I INTRODUCTION

'Politics begins exactly when those who "cannot" do something to show that in fact they can.' (Jacques Rancière)

South African law has embraced a veritable 'parade of horribles' [1] in environments which historically aspire towards aesthetic homogeneity. Led by the Constitutional Court, the South African judiciary has protected, permitted and embraced two forms of expression, which are generally marginalised and degraded by the Western archetypes of beauty and decency: Nose jewellery, and dreadlocks. In orthodox Western societies (arguably now extinct with people's migrations over centuries), these are treated not merely as fashion 'accessories', but also the apparel of rebellious members of the society to be either hounded, reigned in or not taken seriously. The findings of the Constitutional Court are premised on the 'right to be different', which has been constructed from various aspects of South African constitutional law. South African law also accommodates same-sex partners, granting them a previously unheard of equality in the area of family law, through the language of difference. Are these developments in our law sufficient to describe our law, and the Constitutional Court specifically, as 'progressive'?

Explaining Jacques Rancière's theory of equality of intelligence, Todd May defines 'progressive' in the following terms in relation to politics:

> A progressive politics must, if it is indeed to be progressive, take issue with the current hierarchies in place in a society. Whether those hierarchies are economic, political or social, a progressive politics argues that they are unjust and must be changed. [2]

Similarly, progressive law is critical of the existing arrangement and aspires to a more equal arrangement. More simply, the Oxford Dictionary defines 'progressive' as, amongst other things, 'favouring change or innovation'. Our law, with the Constitution as the reference point, is intended to be progressive, [3] however, the progressive application of the law is questionable.

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[1] *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 107.

[2] T May *The Political Thought of Jacques Rancière: Creating Equality* (2008) 60 – 61.

[3] It is frequently described as 'one of the most progressive Constitutions in the world' (see for example: R Murray 'Book review: Socio-Economic Rights in South Africa by Danie Brand and Christoph Heyn (eds) [Pretoria University Law Press, Pretoria, 2005' (2012) *Socio-economic Rights Review* 954, 954; G Ncube 'Rainbow Nation? De jure versus de facto LGBT rights in South Africa' *Consultancy Africa Intelligence* (8 March 2014), accessed at:

Clearly, a progressive understanding of law supports marginalised people's political assertions to power and their claims to central spaces of life and thought. The accommodating approach of courts towards the harmless yet politically charged questions of attire and sexual orientation has not extended to other behaviour and activities, even when these are accepted as legitimate religious or cultural pursuits, which raises concern as to how the court will decide the more difficult diversity cases awaiting it.

The purpose of this paper is to analyse the jurisprudence of the Constitutional Court on difference, explaining how the 'right to be different' has been constructed. It is also to assess the progressiveness of our jurisprudence, specifically considering whether the language of difference and its partner, tolerance, are appropriate lenses for a society that is 'democratic, universalistic, caring and aspirationally egalitarian'. [4] It focuses specifically on the approaches to religious and cultural differences, although the diversity cases extend to gender [5] and sexual orientation. [6] I conclude that the Constitutional Court is far from progressive, and, assuming the desirability of progressive law, propose understanding assertions of difference as political when adjudicating them.

II ESTABLISHING A RIGHT TO BE DIFFERENT

South Africa, like Western liberal democracies, is multicultural [7] in the broad sense of our society being 'comprised of men and women of different cultural, social, religious and

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http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1657:rainbow-nation-de-jure-versus-de-facto-lgbt-rights-in-south-africa-&catid=91:rights-in-focus&Itemid=296 .

[4] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 262.

[5] *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) where the court upheld the distinction between married and unmarried heterosexual couple for purposes of benefitting under the Surviving Spouses Act 27 of 1990; *Jordan v S* 2002 (11) BCLR 1117 (CC) where the court upheld the prohibitions on brothels and the criminalisation of sex workers.

[6] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) which ended South Africa's prohibition on and criminalisation of sodomy; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC) which led to legislation allowing same-sex couples to marry (although the court declined to develop the common law definition of marriage and rectify its discriminatory nature).

[7] This paper uses the term 'multicultural' in the broad sense. Will Kymlicka notes that the term 'multicultural' is complicated by the 'complexity of the term "culture"' and that '[s]ome people use 'multicultural in an even broader way [than national and ethnic differences], to encompass a wide range of non-ethnic social groups which

linguistic backgrounds.' [8] However, there is no overt right to be different on a reading of the country's principal rights-document, the Constitution of the Republic of South Africa, 1996 (the Constitution). Instead, the right to be different is, according to the Constitutional Court, a derivative of the explicit rights, values and vision of the Constitution.

When several shopkeepers and employees were convicted for contravening section 90(1) of the Liquor Act 27 of 1989 by selling alcohol on a Sunday, the majority of the Constitutional Court judges held that this prohibition on the sale of liquor, premised on Christian notions of the Sabbath, did not violate non-Christians' freedom of religion. By contrast, Sachs J noted the exclusionary messages conveyed by legislating an exclusively Christian tradition, thus imposing it on people who are not Christian (different):

> [P]ersons may on their own, or in community with others, express the right to be different in belief or behaviour, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship. [9]

In 2000, the Constitutional Court considered whether the blanket prohibition on inflicting corporal punishment on learners in schools in terms of section 10 of the South African Schools Act 84 of 1996 violated the rights of parents of children in independent schools who, following their religious convictions, consented to its use. The court *per* Sachs J teased out the right to be different on the basis that a democratic and open society [10] may only be achieved in an environment of tolerance and cultural pluralism. In other words, the aforementioned constitutional vision may only be achieved if the right of individuals to be different is recognised and protected. Secondly, the right to be different is implicit in the constitutional acknowledgement and protection of diversity, [11] and the obligation on the state to respect that diversity. Finally, the right to be different is a necessary consequence of certain constitutional rights themselves, including the cultural, religious and linguistic rights contained in section 31 of the Constitution, and the broadly phrased right to freedom of association under section 18 of the Constitution. [12] The court concluded that a cumulative reading of these constitutional

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have, for various reasons, been excluded or marginalised from the mainstream of society' (See W Kymlicka *Multicultural Citizenship* (1995) 10; 17 – 19).

[8] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 49.

[9] *Lawrence v The State, Negal v The State, Solberg v The State* 1997 (10) BCLR 1348 (CC) para 170.

[10] Preamble to the Constitution.

[11] The preamble to the Constitution states: 'We the people of South Africa (…) [b]elieve that South Africa belongs to all who live in it, united in our diversity'.

[12] *Christian Education South Africa v Minister of Justice* 2000 (4) SA 757 (CC) paras 23 – 24.

features 'affirm[s] the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight[s] the importance of individuals and communities being able to enjoy what has been called the "right to be different."' [13]

The difficulty with this case, *Christian Education South Africa*, is that the court never conclusively established the rights of the parents. Instead, it assumed that the parents' rights under section 15(1) and section 31(1)(a) of the Constitution were in issue, that corporal punishment was permissible in terms of section 31(2) of the Constitution, and that the parents' religious rights were limited. [14] In other words, the right to be different was constructed but never applied, and given the court's approach of assuming rights and their violations, there was arguably no need for creating a right to be different in the first place.

The notion of the right to be different reappeared two years later when the Constitutional Court decided *Prince v Law Society of the Cape of Good Hope*. The Constitutional Court was split 5 – 4 in its overall finding. However, both the majority and the minority agreed that Rastafarianism is protected by sections 15(1) and 31(1)(a) of the Constitution (the religious freedom clauses). [15] The court also accepted that the use of cannabis at religious gatherings and as part of private spiritual pursuits is an essential element of the religion. [16] The court's finding on the place of cannabis in Rastafarian spiritual pursuits was based on a combination of factors, including: (i) Mr Prince's 'sincerely held belief' that the use of cannabis formed an essential part of his religious worship; [17] (ii) deference towards expert evidence in favour of the applicant; [18] and (iii) the court's reluctance to make doctrinal determinations of religious laws which, once set out in a judicial decision, purport to be objective truth. [19]

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[13] Ibid para 24.

[14] This has been criticised as an 'extremely artificial way of deciding a case' (Currie & De Waal *The Bill of Rights Handbook* (2005) 166). The section 36 analysis cannot be accurately carried out with only a 'hypothetical' violation of rights on one side of the proportionality scale. Also, arguably, the entire exercise, when based on a hypothesis, becomes a hypothetical exercise with no precedential value.

[15] *Prince* (note 8 above) paras 15; 97.

[16] Ibid paras 17 – 18; 97; 111.

[17] Ibid paras 40; 43; 103.

[18] A professor and an academic expert on the religion attested to the centrality of the use of cannabis to the religion (ibid para 43).

[19] Ibid para 42.

Before proceeding to the third factor, it is necessary to make some comments on the first two factors: Firstly, the adoption of the 'sincerely held belief' standard when testing for whether a religious right is at stake is a wise choice. Religious adherents themselves are at war (in some cases literally) over the meanings of religious texts, and whether practices are dogmatic requirements of the religion. Another difficulty with adjudicating on religion is that 'individuals have shifting relationships with religious communities'. [20] An individual may plausibly and legitimately convert from one religion to another, or abandon atheism in favour of a religion and it would be his state of mind and subjective beliefs which are in question when determining his religious rights under the Constitution; anything less is at odds with dignifying people as rights-bearers to begin with. The sincerely held belief approach signifies the court's recognition of its epistemic and institutional limitations and the resultant undesirability of making a determination of what a religion does or does not require, and holding this determination to be objective fact. Patrick Lenta, for example, notes the absurdity of a judge determining the veracity of a Hindu expert's testimony: '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.' [21]

This approach to religious beliefs, first expounded by the court in *Prince* is far more appropriate than the court's modus in *Christian Education South Africa* where it assumed that the religious rights of parents had been infringed. However, as regards this approach, once it has been accepted that the standard which a claimant must meet is one of a sincerely held belief, the expert evidence should only be entertained to the extent that it reveals a patent manipulation, misrepresentation or fallacy by the claimant. Using expert evidence for anything more than a means of verification risks the court coming dangerously close to what it was avoiding: Making a final determination as to whether a particular practice is an essential tenet of a religion.

It is, for all my preceding comments, the third factor that warrants elaboration in an examination of the right to be different: Unconnected to the fact of a court being both epistemically limited and institutionally inappropriate to decide matters of religious doctrine, the very nature of religious practice evades objective determination:

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[20] P Lenta 'Cultural and religious accommodations to schools regulations' (2008) 1 *Constitutional Court Review* 259, 272. See also the comments of the court in *Pillay* (note 1 above) paras 87 – 88.

[21] Lenta (note 20 above) 274.

> Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. This does not detract from the constitutional protection (…) Human beings may freely believe in what they cannot prove. [22]

This third factor in its entirety, and especially the above statement of Ngcobo J is rooted in a right to be different. The deference which the judiciary is prepared to show to the subjective perceptions of individual followers of a faith and distinctive (and unconventional) expressions of such faith indicates a respect for idiosyncratic expressions, [23] which lie at the heart of difference. Ngcobo J added that the support for difference lies not only in the constitutional features noted in *Christian Education South Africa*, but in the constitutional recognition of different languages, and the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin under section 9(3). [24] In his separate judgment, Sachs J considered section 36(1)(e) of the Constitution (which requires a court, when deciding whether the limitation of a constitutional right is permissible, to have regard to 'less restrictive means' to achieve the purpose behind the limitation) to be a manifestation of the 'constitutional commitment to tolerance and accommodation of different religious faiths implicit in our Constitution'. [25] The Constitutional Court had already, by this time, noted that the idea of empathy is a component of the overall approach to diversity, in a statement which comes close to the words of Walt Whitman as he fused individual and collective identity in *Song of Myself*:

> Agonies are one of my changes of garments,
> I do not ask the wounded person how he feels,
> I myself become the wounded person.

The words of Ackermann J were that 'to understand the "other" one must try, as far as is humanly possible, to place oneself in the position of the "other".' [26]

Sachs J, writing in 2005, built on this notion of the right to be different. [27] The decision of the Constitutional Court in *Minister of Home Affairs v Fourie* required the legislature to provide for same-sex couples the practical protections and the dignity and recognition

[22] *Prince* (note 8 above) para 42.

[23] The court specifically refers to practices which non-practitioners or outsiders may find 'unusual, bizarre or even threatening' (ibid para 172).

[24] Ibid para 49.

[25] Ibid para 79.

[26] *National Coalition for Gay and Lesbian Equality* (note 6 above) para 22.

[27] *Fourie* (note 6 above).

bestowed by the institution of marriage on heterosexual couples. [28] According to the court, the Constitution represented a 'radical rupture' with the bigoted and fanatical apartheid mode, and a true demonstration of something so drastic as the 'rupture' occasioned by the Constitution requires more than tolerance and inclusion expressed in '[s]mall gestures in favour of equality'. [29] Instead, tolerance and inclusion in a constitutional democracy with dreams of rupture and equality means 'accommodat[ing] the expression of what is discomfiting.' [30] In an earlier judgment, Sachs J had explained tolerance as being important not only for the right claimant, but for society as a whole:

> [F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters. [31]

Returning to *Fourie*, the explicit right to equality and the protection against unfair discrimination in section 9 of the Constitution implied a right to be different:

> To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. [32]

The effect is that section 9 of the Constitution provides yet another building block in the construction of a right to be different. The right to be different was, lastly, grounded in the constitutional commitment to the values of human dignity and equality, and the words of the preamble that 'South Africa belongs to all who live in it, united in diversity'. [33]

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[28] Ibid para 155 and see the order of the court.

[29] Ibid para 59.

[30] Ibid para 60.

[31] *Prince* (note 8 above) para 170.

[32] *Fourie* (note 6 above) para 60.

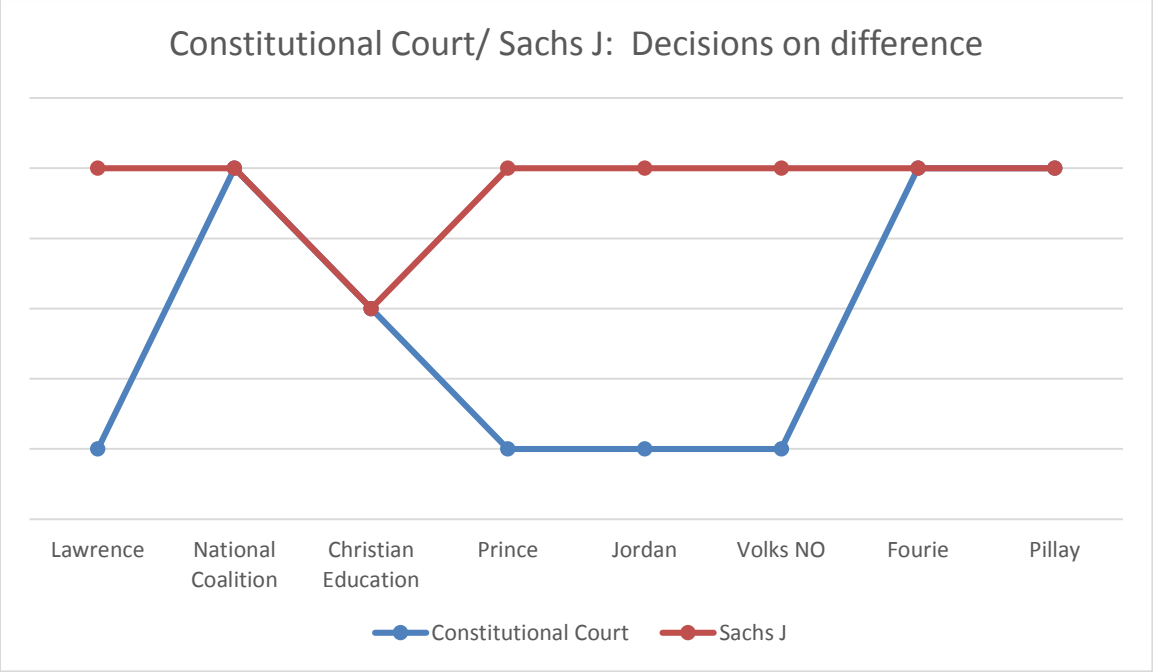
[33] Ibid para 61. See Lenaghan's analysis of the importance of sections 9 and 10 of the Constitution to the right to freedom of religion and culture in P Lenaghan 'Restoring the "historical deficit": The exercise of the right to freedom of religion and culture in democratic South Africa' (2013) 29 *SAJHR* 294 – 313.

III APPLYING THE RIGHT TO BE DIFFERENT

Various writers have acknowledged and in some cases commended the Constitutional Court's apparent embrace of diversity. [34] These assessments are generous. Although there exists a clear and established right to be different under South African law, its application has generally been muddled and inconsistent. [35] This comment does not, however, apply to the decisions of Sachs J, who must, in these cases, be distinguished from the bench generally. A visual depiction of the application by Sachs J, on one hand, and the Constitutional Court, on the other hand illustrates the latter's inconsistency in dealing with issues of difference:

[34] See for example: P Lenaghan 'The right to be different: A retrospective analysis of the Constitutional Court jurisprudence of Justice Albie Sachs – weaving the voice of difference' (2010) *SAPL* 169, 173; 194; P Lenta 'Taking diversity seriously: Religious association and work-related discrimination' (2009) *SALJ* 827, 827; P Langa 'A new Constitution and a Bill of Rights' (2000) *Law Democracy & Development* 115; L du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?' (2008) 2 *AHRLJ* 376.

[35] McGregor summarises the approach of courts (the Labour and Labour Appeal Courts and the Supreme Court of Appeal) and concludes that they 'have provided a fairly coherent and complete set of guidelines' in employment discrimination cases (M McGregor 'Employees' right to freedom of religion versus employers' commercial interests: A balancing act in favour of religious diversity: A decade of cases' (2013) 25 *SA Merc LJ* 223, 243 – 244). However, this is only the case at a very basic level that does not consider the interplay between the various rules established by courts. It is also only that case in the circumscribed and limited workplace, as opposed to the broader nation, where there is still great uncertainty in judicial negotiation of difference.



As the graph illustrates, Sachs J has displayed a consistency of radicalism in his approach to difference, favouring 'the other' seemingly at all costs. [36] By contrast, the Constitutional Court's general approach is a stagnant one which favours categories of behaviour, and does not reflect true 'progressiveness'. [37] It is a court that is comfortable with issues of same-sex couples, [38] and cultural and religious modes of dress, but that has not displayed any incremental growth of ideas or approaches in other areas of difference.

[36] His only moderate decision on difference being justifiably so as it concerned the protection of children from corporal punishment meted out by school teachers. The court considered that the intrusion into the parents' right was not extensive, and so did not outweigh the importance and purpose of the limitation: The ban on corporal punishment in schools does not force parents 'make an absolute and strenuous choice' between law and religion. They are only prevented from delegating their perceived biblical duties in raising their children to teachers on school premises. Despite holding that, in theory, the constitutional protection afforded to religious and associative religious beliefs and practice permitted exemptions from laws which threatened to limit such beliefs and practices, a limitation was justifiable in this case as the purpose of the banning of corporal punishment aims to protect children and fulfil the state's obligation to protect people from violence (*Christian Education South Africa* (note 12 above) paras 50 – 51). The unique jurisprudence of Sachs J has already been dissected in detail (see, Lenaghan (note 34 above), Stephen Pete 'South Africa's Quixotic Hero and His Noble Quest – Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation' (2013) 31 *Obiter* 1 – 15).

[37] Indeed, in addition to the lack of progressiveness, there appears to be a lack of progression, progression in this sense referring to something 'happening or developing gradually or in stages' (Oxford Dictionary).

[38] This is of course, barring the decision of the majority in *Le Roux v Dey* 2011 (3) SA 274 (CC) which is not within the scope of this paper.

(a) Victories for difference

Pillay is a significant example of difference winning in court. [39] However, years before *Pillay*, the Cape High Court was seized with the matter of *Antonie v Governing Body Settlers High School*, which concerned a Rastafarian learner wearing her hair in dreadlocks. As it turned out, the school code of conduct never specifically prohibited dreadlocks and so it was easy to set aside the school's decision to suspend a learner for having dreadlocks. However, van Zyl J held obiter that even a failure to comply with a code of conduct prohibiting dreadlocks should not be dealt with rigidly, but rather assessed with 'a spirit of mutual respect, reconciliation and tolerance.' [40]

Whereas dreadlocks and Rastafarianism were at the centre of *Antonie*; a nose stud, Hinduism and South Indian culture were at the centre of *Pillay*, which concerned a learner wearing a nose stud, contrary to the school's jewellery regulation which permitted only (a limited style of) ear adornments. *Pillay* provides authority for the view that voluntary cultural practices [41] entitle learners to exemptions from school uniform regulations (subject to reasonable limitation). The majority found that in this matter, both the rights to religion and culture were infringed because they were so closely intertwined that a violation of one was a violation of the other. [42] The reasoning is clumsy and is premised on both the right to religion and the right to culture being built solely upon sincerely held beliefs – an approach which ignores the associative nature attributed to culture in terms of the Constitution. [43] There was perhaps a better way to deal with unique or unorthodox expressions of faith and this is demonstrated in an American case: *Grayson v Schuller*, [44] concerned Omar Grayson, who was a member of the African Hebrew Israelites of Jerusalem. It was accepted that the religion,

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[39] See du Plessis' assessment (note 34 above) 399 – 403.

[40] *Antonie v Governing Body Settlers High School* 2002 (4) SA 738 (C) paras 16 – 17.

[41] *Pillay* (note 1 above) paras 64 – 67. This recognition of religion and culture as being equally important to identity is particularly significant given the tendency to categorise non-Western practices, for example African slaughter rituals (which are arguably deeply religious) as 'mere incidents of culture' (see J Amoah & T Bennet 'The freedoms of religion and culture under the South African Constitution: Do traditional African religions enjoy equal treatment?' (2008) 8 *AHRLJ* 357 – 375). Put simply, the equal protection afforded to culture is significant because we no longer know what is and what is not religious.

[42] *Pillay* (note 1 above) para 60.

[43] Ibid para 162. (See my discussion of this in footnote 66 below.)

[44] No 10-3256 (7th Cir 2012).

unlike Rastafarianism, in no way required its members to wear their hair in dreadlocks, but going beyond the requirements of his religion, Mr Grayson took the 'Nazirite vow' which provides, amongst other things: 'As long as he is under the Nazirite vow, he must not cut his hair or shave. He is bound by the vow for the full time that his is dedicated to the LORD, and he shall let his hair and beard grow.' [45]

Mr Grayson was incarcerated in Big Muddy Correctional Centre in Illinois, where the regulations allowed inmates to 'have any length of hair' provided that it 'do[es] not create a security risk.' Mr Grayson was ordered to shear his dreadlocks on the basis that they posed a security risk. The court accepted that even Rastafari could be prevented from wearing their hair in dreadlocks in justifiable circumstances. However, Big Muddy Correctional Center specifically *allowed Rastafari inmates* to wear dreadlocks. Posner J (in a judgment which included a photograph of Bob Marley to illustrate that 'dreadlocks can attain formidable length and density') held that the prison could not permit 'only members of sects (even if not limited to Rastafarians) that "officially" require the wearing of dreadlocks to wear them. Heretics have religious rights' (references omitted). Posner J continued to state that, since heresy is not excluded from the protection of the free exercise clause (similar to section 15(1) of the Constitution), a belief need only be sincere in order to be protected as an exercise of religion. A similar approach in *Pillay* would have seen the court upholding the wearing of a nose stud as an expression of Hindu faith, while maintaining O'Regan J's clear and meticulous approach to cultural expression.

The problematic approach to the overlap between religion and culture aside, Langa CJ's judgment is a formidable application and assertion of the right to be different:

(i) The choice of a comparator

Writing for the majority, Langa CJ considered the comparator to be those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised. [46] This comparator is a political statement, a deconstruction of the notion that an essentially Western dress code is facially neutral. It indicates that we as a society have moved beyond the idea of 'neutrality', [47] to the realisation that nothing is neutral. The comparator used by the majority is politically important

[45] Numbers 6: 5 *Good News Bible*.

[46] *Pillay* (note 1 above) para 44.

[47] See Lenta (note 20 above) 264.

for if we are striving to empower more people, the comparator should be the generally accepted, mainstream and therefore more powerful group. [48]

(ii) The protection of voluntary practices

The protection of not only mandatory but voluntary practices, is an assertion of individual autonomy within the context of a diverse society. [49] So, the right to be different includes a right to choose to express one's religious beliefs as one chooses:

> The protection of voluntary as well as obligatory practices also conforms to the Constitution's commitment to affirming diversity. It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it. That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains. [50]

This ruling is significant as its effect is to overrule the earlier decision of the Labour Court in *Dlamini v Green Four Security*, [51] where a flexible approach by the applicants to the tenets of their religion was held against them. [52] In the future, applicants' voluntary practices, which they subjectively associate with their religions, will weigh as heavily essential tenets of the particular religion.

(iii) The assessment of fairness in terms of section 14(3) of the Equality Act

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[48] This is in contrast with O'Regan J's choice of the group learners who had been granted exemptions as the comparator, on her understanding of the school's rules as 'neutral' (*Pillay* (note 1 above) paras 164 – 165).

[49] Du Plessis (note 34 above) 401.

[50] Ibid para 65. As significantly noted in a case analysis by Carpenter in present times, at least in constitutional states, even religious practices are voluntary (G Carpenter 'The Equality Act in the Constitutional Court' (2008) 23 *SAPL* 196 – 198)

[51] (2006) 27 *ILJ* 2098 (LC).

[52] Ibid paras 24 – 26, concerning the members of the Baptised Nazareth Group who chose to adhere to the practice of not shaving their beards, but who simultaneously chose to work on the Sabbath. This decision by the Labour Court is unfortunate as it fails to appreciate the extent of a poorly-paid worker's choice to determine his working hours, in a system where, if he is not willing to abide, he quickly joins the unemployed 'surplus'. Insufficient respect was given to the attempts by workers to exercise religious freedoms, where this was possible in harsh economic circumstances.

Once discrimination on a specified prohibited ground has been established by the complainant, then that discrimination is presumed to be unfair. It falls to the respondent to rebut the presumption that the discrimination is unfair. Section 14(3) of the Equality Act sets out factors to assist the court (and litigants) in establishing the fairness or unfairness of discrimination. These factors incorporate the section 36 limitation analysis and further include: the context in which the discrimination took place, its impact or likely impact on human dignity and on the complainant specifically, the position of the complainant in society and whether she suffers from or belongs to a group which suffers from past patterns of discrimination, and whether the respondent has taken reasonable steps to address the disadvantage or to accommodate diversity.

In *Pillay*, it was clearly established that the school discriminated against Sunali Pillay on the basis of religion and culture, and so the discrimination was presumed to be unfair and therefore unlawful. In determining whether the school's discrimination against Sunali was actually unfair (beyond the presumption), the court rejected various arguments advanced by the school. [53] The school argued, amongst other things, that the discrimination was altogether not unfair because Sunali had the option of going to another school. The court rejected this argument, effectively rejecting the school's ethnocentric argument of 'assimilate or leave', as it effectively proposed the marginalisation of religions and cultures, which is contrary to the Constitution. [54] Ultimately, on a consideration of a broad number of factors, the discrimination was held to be unfair and so unconstitutional.

Shortly after the decision of the Constitutional Court in *Pillay*, the Labour Appeal Court held the dismissal of five employees of the Department of Correctional Services to be automatically unfair. [55] The employees were dismissed for contravening the department code of conduct by wearing dreadlocks (or in the words of the department '"Rasta man" hairstyle') [56] in accordance with their respective religious and cultural beliefs. [57] The court noted that the purpose of the prohibition against dreadlocks was to achieve neatness, uniformity and

[53] Ibid paras 85 – 91.

[54] Ibid para 92.

[55] This decision was upheld by the Supreme Court of Appeal in the *Department of Correctional Services v POPCRU* 2013 (4) SA 176 (SCA) ('*POPCRU* (SCA decision)').

[56] This is one of the rare instances where a law in a liberal democracy deliberately discriminates against members of a particular religious group. In any event, South African law is concerned with the question of non-neutral effects as opposed to non-neutral intentions (*Prince* (note 8 above) para 145).

[57] *Department of Correctional Services v Police and Prisons Civil Rights Union* (2011) 32 ILJ 2629 (LAC) ('*POPCRU* (LAC decision)') para 5.

discipline in the dress and appearance of the correctional officers, with the underlying objective of improving security and 'service delivery'. [58] The court criticised the tendency to equate Western notions of neatness with neatness itself:

> Not a single witness testified that the respondents' hairstyles were not neat. And if the suggestion is that all dreadlock hairstyles are axiomatically untidy, then the discrimination appears in not applying the same standard to women (…) These examples of permissible hairstyles, including military-style short back and sides, reinforce the impression that dominant or mainstream hairstyles, representing peculiar cultural stereotypes are to be favoured over those of marginalised religious and cultural groups (…) There is also no rational basis to the apprehension that Rasta hairstyles lead to ill-discipline. One has only to state the proposition to realise the unacceptable pejorative stereotyping which its entails. [59]

These comments, premised no doubt on the notion of tolerance of difference, point to a need for us, as a society, to begin to challenge and deconstruct our understanding of discipline, neatness and overall acceptability. The dress codes of both the Department of Correctional Services and Durban Girls' High School enforce a strongly Western (and not neutral) aesthetic, reflecting a conservative view which shuns diversity in the name of discipline.

The Department of Correctional took the matter on appeal one final time to the Supreme Court of Appeal. [60] It added a fascinating argument (or leap of logic) that the department was not concerned with cultural aesthetics, but rather with the faiths of the Rastafarians and intwasa initiates 'which require the use of dagga, an illegal and harmful drug, as an integral ritual in their observance.' [61] In this way, it was argued (with specific reference to Rastfarians only) that dreadlocks have a real and not simply a perceived effect on security, discipline and the overall functioning of prisons as dreadlocks 'render Rastafari officials conspicuous and susceptible to manipulation by Rastafari and other inmates to smuggle dagga into correctional centres.' [62] This argument was rejected as no proper foundation was laid for what proved to be no more than a last-ditch attempt to rescue the department's case. [63] However, the court noted that the argument was not sustainable on the facts: The respondents had worn their hair

[58] Ibid para 38.

[59] Ibid paras 47 – 48.

[60] *POPCRU* (SCA decision) (note 55 above). For a detailed discussion on all three *POPCRU* decisions, see McGregor (note 35 above) 230 – 239; 243 – 244.

[61] Ibid para 19.

[62] Ibid para 20.

[63] Ibid para 24.

in dreadlocks for many years and it was not shown that this led to them being manipulated or co-opted by drug-smugglers. [64] The department's argument was therefore based solely on stereotypical notions of Rastafarians, and general wearers of dreadlocks. This is not only shamefully backward, but is at odds with the constitutional notion of tolerance and the rejection of social stereotypes to found legal arguments in a constitutional era. [65]

(b) Losers in the fight to be different

The most important effect of recognising a right to be different is that, at least in theory, exemptions from established social norms are permitted. This is significant for the exempted individuals who may freely express their sincerely held religious or cultural beliefs or personal preferences. [66] The courts have, however, only given practical effect to the theoretical possibility of exemptions in cases relating to dress code infringements and same-sex couples. Section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 and section 22A(10) the Medicines and Related Substances Control Act 101 of 1992 prohibit the use or possession of cannabis, which is categorised as an undesirable dependence-producing substance.

[64] Ibid para 25.

[65] *Hoffman* 2001 (1) SA 1 (CC) para 37; *Fourie* (note 6 above) para 52; *National Coalition for Gay and Lesbian Equality* (note 6 above) para 54

[66] Based on the majority view in *Pillay* (note 1 above), the test for whether conduct is protected under the right to *culture* is unfortunately based on the purely subjective 'sincerely held belief' standard (para 114), despite the fact that the right to culture only appears in section 31 of the Constitution, which is concerned with *associational*, and not individual, liberties. O'Regan J noted that an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture (as opposed to religion which need not be associative at all). Her test incorporates this significant difference between culture and religion: Firstly, the claimant must establish the practice's associative quality. Secondly, because an approach to cultural rights must be based on human dignity, the claimant must show an infringement of her dignity (para 157). O'Regan J's approach is also preferable because it is consistent with the earlier jurisprudence of the court, which linked the individual to the community for the purposes of section 31 so that '[i]f the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights' (*Christian Education South Africa* (note 12 above) para 23). Finally, the majority's approach to individual expressions of culture reflects the paradoxical liberal understanding of culture, in which 'culture is transubstantiated' so that 'the same set of beliefs and practices change from the binding power of a collective into an expression of personal and private idiosyncrasies' (S Zizek 'Tolerance as an ideological category' (2007) *Critical Inquiry* 119, 120). Unfortunately, it appears that the sincerely held belief approach is now the ubiquitous approach to determining if a practice is protected under the constitutional right to culture (see: *POPCRU* (LAC decision) (note 57 above) paras 13; 15; 26).

Exemptions are granted for its use or possession for medical or research purposes, however, no exemption is granted when its use or possession is inspired by religion. Cannabis is illegal because of its potential to cause harm in the form of psychological dependence when consumed in large doses. [67]

The Law Society of the Cape of Good Hope considered Mr Prince to not be a fit and proper person to be admitted as an attorney to the High Court of South Africa because, while having two previous convictions for possession of cannabis, he further declared his intention to continue breaking the law. [68] His reason for doing so was rooted in his religion – Rastafarianism.

As I have already explained, the judges accepted the place of cannabis as a legitimate feature of Rastafarian rituals, and so recognised that the criminal law limits the religious rights of Rastafari under the Constitution. [69] At the next juncture (of determining whether the limitation was reasonable and justifiable in an open and democratic society in terms of section 36 of the Constitution), the majority and minority parted ways. The majority concluded that an exemption for Rastafari permitting them to possess and use cannabis was not a viable option in South Africa for practical and international-law reasons. [70] From the practical perspective, exemptions for religious (Rastafarian) users of cannabis would be too difficult and therefore unfeasible because there was no objective difference between the general (recreational) use and the Rastafarian use of cannabis. As a result, law enforcement officials would strain to distinguish between general and religious users and possessors, and their function of enforcing

[67] *Prince* (note 8 above) paras 24 – 26.

[68] Ibid para 2. As an aside, it is worth noting that the Law Society has, in the past, refused to admitted or removed from its roll, people whom history has regarded favourably. In his separate judgment, Sachs J cites the examples of Nelson Mandela, Shunmugam Chetty and Julius Baker (see footnote 61 at para 170).

[69] Ibid paras 51; 111. This is because the right to freedom of religion encompasses: the right to entertain the religious beliefs that one chooses to entertain; the right to proclaim these beliefs publicly and without fear of reprisal (which attaches also to free expression); and the right to manifest such belief by worship and practice, teaching and dissemination. And further the freedom may be impaired by measures which force people to act or refrain from acting in a manner contrary to their religious beliefs (para 38).

[70] This argument is not of particular concern to this paper, but to explain briefly, the majority held that there is an extensive trade in cannabis which often begins in South Africa. South Africa has several treaty obligations to play a role in curtailing the trade of narcotics generally which and weight to the legislative prohibitions concerned (ibid para 131). This reading of South Africa's international law obligations was criticised by Sachs J in his dissenting judgment as being overly simplistic to the point of being misleading (see para 164).

the legislation and so controlling and punishing drug use would be undermined. [71] Even if the position of law enforcement officials were to be alleviated through a permit system by which Rastafari could become card-carrying cannabis-users, the position of Rastafari generally would remain fragile: The loose organisational structure of the religion did not lend itself to such regulatory mechanisms and so only ten percent of Rastafari (the percentage who belong to established houses) in South Africa would benefit. [72] Secondly, the majority considered that a permit system would be at odds with the freedom of religion itself:

> It is the essence of that freedom that individuals have a choice that does not depend in any way upon the permission of the executive. If cannabis can be possessed and used for religious purposes, that must be so whether the executive consents or not, and whether the person concerned is a Rastafari or an adherent of some other religion. [73]

This view expressed by the court either reflects inconsistency or a shift in thinking, as five years later, in *Pillay*, the court accepted without question a permit system for learner's exempted from aspects of the schools uniform regulations: '"When exemptions of this sort are granted, the learner is given a card noting the permission, should any teacher query her non-compliance with the Code of Conduct.' [74] It is arguable that the *Prince* rejection on cards as being at odds with freedom has been impliedly overruled by the court's unquestioning acceptance of cards or permits in the subsequent case of *Pillay*. (It perhaps also shows that the majority in *Prince* was clutching at philosophical straws to substantiate a predetermined decision to find against Mr Prince.)

In any event, the practical considerations which persuaded the court that the limitation of the right was reasonable and justifiable in an open and democratic society are inconsistent with its jurisprudence on tolerance and the accepted approach to limitation enquiries under section 36 of the Constitution. The essence of a limitation enquiry is to determine whether 'the constitutional right or the purpose of the limitation ought, in the circumstances of the case, to be upheld, given the needs and requirements of this society.' [75] This requires the court to

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[71] Ibid paras 129 – 132.

[72] Ibid para 137.

[73] Ibid para 138.

[74] *Pillay* (note 1 above) para 130. See also paragraph 6 where the court notes, without objection, that the learner, Sunali Pillay, was given a 'laminated card' to excuse her nose stud in the face of the contrary provisions of the school dress code.

[75] K Govender & M du Plessis *Norms and Standards Handbook: The Legal Services Department of the South African Human Rights Commission* 85; see also Currie & de Waal (note 14 above) 164.

examine the nature of the right that is limited, the importance of the right to an open and democratic society, the purpose for which the right is being limited, the importance of the purpose for the society, the extent of the limitation and whether there are less restrictive means to achieve the purpose. [76] Where the infringement of the right is severe, Govender and du Plessis note that 'the scales tip in favour of the applicant who has asserted his or her right.' [77] The majority in *Prince* accepted that the infringement was severe, stating that 'the disputed legislation places a substantial limitation on the religious practices of Rastafari.' [78] Despite this, the majority was easily satisfied with the state's argument, ultimately attaching a much higher weight to state inconvenience and goals, than to individual and constitutionally protected religious pursuits. In his minority judgment, Sachs J noted that this approach of the majority, which 'puts a thumb on the scales in favour of ease of law enforcement', is at odds with 'the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society.' [79]

Another aspect of the limitation enquiry involves an assessment by the court of 'the likelihood of the purpose being achieved by the limitation (…) The closer the link between the limitation and purpose, the more likely it is that the court will deem the limitation reasonable and justifiable.' [80] There appears to have been no serious examination of this (neither by the majority nor the minority). [81] Perhaps an examination of the specific prohibition may have revealed that when the possession and use of small amounts of marijuana are concerned, there is no objective beyond meeting arrest quotas, and that these arrests are not actually reasonably linked to the state's war on drugs and do not provide access to runners, dealers or kingpins. This could, in turn, have revealed that arrests for possession or use of cannabis constitute no

[76] *S v Makwanyane* (note 4 above) para 708.

[77] Govender & du Plessis (note 75 above) 85; see also Currie & de Waal (note 14 above) 178.

[78] *Prince* (note 8 above) para 114.

[79] Ibid para 147.

[80] Govender & du Plessis (note 75 above) 85 – 86; see also Currie & de Waal (note 14 above) 183.

[81] An exception is the separate decision of Sachs J who proposed that '[a] retreat on the tiny front of sacramental use by Rastafari of indigenous and long-used dagga might make little if any difference to prosecution of the major battles against cartels importing heroin, cocaine and mandrax. Indeed the 'war on drugs' might be better served if instead of seeking out and apprehending Rastafari whose other-worldly use of dagga renders them particularly harmless rather than harmful or harmed, such resources were dedicated to the prohibition of manifestly harmful drugs' (*Prince* (note 8 above) para 154).

more than raw expressions of power at the expense of harmless and often unharmed users, aggravating the constitutional violation of freedoms already playing out.

The minority *per* Ngcobo J adopted a less accommodating approach towards the state, [82] ultimately finding that it failed to show firstly, that all religious uses of cannabis by Rastafari (which extend to burning it as incense, but not smoking it) pose a risk of harm, [83] and secondly, that a religious exemption could not be granted without undermining the objective of the anti-drug legislation. [84] In being overbroad, the prohibition was unreasonable and therefore was not a justifiable limitation of constitutional rights. The approach of the minority reflected how the value of tolerance and so the right to be different, could have a significant impact on a judicial determination of rights: The minority effectively found against the state because of the 'constitutional commitment to tolerance which calls for the accommodation of different religious faiths if this can be done without frustrating the objectives of government.' [85] In other words, the right to be different, and the constitutional emphasis on diversity and respect for it has the potential to set the justification standard very high for government. With this emphasis on tolerance and a right to be different as the lodestar, the minority concluded that the risks associated with granting exemptions for religious users of cannabis are not so great and unmanageable that they should permit a limitation on the freedom of religion (in fact, two exemptions for scientific and medical use already existed). [86] It is in fact possible to minimise the risks. [87] The acceptance by the minority that the state be inconvenienced by, and the requirement that it 'walk the extra mile' [88] for, religious beliefs accords with the constitutional commitment (albeit implicit) to tolerance and difference. [89]

(c) Conclusion

[82] Sachs J in separate judgment captured the disjuncture perfectly, articulating 'the real difference' between the majority and minority judgments as a difference in respect of 'how much trouble each feels it is appropriate to expect the state to go to in order to accommodate the religious convictions and practices of what in this case is a rather small and not very popular religious community' (ibid para 149).

[83] Ibid paras 25 – 26 ; 53 – 54 ; 59 – 62; 77 – 78.

[84] Ibid paras 74; 81.

[85] Ibid para 57.

[86] Ibid para 80.

[87] Ibid para 73.

[88] Ibid para 149. Years later, the majority of the judges in the Constitutional Court would agree with this view (*Pillay* (note 1 above) para 73).

[89] *Prince* (note 8 above) para 79.

Despite the jurisprudential high-point of *Pillay*, we would be wrong to assume that Sachs J's 'golden thread' [90] has found its way into all decisions concerned with people's differences. In fact, the majority of judges in the Constitutional Court gave no indication that they would have decided *Prince* differently with the benefit of Sachs J's philosophical approach sinking in. The vastly different *Pillay* court [91] in fact clarified that the discrepancies between Miss Pillay and Mr Prince's cases were such that the cases should have been decided differently. The discrepancies do not however, come down to questions of law, but to the politics of dress compared to the politics of drugs. The facts of *Pillay*, specifically, the harmless nature of a nose stud, made it easy to accommodate religion and/or culture. It is easy to understand that the Constitutional Court was daunted by the polycentric issues facing it in *Prince*, which ranged from medical to religious, from law enforcement [92] to foreign relations stemming from government's international obligations in respect of the narcotics trade. These areas of knowledge are hardly within a court's expertise and it predictably and superficially glossed over such issues. Additionally, as the court in *Pillay* noted, reasonable accommodation is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck. [93] *Prince* concerned South Africa in its territorial entirety. [94] Although the Constitutional Court's approach to gender and its 'othering' of women is not the subject of this paper, it is worth noting that the decisions of the majorities in *Volks* and *Jordan* gave no indication of being

[90] Lenaghan (note 34 above) 188.

[91] Only two of the justices who sat on *Prince* were also present for the determination of the *Pillay* case, namely Ngcobo and Sachs JJ.

[92] Even the issue of cannabis in the context of law enforcement is far from simple and indicates that the trade in cannabis is far from harmful: In an analysis in the Mail & Guardian, Matthew Brown, speaking to a member of the Cape Town Metro Substance Abuse Unit is reminded 'that big-time marijuana dealers are just as violent as other dealers. 'People think, 'oh, it's just grass', but [the dealers] lie and cheat and kill, just like crack dealers' (M Brown 'Dirty war on drugs in Cape Town' *Mail & Guardian* (27 September to 3 October 2013) 12).

[93] *Pillay* (note 1 above) para 78.

[94] The *Prince* decision is flawed and is certainly a lost opportunity to develop the language of difference along political lines. It could have been decided differently, and opened doors for creative legislative reform on a politically, medically, and economically charged subject (see, for example, legislative reforms in California, Uruguay and the Netherlands). However, du Plessis makes the important point that the *Prince* decision was ultimately flawed not because of the court's approach to the Drugs and Drug Trafficking Act, but rather because the court's failure to address the heart of the dispute, and what really was at stake for Mr Prince: not his right to smoke cannabis, but rather 'his career prospects as an attorney aspirant' (du Plessis (note 34 above) 390; 406).

swayed by the language of 'difference' in those cases, and these are amongst the least progressive of the court's decisions concerning ways of life. [95]

The Constitutional Court has failed to draw on foreign law, and to also engage with it [96] despite the fact that South Africa is certainly not the only diverse society, nor is it uniquely diverse. [97] Secondly, the various shortcomings in our jurisprudence, specifically *Lawrence*, *Prince* and *Pillay*, ought to draw our interest outwards and consider how other constitutional societies, also coming to grips with the reality of diversity, manage difference. [98] For example, England has only recently begun seriously grappling with religious and thought freedom as its Human Rights Act was only passed in 2000, around the same time that our jurisprudence on individual freedom started developing. [99] Perhaps it is only Europe that bears few similarities

[95] See Lenaghan (note 34 above) 179 – 185.

[96] References to Canadian law in *Lawrence* (note 9 above) paras 86 – 97. However, to illustrate the point, the *Lawrence* majority failed to embrace the politics of principle of the court in *R v Big M Drug Mart* [1985] 1 S.C.R. 295, when it refused to apply the reasoning of the Canadian court on the basis that the problematic Canadian legislation prohibited all trading on Sundays, whereas the South African Liquor Act on prohibited liquor trading on Sundays (para 94). The principle enounced by the Canadian Court was that legislation that proclaims 'the standards of the Christian faith (…) creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture' (para 97). Du Plessis' suggestion is that the court was unsympathetic to the appellants in *Lawrence* as they were merchants, and not a 'disadvantaged or marginalised Other' (du Plessis (note 34 above) 386), however even this logic does not excuse the fault of principle in the judgment.

[97] The United Kingdom has grappled with accommodating gypsy lifestyle in its town-planning (*Chapman v United Kingdom* [GC] no. 27238/95 ECHR 2001-I). French legislation (known as 'Law forbidding the wearing of any clothing covering the face completely or in a significant manner,' 1 June 2011) which prohibits all full face coverings in public, and, by implication, bans the burqa, was challenged in the French Constitutional Court despite the fact that only about 1,900 women in France (0.03 percent of France's Muslim population at best) actually wear the burqa (see S Pei **'**Unveiling Inequality: Burqa bans and non-discrimination jurisprudence at the European Court of Human Rights' (2012) *Yale Law Journal* 1089, 1089 – 1090).

[98] This inward-looking approach of the Constitutional Court has been supported by Carpenter who writes: 'It is quite clear that not much assistance can be obtained from other jurisdictions in this regard, as the judge pointed out (ibid). Systems such as those in the United States and Canada furnish a far narrower protection than either our Constitution or the Equality Act. We must therefore rely largely on our own jurisprudence and, of course, on the values and principles contained in the Constitution itself" (Carpenter (note 50 above) 200).

[99] Prior to the passing of the Human Rights Act, 1998, English law did not recognise officially the rights to freedom of thought and freedom of religion. Despite this, the judiciary 'creatively' interpreted the Race Relations

with South African on this topic: Although the European Union system generally also protects individual freedoms, [100] in the interest of either secularism or based on the margin of appreciation, it has deferred to national governments' choices even where these impact religious freedoms. [101] Most notably (and controversially) the European Court on Human Rights has dismissed, on the basis of secularism, an educator's claim that a prohibition on the wearing of headscarves when instructing learners denied her right to religious freedom, [102] and has dismissed on the basis of the margin of appreciation prohibitions of the same nature on learners and students. [103] On the other hand, Europe has, like South Africa, 'elevated freedom of religion to the rank of a substantive right under the [European Convention on Human Rights]'. [104]

Indeed, the jurisprudence is worrying: It tells applicants that if their assertions of rights are rooted in sexual orientation or purely aesthetic dress, then they will be successful. However, if they are asserting difference on any other basis, these will not be 'tolerated'.

Act, 1976 to protect the practices and traditions of Sikhs and Jews (*Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548 and *Simon v Brinham Associates* [1987] ICR 596, respectively) as to discriminate against these 'communities recognisable by ethnic origins' and with 'long shared histor[ies]' and 'cultural traditions[s] of [their] own' is an indirect form of racial discrimination. The Act, however, had its limits and could not be stretched to protect the communities associated with new religions, such as Rastafarianism, (*Crown Suppliers (Property Services Agency) v Dawkins* [1993] IRLR 284). As an aside, it is for this reason (the existence of the Human Rights Act which in many cases supersedes the Race Relations Act) that the court in *Pillay* ought to have rejected the first respondent's empty and desperate reference to the Race Relations Act and related jurisprudence on religion.

[100] The European Convention for the Protection of Human Rights and Fundamental Freedoms. Specifically, article 9 protects the right to religious freedom, and article 14 which provides that the 'enjoyment of rights and freedoms set forth in [the European Convention on Human Rights] shall be secured without discrimination of any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' The Charter of Fundamental Rights of the European Union also grants similar protections.

[101] The next cases are taken from a discussion by Pei at 1093. The writer also provides a succinct critique of the Court's wide margin of appreciation (1094 - 1095).

[102] *Dahlab v Switzerland* App No. 42393/98, 123

[103] *Sahin v Turkey* App No. 44774/98; *Dogru* App No. 27058/05; *Kervanci* App No 31645/04; *Aktas v France* App No 43563/08

[104] Research Division 'Overview of the Court's case law on freedom of religion' (31 October 2013) *Council of Europe/ European Court on Human Rights* para 7.

IV THINKING OF DIFFERENCE AS POLITICS, NOT RIGHTS

The most important effect of recognising a right to be different is that, at least in theory, exemptions from established social norms are permitted. This is significant for the exempted individuals who may freely express their sincerely held religious or cultural beliefs or personal preferences. [105] The Constitutional Court has, however, only given practical effect to the theoretical possibility of exemptions in cases relating to dress code infringements and same-sex couples, and has shown itself to be uncomfortable with heterosexual manifestations of difference and with cultural and religious expressions which go beyond dress. The case for religious or cultural adherents claiming exemptions from dress codes is assisted by (i) the fact that (correctly or incorrectly) they need only show a 'sincerely held belief' in the practice, without meeting an objective standard; and (ii) the ruling of the Constitutional Court that localised contexts lend themselves more easily to exemptions. The jurisprudence provides that, where dress is concerned, the state (or other guardian of the dress code) will be required to meet a very high standard to justify a failure to grant an exemption to religious or cultural attire because the constitutional commitment to diversity and tolerance means that enforcing uniformity can no longer be regarded as a legitimate governmental objective. In addition, this commitment to tolerance also occasions a reassessment of our ideas of discipline, neatness and whatever else these dress codes purport to uphold. The victory is indeed an important one, as

[105] Based on the majority view in *Pillay* (note 1 above), the test for whether conduct is protected under the right to *culture* is unfortunately based on the purely subjective 'sincerely held belief' standard (para 114), despite the fact that the right to culture only appears in section 31 of the Constitution, which is concerned with *associational*, and not individual, liberties. O'Regan J noted that an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture (as opposed to religion which need not be associative at all). Her test incorporates this significant difference between culture and religion: Firstly, the claimant must establish the practice's associative quality. Secondly, because an approach to cultural rights must be based on human dignity, the claimant must show an infringement of her dignity (para 157). O'Regan J's approach is also preferable because it is consistent with the earlier jurisprudence of the court, which linked the individual to the community for the purposes of section 31 so that '[i]f the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights' (*Christian Education South Africa* (note 12 above) para 23). Finally, the majority's approach to individual expressions of culture reflects the paradoxical liberal understanding of culture, in which 'culture is transubstantiated' so that 'the same set of beliefs and practices change from the binding power of a collective into an expression of personal and private idiosyncrasies' (S Zizek (note 66 above) 120). Unfortunately, it appears that the sincerely held belief approach is now the ubiquitous approach to determining if a practice is protected under the constitutional right to culture (see: *POPCRU* (LAC decision) (note 57 above) paras 13; 15; 26).

the exemption is the mode by which the excluded affirm their inclusion, on their own terms. However, the approach of the court to questions of difference needs to be clarified in order for the court to properly address many other religious and cultural practices with a public impact, including the Islamic call to prayer (or azaan), African slaughter rituals, [106] and the use of fireworks by Hindus at Diwali.

Going forward, it may be useful for the court to shift away from the language of tolerance, and towards an appreciation of underlying politics in assertions of difference. [107] To date, politics has remained in the background, which is inappropriate in cases of this nature. As I have already discussed, dress codes are never culturally neutral: For example, a school uniform regulation which allows female learners to have long hair subject to the requirement that it is tied back, while learners are simultaneously punished for having dreadlocks is culturally biased. [108] The politics of African hair loom large. A policy which casts dreadlocks (i.e. natural and long African hair) as a prohibited and thus undesirable mode of dress reinforces the notion that African-ness amounts to inadequacy and degeneration. The Constitutional Court has, at times, recognised underlying politics and has woven these observations into

[106][106] In this matter, the court may find foreign law useful: In *Cha'are Shalom Ve Tsedek v France* [GC] no. 27417/95 ECHR 2000-VII) the European Court on Human Rights held that 'the failure to grant a religious community access to meat from animals slaughtered in accordance with religious prescriptions' interferes with the right to religious freedom under article 9 of the European Convention on Human Rights. Presumably, in the light of legislative intervention. The KwaZulu-Natal High Court has been similarly progressive in seeing through an application for an interdict against the bare-handed killing of a bull known as umkhosi wokweshama as being based on misinformation rooted in intolerance (*Stephanus Smit NO v His Majesty King Goodwill Zwelithini Kabhekuzulu* 1023 KZNPD (2009). Hopefully these decisions will prove more use than the decision of the Supreme Court of Appeal in *Buhrmann v Nkosi* 2002 (1) SA 372 (SCA) where the court held that an (African) occupier of land in terms of the Extension of Security of Tenure Act 62 of 1997 lost the right to bury her son on the land which they both lawfully occupied based on the apparently superior private property rights of the (white) landowner (para 49). A detailed critique of the judgment, and its obvious subjugation of historically black rights in favour of historically white rights is provided by du Plessis in his article on religious othering (du Plessis (note 34 above) 391 – 393). Matters of this nature will also require courts to investigate African religious practices and African cultural practices, which have historically been lumped together under the category of cultural expression, devoid of spiritual content.

[107] The constitutional potential for a more politically informed and politically aware approach is discussed by du Plessis as 'memorial constitutionalism' (see du Plessis (note 34 above) 401 – 402). A political conception of equality and difference would, however, be stronger for progressive purposes than a memorial conception as it is not confined to understanding difference with reference to the past.

[108] See: *Antonie* (note 40 above).

judicial determinations. As Langa CJ noted in *Pillay*, and this can be applied to most dress codes in South African society:

> 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. [109]

In his dissent in *S v Lawrence*, Sachs J noted:

> [A]ny endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation. [110]

Another important reason for localising the debate under the banner of politics is that courts would also be able to address non-religious questions of difference. The present narrow scope for granting exemptions raises the question of the position of heathens, seeking to express themselves on their own terms. Patrick Lenta argues that the significance of the sincerely held belief approach is that it guards against 'charlatans' who 'may be tempted, for tactical purposes, to misrepresent as religiously or culturally motivated their insistence on acting contrary to the rules.' [111] But should atheists and agnostics, wishing to make political statements, be excluded from the realm of exemptions by virtue of their being free of the constraints of organised religion? For example, a staunch believer in Black Consciousness philosophy may seek to grow his hair into an Afro on the basis that he sincerely believes that this is an essential component of his identity as a Black man. The courts have already accepted that the standard to be used in the cases of religion and culture is the subjective notion of a sincerely held belief. It would be unfair to deviate from that when adjudicating the other aspects of section 15(1) of the Constitution – namely, the rights to freedom of belief and freedom of conscience. It would also constitute a return to apartheid-era reasoning which glorified religious beliefs, yet ignored conscientious (political) objectors to conscription. South Africa's jurisprudence on difference

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[109] Ibid para 44. This political statement was echoed by the Labour Appeal Court (*POPCRU* (LAC decision) (note 57 above) para 47): '[The] examples of permissible hairstyles, including the military short back and sides, reinforce the impression that dominant or mainstream hairstyles, representing peculiar cultural stereotypes are to be favoured over those of marginalised religious and cultural groups' (see also para 26). It marks a change from the earlier decisions of courts, which viewed Judeo-Christian or Eurocentric practices and regulations as being 'neutral' (see *Dlamini* (note 51 above), *FAWU v Rainbow Chicken Farms* (2000) 21 *ILJ* 615 (LC)).

[110] *Lawrence* (note 9 above) para 152.

[111] Lenta (note 20 above) 276.

will only be truly progressive if it accepts that important and meaningful beliefs can be formed in the absence of any promise of heaven or fear of hell. [112] The meaning and scope of the terms 'belief' and 'conscience' under section 15(1) of the Constitution would need to be explored in greater detail to determine whether a sincerely held philosophical or political belief warrants an exemption from a particular dress code. [113]

Politics will also assist the court in determining more difficult religious expressions. Lenta notes that it is likely that schools would be required to grant Muslim students an exemption to wear a hijab, which is a headscarf covering a women above the neck until her hairline, while leaving the face fully open. [114] A more difficult question would be whether a Muslim woman who believes that wearing the far more concealing niqab or burqa is an essential part of her Muslim faith and identity should be granted an exemption from a dress code which requires (directly or indirectly) that her face be fully visible. Of course, South Africa is not in the same political frame of mind in relation to Islam as the United Kingdom where it was held that it would be unreasonable to expect a school to grant exemptions for female learners to wear these face-concealing devices. [115] However, South African courts would still have to grapple with the questions of subjugation and equality which surround the niqab and burqa themselves. These particular veils are in many circles (beyond liberal circles) viewed as fundamentally oppressive. [116] Would liberal multiculturalism permit the expression of a culture which is shown to be anti-liberal in the sense that it oppresses women and that it is based on the wearer's lack of choice? If the courts hold that a niqab or burqa should be permitted only when it is worn out of choice, there is the political concern that when this item

[112] For a discussion on the stark departure of this approach from the approach of apartheid-era courts to the conscientious objectors to conscription, see Carpenter (note 50 above) 195.

[113] The idea of exempting persons on the basis of non-religious beliefs was rejected by the US Supreme Court in *United States v. Seeger*, 380 U.S. 163 (1965) when the case of several conscientious objectors to military drafting was dismissed on the basis that their objections were not rooted in a religious belief. However, the circumstances are different to those presented by section 15(1) of the Constitution. The claimants in *Seeger* were claiming an exemption based on section 6(j) of the Universal Military Training and Service Act which only exempts from combatant service in the armed forces those who are conscientiously opposed to participation in war by reason of their '*religious* training and belief' (emphasis added). Secondly, the difference between war and dress codes is so great that to articulate it would be to understate it.

[114] Lenta (note 20 above) 263.

[115] *Headteachers and Governers of Y School* [2007] EWCG 298 (Admin) cited in Lenta (note 20 above) 290.

[116] Most notably, Taj Hargey, Qanta Ahmed, the Centre for Islamic Pluralism and the Muslim Canadian Congress.

is worn out of choice, it ceases to be a sign of belonging to the Muslim community and becomes an expression of idiosyncratic individuality, which others are required to tolerate. [117]

Difference is not a legal concept, and so courts adjudicating difference should not confine themselves to a strictly legal conception of a 'right to be different'. Rather, the 'right' must be treated as a political statement based on a rejection of the essentialism which characterises officials even in a post-apartheid pro-diversity set up. Underlying the approach of the courts to clothing is the political view that dress codes should not be allowed to function as a form of racial oppression, which uses the political power of dress to subjugate and marginalise non-Western forms of expression and impose one culture on another, perpetuating a prolonged colonial/apartheid mindset as articulated by Steve Biko:

> The advent of Western Culture has changed our outlook almost drastically. No more could we run our own affairs. We were required to fit in as people tolerated with great restrained in a western-type society. We were tolerated simply because our cheap labour is needed. Hence we are judged in terms of standards we are not responsible for. Whenever colonialism sets in with its dominant culture it devours the native culture and leaves behind a bastardised culture that can only thrive at the rate and pace allowed it by the dominant culture. This is what has happened to the African culture. It is called a sub-culture purely because the African people in the urban complexes are mimicking the white man rather unashamedly. [118]

Following Biko's analysis, a refusal to adhere to the set Western standard is an assertion of, not just individuality, but political relevance. The judicial decisions of this epoch reflect this strong political content – and this is not bad, for law without the infusion of politics is without context and without relevance to the concerned society. On this basis, the position of irreligious statements of dress should be taken seriously, and constitutionally protected.

It appears, however, that legal academics are also not ready for challenges to authority on the basis of politics. In addition to Lenta's reference to 'charlatans', is the criticism that the court sanctioned Pillay's failure to ask the school for permission to pierce her nose, describing it as a lack of respect for authority and a 'minor act of rebellion'. [119] The failure to conceive of a minor's (minor) rebellion against a Judeo-Christian authority seeking to impose its value-system on society, as a political act that warrants protection under the Bill of Rights, reveals that South African law is a long way from being truly progressive.

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[117] Zizek (note 66 above) 124.

[118] S Biko *I Write What I Like* (2004) 51.

[119] Carpenter (note 50 above) 212 – 213.