

Authors: E de Waal, Re Mestry and CJ Russo

RELIGIOUS AND CULTURAL DRESS AT SCHOOL: A COMPARATIVE PERSPECTIVE

ISSN 1727-3781



2011 VOLUME 14 No 6

<http://dx.doi.org/10.4314/pelj.v14i6.3>

RELIGIOUS AND CULTURAL DRESS AT SCHOOL: A COMPARATIVE PERSPECTIVE

E de Waal*

R Mestry**

CJ Russo***

1. Introduction

While the acceptance of the 1996 *Constitution*¹ paved the way for radical transformation in the constitutional history of South Africa,² the revolutionary political changes that the country has experienced since 1994 have given rise to far-reaching effects in various areas of life, not the least being that of the education dispensation.³ Even the last of the sticking points in trying to find the middle ground for agreeing to the *SA Constitution* was connected to education.⁴ It is therefore small wonder that the adoption of the *Schools Act*⁵ was hailed as launching a new epoch in South African education,⁶ with its main aim being that of achieving relevant stipulations guaranteed by the modern constitutional supremacy of the country.⁷ The period of *apartheid* was criticised for striving towards a national religion within its Christian National Education system based on racial inequality and segregation.⁸ The current ideology in education has now shifted to what is being called *people's education*,⁹ focused on bringing about national unity.¹⁰

* Elda de Waal. PhD. Associate Professor, North-West University, Vaal Triangle Faculty, Outgoing Chairperson: SAELA. E-mail: elda.dewaal@nwu.ac.za.

** Raj Mestry. DEd, Professor, University of Johannesburg. E-mail: rajm@uj.ac.za.

*** Charles J Russo. JD, EdD. Panzer Chair in Education and Adjunct Professor of Law, University of Dayton, Ohio, Visiting Professor at North-West University, Vaal Triangle Faculty. E-mail: Charles_j_russo@hotmail.com.

1 *Constitution of the Republic of South Africa*, 1996 (hereafter *SA Constitution*).

2 Rautenbach, Jansen van Rensburg and Pienaar 2003 *PELJ* 2.

3 Louw 2005 *Ned Geref Teol T* 191.

4 De Groof and Lauwers 2001 *Perspectives in Education* 50.

5 *South African Schools Act* 84 of 1996 (hereafter the *SA Schools Act*).

6 Roos 2003 *Koers* 481.

7 Section 4 *SA Constitution*.

8 Preamble *SA Schools Act*.

9 Snyman 2003 *Ned Geref Teol T* 504.

10 Section 25 *National Policy on Religion and Education* Gen N 1307 in GG 2549 of 12 September 2003 (hereafter *Religion and Education Policy*). It is argued by some that this also has political undertones: Snyman 2003 *Ned Geref Teol T* 504.

South Africa is known world-wide for its cultural, ethnic and religious diversity,¹¹ despite the fact that multiplicity as such is an innate characteristic of our modern world.¹² It was therefore to be expected that South African education authorities would be aiming, among other things, at ensuring that school practices, especially at public¹³ schools, do not impede access to education¹⁴ and do not infringe on the constitutional rights of any of the learners¹⁵ either. Complying with the rights to founding values of human dignity, equality and freedom guaranteed in the *SA Constitution*¹⁶ is therefore one of the most important challenges to creating and maintaining a safe, disciplined environment where effective teaching and learning can take place.¹⁷ School principals, educators and School Governing Bodies - bearing in mind the diversity of South African communities and the vast differences between rural, township and urban schools - have to fulfil their functions as stipulated in the *Schools Act*.¹⁸

What is necessary is a structure within which schools can operate not only to guarantee equal educational opportunities¹⁹ but also to create a positive, disciplined environment²⁰ where learners and educators know what is expected of them and feel secure. Several incidents where school managers have apparently infringed on the fundamental rights of learners in respect of their schools' dress codes have not reached the South African courts,²¹ although the media reports on some of them.

11 Underscored specifically by s 6 of the *SA Constitution*, which guarantees the 11 official languages.

12 Coertzen 2000 *Ned Geref Teol T* 185.

13 In South Africa the term "public school" denotes a state funded school, as opposed to independent schools that are (partially) privately funded.

14 *SA Schools Act*.

15 As stipulated for schools in s 2 *National Guidelines on School Uniforms* (hereafter *Guidelines on Uniforms*) GN 173 in GG 28538 of 23 February 2006.

16 *SA Constitution*.

17 Section 1.1 *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* (hereafter *Guidelines for Codes of Conduct*) GN 776 in GG 18900 of 15 May 1998. Also refer to the s 79(2)(a) *Children's Act* 38 of 2005 which stipulates the safe environment for children.

18 *SA Schools Act*.

19 Section 9 *SA Constitution*; preamble and s 5(1) *SA Schools Act*.

20 Sections 1.1, 1.2 and 1.6 of *Guidelines for Codes of Conduct*.

21 According to Alston, Van Staden and Pretorius 2003 *SAJE* 165. At least three cases occurred: the first case was where a Grade 4 learner was not allowed to attend school without shoes (which his mother could not afford); the second case was where a secondary school Xhosa male learner had to wear prescribed attire connected to his initiation for several weeks (an amicable agreement averted the possibility of serious cultural confrontation); the third case occurred at a former Model C secondary school in KwaZulu-Natal where a Muslim father enrolled two of his daughters, with the first one simply showing up in her Muslim attire although the father had

The current lack of a variety of South African case law necessitates citing some of these newspaper reports in order to reflect on the wide-spread occurrence of such incidents.

Although the media reported on only one 13-year-old Muslim female learner attending a public school as having been asked to take off her headscarf since it was considered to contravene her school's Code of Conduct,²² this incident is not to be regarded as an isolated case.²³ One other case of note occurred when a public school gave a male learner the choice either to shave the beard that he had grown in testimony to the fact that he knew the Koran by heart or to enroll at another school. The school principal's line of defence was that it was complicated to supervise organised learner discipline within a multi-cultural school environment, and that one culture should not be treated differently to the other twelve cultures at the school.²⁴

It is the opinion of the authors of this article that the courts should interpret (a) whether the limitations on the way learners dress to school are lawful rules that school officials may implement to maintain safe and orderly learning environments, or (b) purely violations of the rights learners have, such as their right to freedom of religion, culture and expression.

Litigation pertaining to dress codes at public schools is emerging in both South Africa and the US, and a few strong court judgments, especially in South Africa, have been recorded in the last eight years.²⁵ In the US, trends in students' clothing, among other things, have repeatedly stirred up litigation, as educators have tried to gain power over students' appearance. The US courts have had to weigh the students'

signed that he accepted the school's clearly stipulated dress code, and the second daughter joining the school the year later after the father had deleted the references that were made to any dress code. (The Department of Education threatened the principal with dismissal if he went on refusing to admit the girls to his school.)

22 Sir John Adamson High School in Johannesburg, according to Rondganger and Govender *Star* 3.

23 Anonymous *Star* 8.

24 Pretorius *Beeld* 8.

25 *Antonie v Governing Body Settlers High School* 2002 4 SA 738 (C) (hereafter *Antonie*); *Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (N) (hereafter *Pillay N*); *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) (hereafter *Pillay CC*).

interest in choosing their clothing against the local authorities' interest in preventing disturbances and advancing school objectives.²⁶

This article examines the different approaches taken in South Africa and the US with regard to state school learners' dress codes. In the US, while relevant litigation has been based mainly on the freedom of speech/expression clause,²⁷ the emphasis seems to be on the courts appealing to schools to devise less restrictive rules and/or to follow viewpoint-neutral policies. Similar South African litigation appears to result in courts insisting that schools follow an accommodating approach and/or be especially wary of unfair discrimination towards previously disadvantaged minority groups. Determining how these two approaches differ and how they have influenced current trends in state school learners' dress codes is the object of this article.

Our article begins with a review of the South African legal context underlying its practical implications for learners' dress codes, before examining the US's stance on the matter. It next offers policy recommendations for educators and attorneys who advise them in situations where they wish to develop constitutionally viable dress-code policies. The article concludes with a brief reflection on whether or not education officials should grant exemptions from learner dress codes that prohibit the wearing of distinctive religious garb at school.

2 Learner dress codes at schools: South Africa as the benchmark

There are many South African schools that still resort to a punitive approach towards school discipline, in spite of the fact that a preventative approach appears to be more effective.²⁸ The most basic, obvious preventative measure is the creation of a Code of Conduct for learners, as prescribed in the *Schools Act*,²⁹ which becomes enforceable once it has been adopted by all of the relevant parties. Supported by

26 Thomas, Cambron-McCabe and McCarthy *Public School Law* 128.

27 *Federal Constitution of the United States of America* 1787 (hereafter *US Constitution*) First Amendment.

28 Rossouw 2003 *Koers* 427.

29 Section 8 *SA Schools Act*, which stipulates that School Governing Bodies need to approve learners' Codes of Conduct only after having duly consulted with their school's learners, parents and educators, while seeking to create a disciplined and purposeful environment which would assist in providing effective education and learning at school.

item 1.4,³⁰ such a Code of Conduct should be aimed at upholding "positive discipline; ...[and should] not ...[be]...punitive and punishment oriented". Although such a Code of Conduct forms a part of subordinate legislation it needs to reflect the democratic principles of the *SA Constitution* by supporting the rights to human dignity, equality and freedom.³¹ The former value (human dignity) is of actual relevance to this article and is specifically mentioned in the Guidelines for Codes of Conduct.³² Moreover, the latter document also points out the importance of advancing learners' fundamental rights which include, among others, those pertaining to religion and culture.³³

In order to minimise or eliminate disciplinary problems among learners, the Minister of Education has provided Guidelines on Uniforms.³⁴ These are intended to support School Governing Bodies and include information³⁵ aimed at ensuring that state schools establish and maintain dress codes for learners that do not infringe on any of their constitutional rights.

As the learners at a school are obliged to abide by their Code of Conduct, they need to know its contents, which have to include (a) a register clearly pointing out the expected conduct and the disallowed conduct, (b) what the grievance procedures are; and (c) the format of the due process that is guaranteed when the school carries out a fair hearing.³⁶

In response to the modern increased incidence of violence, the Guidelines on Uniforms³⁷ point out the possibility of school uniforms (a) actually easing disciplinary problems at school level; and (b) enhancing school security.³⁸ These features are reminiscent of the US stance pointed out in the US section below.

30 *Guidelines for Codes of Conduct*.

31 First reference in s 1(a) *SA Constitution*.

32 Section 4.3 *Guidelines on Uniforms*.

33 Section 3.2 *Guidelines for Codes of Conduct*, which refers to expanding learners' fundamental rights, and s 4.3, which refers to holding others' beliefs and cultural observances in high regard.

34 Section 29 *Guidelines on Uniforms*.

35 *Guidelines on Uniforms*, at five headings with (1)–(8) paragraphs.

36 Specifically ss 1 and 3.4 *Guidelines for Codes of Conduct*.

37 *Guidelines on Uniforms*.

38 Sections 5 and (5) under "School Uniforms as Part of an Overall Safety Programme" of *Guidelines on Uniforms*.

Two headings of the section on *Other Factors and Issues* of the Guidelines on Uniforms³⁹ are of particular significance for South Africa.

2.1 *Religious / cultural diversity and freedom of expression*

2.1.1 *A general description of the terms*

Although no definitions are offered either in the *SA Constitution* or the Religion and Education Policy, South Africa's policy of honouring cultural diversity is reflected in the frequent use in the relevant legislation and regulations of words such as *culture* and *religion*.⁴⁰ In this article the word *culture*, as it is found in sections 30 and 31,⁴¹ will be used to refer to a people's way of life,⁴² which could include wearing similar attire and sharing similar convictions.

The latter aspect, the sharing of convictions, links up with how *religion* could be seen to form part of culture⁴³ in the sense that how people think about God is generally thought to influence how they live their lives.⁴⁴ In other descriptions religion is thought to indicate a commitment to some tenet or rule, and to reverence of some kind,⁴⁵ which again could include abiding by certain requirements in dress.

A legal discussion of what *freedom of expression* is would be very lengthy. In this article the phrase is taken to refer to the fundamental right to communicate through one's choice of behaviours,⁴⁶ which would include wearing religious or cultural dress. This wider interpretation of section 16,⁴⁷ which seems otherwise to read as a clear-cut protection of the freedom to speak out or perform artistically, follows from the Constitutional Court's decision in *De Reuck v Director of Public Prosecutions*

39 The headings "Religious and Cultural Diversity", and "Freedom of Expression" as they appear under "Other Factors and Issues" in *Guidelines on Uniforms*.

40 *Religion and Education Policy*; Rautenbach, Jansen van Rensburg and Pienaar 2003 *PELJ* 4, where they point out ss 9, 30, 31, 181, 184-186, 235 and Schedules 4 and 5 as referring to culture, cultural life, cultural community and cultural heritage; ss 9, 15-16, 31 and 37 as referring to religion, conscience, thought, belief and opinion.

41 *SA Constitution*.

42 Currie and De Waal *Bill of Rights Handbook* 629.

43 Rautenbach, Jansen van Rensburg and Pienaar 2003 *PELJ* 6.

44 Malherbe 2006 *TSAR* 629.

45 Onions *Shorter Oxford English Dictionary* 1697.

46 Currie and De Waal *Bill of Rights Handbook* 363.

47 *SA Constitution*.

(*Witwatersrand Local Division*).⁴⁸ Yet it could occur that the limitation of rights is found to be more applicable to communicative behaviour than to speech as such, which would be a situation like that which prevails in the US.⁴⁹ At school level the warning is sounded that if learners were to wear something different than the school uniform, it should never disrupt disciplined education or impede others' fundamental rights.⁵⁰

2.1.2 A formal stance on advancing learners' fundamental rights

Taking care not to impede learners' access to education and not to infringe on any of their constitutional rights,⁵¹ the Department of Education has taken the following stance on the wearing of school uniforms:

- (1) A school uniform policy or dress code should take into account religious and cultural diversity ... Measures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement.
- (2) If wearing a particular attire ... is part of the religious practice of learners or an obligation, schools should not, in terms of the Constitution, prohibit the wearing of such items. Male learners requesting to keep a beard as part of a religious practice may be required ... (to) produce a letter ... substantiating the validity of the request. The same ... is applicable to those who wish to wear a particular attire.
- (3) The uniform policy of a school ... should accommodate the wearing of ... ribbon(s) or badges of approved charity organizations ... Such items should not contribute to disruption by substantially interfering with discipline or with the rights of others... A uniform policy may ... prohibit items that undermine the integrity of the uniform ... such as a T-shirt that bears a vulgar message or covers or replaces the type of shirt required by the uniform.⁵²

Currie and De Waal⁵³ point out that, reading section 15 of the *Constitution*⁵⁴ together with the equality clause,⁵⁵ the State is prohibited from discriminating against any specific religious group. It thus follows that the South African right to freedom of

48 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) para 48.

49 Currie and De Waal *Bill of Rights Handbook* 363, where they point out that this is typically the US practice in that the latter may legally control behaviour in cases where the government pays no attention to the content of what the behaviour is trying to put across.

50 Section 3 under the heading "Freedom of Expression" in *Guidelines on Uniforms*. This is reminiscent of s 16(2) of the *SA Constitution* which points out that not all types of expression are constitutionally protected.

51 Section 2 *Guidelines on Uniforms*.

52 Sections 29, (1), (2) and (3) *Guidelines on Uniforms*.

53 Currie and De Waal *Bill of Rights Handbook* 338.

54 Freedom of religion, belief and opinion.

55 Section 9(3) *SA Constitution*.

religion includes both a free exercise and an equal treatment component. Moreover, the *Taylor-case*⁵⁶ confirmed the possibility of the horizontal application of this right, implying that the right accrues not only to groups but also to the behaviour of individual persons.⁵⁷

*Khumalo v Holomisa*⁵⁸ deserves attention in this regard, since this was the first case in which the Constitutional Court applied the direct horizontal provisions⁵⁹ of the Constitution. The applicants relied on the right to freedom of expression,⁶⁰ which the Constitutional Court described as an important right constitutive of both democracy and individual freedom.⁶¹ However, the Court noted the additional relevant constitutional issue of the reverence of human dignity, which accords value not only to an individual's personal sense of self-worth but also to the public's estimation of the worth or value of the individual.⁶² Law needs to strike an appropriate balance between the two constitutional interests.

One of the benefits found in a direct application of horizontal provisions could be seen in the generous approach to standing which the courts apply in fundamental rights litigation.⁶³ Moreover, a litigant could hold redress in the form of weakening the validity of a course of action that follows a finding of incompatibility between a specific course of action and the *SA Constitution* as being attractive.⁶⁴

Although it would appear that this right to freedom of religion, belief and opinion is cut and dried, South African fundamental rights can be limited by the State.⁶⁵ However, South African courts seem to be inclined towards not analysing the possibilities of limiting the right to freedom of religion, belief and opinion, but are

56 *Taylor v Kurtstag* 2005 1 SA 362 (W). The applicant tried to stop publication of a notice which would excommunicate him from the Jewish faith. The application was dismissed.

57 *Taylor v Kurtstag* 2005 1 SA 362 (W) para 45, which states that religious rights are directly horizontally applicable.

58 *Khumalo v Holomisa* 2002 5 SA 401 (CC). A well-known politician sued the applicants for defamation that arose from a published article. The applicants lost their appeal.

59 *Direct application* occurs when testing the allegation that an aspect of the common law is inconsistent with the *Constitution*.

60 Section 16 *SA Constitution*.

61 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 21.

62 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27.

63 Currie and De Waal *Bill of Rights Handbook* 50-51.

64 Currie and De Waal *Bill of Rights Handbook* 51.

65 Section 36 *SA Constitution*.

rather inclined to limit the extent of the right. South African courts therefore do not treat as such every practice that is alleged to be linked to exercising the freedom of religion, belief, conscience and thought.⁶⁶

A possible point of criticism in this regard is that the courts, when settling disagreements concerned with individuals' right to "the free exercise of religion", might not scrutinise the applicants' level of dedication to their belief. But the sincerity of the applicants' belief should not be questioned.⁶⁷ Care should always be taken that the rationale behind and the outcome of legislation do not infringe on the freedom of religion.⁶⁸

When deciding to limit the extent of the right to religious freedom, belief and opinion rather than to apply the limitation analysis,⁶⁹ South African courts use at least three techniques:

- Identify the sincerity of the claimant's belief.
- Expect the claimant to prove that the prohibited practice is central to the specific religion.
- Interpret the practice contextually to determine if the *Constitution* specifically excludes it from protection.⁷⁰

As pointed out by Currie and De Waal,⁷¹ thought control could never be justified, since beliefs on their own cannot cause harm. However, we need to distinguish between the actual holding of a belief and expressing the belief in public. This might lead to legitimate reasons for limiting specific practices, such as trying to convert someone to a specific religion.

66 Currie and De Waal *Bill of Rights Handbook* 341.

67 Currie and De Waal *Bill of Rights Handbook* 341. This viewpoint refers to the verdict in the original case of *Christian Education SA v Minister of Education* 1999 9 BCLR 951 (SE) 957-958, where Liebenberg J held that it was fitting for a court to reflect on the sincerity of an alleged belief. Reference is made to Tribe *American Constitutional Law* 1988 1181-1182 and 1249, where it is pointed out that US courts do scrutinise "the believer's sincerity." The US, however, does not have a general limitation clause such as is the case with s 36 *SA Constitution*.

68 Currie and De Waal *Bill of Rights Handbook* 341.

69 Section 36 *SA Constitution*.

71 Currie and De Waal *Bill of Rights Handbook* 341-342.

71 Currie and De Waal *Bill of Rights Handbook* 344.

This article now examines the possibility of school dress codes infringing on learners' fundamental right to religious and cultural diversity, their right to human dignity and their right to freedom of expression. Relevant jurisprudence will be cited to point out the true position held by the courts.

2.1.2.1 Equal protection of learners' religious and cultural rights

One of the greatest challenges in drawing up legislation is ensuring that it is applied fairly and consistently. At school level, the Ministry of Education⁷² reminds the relevant parties that the *SA Constitution* is unequivocal on equality, stating that *everyone is equal before the law* and may not be unfairly discriminated against, among other things, on the grounds of religion and culture.⁷³

In the original case of *Pillay*,⁷⁴ the Durban Equality Court listened to a mother who appeared on behalf of her daughter regarding a nose stud that the learner had started wearing after the school holidays in September 2005. *Pillay* applied for an interdict against the principal, Ms Martin, of Durban Girls' High School, that would prevent her from violating the female learner's right to equality and right not to be discriminated against on the grounds of religion, conscience, belief or culture. The magistrate of the Equality Court found the wearing of the nose stud to be in violation of the code of the school, which, although it was *prima facie* discriminatory, was not as such unfair discrimination on the school's side. This court instructed the learner to adhere to the code or face a disciplinary hearing on the matter.

On first appeal,⁷⁵ the High Court found the school's code that banned the wearing of a nose stud to undermine the values of religious and cultural symbols, and that the dress code sent the message to learners that religious beliefs and cultural practices do not merit the same protection as other rights or freedoms.⁷⁶ Moreover, the court declared that fostering substantive equality involved the understanding that equality includes recognising differences, implying that learners who are not similarly situated

72 SA Ministry of Education 2001 www.info.gov.za.

73 Section 9 *SA Constitution*.

74 *Pillay v MEC for Education, Kwa-Zulu Natal* AR 791/05 2006 ZAKZHC 8 (5 July 2006) (hereafter *Pillay (N)*) originally brought in the Durban Equality Court as case AR 791/05.

75 *Pillay (N)*.

76 *Pillay (N)* 35.

should not be treated alike.⁷⁷ The school was therefore committing what could be regarded as a major contemporary form of unfair discrimination.⁷⁸

Basing its argument mainly on the fact that (a) the High Court had erred in characterising the matter as an equality claim under the *Equality Act*,⁷⁹ (b) the school's code affected all religions equally, and (c) the code had been compiled on the basis of extensive consultation with the relevant parties at school, the applicant made submissions for leave to appeal directly to the Constitutional Court. As they pointed out in their written submission,⁸⁰ this case could have a substantial effect on public schools with cultural diversity among the learners.

The respondent based her submission chiefly on the argument that the school's code failed to provide for *reasonable accommodation*,⁸¹ which would have allowed a reasonable balance between the conflicting interests of the school and her daughter's upholding a South Indian family tradition and cultural custom. In their response, the applicants submitted that allowing such an exemption from the school's code would "impact negatively on discipline at the school and, as a result, on the quality of the education provided."⁸²

In reaching its judgment the Constitutional Court considered, among other issues, the following factors as potentially relevant: (1) the practical effect that an order could possibly have at school level; (2) the importance of the issue at hand; and (3) the complexity of the issue at hand.⁸³ Pointing out in the first case that the department's guidelines⁸⁴ serve only as a guide with no mandatory adherence purported, the Constitutional Court indicated that any order it made would have definite practical relevance. In the second case the matter at hand raised vital questions on the nature

77 *Pillay (N)* 41.

78 *Pillay (N)* 54.

79 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter *Equality Act*).

80 *Pillay (N)* 71 Written Submissions on behalf of the Governing Body Foundation (*amicus curiae*).

81 *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC) (hereafter *Christian Education*) par 42: in some cases the community, such as a school, must take positive measures and even incur extra hardship while allowing all persons to participate in school life and enjoy all their rights equally.

82 *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) (Hereafter *Pillay (CC)*) par 47.

83 *Pillay (CC)* par 32.

84 *Guidelines on Uniforms*.

of the protection granted to cultural and religious rights, specifically at school level. Finally, the varying approaches of both the South African courts and the courts in foreign jurisdictions reflected the importance and complexity of these issues.⁸⁵

The Constitutional Court came to the following conclusions regarding the inadequacies of the code under question:⁸⁶

- The school's code did not set out the process according to which religious and cultural exemptions from existing school uniform rules could be granted.
- Plain round studs or sleepers were allowed as earrings, but not as nose studs.
- Failure of the code to treat the respondent's daughter differently resulted in keeping her from "the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion."
- The code failed to get rid of existing structures of discrimination by insisting on uniformity or similar treatment.

Moreover, the Constitutional Court pointed out that school codes need to contain both realistic boundaries and a stipulated procedure which learners could follow when seeking exemption from a school rule.⁸⁷ If they were framed in such a manner, such codes would then nurture a spirit of reasonable accommodation and avoid acrimonious disputes. The final Constitutional Court judgment consisted of finding (a) that the school had discriminated unfairly against the respondent's daughter at the time,⁸⁸ and (b) that the School Governing Body had to amend the school code, not only to show reasonable accommodation of religious and culturally based deviations, but also to set out the procedure for applying and possibly granting such exemptions.⁸⁹

A critical analysis of the verdict gives rise immediately to three comments. The first comment is that the verdict could create the impression that outward appearance

85 *Pillay (CC)* par 33-35.

86 *Pillay (CC)* par 37, 5, 15 and 17.

87 *Pillay (CC)* par 38.

88 *Pillay (CC)* par 115.

89 *Pillay (CC)* par 117.

related to religious beliefs (such as dress requirements) is treated as distinctively *different*, but not as equal, from other aspects connected to religious beliefs of groups of people, such as the public display of religious symbols, an insistence on the application of corporal punishment,⁹⁰ or the public affirmation of faith at school. If this were the case, it would negate the purpose of the Bill of Rights contained in the *SA Constitution*.⁹¹

The second general comment would be that it could have served the Constitutional Court judgment better if the "child's voice" had been heard⁹² and not just that of the parent. This would have given effect to the best interest of the learner being held in high regard.⁹³

The third comment refers to the mother's basing her original complaint on the cultural characteristics of Hinduism. Would the school not perhaps have reacted more vigilantly and would the School Governing Body not have come to some kind of agreement if Ms Pillay had based her dissatisfaction with the school's handling of the matter on religion instead?

Another author's criticism of the verdict⁹⁴ starts by focusing on this case as having been decided by applying the stipulations of the *Equality Act*⁹⁵ - while in general one might have expected the application of the *SA Constitution* - complicating the possibility of the respondents (a) being able to establish that indirect discrimination did not occur, or (b) that the act that was queried did not occur in terms of any of the proscribed foundations. The complication itself results from a proper construction of section 13,⁹⁶ which places the onus squarely on the respondents to counter these two observations, and which could then result in their being able to show that they had been practising fair discrimination.⁹⁷ However, the Constitutional Court took a firm stance against this last possibility.

90 *Christian Education* par 50-52 where the Constitutional Court found Christian parents at fault for wanting the school to conduct corporal punishment as part of its school disciplinary measures.

91 Chapter 2 *SA Constitution*.

92 In the words of the Chief Justice in the matter of *Pillay* (CC) 264.

93 Section 28(2) *SA Constitution*.

94 Govindjee 2007 *Obiter* 362-363.

95 *Equality Act*.

96 *Equality Act*.

97 Govindjee 2007 *Obiter* 363.

Four other significant points of contention exist when reflecting on the Constitutional Court's verdict:⁹⁸

- Hinduism is acknowledged as not being as dogmatic in its religious requirements as is the case with so many other religions.⁹⁹ It would therefore not be easy to identify whether or not a practice falls within the boundary of the Hindu religion,¹⁰⁰ raising the question of whether or not the nose stud could not perhaps be regarded as forming part of Hindu custom or culture only.
- Hindus vary in their tangible compliance with religious and cultural practices, necessitating more intensive research into the matter in order to guard against providing legal protection to randomly occurring individual practices.¹⁰¹
- This verdict could sound a warning to respondents who face litigation of a similar nature to be prepared to oppose specialist evidence which forms part of applicants' evidence. In this way, the respondent would not be caught off guard concerning "the precise scope and nature" of a specific religion and culture.¹⁰²
- Strain emerges when comparing the wide-ranging safeguard that the *Equality Act* grants¹⁰³ with the more specific safeguard of religious convictions and practices that are supported by the Guidelines on Uniforms.¹⁰⁴

In the final analysis, the feature in the Guidelines on Uniforms that begs closer scrutiny is that the word "culture" appears only once, where the document suggests the need to take due notice of the religious and cultural diversity within the community served by the school.¹⁰⁵ The scrutiny is called for in order to answer at least two questions that now arise, which are (a) if schools are thus afforded the

98 Govindjee 2007 *Obiter* 365-366.

99 Govindjee 2007 *Obiter* 365 and also Arweck, Nesbitt and Jackson 2005 *Scriptura* 330.

100 Govindjee 2007 *Obiter* 365.

101 Govindjee 2007 *Obiter* 366.

102 Govindjee 2007 *Obiter* 366.

103 Protection is afforded against any discrimination based on a list of prescribed grounds.

104 Govindjee 2007 *Obiter* 366.

105 Section (1) of "Religious and Cultural Diversity" in *Guidelines on Uniforms*.

authority to make room for multiplicity within their community and (b) to what degree the courts would embrace such diversity.¹⁰⁶

On a different level, Monayi¹⁰⁷ reports that when an educator confiscated a nine-year-old male learner's goatskin bracelet because it contravened school jewellery rules although his mother had emphasised that he was not wearing it as such, the young boy's behaviour changed dramatically.¹⁰⁸ The bracelet had been given to the young Sibusiso during a religious ritual to protect him according to tradition. It had to come off by itself; otherwise the wearer would fall ill.

While the principal of Olifantsfontein Primary School underlined the fact that their school was not a cultural institution and that they chose to adhere to their school rules, the deputy principal, who was also Sibusiso's rugby coach, suggested that he should wear a long-sleeved shirt that would cover the *isiphandla*. However, he conceded that it would mean compromising their school policy on culture.¹⁰⁹ The Gauteng Department of Education spoke out in support of Sibusiso, indicating that the department could not support a school policy that did not recognise learners' cultures. The Department promised that an investigation would follow.

In terms of the *SA Constitution*¹¹⁰ this could be taken as the Department's requiring that schools frame a "school uniform policy or dress code that takes into consideration religious and cultural diversity within the community served by the school".¹¹¹

A similar incident reported in the media¹¹² recently took place at a school in Gauteng. The principal cut off a string of red and white beads from around a learner's neck and instructed him to fetch a broom to sweep them up. African culture maintains that the beads are to be worn to ward off evil or disease and are also to be worn after the

106 Govindjee 2007 *Obiter* 366.

107 Monayi *Citizen* 3.

108 Monayi *Citizen* 3. He became ill, could not sleep and started talking to himself.

109 Monayi *Citizen* 3.

110 Section 31(1) *SA Constitution*: persons belonging to a cultural, religious or linguistic community may not be denied the right with other members of that community - (a) to enjoy their culture, practise their religion and use their language.

111 Section 29(1) *Guidelines on Uniforms*.

112 Van Rooyen *Sunday Times* 5.

death of a relative. In this instance, the learner was wearing the beads to mourn the death of his mother.

The principal had apparently not heard about the Constitutional Court ruling¹¹³ which held that school rules must accommodate forms of dress that allow the expression of particular cultural and religious beliefs. At a more formal level, the Department of Education has also apparently not yet made concerted efforts to advise schools on these contentious matters.

2.1.2.2 Human dignity and freedom of expression

In the *Antonie*-case,¹¹⁴ a learner challenged a School Governing Body's decision to suspend her from school for five days. She was a fifteen-year-old Grade 10 learner at the time, who took an interest in various religions, converting to Rastafarianism. As an expression of her religious conviction, she proceeded to wear a dreadlock hairstyle which she covered with a black cap for the sake of school discipline. Contending that the learner's conduct had transgressed the school's code, which required hair to be tied up if it is below the collar, the School Governing Body charged her with serious misconduct for defying the school rules, judged her guilty of this, and suspended her from school.

Even though the applicant was not in class when she filed suit, her lawyer argued that the suspension had brought about a blot on her name and had had a negative bearing on her permanent record. The court ruled in favour of the learner and set the suspension aside, agreeing that the punishment could have had both a negative effect on her development and her future career, and also infringed her dignity and self-esteem. The court referred to the official Guidelines for a Code of Conduct¹¹⁵ as a footing for its judgment and underlined the fact that human dignity is a constitutional right.¹¹⁶

113 *Pillay (CC)* par 38.

114 *Antonie* 738.

115 Section 4.3 *Guidelines for Codes of Conduct*: every learner has inherent dignity and has the right to have his/her dignity respected.

116 Section 10 *SA Constitution*: everyone has inherent dignity and the right to have their dignity respected and protected.

Apart from the question of human dignity, the court commented on the application of the right to freedom of expression, explaining that as a constitutional right¹¹⁷ it has an effect on a school's code. The court ruled that the freedom of expression includes factors such as the freedom to choose clothing and hairstyles:

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. However, students' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited as the disruption of schools is unacceptable.¹¹⁸

At school level, it would appear that the Ministry of Education takes a contradictory stance on freedom of expression.¹¹⁹ On the one hand, the Guidelines for Codes of Conduct¹²⁰ point out that "(n)othing shall exempt a learner from complying with the Code of Conduct of the school", yet on the other hand it includes a freedom of expression section¹²¹ which indicates (a) that learners' freedom of expression embraces "the right to ... wear and (b) is widened to outward appearance as seen in clothing selection".¹²² The inference is that if schools were to follow the Guidelines for Codes of Conduct closely, particularly the learners' *right to wear*¹²³ as an aspect of their freedom of expression, it appears that learners might be legally allowed to choose what they wear to school as long as their dress choice does not disturb the school.¹²⁴

It would be interesting to follow South African litigation in coming years since the *Antonie* case might have grave implications both on schools' prescribing uniforms and on the learners' right to freedom of expression. Certainly, the Guidelines on Codes of Conduct need to be revisited to ensure clarity of meaning.

The importance of freedom of expression should be considered.

117 Section 16(1) *SA Constitution* guarantees that everyone has the right to freedom of expression.

118 *Antonie*.

119 Section 3.6 *Guidelines for Codes of Conduct*.

120 Section 3.6 *Guidelines for Codes of Conduct*.

121 Section 3.6 and 4.5.1 *Guidelines for Codes of Conduct*.

122 Section 3.6 *Guidelines for Codes of Conduct*.

123 Section 3.6 *Guidelines for Codes of Conduct*.

124 Section 3.6 *Guidelines for Codes of Conduct*.

2.1.2.2.1 Freedom of expression as a prerequisite for our democracy

Freedom of expression is seen to be vital¹²⁵ when a nation aims at establishing "a democratic social ... order and a legal system based on constitutionalism and fundamental human right",¹²⁶ such as is the case in South Africa. This freedom is thought to rank high in any list of fundamental rights.¹²⁷ This sentiment found expression in the judgment of Kriegler J,¹²⁸ for instance, where he states that the freedom to speak one's mind is "an inherent quality of the type of society contemplated by the Constitution as a whole" and as being advanced specifically by the freedom of expression.

The case *Abrams v United States*¹²⁹ foregrounded the metaphor that freedom of expression creates a marketplace of ideas in the sense that "the ultimate good desired is better reached by free trade in ideas".¹³⁰

While it is exactly this kind of freedom of expression which ensures individual development and self-fulfilment,¹³¹ South Africans should take care to learn from international jurisprudence in this matter.¹³² For example, the case *Police Department of Chicago v Mosley*¹³³ specifically points out that the right to freedom of expression restricts court interference in the US, as:

... the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.¹³⁴

The latter is also referred to as content neutrality.

125 Van der Westhuizen "Freedom of Expression" 264.

126 Section 7(1) *SA Constitution*.

127 Section 7(1) *SA Constitution*.

128 *S v Mamabolo (E TV Intervening)* 2001 3 SA 409 (CC) 425-428 (hereafter *Mamabolo*).

129 *Abrams v United States* 250 US 606 (1919) 630.

130 *Abrams v United States* 250 US 606 (1919) 630.

131 Clayton and Tomlinson *Privacy and Freedom of Expression* 112.

132 Currie and De Waal *Bill of Rights Handbook* 359-360.

133 *Police Department of Chicago v Mosley* 408 US 92 (1972).

134 *Police Department of Chicago v Mosley* 408 US 92 (1972) 95.

South African common law strikes a different balance between protecting an individual's reputation and the right to freedom of expression than is the case in the US.¹³⁵ The First Amendment of the US Constitution ranks their freedom of expression as pre-eminent over all other rights. South Africa, on the other hand, does not grant the freedom of expression superior status, since three covalent values - those of human dignity, equality and freedom - are proclaimed as foundational.¹³⁶

Having looked at the South African perspective, the focus turns to that of the US.

3 The position taken by US schools and courts on student dress codes

In the US, litigation on dress code and school uniforms has been based mainly on the freedom of speech/expression clause rather than on the right to religious and cultural freedom. In fact, there has been relatively little litigation over student religious dress at public schools. This litigation arises under the Religion Clauses of the First Amendment to the US Constitution, according to which "Congress shall make no laws regarding an establishment of religion, or prohibiting the free exercise thereof".¹³⁷ In the case of schools which receive no direct state funding, issues of dress are adequately covered by student handbooks that are essentially contractual in nature. In other words, in non-state schools students and their parents have the option of accepting the terms of the enrollment contracts or moving to other schools. Because of the different status of students in such private schools, this part of the paper examines the situation at US public¹³⁸ schools only.

In the few cases dealing with the religious dress of students at public schools, the courts seem to agree that schools must come up with less restrictive alternatives to placing an explicit ban on the wearing of religious garb. Perhaps the best known case involving student dress arose in California,¹³⁹ where Sikh students sought to

135 *Mamabolo*: the appellant argued that the comments regarding a court order which he published as spokesperson of Correctional Services were not intended to show disrespect to the judiciary. The appellant's conviction and sentence were set aside.

136 Section 1(a) *SA Constitution*.

137 *US Constitution*.

138 I.e. state schools, as opposed to private schools.

139 *Cheema v Thompson* 67 F3d 883 (9th Cir 1995).

wear kirpans or ceremonial daggers as part of their clothing, in violation of a school board's ban on weapons at school.¹⁴⁰ In this case, when the Sikh students filed suit under the *Religious Freedom Restoration Act*,¹⁴¹ claiming that the rule violated their right to the free exercise of religion, the Ninth Circuit affirmed an earlier ruling in their favour.¹⁴² The court held that school officials violated the students' rights by placing a substantial burden on their right to the free exercise of their religion.

The court held that the school officials overstepped their authority because they did not show that a total ban on weapons was the least restrictive alternative available¹⁴³ to promote campus safety. Instead, the court explained, the officials should have developed a plan that would have been more narrowly tailored to advance the board's legitimate goal of maintaining safe schools, such as requiring that the daggers be made non-removable from their sheaths.

In a case that overlaps with issues of dress, when students wore rosaries to their high school as necklaces they successfully challenged a school board policy that would have prohibited them from wearing the beads on the basis that they were perceived to be gang-related apparel. Granting the students' request for an injunction to prohibit officials from enforcing the rule, a federal trial court in Texas decided that school officials violated the students' First Amendment right to free speech, because rosaries were a form of religious expression.¹⁴⁴ The court was also of the opinion that since the students' wearing of the rosaries as necklaces was a form of sincere religious belief, it was protected as a form of the free exercise of their religion.

Although most disputes on US student dress were not contested directly on religious or cultural grounds, it is necessary to examine and understand the courts' views on student dress codes and school uniforms. Presently no state legislature or state department of education mandates the use of student uniforms or specific dress

140 The school district based their position firstly on s 626.10(a) of Ch 1 (Schools) of the *California Penal Code*, that criminalises carrying to school a knife with a blade longer than 2½ inches. Secondly they referred to s 48915(a)(2) of a 1 (Suspension and Expulsion) of the *California Education Code*, that allows expulsion in cases where students carry knives that are "of no reasonable use" to that student.

141 *Religious Freedom Restoration Act* 42 USC 1993.

142 *Senate of California v Mosbacher* 968 F2d (9th Cir 1992).

143 *Senate of California v Mosbacher* 968 F2d (9th Cir 1992) 974-975.

144 *Chalifoux v New Caney Indep School Dist* 976 F Supp 659 (SD Tex 1997).

codes in the US.¹⁴⁵ Many large public school systems have schools with either voluntary or mandatory uniform policies, mostly in elementary and middle schools.¹⁴⁶ The US Supreme Court has held that individuals can and do wear clothing to express ideas and opinions. Any attempt by public schools to regulate the types of clothing worn by their students would therefore infringe upon the First Amendment right to freedom of speech.

In its milestone 1969 decision, *Tinker v Des Moines Independent School District* (*Tinker*),¹⁴⁷ the court declined a school district's prohibiting students from wearing black armbands in objection to the Vietnam War. The court's decision was based on the fact that the school district's policy was viewpoint-specific¹⁴⁸ and did not prohibit other pieces of clothing that voiced contentious viewpoints, including Iron Crosses, which were often seen as symbols of support for Hitler and the Nazis. This aspect of the decision is consistent with a number of later court decisions signalling that viewpoint-specific dress restrictions violate the First Amendment.¹⁴⁹ The court upheld students' right to expressions of a social, political or economic nature, yet it also acknowledged the right of school administrators to set rules and establish behavioural guidelines for students.¹⁵⁰

A critical analysis of the *Tinker* case establishes the principle that while the maintenance of order and the promotion of acceptable standards of classroom conduct are synonymous with ensuring an adequate education system, school officials do not have free reign to abridge students' constitutional rights. Since this case was decided, federal courts have been asked to address numerous cases involving school uniform and dress code policies.¹⁵¹ In some instances these cases have narrowed the application of First Amendment protections to student dress.

145 US Department of Education 1996 www.ed.gov.

146 US Department of Education 1996 www.ed.gov.

147 *Tinker v Des Moines Independent School District* 393 US 503 (1969) (hereafter *Tinker*).

148 *Tinker*.

149 *Wilkins v Penns Grove-Carneys Point Reg'l Sch Dist* 123 Fed Appx 493 (3d Cir 2005); *Jacobs v Clark County Sch Dist* 373 F Supp 2d 1162 (D Nev 2005).

150 Referring to *Hazelwood School District v Kuhlmeier* 484 US 260 (1998), on remand, 840 F2d 596 (8th Cir 1998).

151 For example *Littlefield v Forney* 268 F3d (5th 2001) (hereafter *Littlefield*).

In a more recent case decided in March 2001, the US Court of Appeals for the Sixth Circuit issued a ruling regarding a Kentucky high school's dress code.¹⁵² The court indicated that several criteria were crucial in determining if a school's policy interfered with its student rights under the US Constitution. These criteria included, among others, the following:

1. If the school policy appeared to be viewpoint-specific (as in the *Tinker* case), the court would apply a higher level of scrutiny to the school's proposed regulation.
2. If the disputed clothing was obscene, vulgar, or worn in a manner that disrupted school activity or caused unrest during the school day, the courts would allow school districts more discretion in prohibiting such clothing.

Two important principles relating to student dress codes have emerged in the US. Firstly, voluntary and mandatory student uniforms are gaining popularity in large-city school districts, including Baltimore, Chicago, Houston, Indianapolis, Los Angeles, New York, New Orleans and Philadelphia.¹⁵³ Secondly, courts are declining to take up students' challenges to schools' dress codes. The US Supreme Court declined to suspend a dress code at Poway High School, that is at the centre of a continuing legal fight over free speech and religious rights.¹⁵⁴ Harper, a Poway High School student, sued the Poway Unified School District in 2004, claiming that his rights to freedom of speech and religion had been violated when he was pulled out of class for wearing an anti-gay T-shirt. Harper wore the shirt during the school's *Day of Silence*, which is meant to promote showing tolerance towards gays and lesbians. Harper, a Christian, contended that his religion compelled him to speak out.

In yet another case, decided in January 2001, the US Court of Appeals for the Fifth Circuit upheld the constitutionality of a mandatory public school uniform policy in a Louisiana school district.¹⁵⁵ The court held that the dress policy *will pass constitutional scrutiny* in cases where (a) such policy enhances vital government concern; (b) the concern *is unrelated to the suppression of student expression*; and

152 *Castonia v Madison County School Board* 246 F3d 536 (US Ct App 6th Cir).

153 Thomas, *Cambron-McCabe and McCarthy Public School Law* 133.

154 Moran *San Diego Union Tribune* 1.

155 *Canady v Bossier Parish School Board* 240 F3d 437 (US Ct App 6th Cir) (hereafter *Canady*).

(c) the accompanying limitations on First Amendment actions are *no more than is necessary to facilitate that interest*.¹⁵⁶ The court found that *improving the educational process* (as evidenced by the school district's assertion that the uniform policy reduced disciplinary problems) was a vital government concern. In upholding the imposition of mandatory uniforms, the court noted that the school's policy was viewpoint-neutral and that students could still express themselves through other means during the school day.

In a similar kind of dispute, albeit not one that involved religion directly, the court reached a different result. A federal trial court in Maryland granted a school board's motion for summary judgment when a student relied on the First Amendment right to free speech to wear a head wrap to school to celebrate her cultural heritage.¹⁵⁷ The court reasoned that the school's "no hat" policy did not violate the student's rights because it fostered the important governmental concern of providing a safe, respectful school environment that was conducive to learning, that the policy was not related to the suppression of free expression and was sufficiently narrowly tailored such that it did not place any greater a restriction on the student's rights than was necessary.

In the case of *Littlefield*,¹⁵⁸ parents challenged a school uniform policy adopted by the Forney, Texas school board. The policy prescribed what clothes the students had to wear, but parents requested exemptions for their children. This was denied and parents filed suit against the district. The parents contended that the district's policy violated their rights to control the upbringing and education of their children. The plaintiffs also argued that the policy interfered with students' freedom of expression and forced them to express ideas with which they might disagree. In addition, they asserted that the procedures for opting out of the policy violated their religious freedom by allowing school officials to assess the sincerity of people's

156 *Canady*.

157 *Isaacs v Board of Educ of Howard County Md* 40 F Supp 2d 335 (D Md 1999).

158 *Littlefield*, upholding policy requiring students to wear specific types of shirts or blouses of particular colours with blue or khaki pants, shorts or skirts; specifying that clothing be made of specific materials; requiring certain types of shoes, and prohibiting any clothing suggesting gang affiliation.

religious beliefs.¹⁵⁹ The federal district court summarily dismissed the suit without a trial.

The plaintiff then appealed to the 5th Circuit Court. In its decision the 5th Circuit Court indicated that students' free-speech right to select their own clothes is not absolute,¹⁶⁰ and that this right must be balanced against a school board's stated concerns in adopting a dress code or uniform policy. Further, the court noted that parents could apply for their children to be exempt from wearing school uniform based on philosophical or religious objections or medical necessity; thus, the court found no violation of parents' religious freedom or their Fourteenth Amendment right to direct the upbringing of their children.¹⁶¹

To decide if a specific uniform or dress code is permissible under the *US Constitution's* free-speech clause, the court used a four-pronged test it had previously applied in another school uniform case, that of *Canady*.¹⁶² To be looked upon favourably by the court, (a) the school board must have the power to make such a policy; (b) the policy must promote a vital concern of the board; (c) the adoption of the policy must not be an attempt to censor student expression; and (d) the policy's *incidental* restrictions on

In this case, the 5th Circuit found that all four criteria were satisfied and that the district's school uniform policy therefore did not violate the students' right to free expression. The court also ruled that the parents' rights to control their children's upbringing, including their education, could not override school rules that are considered reasonable in maintaining an appropriate educational environment. In this case the court concluded that the uniform policy was rationally related to the interests of the school board in promoting education, improving student safety, increasing attendance, decreasing dropout rates, and reducing socioeconomic

159 This is reminiscent of the South African example, where Currie and De Waal *Bill of Rights Handbook* 341 criticised courts for scrutinising the level of dedication attached to someone's belief, and where a South African court scrutinised the sincerity of religious conviction (fn 71). Moreover, contrary to these parents' claim, US courts do scrutinise the sincerity of claimants' religious beliefs.

160 *Littlefield*.

161 Lumsden and Miller 2002 www.asbj.com.

162 *Canady*.

tensions among the students. The parents' argument that the opt-out procedure violated religious freedom because it gave school officials the authority to judge the sincerity and content of families' religious belief was also rejected by the court. The court's decision noted that the policy did not have a religious goal, did not have the effect of advancing or hindering any particular faith over any other, and did not excessively entangle school officials in religious beliefs.

A number of courts have endorsed dress codes that forbid the wearing of earrings by male students. In doing so these courts have rebuffed all contentions alluding to the fact that jewellery restrictions had to be applied uniformly to male and female students.¹⁶³ In an illuminating case¹⁶⁴ an Illinois federal district court held that the school district's prohibition of the wearing of earrings by male students was connected realistically to the school's legitimate objective of inhibiting ... (gang influences), since it was common cause that earrings are used to express gang-related messages.¹⁶⁵ Moreover, while conceding the lack of a gang-related validation, an Indiana appeals court nevertheless sustained a school district's prohibition of the wearing of earrings by male students attending elementary schools, arguing in favour of advancing legitimate educational objectives and community values which maintain dissimilar standards of dress for males and females.¹⁶⁶

In the final analysis, although federal appellate courts have not agreed on understanding constitutional safeguards relating to appearance directives, US school officials would be cautious to make certain that they have lawful educational justification for any ... dress code.¹⁶⁷ Schools' guiding principles that are devised (a) to ensure students' health and safety, (b) to cut down on violence and disciplinary problems, and (c) to augment learning will in general be sanctioned.¹⁶⁸

163 Thomas, Cambron-McCabe and McCarthy *Public School Law* 130.

164 *Oleson v Board of Education* 676 F Supp 820 (ND Ill 1987).

165 *Oleson v Board of Education* 676 F Supp 820 (ND Ill 1987).

166 *Hines v Caston Sch Corp* 651 NE 2d 330 (Ind Ct App 1995).

167 Thomas, Cambron-McCabe and McCarthy *Public School Law* 134.

168 Thomas, Cambron-McCabe and McCarthy *Public School Law* 134.

4 Conclusion

This article has examined the different approaches taken in South Africa and the US with regard to public school learners' dress codes. It is evident that US courts base their school dress code findings mainly on the freedom of speech/expression clause, calling on schools to devise less restrictive means and/or to follow viewpoint-neutral policies. However, South African litigation appears to result in courts' insisting that schools follow an accommodating approach and/or be especially wary of unfair discrimination towards previously disadvantaged minority groups.

Blanket exemptions for learners from possible discrimination that force schools to allow for cultural diversity on a free-for-all basis could become problematic. Dreadlocks, henna-painted hands, scarves, goatskin bracelets, loincloths, yarmulkes, Christian crosses, What Would Jesus Do bracelets, Scottish kilts... where would one then draw the line? Or would the line have to disappear completely?

In affording religious conduct constitutional protection, courts in South Africa, like those in the US, must weigh the appropriate balance between the rights to freedom of religion and the State's duty, as carried out by school officials, to legislate for the benefit of the public interest by maintaining safe and orderly learning environments at public schools.

South African courts recently seem to be adopting the stance that learners should be allowed to apply for exemptions from dress code policies that prohibit distinctive religious dress in schools. However, before the courts continue with such a line of reasoning they should perhaps consider the strife that such a position could create. Caution would be wise, perhaps limiting exemptions to case-by-case situations as is the practice in the US, especially where questions arise as to whether learners are voluntarily choosing to dress in religious dress or are being pressured to do so by parents and religious leaders, since this may create the unintended consequence of actually limiting rather than enhancing learners' fundamental rights.

5 Recommendations

Dress codes, especially as they relate to religious garb, create tension as they pit conflicting interests against one another. On the one hand, there is the right of learners to engage in a ritual of youth by expressing themselves through their clothing, and the possible wishes of parents who may expect their children to dress in a particular religious or cultural manner. On the other hand, educators have the duty to maintain orderly and safe learning environments that may require them to impose reasonable limits on learners' expressive activities as reflected in how they dress for class, while maintaining an appropriately non-religious environment in government schools.

As South African educational leaders grapple with setting the appropriate balance between their duty to regulate learner dress and the rights of young people and their parents to express their religious values, the following points should be helpful in framing effective, lawful dress code and school uniform policies. Before acting, schools should consider abiding by the following process:

1. Seek input from community, religious and traditional leaders to advise School Governing Bodies on religious and cultural issues involving dress codes.
2. Consult with parents/care-givers from the design phase to the implementation phase when dealing with dress codes, especially on as sensitive a topic as religion and/or culture. The decision-making authority should certainly not be devolved to parents. It is therefore essential to include educators and learners in the consultative process.
3. Develop clear, concise policies that carefully define if the rules are dealing with dress codes relating to religious dress. These rules must be drawn up as narrowly as possible to avoid restricting the religious rights of students. While no policy can cover every possible situation, officials should typically include language such as "this includes ...but is not limited to ...," in attempts to cover situations that may yet emerge.
4. Review policies annually, typically during breaks between school years, never during or immediately after controversies. Placing this time between a controversy and change will give parents/care-givers, learners and educators

a better perspective. The value in reviewing policies regularly is that, in the event of litigation, leading evidence of the review could go a long way in convincing courts that educators are doing the best that they can to be up-to-date in maintaining safe, orderly schools while safeguarding the expressive rights of learners.

5. Advise the disciplinary committees of School Governing Bodies to evaluate each infringement of dress codes based on its context before passing judgment and deciding on sanctions.

However, having made these recommendations, the authors of this article sound a warning that merely stipulating that religious and cultural dress may be worn at school can lead to confrontation. Schools should therefore be proactive in developing conflict resolution skills to handle such potential conflicts.

Bibliography

Alston, Van Staden and Pretorius 2003 *SAJE*

Alston KG, Van Staden JG and Pretorius JL "The Constitutional Right to Freedom of Expression: How Enforceable are School Rules?" 2003 *SAJE* 23(3) 163-167

Anonymous *Star*

Anonymous 'Striving for Equality' *The Star* 28 May 1998 20

Arweck, Nesbitt and Jackson 2005 *Scriptura*

Arweck E, Nesbitt E and Jackson R "Educating the Next Generation in Universal Values? Hindu-related New Religious Movements and Values Education in the Common School" 2005 *Scriptura* 328-337

Clayton and Tomlinson *Privacy and Freedom of Expression*

Clayton R and Tomlinson H *Privacy and Freedom of Expression* (London Oxford 2001)

Coertzen 2002 *Ned Geref Teol T*

Coertzen P "Freedom of Religion and Religious Education in a Pluralistic Society" 2002 *Ned Geref Teol T* 43(1&2) 185-196

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

De Groof and Lauwers 2001 *Perspectives in Education*

De Groof J and Lauwers G "Education Policy and Law: the Politics of Multiculturalism in Education" 2001 *Perspectives in Education* 19(4) 47-63

Govindjee 2007 *Obiter*

Govindjee A "Of Nose Studs, Beards and Issues of Discrimination - *Pillay v KwaZulu-Natal MEC for Education* 2006 10 BCLR 1237 (N), *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC)" 2007 *Obiter* 357-373

Louw 2005 *Ned Geref Teol T*

Louw LP "Religie-onderwys in die brandpunt: gereedheidsvlak van Suid-Afrikaanse opvoeders vir 'n multireligieuse bedeling" 2005 *Ned Geref Teol T* 46(1&2) 191-199

Malherbe 2006 *TSAR*

Malherbe R "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdiensvryheid" 2006 *TSAR* 629-650

Monayi *Citizen*

Monayi D 'Boy sick without goatskin bracelet' *The Citizen* 16 March 2007 3

Moran *San Diego Union Tribune*

Moran G 'High Court Backs School Dress Code in T-shirt Case' *The San Diego Union Tribune* 6 March 2007 1

Onions *Shorter Oxford English Dictionary*

Onions CT *The Shorter Oxford English Dictionary on Historical Principles* 3rd ed (Clarendon Press Oxford 1964)

Pretorius *Beeld*

Pretorius R "n Geloofsaak' *Beeld* 20 January 1998 8

Rautenbach, Jansen van Rensburg and Pienaar 2003 *PELJ*

Rautenbach C, Jansen van Rensburg F and Pienaar GJ "Culture (and Religion) in Constitutional Adjudication" 2003 *PELJ* 1(6) 2-20

Rondganger and Govender *Star*

Rondganger L and Govender P 'Wrangler over headscarf at Johannesburg school' *The Star* 23 January 2004 3

Roos 2003 *Koers*

Roos R "Legal Requirements for School Rules and Disciplinary Sanctions" 2003 *Koers* 481-498

Rossouw 2003 *Koers*

Rossouw JP "Learner Discipline in South African Schools - a Qualitative Study" 2003 *Koers* 413-436

Snyman 2003 *Ned Geref Teol T*

Snyman AH "Godsdiensoopvoeding op Skool - Enkele Aannames in die Konsepbeleid" 2003 *Ned Geref Teol T* 44(1&2) 500-506

Thomas, Cambron-McCabe and McCarthy *Public School Law*

Thomas SB, Cambron-McCabe NH and McCarthy MM *Public School Law* 6th ed (Allyn and Bacon Boston 2009)

Tribe *American Constitutional Law*

Tribe LH *American Constitutional Law* 2nd ed (Foundation Press Harvard 1988)

Van der Westhuizen "Freedom of Expression"

Van der Westhuizen J "Freedom of Expression" in Van Wyk D *et al Rights and Constitutionalism: The New South African Legal Order* (Juta Kenwyn 1994) 264-291

Van Rooyen *Sunday Times*

Van Rooyen K 'Culture shock - Principal turns a beady eye on boy's tradition' *Sunday Times* 1 February 2009 5

Cases

- Abrams v United States* 250 US 616 (1919)
- Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C)
- Canady v Bossier Parish School Board* 240 F3d 437 (US Ct App 6th Cir)
- Castonia v Madison County School Board* 246 F3d 536 (US Ct App 6th Cir)
- Chalifoux v New Caney Indep School Dist* 976 F Supp 659 (SD Tex 1997)
- Cheema v Thompson* 67 F3d 883 (9th Cir 1995)
- Christian Education SA v Minister of Education* 1999 9 BCLR 951 (SE)
- Christian Education SA v Minister of Education* 2000 4 SA 757 (CC)
- De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC)
- Hazelwood School District v Kuhlmeier* 484 US 260 (1998), on remand, 840 F2d 596 (8th Cir 1998)
- Hines v Caston Sch Corp* 651 NE 2d 330 (Ind Ct App 1995)
- Isaacs v Board of Educ of Howard County Md* 40 F Supp 2d 335 (DMd 1999)
- Jacobs v Clark County Sch Dist* 373 F Supp 2d 1162 (D Nev 2005)
- Khumalo v Holomisa* 2002 5 SA 401 (CC)
- Littlefield v Forney* 268 F3d 275 (5th Cir 2001)
- MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC)
- Oleson v Board of Education* 676 F Supp 820 (ND Ill 1987)
- Pillay v MEC for Education, Kwa-Zulu Natal* AR 791/05 2006 ZAKZHC 8 (5 July 2006)
- Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (N)
- Police Department of Chicago v Mosley* 408 US 92 (1972)
- S v Mamabolo (E TV Intervening)* 2001 3 SA 409 (CC)
- Senate of California v Mosbacher* 968 F2d 974 (9th Cir 1992)
- Taylor v Kurtstag* 2005 1 SA 362 (W)
- Tinker v Des Moines Independent School District* 393 US 503 (1969)
- Wilkins v Penns Grove-Carneys Point Reg'l Sch Dist* 123 Fed Appx 493 (3rd Cir 2005)

Register of legislation

California Education Code 1977

California Penal Code 2009

Children's Act 38 of 2005

Constitution of the Republic of South Africa, 1996

Federal Constitution of the United States of America 1787 (as amended)

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Religious Freedom Restoration Act 42 USC 1993

South African Schools Act 84 of 1996

Register of government publications

Gen N 776 in GG 18900 of 15 May 1998 (*Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners*)

Gen N 1307 in GG 2549 of 12 September 2003 (*National Policy on Religion and Education*)

GN 173 in GG 28538 of 23 February 2006 (*National Guidelines on School Uniforms*)

Register of internet sources

Lumsden and Miller 2002 www.asbj.com

Lumsden I and Miller G 2002 School Dress Codes and Uniforms *American School Board Journal* www.asbj.com/2002/03/0302schoollaw.html [date of use 11 Mar 2010]

SA Ministry of Education 2001 www.info.gov.za

South African Ministry of Education 2001 Manifesto on Values, Education and Democracy www.info.gov.za/view/DownloadFileAction?id=70295 [date of use 11 Mar 2011]

US Department of Education 1996 www.ed.gov

United States Department of Education 1996 Manual on School Uniforms www.ed.gov/updates/uniforms.html [date of use 11 Mar 2010]

List of abbreviations

Ned Geref Teol T	Nederduitse Gereformeerde Teologiese Tydskrif
PELJ	Potchefstroom Electronic Law Journal
SAJE	South African Journal of Education
TSAR	Tydskrif vir die Suid-Afrikaanse Reg