 2000 (7) BCLR 823 (SCA); 2000 (3) SA 845 (SCA).

37 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

38 *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC).

[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest — it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation...Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should, where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.<sup>39</sup>

The Constitutional Court thus made an attempt to accommodate concerns of a vulnerable, religious minority, but did not fully deliver on the promise that its effort held, for its final (majority) judgment went against Prince.<sup>40</sup> The *ratio* underlying the majority of the court's final decision is that it is impossible for state agencies involved in enforcing the overall statutory prohibition on the use of dagga, to make allowance for the use of small quantities of this prohibited substance for religious purposes without actually compromising the justifiable objectives of the overall prohibition. The minority of the court did not dispute the legitimacy of criminalising the possession and use of dagga in general, but argued that it was feasible for the state agencies involved to lay down and police conditions for Rastafarians' limited use of dagga for religious purposes.

### **3.4 MEC for Education: KwaZulu Natal v Pillay<sup>41</sup>**

As one of South Africa's 2,49% Indians and 1,2% Hindus, Sunali Pillay, a female teenager at the time when events resulting in the litigation with her school were brought to a head, is (and was at the time) a likely candidate for religious and cultural 'Othering' – if not marginalisation. However, as a learner at Durban Girls' High School, one of the best schools in the country, she also

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39 *Prince v President, Cape Law Society* 2000 (7) BCLR 823 (SCA); 2000 (3) SA 845 (SCA); *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) at par 26.

40 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

41 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) (the *Pillay* case).

belongs to the exquisite minority of South African learners particularly privileged to have enjoyed an excellent secondary school education. The school is a former 'Model C school' – the code name, as South Africans know, for advantaged, previously all white state schools, by far better resourced and staffed than their previously (and mostly still) all black, all coloured and all Indian/Asian counterparts in *de facto* uniracial residential areas. Model C schools have increasingly taken in learners (and to a lesser extent teachers) from race groups other than whites, and some of these schools have achieved quite a high participation rate of learners from diverse ethnic origins and cultural backgrounds.<sup>42</sup>

At a school as first-rate as – but with school fees considerably lower than – any prestigious private school, noblesse (still) oblige, and Sunali's school accordingly prides itself on an exemplary Code of Conduct, duly adopted by the governing body in consultation with learners, parents and educators. A learner's parents must sign an undertaking to ensure that their child will comply with the Code, in terms of which wearing a school uniform to school is non-negotiable. The only jewellery allowed with the school uniform is "[e]ar-rings, plain round studs/sleepers . . . ONE in each ear lobe at the same level" and wrist watches in keeping with the uniform. Especially excluded is "any adornment/bristle which may be in any body piercing". Strict enforcement of these "jewellery rules" sparked the Pillays' dispute with the school.

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42 In this regard the Durban Girls' High School – in the course of the judgment in *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 125 – got an excellent report card from no less an authority than the Chief Justice of the Republic of South Africa himself: "Durban Girls' High School, the school at issue in this case, is one of the exceptions. Although historically it was a school for White girls under apartheid law, that has changed dramatically in the last fifteen years. Now, we were told from the bar, of its approximately 1300 learners, approximately 350 are Black, 350 are Indian, 470 are White and 90 are Coloured. Moreover, it is an educationally excellent school which produces fine matriculation results. It is at the cutting edge of non-racial education, facing the challenges of moving away from its racial past to a non-racial future where young girls, regardless of their colour or background, can be educated. This context is crucial to how we approach this case".

Upon reaching physical maturity, and as a form of religious and cultural expression, Sunali had her nose pierced and a gold stud inserted. The school did not take kindly to this contravention of its jewellery stipulations, but gave Sunali permission to wear the stud until the piercing had healed, and then remove it or else face disciplinary proceedings in terms of the Code. Navaneethum Pillay, Sunali's mother, was requested to write a letter to the school explaining why, as a form of religious and cultural expression, Sunali had to wear a nose stud.

In her letter to the school Mrs Pillay explained that they came from a South Indian family and that they intended to maintain their cultural identity by upholding the traditions of the women before them. Insertion of the nose stud is part of a time-honoured family tradition. When a young woman reaches physical maturity her nose is pierced and a stud inserted indicating that she had become eligible for marriage. The practice is meant to honour daughters as responsible young adults. Sunali, Mrs Pillay claimed, wore the nose stud not for fashion purposes, but as part of a religious ritual and a long-standing family tradition, and therefore for cultural reasons too.<sup>43</sup>

The school management refused to grant Sunali an exemption to wear the nose stud. Mrs Pillay, complaining of discrimination, took the case to an equality court, which found in favour of the school. The Pillays successfully appealed to the Durban High Court, whereafter the school appealed to the Constitutional Court which handed down the judgment presently under discussion, dismissing the school's appeal.

Langa CJ, writing for the majority of the court,<sup>44</sup> found that the provisions of the school's Code of Conduct combined with the governing board's refusal to grant

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43 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 8.

44 The minority judgment of O'Regan J is wholly in agreement with the results of the majority judgment, but poses relevant questions about possible alternative routes to the same destination and she draws a sharper distinction between religion and culture and the

Sunali an exemption, resulted in discrimination against her. The problem with the Code was that it did not provide for any procedure to obtain exemption from the jewellery stipulations and excluded nose studs from its list of jewellery that may be worn with the school uniform. The Code thus compromised the sincere religious and cultural beliefs or practices of a learner like Sunali, but not those of other learners. This latter group constituted a comparator showing up the discrimination against Sunali and others in a similar position. The court emphasised that –

the norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. Accordingly a burden is placed on learners who are unable to express themselves fully and must attend school in an environment that did not completely accept them.<sup>45</sup>

The court further pointed out that it did not really make a difference whether the discrimination was on religious or cultural grounds, especially since Sunali was part of a group defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition.<sup>46</sup> At the same time, however, religion and culture as grounds on which discrimination can take place should not be collapsed, because –

religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community.

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constitutional rights pertaining to them than Langa CJ does – *cf n 4 infra*. *Cf MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 143-146. For present purposes, however, this debate is not of pressing importance.

45 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 44. See also Young (n 7) 168: "Integration into the full life of the society should not have to imply assimilation to dominant norms and abandonment of group affiliation and culture. If the only alternative to the exclusion of some groups defined as Other by dominant ideologies is the assertion that they are the same as everybody else, then they will continue to be excluded because they are not the same."

46 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 50.

The two can nonetheless overlap, so that –

while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.<sup>47</sup>

Sunali sincerely believed that wearing a nose stud was part of her religion and culture, but the evidence in the case showed that it was no mandatory tenet of either her religion or her culture. The court, however, thought that this in no way lessened the school's discrimination against her:

Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other ... . A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues.' One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.<sup>48</sup>

In considering whether the discrimination against Sunali was unfair, the court (also) explored the notion of "reasonable accommodation" concluding that its absence *in casu* rendered the discrimination against Sunali unfair:

The State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.<sup>49</sup>

But then, of course, there is always the "slippery slope" scenario or, worse, the "parade of horrors" which may, in other cases, turn the tiny gold nose stud

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47 *Ibid* at par 47.

48 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 63-64.

49 *Ibid* at par 73.

"[a]t the centre of the storm"<sup>50</sup> in the *Pillay* case, into an ornament as conspicuous as a nose ring – or a headscarf or a facial veil – or as dangerous as a kirpan, the metal dagger of religious and cultural significance worn by Sikh men. The court dismissed both this line of argument and the fears inducing it:

Firstly, this judgment applies only to *bona fide* religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horrors" but a pageant of diversity which will enrich our schools and in turn our country.<sup>51</sup>

This *dictum* neatly captures how the *Pillay* case is about constitutional substantiation for the affirmation and celebration of identity, also and especially the identity of the Other, for this is what really *liberates* the self from fear for the unknown.

In an earlier case<sup>52</sup> the Cape High Court adjudicated the issue of wearing Rastafarian dreadlocks and a cap to school, allegedly in contravention of the school's Code of Conduct, very sympathetically – even generously – in favour of a learner claiming her right freely to express her religious beliefs. In this case the school's Code of Conduct was enforced by its governing body in quite a draconian way. The Code graphically depicted a number of forbidden hair styles, but did not say anything about dreadlocks (and caps) and yet the governing body expelled the applicant from the school for wearing dreadlocks and a cap, after finding her guilty of serious misconduct. This meant that she was treated as if she had committed a criminal offence!

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50 In the words of Langa CJ *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 1.

51 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 107.

52 *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C).

#### 4 Assessment and analysis – with *Pillay* as benchmark

*Pillay*, I venture to suggest, was inspired by what may appropriately be referred to as a *jurisprudence of difference*. By analogy with a "politics of difference"<sup>53</sup> such jurisprudence affirms and, indeed, celebrates the Other beyond the confines of mere tolerance or even magnanimous recognition and acceptance. The court in *Pillay* in effect insisted on compliance with the injunction in section 7(2) of the Constitution that the state must respect, protect and, on top of that, *promote* and *fulfil* the rights entrenched in the Bill of Rights.<sup>54</sup> As Iris Marion Young suggests, a politics (and jurisprudence) of difference have a distinctive grasp of "quality equality":<sup>55</sup>

A goal of social justice . . . is social equality. Equality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realize their choices.<sup>56</sup>

For Sunali Pillay, distribution had determined access to a "privileged school context", but full *participation* and *unconstrained inclusion* finally had to determine the meaningfulness of her "presence" as beneficiary-Other in that context. The achievement of such quality participation, calls for memory of a history of denied participation and decided exclusion of the Other, as the

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53 Young (n 7).

54 In the judgement itself only passing reference is made to s 7(2) and then not in a context where any of the main issues in the case is dealt with; cf *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 40 n 18.

55 Young (n 7) 173.

56 That a politics (or jurisprudence) of difference is not unproblematic without ado and may result in an (unwanted) 'over-inclusion' of the Other not duly honouring her/his difference or 'otherness' is, as Lindahl "Recognition" convincingly argues, a possibility that (also) ought to be reckoned with – but this, I would suggest, was not the outcome in *Pillay*.

following *dictum* from Langa CJ's judgment in *Pillay*, dealing with the protection of voluntary (as opposed to obligatory) religious practices,<sup>57</sup> so aptly explains:

The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains.<sup>58</sup>

The *Pillay* judgment is not perfect in every way and some of the conceptual and strategic choices the court made are debatable. O'Regan J who, in her minority judgment, is in agreement with the results of the majority judgment, posed questions about alternative routes to the destination where the majority arrived and, for instance, drew a sharper distinction between religion and culture and the constitutional rights pertaining to them than Langa CJ in the majority judgment did.<sup>59</sup>

For present purposes, however, we are mostly interested in *Pillay* as (to use a Dworkinian metaphor)<sup>60</sup> a chapter in a constitutional chain novel interrogating issues of identity and difference. It then becomes worthwhile to look at the previously discussed pre-*Pillay* cases once again – with the wisdom of hindsight.

In *Solberg* a traditionally disadvantaged religious Other was absent. Actually the claimant was very much an entrepreneurial wolf(-ess) in religious sheep's clothes, claiming protection of a *religious* right for *non-religious* reasons. This certainly inhibited the development of what might have grown into a

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57 And elaborating on two previously cited *dicta* in *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 63-64.

58 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 65.

59 *Ibid* at par 143-146.

60 Dworkin *Law's Empire* 228-238.

jurisprudence of difference, centred on religious and related rights, rendering *Solberg* a bad case making bad law in this respect as well.

A comparison of the adjudicative strategies in *Solberg* and *Pillay*, tangibly influenced by the litigious route for which the *dominus litis* in each case opted, gives pause about reliance on equality in addition to (or perhaps even instead of) freedom, in litigation on the realisation of religious and related entitlements. It will be remembered that in *Solberg* four of the nine judges thought that if a constitutional complainant in her or his pleadings contends that a law is unconstitutional because it infringes the right to freedom of religion, it is not competent for the court to test the constitutionality of the impugned legislation with reference to religious equality claims too. Five of the judges, however, thought that the court *in casu* could entertain questions relating to the even-handed (and therefore equal) treatment of people of different religious convictions and affiliations under the impugned legislation, and this was, for *stare decisis* purposes, the majority position in the case. The latter approach is to be preferred, first, because it makes for a *systematic* (that is: coherent) reading of the constitutional provisions entrenching religious freedom<sup>61</sup> and equality<sup>62</sup> respectively, in the context of the Bill of Rights and of the Constitution as a whole, and, second, because it duly accounts for the effect of equality as a constitutional value<sup>63</sup> (co-)determining the meaning of (the right to) religious freedom.

Reliance on equality in *Pillay* resulted in a much more potent and far-reaching affirmation of the religious and related rights of the claimant than was the case in *Solberg* where legislation was constitutionally challenged. *Pillay* was brought – and decided by three courts (of which two were specialist equality courts) – as an equality complaint. Why then could it end up as such a powerful assertion

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61 S 14(1) of the transitional and s 15(1) of the 1996 Constitution.

62 S 8(2) of the transitional and s 9(3) of the 1996 Constitution.

63 S 33(1)(a)(ii) and 35(1) of the transitional and s 1(a), 7(1), 36(1) and 39(1)(a) of the 1996 Constitution.

of the claimant's religious and cultural rights (and identity, one could add)? A comparator, called for when dealing with an equality complaint, facilitates the detection of decided difference or otherness and of disparities conventionally (and perhaps even unknowingly) involved in dealing with the matter complained of. This 'discovery', in its turn, shows up inarticulate preferences and biases underlying supposedly neutral norms, and interrogates the even-handedness of the effects of such norms. All these considerations were but marginally present in *Solberg*, but prominent in *Pillay*. However, invoked as listed grounds for the prohibition of discrimination, 'religion' and 'culture' were not treated with exemplary definitional precision in *Pillay*.

In *Christian Education*, which focused on freedom of religion as the *substance* of a constitutional right, conceptual accuracy was more the order of the day and the judgment handed down by Sachs J has indeed become a landmark for definitional orientation in dealing with key concepts in the discourse on religious and related rights in the South African context. *Christian Education* is to a large extent the milestone that *Solberg* could have been. The claimants in this case were not really 'religious Others', but were part of a mainstream Christianity privileged enough to sustain a system of independent schools. The Constitutional Court showed much genuine understanding for the religious entitlements of these claimants, affording them the consideration of articulate conceptual analysis, but also demarcating them and duly restraining their exercise.

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

The Constitutional Court's insistence, in the interim *Prince* judgment, that Prince and the Rastafarian community, had to be afforded the fullest possible

opportunity to be heard – precisely because they are 'religious Others' – signalled an attempt to ensure their quality participation and inclusion in public life. It could not prevent the eventual 'othering' of Prince as outcome of the saga, though. The court, in its final judgment, paid serious attention to the question what the possible effects would be of allowing, as religious observance, conduct conventionally regarded as a threat to the good order in society. (Actually the court in *Pillay* had to deal with a similar question in relation to a more limited community, namely a school.) By a narrow majority the court in *Prince* finally concluded that it could not hand down a judgment licensing unlawful conduct – but in the process the court also failed to address Prince's actual concern, namely his fitness and propriety, as consumer of cannabis, to practice as an attorney. Especially this oversight ended in a non-fulfilment of the consideration that the Constitutional Court so encouragingly afforded Prince (and his eccentric community of Others) in the interim judgment.

## 5 Conclusion

The Constitutional Court's jurisprudence in relation to issues of identity and difference has increasingly been interrogating, with transformative rigour, 'mainstream' preferences and prejudices regarding the organisation of societal life, inspired by a desire to proceed beyond – and 'not again' to resurrect – all that used to contribute to and sustain marginalisation of the Other. In this article I showed how this has happened in cases dealing with the right to freedom of religion (and related rights).

*Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*<sup>64</sup> (*Fourie* case), the Constitutional Court judgment in which the statutory and common-law exclusions of same-sex life partnerships from the

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64 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).  
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ambit of 'marriage' were held to be unconstitutional, is another example of recent Constitutional Court case law *qua* jurisprudence of difference, in which considerations of religious belief operated in the background, but were significantly present nonetheless.<sup>65</sup> Commenting on religious objections to gay marriages, the court expressed the view that –

[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and life styles in a reasonable and fair manner.<sup>66</sup>

There are important challenges involved in negotiating the shoals between the Scylla of strongly held religious beliefs and the Charybdis of affirming and celebrating an otherness whose marginalisation has been justified – and may even have been called for – by those very beliefs. In a constitutional democracy this dilemma must be confronted head-on – wary to avoid doctrinal entanglement – which is a challenge in itself.<sup>67</sup> The issue of doctrinal entanglement came prominently to the fore in the Transvaal Provincial Division of the Equality Court in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*<sup>68</sup> (*Strydom* case) where the court was called upon to decide whether it was permissible for a congregation to terminate the services of the head of its "art academy" who openly entered into a gay relationship. The complainant instituted proceedings on the basis that he was discriminated against unfairly, while the congregation maintained that it was acting in terms of its religious beliefs and therefore exercised its religious freedom as sustained

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65 Reflecting on an appropriate response to gay and lesbian Others, Sachs J observed that: "[t]he acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation" (*Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at par 60).

66 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) at par 95.

67 Farlam (n 5) 41-40 - 41-41.

68 [2008] ZAGPHC 269; 2009 (4) SA 510 (T).

by the Constitution. The court found in favour of the complainant. The question is: was it justified to give a judgment effectively rejecting the church's case based on its "doctrinal beliefs" about homosexuality?

In the wake of cases such as *Fourie* and *Pillay* (and *Strydom*) rigorous debate has been taking place on *public platforms* about taboos formerly relegated to (and hidden away in) "the private sphere". The bold assertions of the Constitutional Court on the affirmation and celebration of the Other, challenge all religions with simultaneously lofty and magnanimous ideas about "doing unto Others" to make themselves heard as well, for "our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation"<sup>69</sup> and "neither the *Equality Act*<sup>70</sup> nor the Constitution require (*sic!*) identical treatment. They require equal concern and equal respect".<sup>71</sup>

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69 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 92.

70 That is, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

71 *MEC for Education: KZN v Pillay* 2008 (2) BCLR 99 (CC); 2008 (1) SA 474 (CC) at par 103.

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**List of abbreviations**

ch	chapter(s)
ICLARS	International Consortium for Law and Religion Studies
par	paragraph(s)
s	section(s)