

Religious freedom, reasonable accommodation and the protection of the conscience of learners in South African public schools

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Abstract

South Africa under apartheid practiced a policy of Christian National Education, teaching children within a narrow framework of religion and values. Post-apartheid, the government has worked to balance equality and pluralism. Problems easily arise in the educational sphere when parents object to the content of required courses. The principle of reasonable accommodation provides guidance in such situations. The practice and implications of reasonable accommodation may be found in legal precedent. Reasonable accommodation requires flexibility of both parties in a dispute. It demands not equality of outcomes across all cases, but rather that all parties be treated with equal respect and consideration.

Keywords South Africa, education, religion, conscience, pluralism, discrimination, constitution, reasonable accommodation.

The interplay of the right to religious freedom, the right to freedom of conscience and the right to education is significant and this interplay universally creates a difficult dynamic. The fact remains that the interplay of these complex rights requires thoughtful engagement with diversity, tolerance as well as pluralism (De Vos & Freedman 2014:483). One of the ways in which South Africa has dealt with this interplay is by way of the principle of reasonable accommodation.

Religious freedom and equality within the context of education did not exist during Apartheid in South Africa. Christian National Education (CNE) formed the cornerstone of education and the application thereof was exclusive of other beliefs, religions and ideologies. CNE violated the psychological integrity, security and conscience of learners and parents who did not follow a specific version of Protestant Christianity.

Because South Africa is now a democracy that promotes the right to religious freedom, the possibility of harming the psychological integrity and security of a learner or parent seems unlikely. Yet, it is argued that less obvious and subtle threats to the violation of the conscience and psychological integrity of learners and parents can occur. Seemingly neutral provisions within the National Policy on Re-

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ligion and Education, 2003 (hereinafter the Policy), have the potential to cause or threaten to cause injury to the psychological security or the freedom of conscience of learners or their parents. These potential and subtle threats exist in the inherent transfer of values that emanate from education and specific subjects, especially those more conducive to the transfer of values such as sex education, religious education and human rights education. Values and ideologies which form part of compulsory subjects might be in conflict with certain religious and ideological views of parents and learners. This has the potential to be burdensome to the psychological integrity of a learner since these subjects are compulsory and not subject to free and voluntary attendance. Situations may arise where the values and standards of parents and schools cannot be reconciled. The growing schism between family education and education received in schools does not help this situation. This applies to sex education, religious education and the teaching of values in general.

The first part of this article will research potential instances in South African public school curricula where the transfer of values, whether religious or non-religious occur most prominently. Secondly, the nature of the principle of reasonable accommodation and whether it should be applied in cases concerning the transfer of religious and non-religious values within public school curricula as a measure to promote the right to religious freedom is considered. Thirdly, problems arising from the application of the principle of reasonable accommodation are discussed and dealt with.

The development of the principle of reasonable accommodation towards the protection of the right to religious freedom, the freedom of conscience and the psychological integrity of learners and parents also has international value. The problem of freedom of religion and conscience within education is found in various countries, especially countries such as the United States of America, Belgium, Russia, India and several others. This article adds to the general debate on methods to deal with conflict between curriculum and freedom of religion and can also be relevant for these countries.

1. South African legal position regarding the transfer of religious² and non-religious values³

Section 15(1)⁴ of the Constitution of the Republic of South Africa, 1996 (final Constitution) refers to the “freedom of conscience, religion, thought, belief and opin-

² “Teaching of religion” or “transfer of religious values” is a phrase used holistically to describe any type of teaching concerning religion. In other words, teaching about religion or religion education and confessional teaching of religion or religious instruction. This is also a narrow subset of “the transfer of values”.

³ “The transfer of values” is a very broad concept which, for purposes of this article includes: religion education, religious instruction, sex education, and human rights education and also the impartation of any ideology, value, concept, idea or virtue.

⁴ “(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion. (2) Religious observances may be conducted at state or state-aided institutions, provided that (a) those

ion.” The wording of section 15(1) derives much from the predecessor, section 14 of the interim Constitution⁵ and includes a broad spectrum of atheistic and theistic beliefs and values (Farlam 2008:41-5).⁶

Section 15 has two components – a free exercise component and an equal treatment component. Teaching of religion falls mainly under the free exercise component which includes the customs inherently associated with religions, the wearing of traditional religious symbols and religious education. These have the potential to cause conflict in a multi-religious South Africa (Du Plessis 2006). Teaching of religion can also fall under the equal treatment⁷ component (section 9 of the final Constitution), where a public school, or the government, or an individual, attempts to establish a religion in the state and hence in the public schools, and in effect discriminates against other religions – similar to the South African government and Christian National Education during Apartheid.⁸ This does not mean that the state is not allowed to assist or aid religious institutions in the public sphere (as indicated in section 15 (2)) – as long as the requirements of section 15(2) are met and it does not amount to unfair discrimination in section 9. According to Iain Benson (2010:27), South Africa thus favours both a religiously inclusive conception of the public sphere and a plural conception of the public sphere.

Former Chief Justice Chaskalson stated in the case of *S v Lawrence; S v Negal; S v Solberg* (hereinafter the *Lawrence*-case) that section 14 of the interim Constitution does not include an establishment clause.⁹ It is not similar to the United States’ position where the First Amendment states that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” and that we should not read

observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary...”

⁵ 200 of 1993

⁶ This is also in line with the wide interpretation of religion and belief as mentioned in international law jurisprudence. Article 18 of the Universal Declaration on Human Rights (UDHR), 10 December 1948, states: “Everyone has the right to freedom of thought, conscience and religion.” In line with section 15 of the final Constitution and section 14 of the interim Constitution, article 18 does not only protect religion but also political or other opinions. Also see article 18 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

⁷ “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law...(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...religion, conscience, belief, culture, language and birth...”

⁸ Christian National Education meant education as the study of all the sciences based on the doctrine of the sovereignty of God (Kinghorn 1997:136). Every sphere of society, church, state, schools, and households had to conform to what was regarded as divine law (Chidester 1992:192). Also see the National Education Policy Act, No. 39 of 1967.

⁹ *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC), paragraph 101.

into this the “advancement or inhibition of religion by the state.”¹⁰ The cases of *Christian Education South Africa v Minister of Education*¹¹ (*Christian Education-case*) and *Minister of Home Affairs and Another v Fourie*¹² (*Fourie-case*), state that the religious beliefs held by the great majority of South Africans must be taken seriously.¹³ Religious bodies are seen to be part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.¹⁴

The inclusive and pluralistic approach towards religion is further mentioned in legal instruments concerning education, such as the National Policy on Religion and Education, 2003. In the foreword of the Policy, it is stated that the Policy gives expression to the invocation of religion in our Constitution and the principles governing religious freedom. It mentions that, because South Africa is a diverse population, it should be developed through diversity, a unity of purpose and spirit recognising and celebrating our diversity. The Policy also clearly states that there should be no particular religious ethos dominant in public schools suppressing other religions. The Minister (at the time Kader Asmal) further stated that we do not have a state religion, but our country is not a secular state where there is a very strict separation between religion and state.¹⁵ The Policy recognises the right and diverse religious heritage of South Africa and adopts a co-operative model. Also, the Policy is not hostile towards any religion and does not discriminate against anyone – rather it displays respect towards the various religions of South Africa.¹⁶ Paragraph 5 states that the state does not advance or inhibit religion and must assume a position of fairness informed by esteem for all worldviews and religions. This is called positive impartiality.

South African law, in general, supports an inclusive, pluralistic and accommodative approach towards religion in society and education – but what about instances concerning the transfer of values? The question remains as to what extent and how the right to religious freedom is realised in South African public schools and what it can contribute with regards to the transfer of religious and non-religious values within public school curriculum universally.

The current approach to freedom of religion, belief and conscience within education is vastly removed from the historical CNE approach and contrary to censorship and exclusiveness. When considering the current democratic dispensation and the human rights in the Bill of Rights of the final Constitution such a past seems

¹⁰ Ibid.

¹¹ 2000 (4) SA 757 (CC) (2000 (10) BCLR 1051).

¹² 2006 (1) SA 524 (CC) (2006 (3) BCLR 355).

¹³ Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC) (2006 (3) BCLR 355), paragraph 89.

¹⁴ Ibid., paragraph 90.

¹⁵ National Policy on Religion and Education, 2003, Minister Kader Asmal's foreword.

¹⁶ Ibid.

unreal and under the Constitution, never to be repeated again. In order to prevent any unintentional repetition of past injustices and harm to the psychological integrity of the learner, several subject areas within the South African curriculum that are viewed and instituted as objective, neutral and compulsory, and in line with the current democratic approach to the right to freedom of religion and belief, need further investigation. These subjects are chosen since they can easily contain the transfer of controversial information and values. It is argued that these subjects are not in themselves necessarily discriminatory, but in their application, have the potential to discriminate, irrespective of their neutral and objective motivation.

It is not argued that these subjects should not be allowed. In fact, these are vital parts of the curriculum and it is fundamental for a school to provide this information and access to this information. Children should be able to choose this if they want to. This is vitally important to prevent censorship as was done during Apartheid. However, alternatives to religion and sex education that are actively sought by a person will be a form of self-censorship which is the prerogative of an individual – and this is not provided for by these compulsory subjects.

1.1 Religion education

In accordance with the National Policy, religion education is a set of curriculum outcomes defining what a pupil should know about many different religions in a “neutral way” (Jeenah 2014:17). Paragraph 18 states that religion education is justified by the educational character of the programme. Religious instruction on the other hand refers to the actual teaching which is aimed at “providing information regarding a particular set of religious beliefs with a view to promoting adherence thereto.”

It is argued that even the objective teaching of religion can occasion the transfer of values – values which can be viewed by parents and learners as contrary to their right to religious freedom, conscience or psychological integrity. Some parents do not want their child to be taught about other religions as they fear that this might divert them from their own religion, or they may not agree with some of the principles of other religions. Whether such a form of self-censorship is an appropriate response by parents or not, is not necessarily for the state to determine. It holds a possible threat to the conscience and psychological integrity if a choice is not provided since this subject is compulsory. What is relevant is whether parents and learners have alternative options.

1.2 Sex education

The second subject within the South African curriculum that is conducive to the transfer of values is sex education. Sex education forms part of the subject “Life Orientation” which is provided for as a fundamental subject required for the National

Senior Certificate in South African schools. Life Orientation can include topics that are vitally important but potentially harmful to the psychological integrity and conscience of the learner or parent. These topics include information on gender roles, changes towards adulthood and decision-making regarding sexuality, stereotypical views of gender roles and responsibilities, teenage pregnancy and sexually transmitted diseases – including HIV and AIDS.¹⁷ Nothing in the Schools Act allows parents to play a role with regards to sex and health education. As parents' views regarding sex and health education to their children may be shaped by their religious beliefs and philosophical worldviews, they may have objections to the way such education is presented (Visser 2005:213).

1.3 Science

In Grade 12, the South African curriculum requires students to learn about Darwinism, natural selection and evolution in the subject called “life sciences” and Grade 10 students are taught about the history of life on earth.¹⁸ The issue of teaching evolution in countries such as the USA has been a major cause of conflict regarding religious freedom.¹⁹ It is important to indicate that topics such as Darwinism, natural selection and human evolution can be contrary to specific religious views and may cause an issue with regards to imposing on the freedom of conscience of specific religious individuals, as well as imposing on the right to religious freedom – especially in light of the fact that this subject has no provisions for alternative classes.

1.4 Values education

It should be remembered that values education referred to in this thesis is much broader than the subjects “religion education” and “religious instruction” as indicated in the Policy. It includes other subjects and is encompassing of the whole curriculum of South African public schools and the teaching of ideologies, beliefs, ideas, religions and opinion in the curriculum.

¹⁷ Ibid.

¹⁸ “National Curriculum Statement, Life Sciences, Further Education and Training phase (grades 10-12)”, Department of Basic Education, 2011, accessed September 1, 2014, <http://www.education.gov.za/LinkClick.aspx?fileticket=RsiGaHNRRNA%3D&tabid=420&mid=1216>.

¹⁹ In *Edwards v. Aquillard* 482 U.S. 578 (1987), the US Supreme Court held that a balanced treatment in the teaching of creation science and evolution science violated the First Amendment. See also, *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255, 1258-1264 (ED Ark. 1982) and *Tammy Kitzmiller, et al. v. Dover Area School District*, et al. 400 F. Supp. 2d 707, Docket no. 4cv2688. In *Pelozo v. Capistrano Unified School Dist.* 782 F. Supp. 1412 (C.D. Calif. 1992), the School district did not violate the First Amendment rights of the biology teacher by requiring him to teach the evolution theory and prohibiting any discussion of creationism or religion during class. For a discussion of these issues see Barendt 2011:267-281.

One specific example is the teaching of human rights and other values. For example, the relationship between religion and education must be guided by the principles mentioned in paragraph 8 of the National Policy: the relationship must flow directly from the constitutional values of citizenship, human rights, equality, freedom of conscience, religion etcetera. Paragraph 30 states that schools should show awareness and acceptance of the fact that values do not necessarily stem from religion and that not all religious values are consistent with the Constitution.

The Preamble of the South African Schools Act²⁰ aims at providing one national education system enhancing the culture of human rights and the foundations of the Constitution (human dignity, equality, non-racialism and non-sexism, the supreme authority of the Constitution, and the rule of law in South Africa) (Joubert 2012:342). From the above, South African education promotes the teaching of constitutional values and specific interpretations of human rights within its curriculum in general.

It can be argued that such values may be contrary to the religious, ideological or philosophical convictions of parents or learners. It can also be asked whether a new ideological viewpoint based on constitutional values is not being enforced upon learners. Paragraph 68 of the Policy tries to answer this question by stating that it does not try to select from different religious traditions to try and build a new unified religion and it is not a project in social or religious engineering designed to establish uniformity or religious beliefs and practices. According to the Policy a free and open space is created for exploration and respect for diversity. It cannot be denied that the teaching of the human rights and values of the Constitution can impart specific values to students that might be contrary to their religious views.

Gerhard van der Schyff (2001:152) states that if religious classes form part of the public school curriculum the attendance at such classes must be voluntary. However, religion education and values education, where constitutional values are taught (whether contrary to religious beliefs or not) are not voluntary in South Africa. PJ Visser (2005:213) is of the opinion that the Policy attempts to impose a humanistic perspective on the study of matters of faith, which ostensibly goes against the views on religion held, for example, by many Christians and Muslims. If the Policy would be implemented on a voluntary basis by allowing for exemptions on conscientious grounds (which is currently excluded), parents and learners would at least have a choice and their right to freedom of religion would accordingly be respected.

Since it is argued that the transfer of values cannot be avoided in education, it is argued that reasonable accommodation should allow for schools teaching a sin-

²⁰ 84 of 1996

gular ideological ethos as long as respect for the other are taught at the same time (which is in contrast with former CNE). The goals of the Policy can also be taught by schools with a singular ethos.²¹

An inclusive and accommodative approach to these curricula issues is supported by the Constitution and other jurisprudence analysing provisions on the right to education and religious freedom. In order to promote such an accommodative approach, it is argued that the principle of reasonable accommodation as used in South African law needs further development to provide protection for learners whose religious freedom and freedom of conscience can potentially be infringed upon by seemingly neutral subjects such as religion education, sex education, science and the general transfer of values in public schools.

2. Reasonable accommodation

Reasonable accommodation is used by Justice Langa in the case of *MEC for Education, Kwazulu-Natal, and others v Pillay*²² (*Pillay*-case). He states that religious and cultural practices should not only be permitted, but rather affirmed, promoted and celebrated. This is in line with the Constitution's commitment to affirming diversity and completely in accord with the nation's decisive break from its history of intolerance and exclusion.²³ Justice Albie Sachs continues this interpretation by stating that equality is not uniformity. His interpretation of equality is one where uniformity can be the enemy of equality. Equality means equal concern and respect across differences and does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality does not imply a homogenisation of behaviour but acknowledgement and acceptance of difference.²⁴ This is also supported by section 2(c)²⁵ of the schedule in the Promotion of Equality and Prevention of Unfair Discrimination Act²⁶ (PEPUDA). However, this accommodation is qualified by the fact that it must be accommodated substantively equally (thus, all religious groups / individuals must be allowed the same opportunities) and attendance must be free and voluntary. Thus,

²¹ The general religious community within South Africa agrees with such an approach. This general view can be found in articles 7-9 of the *South African Charter of Religious Rights and Freedoms* of the South African Council for the Protection and Promotion of Religious Rights and Freedoms.

²² *MEC for Education, Kwazulu-Natal, and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

²³ *Ibid.*, paragraph 65.

²⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), paragraph 132 (Sachs J).

²⁵ One of the unfair practices in education includes: "(c) The failure to reasonably and practicably accommodate diversity in education."

²⁶ 4 of 2000.

religion cannot be forced onto a person / group, if religious activities / rituals are conducted in the public sphere. Teaching about religion will have to adhere to these equality provisions and provisions concerning personal liberty. Such a religiously inclusive and plural conception of the public sphere is in line with the approaches followed in countries such as Belgium²⁷ and Netherlands.²⁸

An approach which celebrates diversity is in line with one of the two approaches to liberalism. The two approaches to liberalism include convergence liberalism and *modus vivendi*. Convergence liberalism assumed that society will move towards some sort of consensus as time goes on. This version hides the real problem, that there are claims, integral to our various communities that cannot in fact be reconciled. *Modus vivendi* gives space to diversity – “pluralistic liberalism” (Benson 2014). Convergence liberalism states that liberal toleration is the ideal of a rational consensus on the best way of life (Gray 2000:1). It cannot show us how to live together in societies with plural ways of life (Gray 2000:1-2). Pluralistic liberalism (*modus vivendi*) is the search for terms of peace among different ways of life – a means to peaceful co-existence (Gray 2000:2). With reasonable accommodation, room is made for diverging ideas about life and these ideas acknowledged. For example, neutral forms of sex education and religion education are upheld and presented as the status quo (this is more in line with convergence liberalism), but reasonable accommodation acknowledges that there are plural thoughts on these issues and should be accommodated when reasonable (which gives adherence to pluralistic liberalism). This also provides for a practical method to give effect to religious diversity in education.

Accommodation has been discussed in South African jurisprudence and case law. In the *Fourie*-case²⁹ it was stated that an open and democratic society is a place where there is capacity to accommodate and manage differences of intensely-held world views and lifestyles in a reasonable and fair manner. The Constitution’s objec-

²⁷ Many refer to the Belgian system as one where there is a separation between religion and state. However, this is not the same as *laïcité*. Also, some authors argue that the separation-terminology is not appropriate. Another phrase may more precisely capture the religion-state model in Belgium – “mutual independence.” The phrase emphasises the freedom which exists as well as the mutual consideration which demands, at the least, the acceptance of each other’s existence. Belgium is neutral but this is not neutrality in a way that requires state disbelief of religious phenomena. This is positive neutrality where positive promotion of the development of religion exists without interference in their independence (Torfs 1996:959).

²⁸ The right to religious freedom in the Netherlands is a combination between positive and negative religious freedom (Wijnen and Miedema 2013:6). The state is actively trying to make the exercise of religion possible and adheres to the idea of active pluralism or inclusive neutrality. In this approach religion is actively allowed in the public sphere but on an equal basis. *Ibid.*, 7 See also, Zootjens and Glenn 2012:339. In France the emphasis is on neutrality and *laïcité*. In the Netherlands, the emphasis is on diversity. *Ibid.*, 9. Unlike France and the US, there is no principle requiring the separation of religion and state in education in England (Glendenning 2008:143).

²⁹ (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

tive is to allow different concepts about the nature of human existence to inhabit the same public realm, in a manner that is not mutually destructive and allowing government to function in a way showing equal concern and respect for all.³⁰

The most prominent case dealing with reasonable accommodation and its meaning is the case of *Pillay*. In this case a young Hindu girl was wearing a nose-stud to school as part of her religious tradition. The wearing of the nose-stud was contrary to the dress code of the particular school.³¹ This case clearly poses the question: what is the place of religious and cultural expression in public schools? It raises vital questions about the nature of discrimination under the provisions of the PEPUDA as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond.³² In the Equality Court it was held that the discrimination was not unfair and she could not wear the nose-stud.³³ This decision was set aside in the High Court and indicated to amount to unfair discrimination.³⁴ The Court decided that the phrase reasonable accommodation is important in the determination of the fairness of discrimination against religious freedom.³⁵ Reasonable accommodation is also most appropriate where discrimination arose from (a) a rule or practice that was neutral on the face of it and designed to serve a valuable purpose but (b) nevertheless has a marginalising effect on certain parts of society.³⁶ The Court finally decided that the discrimination had a serious impact on the girl and the intended purpose of upholding discipline and a high standard of education was not diminished by the girl's exemption from the rules of the school.³⁷ This case indicated that reasonable accommodation allows for the wearing of religious symbols in public institutions. The Court also stated that "...religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality."³⁸

The PEPUDA, section 14(3)(i)(i-ii), states that steps must be taken that are "reasonable in the circumstances to (a) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or (b) accommodate diversity." One of the prohibited grounds includes religion.³⁹ This supports the principle of reasonable accommodation. Paragraph 73 of *Pillay* elaborates on the content of the

³⁰ *Ibid.*, paragraph 95.

³¹ (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

³² *Pillay*-case, paragraph 1.

³³ *Ibid.*, paragraph 14.

³⁴ *Ibid.*, paragraph 18.

³⁵ *Ibid.*, paragraph 77.

³⁶ *Ibid.*, paragraph 78.

³⁷ *Ibid.*, paragraph 112.

³⁸ *Ibid.*, paragraph 32.

³⁹ Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

principle, by stating that a school must sometimes take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that people are not relegated to the margins of society because they do not or cannot conform to certain social norms.

Paragraph 74 of *Pillay* also states that exclusion from the mainstream of society results from the construction of a society based solely on mainstream attributes. “Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in . . . relegation and banishment.”

As already mentioned, certain requirements are given for reasonable accommodation. Paragraph 78 of the *Pillay*-case states that first, reasonable accommodation is most appropriate where discrimination arises from a rule of practice that is neutral at face value and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect. Second, the principle is particularly appropriate in specific localized contexts, such as an individual’s workplace or school, where a reasonable balance between conflicting interests may more easily be struck.

The curriculum subjects discussed above all fall under these two requirements. They are all practices of curricula that are neutral at first glance, but may still have a marginalizing effect when they intrude on the religion, belief or conscience of a learner. If it is possible to expect a school to incur additional hardship or expenses to accommodate learners in cases where their or their parents’ views differ regarding sex education, transfer of values, religion education and, in some instances, science, it can still place an enormous burden on the school and state. In order to overcome this, the accommodation has to be reasonable. Is compulsory religious education, sex education and other objective values taught in the schools neutral at face value, designed to serve a valuable purpose but (b) nevertheless have a marginalising effect on certain parts of society?⁴⁰ It is argued that they have the potential to be so in the absence of opt-out clauses or other alternatives. It is also argued that the flexible nature of the reasonable accommodation principle as proven in the *Pillay*-case and confirmed by Dympna Glendenning (2008:28), can find application in religious education and the transfer of values and in general, the further protection of religious freedom in public schools. In line with the Equality Act, reasonable steps must be taken to accommodate diversity and prevent discrimination on one of the prohibited grounds – namely, religion.

3. Problems and arguments concerning reasonable accommodation

Reasonable accommodation also presents some problems and is not without limitation. When will accommodation be reasonable? When will accommodation place

⁴⁰ Ibid., paragraph 78.

too much of a burden on the state? Will the allowance of learners and parents to opt-out vital curriculum modules not create an unmanageable administrative burden on the state and therefore be unreasonable?

*Prince v President of the Law Society of the Cape of Good Hope*⁴¹ (Prince-case) states that “it is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform to the law...the balancing exercise requires a degree of reasonable accommodation from all concerned. Rastafari are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice of their religion.”⁴² However, Justice Sachs in his minority judgment did not agree by indicating that the:

[M]ajority judgment effectively, and...unnecessarily, subjects the Rastafari community to a choice between their faith and respect for the law. Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government. ...the majority judgment puts a thumb on the scales in favour of ease of law enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notions of tolerance and respect for diversity that our Constitution demands for and from all in our society.⁴³

Clearly then, reasonable accommodation will not be possible in all circumstances, and sometimes it is even expected of the holder of the belief to compromise. It is agreed that religion, together with the state, must in some cases make reasonable accommodations and adapt to circumstances. Learners and parents cannot abstain from curricula without restriction as this will place an enormous burden on the school. It is also agreed with the minority judgment that the mere fact that accommodation of religious instruction or allowance of opt-out clauses during specific parts of science or alternative classes during sex education might place some financial or administrative burden on the state is not sufficient to refuse reasonable accommodation. Reasonable accommodation should be applied in a flexible manner, depending on the circumstances of the case.

Reasonable accommodation is also influenced by the ideologies promoted in society. Convergence liberalism will usually hold forward one version of the common good and measure all other instances against it. For example, one interpretation of equality and the common good might allow reasonable accommodation in some

⁴¹ (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

⁴² *Ibid.*, paragraph 76.

⁴³ *Ibid.*, paragraph 147. Minority judgment of Justice Sachs.

circumstances, but another interpretation of equality might not allow reasonable accommodation in the same circumstances. Religion is accommodated within the framework of the values established by the state and their interpretation thereof. This immediately creates a scenario where religion has to adapt itself in order to “fit” those values. This is not always a just position and therefore it is argued that it is the state who should, as far as possible reasonably accommodate religion (as argued by Justice Sachs) and not the religion that should, as far as possible accommodate the state. This can very easily be contrary to human dignity and also place a grave burden on the religious person or group. However, reasonable accommodation cannot be abused by learners and parents as a measure simply to impose their will. Silvio Ferrari mentions that the right of religious freedom has increasingly taken on the goal of protecting a public order unilaterally assessed by the states themselves rather than autonomies of individual consciences and religious groups. The right of religious minorities to access the public space is increasingly made dependent on their ability to pass a very identitarian and reasonable/unreasonable test (Foblets 2012:14). It is the modern state that defined, in different ways according to the times, the space and role of the private sphere. “The latter can be free – and distinct – from the state only when the state agrees and restrains itself, in this way giving spaces of freedom to individuals and groups.”⁴⁴ In the *Christian Education*-case the court held that to grant respect to sincerely held religious views of a community and make an exception from the general law to accommodate them would not be unfair to anyone else who did not hold those views. The essence of equality lay not in treating everyone in the same way, but in treating everyone with equal concern and respect.⁴⁵ Therefore, making an exception for children who do find the objective teaching of religion in religious education to be contrary to their beliefs, will not necessarily amount to inequality against others who do not believe this. The same is relevant for sex education and other forms of transfer of values.

Iain Benson (2011:11) also states that the principle of accommodation exists because we cannot expect public officials to act differently than their religions dictate when they are at work. If we wish for them to act conscientiously, and their consciences are formed by their beliefs and their beliefs may well be informed by what they believe to be true about religion, then one cannot expect them to leave their religion at home. Similarly, we cannot expect children and parents to act differently at school, even more so if their conscience is formed by their religion and it is expected of them to act in accordance with their conscience. Iain Benson

⁴⁴ Alessandro Ferrari, “Religious Freedom and the Public-Private Divide: A Broken Promise in Europe?” in *Religion in public spaces: A European perspective*, eds. Silvio Ferrari and Sabrina Pastorelli, 71-91 (Farnham, Surrey: Ashgate, 2012), 71.

⁴⁵ Paragraph 42 at 781H/1 - 782B/C.

(2010:25) further argues that the public is best understood as a realm of competing belief systems: the public contains believers of all kinds – agnostic or religious. The role of the law is to order or reconcile the relationships when conflict arises between believers and to do so according to the principles of justice. This should give religion as much scope as possible, rather than taking a narrow approach, such as saying that the public sphere is non-religious (Benson 2010:25-26).

Based on such an interpretation of reasonable accommodation, it can be argued that it is a positive duty of the state to reasonably accommodate parental choice and more religious freedom in the public school. This does not mean that each person can determine for himself which laws he / she will obey or which parts of the curriculum he / she will attend, but rather, that the state should avoid a burdensome scenario for parents and children. This means possible allowance of religious instruction on a voluntary basis or allowance for opt-out clauses during sex-education, religious education or science for parents who find these modules contrary to their right to religious freedom. With this it is not stated that parents with religious ideas are automatically exempted from certain laws of governing education.

Finally, reasonable accommodation, despite its limitations, is promoted as a solution to enhancing religious freedom in education. The right to religious freedom is fundamentally important and the argument that an undue burden is placed on the state in the accommodation of religion should not easily be accepted. In the words of Justice Sachs above – this is the price that constitutionalism exacts from the government. The state has the resources to reasonably accommodate religious freedom – resources that persons and communities usually do not possess and yet, at a time of secularist movements, convergence liberalism and increasing pressures on religious associations, the needs of religious societies are not met, but rather the needs of the state. In this manner a repetition of past Apartheid religious discrimination is avoided. Single religion education or teaching is not rejected but it is rather stated that reasonable accommodation can make room for single religion schools and schools with a singular ethos while still teaching “respect for the other.”

4. Conclusion

This article acknowledges the importance of the rights in the Constitution. It is also argued that these rights are so fundamental that the past injustices of Apartheid should never be repeated again. CNE promoted one religion above all others in public school education.⁴⁶ This infringed on the psychological integrity, freedom of religion and conscience of many parents and learners. It is argued that the current curriculum contains

⁴⁶ Single-faith education is not necessarily negative if it is dealt with properly and in line with Constitutional values. It is merely argued that single-faith education as used in CNE is contrary to the values of freedom, equality and human dignity.

subtle threats to the right to religious freedom and conscience, although the intention has not been to repeat past injustices. Education inherently contains the transfer of values, whether of a religious or non-religious kind. Certain subjects such as religion education, sex education and science are more conducive to the transfer of values and therefore carry a higher risk to infringe on the right to religious freedom and the right to freedom of conscience. In order to avoid such discrimination these threats are identified and possible solutions considered, namely, the principle of reasonable accommodation. Together with this it is argued that reasonable accommodation should also allow single ethos schools teaching respect for the “other.” This approach is contrary to CNE.

Although it is not argued that the development of reasonable accommodation is the only way to enhance equality and pluralistic liberalism regarding the right to religious freedom, it is argued that it is one way to do so. It is also a way to prevent infringements on the freedom of religion, belief, conscience and psychological integrity of the learner or parent in subjects that are deemed to be neutral but may still have a discriminating effect.

The use of the principle of reasonable accommodation presents limitations but is one method in promoting the values of diversity, tolerance, equality, freedom and human dignity of the final Constitution. Because the right to religious freedom is so fundamental, the mere fact that an administrative burden is placed on the state does not serve as a blanket ban to the use of the principle of reasonable accommodation. As stated by Justice Sachs, ease of law enforcement cannot be promoted at the expense of tolerance and respect for diversity demanded by the final Constitution.

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