

Learners' religious-cultural rights: A delicate balancing act*

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OPSOMMING

Leerders se Godsdienstig-kulturele Regte: 'n Delikate Balanseertoertjie

Suid-Afrikaanse openbare skole konfronteer die uitdaging om duidelike riglyne te ontwikkel wat die grondwetlik-beskerende regte van alle godsdienste en kulture respekteer en eer. Die Suid-Afrikaanse Skolewet 84 van 1996 verwag van skoolbeheerliggame om 'n Gedragskode vir Leerders daar te stel wat streng onderworpe is aan die Grondwet van die Republiek van Suid-Afrika, 1996.¹ Die reg van groepe om hul godsdienste te beoefen en hul kultuur te geniet moet in lyn wees met die bepalinge van die Handves van Menseregte, en dit impliseer dat daar nie onbillik inbreuk gemaak mag op die reg op vryheid van godsdienste en kultuur nie.²

In die Verenigde State van Amerika verskaf die federale Grondwet op 'n beperkte wyse beskerming vir leerders se vryheid van godsdienste en kultuur op skool. Die beskerming geld solank die uitoefen van sulke regte nie inmeng

* The terms *learner(s)* and *student(s)* are used interchangeably in the article: in South Africa a school-going person is a *learner*; in the United States of America (USA) a school-going person is a *student*.

** The authors acknowledge the publication of a previous article written by De Waal, Mestry and Russo "Religious and cultural dress at school: a comparative perspective" 2011 *Potchefstroom Electronic LJ* 64. This is a follow-up, relying on the same South African case law, and encompassing some of the discussion presented in the *Potchefstroom Electronic LJ* article. Obviously, the legislation/guidelines/regulations remain constant.

1 South African Schools Act 84 of 1996 (SASA); s 16(1) SASA assigns the professional management of a public school to the principal acting under the authority of the provincial Head of Department of Education (HoD); s 16(3) SASA assigns the governance of such a school to the School Governing Body; SA Constitution.

2 SA Constitution, Chapter 2 ss 7-39; note also the case that considered whether an amendment to SASA that prohibited corporal punishment at schools violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to its use and where the Court dismissed the parents' appeal. *Christian Education South Africa v Minister of Education* [2000] 4 SA 757 (CC) (*Christian Education*) par 36 points out the importance of the right to freedom of religion, belief and opinion "in the open and democratic society contemplated by the Constitution" especially the Preamble, ss 36(1), 39(1)(a) SA Constitution. The Court also noted that "[t]he right to believe or not to believe, and to act or not act [accordingly] ... is one of the key ingredients of any person's dignity" and that "religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights".

met die bestuur van die skool en die regte van ander leerders nie.³ Met die Grondwetlike Hof van Suid-Afrika wat diverse godsdiens- en kultuurregte op openbare skole erken, ontstaan daar spanning tussen die menings wat betref die menseregte van leerders wat uit verskillende godsdiens- en kulturele agtergronde afkomstig is en skoolamptenare se verantwoordelikheid om veilige en gehalte skole te bedryf. In hierdie artikel ondersoek die outeurs hierdie spanning en die implikasie daarvan op skoolbeleid vir Suid-Afrikaanse openbare skole.

1 Introduction

Driven by the fact that, at an international level too, South Africa is well-known for cultural, ethnic and religious diversity, education authorities are now seen to be attempting to maintain public school practices that do not, among others, intrude on learners' legal rights.⁴

Two of the most widely used South African school documents feature the significance of the religious-cultural dimension of a South African learner.⁵ The preamble to the South African Schools Act⁶ (SASA) provides:

Whereas this country requires a new national system for schools which will ... provide and advance our diverse cultures ... [and] uphold the rights of all learners [and] parents ...

The Guidelines for Codes of Conduct⁷ provide, *inter alia*:

The Code of Conduct must...
 Item 1.3 reflect the ... human rights ... which underpin South African Society ...
 Item 1.4 set a standard of moral behaviour for learners ...
 Item 1.9 contain a set of moral values, norms and principles which the school community should uphold ... [and]
 Item 3.2 [t]his policy shall be directed to the advancement and protection of the fundamental rights of every person ...

The need for a strategy according to which public schools can start crafting milieus that allow learners, among others, to experience *a sense of security* and feel at ease with expressing their religious-cultural uniqueness is imminent.⁸ A management area that brings to light the tension between these two demands is learner dress codes. Although the

3 393 US 503.

4 De Waal, Mestry & Russo "Religious and cultural dress at school: a comparative perspective" 2011 *Potchefstroom Electronic LJ* 64; *National Guidelines on School Uniforms* GG 28538 of 2006-02-23 item 2 (*Guidelines on Uniforms*) s 2.

5 SASA; *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* GG 18900 of 1998-05-15 (*Guidelines for Codes of Conduct*).

6 84 of 1996.

7 GG 18900 of 1998-05-15.

8 De Waal "Random drug-testing: the duty to act against learners who use drugs" 2007 *Acta Academica* 229; De Waal *et al* 64.

South African Court declared in 2007 that policies that fail to accommodate a learner's religious and cultural practices result in unfair discrimination, the South African media continue to report incidents where learners have alleged that school managers have infringed on their fundamental rights by imposing dress codes that limit the expression of their religious-cultural beliefs.⁹ In a recent incident, a Cape Town School Governing Body suspended a 15-year-old learner, Odwa Sityata, for a week for not trimming his dreadlocks which were against school regulations.¹⁰ Not willing to take a firm stance, a spokesperson for Western Cape Education Minister, Donald Grant (Western Cape MEC), was quoted as saying that:

[t]here was no clear constitutional issues at stake, no previous case law has explicitly dealt with the issues of Rastafarianism – it has rather avoided this specific issue. In two previous cases, the courts ordered the children to return to school on administrative grounds.¹¹

Moreover, speaking from the Claude Leon Foundation Chair in Constitutional Governance at the University of Cape Town, a constitutional critique points out the sad state of affairs that the spokesperson was apparently not aware of *the well-established rule of precedent* which holds the courts to previous judgments.¹² Even sadder would be the possibility of the Western Cape MEC choosing not to react, due to a looming election and politically self-serving reasons.¹³

A previous article, "Religious and cultural dress at school: a comparative perspective",¹⁴ pointed out that the South African debate has certainly heated up specifically regarding two questions related to learner conduct codes:¹⁵

- (a) Are restrictions contained in learners' dress codes at schools valid rules that aim at sustaining non-violent and organised learning environments?

9 *The Star* (2004-01-23) 3 reported on a 13-year old Muslim learner who was told to remove her headscarf because Sir John Adamson High School's Code of Conduct prohibited it; *Beeld* (2008-01-20) 8 reported on a learner who was told to shave the beard he had grown as proof that he had memorised the *Quran* or enrol at another school.

10 Originally reported by *Mail & Guardian Online* (2011-03-10) available at <http://img.co.za/article/2011-03-10-pupil-school-face-off-over-dreadlocks> (accessed 2011-03-12).

11 *MEC for Education, KwaZulu-Natal v Pillay* 2007 1 SA 474 (CC) (*Pillay CC*).

12 De Vos "Dreadlocks at school must be allowed" available at <http://constitutionallyspeaking.co.za/dreadlocks-at-school-must-be-allowed> (accessed 2012-03-01); see the discussion of *Pillay* as an example of the rule of precedent *infra*.

13 *Ibid.*

14 De Waal *et al* 65.

15 De Waal *et al* 65.

(b) Are restrictions in learners' dress codes infringements on learners' constitutional rights to freedom of religion, human dignity, equality, and/or speech and expression?¹⁶

After the 2007 Constitutional Court decision, rather than diminishing, the tension at public schools concerning dress code regulations and religious-cultural requirements of learners' beliefs is escalating. This article provides a closer examination of policies, laws and litigation to convey the responsibility school officials bear to accommodate religious-cultural beliefs of their learners.

At the same time, the article provides a brief comparative law method, defined as a distinctive, methodical and legal systems approach, which aims at acquiring new knowledge and understanding of the specific topic by virtue of similarities and differences.¹⁷ Such similarities and differences will be gleaned by likening the South African approach concerning learners' legal religious-cultural rights to that of the United States where it would be relevant.

The structure of the article comprises presenting a bird's eye view of South African public schools' learner dress codes by addressing diversity and freedom of expression; unfair discrimination; reasonable accommodation under the Promotion of Equality and Prevention of Unfair Discrimination Act;¹⁸ human dignity and freedom of expression; and applying rights to freedom of expression. In the next instance, the focus turns to the United States (US) approach as an example of foreign jurisdiction. From the analysis of (1) the South African legal context related to learner dress codes and (2) the US approach, the authors followed a comparative law method in order to draw implications for South African educators and School Governing Bodies as they seek to balance learners' constitutionally protected rights and to maintain safe

16 S 15(1) SA Constitution which stipulates that all people have the right to "freedom of conscience, religion, thought, belief and opinion"; s 10 SA Constitution which stipulates everyone's dignity as being part of their very nature ("inherent") and their right to have it esteemed and kept safe from harm ("respected and protected"); s 9 SA Constitution which stipulates the following: Everyone is equal before the law and has the right to equal protection and benefit of the law; Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken; The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including... Religion, conscience, belief, culture; Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. s 16(1) SA Constitution which stipulates that all people have the right to freedom of expression.

17 Venter, Van der Walt, Van der Walt, Pienaar, Olivier & Du Plessis *Regsnavorsing: metode en publikasie* (1990) 211.

18 4 of 2000 (Equality Act).

learning environments for all learners.¹⁹ Specific recommendations are made to support schools in framing and implementing policies that would not infringe on learners' legal rights to religion/culture expression. This article closes by contemplating what South African schools and their educators must do to ensure the protection of learners' religious-cultural rights.

2 Learner Dress Codes at South African Public Schools

In South Africa, litigation pertaining to dress codes at public schools has emerged with a few significant court judgments rendered in the last ten years,²⁰ unlike the US where few judgments have been handed down concerning student uniforms and constitutionally protected religious-cultural expression.²¹ Moreover, the South African Minister of Education has provided Guidelines on Uniforms, including information to support public schools in establishing dress codes that do not infringe on learners' constitutional rights.²² For the purposes of this article, the Guidelines on Uniforms' first two headings have been selected and grouped together below since they are specifically relevant to South Africa.²³

2.1 Religious-Cultural Diversity and Freedom of Expression

At an official level, the Department of Education is seen to be serious about supporting public schools in the aim of protecting learners' constitutional rights.²⁴

With regard to the custom of South African learners wearing some form of school uniform, the Guidelines on Uniforms boast three significant sub-sections:²⁵

29(1) A school ... dress code should take into account religious and cultural diversity ... [and] ... accommodate learners whose religious beliefs are compromised by a uniform requirement.

19 This article is a follow-up on *Religious and cultural dress at school: a comparative perspective* that was published in the 2011 *Potchefstroom Electronic LJ* 63-96.

20 De Waal *et al* 65; *Antonie v Governing Body, Settlers High School* 2002 4 SA 738 (C) (*Antonie*); *Pillay v MEC for Education, KwaZulu-Natal* 2006 6 SA 363 (N) (*Pillay High Court*); *MEC for Education, KwaZulu-Natal v Pillay* 2007 1 SA 474 (CC) (*Pillay CC*).

21 Thomas, Cambron-McCabe & McCarthy *Public school law – teachers and students' rights* (2009) 133-134.

22 Guidelines on School Uniforms item 2; also specifically item 29 where the document has five headings that are divided into eight sub-paragraphs; De Waal *et al* 67.

23 De Waal *et al* 68.

24 *Guidelines on Uniforms* item 2.

25 *Idem* item 29(1)-(3).

(2) If wearing ... attire ... is part of the religious practice of learners..., schools should not, in terms of the SA Constitution, prohibit the wearing of such items.

(3) A uniform policy may ... prohibit items that undermine the integrity of the uniform ... such as a T-shirt that bears a vulgar message ...

Connecting the Department of Education's standpoint on religious-cultural aspects as reflected in the above-mentioned three sub-sections to a constitutional perspective, Currie and De Waal²⁶ call attention to the importance of not regarding freedom of religion, belief and opinion on its own. It is preferable to read the latter in conjunction with the equality clause, which forbids the State to discriminate against, among others, any religious-cultural group.²⁷ In this regard, a close examination reminds the reader that the South African fundamental right to freedom of religion embraces both *a free exercise* and *an equal treatment* element.²⁸

Taking it one step further, the Court indicated in *Taylor v Kurtstag* the likelihood of applying the legal right to freedom of religion, belief and opinion horizontally.²⁹ Horizontal application would then signify the right as not only accruing to groups, but also to individual persons' conduct.³⁰

The Constitutional Court's first call to apply the direct horizontal provisions of the SA Constitution occurred in *Khumalo v Holomisa*.³¹ With the applicants relying on their right to freedom of expression, the Court noted this right as a significant one, combining to form "both democracy and individual freedom".³² Additionally, the Constitutional Court distinguished the issue of human dignity as it bestows value not only on an individual's sense of pride, but also on society's appraisal of the value of the individual as being applicable to the right to freedom of expression.³³

In this sense, law must discover a proper equilibrium between these two constitutional interests of the right to freedom of expression and respect for human dignity.³⁴

26 Currie & De Waal *The Bill of Rights handbook* (2006) 338; s 15 SA Constitution.

27 S 9(3) SA Constitution that specifies religion, conscience, belief and culture as grounds that could constitute unfair direct or indirect discrimination.

28 Currie & De Waal 338; De Waal *et al* 69-70.

29 2005 1 SA 362 (W): the applicant tried stopping publication of a notice that would ex-communicate him from the Jewish faith; the application was dismissed.

30 *Idem* par 45, stating that religion rights are applicable directly horizontally.

31 2002 50 SA 401 (CC): a well-known politician sued the applicants for defamation that arose from a published article; the applicants lost their appeal.

32 S 16 SA Constitution; *Direct application* occurs when testing the allegation that an aspect of the common law is inconsistent with the SA Constitution; *Khumalo v Holomisa* par 21.

33 *Khumalo v Holomisa* par 27.

34 De Waal *et al* 70.

As pointed out in a previous article, the *generous approach to standing that courts apply in fundamental rights litigation* is regarded as an advantage of applying horizontal provisions directly, making it more appealing to file suit concerning alleged infringements of fundamental rights in the future.³⁵ This could then also point to more frequent litigation regarding school-related issues.

One should, however, not forget that all South African fundamental rights can be limited by the State by the so-called limitation clause.³⁶ In this regard, in section 36(1) the SA Constitution specifically states that all fundamental rights “may be limited ... to the extent that the limitation is reasonable and justifiable in [a] ... democratic society based on human dignity, equality and freedom”. Yet determining the legitimacy of such limitation needs to take into account what the nature of the right is; how important the purpose of the limitation is; what the nature and extent of the limitation comprise; what the relationship between limitation and purpose is; and whether means are available that would imply less restriction.

Up till now, other than would be expected and as pointed out before, South African courts do not appear to be inclined to “limit the right to freedom of religion, belief and opinion”; preference is given to “broadening/widening the scope of the right”.³⁷ It thus follows that the courts, however, do not treat every practice/habit that claims to be linked to exercising the freedom of religion, belief, conscience and thought as if it is such.³⁸ This stance should reassure public schools especially that courts will not allow practices that disrupt school and/or classroom activities.³⁹

Beliefs alone are unable to cause mischief.⁴⁰ While this statement would imply that *thought control* would always be unacceptable, a definite need exists to differentiate between embracing a belief and voicing it publically.⁴¹ At public school level, this need to differentiate may give rise to valid reasons why a specific practice must be limited. An example would be that of learners who want to hold a religious-cultural school event in an attempt to convince other learners to join their religious-cultural endeavours.

While the limitation of specific practices at public school level may legitimately be justified, these schools also face the significant challenge of being seen to be fair and consistent when applying their dress codes.

35 *Idem*; Currie & De Waal 50-51.

36 S 36 SA Constitution.

37 De Waal *et al* 70-71; Currie & De Waal 341; *Christian Education* where the court adds the possibility of not just *restricting* but also broadening or widening the scope of this right.

38 *Ibid.*

39 *Guidelines for Codes of Conduct* item 4.5.1 & 5.2.

40 Currie & De Waal 344.

41 *Ibid.*

2 1 1 Learners' Religious-Cultural Rights: Fair and Consistent Protection

The SA Constitution stands firmly in its efforts to strive not to discriminate *unfairly* against any person concerning any grounds:⁴² Seventeen of these grounds are listed in section 9(3), with religion and culture among them. Reminiscent of this, the SA Ministry of Education underscores the SA Constitution as being unequivocal on equality.⁴³

In *Pillay v MEC for Education, KwaZulu-Natal and Others (Pillay Eq Court)*, the Durban Equality Court heard the complaint of a mother who acted in support of her daughter, Sunali, regarding a nose stud that she wore under supervision of her mother after the September 2005 school holidays.⁴⁴ The school's dress code prohibited the wearing of a nose stud. Although the school's Code of Conduct had been drawn up in consultation with the school community and school officials had allowed some learners religious exemptions from these provisions, the school did not regard Sunali's request for exemption to constitute a legitimate claim.⁴⁵ The mother approached the court in search of an interdict that would prevent the principal from violating what she regarded as her daughter's right to be protected against discrimination due to her religion and/or culture.⁴⁶ At the same time, the mother also applied for a court order to require supervision of the school's "progress ... [in achieving] the goal of transformation".⁴⁷

The Durban Equality Court ruled that the way in which the school's dress code – which prohibited the wearing of nose studs – had been written was *prima facie* discriminatory; but not *unfair* discrimination. This Court noted that the school had followed the correct procedures, acting within the framework of its authority, and adhering to the provisions of acting reasonably and fairly at all times.⁴⁸ The magistrate therefore warned the learner that not observing the school's dress code in this regard would result in disciplinary measures being taken.

Although at face value *Pillay Eq C* attended to important issues such as following correct administrative procedures, acting *intra vires* and being

42 S 9(3) SA Constitution.

43 *Manifesto on Values, Education and Democracy* (2001); De Waal *et al* 72.

44 Originally brought in the Durban Equality Court, hearing scheduled for 2005-09-29 as Case AR 791/05 (*Pillay Eq C*).

45 *Pillay High Court* par 24: learners, parents and educators representing the racial, religious and cultural groups in South Africa formed part of the process; *Pillay CC* par 7, 12: Mrs Pillay wrote a letter to the principal in which she pointed out that the nose stud was worn as "a personal choice and tradition" and not for religious reasons.

46 *Pillay High Court* par 1(a).

47 *Idem* par 1(b) where Mrs Pillay asked the Durban Equality Court to issue an order that would guide the MEC for Education, KwaZulu-Natal, to monitor the Durban Girls High School's advancement in reaching a higher level of transformation.

48 This part of the Durban Equality Court's finding in *Pillay Eq Court* is also mentioned in par 13 of *Pillay CC*.

fair, the court did not address what requirements the school should have met to be considered acting reasonably.

2 1 1 1 Pillay Eq C's Appeal

When the mother appealed the matter, the High Court found that the school's Code of Conduct undercut the ideals of religious-cultural symbols.⁴⁹ Moreover, the High Court questioned the perspective that the school's learners could develop religious-cultural practices not being worthy of the same protection that other rights or freedoms were afforded.⁵⁰ The High Court referred to foreign case law when it pointed out how critical it was for schools (1) to protect others' religious and cultural rights or freedoms, and (2) to respect minority groups.⁵¹

In emphasising that *substantive equality* involves appreciation for the fact that equality takes account of differences, the High Court implied that *learners who are not similarly situated should not be treated alike*.⁵² For that reason, the High Court found the school's Code of Conduct to be an example of *a major contemporary form of unfair discrimination*.⁵³

The Pillay High Court concluded:

- (a) The school's argument, that the Pillays had accepted the Code of Conduct when they enrolled their daughter, was not relevant, since fundamental rights and freedoms can never be waived.⁵⁴
- (b) Allowing plain round studs or sleepers as earrings, but not as nose studs, constituted an illegality.⁵⁵

⁴⁹ *Pillay High Court*.

⁵⁰ *Idem* par 35.

⁵¹ *Multani v Commission Scolaire Marguerite-Bourgeoys* (2006) SCC 6; this supported the decision of the authors to include foreign case law in this article; Accommodating this learner to wear the nose stud would illustrate exactly this point; *Pillay High Court* par 35.

⁵² *Idem* par 41; De Waal *et al* 72-73.

⁵³ *Pillay High Court* par 47, where the High Court pointed out that the *formal equality* approach of this school did not consider "actual social... disparities or material and significant differences between groups and individuals and which [ignored] the historical burden of inequality which the SA Constitution seeks to overcome, [neglecting its] deepest commitment"; *Idem* par 54, where this court described the specific provision of the *Code of Conduct* that bans nose studs from the school grounds (*Idem* par 3) as one that could not be trusted, relied upon or respected.

⁵⁴ *Idem* par 25.

⁵⁵ *Idem* par 25-26, 34, where the High Court pointed out that treating all female learners symmetrically equal was reminiscent of the case *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 132: "Equality means equal concern and respect across difference ... not ... the elimination of or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self ... At the very least [equality] ... affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment ... it celebrates the vitality that difference brings to any society".

(c) Failure of the Code of Conduct to treat the respondent's daughter differently from other female learners at the school denied her the advantage and chance of benefiting from her culture and of practising her religion.⁵⁶

As pointed out previously, the *Pillay* High Court verdict raises the concern, among others, of whether the obvious display of religious-cultural beliefs by wearing specified clothing could be regarded as being treated uniquely different from other religious-cultural customs such as the unrestricted exhibit of religious symbols, disciplinary measures associated with religious beliefs as were tested in *Christian Education* or public affirmation of faith at school.⁵⁷

2 1 1 2 The *Pillay* Case at the Constitutional Court

Not satisfied that the case had received the attention it deserved, the respondents of the High Court *Pillay* case applied for leave to appeal directly to the Constitutional Court.⁵⁸ The chief argument revolved around the applicants' claiming that (1) the High Court had gone astray in describing the matter as an equality claim under the Equality Act; (2) the school's Code of Conduct took equal effect on all religions; and (3) the Code of Conduct had been developed by consulting the relevant parties at school extensively.⁵⁹

Furthermore, two applicants asked the court to take into account that the learner would no longer be enrolled at the school when judgment was handed down and that the National Department of Education had published new guiding principles that appeared after this case had come to the fore.⁶⁰ In the written submission these two applicants indicated their concern that the High Court's ruling had the potential of bringing about significant consequences for South African public schools with substantial cultural diversity.⁶¹

In reaction to the school officials' claim, the mother, Pillay, grounded her submission on the argument that the school's Code of Conduct did not make provision for *reasonable accommodation*.⁶² Such a provision would have permitted an even-handed balance between the conflicting interests of the school and her daughter's safeguarding a South Indian

⁵⁶ *Idem* par 42.

⁵⁷ De Waal *et al* 74-76; Mawdsley, Cumming & De Waal "Building a nation – religion and values in the public schools of the USA, Australia and South Africa" 2008 *Ed and the Law* 96.

⁵⁸ MEC for Education KwaZulu-Natal, Thulani Cele the School Liaison Officer, Anne Martin the principal of Durban Girls' High School, and Fiona Knight the Chairperson of the School Governing Body.

⁵⁹ 4 of 2000; in this case the applicants applied and received approval to bypass the Supreme Court of Appeal.

⁶⁰ *Guidelines on Uniforms*.

⁶¹ Written Submissions on behalf of the Governing Body Foundation (*amicus curiae*) 71; *Pillay CC* par 71; De Waal *et al* 73.

⁶² *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 and enjoy all their rights equally.

family tradition and culture. In their response, the school officials argued that allowing the learner to wear the nose stud would necessarily affect discipline and education at their school negatively.⁶³

The Constitutional Court deliberated on the application of three explicit factors:⁶⁴

(a) The effect that a Constitutional Court order could have at everyday school level – this Court found that all its orders would be practically relevant since the Department of Education’s guidelines function without any binding observance purported.⁶⁵

(b) The prominence of the matter – this Court found the issue to be of significance concerning the security that schools afford religious/cultural groups.⁶⁶

(c) The intricacy of the matter – this Court found the differences between the approaches of the South African judiciary and those of foreign judiciaries to underline the difficulty of handling such matters.⁶⁷

The Constitutional Court initially identified whether the alleged discrimination resulted from the Code of Conduct that prohibited the wearing of the nose stud or from the school’s denial of an exemption to the Code. Although both sides presented arguments, the Court maintained that it was a combination of the Code of Conduct *and* the refusal to grant an exemption.⁶⁸ Specifically, the Court noted that the Code did not contain a process for learners to seek an exemption, and it then banned the wearing of a nose stud, requiring the learner to ask for an exemption. According to the Court, “a properly drafted code which sets realistic boundaries” and which indicates a route when applying for and granting exceptions, is the appropriate manner to promote a character of *reasonable accommodation* at South African schools.⁶⁹

2.2 Unfair Discrimination

In examining for the first time what amounts to *unfair discrimination* under the Equality Act, the Constitutional Court took up the question of whether there was a comparator (another group that was treated better than Sunali) for assessing discriminatory treatment.⁷⁰ In this case, the Court held that an appropriate comparator did exist – “learners whose

63 *Pillay CC* par 96.

64 *Idem* par 32; *De Waal et al* 73-74.

65 *Pillay CC* par 30 where the Constitutional Court noted that “the strongest obligation that exists on governing bodies is that they must ‘consider’ the guidelines”. The court further commented that such a requirement to consider guidelines “hardly alters the ‘legal landscape’ as schools might consider the guidelines and lawfully decide to adopt exactly the same provision” as the policy challenged.

66 *Idem* par 33.

67 *Idem* par 34-35.

68 *Idem* par 36.

69 *Idem* par 38.

70 S 1 Equality Act: discrimination is defined as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds

sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised”.⁷¹ The Court then articulated a critical point in defining unfair discrimination: the standard personified by the Code of Conduct was not neutral, but imposed middle-of-the-road and historically privileged types of ornamentation... at the expense of alternative and previously barred types.⁷² In this regard, a warning is therefore sounded that when the norms of Codes of Conduct prove not to be neutral, such documents can infringe the constitutional rights of learners.

Under the Court’s stance, Sunali was required to show that her religious or cultural beliefs or practices had been impaired and, furthermore, that it was unfair.

In *Pillay*, the Constitutional Court grappled with alleged discrimination on both religion and culture grounds, noting that they represent distinct, but overlapping grounds. For simplicity, the Court distinguished the two grounds by stating that *religion* relates to individual faith and belief while *culture* involves practices and convictions developed by communities.⁷³ The Court emphasised the difficulty of separating religion and culture, since both inform each other. For the purposes of interpreting culture under the Equality Act, however, the Court found Sunali to be part of South Indian Tamil and Hindu groups that are characterised by a blend of religion, language, geographical origin, ethnicity and creative tradition.⁷⁴

2 2 1 *The Importance of Cultural Rights*

The language of the Court provides insight into the importance of cultural rights in South Africa, as well as the all-encompassing nature of these rights. Particular phrases are compelling in delineating the concept: “every individual is an extension of others,” “inter-dependence of the members of a community” and “importance of community to individual identity and hence to human dignity”.⁷⁵ One of the most powerful statements proclaimed:

Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple

benefits, opportunities or advantages from any person on one or more of the prohibited grounds”.

71 *Pillay CC* par 44.

72 *Ibid.*

73 Amoah & Bennett “The freedoms of religion and culture under the SA Constitution: do traditional African religions enjoy equal treatment?” 2008 24, 1-20, expressing their concern that traditional African religions are not treated equally when they do not possess the characteristics of non-African religions (i.e. western religions); *Pillay CC* par 47.

74 *Pillay CC* par 50.

75 *Idem* par 53.

association; it includes participation and expression of the community's practices and traditions.⁷⁶

The Court went on to caution that culture is not a unified entity, but differs from person to person. That is, individuals will adhere to selected aspects of their culture; not everyone will conform to the same practices. At school level, the concern would be whether learners are merely pretending to hold specific religious-cultural beliefs and customs or whether such beliefs and customs are a serious aspect of who they are.

2.2.1.1 Did the Nose Stud Constitute a Significant Practice?

The Court then addressed the issue whether the nose stud constituted a significant religious-cultural practice. While individuals claiming protection for religious practices must profess sincerely held beliefs, no such test exists for cultural practices.⁷⁷ The Court, however, stated that both the objective and subjective evidence in this case did, in fact, show that the contested jewellery held religious and cultural significance for Sunali.⁷⁸ Specifically, Sunali decided to wear the nose stud to mark her physical maturity, as her mother and grandmother did when they were young women. She continued to uphold this family and cultural tradition when threatened with removal from school, suffering poor treatment from other learners and focused media attention. However, expert testimony established that the nose stud is not mandatory in the Hindu religion or culture, although it is viewed as a significant and valued practice.

In the next instance, the Court confronted the issue whether the Equality Act and the SA Constitution protected voluntary religious-cultural practices. Typically, laws are nullified when they force individuals to make hard choices between their faith and abiding by a law. The Court argued, however, that there are other reasons than avoiding hard choices, since religious-cultural traditions are protected because they are fundamental to human distinctiveness and therefore to human dignity which is, in turn, essential to equality.⁷⁹ In promoting the constitutional values of human dignity, equality and freedom, the Court ruled that a necessary element is respecting voluntary religious-cultural practices of all individuals. The fact that people choose freely rather than through an obligated sentiment merely increases the importance of a

⁷⁶ *Ibid.*

⁷⁷ This "sincerely held belief test" is central in the United States for claimants challenging discrimination based on their rights to free exercise of religion (*Wisconsin v Yoder* 406 US 205). Individuals, however, cannot use the free exercise of religion clause of the US Constitution to avoid complying with criminal law (ie use of drugs in a religious ceremony) *Employment Division v Smith* 494 US 872.

⁷⁸ While the Court noted that the nose stud involved both religion and culture, this would not always occur since they are "very different forms of human association and individual identity"; *Pillay CC* par 60.

⁷⁹ *Pillay CC* par 62.

tradition to their independence, their distinctiveness and their dignity.⁸⁰ Furthermore, the Court noted that protecting voluntary practices affirms the constitutional commitment to diversity.

Public schools, especially, should be seen as committed to promoting religious-cultural diversity by protecting the religious-cultural practices of, among others, their learners.

2 2 2 Fair versus Unfair Discrimination

Finding that Sunali had suffered discrimination based on both religion and culture under section 6 of the Equality Act, the Constitutional Court turned to the question of whether this was *unfair discrimination*.⁸¹ Assessing fairness under the Equality Act includes a greater number of factors than under section 9 of the SA Constitution.

The Court noted that respondents' attempting to prove that specific discrimination is fair under the Equality Act must be judged by (1) the context; (2) the nine specific factors listed in the Act; and (3) "whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned."⁸² The Court noted that a key element of the unfairness determination was the place of *reasonable accommodation* in the Equality Act.

The Court made two points:

(a) The Equality Act indicates that not taking steps to accommodate the needs of people reasonably founded on race, gender or disability will result in unfair discrimination.

80 *Idem* par 64; also *Alabama and Coushatta Tribes of Texas v Trustees* 817 F Supp 1319, holding that Native American students' wearing of long hair was a sincerely held religious belief protected under the First Amendment of US Constitution even though it was not a mandatory tenet of their belief, but was rooted in traditional Native American religion.

81 *Pillay CC* par 69.

82 S 13(3) Equality Act lists the following factors:

- (a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstance to –
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity; *Pillay CC* par 69.

(b) The factors identified in section 14(3)(i)(ii) include whether reasonable steps have been made to accommodate diversity.⁸³

Although the Court had articulated the various dimensions of reasonable accommodation for religion under the SA Constitution, in *Pillay* the Court defined what it means to provide reasonable accommodation under the Equality Act.

2.3 Reasonable Accommodation under the Equality Act

From the specific language of section 14(3)(i)(ii), the Court stated that reasonable accommodation would constantly be a significant aspect “for the determination of the fairness of discrimination”.⁸⁴ The Court cautioned that reasonable accommodation is not the sole determining factor; other factors listed in section 14(3) must also be considered. Whether accommodation is required will depend on the character of the case and the character of the interests implicated.⁸⁵ Considering the specific facts of Sunali’s case (a rule that was neutral on its face, but that disadvantaged certain groups), the Court ruled that fairness demanded reasonable accommodation, which required the school to make an exception to its Code, depending on how important the nose ring was to Sunali and the problem this would pose to the school.

Although Sunali did not testify in court, the Court concluded that sufficient evidence existed to substantiate the importance of the nose stud to her cultural or religious identity:⁸⁶ she persisted in wearing it when faced with disciplinary action, when subjected to ridicule from others, when faced with declining grades and when confronted with the stress of publicity. Although the school argued that the violation of Sunali’s rights was less because the nose stud was a cultural, rather than a religious practice, the Court emphasised that what was applicable was not whether a tradition was religious or cultural, “but what its significance was to the person concerned”.⁸⁷

Public schools should, therefore, consider the significance of the religious-cultural traditions of their learners carefully when revising their Codes of Conduct and/or reviewing learners’ requests for accommodation.

⁸³ Equality Act; *Pillay CC* par 72.

⁸⁴ *Pillay CC* par 77.

⁸⁵ *Idem* par 78.

⁸⁶ *Idem* par 88: the Court regarded this as a pivotal question.

⁸⁷ *Idem* par 91; see Consent Decree *Iacono v Groom* (No 5:10-cv-00416-H ED North Carolina 2011-06-06), agreeing to reinstate a student suspended for wearing a nose ring; school board also agreed to change *Student Dress Code* to provide exemption for students based on sincerely held religious beliefs with no determination that practice was central to religious doctrine.

2 3 1 Sunali's Request: An Undue Burden on the School?

In examining whether the school would suffer an undue burden in accommodating Sunali, the Court went to great lengths to stress the importance of school rules and to reinforce that this decision did not address the constitutionality of school uniforms, but rather exemptions to uniform policies. The evidence did not persuade the Court that granting Sunali's request would have interfered with school discipline and safety. She had worn the nose stud for two years with no apparent impact on discipline or the quality of education. Nor did the Court find the school's concern about the possible consequences of permitting the nose stud exemption convincing. The Court found no merit in the school's "slippery slope scenario."⁸⁸ Only sincerely held religious and cultural practices are protected: the exemption of some practices does not mean all practices must be honoured; any practice creating an unreasonable burden can be denied accommodation.

Moreover, based on the Court's ruling, schools should value the fact that learners can now have the courage to express their religious-cultural beliefs, since this would indicate that as a country, South Africa is moving closer to becoming the society visualised in the SA Constitution.

2 4 Human Dignity and Freedom of Expression

In *Pillay*, the Constitutional Court described a vital element of individuals' freedom and dignity as claiming esteem for the distinctive collection of superfluities which they practise freely, noting religious-cultural choices as examples.⁸⁹ Making the choices out of one's own free will, will augment the importance of customs or rituals to peoples' independence, distinctiveness and self-esteem.⁹⁰ Moreover, exercising one's right to religion and culture forms a fundamental part of one's right to freedom of expression.⁹¹ Although the Schools Act does not explicitly provide for freedom of expression, other rights designated in the Act are inextricably linked to this constitutional right.⁹²

An earlier court case sheds additional light on learners' expression rights. In *Antonie*, a learner faced up to a School Governing Body resolution to suspend her for five days.⁹³ This fifteen-year-old Grade 10

88 *Pillay CC* par 107 where the Constitutional Court maintained that the school's argument that a ruling in favour of *Pillay* had *the necessary consequence* of more learners showing up at school with dreadlocks, body piercings, tattoos and loincloths had *no merit*. The Court referred to the phrase "parade of horrors" as O'Connor coined it in *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 911.

89 *Pillay CC* par 64.

90 *Ibid.*

91 *Idem* par 94 where the Constitutional Court pointed out that the female learner's right to convey her religion and culture formed an essential part of her right to freedom of expression.

92 *Guidelines for Codes of Conduct*.

93 *Antonie* 738.

learner became interested in a variety of religions and converted to Rastafarianism. Part of expressing her newly-found religious conviction was sporting a dreadlock hairstyle. She started wearing this hair-style, but covered it with a black cap for the sake of her school rules. The School Governing Body charged her with serious misconduct for disregarding the school rule that necessitated hair below the collar to be tied up. She was found guilty and therefore suspended from school for five days.

In the *Antonie* case, an aspect that deserves attention from educators is that, despite the fact that the applicant was no longer at school when she filed suit, her lawyer contended that the suspension had caused her name to be blemished and her permanent record to have been affected negatively.⁹⁴ The Court concurred with the learner's lawyer and ruled in her favour: the suspension was set aside.⁹⁵ It was possible that the five day suspension had had a negative effect both on her development and her career; it was also possible that the punishment had infringed her dignity and self-esteem. In the final analysis, the Court mentioned the official guidelines for adopting a Code of Conduct as a basis for its ruling and highlighted the fact that "human dignity is a constitutional right".⁹⁶

2.5 The Application of the Right to Freedom of Expression

The *Antonie* Court also commented on the application of the right to freedom of expression: as a constitutional right it would, for example, take effect on a school's dress code for learners.⁹⁷ In this regard, this Court indicated freedom of expression to embrace choosing clothing and hairstyles by ruling freedom of expression as entailing more than just freedom of speech:⁹⁸ ... [It] ... includes the right to ... wear ... [and] ... is extended to ... outward expression as seen in clothing selection and hairstyles.⁹⁹

Others have argued that *expression* should include each deed by which an individual tries to express feeling, conviction and/or objection.¹⁰⁰

Across the globe, freedom of expression is viewed as a condition critical to the nurturing of a democratic society.¹⁰¹ The issue is how to

94 De Waal *et al* 78.

95 *Antonie* 738.

96 Guidelines for Codes of Conduct item 4.3 privacy, respect and dignity; s 10 SA Constitution, guaranteeing everyone's "inherent dignity and the right to have their dignity respected and protected." *Pillay CC*: "In reversing the [learner's] suspension the High Court ... reasoned that to enforce the school's Code of Conduct in a rigid manner without considering the expressive nature of the dreadlocks" would bring it into conflict with the SA Constitution.

97 S 16(1) SA Constitution: "Everyone has the right to freedom of expression".

98 De Waal *et al* 79.

99 *Antonie*.

100 Currie & De Waal 363.

101 Van Vollenhoven, Beckmann & Blignaut "Freedom of expression and the survival of democracy: has the death knell sounded for democracy in South African schools?" 2006 *J of Ed* 40 120.

achieve a balance that protects the human dignity of individuals and permits the smooth operation of government institutions.

3 The United States Approach as an Example of a Foreign Jurisdiction

The United States' established jurisprudence regarding the pre-eminence of freedom of expression in its constitution sheds light on how balance can be achieved. The government, including schools, must have a compelling justification to restrict individuals' speech. The United States Supreme Court's landmark decision in *Tinker v Des Moines Independent School District*¹⁰² established American students' constitutional right to express themselves at schools. In that case, students were punished for wearing black armbands to school to protest against the Vietnam War. School officials had forbidden this for fear of classrooms being disrupted. The Supreme Court ruled that indistinguishable anxiety concerning disorder was not sufficient to surmount the right to freedom of expression, also noting that educators must show more than an aspiration to circumvent the uneasiness that always goes with unpopular points of view to limit students' expression rights.¹⁰⁵

In the US, courts protect student expression as long as it does not "materially and substantially interfere" with the operation of the school.¹⁰⁴ Yet it is not an absolute right. The United States Supreme Court has broadened the categories of unprotected speech over recent decades. Vulgar, lewd and indecent expression can be punished; defamatory expression (spoken and written false statements) can be banned; inflammatory expression designed to incite or threaten upheaval is not protected; and expression advocating illegal activity can be prohibited.¹⁰⁵ The SA Constitution identifies unprotected expression that overlaps with US court rulings. Specifically, section 16(2) of the SA Constitution states that protection does not extend to "(a) propaganda for war; (b) incitement of imminent violence; (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

Additionally, in the United States the *type of forum* in which expression occurs is important in assessing whether it is protected. If the expression is viewed as being *school sponsored*, school officials can place limitations on it.¹⁰⁶ For example, educators can restrict the expression published in a school-sponsored newspaper as long as the restriction is based on legitimate pedagogical concerns. School officials have the right to

102 393 US 503.

103 *Idem* 508 & 509.

104 *Ibid.*

105 *Bethel School District No 403 v Fraser* 478 US 675; *Texas v Johnson* 491 US 397; *Gooding v Wilson* 405 US 518; *Morse v Frederick* 127 S Ct 2618.

106 *Hazel School District v Kuhlmeier* 484 US 260.

disassociate themselves from speech that appears to represent the school. However, the US Constitution still protects student expression that represents private/personal views unless it poses disruption at school.

As the Constitutional Court continues to delineate expression rights under the SA Constitution and learners' rights to religious and cultural expression under the Schools Act, School Governing Bodies will face the challenge of balancing concerns for school discipline and order with learners' constitutional rights.

4 Recommendations

Legal precedent undoubtedly sanctions learners who have the need to express their religious-cultural beliefs that clash with existing dress codes. The superlative example in South Africa would be that of the Constitutional Court's decision in *Pillay* that clearly defines learners' rights under the Equality Act regarding religious-cultural practices. The challenge to schools is thus clear: treat all learners fairly, making allowances for exemptions from requirements that may infringe religious-cultural practices. School incidents reported post-*Pillay*¹⁰⁷ indicate the need for greater attention to ensuring that schools treat all learners fairly.

As pointed out before, schools need to be made aware of the Constitutional Court's ruling that school rules need to provide accommodation for dress customs that cater for the expression of specific religious-cultural groups.¹⁰⁸ Even more urgent is the fact that the Department of Education needs to be seen as reacting by making resolute efforts in getting schools to pay attention to the *contentious matters* of supporting schools to develop rules that will accommodate learners' expressing religious-cultural beliefs.¹⁰⁹

The following points should be considered in framing and implementing policies that have the potential for infringing on rights related to religion/culture:

- (1) *Seek input from everyone willing to contribute to the debate.* Their support is not only crucial in implementing policies, but also in bringing matters to the forefront that may have the potential to impinge on a particular religion and/or culture. As can be seen in the *Pillay* decision, however, consultation does not immunise the school from challenges to its policies. The Constitutional Court noted that several individual societies maintain traditionally imbalanced power relationships or traditionally distorted population groups, increasing the possibility of local resolutions infringing on the rights of destitute groups.¹¹⁰ To counter this concern, schools must

107 Such as reported by *The Star* (2004-01-23) and *Beeld* (2008-01-20).

108 De Waal *et al* 78; *Pillay CC* par 38.

109 De Waal *et al* 78.

110 *Pillay CC* par 83.

attempt to involve the broad community to gain greater representation of diverse perspectives in the construction of the School Code.

(2) *Avoid falling into the trap of developing neutral Codes of Conduct.* The standards of such codes frequently put so-called middle-of-the-road and even *historically privileged practices* into effect.¹¹¹ In fact, the biggest threat to such dress policies, as reflected in a case in Texas, involving rosary beads, is the charge of being vague and over-broad.¹¹² As pointed out before, phrases such as *this includes ... but is not limited to ...* would indicate a school's willingness to accept that its code cannot foresee all circumstances that may occur.¹¹³ In such situations, courts tend to defer to educators when dealing with otherwise well-crafted policies. As reflected in the litigation discussed in this paper, whether in South Africa or the USA, the fact-specific nature of disputes about dress codes becomes readily apparent.

(3) *Include a clear process for requesting exemptions in dress code policies.* Who does the learner contact to request an exemption? On what basis will exemptions be granted? What should the learner's petition for an exemption include? How will the *centrality* of a learner's religious and cultural practices be assessed? When will the school notify the learner of the decision? What is the appeal process if a school denies a request?

(4) *Note that educators can restrict practices that will be disruptive to the school process.* As the US Supreme Court noted, however, it must be more than a fear of disruption. In the *Pillay* case, school officials argued that the nose stud posed a threat of disrupting the educational process. Yet, Sunali wore the nose stud for two years with no apparent impact on learners' education. What may be most difficult when school leaders attempt to make accommodations is to move out of the comfort of their own culture and recognise that a practice that seems different, exotic or even bizarre can be included and honoured without damaging the educational environment. As the Constitutional Court noted, "our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation."¹¹⁴

5 Conclusion

In affording religious-cultural practices legal protection, courts in South Africa weigh the appropriate balance between the rights to freedom of religion and culture and the State's duty, as carried out by school officials, to maintain safe and orderly learning environments at public schools. The South African Constitutional Court, in recognising learners' protected rights to human dignity, equality and freedom, has held that learners must be permitted to apply for exemptions from school policies that interfere with their religious or cultural practices:

- (1) Educators must ensure that policies do not include blanket prohibitions that unduly impinge on learners' rights.

111 De Vos where he points out that such a code is hardly ever *neutral*.

112 *Chalifoux v New Caney Independent School District* 976 F Supp 659. The federal district court upheld the wearing of rosaries, noting it as "pure speech", an unconstitutional restriction on a sincerely held religious belief, and it did not pose any disruption to the school.

113 De Waal *et al* 89.

114 *Pillay CC* par 92.

(2) Educators must be mindful of the Constitutional Court's warning regarding efforts to make reasonable accommodations:

The difficult question then is not whether positive steps must be taken, but how far the community must be required to go to enable those outside the 'mainstream' to swim freely in its waters.¹¹⁵

How far? Although part of the solution has already been imbedded in this article, the distance public schools need to go would be as far as it takes to avoid *the slippery slope scenario* of ignoring the *bona fide* religious-cultural practices of South Africa's public school learners.¹¹⁶ If school practices were to stop infringing on the religious-cultural rights of learners, the first step in complying with human dignity, equality and freedom as guaranteed by the SA Constitution would have been taken.

This article has focused on Codes of Conduct and the importance of ensuring that these codes do not unfairly discriminate against learners. Yet, conduct codes represent only one aspect of supporting and promoting equality and freedom in South African schools. As school officials work to provide leadership in inculcating important social values surrounding ethnic diversity, they must also be aware of what messages are embedded in the curriculum, instructional practices and organisational structures at school. Are these various aspects of schooling designed primarily to reflect mainstream and historically privileged forms of schooling? Do all learner groups feel valued? Do some learners feel excluded or marginalised? Do students see aspects of their religion and culture recognised, respected, or celebrated? Do schools encourage learners to freely express their opinions and beliefs? In fact, unexamined school practices in many arenas may be causing unfair discrimination for learners. School officials can use the factors for assessing discrimination specifically stipulated in the Equality Act to begin a dialogue with the school, the parents/caregivers and the community regarding whether unfair discriminatory practices exist. Relying on the Equality Act, an entry point for such a dialogue could be "whether the discrimination impairs or is likely to impair human dignity".¹¹⁷ When human dignity is threatened, learners are unlikely to grow and develop to their full potential. Human dignity would certainly be a powerful lens for school officials to use in examining pluralism and learners' freedom in South African schools.

Let us celebrate religious-cultural diversity at school level through policy and procedure!

115 *Idem* par 76.

116 *Idem* par 107.

117 S 14(3)(a) Equality Act.