

Upholding the Rastafari religion in Zimbabwe: *Farai Dzvova v Minister of Education, Sports and Culture and Others*

Mtendeweka Owen Mhango*

Lecturer in Law, University of the Witwatersrand, South Africa

Summary

This discussion deals with a unanimous decision by the Supreme Court of Zimbabwe, ruling that the expulsion of six year-old Farai Dzvova from the Ruvheneko Government Primary School because of his expression of his religious belief through wearing dreadlocks is a contravention of section 19 of the Constitution of Zimbabwe. This contribution argues that the judgment in Farai is progressive and should be welcomed. It further argues that the reasoning by Cheda J, demonstrating why Rastafari qualifies as a religion under section 19 of the Constitution of Zimbabwe, should be welcomed particularly as progressively realising and promoting religious rights in Zimbabwe, and that it adds to the growing progressive religious jurisprudence in Southern Africa. It is further noted that the decision will likely have the effect of reversing similar rules or regulations which prohibit Rastafari learners from attending public schools on account of their dreadlocks in Southern Africa. The contribution criticises previous decisions by the Zimbabwe Supreme Court and the South African Constitutional Court that recognised Rastafari as a religion without explaining why this was done.

* BA (Morehead State, USA), LLM (Wayne State, USA), JD (Michigan State, USA); Mtendeweka.Mhango@wits.ac.za. I would like to thank Prof Marius Pieterse and Ms Ntombizozuko Dyani for their useful comments and recommendations on an earlier draft.

1 Introduction

In *Farai Dzvova v Minister of Education, Sports and Culture and Others*,¹ the applicant and father of six year-old Farai Dzvova (Farai), on behalf of Farai successfully challenged the decision of the Ruvheneko Government Primary School (School) to expel Farai from the school on account of his Rastafarian (Rastafari) dreadlocks. He argued that the school's decision to expel Farai from the school on account of his Rastafari dreadlocks violated section 19(1) of the Constitution of Zimbabwe.² In a unanimous decision by the Supreme Court of Zimbabwe, Cheda J ruled that the expulsion of Farai from the school because of his expression of his religious belief through wearing dreadlocks is a contravention of section 19 of the Constitution of Zimbabwe. This judgment confirmed the provisional order and decision of the High Court to allow Farai's enrolment into the school.

This note argues that the judgment in *Farai*, in line with a number of cases upholding the Rastafari religion in Southern Africa,³ is progressive and should be welcomed. It is further argued that the reasoning by Cheda J, which demonstrates why Rastafari beliefs qualify as a religion under section 19(1) of the Constitution of Zimbabwe, should be welcomed particularly as progressively realising and promoting religious rights in Zimbabwe, and that it adds to the growing progressive jurisprudence on religion in Southern Africa. It is further noted

¹ Judgment SC 26/07 (2007) ZNSC 26, <http://www.saflii.org> (accessed 31 January 2008). See also L Nkatazo 'Supreme Court lifts ban on dreadlocks' (October 2007) <http://www.NewZimbabwe.com> (accessed 31 January 2008).

² Sec 19(1) of the Constitution of Zimbabwe provides that '[e]xcept with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to manifest and propagate his religion or belief through worship, teaching, practice and observance'.

³ *Antonie v Governing Body, Settlers High School & Others* 2002 4 SA 738 TPD (reversing a decision of a school governing body to suspend a Rastafarian student on account of his dreadlocks); *In re Chikweche* 1995 4 BCLR 533 (ZS) (reversing the decision of the High Court to refuse the admission of a Rastafari attorney as a practitioner into the Zimbabwe Law Society); and see *Pillay v MEC for Education, KwaZulu-Natal* CCT 51/06 (2007) (unreported) (where Ms Navaneethum Pillay successfully challenged, on behalf of her daughter Sunali Pillay, the decision of Durban Girls High School to prevent Sunali from wearing a nose stud to school. She argued that the school's refusal to permit Sunali to wear the nose stud at the school was an act of unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Chief Justice Langa, who wrote the majority judgment of the South African Constitutional Court, agreed and ruled that the school's actions amounted to unfair discrimination); see also *Pillay v MEC for Education, KwaZulu-Natal & Others* 2006 6 SA 363 (EqC); 2006 10 BCLR 1237 (NPD) (where the High Court found in favour of Ms Pillay, the applicant in the case).

that this decision will likely have the effect of reversing similar rules or regulations that prohibit Rastafari learners from attending public schools on account of their dreadlocks in Southern Africa.⁴ In light of the Zimbabwe Supreme Court's analysis of what constitutes a religion, this note criticises previous decisions by the same court and the South African Constitutional Court that recognised Rastafari as a religion without explaining their conclusions.

2 The background of the case

The case was an appeal heard by the Zimbabwe Supreme Court following a provisional order by the Zimbabwe High Court. The facts which led to this appeal are the following: In March 2005, Farai was enrolled in Grade O at the school, in line with the new education policy of the Ministry of Education, which requires that pre-schools be attached to primary schools, to allow learners to automatically progress to primary school from the pre-school.

According to his founding affidavit submitted to the Supreme Court, the applicant and his customary wife, Tambudyazi Chimedza, are the Rastafari parents of Farai. They both have been practising the Rastafari religion for almost a decade. He stated that they initially attended Chimanuka Rastafari House in St Mary's, which is the headquarters of the National Rastafari Council. He added that in 2002 they opened a branch of the church in Glen Norah for which he is the Priest. At Glen Norah, church services are held every Saturday and in good weather they begin the preceding Friday evening.

The applicant also stated that it is an integral part of the Rastafari faith that they take certain vows as part of their religion. One of these vows is the Nazarene Vow, which requires that they do not eat refined food, but only eat food in its natural state. Further to this, they are required to refrain from drinking alcohol, and central to this is their vow not to cut their hair; adding that these vows are biblically mandated.⁵ Therefore, the applicant stated that Farai, in line with the family's religion, could not cut his hair.

According to the applicant, Farai's hair had never been cut before or during pre-school, in accordance with the family's religious beliefs. Instead, Farai wore dreadlocks until he graduated from pre-school.

⁴ MO Mhango 'The constitutional protection of minority religious rights in Malawi: The case of Rastafari students' (2008) 52 *Journal of African Law* 2 (discussing that in Malawi Rastafari students are prevented from attending public schools on account of their dreadlocks).

⁵ See King James Version, Numbers Chapter 6:1-6.

Following his graduation, Farai was enrolled in the primary school. His fees were paid up and all the necessary books and stationery were purchased. In January 2006, the applicant was called to the school to discuss the issue of Farai's hair with the headmaster. By this time, Farai was being detained and no longer attended classes with the other children.

On 27 January 2006, the headmaster of the school ordered a letter to be sent to the applicant regarding Farai's hair. It stated as follows:

You are cordially advised that one of our regulations as a school is that hair has to be kept very short and well combed by all pupils attending Ruvheneko Government Primary School, regardless of sex, age, race or religion. You are therefore being asked to abide by this regulation, failure to which you will be asked to withdraw or transfer your child, Farai Benjamin Dzvova, to any other school. This is to be done with immediate effect.

Following this letter, the applicant discussed the matter with the deputy headmaster and teacher in charge, who maintained that they could not accept Farai's continued enrolment at the school as long as his hair was not cut to an acceptable length. According to the school rules that were at the heart of the dispute, 'all pupils [are required] to have short brush hair regardless of sex, age, religion or race'.⁶ The applicant also unsuccessfully discussed the matter with the headmaster and the regional education officer. Following these unsuccessful negotiations with the education authorities, the applicant lodged an application to the High Court and obtained the following provisional order pending the resolution of the matter by the Supreme Court:

- (i) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.
- (ii) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:
 - (a) separating Farai Benjamin Dzvova from his classmates;
 - (b) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;
 - (c) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.

⁶ Ruvheneko Government Primary School, January 2005 School Rules for All Pupils, cited in *Farai*.

3 The issues and analysis of the Supreme Court

3.1 How does Rastafari qualify as a religion?

The case was referred to the Supreme Court to determine whether the exclusion of Farai was done in accordance with the authority of a law as envisaged in section 19(5) of the Constitution and, if so, whether such a law is reasonably justifiable in a democratic society. Section 19(5) provides as follows:

Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision –

- (a) in the interests of defence, public safety, public order, public morality or public health;
- (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion or belief without the unsolicited intervention of persons professing any other religion or belief; or
- (c) with respect to standards or qualifications to be required in relation to places of education, including any instruction, not being religious instruction, given at such places;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

However, before addressing this issue, the Supreme Court had to determine whether the application before it fell within the ambit of section 19(1) of the Constitution. In order to address this question, the Supreme Court had to enquire whether Rastafari is a religion for the purposes of section 19(1).

The Supreme Court began its analysis of the inquiry by noting that in 2002 the applicant opened a branch of the Rastafari Church in Glen Norah of which he is the priest. It also noted that services at this church are held every Saturday or Sabbath day. The Supreme Court was convinced that this shows that the Rastafari organisation conducts services for worshipping purposes on weekends, and by the fact that the Rastafari religion is based on the Bible, which it noted was also the basis for many other religions. The Supreme Court also relied on the *New English Dictionary on Historical Principles, VIII* for its definition of religion. According to this definition, religion is:

- 1 a state of life bound by monastic vows;
- 2 a particular monastic or religious order or rule;
- 3 action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;
- 4 a particular system of faith and worship;
- 5 recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or

the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.

- 6 devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment.

The Supreme Court was further convinced by what was said by the applicant in his affidavit concerning the Rastafari religion, which it concluded fell within the above descriptions. The Supreme Court also referred to the United States cases of *Reed v Faulkner*⁷ and *People v Lewis*⁸ and the United Kingdom case of *Crown Supplies v Dawkins*,⁹ in which it was held that Rastafari is a religion. Therefore, this compelled the Supreme Court to conclude that Rastafari was a religion for purposes of section 19(1). It is submitted that the foregoing aspect of the ruling should be particularly welcomed because it clarifies why Rastafari qualifies as a religion under section 19(1) of the Constitution of Zimbabwe.

3.2 The importance of religious freedom in Zimbabwe

The Supreme Court also put special emphasis on the importance of the protection of the rights of the individual against discrimination on religious grounds in section 19 of the Constitution of Zimbabwe. It noted several decisions that dealt with the nature and content of the right to freedom of religion. Among them is the decision in *In re Munhumenso and Others*,¹⁰ where it was confirmed that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, stipulated in the Constitution. On the importance of the right, the Supreme Court approved of the decision by the South African Constitutional Court in *Christian Education of South Africa v Minister of Education*,¹¹ which held that the protection of religious right is the cornerstone of human rights. In that case it was remarked that

religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.

Lastly, the Supreme Court referred to the English case of *The Queen, on application of SB v Head Teacher and Governors of Denbigh High School*,¹² for the proposition that it is important to respect one's genuine religious

⁷ 842 F2d 960 (7th Cir 1988).

⁸ 510 NYS 273 (1986).

⁹ (1993) 1 CR 517 (CA).

¹⁰ 1994 1 ZLR 49.

¹¹ 2000 4 SA 757 (CC).

¹² 2004 EWHC 1389.

beliefs.¹³ In this case, Lord Justice Scott Blake of the Supreme Court of Judicature held as follows:

Every shade of religious belief, if genuinely held, is entitled to due consideration under article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's article 9 right to manifest her religion.

While the Supreme Court's acknowledgment of the special importance of freedom of religion is commendable, it should be criticised for two reasons. First, the Supreme Court fails to give any particular reasons to justify the important status of the right to freedom of religion. It simply states in general terms that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual without specifying why freedom of religion was so special. Secondly, while the Supreme Court correctly relied on South African and English case law for the proposition that freedom of religion is important and that genuinely held beliefs should be protected, it failed to apply its mind and demonstrate the important status of freedom of religion in the context of Zimbabwe. A proper analysis of the unique importance of this right by the Supreme Court should have included, among other things, a historical analysis of the failure by previous governments to protect the freedom of religion and perhaps some articulation of the need to specifically protect this freedom in Zimbabwe. Instead, the Supreme Court spoke about the importance of freedom of religion in general and not in terms specific to Zimbabwe.

3.3 Did the school have the authority to make rules and expel Faraï?

Following a determination and ruling on the preliminary matters before it, the Supreme Court addressed the main question, namely,

¹³ The Supreme Court had previously endorsed this view in *In re Chikweche* (n 3 above, 538), where it held that 'the Supreme Court is not concerned with the validity of attraction of the Rastafari faith or beliefs but only their sincerity'; see also *United States v Ballard* 322 US 78 (1944) (explaining that the sincerity of one's belief was a proper subject for judicial scrutiny); D O'Brien & V Carter 'Chant down Babylon: Freedom of religion and the Rastafarian challenge to majoritarianism' (2002) 18 *Journal of Law and Religion* 219 235-238 (discussing the fact that courts in the United States and, in some cases the Caribbean, have been known to screen claims by reference both to the sincerity of the claimant's religious beliefs and to the centrality of the practice for which protection is claimed); MD Evans *Religious liberty and international law in Europe* (1997) 307 (discussing the fact that the jurisprudence of the European Commission on Human Rights focuses upon the degree to which the practice or activity under consideration represents a necessary expression of a religion or belief); *Pillay* case (n 3 above) para 52 (holding that, in order to determine if a practice or belief qualifies as religious, a court should ask only whether the claimant professes a sincere belief); see, however, *Prince v President, Cape Law Society & Others* 2002 2 SA 794 (CC) para 43 (where the Constitutional Court previously decided against inquiring into the sincerity of a claimant's belief and urged that believers should not be put to the proof of their beliefs or faith).

whether the rules made by the school's headmaster were made under the authority of law.

According to the Supreme Court, the rules that were used to expel Farai from the school were made by the headmaster. Therefore, the question before the Supreme Court was whether these rules were made under the authority of law. In addressing this question, the Supreme Court referred to section 4 of the Educational Act,¹⁴ which provides as follows:¹⁵

- 1 Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education.
- 2 Subject to section (5), no child in Zimbabwe shall
 - (a) be refused admission to any school; or
 - (b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school;
 on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.

In light of the above section, the Supreme Court concluded that the attempt by the school to bar Farai from the school contravenes not only the Constitution, but also the above provision of the Education Act. In interpreting the latter Act, the Supreme Court reasoned that there is nothing in the Education Act which confers powers to the headmaster of a school to make rules or regulations.

The Supreme Court then rejected the argument by the school that its rules were made pursuant to a legal rule. According to the school, the Minister of Education promulgated the Education Disciplinary Powers Regulations (Regulation 362), which was the source of its power to create its rules.¹⁶ In section 2, Regulation 362 provides as follows:¹⁷

Every pupil who enrolls in a government or non-government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff.

The school conceded that the school rules are not law, but argued that they were made under the authority of a law; in particular, the school argued that the school rules were made under the authority of section 69 of the Education Act. This section confers powers to make regulations on the Minister of Education regarding discipline in schools and other related matters. In addressing this argument, the Supreme Court reasoned that section 69 of the Education Act did not confer any powers to make regulations on the headmaster, and that it did not authorise the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a pupil to a school or the type of hair to be kept by pupils. The Supreme

¹⁴ Cap 25:04.

¹⁵ As above.

¹⁶ Regulation 1998 SI 362.

¹⁷ As above.

Court also noted that the Education Act only appointed the Minister, and not the headmaster, to make regulations; that it was also clear that the headmaster of the school was never appointed to the office by the Minister and was never delegated any powers conferred on the Minister. Instead, what was clear, according to the Supreme Court, is that the Minister allowed the school to maintain certain standards at the school, but never authorised the school to make any regulations. Specifically, the Supreme Court noted that section 2 of Regulation 362 clearly specified the powers the headmaster can exercise over a pupil in cases of serious acts of misconduct only.¹⁸

In rejecting the school's argument above, the Supreme Court further reasoned that the relevant provisions of Regulation 362 deal with discipline in the school and obedience to the school staff; that

I understand this to refer to the conduct of behaviour of pupils and obedience to the school staff generally. I do not consider that asking a pupil to conform to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion.

The Supreme Court also noted that there is no suggestion by the school, nor can it be argued that keeping dreadlocks is an act of ill-discipline or misconduct.¹⁹ Rather, it concluded that Farai's dreadlocks are a manifestation of a religious belief and not related to his conduct at the school. Therefore, the Supreme Court was not convinced that Regulation 362 was relevant to the matter of Farai, and ruled that the submission by the school that its rules were made under the authority of a law cannot be correct. Furthermore, the Supreme Court held that the headmaster could not make rules which constituted a derogation from the constitutional rights of the pupil; that the headmaster exceeded his powers, which are stipulated in Regulations 362, and used powers which were never and could never have been lawfully delegated to him.

Having concluded that the school's rules were not made under a law, the Supreme Court held that it was not necessary to consider the issue of justification raised by the school. Lastly, the Supreme Court ordered that Farai be allowed to enrol at the school for purposes of education, and the school was barred from separating Farai from his classmates or in any way discriminating against Farai on the basis of his dreadlocks or religious beliefs.

4 Other attempts to define religion

One of the highlights of the judgment in *Farai* is its attempt to define

¹⁸ As above.

¹⁹ Similarly, the High Court in South Africa overturned a decision of a school governing body that keeping dreadlocks constituted serious misconduct. See *Antonie* (n 3 above).

religion. Prior to this ruling, courts in Southern Africa were reluctant to indicate why the Rastafari religion qualified as a religion.²⁰ Under this analysis, the issue will inevitably arise as to the nature of religion. Instead, most courts were willing only to hold that Rastafari is a recognised religion without any analysis to explain their conclusions.²¹ For example, in *In re Chikweche*, a case involving a Rastafari lawyer who had been denied admission as a practitioner by the High Court in Zimbabwe where, after referring to foreign case law, the Supreme Court accepted that Rastafari is a religion without demonstrating why it qualified as a religion under section 19(1) of the Constitution of Zimbabwe. It was in fact necessary in this case for the Supreme Court to show this because, in a concurring opinion by McNally JA, he disagreed with this conclusion when he stated:²²

I have reservations about the classification of [Rastafari] as a religion. But I have no doubt that it is a genuine philosophical and cultural belief, and as such falls under the protection of section 19(1) of the Constitution.

The case of *Prince v President of the Cape Law Society*, decided by the South African Constitutional Court, involved a Rastafari lawyer named Prince who had been denied admission to the Cape Law Society on the basis that, since he had been previously convicted of possession of marijuana, he was not a fit and proper person under the Attorneys Act 53 of 1979. On the question of whether or not Rastafari is a religion, the Constitutional Court made certain assumptions and simply ruled that 'it is not in dispute that Rastafari is a religion, that it is protected by sections 15 and 31 of the South African Constitution'.²³ Unlike in *In re Chikweche*, the South African Constitutional Court in this case relied on the fact that, since no one had disputed the classification of Rastafari as a religion, it was not necessary to demonstrate how Rastafari qualified as a religion.

Recently, in *Pillay v MEC Education, KwaZulu-Natal*,²⁴ the South African Constitutional Court made similar assumptions as in *Prince*, and ruled that Hinduism was a religion for purposes of section 15 of the South African Constitution. I have argued elsewhere that, while Hinduism is a recognised religion, it is in the interests of justice for the Constitutional Court to demonstrate why a religion should be recognised as such and receives protection under the Constitution.²⁵

²⁰ See *Prince* (n 13 above); *In re Chikweche* (n 3 above).

²¹ See *In re Chikweche* (n 3 above) (accepting that Rastafari is a religion based on a review of US case law); *Prince* (n 14 above) (holding that Rastafari is a religion that is protected by the Constitution).

²² *In re Chikweche* (n 3 above) 541.

²³ *Prince* (n 13 above) 804 para 15.

²⁴ *Pillay* (n 3 above).

²⁵ M Mhango & N Dyani 'The protection of religious freedom under the Promotion of Equality and Prevention of Unfair Discrimination Act: *Pillay v MEC for Education, KwaZulu-Natal*' *South African Journal on Human Rights* (forthcoming 2008).

Similarly, the United States Supreme Court has avoided trying to formulate a definition of religion.²⁶ However, the US Supreme Court has considered the issue in a number of contexts.²⁷ The most significant and relevant for our purposes was the definition given in cases arising under the Universal Military Selective Services Act,²⁸ where the US Supreme Court struggled to define religion for purposes of the conscientious objector exemption. The leading cases on this issue are *United States v Seeger*²⁹ and *Welsh v United States*.³⁰ Both cases involved persons (Welsh and Seeger) seeking exemption from the draft on religious grounds. Both Welsh and Seeger affirmed in their applications that they held deep conscientious scruples against taking part in wars where people were killed. They both believed that killing was wrong, unethical, and their consciences forbade them to take part in such an evil practice.

In both cases, the US Supreme Court offered no criteria for assessing whether a particular view qualifies as religious. Instead, the US Supreme Court said that the crucial inquiry in determining whether a person's beliefs are religious is whether these beliefs play the role of religion and function as religion in the person's life.³¹ In attempting to offer a definition, Black J explained that³²

if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly qualify as religious.

According to Chemerinsky, although *Seeger* and *Welsh* involved the US Supreme Court's interpreting a statutory provision and not the First Amendment to the Constitution, they likely would be the starting point for any cases that required the US Supreme Court to define religion under the Constitution.³³

The problem with the approach taken by the courts in *In re Chikweche*, *Prince*, *Seeger* and *Welsh* is that it causes the law to be unclear. These cases should be criticised because of the lack of guidance they provide in determining the nature of a religious belief.³⁴ A judge in a future case has little guidance in deciding what is a belief that is religious or

²⁶ E Chemerinsky *Constitutional law* (2001) 1240.

²⁷ Chemerinsky (n 26 above) 1241.

²⁸ Universal Military Selective Service Act of 1967, 50 USCA App § 456(j).

²⁹ 380 US 163 (1965).

³⁰ 398 US 333 (1970).

³¹ Chemerinsky (n 26 above) 1242.

³² *Welsh* (n 30 above) 340.

³³ Chemerinsky (n 26 above) 1243.

³⁴ However, see Mhango (n 4 above) (where the author, having analysed the decision in *In re Chikweche* and the minority opinion in *Prince*, argues that Zimbabwe and South Africa are progressive in their interpretation of the constitutional right to the freedom of religion).

a movement that qualifies as a religion. Therefore, it is submitted that, regardless of whether none of the parties disputes this issue, courts should address these matters in the interest of justice.³⁵ An argument could be made that the above analysis should not be supported because it would require courts to deal with abstract or hypothetical issues that are not justiciable.³⁶ However, such an argument would not succeed in light of recent judicial interpretations of the justiciability doctrines. For example, in the South African case of *Ferreira v Levin NO*, Chaskalson J explained that³⁷

although it is important that the courts should not devote their scarce resources to abstract and hypothetical issues and that they should deal with issues and controversies properly before them, this does not mean that a narrow approach be taken to applying the justiciability doctrines to constitutional cases.

Instead, Chaskalson suggested as follows:³⁸

We should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

Similarly, in the United States, the US Supreme Court has applied justiciability doctrines in a less strict manner.³⁹ The benefit of engaging in the analysis suggested above (which seeks to demonstrate how a religion is recognised as such) is that it would provide guidance to a future judge in a case. It is also in the interests of justice for the courts to demonstrate why a belief is recognised as religious under the Constitution, because it allows other unrecognised movements or belief systems to get clarification on the law.

The need to define religion might arise in the context of an individual who is seeking an exemption from a law because of views that he or

³⁵ See, eg, *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 33-57 (discussing that a court may address an issue not raised by the parties if it is in the interest of justice and development of common law). See also I Currie *et al* *The Bill of Rights handbook* (2005) 94-95 (discussing justiciability doctrines).

³⁶ Currie *et al* (n 35 above) 80-82 (discussing the justiciability doctrines).

³⁷ *Ferreira v Levin NO* 1996 1 SA 984 (CC); *Pillay* (n 3 above) (where the court took a broad approach on the issue of mootness and ruled that, even if the matter was moot in the sense that the student on whose behalf the case had been brought was no longer a student at the respondent school, it was in the interest of justice to hear the matter because any order which it may make will have some practical effect whether on the parties or others). See also Currie *et al* (n 35 above) 80-82.

³⁸ *Ferreira v Levin NO* (n 37 above) para 165, citing *R v McDonough* (1989) 40 CRR 151 155.

³⁹ Chemerinsky (n 26 above) 72; *United States Parole Commission v Geraghty*, 445 US 388 400; See also E Lee 'Deconstitutionalising justiciability: The example of mootness' (1992) 105 *Harvard Law Review* 605; *Moore v Ogilvie* 394 US 814 (1969); *Roe v Wade* 410 US 113 (1973); and *Defunis v Odegaard* 416 US 312 (1974).

she terms religious.⁴⁰ To demonstrate this need, imagine a *sangoma* (a traditional medicine expert) who practises a century-held belief that, if you burn a live monkey's head together with other liquid substances, it has the effect of removing evil spirits in a married couple's home.⁴¹ While this belief might be widely practised in Southern Africa, the practice is not officially recognised. If a conflict were to arise between the beliefs of such a *sangoma* and the South African Animals Protection Act,⁴² would the *sangoma* be protected under the religious clause of a constitution such as section 15 of the South African Constitution? After *Farai*, the law provides a judge in a future case with a framework to determine why such a belief could be recognised and protected under the freedom of religion clauses of many constitutions in Southern Africa.

However, this argument might not have the same effect in the context of section 15(1) of the South African Constitution. According to some commentators, the question as to the nature of religion is superfluous in the context of section 15 of the South African Constitution, because this section also protects rights to freedom of conscience, thought, belief and opinion along with the right to freedom of religion.⁴³ Accordingly, a literal interpretation of section 15(1) is broad and protects an extremely wide range of world views, unlike section 19 of the Constitution of Zimbabwe. The latter section is narrow in its scope, but appears to extend protection to genuinely held religious beliefs and those beliefs which are sincere and based on personal morality, and which extend to conscientiously-held beliefs, whether grounded in religion or secular morality.⁴⁴

As a result, a question as to the nature of religion is most relevant in those countries' constitutions that have a narrow freedom of religion clause, as in the case of Zimbabwe.⁴⁵ This might explain the

⁴⁰ Chemerinsky (n 26 above) 1243.

⁴¹ See I Khumalo 'Cursed by evil muthi' *Daily Sun* (28 November 2007).

⁴² Animals Protection Act 71 of 1962.

⁴³ Currie *et al* (n 35 above) 338.

⁴⁴ *In re Chikweche* (n 3 above) 539.

⁴⁵ The freedom of religion clause in the Zimbabwe Constitution is identical to the Jamaican constitutional provision found in sec 21, and the courts in both countries have defined religion and concluded that Rastafari is a religion. See United Nations, Economic and Social Council, ESC Conference, 24th session, UN Doc E/C.12/2000/SR.75 (2000) (addressing the important relationship between racism and religion, and citing the Jamaican example of Rastafari. The question of racism arose in that context because of the religion's identification with His Majesty Emperor Haile Sellassie of Ethiopia, believed by Rastafari to be the reincarnated Christ. It noted that Jamaican courts have had to decide whether Rastafari was truly a religion and whether the prohibition of some of its sacraments, such as the smoking of cannabis, flouted the right to exercise one's religion. Like in Zimbabwe, the courts in Jamaica have ruled that Rastafari was indeed a religion, but that it did not necessarily follow that practices which disrupted public order were, of themselves, in conformity with rules relating to religious rights).

assumption-based approach by the Constitutional Court in *Prince and Pillay*, and why it has not engaged with the question as to the nature of religion.⁴⁶ Yet, as in the Zimbabwean context, the Constitutional Court has confirmed, in relation to the protection of the freedom of religion, that in order to determine if a practice or belief qualifies as religious, a court should ask only whether the claimant professes a sincere belief;⁴⁷ that a sincerely held religious belief or practice will receive constitutional protection.⁴⁸ Lenta suggests a test for determining whether or not to grant religious exemptions in the South African context. He proposes that several questions be asked, including the following: Is the belief, which seeks to be exempted, genuinely held? Are the beliefs religious?⁴⁹ It is submitted that these questions further demonstrate the need to define religion, even in broadly-worded constitutions such as that of South Africa, because they require courts to define religion and to determine the nature of a religious belief. Therefore, there is a slight possibility that the question as to the nature of religion may not be entirely superfluous in the South African (and Malawian) context in light of these countries' broad freedom of religion clauses. Nevertheless,

⁴⁶ One other explanation of the Constitutional Court's reluctance to decide these matters is its commitment to the doctrine of avoidance which forms part of South African constitutional law. This doctrine holds that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'. See *State v Mhlungu* 1995 3 SA 867 (CC) para 59. This doctrine was affirmed in *Zantsi v Council of State, Ciskei & Others* 1995 4 SA 615 (CC) paras 2-8 (where Chaskalson J referred to the salutary rule which is followed in the United States never to anticipate a question of constitutional law in advance of the necessity of deciding it and never to formulate a rule of constitutional law broader than is required by the facts to which it is to be applied). See also Currie *et al* (n 35 above) 75-78 (discussing the reasons for observing the doctrine of avoidance arguing that courts should avoid making pronouncements on the meaning of the Constitution where it is not necessary to do so, so as to leave space for the legislature to reform the law in accordance to its own interpretation of the Constitution); I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138 (discussing political philosophical reasons for the doctrine of avoidance). In the United States, courts have applied a similar principle of avoidance in the adjudication of constitutional matters. See *Abbott Laboratories v Gardner*, 387 US 136, 148-149 (1967) (explaining that the basic rationale of the doctrine of ripeness is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalised and its effects felt in a concrete way by the challenging parties).

⁴⁷ *Pillay* (n 3 above) paras 52-58 (concluding that since Sunali Pillay held a sincere belief that wearing a nose stud was part of her religion and culture, the practice was considered religious).

⁴⁸ *Pillay* (n 3 above), citing *Prince* (n 13 above) para 42; *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (SCC) para 43; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 paras 70-71; *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 715-716 (1981); *United States v Ballard* 322 US 78, 86-87 (1944); and *In re Chikweche* (n 3 above).

⁴⁹ P Lenta 'Religious liberty and cultural accommodation' (2005) 122 *South African Law Journal* 376.

this question remains relevant in countries like Zimbabwe, Malawi⁵⁰ and, possibly, Swaziland,⁵¹ where *Farai* is likely to have an impact. Therefore, the decision in *Farai* should be welcomed as an addition to the growing progressive religious jurisprudence in Southern Africa and because it clarifies the law and provides guidance to other believers whose beliefs have not been recognised officially as being religious.

5 Conclusion

In *Prince*,⁵² Justice Sandile Ngcobo said that ‘the right to freedom of religion is probably one of the most important of all human rights’.⁵³ In the same case, Justice Albie Sachs reasoned that⁵⁴

where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the state to walk the extra mile, and not subject believers to a choice between their faith and the law.

In *Prince*, both Ngcobo J and Sachs J were not in the majority, and the issue was not the wearing of dreadlocks in public schools. Rather, the issue was whether or not Rastafari should be accommodated under the criminal law of South Africa, allowing for the use of marijuana for religious purposes.

In the case of *Farai*, the practice that was at issue did not fall within the general legal prohibition, as was the case in *Prince*. Rather, the issue dealt with the practice of Farai’s right to freedom of religion and education. It is submitted that in an open and democratic society envisioned

⁵⁰ In Malawi, the relevance of this question is probably not as a result of its constitutional religious clause, which is similar to South Africa’s. Instead, it may arise from the absence of any judicial interpretations of sec 33 of the country’s constitution.

⁵¹ The reference to Swaziland is because in 2000 it was reported that the King of Swaziland disowned several of his nephews for wearing dreadlocks and for subscribing to Rastafari beliefs and practices. See B Matsebula ‘Rasta row shakes Swazi royals’ 28 May 2002 BBC World Service <http://news.bbc.co.uk/1/hi/world/africa/2012793.stm> (accessed 25 December 2007); and see Mhango (n 4 above) (briefly discussing Rastafari beliefs, practices and doctrines).

⁵² n 13 above, 794.

⁵³ *Prince* (n 13 above) 815 para 48.

⁵⁴ *Prince* (n 13 above) 848 paras 147-149. See also *Prince v South Africa* Communication No 1474/2006, UN Human Rights Committee, views adopted on 31 October 2007, paras 5.5 & 7.5. Prince argues that, if exceptions to the prohibition of the use of cannabis could be made for medical and research purposes and effectively enforced by the state party, similar exceptions could also be made and effectively enforced on religious grounds with no additional burden on the state party; that the failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates his freedom to manifest his religion guaranteed under art 18 of the International Covenant on Civil and Political Rights, and cannot be justified under art 18(3) of the same. Prince also argued that he is the victim of *de facto* discrimination because, unlike others, he has to choose between adherence to his religion and respect for the laws of the land.

under the various international instruments,⁵⁵ it should never be justified to prohibit a student from wearing dreadlocks in schools (whether for religious or cultural reasons), because such prohibition manifestly limits the rights of the Rastafari to practise their religion everywhere, and is inimical to human rights and dignity. These kinds of prohibitions, wherever they may be found, stigmatise Rastafari learners and prevent them from enjoying other constitutional rights such as the right to education and the right to be raised by their parents contained in many modern constitutions of Southern Africa⁵⁶ and under international law.⁵⁷

Moreover, no evidence from social science research or otherwise has ever been produced that suggests that the wearing of dreadlocks by learners affects their ability to learn and perform in school, or generally affects the standard of education or discipline in schools.⁵⁸ On the other hand, one never hears questions on whether an African person who bleaches his or her skin and straightens his or her hair is incapacitated in any way. To adopt the approach advocated by this author, defining religion would permit the courts to challenge mainstream (Christian) assumptions over which practices and beliefs are genuine and acceptable in society. The current interpretation of what are acceptable and genuine practices or beliefs, which interprets dreadlocks as being

⁵⁵ See art 29 of the Universal Declaration of Human Rights, GA Res 217 A(III), UN Doc A/810 71 (1948).

⁵⁶ Eg, sec 23(3) of the Constitution of Malawi, 1995, provides that '[c]hildren have the right to know, and to be raised by, their parents'; article 15(1) of the Constitution of Namibia, 1992, provides that '[c]hildren shall have the right to know and be cared for by their parents'; art 7(c) of the Constitution of Swaziland, 2005, provides that '[p]arliament shall enact laws necessary to ensure that parents undertake their natural right and obligation of care, maintenance and proper upbringing of their children'; art 27 of the Constitution of Rwanda, 2003, provides that '[b]oth parents have the right and duty to bring up their children'; art 30(1) of the Constitution of Uganda, 1995, provides that '[m]en and women of the age of eighteen years and above have the right to marry and to found a family'; art 16(1) of the Constitution of Tanzania, 1997, provides that '[e]very person is entitled to the privacy of his family and of his matrimonial life'; arts 43 and 46 of the Transitional Constitution of the Democratic Republic of Congo, 2003, provide that '[f]or parents the care and education to be given to children shall constitute a natural right; and the parents shall, by priority, have the right to choose the type of education to be given to their children'; and sec 28(b) of the South African Constitution provides that 'every child has the right ... to parental care'.

⁵⁷ See arts 11, 19 and 20 of the African Charter on the Rights and Welfare of the Child, OAU Doc CAB LEG/24 9/49 (1990), entered into force 29 November 1999; and arts 5, 14 & 15 of the Convention on the Rights of the Child, GA Res 44/25, annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

⁵⁸ The US Supreme Court set a precedent for the use of social science research in defining and examining inequity in education. See *Brown v Board of Education* 347 US 497 (1954). See also *Pillay* (n 3 above) para 102 (rejecting the argument that allowing an exemption to wear a nose stud has a demonstrable effect on school discipline or the standard of education); and *Farai* (n 1 above) (holding that the issue of discipline in schools is not related to Farai's right to wear dreadlocks in school).

inconsistent with mainstream Western society (Christian) views, but finds no problem with the bleaching or straightening of a learner's hair in school, is not consistent with the character of an open and tolerant society and should be condemned.⁵⁹

Furthermore, it should be noted that the decision in *Farai* is likely to have an effect in some countries in Southern Africa where government schools have for many years instituted similar prohibitions as in the case of *Farai*. One country where this decision is likely to have the effect of reversing such prohibitions is Malawi. In Malawi, Rastafari learners are prevented from attending public schools on account of their dreadlocks. This prohibition is enforced based on a long-standing tradition, adopted by the Ministry of Education during the period when Malawi was under British colonial rule, that a student must be dressed in a prescribed school uniform and well-groomed.⁶⁰ There are several reasons that support my argument that *Farai* is likely to have an effect on future Rastafari litigants in Malawi.

Firstly, section 33 of the Constitution of Malawi, which provides for freedom of 'conscience, religion, belief and thought, and to academic freedom', reads like section 19(1) of the Constitution of Zimbabwe (which has been read to protect the right of a dreadlock-wearing Rastafari to attend a government primary school), and would likely be interpreted in the same way by a Malawian judge in a future case involving a Rastafari student with dreadlocks. Secondly, section 11 of the Constitution of Malawi provides in subsection (2) that⁶¹

in interpreting the provisions of the Constitution, a court of law shall promote the values which underlie an open and democratic society and, where applicable, have regard to current norms of international law and comparable case law.

Recently, courts in Malawi have explained that they will rely on foreign case law from countries that have constitutional provisions that have the same effect and wording as the constitutional provisions in Malawi and countries that have similar historical backgrounds.⁶² Therefore,

⁵⁹ Lenta has correctly noted that liberal democracies recognise that the demand for uniformity of treatment must often give way to the demands of those who do not share mainstream attitudes and beliefs to be permitted to act in violation of civic norms; Lenta (n 49 above) 354.

⁶⁰ See Mhango (n 4 above).

⁶¹ Secs 11(2)(a) & (b) Constitution of Malawi.

⁶² See *Francis Kafantayeni v Attorney-General*, Constitutional Case 12 of 2005 (unreported) (where the High Court, in relying on the case of *Reyes v The Queen* (2002) 2 AC 235, ruled that the mandatory death sentencing provision under the Malawi Penal Code was unconstitutional); and *In the Matter of the Question of the Crossing the Floor by Members of the National Assembly* (Presidential Reference Appeal 44 of 2006) [2007] MWSC 1 (15 June 2007), <http://www.saflii.org> (accessed 12 December 2007) (where the Supreme Court of Appeal justified its reliance on foreign case law in upholding the country's anti-defection clause by explaining that many countries in the region with similar historical backgrounds and legal systems to Malawi have anti-defection clauses).

since Malawi and Zimbabwe share a common historical background and legal system, dating back to 1953 when the Federation Rhodesia and Nyasaland was established under which modern Zimbabwe and Malawi were governed,⁶³ it is likely that courts in Malawi will find *Farai* relevant in the adjudication of similar matters in Malawi. Additionally, since the constitutional guarantee in section 19(1) of the Constitution of Zimbabwe has a similar wording and effect as section 33 of the Constitution of Malawi, the decision in *Farai* is a valuable and relevant persuasive precedent for courts in Malawi. Lastly, courts in Malawi have not yet been presented with an opportunity to interpret section 33 of the Constitution of Malawi, particularly with reference to the freedom of Rastafari learners to wear dreadlocks in public schools. As a result, they will likely find the decision in *Farai* relevant. Therefore, it is submitted that the Supreme Court decision in *Farai* should be welcomed as a progressive realisation of religious freedom in Southern Africa and for its likely consequences in the protection of religious freedom in neighbouring countries.

⁶³ See J Makawa 'The rise and fall of the Federation of Rhodesia and Nyasaland' unpublished LLM thesis, Michigan State University, 1965; and JRT Wood *The Welensky papers: The history of the Federation of Rhodesia and Nyasaland* (1983).