

Children's Right to Education versus their Right to Religion and Culture in South Africa: With Specific Reference to the Wearing of a Headscarf in South African

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Online ISSN
1727-3781

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Date Submitted

29 September 2022

Date Revised

22 April 2023

Date Accepted

22 April 2023

Date Published

15 May 2023

Editor Prof C Rautenbach

Section Editor N Gabru

How to cite this article

Essop Z "Children's Right to Education versus their Right to Religion and Culture in South Africa: With Specific Reference to the Wearing of a Headscarf in South African Schools" *PER / PELJ* 2023(26) – DOI <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a14904>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a14904>

Abstract

In terms of section 29(1) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*), "everyone has the right to basic education". At the same time the *Constitution* provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion, and the right to participate in the cultural life of his or her choice.

Children's right to education versus their right to religion and culture is a highly debated topic in South Africa. The *Constitution* guarantees both the right to education and the right to religion and culture. In the culturally diverse South African environment the right to education and the child's right to participate in the cultural life of their choice may conflict with each other. The conflict referred to can mean that the child's right to participate in the cultural life of his or her choice might be sacrificed to the right to education. One such instance is the wearing of a headscarf in schools. The headscarf, also known as a hijab, is a traditional piece of clothing worn by Muslim women in accordance with their religious beliefs. The wearing of a headscarf in schools has become a contentious issue as it is seen by some as conflicting with the principles of education and the dress codes of schools.

The government has a constitutional obligation to provide basic education to all children in the country. This right is seen as a crucial factor in ensuring that children can develop to their full potential. On the other hand, the right to religion and culture is equally important as it allows individuals to practice their religious beliefs and maintain their cultural identity. To evaluate discrimination against children in a culturally diverse classroom, it is mandatory to look at what the right to basic education entails and what obligations this right place on the state – more specifically on the Department of Basic Education – when it comes to promoting the right to basic education while protecting children's other constitutional rights.

The government must adopt a balanced approach to ensure that both the right to education and the right to religion and culture are respected and protected. This study will investigate whether the state fulfils its obligation to protect the child's constitutional right to basic education without infringing on the child's right to religion and culture.

Keywords

Right to basic education; freedom of religion; right to culture; freedom of expression; religious intolerance; headscarf; equality; discrimination; dress codes; national guidelines; school governing bodies.

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1 Introduction

The subject of accommodating learners' cultural and religious beliefs is not new to us and the question whether schools should allow Muslim learners to wear a headscarf to school has been a subject of increasing interest.¹ The issue of a school's sovereignty in enacting a code of conduct and prohibiting specific religious or cultural attire has been dealt with before.² Over the years the use of the Islamic headscarf in schools has sparked widespread debate.³

The *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*)⁴ states that "everyone has the right to education".⁵ The *Bill of Rights* is contained in Chapter 2 of the *Constitution*.⁶ In South Africa, the *Bill of Rights* is the cornerstone of democracy.⁷ It preserves the rights of the South African people and asserts the democratic values of human dignity, equality and freedom.⁸ Section 7(2) of the *Constitution* obliges the state to respect, protect, promote and fulfil the rights in the *Bill of Rights*.⁹

Education has long been thought of as the mechanism by which society transfers knowledge from one generation to the next.¹⁰ It is now recognised as a human right all around the world.¹¹ According to Chürr, education, is one of the most important fundamental rights, since it fosters economic and social well-being.¹²

Several sections of the *Constitution* value and defend diversity and variety. Section 15(1) states that everyone has the right to freedom of conscience,

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¹ Wingfield 2017 <http://theconversation.com/what-decolonised-education-should-and-shouldnt-mean-72597>.

² Osman and Wilke 2018 *Obiter* 585.

³ Osman and Wilke 2018 *Obiter* 585.

⁴ *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the *Constitution*).

⁵ Section 29(1) of the *Constitution*.

⁶ Chapter 2 of the *Constitution*; ss 7 to 39 of the *Constitution*.

⁷ Section 7(1) of the *Constitution*.

⁸ Section 7(1) of the *Constitution*.

⁹ Section 7(2) of the *Constitution*.

¹⁰ Chürr 2015 *PELJ* 2405.

¹¹ Chürr 2015 *PELJ* 2405.

¹² Chürr 2015 *PELJ* 2405.

religion, thought, belief and opinion.¹³ Section 16 states that everyone has the right to freedom of expression.¹⁴ The right to engage in the cultural life of one's choice is guaranteed by section 30.¹⁵ In South Africa's culturally varied context, the right to education and the right of children to engage in the cultural life of their choice may conflict. The tension could mean that a child's right to engage in his or her preferred cultural life is forfeited in favour of the right to education.

Despite the modifications that have been made, the school system in South Africa, according to Chürr, is still failing to function satisfactorily. She bases her opinion on the reality that some learners are still excluded from school because they have different interests, such as religious or cultural customs.¹⁶ This may result in a violation of the child's right to equality.

The relation between basic education and the right to equality as provided in the *Constitution* will be discussed. Based on the wording in section 9 of the *Constitution*, education must be made available to all equally. The state is obliged by the *Universal Declaration of Human Rights*¹⁷ to respect all ethnic and minority groups, languages and religious rights when realising the right to education.¹⁸ In a diverse classroom, however, realising a child's right to education may result in an infringement of the child's right to his or her own culture and religious beliefs, and if this occurs, the child's right to equality is violated.

South Africa's school education is governed by the *South African Schools Act* (hereinafter referred to as the *Schools Act*).¹⁹ (It was enacted to correct past educational injustices and to combat discrimination.²⁰ Guidelines for Governing Bodies to Consider in Adopting a Code of Conduct for Learners in South African schools was published by the government in 2006.²¹ The purpose of these guidelines is to assist school governing bodies in making decisions on the school's uniform, for instance.²² While these guidelines are not obligatory and one could argue that under section 8(1) of the *Schools Act* they apply only to public schools, Osman and Wilke are of the opinion

¹³ Section 15(1) of the *Constitution*.

¹⁴ Section 15(1) of the *Constitution*.

¹⁵ Section 30 of the *Constitution*.

¹⁶ Chürr 2015 *PELJ* 2438.

¹⁷ *Universal Declaration of Human Rights* (1948) (herein after referred to as the *UDHR*).

¹⁸ Article 25 of the *UDHR*.

¹⁹ *South African Schools Act* 84 of 1996 (hereinafter referred to as the *Schools Act*).

²⁰ The Preamble of the *Schools Act*.

²¹ GN 173 in GG 28538 of 23 February 2006 (hereinafter referred to as the National Guidelines on School Uniforms).

²² Osman and Wilke 2018 *Obiter* 593.

that they were created to guide governing bodies in the adoption of a code of conduct.²³ As per paragraph 29(1) of the National Guidelines on School Uniform, school uniform policies should be based on the area and community that the school serves, taking religious and cultural diversity into account.²⁴ Paragraph 29 of the guidelines further clearly states that when wearing religious apparel such as a headscarf throughout the school day as a component of a learner's religious practice, schools are not permitted to restrict such attire.²⁵

When the right to education is violated, it is almost always because of indirect discrimination.²⁶ One example of indirect discrimination occurred in the matter of *Pillay v MEC for Education, KwaZulu-Natal*,²⁷ where a Hindu student was denied permission to wear a nose stud that had religious and cultural importance to her. In this case the High Court determined that the school's refusal to allow the learner to wear the nose stud amounted to indirect discrimination and that the school's actions were unjust. The court decision was based on the notion that the nose stud had religious and cultural importance for the student, and that the school was depriving her of her cultural rights by preventing her from wearing it.²⁸ When the matter was heard in the Constitutional Court, it stated that:

Cultures are living and contested formations. The protection of the Constitution extends to those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.²⁹

In the case of *Governing Body of the Juma Masjid Primary School v Essay*,³⁰ the Court found that "unlike other socio-economic rights which have textual qualifiers, the right to basic education is immediately realisable".³¹ This leads to the conclusion that the right to education is distinct from other rights, and that anything less than fulfilling the right will be considered a limitation.³²

²³ Osman and Wilke 2018 *Obiter* 593.

²⁴ National Guidelines on School Uniforms paras 17 and 29.

²⁵ National Guidelines on School Uniforms para 29.

²⁶ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 540.

²⁷ *Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (EqC) (hereinafter referred to as the *Pillay* case).

²⁸ *Pillay* case para 15.

²⁹ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 54.

³⁰ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) (hereinafter referred to as the *Juma Masjid* case).

³¹ *Juma Masjid* case para 37.

³² McConnachie and McConnachie 2012 *SALJ* 564.

In this article the author will examine how the right to education should be valued when it conflicts with other fundamental rights such as religious freedom and the ability to follow one's own cultural practices. It is necessary to examine what is meant by the term basic education as well as what the aim of basic education is, and to decide how the right to education and the right to a cultural life of choice should be balanced in a culturally diverse classroom. Section 9 of the *Constitution* provides that "everyone is equal before the law" and that "everyone has the right to equal protection and benefit of the law".³³ The conclusion drawn from section 9 is that no child should be discriminated against, and that each child should be given the opportunity to enjoy the same rights without discrimination based on the child's religious beliefs or cultural traditions.³⁴

An analysis will reveal what obligations the law imposes on the state in terms of promoting the right to education while also safeguarding a child's right practice his or her religious and cultural practices. The writer will investigate and examine the obligation of South African schools to accommodate the headscarf, as it is a basic pillar of the Islamic faith that is protected by the constitutional right to religious freedom. The writer will further investigate whether schools are obliged to accommodate the headscarf under current school uniform guidelines.

2 The importance of the headscarf for Muslim woman

The headscarf is a modest item of clothing worn by Muslim women in conformity with their religious convictions.³⁵ The scarf is usually worn by Muslim women to completely cover their hair, neck, and ears while leaving their faces exposed.³⁶

The Qur'an states:

O Prophet! Tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad).³⁷

And say to the believing women that they should lower their gaze and guard their modesty, that they should not display their beauty and ornaments except that what must ordinarily appear thereof; that they should draw their veils over their bosoms and that they should not display their beauty ...³⁸

³³ Section 9(1) of the *Constitution*.

³⁴ Essop *State's Duty to Realise the Right to Education* 4.

³⁵ Osman 2014 *PELJ* 1318.

³⁶ Osman 2014 *PELJ* 1319.

³⁷ The Holy Quraan Surah 33, Verse 59.

³⁸ The Holy Quraan Surah 24, Verse 31.

According to the common interpretation of these verses from the Qur'an, Muslim women who have attained puberty must cover their heads in public.³⁹ Muslim scholars agree that wearing a headscarf is required by Islam.⁴⁰ According to the UN Human Rights Committee, wearing distinguishing attire or head coverings is one example of how religion is observed and practised.⁴¹

It can thus be argued, based on the above, that the requirement that Muslim women wear headscarves is viewed as a necessity of the Islamic faith and is protected by the right to freedom of religion. According to Osman this requirement applies to all situations, including work and school, and it is not suspended even for brief intervals of exercise. She is further of the view that the headscarf should be considered as an essential part of the Islamic religion rather than merely a religious symbol.⁴² This implies that from a particular age girls would have to wear the headscarf to school. The wearing of the headscarf may contradict with the requirements of the school's code of conduct, forcing the female Muslim learner to choose between adhering to the code of conduct and adhering to the rules of her faith. This would mean that the Muslim learner's right to religion and culture comes into conflict with the right to basic education. In instances like this the equality clause should be considered and a balance between the opposing rights should be developed when attempting to resolve a dispute between two rights.⁴³ One must evaluate the interests that the rights are meant to protect to strike a balance between them. In order to balance these rights, the author will evaluate the provisions of section 29 before examining the legal framework governing the right to education in a diverse country like South Africa.

3 The right to basic education and the right to equality

3.1 The right to basic education – a close look at the content of the right

The *Constitution* guarantees the right to a basic education. Section 29 of the *Constitution* states the following:⁴⁴

- (1) Everyone has the right –

³⁹ Osman 2014 *PELJ* 1319.

⁴⁰ Osman 2014 *PELJ* 1319.

⁴¹ *Human Rights Committee General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)* UN Doc CCPR/C/21/Rev1/Add4 (1993) para 4.

⁴² Osman 2014 *PELJ* 1320.

⁴³ Kayacan *How to Resolve Conflicts* 9.

⁴⁴ Section 29(1) of the *Constitution*.

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Neither the *Constitution* nor the Interim *Constitution* defines the word "basic education".⁴⁵ The *Schools Act* merely defines compulsory school attendance and does not provide a definition of basic education.⁴⁶ The term comes from the phrase "primary education", which means meeting all a child's basic educational needs.⁴⁷ The community's culture must be considered when meeting the basic need to learn.⁴⁸ Basic education can be defined as education that meets an individual's basic learning needs.⁴⁹ Malherbe believes that the right to education is a crucial right, as it is the key to unlocking all of the other rights enshrined in the *Bill of Rights*.⁵⁰ According to Skelton, it is self-evident that children who do not have access to basic education do not achieve their full potential.⁵¹ The aim, according to Krüger and McConnachie, is for schools to provide an atmosphere that promotes and fulfils learners' constitutional rights. They believe that education provides learners with the opportunity to address the unequal distribution of competences and abilities, as well as to break the poverty cycle.⁵²

Seleoane argues that the right to a basic education is superior to other socio-economic rights in three ways. According to him, the right is instantaneous, does not depend on the availability of resources, and is direct. Seleoane goes on to say that, in accordance with section 36 of the *Constitution*, the availability of resources can be a factor only when limiting the right to education.⁵³ Seleoane further argues that it is doubtful whether the state may limit access to basic education in response to a limitation of resources and that limiting the right as a result of the unavailability of resources would defeat the objectives of section 29(1)(a) of the *Constitution*. He draws the conclusion that if the *Constitution* wanted to subject the right

⁴⁵ Seleoane 2003 *LDD* 143.

⁴⁶ Section 3 of the *Schools Act*.

⁴⁷ *World Declaration on Education for All and the Framework for Action to meet Basic Education* (1990) Art 5.

⁴⁸ *World Declaration on Education for All and the Framework for Action to meet Basic Education* (1990) Art 5.

⁴⁹ McConnachie and McConnachie 2012 *SALJ* 567.

⁵⁰ Malherbe "Education Rights" 399.

⁵¹ Open Society Foundations *Strategic Litigation Impacts* 22.

⁵² Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 535.

⁵³ Seleoane 2003 *LDD* 140.

to basic education to the availability of resources it would have been stated in section 29(1)(a) of the *Constitution*.⁵⁴

In the *Juma Masjid* case the South African courts first addressed the content of the right to basic education. Nkabinde J quoted from general comment 13 of the Committee on Economic, Social and Cultural Rights⁵⁵ to the effect that:

Education is both a human right in itself and an indiscernible means of realising other human rights. As an empowerment right, education is the primary vehicle by which other economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.⁵⁶

The Court found that the right to a basic education is an unqualified right, separate from other textually qualified socio-economic rights guaranteed by the *Constitution*.⁵⁷ Nkabinde J held that:

Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be progressively realised within available resources subject to reasonable legislative measures. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This right is therefore distinct from the right to further education provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education progressively available and accessible.⁵⁸

The *Juma Masjid* case established a distinction between the right to basic education and other socio-economic rights such as the right to further education⁵⁹ or the right to housing.⁶⁰ This is because section 29(1)(a) lacks the textual qualifiers included in the other socio-economic rights.⁶¹

⁵⁴ Seleoane 2003 *LDD* 140-141.

⁵⁵ Hereinafter referred to as the CESCR.

⁵⁶ *Juma Masjid* case para 41.

⁵⁷ *Juma Masjid* case para 37.

⁵⁸ *Juma Masjid* case para 37.

⁵⁹ Section 29(1)(b) of the *Constitution*; McConnachie and McConnachie 2012 *SALJ* 561.

⁶⁰ Section 26(1) of the *Constitution*.

⁶¹ McConnachie and McConnachie 2012 *SALJ* 561.

The courts choose to use a reasonableness approach when dealing with other socio-economic rights. The wording of the section 26 and 27 rights was the primary factor in the court adopting the reasonableness approach,⁶² in term of which the state merely needs to show that it has used reasonable procedures and processes to gradually realise the right within its available resources, even though there is a positive duty on the state to do so as indicated in sections 26 and 27. According to Liebenberg, the court merely considers whether the state's actions are reasonable when determining what is acceptable.⁶³ She is further of the view that there are two factors that influence the courts' assessment of reasonableness. Firstly, the rights included in sections 26(1) and 27(1) must be "progressively realised", and the availability of resources is a factor, according to subsections 26(2) and 27(2). Secondly, the historical, social and economic contexts are used to evaluate the extent of the reasonableness.⁶⁴

The *Juma Masjid* case provides evidence that the right to a basic education, as guaranteed in the *Constitution* is distinct. The Court in this matter stated that the right to basic education is a fundamental right and providing anything less is a limitation on that right. Nkabinde J stressed the importance of basic education. He held that:

The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked.⁶⁵

Berger argues that if the state fails to uphold the right to a basic education as provided for in the *Constitution*, the state is not only violating the child's constitutional right to education but is also failing to act in the child's best interest.⁶⁶ The right to education is crucial for a child's growth, and the state would be doing the children of South Africa a great injustice if it failed to recognise this right or permitted certain hurdles to deny children an education.

The Court in the *Juma Masjid* case further stated that the right to basic education is immediately realisable and that it is subject only to the limitation clause. The Court held that:

This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through

⁶² McConnachie and McConnachie 2012 *SALJ* 561.

⁶³ Liebenberg 2004 *ESR Rev* 8.

⁶⁴ Liebenberg 2004 *ESR Rev* 9.

⁶⁵ *Juma Masjid* case para 42.

⁶⁶ Berger 2003 *Colum L Rev* 628.

reasonable measures, to make further education progressively available and accessible.⁶⁷

The term primary education has been replaced with the term basic education⁶⁸ in both the *Convention on the Rights of the Child*, 1989⁶⁹ as well as the *International Covenant on Economic Social and Cultural Rights*, 1966.⁷⁰ Articles 13 and 14 of the ICESCR deal with the right to education. Every state party to the Convention is required by Article 13 of the ICESCR to acknowledge that everyone has a right to a basic education. In terms of the ICESCR, parties to the Convention are required to make sure that education is available, accessible, acceptable and adaptable.⁷¹ These four A's are regarded as the benchmark by which states can evaluate their own progress in implementing the right to a fundamental education.⁷²

It is clear in the above that children's right to a basic education encompasses more than just their attendance at school and that it is necessary to interpret the right to education broadly. Section 29 of the *Constitution's* definition of the right to education views "education" as a means by which children can aid themselves to realise their full potential, and it implies that the right to education is one of the most important rights that children have. The crucial question is whether all children in South Africa are enjoying the same right, free from prejudice.

4 Legal framework for the right to basic education in South Africa

4.1 The right to equality in the field of education

The Preamble of the *Constitution* requires that when constitutional rights are exercised, equality must be the ultimate objective.⁷³ Section 9 of the *Constitution* provides that "everyone is equal before the law and that everyone has the right to the equal protection and benefit of the law".⁷⁴ In addition to prohibiting the state from unfairly discriminating, the right to equality calls for measures to remedy previous disadvantage.⁷⁵ Numerous socio-economic rights for children are guaranteed by the Bill of Rights.⁷⁶

⁶⁷ *Juma Masjid* case para 37.

⁶⁸ McConnachie and McConnachie 2012 SALJ 567.

⁶⁹ Hereinafter referred to as the CRC.

⁷⁰ Hereinafter referred to as the ICESCR.

⁷¹ Kamga "Right to Basic Education" 518.

⁷² Woolman and Fleish *The Constitution in the Classroom* 130.

⁷³ Proudlock "Children's Socio-Economic Rights" 359.

⁷⁴ Section 9(1) of the *Constitution*.

⁷⁵ McConnachie and McConnachie 2012 SALJ 571.

⁷⁶ Sections 26, 27, 28(1)(c) as well as 29(1) of the *Constitution*.

According to the *Constitution's* Preamble, when these rights are exercised, this must be done in a way that promotes equality, unleashes each person's potential, and enhances the quality of life for all citizens.⁷⁷

The right to basic education is guaranteed in section 29, as stated above. The right to education includes the right to an equal education because section 29 is qualified by section 9.⁷⁸

According to Kruger and McConnachie, unfair discrimination was characteristic of the previous South African educational system. Additionally, they argue that the objectives of section 9 are to address persistent unfair discrimination in schools and to undo the patterns of past disadvantage.⁷⁹ According to Fagan, discrimination occurs when certain groups of individuals are given exclusive access to rights such as those in the Bill of Rights while other groups are excluded.⁸⁰ Consequently, prejudice in the area of education, results from the exclusion of a particular group of learners.⁸¹ Children are discriminated against in schools, according to Krüger and McConnachie, when they are treated differently on the basis of one of the grounds stated in section 9(3) of the *Constitution*. Discrimination can occur either directly or indirectly. They are of the opinion that when one of the prohibited factors specified in section 9(3) is utilised to unfairly benefit or disadvantage a particular group, the action constitutes direct discrimination and that when the withholding of benefits has a disproportionately negative effect on a particular group, there is indirect discrimination.⁸²

Discrimination may also occur when a right is limited or when someone is treated unfairly on one or more prohibited grounds.⁸³ While attending school a Muslim learner may encounter religious discrimination, but if the learner is a black female Muslim, she may also encounter sexism and racism.⁸⁴ It would be discrimination on the overlapping grounds of culture, gender, and religion if a public school prohibited a Muslim female learner from wearing the headscarf.⁸⁵ The preambles to both the *Constitution* and the *Schools Act* state that the goals of these laws are to promote equality and address historical inequalities. Equality must be addressed in the educational system

⁷⁷ Proudlock "Children's Socio-Economic Rights" 359.

⁷⁸ McConnachie and McConnachie 2012 *SALJ* 571.

⁷⁹ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 538.

⁸⁰ Fagan 1998 *SAJHR* 235.

⁸¹ Essop *State's Duty to Realise the Right to Education* 15.

⁸² Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 539.

⁸³ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 540.

⁸⁴ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 540.

⁸⁵ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 540.

if children are to benefit from their constitutional rights to basic education and the provisions of sections 15, 16 and 30.

It seems obvious that all South Africans must receive an equitable education under section 9 of the *Constitution*. Basic education is so crucial to a child's development, and it should be addressed when a child might be excluded from education because of his or her cultural or religious views. Excluding a child based on his or her cultural or religious views would violate the child's right to equality and basic education. Children should not be subjected to direct or indirect discrimination because of their religious and/or cultural beliefs. Each child's constitutional rights must be progressively realised by the state, and if the state fails to do so, especially when it comes to the right to education, the child will not have the chance to realise all his or her potential. No child should face discrimination, and all children should have the chance to exercise their rights without being treated differently because of their religion or culture. From all the above it can be argued that the right to education and the right to equality must be interpreted jointly, and as a result, the right to a basic education encompasses the right to equal education for all.

4.2 The best interest of the child

Section 28(2) of the *Constitution* and section 9 of the *Children's Act*⁸⁶ state that in every aspect or matter relating to a child the best interest of the child must be of paramount importance. Skelton is of the opinion that section 28(2) can be used to establish the meaning, scope and the limitation of other rights in the Bill of Rights.⁸⁷ Malherbe believes that when a child's other constitutional or legal rights are at risk, the best interest approach should be used.⁸⁸ Malherbe is also of the opinion that the best interest approach of the child is enforceable against state and state organs.⁸⁹

4.3 The child's right to culture

South Africa is a multicultural society since it is home to people from a wide variety of cultures, values and beliefs.⁹⁰ The individual right to culture is safeguarded by section 30 of the *Constitution*. People's right to enjoy their culture, practice their religion, use their language, and establish and maintain cultural, religious, and linguistic connections are protected under section 31 of the *Constitution*. The right to culture may not be practised in a

⁸⁶ *Children's Act* 38 of 2005 (hereinafter referred to as the *Children's Act*).

⁸⁷ Skelton "Constitutional and International Protection of Children's Rights" 280.

⁸⁸ Malherbe 2008 *TSAR* 268.

⁸⁹ Malherbe "Impact of Constitutional Rights Education" 440.

⁹⁰ Gretta *Critical Analysis of Multicultural Education* 1.

manner that is inconsistent with the *Constitution*, according to the internal limitation clause in Section 31(2).⁹¹ Generally speaking, features like shared languages, religions or cultural traditions are regarded as determining culture.⁹² In the *Pillay* case the Court made the argument that culture went beyond a common language, religion, or cultural tradition but ultimately did not establish its boundaries.⁹³

Different cultural groups have different value systems.⁹⁴ According to Gretta, South Africa's apartheid-era educational system had different components for each different racial and cultural group. After 1994 the dynamic changed, and South African public schools welcomed all learners, regardless of their race or culture.⁹⁵ It might be challenging for teachers to find a common ground to which to appeal in today's ethnic and diverse classrooms. Each learner will bring with him or her a unique set of values, beliefs, and experiences, which will constitute a significant set of barriers to assimilating whatever educational experience is provided. According to Gretta, the learners' behaviour and attitudes can be influenced by these values, beliefs, and experiences. She claims that all cultural values are significant and that conflicts may occur when teachers and learners are unaware of the variations and parallels among cultures and beliefs.⁹⁶ Gretta further believes that the educational system should appreciate, accept, tolerate, and advance diversity within reasonable and justifiable bounds.⁹⁷

Section 4 of the *National Education Policy Act*⁹⁸ (hereafter referred to as *NEPA*) aims to protect and guarantee the right to culture:

- (i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;
- (ii) of every person to basic education and equal access to education institutions;
- (iii) of a parent or guardian in respect of the education of his or her child or ward;
- (iv) of every child in respect of his or her education;

⁹¹ Section 31(2) of the *Constitution*.

⁹² Osman and Wilke 2018 *Obiter* 587.

⁹³ *Pillay* case paras 48-49.

⁹⁴ Gretta *Critical Analysis of Multicultural Education* 1.

⁹⁵ Gretta *Critical Analysis of Multicultural Education* 6.

⁹⁶ Gretta *Critical Analysis of Multicultural Education* 8.

⁹⁷ Gretta *Critical Analysis of Multicultural Education* 19.

⁹⁸ *National Education Policy Act* 27 of 1996 (hereinafter referred to as *NEPA*).

- (v) of every student to be instructed in the language of his or her choice where this is reasonably practicable;
- (vi) of every person to the freedoms of conscience, religion, thought, belief, opinion, expression and association within education institutions;
- (vii) of every person to establish, where practicable, education institutions based on a common language, culture or religion, as long as there is no discrimination on the ground of race;
- (viii) of every person to use the language and participate in the cultural life of his or her choice within an education institution.⁹⁹

According to the Preamble of the *Schools Act*, South Africa needs a new national school system to address historical injustices in education, provide high-quality education, and lay the foundation for combatting racism, sexism, and all other forms of discrimination and intolerance, as well as to preserve and advance our diverse cultures and languages.¹⁰⁰

In the matter of *MEC of Education Kwazulu-Natal v Pillay*¹⁰¹ the Court stated that cultural practices are often essential to an individual's self-identity and sense of human dignity, and for some people they are just as significant as religious beliefs.¹⁰² The Court further stated that it is crucial that learners feel free to practise their views because only then will we be in the process of bringing about the society that the *Constitution* envisions.¹⁰³ The Court also emphasised that when a learner demonstrates at school his or her adherence to the practices of any particular religion, the demonstration should be viewed as a symbol of diversity that will benefit our schools and, in the long run, our nation.¹⁰⁴

Most South African children attend public schools. This suggests that many children from various cultural origins will be enrolled in the same classroom. The state should modify the educational system to fit the diversity in the classroom and be accommodating of the various cultural backgrounds of learners.

4.4 The child's right to religion and freedom of expression

The freedom of religion, belief and opinion is guaranteed by Section 15 of the *Constitution*.¹⁰⁵ Religious freedom promotes beliefs that are often

⁹⁹ Section 4(a) of *NEPA*.

¹⁰⁰ The Preamble of the *Schools Act*.

¹⁰¹ *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) (hereinafter referred to as the *Pillay Constitutional Court case*).

¹⁰² *Pillay Constitutional Court case* para 53.

¹⁰³ *Pillay Constitutional Court case* para 107.

¹⁰⁴ *Pillay Constitutional Court case* para 107.

¹⁰⁵ Section 15 of the *Constitution*.

profoundly personal and integral to a person's self-identity.¹⁰⁶ The right to freedom of religion is subject to the same limitations under section 36 of the *Constitution*, just like any other right guaranteed by the Bill of Rights.

Wearing religious attire is a form of expression that has been used by individuals throughout history to reflect their religious beliefs and cultural heritage. The *Constitution* states that everyone has the right to freedom of expression.¹⁰⁷ Freedom of expression is a cornerstone of democratic societies and is protected by various international human rights instruments, including the *UDHR*.¹⁰⁸ In modern society the wearing of religious attire is a powerful form of expression that reflects the beliefs and values of an individual.¹⁰⁹ In many religious traditions, attire is an integral part of religious practice,¹¹⁰ and it is normally worn as a symbol of devotion and commitment to a particular faith. For example, Muslim women wear the hijab as a form of expression of their beliefs. The right to freedom of religion, which is protected by various international and national human rights instruments, encompasses the right to express one's beliefs through religious practices and customs, including the wearing of religious attire.¹¹¹

When looking at the right to culture and freedom of religion, the Court in the *Pillay Constitutional Court* case stated that cultural beliefs might have a religious basis, while religious practices often inform cultural beliefs.¹¹² The Court further held that a single practice could be both cultural and religious, and that there is generally a significant overlap between the rights to religion and culture.¹¹³ The Court further stated that wearing of a nose stud must be seen as a form of expression of the learner's religion and culture.¹¹⁴ The Court referred to section 7 of the *Constitution* and stated that "freedom is one the underlying values of the *Bill of Rights*."¹¹⁵ Langa J further stated that the fundamental ideals of "human dignity, equality, and freedom" must be promoted by courts when interpreting all rights.¹¹⁶

The sincerity of learners claiming the right to freedom of religion and their related views must be considered by the court while determining whether a

¹⁰⁶ Osman and Wilke 2018 *Obiter* 590.

¹⁰⁷ Section 16 of the *Constitution*.

¹⁰⁸ Article 19 of the *UDHR*.

¹⁰⁹ *Pillay Constitutional Court* case para 53.

¹¹⁰ Osman 2014 *PELJ* 1319.

¹¹¹ Section 15(2) of the *Constitution*.

¹¹² *Pillay Constitutional Court* case para 47.

¹¹³ *Pillay Constitutional Court* case para 47.

¹¹⁴ *Pillay Constitutional Court* case para 60.

¹¹⁵ *Pillay Constitutional Court* case para 63.

¹¹⁶ *Pillay Constitutional Court* case para 63.

practice is religious and worthy of protection.¹¹⁷ Such protection should be extended to include voluntarily adopted behaviours that increase our autonomy and dignity.¹¹⁸

In the matter of *Christian Education SA v Minister of Education*¹¹⁹ the Court stated that:

There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity.¹²⁰

It is evident that when learners' right to freedom of religion and expression and their right to a basic education are at odds in a learning environment, the violation of that right must be carefully considered because it might induce the learner to choose between upholding their beliefs and receiving the benefits of their right to a basic education. Discrimination would occur if the right were interfered with, and the court would have to decide if the discrimination was fair and should be upheld.¹²¹

4.5 Promotion of Equality and Prevention of Unfair Discrimination Act¹²²

PEPUDA is the national legislation enacted by the South African government to prevent any unfair discrimination. Complaints of unfair discrimination should be adjudicated in accordance with the Act, and parties cannot avoid the legislation by relying solely on the constitutional rights in dispute.¹²³ Discrimination is explicitly prohibited by both the state and private parties under section 6 of *PEPUDA*. Discrimination is defined in *PEPUDA* as:

any action or omission, including any rule, legislation, regulation, custom, condition, or practice that directly or indirectly –

- (a) places restrictions, demands, or disadvantages on; or
- (b) refuses to provide any individual with benefits, chances, or advantages on one or more of the prohibited grounds.¹²⁴

¹¹⁷ *Pillay Constitutional Court case para 67.*

¹¹⁸ *Pillay Constitutional Court case para 64.*

¹¹⁹ *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) (hereinafter referred to as the *Christian Education case*).

¹²⁰ *Christian Education case para 36.*

¹²¹ *Osman and Wilke* 2018 *Obiter* 591.

¹²² *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereinafter referred to as *PEPUDA*).

¹²³ *Currie and De Waal Bill of Rights Handbook* 245.

¹²⁴ Section 1 of *PEPUDA*.

Practices that would be viewed as discriminatory in the education sector are included in section 2 of the Schedule to *PEPUDA*, including:

- (a) unfairly eliminating students, especially those with special needs, from educational institutions;
- (b) wrongful denial of scholarships, bursaries, or any other type of financial aid to students who belong to certain groups as defined by the prohibited grounds;
- (c) failure to adequately and practically embrace diversity in education.¹²⁵

It is evident here that schools have a duty to embrace diversity, and when considering the dress codes in schools, one can argue that the legislator intended for schools in South Africa to make sure they are doing everything possible to effectively accommodate learners from all groups so that they can enjoy their rights equally with other learners and so prevent unfair discrimination.¹²⁶

4.6 South African School's Act and NEPA

On a national level the *Schools Act*, *NEPA* and the *Employment of Educators Act*¹²⁷ create the legal framework for education and give effect to the right to equality.¹²⁸

In terms of the preamble of the *Schools Act*, one of its objectives is to "create a system in schools which will redress past injustices in the education system as well as prohibiting unfair discrimination".¹²⁹ The preamble of the *Schools Act* further states that, South Africa needs a new national school system to address historical injustices in education, provide high-quality education, lay the groundwork for combatting racism, sexism and all other forms of discrimination and prejudice, and preserve and promote our diverse cultures and languages.¹³⁰

Section 5 of the *Schools Act* prohibits unfair discrimination.¹³¹ The same section forbids denying admission to a learner based on a predetermined ground.¹³²

¹²⁵ Section 2 of the Schedule of *PEPUDA*.

¹²⁶ Osman and Wilke 2018 *Obiter* 593.

¹²⁷ *Employment of Educators Act* 76 of 1998.

¹²⁸ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 539.

¹²⁹ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 539.

¹³⁰ The Preamble of the *Schools Act*.

¹³¹ Section 5 of the *Schools Act*.

¹³² Veriava and Coomans "Right to Education" 67.

The *NEPA* empowers the Minister to create policies aimed at the promotion of equality, and the *Employment of Educators Act* makes unfair discrimination a dismissible offence.¹³³

From the above one can conclude that there is a complete framework for the prohibition of discrimination in South African schools. This framework is created by the constitutional requirements and provisions, *PEPUDA*, *NEPA*, and the *Schools Act*. Osman and Wilke are of the opinion that the framework encourages embracing diversity and allowing minority practices in the educational environment. They are further of the view that policies that do not accommodate the headscarf and hairstyles must be assessed in the light of this framework.¹³⁴

5 Dress codes and the code of conduct in public schools

A code of conduct is a vital tool in promoting discipline, order and respect in schools. It sets the expectations and standards of behaviour that are required of learners attending the school. The Governing Body (hereinafter referred to as the SGB) of a public school shall adopt a code of conduct, as stated in Section 8 of the *Schools Act*.¹³⁵ In 1998 the Minister of Education issued a government notice including a schedule with guidelines for consideration by the SGB when drafting and adopting a code of conduct.¹³⁶ The schedule focussed on constructive discipline, the need to build a culture of peace and tolerance in all schools, and the importance of teaching, learning and mutual respect.¹³⁷ The adopted code of conduct must be subject to the *Constitution*, the *Schools Act*, and provincial legislation.¹³⁸ The SGB must consult the parties who may be affected by this policy before adopting the code of conduct. These parties include the parents, teachers, and learners.¹³⁹ In accordance with section 8(3) of the *Schools Act*, the Minister of Basic Education may offer guidelines that the SGB must abide by while drafting the code of conduct. The purpose of the code of conduct must be to uphold and enforce school discipline as well as to encourage uniformity.¹⁴⁰ The guidelines for drafting and implementing a code of conduct further state that the code of conduct must be focussed on advancing and protecting each person's fundamental rights as provided in

¹³³ Krüger and McConnachie "Impact of the Constitution on Learners' Rights" 539.

¹³⁴ Osman and Wilke 2018 *Obiter* 594.

¹³⁵ Section 8 of the *Schools Act*.

¹³⁶ GN 776 in GG 18900 of 15 May 1998.

¹³⁷ GN 776 in GG 18900 of 15 May 1998 para 2.3.

¹³⁸ GN 776 in GG 18900 of 15 May 1998 para 1.

¹³⁹ Section 8(1) of the *Schools Act*.

¹⁴⁰ Section 8(2) of the *Schools Act*.

the Bill of Rights.¹⁴¹ Paragraph 4 of the guidelines for drafting and implementing a code of conduct deals with the rights of learners and it states that learners' cultural traditions must be respected. It further states that the right to freedom of expression in the school environment is extended to the wearing of certain clothing as well as hairstyles.¹⁴² The guidelines for drafting and implementing a code of conduct acknowledge that when learners contravene the code of conduct of the school, action may be taken against those learners but that the action taken by the SGB and the school must suit the transgression.¹⁴³ Paragraphs 10 to 13 of the guidelines discuss the possible sanctions that may be applied when violations of the school code of conduct occur, and they make it very clear that any punishment must be fair.

The state has a duty to make sure that, among other things, the SGB is appropriately enabled to develop and implement policies in accordance with the *Schools Act*. This can be done by the state enacting appropriate legislation and providing other forms of guidance to the SGB.¹⁴⁴

The Minister of Education has provided National Guidelines on School Uniform in this regard which state that uniform policy/dress codes "should consider the religious and cultural diversity within the community served by the school".¹⁴⁵ The National Guidelines on School Uniform further state that learners whose religious views are materially impacted by a uniform requirement must be accommodated by a school uniform policy.¹⁴⁶ The issue with these guidelines is that they are not mandatory.¹⁴⁷ Nevertheless the writer is of the opinion that the Department of Basic Education, which is responsible for ensuring that children's right to a basic education is realised, should enforce the criterion that school dress codes "should take into consideration religious and cultural diversity".¹⁴⁸ According to paragraph 29 of National Guidelines on School Uniform, schools should not restrict the wearing of headscarves as a sign of a religious practice. Instead, they should accommodate learners' religious beliefs.

¹⁴¹ GN 776 in GG 18900 of 15 May 1998 para 3.2.

¹⁴² GN 776 in GG 18900 of 15 May 1998 para 4.5.1.

¹⁴³ GN 776 in GG 18900 of 15 May 1998 para 3.5.

¹⁴⁴ Reyneke 2019 *Africa Education Review* 158.

¹⁴⁵ National Guidelines on School Uniforms para 29.

¹⁴⁶ National Guidelines on School Uniforms para 29.

¹⁴⁷ National Guidelines on School Uniforms para 34.

¹⁴⁸ National Guidelines on School Uniforms para 29(1).

In the matter of *Antonie v Governing Body, Settlers High School*¹⁴⁹ the school's code of conduct was challenged when a learner was charged with serious misconduct in terms of the code of conduct for wearing headgear and the growing of dreadlocks as part of her Rastafarian religion.¹⁵⁰ The respondent in the matter stated that the learner caused disruption with her conduct and that by wearing the headgear to school she disregarded the code of conduct.¹⁵¹ The code of conduct did not make any reference to headgear or dreadlocks.¹⁵² The court in this matter referred to the schedule¹⁵³ issued by the Minister of Education during 1998. The Court stated that:

The focus in the schedule is on positive discipline ... and the need to achieve 'a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools' (s 2.3). This must be done in the context of the democratic values of human dignity, equality and freedom, as enshrined in the Bill of Rights contained in the Constitution of the Republic of South Africa Act 108 of 1996 (s 4.1). Every learner is accorded 'inherent dignity' and 'the right to have his/her human dignity respected', in the sense of 'mutual respect including respect for one another's convictions and cultural traditions'(s 4.3)¹⁵⁴

The Court further alerted the parties in the *Antonie* case that the right to freedom of expression is clearly mentioned in the guidelines as paragraph 4.5.1 clearly states that:

Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles...¹⁵⁵

Van Zyl J stated that while the principles stated in the guidelines were not explicitly stated in the code of conduct that the applicant was bound by, the applicant's failure to abide by the prohibition should not be rigidly evaluated as this would undermine the ideals and principles outlined in the guidelines and put them in conflict with the principles of justice, fairness, and reasonableness that underlie our *Constitution*.¹⁵⁶

¹⁴⁹ *Antonie v Governing Body Settlers High School* 2002 4 SA 738 (C) (hereinafter referred to as the *Antonie* case).

¹⁵⁰ *Antonie* case para 6.

¹⁵¹ *Antonie* case para 6.

¹⁵² *Antonie* case para 11.

¹⁵³ GN 776 in GG 18900 of 15 May 1998.

¹⁵⁴ *Antonie* case para 14.

¹⁵⁵ *Antonie* case para 15.

¹⁵⁶ *Antonie* case para 16.

In the matter of *Radebe v Principal of Leseding Technical School*¹⁵⁷ the first applicant was a grade 8 learner who was forced out of class by the principal on numerous occasions due to her having dreadlocks.¹⁵⁸ This resulted in her missing lessons and being prevented from receiving an education.¹⁵⁹ The second applicant, the first applicants' father, informed the school that he and his family belonged to the Rastafarian religion.¹⁶⁰ The school stated that the first applicant could return to school if she cut off her dreadlocks, because they violated the school's rules on hairstyles.¹⁶¹ The applicants argued that the school was discriminating against the first applicant on the basis of her religion.¹⁶² The judge in this case found in favour of the first applicant, warning that "religious intolerance can ruin the whole country".¹⁶³ The judge further stated that:

I would appeal to the respondents and the powers that be to educate and make our people aware of the importance and advantages of accepting our religious diversity.¹⁶⁴

The Court found that the first applicant had a right to basic education, which included a right to be in class¹⁶⁵ and that the school had discriminated against the first applicant based on her religion and violated her rights to freedom of religion, belief, expression and culture.¹⁶⁶

As previously indicated, a SGB is constrained to drafting a code of conduct in accordance with the *Schools Act*. Consultation with educators, parents, and learners should take place during the process. Whether SGBs actually consult learners and parents while drafting the dress codes is debatable. Children from various ethnicities and origins enrol in schools, and so school communities evolve, which would necessitate the routine revision of schools' dress codes. Although the right to practice one's religion is protected by the *Constitution* and the guidelines specifically state that this practice is to be considered when the dress codes are drafted, it is possible that when dress codes are drafted diversity is not explicitly considered. As a result, some schools may still require learners to obtain permission to wear the headscarf. A female Muslim learner may then be forced to choose

¹⁵⁷ *Radebe v Principal of Leseding Technical School* (1821/2013) [2013] ZAFSHC 111 (30 May 2013) (hereinafter referred to as the *Radebe* case).

¹⁵⁸ *Radebe* case para 12.

¹⁵⁹ *Radebe* case para 12.

¹⁶⁰ *Radebe* case para 10.

¹⁶¹ *Radebe* case para 10.

¹⁶² *Radebe* case para 10.

¹⁶³ *Radebe* case para 21.

¹⁶⁴ *Radebe* case para 22.

¹⁶⁵ *Radebe* case para 20.

¹⁶⁶ *Radebe* case para 3.

between her right to a basic education and her cultural and religious beliefs. Most SGB members are lay people without access to legal resources,¹⁶⁷ which could cause them to overlook crucial elements that ought to be considered while drafting a code of conduct and a dress code. Reyneke is of the view that care should be taken to reasonably accommodate learners from all backgrounds, even if this necessitates changing the rules or procedures, as school rules have the potential to exclude people who deviate from the norm, such as a minority religious group.¹⁶⁸

6 Conclusion

From a scrutiny of the provisions in the *Constitution* as well as the legal framework that guides the education sphere, it has become clear that the right to basic education is the most crucial right that the state must uphold since it provides children and other marginalised community members with the ability to escape poverty. All children should be allowed to pursue their education without facing any barriers. When the right to basic education is read alongside section 9 of the *Constitution*, this becomes evident.¹⁶⁹ Diversity is a reality in South African classrooms. Because basic education is so crucial to a child's development, it should be addressed when a child might be excluded because of his or her cultural or religious beliefs. This would violate the child's right to equality and basic education.

The right to religious and cultural practices often conflicts with the right to an education, as we have witnessed over the past few years. The learner, the parent and the school may all have concerns about this. We frequently see that the rigorous rules imposed by school governing bodies are of such a nature that they overlook the right to religious and cultural practices and beliefs of their learners, thus violating their constitutional rights.¹⁷⁰ The *Pillay case*, the *Antonie case* as well as the *Radebe case* provides evidence of this. The High Court in the *Pillay case* determined that the school's code of conduct violated the law since it did not adhere to the provisions of the *Constitution*, the *Schools Act*, and provincial legislation.¹⁷¹ A clear prohibition of a particular cultural practice sends the wrong message to learners. The implication is that religious belief and cultural practice do not warrant the same level of constitutional protection as other rights.¹⁷² Diversity in the classroom and ultimately in the school was not considered

¹⁶⁷ Reyneke 2019 *Africa Education Review* 159.

¹⁶⁸ Reyneke 2019 *Africa Education Review* 167.

¹⁶⁹ Section 9(1) of the *Constitution*.

¹⁷⁰ Essop *State's Duty to Realise the Right to Education* 63.

¹⁷¹ *Pillay case* para 34.

¹⁷² *Pillay case* para 35.

by the Code of Conduct in the *Pillay* case¹⁷³ and the Court held that "there is no need to suppress individuality to achieve harmony".¹⁷⁴

Most school codes of conduct set forth rigorous guidelines for how learners can and should not dress. Frequently this leads to violations of the cultural rights of the learners, and in some instances, this has necessitated judicial judgements. This leads to the conclusion that the educational system has not evolved to meet the demands of democracy and section 9 of the *Constitution*, which guarantees that everyone has an equal right to the protection of the law.¹⁷⁵

It is inevitable that constitutional rights will eventually come into conflict with one another.¹⁷⁶ The scope of the right conflicted is critical when there is a conflict. It can be difficult to resolve the conflict. The equality clause should be considered while attempting to resolve a dispute between two rights, and a balance between the competing rights should be maintained.¹⁷⁷ When a school treats one group differently from another without good cause, this breaches the right to be free from discrimination.¹⁷⁸ Regardless of the content of a right, it has equal legal validity under the *Constitution*. Any restriction on a right implies that one right is more important than another. To balance, one must assess the interests that the rights are intended to defend. However, while striving to strike a balance between various fundamental rights, the facts of the situation remain vital.¹⁷⁹ To find a workable solution, the seriousness of the breach of rights should be assessed. The extent of the infringement of the right should be established and if the strategy being used is acceptable.¹⁸⁰

The question one should ask is, should SGBs refrain from establishing regulations that will exclude vulnerable, marginalised, and minority sectors of society who have already experienced inequities in the past? The best way to ensure that all learners have access to education in a way that balances their other constitutional rights with their right to a basic education, might be for schools to stop focussing on things like hairstyles, headscarves, or clothing worn for religious reasons.

¹⁷³ *Pillay* case para 34.

¹⁷⁴ *Pillay* case para 36.

¹⁷⁵ Essop *State's Duty to Realise the Right to Education* 56.

¹⁷⁶ Kayacan *How to Resolve Conflicts* 4-5.

¹⁷⁷ Kayacan *How to Resolve Conflicts* 9.

¹⁷⁸ Kayacan *How to Resolve Conflicts* 10.

¹⁷⁹ Kayacan *How to Resolve Conflicts* 15.

¹⁸⁰ Essop *State's Duty to Realise the Right to Education* 63.

This research demonstrates that while the current South African educational environment has frameworks in place that support diversity in schools, some practices occasionally stifle diversity and learners' identities. The provisions of the *PEPUDA* and *Schools Acts* prohibit discrimination based on any ground. Infringing on a learner's ability to exercise their right to freedom of religion by prohibiting them from donning a headscarf is considered unfair religious discrimination until the school can demonstrate otherwise.¹⁸¹ Osman and Wilke are of the opinion that schools are likely to use the need for consistency and discipline as a justification for not allowing female Muslim learners to wear the headscarf but at the same time they argue that this seems like a dubious justification because there is no evidence that allowing learners to wear a headscarf will interfere with classroom discipline. They are further of the view that the headscarf may be included in the uniform, and the school may specify the colour and style of the headscarf to be worn in order to maintain conformity.¹⁸² The writer agrees with this and is of the view that, given South Africa's multicultural society, school dress codes should not prohibit the headscarf and that female Muslim learners should not have to request permission to wear one. Although it is just a recommendation, the National Guidelines on School Uniform in paragraph 29 specifically requires governing bodies to take learners' religious beliefs into account and desist from prohibiting the wearing of headscarves in conformity with such beliefs. School dress code that does not allow for the headscarf would constitute unfair discrimination and should not be permitted and accepted. For SGBs to take the National Guidelines on School Uniform into consideration when drafting the code of conduct and the dress code, these guidelines should first be made mandatory. By making these guidelines obligatory the Department of Basic Education would make sure that SGBs develop codes of conduct that consider significant constitutional developments relating to the best interests of children and adequately accommodate for diversity in schools.

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International Covenant on Economic Social and Cultural Rights (1966)

Universal Declaration of Human Rights (1948)

World Declaration on Education for All and the Framework for Action to meet Basic Education (1990)

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List of Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
Colum L Rev	Columbia Law Review
CRC	Convention on the Rights of the Child
ESR Rev	Economic and Social Rights Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
LDD	Law, Democracy and Development
NEPA	National Education Policy Act 27 of 1996
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SGB	School governing body
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDHR	Universal Declaration of Human Rights