#MINORMATTERS

SOUTH AFRICAN CASE LAW ON RELIGIOUS FREEDOM RELATED ISSUES

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Christian Education South Africa V. Minister of Education (Case CCT 4/00) Decided on 18th August 2000

This case focused on the issue of whether prohibiting corporal punishment in schools violated the rights of parents who consented to the use of corporal punishment in line with their religious convictions. This issue arose due to Section 10 of the South African Schools Act (the Schools Act) in 1996 stating that "No person may administer corporal punishment at a school to a learner."

The case was filed by a voluntary association, which is an umbrella body of 196 independent Christian schools at the South-Eastern Cape Local Division of the High Court and thereafter came up in appeal at the Constitutional Court. They stated that the prohibition of corporal punishment was an infringement of their individual, parental and community right to freely practise their religion. The appellants also stated that the relevant section in the legislation violated the constitutionally guaranteed right to privacy, education, language and culture and the rights ensured to cultural, religious and linguistic communities.

The respondent in this case was the Minister of Education. He stated that inflicting corporal punishment violated constitutionally guaranteed rights such as the right to equality, human dignity, freedom and security of the person and the right of the child to be protected from maltreatment, neglect, abuse or degradation. The respondent also stated that banning corporal punishment was a current trend seen in other democratic nations and that South Africa was bound to ban this form of punishment in light of its international commitments such as to the Convention Against Torture and the Convention on the Rights of the Child. The respondent argued that though the parents may continue to punish their children in this manner, the school should not do so. The respondent also stated that this was an effort to bring the education system in line with constitutional principles and to ensure uniformity among all schools in the country irrespective of whether they were public or independent schools.

The Court took note of the fact that the Act only prevented the school from carrying out corporal punishment and did not in any way hinder the parents from bringing up their children in line with their beliefs. Reference was made to the Canadian case of P v S where it was stated: "… Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion." The court was of the opinion that the respondent's argument that granting exemption from this law to those of a particular faith will breach the right to equality of others was not convincing, and the Court substantiated its position by citing the case of Prinsloo v Van Der Linde and Another where the Court stated that "…the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect."

Dealing with the infringement of the child's human dignity, the Court looked at other cases in South Africa and elsewhere, where corporal punishment has been regarded as a violation of human dignity and stated that: "We cannot, however, forget that, on the facts as supplied by the appellant, corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment. Section 10 grants protection to school children by prohibiting teachers from administering corporal punishment. Such conduct happens not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school."

The Court highlighted the fact that the law was also intended to address the past where there had been state sanctioned use of physical force. While respecting the religious beliefs and their ways of correcting children, the Court decided that the law prohibiting corporal punishment should be upheld. The Court pointed out that this does not interfere with parents using corporal punishment on their children and that this law was to prohibit parents from authorising teachers to inflict corporal punishment. This was not considered a violation of freedom of religion, as children are taught other secular norms in school.

"…The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises… When all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption…"

The Court also noted that a curator to represent the children would have enriched the discussion: "…Although both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name… Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue…"

Prince V. President of the Law Society of the Cape of Good Hope (CCT36/00) Decided on 25th January 2002

The appellant is Garreth Prince, who wished to be enrolled as an Attorney-at-Law. He was required to complete community service and register such completion with the Law Society as one of the perquisites to being enrolled as an Attorney. At this point, he disclosed that he had two previous convictions of possession of cannabis and he stated that he will continue to use cannabis as part of his Rastafari religion. As the possession and use of cannabis is an offence under South African law, the Law Society refused to register his contract of community service which would entitle him to become an Attorney, as the Law Society stated that Prince would continue to commit the offence and hence bring the legal profession into disrepute.

Prince challenged the constitutionality of this prohibition on the use and possession of cannabis at the Cape of Good Hope High Court and at the Supreme Court of Appeal and not having received judgments in his favour, he appealed to the Constitutional Court. Prince agreed that the prohibition served a general government interest and therefore only asked that the prohibition was too wide and should allow for exemptions such as for those following the Rastafari religion. The existing exemption was for "…medicinal, analytical or research purposes."

The Court acknowledged that the Rastafari religion was protected under the freedom of religion clauses in the Constitution (Article 15 and 31).

The Attorney General and the Ministry of Health argued that the prohibition was necessary to fight against drugs, to be in line with international obligations and that an exemption for adherents of the Rastafari religion will be difficult to administer. The High Court and the Supreme Court of Appeal agreed with these arguments and held that the legislation cannot be deemed unconstitutional.

The Court emphasised that law enforcement officials will not be able to differentiate between the use of cannabis for illicit purposes and religious purposes as it was not possible to objectively make such a differentiation. In response to this, Prince suggested that a permit system similar to the system adopted for the use of harmful drugs for medicinal purposes, be introduced which was not accepted by the Court, as the Court stated that there will be numerous practical difficulties in enforcing such a system given the looseness of the structure of the Rastafari religion and as "cannabis has not been approved as being suitable for medical use and, in fact, there is no medical exemption that permits it to be used for such purpose", thus exposing the Rastafarians to harm. The Court further stated that "…to make its use for religious purposes dependent upon a permit issued by the state to "bona fide Rastafari" would, in the circumstances of the present case, be inconsistent with the freedom of religion."

The majority judges were of the opinion that the state's international obligations and its duty in the public interest to enforce the law overrode the exemption sought by the Rastafarians and hence concluded that "The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution." Therefore, the Court agreed with the judgment of the Supreme Court of Appeal and dismissed the appeal.

However, certain judges namely, Ngcobo J, Mokgoro and Sachs JJ and Madlanga AJ dissented with this opinion. They stated that the use and possession of cannabis was central to Prince's practice of his religion and that prohibiting this will result in limiting the right of the Rastafari to practice their religion. Therefore, the question left to be answered was whether this limitation was justified in law according to Article 36 of the Constitution and whether the limitation was 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

The dissenting judgment concluded that the prohibition is constitutionally bad and unreasonable as it is too wide and "…proscribes the religious use of cannabis even when such use does not threaten the government interest." Therefore, the minority judgment stated that they can "…declare the provisions of section 4(b) of the Drugs Act and section 22A(10) of the Medicines Act invalid to the extent that they do not allow for an exemption for the religious use, possession and transportation of cannabis by bona fide Rastafari." However, as declaring it invalid with immediate effect will pose a danger to society, the minority judgment stated that they would suspend the declaration by 12 months, thereby giving Parliament time to draw up a suitable alternative that takes into consideration this exception. For these reasons, the dissenting judgment also decided that it cannot provide an interim exemption.

The dissenting judgment made no order on whether Prince's contract of community service should be registered by the Law Society, as they were of the opinion that this will prejudice the Parliament's decision on the matter. However, the dissenting judgment took cognisance of the fact that "… until such time as it is determined whether the appellant falls within the category of persons who may lawfully possess cannabis, the obstacle besetting his way to the profession of attorneys remains."

MEC for Education: Kwazulu-Natal and Others V. Pillay (CCT 51/06) [2007] ZACC 21 Decided on 5th October 2007

This case was filed by the members of the relevant Education Department, the principal and a member of the school governing body against a student Sunali Pillai for wearing a nose stud in contravention of the Code of Conduct of the School which restricts the jewellery that may be worn by the students. Sunali's mother explained to the school, when questioned about this, that the nose stud was worn as part of their cultural and traditional heritage, symbolizing the physical maturity of the girl and as an indication that she is eligible for marriage.

Sunali's mother filed action in the Equality Courts which held that the discrimination was not unfair and that the nose stud could not be worn, including for reasons such as Sunali's mother agreeing to abide by the Code of Conduct when she sent her daughter to this school and that "…no impairment to Sunali's dignity or of another interest of a comparably serious nature had occurred." Sunali's mother then appealed to the Pietermaritzburg High Court which stated that this discrimination was unfair, the rights of different religious and cultural groups were protected in the Constitution, that Indians have long been discriminated in South Africa's past and that "there was no evidence that wearing the nose stud had a disruptive effect on the smooth-running of the School."

It was argued by those opposing the wearing of the nose stud, that uniformity should be maintained in school, that this Code applied to all religions equally, that Sunali could still continue to wear the nose stud at home and that her mother had agreed to the Code when admitting her child to this school. The parties also submitted that the matter was moot as Sunali had left school by then and as new guidelines had been issued. However, the Court decided that the matter can still be adjudicated upon as it would have a practical benefit for those facing similar issues in the future, and as the new guidelines were not mandatory.

The Court went on to recognise that the Constitution extends protection of culture and that this protection is not limited to "those who happen to speak with the most powerful voice in the present cultural conversation." The Court also stated that it would have been better if Sunali herself had been called to testify. Sunali's persistence in wearing the nose stud despite treatment from her peers and prefects as well as the media attention "points to the conclusion that Sunali held a sincere belief that the nose stud was part of her religion and culture." The Court took cognisance of the fact that "…the nose stud is not a mandatory tenet of Sunali's religion or culture…But the evidence does confirm that the nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that Sunali regards it as such." The Court stated that "Sunali was discriminated against on the basis of both religion and culture in terms of Section 6 of the Equality Act."

The Court was also of the opinion that the School's argument about Sunali having the freedom to wear the nose stud while at home cannot be accepted as the "symbolic effect of denying her the right to wear it for even a short period…sends a message that Sunali, her religion and her culture are not welcome."

The Court also decided that the ban on the nose stud limited Sunali's right to express her religion and culture, which are an integral aspect of the freedom of expression. The Court also stated that granting an exemption to Sunali will not negatively impact discipline in the school.

Thus, the Court concluded that Sunali had been unfairly discriminated. The Court ordered the school to revise the Code to allow for exemptions on religious and cultural grounds and for the necessary procedures relating to such exemptions.

One of the judges – Justice O'Regan dissented partially in this matter, stating that the matter was moot and therefore the Court need not declare that Sunali's rights have been infringed. However, he agreed that the Code of Conduct of the school should be revised.

Organisasie Vir Godsdienste-Onderrig En Demokrasie V. Laerskool Randhart and Others (29847/2014) Decided on 27th June 2017

This case was filed, with six main declarations being sought against specific public schools as well as public schools in general. It was sought to have declared as a breach of the National Religion Policy and as unconstitutional a range of propositions, which included, "including promoting only one religion in favour of others; associating itself with any particular religion; requiring of a learner to disclose (to the school) adherence to any particular religion; and permitting religious observances during school programs on the basis that a learner may elect to opt out."

In addition, seventy-one interdicts were sought against six specific schools including for the schools "holding itself out as a Christian school", "having a value that includes learners to strive towards faith", endorsing the school as having a Christian character, recording that its school badge represents the Holy Trinity, recording as part of its mission statement that "we believe", having religious instruction and singing, handing out Bibles, opening the school day with Scripture and explicit prayer dedicated to a particular God and referring to any deity in a school song, to mention a few.

The main argument was that the conduct of the schools is offensive to the Constitution and to the National Religion Policy. The schools on the other hand argued that they too have freedom of religion, that they are legally entitled to have an ethos of character and that the school governing body is entitled to determine this ethos or character with reference to the religious make-up of the feeder community that serves the particular school. The applicants argued that even if all the students from the particular feeder area were adherents of a particular religion, the school was yet not entitled to adopt one particular religion, as that would be in violation of Article 15(1) of the Constitution which provides that "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

Further, the applicants argued that Article 15(2) which provides that "Religious observances may be conducted at state or state-aided institutions, provided that— (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary" was not applicable in this instance, as the Article stated that the observances may be conducted 'at' at the school (by someone else) and not 'by' the school. The Court referred to the fact that the Court has generally taken a neutral position when adjudicating on state and religion. The schools argued that the National Religious Policy does not constitute law, to which the Court agreed, stating that however it has policy value. The Court stated that the applicant either needs to show that the conduct of the schools is not in line with the relevant law or that the relevant law is unconstitutional.

The Court stated that the school governing body has taken into consideration what is equitable, or free and voluntary, and has also set out a rule that legitimises the conduct. The Court also concluded, that as the diversity of the nation should be celebrated and has even been recognised in the constitution, a public school should not hold out itself as having adopted one particular religion: "In the circumstances we issue the following order: (a) It is declared that it offends s.7 of the Schools Act, 84 of 1996 for a public school – (i) to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly only one religion to the exclusion of others; and (ii) to hold out that it promotes the interests of any one religion in favour of others…"