

# CULTURAL AND RELIGIOUS ACCOMMODATIONS TO SCHOOL UNIFORM REGULATIONS

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## 1 Introduction

Laws and regulations in modern liberal democracies rarely discriminate deliberately against members of religious and cultural groups or target religious and cultural practices. In one relatively recent example, *Church of Lukumi Babalu Aye, Inc v City of Hialeah* (*Church of Lukumi Babalu Aye*), the US Supreme Court invalidated municipal ordinances adopted by the city of Hialeah for the specific purpose of proscribing animal sacrifice practised by the Santeria religion.<sup>1</sup> Since these ordinances did not constitute a neutral law of general applicability, but deliberately targeted a religious practice, the Supreme Court determined that they were invalid unless they served a compelling state interest. Since the state could not show such an interest, the ordinances were declared, relatively uncontroversially, to be in violation of the Free Exercise clause (the US equivalent of South Africa's right to freedom of religion and conscience)<sup>2</sup> and so invalid.

Laws and regulations that are facially neutral in the sense that they do not deliberately target members of particular cultural or religious groups are more common than those which are overtly discriminatory. In some instances, however, these facially neutral laws may have non-neutral effects and impose disparate burdens on group members. These individuals sometimes claim from the courts

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<sup>1</sup> *Church of Lukumi Babalu Aye Inc v City of Hialeah* 508 US 520 (1993).

<sup>2</sup> Section 15(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') provides that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'.

exemptions to generally applicable laws and regulations on the grounds that particular laws or regulations impose burdens on them that are not imposed on others. For example, Muslim female pupils may seek exemptions from school uniform regulations that forbid the wearing of headscarves on the grounds that their religious beliefs obligate them to wear a headscarf or that wearing a headscarf is a genuine expression of their faith.

Should Muslim girls be required to relinquish this cherished religious practice as a condition of availing themselves of the opportunity of education, or are schools obligated to meet their demands for accommodation? The most compelling argument that claims for exemptions in such cases should be granted begins with the claim that cultural group membership (including membership of religious groups) is intrinsically valuable for individual group members. Will Kymlicka argues that cultural membership is

the context within which we choose our ends, and come to see their value, and this is a precondition for self-respect, of the sense that one's ends are worth pursuing.<sup>3</sup>

Membership of groups provides individuals with personal and social identities, on which their dignity and prosperity may depend.<sup>4</sup>

<sup>3</sup> W Kymlicka *Liberalism, community and culture* (1989) 193.

<sup>4</sup> For other accounts of the significance of group membership, see J Raz 'Multiculturalism: a liberal perspective' in his *Ethics in the public domain* (1994), B Parekh *Rethinking multiculturalism* (2000), J Tully *Strange multiplicity* (1995) and C Taylor *Multiculturalism and the politics of recognition* (1992). For a recent acknowledgment by the Constitutional Court concerning the value of group membership to members, see *Minister of Home Affairs & Another v Fourie & Another* 2006 1 SA 524 para 89. The existence of cultural groups has social benefits too. Characterising religious groups in the United States as a source of 'social capital', R Putnam *Bowling alone: The collapse and revival of the American community* (2000) 79, has observed that 'faith-based organisations serve civic life both directly, by providing social support to their members, and indirectly, by nurturing civic skills, inculcating moral values [and] encouraging altruism'. It is not fanciful to imagine that the moral values to which Putnam refers could potentially provide a counterweight to what B Barry *Why social justice matters* (2005) 236, calls 'the recrudescence ideology of individualism, with its concomitant implications that members of society are nothing to one another', in contemporary capitalist society. Also important are the 'benefits to society of having religious groups operating as vital associations intermediate between individuals and government and creating a barrier to government domination of social life' (K Greenawalt *Religion and the constitution* (2006) 439). The Constitutional Court recognised certain of the benefits of religion to society in *Fourie* (above) para 90. It must nevertheless be conceded that 'there is nothing automatically good about religion, which can after all lead to war, insanity, mutilation, suicide, soul-murder'. (JB White 'Talking about religion in the language of the law: Impossible but necessary' (1999) 81 *Marquette Law Review* 177 193).

The argument that Muslim headscarves should be accommodated by school authorities proceeds as follows.<sup>5</sup> According to the liberal principle of equality of opportunity, individuals with differing aims should be afforded an equal chance to realise their ambitions and the costs that people should have to bear to do so should be, as far as possible, equal. But since cultural membership is bound up with individual autonomy, dignity, prosperity and self-respect (all of which liberals have a reason to value), in assessing whether people have equal opportunities, their cultural and religious commitments must be taken into account. A prospect only represents an opportunity for an individual if she can avail herself of it without incurring excessive costs. But in the case of a Muslim pupil, the cost of complying with the school uniform regulation may be sufficiently high that the opportunity is effectively removed. Genuine equality of opportunity, on the liberal multiculturalist conception, requires an exemption to permit Muslim female pupils to wear headscarves in school to eliminate the excessive costs attached to compliance with the uniform regulations.

A common response to the contention that granting an exemption in such cases would amount to unfairly preferential treatment of members of the particular group – one that recommended itself to the Constitutional Court of South Africa in *MEC for Education, KwaZulu-Natal and Others v Pillay (Pillay)*,<sup>6</sup> the most recent occasion on which it was confronted with a claim for an accommodation<sup>7</sup> – is that when a cultural or religious group constitutes a minority, and so is less powerful than majority groups, as Muslims are in South Africa, then its members are disadvantaged compared to members of majority (or more powerful) groups. Laws and regulations are often framed in a way that is consistent with the beliefs and values of the dominant, mainstream cultural groups, but not with those of vulnerable, minority groups. As a result, members of minority groups bear costs in pursuing opportunities with which members of mainstream and more powerful groups are not confronted. Since on this argument membership of a cultural or religious group is like a physical handicap, inasmuch as it is usually an unchosen feature of individuals which is in certain respects disadvantaging, exemptions

<sup>5</sup> I have presented this argument in greater detail in P Lenta 'Muslim headscarves in schools and in the workplace' (2007) 124 *South African Law Journal* 296-298-299. 2008 1 SA 474 (CC) (*Pillay*).

<sup>6</sup> See (n 6 above) paras 44 ('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'), and para 83 ('many individual communities still retain historically unequal power relations or historically skewed population groups which may make it more likely that local decisions will infringe on the rights of disfavoured groups').

should be granted to create equality of opportunity for all persons regardless of power and influence.<sup>8</sup>

In this paper, I shall comment on *Pillay*, which concerns the duty of school authorities to accommodate religiously and culturally expressive clothing and accoutrements – in this case, a nose stud, which, it was claimed, expressed the pupil's Hindu faith and South Indian culture, but which contravened school uniform regulations.<sup>9</sup> The issue of whether a pupil should be permitted to wear a tiny nose stud might seem trivial. In fact, however, the politics of dress in schools is highly emotive, both in South Africa and elsewhere, because items of clothing and adornment often serve as visible markers of religious and cultural identity.<sup>10</sup>

It might be imagined that this issue could easily be disposed of with reference to the question of whether exemptions should be granted to accommodate Muslim headscarves. I have argued elsewhere that exemptions from school uniforms should be granted to permit Muslim pupils to wear headscarves: in some cases, Muslim pupils may sincerely believe that they are under a religious obligation

<sup>8</sup> A version of this argument is made in C Eisgruber & L Sager 'Equal Regard' in S Feldman (ed) *Law and religion* (2000) 200. For a similar argument in support of religious exemptions, according to which, since members of a majority religion will usually protect their own religious practices when enacting laws, but ignore, often unintentionally, the burden that otherwise valid laws impose on minority religions, exemptions are justified in order to remedy this flaw in the political process, see D Laycock 'Formal, substantive, and disaggregated neutrality toward religion' (1990) 39 *DePaul Law Review* 993 1014; M McConnell 'Free exercise revisionism and the *Smith* decision' (1990) 57 *University of Chicago Law Review* 1109 1130-36 and M Nussbaum *Liberty of conscience: In defense of America's tradition of religious equality* (2008) 20-21 116-119. In *Pillay*, Langa CJ drew an analogy between membership of a minority religious or cultural group and disability (n 6 above, 74).

<sup>9</sup> For useful discussions of the right to freedom of religion and the ways in which it has been applied in South Africa, see P Farlam 'Freedom of religion, conscience, thought and belief' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2003) ch 41, S Woolman 'Community rights: Language, culture and religion' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2003) ch 58, D Meyerson 'Religion and the South African constitution' in P Radan, D Meyerson & R Croucher (eds) *Law and religion* (2005) ch 5, G J Pienaar 'The effect of equality and human dignity on the right to religious freedom' (2003) 66 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 579, I Currie & J de Waal *The bill of rights handbook* (5th ed 2005) ch 15, N Smith 'Freedom of religion: The right to manifest our beliefs' (2002) 119 *South African Law Journal* 690. Discussions of cultural expression are few, but see, for example, Woolman (above), especially at 31-43, S Woolman 'Defending discrimination: On the constitutionality of independent schools that promote a particular, if not comprehensive, vision of the good life' (2007) 22 *Stellenbosch Law Review* 31, B Fleisch & S Woolman 'On the constitutionality of single-medium public schools' 23 *South African Journal on Human Rights* 34 and I Currie & J de Waal *The bill of rights handbook* (5th ed 2005) ch 28.

<sup>10</sup> As Frantz Fanon observes, 'immense cultural regions can be grouped together on the basis of original, specific techniques of men's and women's dress ... [t]he fact of belonging to a given cultural group is usually revealed by clothing traditions' (F Fanon, 'Algeria unveiled' in *Studies in a dying colonialism* (1962) 35).

to wear a headscarf and the objectives furthered by having uniforms may not be significantly undermined by granting this exemption.<sup>11</sup> But if headscarves should be exempted, then so too, one might think, should Hindu nose studs.

My purpose in this essay is to show that, although South African Hindus of South Indian extraction are, like Muslims, a minority group, the facts of *Pillay* are not as closely analogous as they might first appear to the case of a Muslim pupil who seeks an accommodation to permit her to wear a headscarf which she sincerely believes to be a matter of religious obligation. Furthermore, the ways in which these cases differ provide grounds for concern about the Constitutional Court's decision to accommodate nose studs in *Pillay*. I shall begin by providing, as background, an account of the Constitutional Court's jurisprudence in the two cases in which it has previously considered claims for accommodations. I shall then focus on the Constitutional Court's reasoning in *Pillay*. Throughout, I shall contrast the approach of the Constitutional Court to claims for accommodation with similar claims that have been adjudicated by courts of ultimate jurisdiction in three other jurisdictions: the United States, the United Kingdom and Canada.

## 2 Corporal punishment and cannabis

In *Christian Education South Africa v Minister of Justice (Christian Education)*,<sup>12</sup> the first occasion on which the Constitutional Court was confronted with a claim for an accommodation, it unanimously affirmed that accommodations are, in principle, justifiable. Sachs J aligned the Court with liberal multiculturalist proponents of exemptions by stating that the granting of religious exemptions 'would not be unfair to anyone else who did not hold those views'<sup>13</sup> and that

the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law<sup>14</sup>

provided that religious practices do not violate the rights included in

<sup>11</sup> This is the argument of Lenta (n 5 above).

<sup>12</sup> 2000 4 SA 757 (CC).

<sup>13</sup> *Christian Education* (n 12 above) para 42.

<sup>14</sup> *Christian Education* (n 12 above) para 35.

the Bill of Rights.<sup>15</sup>

The Constitutional Court nevertheless declined to grant an exemption to legislation proscribing corporal punishment in schools to permit teachers to inflict corporal punishment in Christian schools. The exemption was sought on the grounds that verses in chapters 9, 22 and 23 of the Book of Proverbs command the corporal punishment of children at school. Sachs J argued that the right to dignity, coupled with the right not to be subjected to cruel and unusual, inhuman or degrading punishment, placed a duty on the state to 'reduce violence in public and private life',<sup>16</sup> particularly in view of the state's resort to violence to counter protests by children during apartheid and the high incidence of child abuse in contemporary South Africa.

The Constitutional Court's decision in *Christian Education* is, I think, correct.<sup>17</sup> In a liberal democracy, the state is the ultimate guardian and arbiter of children's interests; it has a duty to protect

<sup>15</sup> The granting of religious accommodations is, of course, far from uncontroversial. J Locke argues forcefully in favour of state neutrality, inasmuch as the state must not prefer particular religions over others, yet he does not endorse the practice of granting exemptions, insisting instead that 'the private judgement of any person conceiving a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation' (J Locke 'A letter concerning toleration' in I Shapiro (ed) *Two treatises of government and a letter concerning toleration* (2003) [1689] 243). Locke's position is that all people, regardless of their affiliations, must comply with generally applicable laws. If individuals' religious beliefs require them to disobey the law, they should accept the punishment prescribed by law. Thus, for Locke, if generally applicable laws are neutral in the sense that they do not deliberately target religion, or a particular religion, they should be construed as fair. Nowadays, the principal objection to granting religious exemptions is that to do so is unfair to those who might also wish to be excused from otherwise legitimate laws that burden practices motivated by secular moral beliefs. See, for example, FM Gedicks 'An unfair foundation: The regrettable indefensibility of religious exemptions' (1998) 20 *University of Arkansas Little Rock Law Journal* 555. Some defenders of the approach taken in J Rawls *Political liberalism* (1993) may be tempted to argue that the principle of state neutrality, according to which the state should not prefer one religious viewpoint over another, nor religious beliefs over secular beliefs, renders the granting of religious exemptions unjustifiable. On this view, exempting religious believers immunises religion in a way that advances it in comparison to equally heartfelt secular reasons for claiming exemptions. Accommodations for religious beliefs, some Rawlsians may argue, amount to favourable treatment to which religious believers are not entitled. A common response to this objection to mandatory accommodations – one that is implicit in Sachs J's judgment – is that, if a generally applicable law puts members of a religious or cultural group (especially a minority group) at a disadvantage relative to others, refusing the exemption cannot be justified on the basis that the law provides formal equality: justice requires that exemptions be granted in appropriate cases to eliminate or reduce the burden as far as possible.

<sup>16</sup> *Christian Education* (n 12 above) para 47.

<sup>17</sup> For a more detailed commentary, see P Lenta 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 352-363-371.

children against what it deems to be abusive practices.<sup>18</sup> One of the most fundamental liberal rights is to be free from physical assault. Most people think that children have this right.<sup>19</sup> Since there is considerable evidence that corporal punishment is psychologically harmful to pupils, then, even though there may be countervailing evidence indicating that mild and infrequent corporal punishment has an improving effect on children, the state is entitled to proscribe it in schools. Once it does so, there is no room for an exemption for Christian schools, since corporal punishment inflicted at these schools will not be rendered non-abusive because it is a practice underpinned by religious beliefs. To grant an exemption would be to frustrate the purpose behind the legislation, which is not to reduce the incidence of corporal punishment in school, but to prevent every instance of an abusive practice.

The Court's decision in *Christian Education* is consistent with that of the UK House of Lords in *R (Williamson) v Secretary of State for Education and Employment (Williamson)*,<sup>20</sup> the facts of which were virtually identical, except that whereas Sachs J emphasised the duty on the state to reduce the incidence of physical violence because of South Africa's circumstances, Lord Nicholls of Birkenhead took the view that deference to parliament on an issue of 'broad social policy' was appropriate.<sup>21</sup> Baroness Hale of Richmond agreed in substance with Lord Nicholls, adding that to ban only corporal punishment that infringed against children's right not to suffer abusive punishment would present 'difficult problems of definition, demarcation and enforcement'.<sup>22</sup>

<sup>18</sup> Although there is a presumption in favour of permitting parents to raise their children in accordance with their religious beliefs, the ultimate responsibility of the state for the welfare of children may require it to overrule the religious beliefs of parents. See, for example, *Hay v B & Others* 2003 3 SA 492 (WLD), in which parents of a minor opposed a doctor's application to conduct an emergency blood transfusion to save the life of their child principally on the grounds that receipt of a blood transfusion was contrary to their religious beliefs. Jajbhay J held that the parents could not insist that their child should be denied a blood transfusion if the child's survival, in the opinion of a doctor, depended on it. Jajbhay J is absolutely correct: adults may reject life-saving medical treatment for themselves, but they may not condemn their children to death on the basis of their religious beliefs. A similar position was adopted in the UK in *Re O (A Minor) (Medical Treatment)* (1993) 2 FLR 149; *Re R (A Minor) (Blood Transfusion)* (1993) 2 FLR 757. The Canadian Supreme Court arrived at this conclusion in *B(R) v Children's Aid Society of Metropolitan Toronto* (1995) 122 DLR (4th) 1 (SCC), in which it upheld a lower court order to remove a baby from the custody of its Jehovah's Witness parents temporarily so that it could receive life-saving medical treatment, including a blood transfusion. In the US, judges have readily ordered treatment over the parents' wishes. See *Matter of Hamilton*, 657 SW 425, 429 (Tenn Ct App 1983); *Custody of a Minor*, 393 NE2d 836 (Mass 1979).

<sup>19</sup> See C McKinnon *Tolerance: A critical introduction* (2006) 107.

<sup>20</sup> 2005 2 AC 246 (HL).

<sup>21</sup> n 20 above, para 51.

<sup>22</sup> n 20 above, para 86.

In *Prince v President of the Law Society of the Cape of Good Hope (Prince)*,<sup>23</sup> a narrow majority of the Constitutional Court refused to grant to Rastafarians an exemption from legislation forbidding the possession and use of cannabis, despite an existing permit system for administering medical exemptions. The majority denied the claim principally on the grounds of the practical difficulty of policing the exemption, and because South Africa's obligations under international law required a ban to be uniformly enforced.<sup>24</sup>

The applicant, a Rastafarian attorney, applied for an exemption to statutes which proscribe the possession and use of cannabis, on the grounds that these Acts prevent an activity central to the sacramental activities of his religion. The majority of the Court decided that although medical exemptions from the Act could be effectively controlled and administered, the same would not be true of a religious exemption for Rastafarians. Since Rastafarian use of cannabis was not restricted to small quantities at religious ceremonies, but was consumed at home and on social occasions, there would be no way for enforcement officials to distinguish between authentic religious consumption and consumption for recreational reasons. Moreover, the majority decided, South Africa's blanket ban on the use and possession of cannabis was intended to meet its obligations under international law. There would, in addition, be financial and administrative difficulties in establishing a permit system and this coupled with the fact that the Rastafarian religious community is not easily delineated, since its structures are informal, would render a permit system incapable of preventing cannabis being distributed to non-Rastafarians. The majority, despite aligning itself with the approach of the minority of the US Supreme Court in *Employment Division v Smith (Smith)*,<sup>25</sup> according to whom religious practices could only be subordinated to a general governmental interest if the state could show a 'compelling state interest' and that the law was the 'least restrictive means' of serving that interest,<sup>26</sup> held that a uniform ban on a drug such as cannabis, which is widely used for recreational purposes and in which there is significant trade, was justified.

The dissenting judgements of Ngcobo and Sachs JJ took the view that a partial rather than full exemption (as sought by the applicant) should be granted to enable Rastafarians to use small quantities of cannabis for sacramental purposes on religious occasions. A limited exemption, Sachs J held, would secure for the Rastafari 'a modest but

<sup>23</sup> 2002 2 SA 794 (CC).

<sup>24</sup> For a more detailed analysis, see Lenta (n 17 above) 371-375.

<sup>25</sup> *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 (1990).

<sup>26</sup> *Prince* (n 23 above) para 122.

meaningful measure of dignity and recognition' and was required because 'the Constitution requires the state to walk the extra mile'.<sup>27</sup> Against the majority, Ngcobo and Sachs JJ contended that a permit system, coupled with administrative guidelines, could be instituted to ensure that the terms of a limited exemption would be effectively enforced. Ngcobo J argued that an exemption would not violate South Africa's obligations under international law since provisions to the effect that such measures were subject to each party's constitutional principles and limitations were included in international protocols and conventions binding on South Africa. If the South African Constitution is interpreted by the Court as requiring an exemption, it would not fall foul of international conventions. Sachs J similarly claimed that South Africa's international obligations do not rule out an exemption for religious purposes.<sup>28</sup>

The majority's failure to take seriously a limited exemption for an act of worship central to faith that would use administrative procedures similar to medical exemptions is, I think, regrettable. The burden imposed by the relevant legislation on Rastafarians is severe: sacramental and liturgical practices are at the core of religion and forbidding these practices forces Rastafarians either to violate the tenets of their religion or become outlaws. This appears discriminatory since it is unthinkable that major faiths should have to face this choice. The use of wine in the Catholic Mass is unlikely ever to be forbidden.

On the issue of enforcement, screening devices might have been employed to separate genuine Rastafarians wishing to use cannabis for purposes of worship from others seeking to smoke cannabis for recreational purposes. The terms of the exemption proposed by the minority were consistent with dispensing cannabis in small quantities directly to Rastafarian priests for distribution restricted to individuals participating in church services, the whole to be overseen by state officials.<sup>29</sup> People masquerading as Rastafarian worshippers would have to go to great lengths to pass themselves off as believers before other believers and state officials. They would be required, at considerable inconvenience to themselves – which would in most cases, one imagines, outweigh the pleasure they would otherwise derive from smoking – to participate in the ceremony. It is implausible to think that a limited exemption such as this would promote the illegal trafficking of drugs any more than would a medical exemption. I concede, however, that justifying the limited

<sup>27</sup> *Prince* (n 23 above) paras 148-9.

<sup>28</sup> *Prince* (n 23 above) para 164.

<sup>29</sup> The granting of this limited exemption might have had an economic cost. It might have been appropriate to ask Rastafarian worshippers to bear at least part of this cost.

exemption might depend on the plausibility of the majority's interpretation of South Africa's obligations under international conventions.

By aligning itself with the 'compelling interest test' established by the US Supreme Court in *Sherbert v Verner*<sup>30</sup> and *Wisconsin v Yoder* (*Yoder*),<sup>31</sup> the Constitutional Court affirmed its willingness to grant exemptions in principle.<sup>32</sup> In doing so, it offered greater protection for religious liberty than US Supreme Court did in *Smith*, in which the majority refused to grant an exemption from a criminal prohibition to permit Native American Indians to ingest as an element of their worship, peyote, a psychotropic drug. The majority in *Smith*, abandoning the 'compelling interest' standard (except for unemployment compensation cases and 'hybrid' cases involving two constitutional rights), held that if a law is generally valid, the government may apply it against religious claimants without having to show more than that the law has a rational basis. Provided the state can show this, there is no constitutional requirement to grant religious groups exemptions from facially neutral laws which do not have the purpose (though they may have the incidental effect) of burdening the practice of religion. As Scalia J put it, the right to freedom of religion 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability"'.<sup>33</sup>

In response to *Smith*, the US Congress, at the instigation of a large number of religious groups, enacted the Religious Freedom Restoration Act ('RFRA'). The RFRA was intended to restore the position prior to *Smith* relating to the granting of religious exemptions, according to which, as the Act states

Government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability ... [unless] it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that ... interest.<sup>34</sup>

In *City of Boerne v Flores, Archbishop of San Antonio et al*,<sup>35</sup> the US Supreme Court declared the RFRA invalid as it applies to states and

<sup>30</sup> 374 US 398 (1963).

<sup>31</sup> 406 US 205 (1972).

<sup>32</sup> *Prince* (n 23 above) para 128.

<sup>33</sup> *Smith* (n 25 above) p 879.

<sup>34</sup> Religious Freedom Restoration Act, 42 USC §§ 2000bb-1-2000bb-4 (2004).

<sup>35</sup> 521 US 507 (1997).

localities, but not as it applies to the federal government, for which purposes it remains valid.<sup>36</sup>

In a recent US Supreme Court decision, *Gonzalez, Attorney General et al v O Centro Espirita Beneficente União Do Vegetal et al (Gonzalez)*,<sup>37</sup> members of a church, the Christian Spiritists, wished to import *hoasca*, a tea containing a federally proscribed hallucinogen, which, it claimed, facilitated communion. The Supreme Court dismissed the Government's submission that it had a compelling interest in the uniform application of the law to the extent that no exemption could be granted to accommodate the sect's sacramental use of *hoasca*. The Court held that the government's failure to grant an exemption to the claimants was inconsistent with their rights under the RFRA.

Although the Supreme Court in *Gonzalez* adopted an approach similar to that employed in *Prince*, there are two important respects in which the approaches of the two courts differ.<sup>38</sup> First, the majority in *Prince* gave greater weight to a need for uniform enforcement if the ban on the use and possession was to be effectively policed. Second, the US Supreme Court ruled that the fact that *hoasca* was covered by the Convention on Psychotropic Substances, did 'not automatically mean' that the federal law furthered a compelling interest that outweighed the claim for an exemption under the RFRA. Despite acknowledging the importance of 'honouring international obligations and of maintaining the leadership position of the United States in the war on drugs', the invocation of these general interests alone, the Supreme Court decided, was 'not enough' in the absence of evidence addressing the international consequences of granting an exemption.<sup>39</sup> By contrast, the majority of the Constitutional Court attached greater significance to South Africa's obligations under international law, holding that '[t]he use made of cannabis by Rastafari cannot in the circumstances be sanctioned without

<sup>36</sup> The American Indian Religious Freedom Act Amendments were enacted by the US Congress in 1994 to permit peyote use by Native Americans for the purposes of religious worship and many states enacted legislation to exempt Native American Indians from existing prohibitions against drug use. This legislation does not protect the sacramental use of cannabis by Rastafarians, however, raising the issue of whether the 1994 Amendments constitute unfair discrimination. This issue arose in the Kansas Court of Appeals in *State v McBride* 955 P2d 133 (Kan Ct App 1998), in which the court distinguished between the religious use of the two substances on the following grounds: peyote is used in small quantities and is restricted to religious ceremonies by Native American Indians; recreational use and abuse of peyote is rarer than is the case with cannabis, and the state in the US has a special duty to respect the political and cultural integrity of Native Americans. See B Taylor 'Kansas denies religion-based defense to Rastafarians on marijuana charges' (1998) 38 *Washburn Law Journal* 307.

<sup>37</sup> No 04-1084 (2006).

<sup>38</sup> See P Edge 'Religious drug use in England, South Africa and the United States of America' (2006) 1 *Religion and Human Rights* 165-176.

<sup>39</sup> *Gonzalez* (n 37 above) 17-18.

impairing the state's ability ... to honour its international obligation to do so'.<sup>40</sup>

Do these differences in approach indicate that the US Supreme Court in *Gonzalez* provided greater protection to freedom of religion than the Constitutional Court did in *Prince*? Before concluding that it did, it is important to recognise that the facts of the two cases are different. *Gonzalez* deals with a drug that is not widely used: the market for *hoasca* is small and there had not in the past been practical difficulties in policing the ban on recreational use of *hoasca*. By contrast, as the majority in *Prince* noted, 'cannabis, unlike peyote, is a drug in which there is substantial illicit trade'.<sup>41</sup> Unlike *hoasca*, cannabis is widely used beyond the confines of religious worship for recreational purposes. For these reasons, an approach such as that employed in *Gonzalez* may well have denied an exemption for religious use of cannabis, just as Blackmun J in his dissenting judgement in *Smith* held that although an exemption should be granted in the case of peyote, the state could legitimately deny claims for religious exemptions involving drugs such as marijuana and heroin, the use of which is not restricted to a ceremonial context and in which there is 'significant illegal trade'.<sup>42</sup> Would the majority's approach in *Prince* commit it to denying an exemption in a case in material respects the same as *Gonzalez*? Few of the difficulties of policing and administering an exemption for cannabis are likely to occur in the case of an exemption for *hoasca*. Nevertheless, if the Constitutional Court determined that South Africa's obligations under international law required a ban to be uniformly enforced, the view of the majority in *Prince* suggests that the Court might reject a claim for an exemption for *hoasca* too.

The refusal of the majority of the Constitutional Court in *Prince* to grant an exemption to enable Rastafarians to use cannabis on the grounds of international law obligations is consistent with the approach of the UK judiciary. In *Taylor*,<sup>43</sup> later endorsed in *Andrews*,<sup>44</sup> a Rastafarian had been observed by police officers approaching a Rastafarian temple. On being searched, he was found to be in possession of cannabis, in violation of a criminal prohibition. The Rastafarian's defence consisted in the contention that the cannabis was intended to be consumed as part of an act of worship at the temple. Accordingly his possession was a manifestation of his religion, protected under the right to freedom of religion (Article 9 of the European Convention on Human Rights). The Court of Appeal held,

<sup>40</sup> *Prince* (n 23 above) para 139.

<sup>41</sup> n 23 above, para 129.

<sup>42</sup> *Gonzalez* (n 37 above) 917-8.

<sup>43</sup> [2001] EWCA Crim 2263; [2002] 1 Cr App R 37.

<sup>44</sup> [2004] EWCA Crim 947.

on the basis of several international conventions whose purpose was to restrict the use, possession and trafficking of psychotropic narcotics, that whatever the interference with the Rastafarian's freedom of religion, it was justified in order to prevent public health and safety dangers arising from cannabis use, possession and supply.

### 3 Nose studs, headscarves and daggers

*Pillay* concerned a claim by the parent of a Hindu pupil at a state school that the failure of the school's authorities to grant her daughter an exemption from the school's Code of Conduct to permit her to wear a nose stud constituted unfair discrimination on the grounds of religion and culture. The claim was brought under the Promotion of Equality and Unfair Discrimination Act,<sup>45</sup> which prohibits unfair discrimination on the grounds of religion and culture. Although the claim was not brought under the rights to freedom of religion and culture, the Court held that there may be, as in this case, an

overlap [between the Promotion of Equality and Unfair Discrimination Act and the rights to freedom of religion, belief and opinion and to participate in cultural life<sup>46</sup>] ... where the discrimination in question flows from an interference with a person's religious or cultural practices'.<sup>47</sup>

*Pillay* clearly represents a development of the Court's jurisprudence on religious liberty and cultural accommodation.

The Court ruled that the school's failure to grant the exemption was unfairly discriminatory and that the school was required to exempt the pupil concerned, Langa CJ, on behalf of the majority, deciding that the wearing of a nose stud represents an expression of the Hindu religion and of South Indian Tamil culture. The majority found that the failure of the school to grant the accommodation was unfairly discriminatory against the pupil concerned relative to other pupils whose religious beliefs and cultural practices did not bring them into conflict with the Code. Langa CJ stated that although the school uniform served 'admirable purposes,' these objectives would not be undermined by granting religious and cultural exemptions.<sup>48</sup>

In a separate judgement in which she agreed with the majority's finding of unfair discrimination, but disagreed in part with its

<sup>45</sup> Act 4 of 2000 ('the Equality Act').

<sup>46</sup> Section 30 of the Constitution reads: 'Everyone has the right to use the language and participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

<sup>47</sup> *Pillay* (n 6 above) para 46.

<sup>48</sup> *Pillay* (n 6 above) para 101.

reasoning, O'Regan J found that there is no evidence that the wearing of a nose stud has *religious* significance for the claimant, although she accepted that it is a form of cultural expression. She agreed with the majority that the failure of the school to grant an exemption was unfairly discriminatory, but for a different reason: the applicant was discriminated against, not relative to those pupils on whom the Code imposed no burden of religious or cultural denial, but relative to other pupils whom the school had in the past exempted: Hindu pupils had been permitted to wear 'Lakshmi strings' in honour of the Goddess Lakshmi and other pupils had been allowed to wear hide bracelets as a mark of respect on the death of a relative.<sup>49</sup>

Both Langa CJ and O'Regan J recognised that exemptions should not be made in response to every claim. Claims for exemptions call for a proportionality exercise. The strength of the claim must be determined. This involves an enquiry into whether, if a religious belief is relied upon, it is genuinely a religious belief, or, in the case of a cultural practice, that it is genuinely a cultural practice; the sincerity of the claimant, and the nature and severity of the burden on religious exercise. The strength of the competing interest of the state or other relevant institution in the uniform application of the rule must equally be considered. In cases where the law in question protects fundamental rights of individuals, or serves a compelling state objective that would be significantly frustrated by granting an exemption, or where the exemption would present insurmountable practical difficulties such that it could not be administered effectively, it may be that an exemption is ruled out. In the rest of this section, I consider the way in which the Constitutional Court negotiated each step in this enquiry.

### 3.1 Religious belief or cultural practice?

The claimant was required to show that the practice for which the accommodation is claimed is cultural in nature or that it is motivated by religious beliefs. The task of determining what beliefs and practices are religious – as opposed to secular, moral or personal – is a difficult matter, since religion is a highly complex concept. By what criteria can religion be defined and the distinction between it and the non-religious drawn, given the ineffable nature of religious experience and the fact that individuals have shifting relationships with religious communities which may themselves be riven with profound theological differences? Defining culture, to the extent that

<sup>49</sup> *Pillay* (n 6 above) para 130.

it differs from religion, is no easier, since 'cultural forms possess inherent indeterminacy'.<sup>50</sup>

On the issue of the cultural significance of the nose stud, Langa CJ asserted two claims. First, 'cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs are [for religious believers]' since individual identity and dignity is bound up with culture. Second, cultural practices 'will differ from person to person within a culture', since '[c]ultures are living and contested formations'.<sup>51</sup> Noting the regrettable absence of testimony from the pupil herself, Langa CJ found that an admission by the school authorities that the nose stud has 'cultural significance'<sup>52</sup> for the pupil was dispositive of the question of whether the practice should be considered to be a cultural practice.

On the issue of whether the nose stud has religious significance, Langa CJ referred to the testimony of Dr Rambilass, an expert on the Hindu religion, who had given evidence on behalf of the school. Dr Rambilass had conceded that the wearing of a nose stud is a cultural practice, but denied that the nose stud has independent religious significance, being 'part of the Shringaar which is concerned with love, beauty and adornment'.<sup>53</sup> Langa CJ contested this expert witness's conclusion that the wearing of a nose stud is devoid of religious significance on three grounds. First, he argued that it is difficult to separate Hindu culture and Hindu religion. Secondly, 'there are many different sects of Hinduism with different beliefs and practices'.<sup>54</sup> Thirdly, Dr Rambillas's testimony

self-consciously focused on defining Hindu religion according to the specific wording of the Vedic texts rather than on a broader view of religion as being informed and even defined by culture, tradition and practice.<sup>55</sup>

On the grounds that 'the borders between culture and religion are malleable and that religious belief informs cultural practice and cultural practice attains religious significance', Langa CJ concluded that Sunali's (the pupil in question's) wearing of a nose stud was 'an expression of both culture and religion'.<sup>56</sup>

Langa CJ's reasoning in determining that the wearing of a nose stud has religious significance may be questioned from several

<sup>50</sup> L Rosen, quoted in W Fallers Sullivan 'Judging religion' (1998) 81 *Marquette Law Review* 441 456.

<sup>51</sup> *Pillay* (n 6 above) paras 53-54.

<sup>52</sup> *Pillay* (n 6 above) para 58.

<sup>53</sup> *Pillay* (n 6 above) para 59.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> *Pillay* (n 6 above) para 60.

perspectives. There was no evidence to suggest that it bore religious significance for Sunali beyond the claimant's assertion that it did. Expert testimony indicated otherwise, and Langa CJ's rejection of Dr Rambilass' testimony concerning the content of the Hindu religion, about which he and not Langa CJ is an expert, is illegitimate. As for Langa CJ's contention that it is often difficult to distinguish between culture and religion, it is one thing to say that many religious practices are in some sense cultural and that many cultural practices are religious – both of which propositions are true, since culture and religion are inter-imbricated. It is quite another thing to aver that all cultural practices are religious, which is false. There is a subset of cultural practices that do not carry religious significance, which the evidence of Dr Rambilass indicated included the wearing of a nose stud.

That the borders of religion and culture are porous and that cultural practices *may* attain religious significance does not, contra Langa CJ, constitute evidence that the nose stud has religious significance. It would do so only if all cultural practices had religious significance, which is surely not the case. Langa CJ failed to cite credible evidence for thinking that nose studs have religious significance. Accordingly, O'Regan J's assessment is more plausible:

Although the applicant argues that the nose stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than personal religious beliefs. This is consistent with Dr Rambilass's evidence that wearing a nose-stud is not part of Hindu religion'.<sup>57</sup>

O'Regan J's approach to determining whether a practice is cultural is to be preferred to Langa CJ's. She contended that since cultural practices are associative and that the right to cultural life is to be practiced as a member of a community and not primarily a question of sincere, but personal belief, Langa CJ's 'individualised and subjective approach to what constitutes culture is faulty'. Rather 'in probing whether a particular practice is a cultural practice, some understanding of what the cultural community considers to be a cultural practice is important'.<sup>58</sup> O'Regan J elaborated:

<sup>57</sup> *Pillay* (n 6 above) para 62. O'Regan J's conclusion – 'that the applicant has established that the wearing of a nose stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs' – is open to the interpretation that she accepted that the practice has *non-mandatory* religious significance for Sunali. But this would be inconsistent with O'Regan J's failure to challenge, and apparent acceptance of, Dr Rambilass's statement that wearing a nose stud is not a religious practice.

<sup>58</sup> *Pillay* (n 6 above) para 154.

It will not ordinarily be sufficient for a person who needs to establish that he or she has been discriminated against on the grounds of culture to establish that it is his or her sincerely held belief that it is a cultural practice, or that his or her family has a tradition of pursuing this practice. The person will need to show that the practice that has been affected relates to a practice that is shared in a broader community of which he or she is a member and from which he or she draws meaning.<sup>59</sup>

O'Regan J's distinction between religion and culture has merit. Although most religions are also cultures, a religion may be constituted by the beliefs and practices of a single individual. A religion need not be constituted by *shared* practices and beliefs (even though it will usually be). By contrast, culture signifies the range of beliefs and assumptions held in common by members of a group, as well as the ensemble of customs and practices (fluid and mobile to be sure) that reflect the way members do things in common: modes of dress and decoration, types of circulation and social activity, ways of working and so on. Thus, where it is claimed that a practice is a cultural practice, we can examine the culture concerned to determine whether members engage in it in common with other members. We are not necessarily in a position to do this when it is claimed that a particular practice is religious in nature, since the beliefs and practices of a single individual may be sufficient to constitute a religion.

O'Regan J noted that there are a number of women of South Indian heritage who wear a nose stud because it identifies them as members of that community and connects them with their community and with former generations. She rightly considered this sufficient evidence to conclude that the wearing of a nose stud by women of South Indian extraction is a matter of 'associative cultural significance'.<sup>60</sup> She nevertheless noted, again correctly, that the practice is optional (that there is no cultural norm or obligation putting pressure on Sunali to wear a nose stud is evidenced by the fact that her sisters opted not to do so).

No evidence was adduced by the applicant to show that the wearing of the nose stud by her daughter was religious; indeed, it is clear that the wearing of a nose stud is, for Hindu women, an expression of cultural identity that is entirely optional and is not a religious practice. Nevertheless, that the practice has cultural significance is sufficient to bring it within the ambit of the Equality Act.

<sup>59</sup> *Pillay* (n 6 above) para 159.

<sup>60</sup> *Pillay* (n 6 above) para 162.

### 3.2 Sincerity

In order to be successful, the claimant must be sincere in her assertion that her opposition to conforming to the standard requirements rests on religious or cultural grounds: she must demonstrate that her beliefs are sincerely held ('neither fictitious, nor capricious ... [nor] an artifice')<sup>61</sup> or that she is sincerely expressing her cultural identity. Although the enquiry into sincerity precludes determining the truth or legitimacy of religious claims, it is important because charlatans may be tempted, for tactical purposes, to misrepresent as religiously or culturally motivated their insistence on acting contrary to the rules. The sincerity enquiry

attempts to ensure that exemptions are not granted to individuals who frame their opposition ... in religious [or cultural] terms in order to be afforded the legal remedy desired when in fact the religious beliefs are not sincerely held because the opposition stems from secular convictions.<sup>62</sup>

A claimant is not acting on sincerely held religious beliefs or expressing her cultural identity simply because she says she is. The claimant must demonstrate to the satisfaction of the court that the asserted beliefs are sincerely held or that the practice in question is an expression of cultural identity. For Langa CJ, the fact that Sunali refused to remove the nose stud after initially agreeing to do so – equivocation that is most plausibly explained, he stated, 'as a young woman uncertain about the consequences of standing up against the imposing authority of the School's headmistress' – 'points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture'.<sup>63</sup> In fact, however, Sunali's conduct was also consistent with the actions of a pupil who was initially prepared to forgo wearing the nose stud, but whose parent resolved to defy the school's authorities in order that her daughter could continue to engage in a practice expressive of cultural identity only. The sincerity of the claimant's averment that the practice has religious significance is questionable, particularly in view of Dr Rambilass's evidence that Hindu women do not regard it as a religiously significant practice. Even allowing that different believers within the same faith may hold different beliefs and attach different significance to the same

<sup>61</sup> Iacobucci J in *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 para 52 (*Amselem*).

<sup>62</sup> C Kraus 'Religious exemptions – applicability to vegetarian beliefs' (2001) 30 *Hofstra Law Review* 197 215. As the US District Court observed in *US v Kuch* 288 F Supp 439 443 claimants 'must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned'.

<sup>63</sup> *Pillay* (n 6 above) para 58.

practice, the applicant provided no convincing evidence that Sunali's wearing of a nose stud was motivated by sincerely held religious belief. In the absence of any evidence that the wearing of a nose stud is motivated by a religious belief (such as the scriptural evidence provided by the claimants in *Christian Education* or the verses of the Quran referred to by Muslim women claiming exemptions to permit them to wear headscarves) the impression that remains is that Sunali's wearing of a nose stud only masqueraded as a religious practice for the purposes of securing an exemption.

This is not to insist on the semiotic neutrality of a nose stud for a pupil of South Indian descent, nor is it to dispute the sincerity of the claimant's assertion that Sunali wished to wear the nose stud to express her South Indian culture. Far from it: as both Langa CJ and O'Regan J rightly observed, it is a practice that is clearly invested with cultural significance: an expression of the pupil's cultural identity. Although the nose stud is an adornment worn by women out of personal choice within South Indian culture, there is no reason to doubt that Sunali wore it as a fashion accessory that expressed her cultural identity.

### 3.3 Claimant's burden versus state interest

Langa CJ observed that the constitution places a duty of 'reasonable accommodation' on the institution from which an exemption is claimed. How should reasonableness be construed in this context? According to Langa CJ, the institution must make more than mere negligible effort 'to enable those outside the "mainstream" to swim freely in its waters', but determining the extent of the hardship it must suffer to do so will involve a 'contextual' determination, 'an exercise in proportionality that will depend intimately on the facts'.<sup>64</sup> In practice, courts must assess the burden imposed on the claimant's religious freedom or cultural practice and whatever interest is served by refusing the exemption, and strike an appropriate balance between the two. The claimant should only succeed if she suffers a substantial burden on the exercise of her religion or culture and if the state or institution's interest in denying her an exemption is not strong. Even if the burden on the claimant is substantial, the claim should not succeed if the government's interest in denying the exemption is strong: human sacrifice may be central to a claimant's religion, but it should not be accepted as a defence against a charge

<sup>64</sup> *Pillay* (n 6 above) para 76.

of murder. Likewise the claim should fail if it affects religious or cultural activities only marginally.<sup>65</sup>

The claimant was required to show that, as a result of the school's code, Sunali was placed under a substantial burden. A showing of this kind is easier where the religious or cultural practice for which the claimant is seeking protection is mandatory rather than optional: where there is 'a Hobson's choice between observance of their faith and adherence to the law'<sup>66</sup> as there was in *Christian Education*. In *Pillay*, by contrast, the applicant conceded that her wearing a nose stud was not required by the tenets of her faith, but was instead a voluntary practice. The Constitutional Court held — consistently with the Canadian Supreme Court's ruling in *Amselem*<sup>67</sup> (affirmed, though the Constitutional Court does not say so, by the House of Lords in *Williamson*<sup>68</sup>) — that it is not essential to the success of a claim for a religious exemption that the religious practice be required by the claimant's religious or cultural beliefs, but only that it be an expression of those beliefs. That is so, stated Langa CJ, because the Constitution is committed to 'affirming diversity' and 'differentiating between mandatory and voluntary practices does not celebrate or affirm diversity but merely tolerates it'.<sup>69</sup>

The Constitutional Court is clearly correct that in order to be afforded protection under the right to freedom of religion the belief or practice need not be mandatory, although this has nothing to do with celebrating rather than tolerating diversity. To be successful, the claimant must demonstrate not that the practice for which she seeks protection is compelled by her religion, but that the regulation imposes a substantial burden on the practice of her religion. A trivial impact imposed by a law on an individual would not be sufficient to qualify for an exemption. Even if religious practices are not mandatory, being prevented from engaging in such practices may be substantially burdensome. Kent Greenawalt illustrates this point with an example: individual A might not consider wearing a cross to be mandatory, yet could regard wearing a cross as 'an important symbol of witness and commitment and a great aid to devotion'.<sup>70</sup> Were a school to forbid all jewellery, including crosses, A's convictions should

<sup>65</sup> See *Lyng v Northwest Indian Cemetery Protection Association* 374 US 398 (1963) at 475, in which Brennan J, dissenting, argued that a trivial interference with religious practice was insufficient; the claimants were required to show the 'centrality' of the affected practices and the presence of a 'substantial and realistic threat of frustrating their religious practice'.

<sup>66</sup> *Pillay* (n 6 above) para 62.

<sup>67</sup> n 61 above, paras 67-8.

<sup>68</sup> n 20 above, para 33.

<sup>69</sup> *Pillay* (n 6 above) para 65.

<sup>70</sup> Greenawalt (n 4 above) 210.

be sufficient to vault her over the threshold of substantial burden.<sup>71</sup> Of course, not all voluntary practices are similarly justifiable. Consider individual B, who wears a cross without attaching great religious significance to it, though aware that it represents for Christians the crucifixion of Christ. A rule forbidding B from wearing jewellery would not constitute a substantial burden.

Even allowing that proscribing voluntary practices may be burdensome, interfering with obligatory practices is likely to be more burdensome. That is so, because forgoing a practice mandated by the tenets of religion (as wearing a headscarf is for some Muslim women) will be intensely injurious to them, because what is being demanded of them is that they violate transcendental religious commands, on which the favour of their deity or sanctions, salvation or damnation, may depend. A clash between religious commandments and civil laws or regulations situates believers between competing sources of authority, a predicament particularly grave given ‘the widespread sense that one’s religious obligations are more ultimate than those of the social order and should take priority if the two come into conflict’.<sup>72</sup> Voluntary practices, precisely because they are not commanded, are less damagingly relinquished, even if forbidding such obstacles may be substantially burdensome.

Langa CJ appeared not to appreciate this when he asserted, ‘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,’ to which he added that ‘it may be even more vital to protect non-obligatory cultural practices’.<sup>73</sup> But this obscures the fact that the costs to a believer of forgoing an optional practice will almost always be lower than the costs that a believer pays in deciding not to engage in a practice that the tenets of his faith mandates, because in the case of an optional practice, the individual is not required to make the agonising choice between competing sources of authority.

<sup>71</sup> See, by way of illustration, *Sasnett v Sullivan* 908 F Supp 1429 (WD Wis 1995), aff’d, 91 F 3d 1018 (7<sup>th</sup> Cir 1996), vacated and remanded, 521 US 1114 (1997), in which a prisoner challenged under the RFRA regulations limiting the wearing of all religious jewellery except wedding bands. Prison officials argued that the exercise of a prisoner’s religion was substantially burdened only if the practice was required by their religion, which the wearing of crucifixes was not. Posner J held that the question was whether the burdened practice was motivated by a sincere religious belief, not whether it was ecclesiastically mandated. He found that the regulation forbidding the wearing of crosses substantially burdened the plaintiff’s religious liberty. Winnifred Fallers Sullivan quotes one of the plaintiffs: ‘There’s nothing saying you have to wear a cross, but it brings a person closer to God’ (Sullivan (n 50 above) 451).

<sup>72</sup> Greenawalt (n 4 above) 439.

<sup>73</sup> Pillay (n 6 above) paras 64 & 66.

How should the magnitude of the burden imposed on the claimant be measured? Langa CJ decided that the failure of the school to grant an exemption constituted a ‘significant infringement’ of the claimant’s religious and cultural identity on the basis of what he referred to as a ‘subjective investigation’.<sup>74</sup> The issue, he stated, is whether the pupil considered the nose stud central to her religion or cultural identity, not whether other members of the South Indian Tamil Hindu community do so (since the status of a practice within a particular group may be disputed). Langa CJ acknowledged that ‘the Court can properly look at a range of evidence including evidence of the objective centrality of the practice to the community at large’.<sup>75</sup> Yet it is striking that he, unlike O’Regan J, did not consider the way in which the practice is viewed by other members of the South Indian Hindu community. Instead he considered the pupil’s beliefs and attitudes concerning the practice, which he inferred from her conduct. Where Langa CJ’s reasoning went awry was in assuming that behaviour is an accurate indicator of beliefs. In fact, conduct is not reliable evidence of beliefs: it is usually the case that multiple beliefs and motivations are consistent with any individual’s activity.

Langa CJ appears to have accepted uncritically the applicant’s assertion that she was placed under a substantial burden and refers to the pupil’s insistence on wearing the nose stud under the pressure of threatened disciplinary action as evidence of this.<sup>76</sup> But in fact, all that the pupil’s conduct evidences is a strong commitment to wearing the nose stud, which could reflect a substantial burden but could equally be motivated by her obedience to her mother, who appears to have engaged in a power struggle with the school authorities. The difficulty with Langa CJ’s enquiry into burden is that he seemed to treat the conclusory allegation on the part of the claimant regarding burden as dispositive. He was too ready to interpret the pupil’s conduct as indicative of the strength of her religious and cultural commitment to the practice, without allowing that a strong commitment to persisting with the practice is not necessarily generated by a substantial burden.

The school claimed that the burden, if any, was slight since the pupil could wear the nose stud out of school hours. Langa J rejected this claim on the grounds that ‘[t]he practice to which Sunali adheres is that once she inserts the nose stud, she must never remove it’.<sup>77</sup> However, he referred to no evidence in support of the claim that the practice of wearing a nose stud adopted by certain members of the

<sup>74</sup> *Pillay* (n 6 above) paras 85 & 88.

<sup>75</sup> *Pillay* (n 6 above) para 88.

<sup>76</sup> *Pillay* (n 6 above) para 90.

<sup>77</sup> *Pillay* (n 6 above) para 85.

South Indian community obliges them to wear the nose stud at all times.

The school claimed that the burden placed on the pupil was slight for the additional reason that she could have transferred to another school that would have allowed her to wear a nose stud. Langa CJ rejected this argument on the grounds that ‘permitting it only when no other option remains’<sup>78</sup> was inconsistent with South Africa’s ‘constitutional project which not only affirms diversity, but promotes and celebrates it’. The effect of requiring the pupil to relocate to another school to express her cultural identity, Langa CJ asserted, ‘would be to marginalise religions and cultures’.<sup>79</sup>

If in *Pillay* the burden on the pupil did not, contra Langa CJ, appear to be particularly substantial, neither was the school’s interest in enforcing the school uniform without exception strong. It is often argued that uniforms promote crucial educational interests: minimising external differences between pupils of different social classes; discouraging competitive fashions; promoting school spirit and encouraging discipline.<sup>80</sup> At issue was the empirical question of whether the accommodation sought by the claimant would significantly impair the achievement of these educational objectives. The school did not offer evidence on this point and it is difficult to see how it could have done so. In fact, as Langa CJ noted, it is difficult to see how granting an exemption to permit the wearing of a nose stud would interfere substantially with the effective running of a school and with the purposes the school uniform was designed to further.<sup>81</sup>

This conclusion is consistent with that of the UK House of Lords in *Mandla v Dowell Lee*,<sup>82</sup> decided under the Race Relations Act of 1976, in which a headmaster had refused to admit a Sikh pupil to a private school on the grounds that the pupil insisted on wearing a turban, mandated by his faith, in violation of the school uniform. Lord Fraser

<sup>78</sup> *Pillay* (n 6 above) para 65.

<sup>79</sup> *Pillay* (n 6 above) para 92.

<sup>80</sup> There is some debate about whether school uniforms are successful in fostering these educational objectives, although (contested) studies conducted by American researchers have found school uniforms increase discipline, foster school morale, reduce unhealthy competition amongst pupils and so forth. For a critical review of the literature, see D Brunsma *School uniforms: A critical review of the literature* (2002). The United States Department of Education’s *Manual on school uniforms*, (<http://www.ed.gov/updates/uniforms.html> (accessed: 6 June 2007)) begins with the sentence, ‘A safe and disciplined learning environment is the first requirement of a good school’ and under the heading ‘Treat school uniforms as part of an overall safety program’ the *Manual* states as follows: ‘Uniforms by themselves cannot solve all of the problems of school discipline, but they can be one positive contributing factor to discipline and safety’.

<sup>81</sup> *Pillay* (n 6 above) para 101.

<sup>82</sup> [1983] 2 AC 548.

likewise dismissed the headmaster's argument that an exemption would frustrate the objectives furthered by the uniform.

In *Pillay*, the available evidence suggested that the burden imposed on the pupil and the interest of the school in denying her an exemption were roughly in equipoise. The political philosophy underlying the Court's holding that the severity of the burden placed on the pupil outweighed the burden placed on the school is revealed in its commitment not only to tolerating difference but to 'affirm[ing] it as one of the primary treasures of our nation'.<sup>83</sup> The Court appears to be committed to a 'politics of difference' that in certain respects resembles that outlined by Iris Marion Young in *Justice and the Politics of Difference*.<sup>84</sup>

Young's contrast between what she considers the traditional liberal approach and the politics of difference is instructive:

The vision of liberalism as the transcendence of group difference seeks to abolish the public and political significance of group difference, while retaining and promoting both individual and group diversity in private, or nonpolitical, social contexts.<sup>85</sup>

For Young, '[g]roups cannot be socially equal unless their specific experience, culture and social contributions are publicly affirmed and recognised'.<sup>86</sup> She deprecates the 'the typical liberal approach ... which tolerates any behaviour so long as it is kept in private',<sup>87</sup> arguing that 'the private, as traditionally conceived, is what should be

<sup>83</sup> *Pillay* (n 6 above) para 92.

<sup>84</sup> IM Young *Justice and the politics of difference* (1990). It may be useful to deal briefly with the change in the way in which the idea of respect for difference has been viewed in South Africa. In a perversion of the contemporary politics of difference, the apartheid government justified its policy of creating 'homelands', an order of 'plural nations' in semi-autonomous polities with no economic viability, with reference to something like a multicultural respect for difference. As R Nixon *Homelands, Harlem and Hollywood: South African culture and the world beyond* (1994) 206 asserts, 'Since the late 1950s, difference (as opposed to unity) has been perceived – for sound historical reasons – as a government term. This is so because the South African brand of racial supremacy has been couched as a form of sensitivity to the special needs and cultural particularities of diverse "peoples". Attentiveness to difference is thus perceived as "apartheid" business, a way of coating state racism with a democratic gloss'. Nevertheless, as John and Jean Comaroff 'Criminal justice, cultural justice: The limits of liberalism and the pragmatics of difference in the new South Africa' (1994) 31 *American Ethnologist* 188 195 observe, there has been in South Africa 'a growing recognition of the gravitas of difference'. In the jurisprudence of the Constitutional Court, attentiveness to difference has emerged, particularly in its jurisprudence dealing with sexual orientation and religious and cultural accommodation, as an integral part of constitutional justice.

<sup>85</sup> n 84 above, 168 (emphasis added).

<sup>86</sup> n 84 above, 174 (emphasis added).

<sup>87</sup> Young (n 84 above) 161 (emphasis added).

hidden from view, or what cannot be brought out to view. It is connected with shame and incompleteness'.<sup>88</sup>

The refusal to permit members of cultural groups to manifest their culture publicly is considered by Young and the Constitutional Court to devalue members by relegating cultural practices to the private sphere. It is from this perspective that we should understand Langa CJ's assertion that 'the symbolic effect of denying her the right to wear it ... sends a message that Sunali, her religion and her culture are not welcome'.<sup>89</sup> From the perspective of the politics of difference, the school's refusal to permit Sunali to express her cultural identity at school (that is, in public) constitutes an injury to her. Young's depreciation of liberal toleration chimes with O'Regan J's statement that 'treating people as worthy of equal respect in relation to their cultural practices requires more than mere tolerance'.<sup>90</sup>

### 3.4 Discrimination, neutrality and fairness

Under the Equality Act, the claimant was required to show that the school's Code unfairly discriminated against her on the basis of religion or culture. The school argued that in this case there was no comparator, no group relative to which Sunali received inferior treatment. The location of the appropriate comparator was the subject of disagreement between the judgements of Langa CJ and O'Regan J. Langa CJ identified the appropriate comparator as 'those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs are uncompromised'. He found that 'the Code has a disparate impact'<sup>91</sup> on certain religions and cultures, the members of which are disproportionately burdened or incommoded relative to others who are not members. He took to view that the school's 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.<sup>92</sup>

This again is consistent with Young's 'politics of difference', according to which

<sup>88</sup> Young (n 84 above) 119.

<sup>89</sup> *Prince* (n 6 above) para 85. Langa CJ here paraphrases the Canadian Supreme Court in *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] SCC 6 para 79 (*Multani*): 'A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others'.

<sup>90</sup> n 84 above, 156.

<sup>91</sup> *Pillay* (n 6 above) para 44.

<sup>92</sup> As above.

blindness to difference disadvantages groups whose experience, culture and socialised capacities differ from those of privileged groups [who] ... implicitly define the standards according to which all will be measured. Because their privilege involves not recognising those standards as culturally and experientially specific, the ideal of common humanity in which all can participate without regard to race, gender, religion or sexuality poses as neutral and universal.<sup>93</sup>

For O'Regan J, by contrast,

the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case.<sup>94</sup>

As indicated above, the school had in the past granted exemptions to permit the wearing of red 'Lakshmi strings' and of hide bracelets to mark respect after a funeral,<sup>95</sup> both of which were 'associative cultural or religious practices'. According to O'Regan J, the unfairness lay in the school's inconsistency in exempting certain practices but not others without adequate justification of the differential treatment. Whereas Langa CJ asserted that the Code was non-neutral, O'Regan J appears to have accepted that the Code was neutral: she stated that 'the Code is entitled to establish neutral rules to govern the school uniform'.<sup>96</sup>

Which group is the correct comparator? The answer, I think, is that both groups are. Langa CJ was certainly correct that the unfairness that justifies the granting of an exemption is present when a rule imposes a burden on members of a minority or vulnerable cultural or religious group to which others are not subject. On the other hand, O'Regan J is right that the granting of exemptions to permit certain religious and cultural practices allows those who have been denied exemptions to claim that they have been unfairly treated. Since both judges found that there had been discrimination, does it matter which comparator is to be considered the appropriate one? It does: on O'Regan J's approach, had the school refused to grant any exemptions there would have been no discrimination and the claim would have failed. By contrast, Langa CJ would have still found the rule to be discriminatory and the claim would still have been successful. The correct approach would be to hold that *both* groups are appropriate comparators and both can give rise to claims for exemptions.

<sup>93</sup> n 84 above, 164.

<sup>94</sup> *Pillay* (n 6 above) para 164.

<sup>95</sup> *Pillay* (n 6 above) para 170.

<sup>96</sup> *Pillay* (n 6 above) para 165.

Given the disagreement between Langa CJ and O'Regan J about whether the Code is neutral, who is right? Langa CJ's determination that the code is non-neutral is preferable, comporting as it substantially does with the approach of the minority of the US Supreme Court in *Goldman v Weinberger (Goldman)*.<sup>97</sup> In that case, an orthodox Jewish rabbi serving as a psychologist in the military claimed an exemption from an air force regulation that proscribed the wearing of headgear indoors. The military's uniform dress regulation permitted the wearing of rings and the wearing of religious symbols underneath military uniforms. This allowed latitude for Christians to wear articles with religious significance. The minority in *Goldman* were prepared to grant the exemption in part because 'the accommodation of items Christians were likely to wear contrasted disturbingly with the rigidity of the rule that disfavoured Orthodox Jews and other minorities'.<sup>98</sup>

The School argued that if an exemption were to be granted, then 'some of the girls might feel that it is unfair'.<sup>99</sup> Langa CJ, with whom O'Regan J agreed on this point, determined, correctly and consistently with the Canadian Supreme Court in its recent *Multani* decision,<sup>100</sup> that once the rule is found to be discriminatory the appropriate response to complaints from those not covered by the exemption is to explain to them that the Code does not impose a burden of cultural denial that is comparable to the burden imposed on them in requiring them to forgo a fashion item.<sup>101</sup>

### 3.5 Deference

The school raised the argument that *deference* should be accorded to the professional judgements of the school authorities regarding school uniforms. Langa CJ responded by conceding that 'the Court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area'. He insisted, however, that courts 'are best qualified and constitutionally mandated' to answer the question 'whether the fundamental right to equality has been violated, which in turn requires the Court to determine what obligations the school bears to accommodate diversity reasonably'.<sup>102</sup> 'The Court cannot abdicate its duty by deferring to the school's view on the requirements of fairness' since

<sup>97</sup> 475 US 503 (1986).

<sup>98</sup> Greenawalt (n 4 above) 165.

<sup>99</sup> Pillay (n 6 above) para 103.

<sup>100</sup> n 89 above, para 104.

<sup>101</sup> As O'Regan J observed, 'A school is an ideal place to educate other learners about the difference between fashion and cultural practices, and should an exemption for nose-studs be granted, a school would be obliged to furnish such education to its learners' (Pillay (n 6 above) para 172).

<sup>102</sup> Pillay (n 6 above) para 81.

to do so would be to make the school a judge in its own case.<sup>103</sup> Langa CJ referred approvingly to the fact that the Code had been ‘devised after extensive consultation with parents, educators, staff and learners’, but decided that the fact of consultation ‘does not immunise the resultant decisions ... from constitutional scrutiny and review’ since

many individual communities still retain historically unequal power relations or historically skewed population groups which may make it more likely that local decisions will infringe on the rights of disfavoured groups.<sup>104</sup>

Langa CJ’s view of judicial deference is correct.<sup>105</sup> A moderate degree of deference should be accorded school authorities because they possess specialist expertise. The Court should allow ample scope for the development of policy and the promulgation of regulations by the school administration, recognising that rights can sometimes properly give way to contrary public needs, such as the creation of conditions for effective education. Yet the Court, as ultimate authority on questions of right, should arrive at its own independent evaluation, rather than accepting the view of the school authorities. Brennan J took this view in *Goldman*, criticising the majority for deferring unduly to the judgement of the military.<sup>106</sup>

### 3.6 A slippery slope? The end of school uniforms?

Langa CJ rejected an objection that to grant an exemption in this case would result in a ‘slippery slope scenario’, an opening of the floodgates to endless claims for accommodation for, amongst other things ‘dreadlocks, body piercings, tattoos and loincloths’.<sup>107</sup> On this objection, once nose studs have been accommodated, fairness requires that other claims for exemptions be granted, resulting in the erosion of the uniformity of school uniforms to the point that there would be a uniform in name only. This argument has no merit, Langa CJ claimed, since, first, exemptions must only be considered for ‘bona fide religious and cultural practices’.<sup>108</sup> Second, claims for exemptions may be refused on the grounds that ‘a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform’.<sup>109</sup> Third, schools could refuse

<sup>103</sup> *Pillay* (n 6 above) para 81.

<sup>104</sup> *Pillay* (n 6 above) para 83.

<sup>105</sup> For a discussion of what constitutes appropriate deference in the context of rights adjudication, see P Lenta ‘Judicial deference and rights’ (2006) *Tydskrif vir Suid-Afrikaanse Reg* 456.

<sup>106</sup> n 97 above, 515.

<sup>107</sup> *Pillay* (n 6 above) para 107.

<sup>108</sup> As above.

<sup>109</sup> *Pillay* (n 6 above) para 114.

to accommodate a particular practice 'if accommodating [it] would impose an unreasonable burden on the School'.<sup>110</sup> if the practice will 'create a real possibility of disruption ... threaten[ing] academic standards or discipline'.<sup>111</sup> Finally, as to the extent that other cultural and religious practices are exempted from the Code, 'that is something to be celebrated, not feared' since 'the display of religion and public is ... a pageant of diversity which will enrich our schools and in turn our country'.<sup>112</sup>

Langa CJ's response accords with that of Brennan J in *Goldman*. Brennan J stated that each claim would have to be evaluated against the reasons for refusing it. He added that the court could defer to 'dress and grooming rules that have a reasoned basis in, for example, functional utility, health and safety considerations and the goal of polished, professional appearance'.<sup>113</sup> Claims for accommodation could justifiably be refused in the case of departures from the uniform that infringed these requirements.

Despite the US Supreme Court's recent characterisation of the 'slippery slope' argument as 'the classic rejoinder of bureaucrats throughout history',<sup>114</sup> the raising of this concern is not always an indication of bad faith. It may instead reflect 'the reasonable belief that the proliferating recognition of difference might itself generate an accelerating and potentially destabilising realignment of institutional practices'.<sup>115</sup> Langa CJ was adamant that the decision in *Pillay* 'does not abolish school uniforms'.<sup>116</sup> Yet, given the broadness of culture, or as O'Regan J put it, the fact that 'all human beings have a culture',<sup>117</sup> the potential number of claims for accommodation that may have to be granted consistently with the jurisprudence in *Pillay* may be high. Langa J mentions turbans, yarmulkes and headscarves,<sup>118</sup> all of which schools would have to accommodate. What about dreadlocks? Provided they were tied up, they may have to be accommodated as an expression of Rastafarian culture or religion. Body piercings and tattoos? Perhaps: tattoos, for example, may express not only the faith of Coptic Christians but also Maori culture.

<sup>110</sup> *Pillay* (n 6 above) para 107.

<sup>111</sup> *Pillay* (n 6 above) para 114.

<sup>112</sup> *Pillay* (n 6 above) para 107.

<sup>113</sup> *Goldman* (n 97 above) 519.

<sup>114</sup> *Gonzalez* (n 37 above) 15.

<sup>115</sup> A Sarat & R Berkowitz 'Disorderly differences: Recognition, accommodation, and American law' (1994) 6 *Yale Journal of Law and the Humanities* 285 288.

<sup>116</sup> *Pillay* (n 6 above) para 114.

<sup>117</sup> *Pillay* (n 6 above) para 150.

<sup>118</sup> *Pillay* (n 6 above) para 106.

Kilts? A pupil of Scottish extraction may insist on wearing a kilt at school and it is not clear, on the approach outlined in *Pillay*, that schools could refuse to grant this exemption.<sup>119</sup> It is difficult to predict how many claims for religious and cultural accommodation are likely to be pressed,<sup>120</sup> but were all the claims that are required to be accommodated in accordance with the approach in *Pillay* to be brought, school uniforms, although they might not be abolished, would be far less uniform. In that case, the educational objectives promoted by uniforms may be to some extent undermined. This is the price that may have to be paid for extending the obligation to accommodate to include optional cultural practices.

A claim that could be refused on the grounds of the approach in *Pillay* is a claim for an exemption to permit a pupil to carry a weapon. In *Multani*, the Canadian Supreme Court – adopting an approach to religious exemptions strongly resembling the approach of the Constitutional Court in *Pillay* to religious and cultural exemptions – decided that the ‘duty to make reasonable accommodation’<sup>121</sup> obliged a school to accommodate a Sikh pupil’s demand for an exemption to permit him to wear a *kirpan*, a metal dagger, which Sikh men believe themselves to be religiously obligated to wear at all times. Despite accepting that a *kirpan* is a bladed weapon, the Supreme Court held that the increased risk of violence introduced by granting the exemption to the school’s *code de vie* was acceptably low, provided the pupil wore the *kirpan* sealed and sewn inside his clothing. To refuse an accommodation in this case, the Court (consistently with the view of the Constitutional Court in *Pillay*) added, would be to ‘stifle the promotion of values such as multiculturalism, diversity and the development of an educational culture respectful of the rights of others’.<sup>122</sup>

The Constitutional Court would be unlikely to grant an exemption for a *kirpan* (and mistaken were it to do so), since South Africa is ‘an

<sup>119</sup> It might be contended in response that South Indian/Hindu culture is a more authentically South African culture than Scots Presbyterian culture, but that would be mistaken. While Hindu South Indians arrived in South Africa as indentured labourers from the 1860s onwards, the Scots began to arrive before that. Two aspects of Scots culture are relevant here. First, it is strongly religious. During the mid nineteenth century, a group of Scots who were ministers of the Presbyterian Church of Scotland helped to revitalise the Dutch Reformed Church. Secondly, it is difficult to imagine a more forceful and nationalistic assertion of culture than that characteristic of the Scots.

<sup>120</sup> The granting of an exemption by the US Supreme Court in *Yoder* did not result in an avalanche of claims. See W Galston *Liberal pluralism* (2002) 121: ‘The limited public education accommodation for the Old Order Amish endorsed by the Supreme Court in *Wisconsin v Yoder* a quarter of a century ago has not lead to an escalation of faith-based demands. Indeed few other groups have sought similar treatment for themselves’.

<sup>121</sup> *Multani* (n 89 above) para 53.

<sup>122</sup> *Multani* (n 89 above) para 78.

exceptionally, possibly uniquely, violent society',<sup>123</sup> whereas Canada is one of the least violent countries in the world. Yet its probable refusal to do so would not necessarily reflect a difference in approach between the Constitutional Court and the Canadian Supreme Court: the social contexts of Canada and South Africa are sufficiently different as to result in the same approach to accommodations leading in the case of weapons to different outcomes.

#### 4 Accommodating dress and adornment: A comparative analysis

The jurisprudence of the UK House of Lords indicates that it may be prepared, in certain circumstances, to grant an exemption to permit the wearing of religious clothing and adornments, although its approach suggests that it is less solicitous towards claims for exemptions to school uniforms for religious dress than its South African and Canadian counterparts. In *Begum*,<sup>124</sup> the House of Lords rejected a claim for a religious exemption from a Muslim pupil, who wished to wear not only a headscarf (*hijab*), but also a *jilbab*, a long garment the purpose of which is to hide the contours of the female body. Despite accepting that the application was motivated by a sincere belief on the part of the pupil that she was under a religious obligation to wear a *jilbab*, the Court denied the claim, for the following reasons: first, the current school uniform's dispensation for Muslim pupils was designed in consultation with Muslim authorities to meet their religious requirements; second, the pupil could have transferred to another school in the area that permitted the wearing of a *jilbab*;<sup>125</sup> third, deference – a 'margin of appreciation'<sup>126</sup> – should be accorded to the decision of Parliament to allow schools to make their own decisions about uniforms<sup>127</sup> and, fourth, to grant this exemption might encourage undesirable religious extremism and might place undue pressure on Muslim female pupils who did not wish to wear the *jilbab* to do so.<sup>128</sup>

Faced with a case with similar facts to those in *Begum*, the jurisprudence of the Constitutional Court would seem to commit it to

<sup>123</sup> A Altbeker A country at war with itself: South Africa's crisis of crime (2007) 12.  
<sup>124</sup> *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (*Begum*).  
<sup>125</sup> *Begum* (n 124 above) paras 25 & 89.  
<sup>126</sup> *Begum* (n 124 above) para 62.  
<sup>127</sup> *Begum* (n 124 above) para 34.  
<sup>128</sup> *Begum* (n 124 above) para 65.

granting an exemption to permit the pupil to wear a *jilbab*.<sup>129</sup> Langa CJ rejected the argument that the Court should substantially defer to the judgement of the school authorities about whether an exemption would interfere with the effective running of the school. He also disputed the contention that the pupil could have relocated to another school that permitted the practice, since this would fail to celebrate diversity, and ‘would be to marginalise religions and cultures’.<sup>130</sup> The Constitutional Court is likely to take the view, as far as claims for accommodation are concerned, that there is only one sensible stopping point: the point at which religious and cultural practices violate the rights of others or interfere with the business of the school. So, for example, the Constitutional Court should not only refuse to accommodate weapons in schools; it should also agree with Silber J in *Headteachers and Governors of Y School*<sup>131</sup> that it is not reasonable to expect a school to accommodate a *niqab*, a veil which covers the entire face and head save for the eyes, which would frustrate educational objectives by impeding identification of and communication with pupils.<sup>132</sup>

<sup>129</sup> *Begum* was followed in *Playfoot (a minor), R (on the application of) v Millais School* [2007] EWHC 1698 (Admin) (16 July 2007), in which the High Court refused to grant an exemption to permit a female pupil to wear a silver ring that expressed her commitment, as a Christian, to remaining sexually abstinent prior to marriage. The Court rejected the claim primarily on the grounds that the wearing of the ring at school was not *required* by her religion unlike other practices that the school had accommodated, such as the wearing of headscarves by Muslim pupils and the wearing of Kara bangles by Sikh girls. Since the Constitutional Court has emphasised that the duty of reasonable accommodation includes optional as well as mandatory practices, it may well be that it would grant an exemption in these circumstances. The reasoning in *Playfoot* is anyway inconsistent with that of the House of Lords in *Williamson*, in which it was stated that a perceived obligation is not a ‘prerequisite to manifestation of a belief in practice’ (n 20 above, para 33).

<sup>130</sup> *Pillay* (n 6 above) para 92.

<sup>131</sup> *R (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298 (Admin); [2007] HRLR 20 (QBD (Admin)).

<sup>132</sup> Two points about this. First, although the Court would probably agree with Silber J’s conclusion, it would decline to follow the reasoning of Silber J, who, adopting the approach of the House of Lords in *Begum*, declined to grant the exemption on the grounds that deference is due to school authorities and because the pupil concerned could have transferred to another school which permits the wearing of a *niqab*. Secondly, if the school is acting reasonably by declining a *pupil’s* request that she be permitted to wear a *niqab*, a school’s decision to refuse to permit a *teacher* to wear a *niqab* is equally reasonable, since a teacher’s obscuring of her face and mouth makes non-verbal communication more difficult and, as a result, may impede effective communication between the teacher and pupils. The UK Employment Appeal Tribunal took this view in *Azmi v Kirklees Metropolitan Borough Council* [2007] UKEAT/0009/07 (30 March 2007). Of course, non-verbal communication might be less important with older learners. See, for example, Nussbaum (n 8 above) 350.

The US Supreme Court has yet to be confronted with a claim for an exemption from school uniform regulations. Would it be likely to grant a claim for an exemption to permit religious clothing and adornments?<sup>133</sup> In *Smith*,<sup>134</sup> the US Supreme Court held that, other than in exceptional circumstances, there is no constitutional requirement to grant religious exemptions from facially neutral laws which do not have the purpose, but may have the incidental effect, of burdening the practice of religion. Post-*Smith*, a facially neutral school uniform policy, if fairly administered, would be constitutionally valid. Nevertheless, as the Supreme Court stated in a subsequent decision, *Church of Lukumi Babalu Aye*,<sup>135</sup> the regulation would have to be applied in a religiously neutral manner. If exemptions are made for some religious groups but not for others, as they were in *Pillay*, they may be held unconstitutional. Moreover, the regulation might be challenged, as in *Pillay*, under a 'hybrid' claim that it infringes not only religious liberty but also freedom of expression. The US Supreme Court in *Smith* indicated that hybrid claims might be treated differently from free exercise claims standing alone.<sup>136</sup> The claim that the wearing of clothing and adornments constitutes expressive conduct appears strong. In *Pillay*, Langa J found that the ban on nose studs under the school uniform infringed the pupil's right to freedom of expression.<sup>137</sup> And in her concurring judgement in *Begum*, Baroness Hale of Richmond contended that a woman wearing a hijab 'may have chosen the garment as a mark of her defiant political identity' and may be engaging 'in a highly complex autonomous act intended to use the resources of the

<sup>133</sup> See J Mikhail 'The free exercise of religion: An American perspective' in M Mahlman & H Rottleuthner (eds) *Ein Neuer Kampf Der Religionen? Staat, Recht und Religiöse Toleranz* (2006) 271.

<sup>134</sup> n 25 above.

<sup>135</sup> n 1 above.

<sup>136</sup> n 25 above, 881 - 882. The category of the 'hybrid' claim, though difficult to interpret, has resulted in some successful claims, particularly in areas that link free speech to religious liberty. See, for example, *Chalifoux v New Caney Ind School Dist*, 976 F Supp 659 (SC Tex 1997).

<sup>137</sup> n 6 above, para 94.

tradition both to change and to preserve it'.<sup>138</sup>

## 5 Conclusion

The relative levels of protection for religious liberty afforded by the South African Constitutional Court, the UK House of Lords, the Canadian Supreme Court and the US Supreme Court in response to claims for exemptions from school uniforms may now be assessed. The highest level of protection is provided by the South African Constitutional Court and the Canadian Supreme Court. These courts are most accommodating of clothing and adornment practices of religious (and in the case of the South African Constitutional Court, cultural) significance, emphasising the values of multiculturalism and diversity.

The UK House of Lords offers a lower level of protection for religious claimants. It is more deferential to the legislature, on the grounds of a Dworkinian distinction between policy and principle (as in *Williamson*), and to school authorities, on the basis of their specialist expertise (as in *Begum*). It takes the view that pupils should as far as possible accommodate themselves to the relevant regulation by, for example, transferring where reasonably possible to another school that would permit the practice for which protection is being sought. By contrast, the South African Constitutional Court and the Canadian Supreme Court's emphasis on affirming culturally and religiously differentiated identities suggests a stance in accordance with which pupils are to a lesser extent required to accommodate themselves to the regulation. The approach of the House of Lords in *Begum* reflects an anxiety about religious extremism which is pervasive in post 9/11 and 7/7 UK but not in the different

<sup>138</sup> n 124 above, para 94. The US Supreme Court has not yet addressed the issue of whether school uniforms violate the right to freedom of expression, but lower courts have decided that school uniforms do not violate the right to free speech. The US Court of Appeals upheld the constitutionality of a mandatory public school uniform policy in a Louisiana school district (*Canady v Bossier Parish School Board*, 240 F 3d 437, US Ct App 6th Circuit (2001)). The court found that 'improving the educational process' was an important and substantial government interest. In upholding the imposition of mandatory uniforms, the court noted that the school's policy was 'viewpoint-neutral'. Most importantly of all for the present case, the Court went on to find that

[t]he School Board's purpose for enacting the uniform policy is to increase test scores and reduce disciplinary problems throughout the school system. This purpose is in no way related to the suppression of student speech. Although students are restricted from wearing clothing of their choice at school, students remain free to wear what they want after school hours. Students may still express their views through other mediums during the school day. The uniform requirement does not bar the important 'personal intercommunication among students' necessary to an effective educational process.

environment of South Africa:<sup>139</sup> the House of Lords's concern about the prospect of undesirable extremism and the potential for moderate Muslims to become radicalised is not even engaged with in *Pillay*, despite being raised in the school's Heads of Argument. The lowest level of protection is that provided by the US Supreme Court, which will in most cases decline to grant exemptions to facially neutral state laws and local regulations, including school uniform regulations.

<sup>139</sup> JM Coetzee *Diary of a bad year* (2007) 122 describes South Africa as a country in which 'Islamist extremism still takes a lowly place on the list of public concerns'.

