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# Can law avoid creating culture and religion in its own image? The context for diversity, religion and culture in *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*: Reflections a decade later

The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. These conversations have many voices.<sup>1</sup>

## Abstract

This article reviews the important *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay* decision, handed down by the Constitutional Court of South Africa, against reflections regarding law and religion in the ten years since that decision was delivered. It places the decision in relation to scholarly debates about the nature of a diverse society and, in particular, how certain strands of what pass for “liberal” theory do not, in fact, provide for respect for diversity and difference. In particular, the article reviews various ways in which moves towards homogeneity may employ the language of diversity to achieve their ends against the goals of the South African *Constitution*, which, properly understood, should maximize genuine diversity and accommodation. The article also discusses briefly the recent decision of *Organisasie vir Godsdiens Onderrig en Demokrasie v Randhart et al.*, which interprets sec. 15(2) of the *Constitution* as allowing religious observances in public schools as long as such observances are not exclusive and exclusionary. The article supports this interpretation and suggests that the goals sought by the applicant in *Organisasie vir Godsdiens Onderrig en Demokrasie v Randhart et al.* exemplified the kind of “convergence” and “civic totalism”. Also discussed is whether other listed constitutional terms such as ‘culture’, ‘belief’ and ‘conscience’ should attract the same kind of protections as ‘religion’ and whether there is a risk that, by categorizing the protection of other concepts too broadly, important aspects of religion (for example, that it is not simply an individual, but a communitarian right) might be trivialized. Finally, the article reviews

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1 Martin Chanock 2002:41 quoted by Langa CJ in *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 54.

certain developments in other countries (France and Canada) to suggest that how the State is understood in the context of accommodation will vary in relation to how the terms 'secular' and 'diversity' are defined.

## 1. Introduction

In this article, I shall review the decision of the Constitutional Court in *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay (Pillay)*,<sup>2</sup> delivered over a decade ago, to offer some reflections on its ongoing importance in the fields of religion, culture and education. After giving a review of the decision, I shall raise a few questions about how religious (and cultural) accommodation is approached with a view to suggesting that the spectre of a single culture, the very thing Chanock warns us against in the above quotation, is very much with us in some of the language we use to describe the nature of the "state" within which our analysis of accommodation must occur. I refer to what we mean when we speak of "the secular" and, more generally, whether or not we are aware of the anti-religious ideology of "secularism".<sup>3</sup> Secondly, I shall suggest that there are, in fact, competing conceptions of what it means to be "liberal" that cast into doubt any generalized embrace of "liberalism", since at least one of the main kinds of liberalism currently on offer is, in fact, illiberal. Thirdly, I shall also suggest that there are, in fact, a few central terms and concepts in the discussion about law and religion that hold the prospect of diminishing rather than furthering proper respect for the role of religion (and culture). I shall caution that, unless some of the central conceptions are re-understood, there is the spectre that law, driven in part by the momentum of contemporary liberalism, may well undermine the important constitutionally guaranteed principles it is trying to protect.

## 2. The facts and judgement of Pillay

It will be apt to briefly begin by providing an overview of the reasons for judgement in *Pillay*. In the words of Chief Justice Langa, the judgement in *Pillay* " ... raises vital questions about the nature of discrimination under the provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the *Equality Act*) as well as the extent of protection afforded to cultural and religious rights in the public school

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2 CCT 51/06.

3 I am aware that there are variant readings of 'secularism', but wish to note that, on one reading, which is the meaning given to the term by the man who coined it in English in the mid-19<sup>th</sup> century, George Jacob Holyoake, the theory is intended to replace religion on a "material" basis. While others may use the term in a way that suggests it is "friendly" to religions or consistent with liberal democracy, I am of the opinion that it is important not to overlook a more aggressive strategy of religious exclusion and marginalization that shelters under other meanings. Contemporary French laicism partakes more of the spirit of Holyoake and his followers than anything inclusive and accommodational. See Benson 2004:83-98.

setting and possibly beyond”.<sup>4</sup> History has done nothing to alter the importance of these questions, as shown by the recent litigation in the High Court decision in the *Organisasie vir Godsdiens Onderrig en Demokrasie v Randhart et al.* GPJHC 27-06-2017 Case no. 29847/2014 (Gauteng HC) (*Randhart*) case.<sup>5</sup> This decision held that “single ethos” or single branded religious schools could not satisfy the constitutional requirements in sec. 15(2) for religious observances in state-funded schools to provide “equitable basis” delivery and “free and voluntary attendance”. Single religious provision and single religious branding were, therefore, struck down by the said High Court. The analysis in this article should be helpful in any setting in which the public sphere and principles of accommodation are at issue.

The respondent, Ms Pillay (the ‘respondent’) appeared on behalf of her minor daughter Sunali, the latter being admitted to the Durban Girls’ High School (DGHS) (the ‘School’) after the respondent signed a declaration, in which she undertook to ensure that Sunali complied with the Code of Conduct of the School (the ‘Code’). During the school holidays in September 2004, the respondent gave Sunali permission to pierce her nose and insert a small gold stud. When Sunali returned to school after the said holidays, the respondent was informed that her daughter was not allowed to wear the nose stud, as it was in contravention of the Code.<sup>6</sup> The respondent explained to the School that she and Sunali came from a South Indian family that intended to maintain cultural identity, which entailed the insertion of a stud in a young woman’s nose when she reached physical maturity as an indication that she had become eligible for marriage.<sup>7</sup> The School decided that, if Sunali did not remove the nose stud by a given date, she would face a disciplinary tribunal. Sunali did not remove the nose stud and a hearing by the disciplinary tribunal was then re-scheduled.

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4 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 1. See also *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 35, where the Court stated: “... this matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex”.

5 *Organisasie vir Godsdiens Onderrig en Demokrasie v Randhart et al.* raises the question of the accommodation of both religious and non-religious students in a public-school setting; at par. 22, the judgement refers to “non-believers” being treated the same as religious believers. Strictly speaking, it would be wiser to view public schools, as with the public sphere generally, as a realm of competing belief systems. Since all citizens are believers, the question is not whether they believe, but what they believe in.

6 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 5 reads: “Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wrist watch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn.”

7 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 4.

However, the disciplinary hearing never took place, as the respondent took the matter to the Equality Court.

The Equality Court held that, although there was a clear case of discrimination against Sunali, such discrimination was not unfair, the purpose of the Code being “to promote uniformity and acceptable convention amongst the learners”.<sup>8</sup> The decision by the Equality Court was taken on appeal by the respondent to the Pietermaritzburg High Court. In its judgement, the High Court held that the conduct of the School was discriminatory against Sunali and was unfair in terms of the *Equality Act*. The High Court stated that, because the nose stud had religious and/or cultural significance to Sunali, the failure to treat her differently from her peers amounted to withholding from her “the benefit, opportunity and advantage of enjoying fully [her] culture and/or practising [her] religion” and, therefore, constituted “indirect discrimination”.<sup>9</sup> This was so, because Sunali was part of a group that had been historically discriminated against; the High Court emphasized the vulnerable and marginalised status of Hindu and Indians in South Africa’s past and present, and the demeaning effect of denying Sunali’s religion (and hence her identity). The High Court held further that there was no evidence that wearing the nose stud had a disruptive effect on the running of the School, and that there were, in any event, less restrictive means to achieve the School’s objectives by simply explaining to its learners that Sunali’s religion or culture entitles her to wear the nose stud.<sup>10</sup> Consequently, the High Court set aside the decision and order of the Equality Court, which led to the School’s appeal to the Constitutional Court (the ‘Court’).

As Sunali was no longer at the School, the issue was moot, and the Court had to determine, in relation to the “leave to appeal”, whether the case should be heard. In line with settled jurisprudence, the Court held that it may be in the interests of justice to hear a matter, even if it is moot if “any order which [it] may make will have some practical effect either on the parties or on others”.<sup>11</sup> At issue for the Court was the combination of the Code<sup>12</sup> and the refusal to grant an exemption that resulted in the alleged discrimination.<sup>13</sup> With respect to the approach that should be taken in the interpretation of the *Equality Act*, the court noted that a litigant cannot

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8 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 14.

9 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 15.

10 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 17.

11 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 32. For other factors potentially relevant in determining whether the Court could hear a moot issue, see *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 32.

12 (i) The Code under review did not set out a process according to which exemptions should be granted, for the guidance of learners, parents and the Governing Body. (ii) The jewellery provision in the Code did not permit learners to wear a nose stud and accordingly required Sunali to first seek an exemption.

13 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 36. See also *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 38.

circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to fail to recognise sec. 7(2) of the *Constitution*.<sup>14</sup> Therefore, courts must assume that the *Equality Act* is consistent with the *Constitution*, and claims must be decided within its margins.<sup>15</sup> The Court stated that an appropriate comparator (in order to determine discrimination) is available – it is those learners whose sincere *religious or cultural beliefs or practices* are not compromised by the Code, as compared to those whose beliefs or practices are compromised.<sup>16</sup>

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14 *Constitution of the Republic of South Africa* 108/1996:sec. 7(2): “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

15 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000:par. 40. This was also reaffirmed later on in the judgement, where it was stated under consideration of the ‘fairness’ test that “... the fairness test under the *Equality Act* as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of section 9 of the Constitution. Whether that approach is consistent with the Constitution is not before us, and we address the question on the legislation as it stands”, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 70. However, Justice O’Regan adds: “I agree with Chief Justice Langa that this case falls to be determined under the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, not directly on the basis of section 9 of the Constitution although I also accept that the Act should, where reasonably possible, be interpreted consistently with section 9 of the Constitution”, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 134. See also Justice O’Regan’s views on the determination of ‘unfairness’, namely, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:paras. 165, 173 and 175.

16 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 44. In this regard, see the minority judgement by Justice O’Regan, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 164: “Langa CJ finds the comparator to be those learners whose sincere religious or cultural beliefs are not compromised by the Code. In my view, the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case. Those learners who are not afforded an exemption suffer a burden in that they are not permitted to pursue their cultural or religious practice, while those who are afforded an exemption may do so.” Justice O’Regan adds that this was the correct comparator in her view, because the challenge really related to a failure by the School to afford the learner an exemption. Therefore, the challenge was based on a failure to provide reasonable accommodation to the learner in respect of a neutral rule: “In this I differ from the position taken by the Chief Justice who sees the complaint both in the text of the Code and in the failure to grant an exemption.” According to Justice O’Regan, the Code is entitled to establish neutral rules to govern the school uniform: “The only cogent complaint to be directed at the Code is its failure to provide expressly for a fair exemption procedure ...”, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 165.

## 2.1 Culture and religion

The Court found that the nose stud is a voluntary expression of South Indian Tamil Hindu culture, a culture that is intimately intertwined with Hindu religion, and that Sunali regarded it as such. The Court also found that the borders between culture and religion are malleable; that religious belief informs cultural practice, and that cultural practice attains religious significance.<sup>17</sup> Religious and cultural practices are protected, because they are central to human identity and hence to human dignity (inextricably linked to the value of freedom<sup>18</sup>), which is, in turn, central to equality.<sup>19</sup> According to the Court, a necessary element of the freedom and dignity of any individual is an “entitlement to respect for the unique set of ends that the individual pursues”, one of these ends being the voluntary religious and cultural practices in which we participate.<sup>20</sup>

## 2.2 Voluntary and obligatory religious and cultural practices should be respected

The protection of *voluntary* and *obligatory* practices also conforms to the *Constitution*'s commitment to affirming diversity, taking into consideration the *centrality of the practice* – a commitment in line with South Africa's decisive break from its history of intolerance and exclusion.<sup>21</sup> The Court also stated that “the display of religion and culture in public is not a ‘parade of horrors’, but a pageant of diversity that will enrich our schools and, in turn, our country”.<sup>22</sup>

## 2.3 Reasonable accommodation is a required positive measure

The Court also emphasised the *principle of reasonable accommodation*, a principle found in the *Employment Equity Act* and in previous judgements

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17 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 60. In fact, the Court stated that religious and cultural practices can be equally important to a person's identity, but what is relevant is not whether a practice is characterised as religious or cultural, but its meaning to the person involved, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 91.

18 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 63.

19 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 62.

20 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 64.

21 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 65.

The Court stated: “The School also argued that if Sunali did not like the Code, she could simply go to another school that would allow her to wear the nose stud. I cannot agree. In my view the effect of this would be to marginalise religions and cultures, something that is completely inconsistent with the values of our Constitution. As already noted, our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation”, *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 92.

22 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 107.

of the Constitutional Court. The Court postulated that at the core of reasonable accommodation is the notion that sometimes the community (whether the state, an employer or a school) must take positive measures and possibly incur additional hardship (or expense), in order to allow all people to participate and enjoy all their rights equally.<sup>23</sup> However, the question now needs to be addressed as to what the parameters should be for such “reasonable accommodation”. Before going any further, it is important to note that the Court warned against aligning the “fairness” test with that for reasonable accommodation, because the factors relevant to the determination of fairness have been carefully articulated by the legislature and that option has been specifically avoided.<sup>24</sup> However, the Court found that fairness did require a reasonable accommodation, due to the following:

- Reasonable accommodation is most appropriate where, as in the present case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but that nevertheless has a marginalising effect on certain portions of society.
- Reasonable accommodation is particularly appropriate in specific localised contexts such as a school, where a reasonable balance between conflicting interests may more easily be struck.<sup>25</sup>

According to the Court, whether the above required the School to permit the student to wear the nose stud depended on the importance of the practice to her and the hardship that permitting her to wear the stud would cause the School.<sup>26</sup> Regarding the former, one would have to examine the *centrality of the practice*, which will be determined by primarily scrutinising whether, according to Sunali, the wearing of a nose stud is central to her as a South Indian Tamil Hindu – “it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way”.<sup>27</sup> Other evidence such as an objective investigation as to the centrality of the practice to the community at large would only be relevant if it assists in answering the *primary inquiry of subjective centrality*.<sup>28</sup> In this regard, the Court was convinced that the practice was a peculiar and particularly significant manifestation of her South Indian, Tamil and Hindu identity – “it was her way of expressing her roots and her faith”.<sup>29</sup> This concluded the first requirement, namely the importance of the practice to Sunali.

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23 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 73.

24 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 77.

25 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 78.

26 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 79.

27 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 87.

28 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 88.

29 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 90. See also the minority judgement by Justice O’Regan, stating that: “If a sincere religious belief is established, it seems correct that a court will not investigate the belief further as the cases cited by the Chief Justice in his judgement make plain. A religious belief is personal, and need not be rational, nor need it be shared by others. A court must simply be persuaded that it is a profound

Regarding the second aspect, namely the hardship that permitting her to wear the stud would cause the School, the Court held that the question is whether, considering the importance of the stud to Sunali, allowing her to wear the stud would impose too great a burden on the School.<sup>30</sup> This evaluation relates to factors in sec. 14(3)(f), (g) and (h) of the *Equality Act* that are also part of the traditional sec. 36 test regarding a reasonable and justifiable limitation of rights. This includes questions such as whether there is a legitimate purpose; whether the limitation achieves the purpose, and whether there are less restrictive means available to achieve the purpose.<sup>31</sup> Applying these questions to the facts of this case, the Court concluded that allowance of the nose stud (by granting an exemption to the general rule) would not have imposed an *undue burden* on the School.<sup>32</sup> In sum, the majority concluded that the discrimination had a serious impact on Sunali and that allowing the nose stud would not have imposed an undue burden on the School and that reasonable accommodation required her to be allowed to wear the nose stud.

## 2.4 The separate judgement of Justice O'Regan

In a separate judgement, Justice O'Regan stated that the South African *Constitution* recognises that culture is not the same as religion, and should not always be treated as if it is. The association of religion with belief and conscience, which involves an individual's state of mind, means religion should be understood in an individual sense:<sup>33</sup> a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from sec. 15 suggests that culture is different.<sup>34</sup> The inclusion of culture in secs 30 and 31 makes it clear that by and large culture, as conceived in the *Constitution*, involves associative practices and not individual beliefs.<sup>35</sup> Justice O'Regan furthers her analysis regarding the concepts of religion and culture by stating that the meaning of 'culture', to which our *Constitution* refers in secs 30 and 31, connotes an anthropological conception of culture that refers to the way of life of a particular community.<sup>36</sup> Consequently, it will not ordinarily be sufficient for a person who needs to prove that s/he has been discriminated against on the grounds of culture to establish that it is his/her sincerely held belief that it is a cultural practice, or that his/her family has a tradition of pursuing this practice. The person will need to show that the practice that has been

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and sincerely held belief", *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 146.

30 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 95.

31 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 97.

32 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 112.

33 I shall discuss the law's tendency to "render" religion into individualistic, rather than into communitarian or more richly personalistic directions, below in relation to the work of Benjamin Berger.

34 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 143.

35 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 144.

36 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:paras. 149 and 150.

affected relates to a practice that is shared in a broader community, of which s/he is a member and from which s/he draws meaning.<sup>37</sup> Justice O'Regan went on to state that, although the applicant argued that the nose stud was part of religious practice, it is clear that its primary significance to her family arises from its associative meaning as part of their cultural identity, rather than from personal religious beliefs.<sup>38</sup> Justice O'Regan then stated that:

... the applicant has established that the wearing of the nose-stud is a matter of associative cultural significance, which was a matter of personal choice at least for the learner in this case, but that it is not part of a religious or personal belief of the applicant that it is necessary to wear the stud as part of her religious beliefs.<sup>39</sup>

Therefore, Justice O'Regan found that the applicant had established that, in failing to grant her an exemption to wear the nose stud in circumstances where other learners were afforded exemptions to pursue their cultural practices, the School did discriminate.<sup>40</sup> Justice O'Regan then determined that the School did exercise unfair discrimination because of its failure to be consistent with regard to the granting of exemptions.<sup>41</sup>

### 3. Developing an open-textured conception of culture and the liberal democratic state: Avoiding converting minority/majority analysis into an avoidance of accommodation

Scholars such as Gray have suggested that the concept of a "single culture" or a "one-size-fits-all" conception of the public, conceptions that are actually anti-liberal, can hide within approaches to liberalism that have the often implicit endorsement of "convergence". By convergence I mean the idea that, sooner or later, we will come to agree about things that, in the current state of things, we cannot. Often the implicit assumption is that the law will get us to that distant point of agreement. Gray believes that this

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37 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 159.

38 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 162.

39 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 162.

40 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:par. 166.

41 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:paras. 173 and 175 where Justice O'Regan states: "The Code of Conduct once adopted did not contain any express provision for exemptions, either to regulate in what circumstances they would be granted or to establish a procedure whereby an exemption could be obtained. In my view, it is this absence which was a significant factor in giving rise to the unfairness in this case. An exemption procedure was established in an ad hoc fashion which allowed certain exemptions to be made but which did not establish the principles for the granting of an exemption, nor the process that had to be followed to obtain one." Regarding this reason by Justice O'Regan for unfairness, see also *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*:paras. 165 and 173.

is not only wrong, but also illiberal. Certain approaches to “liberalism”, as with “the secular”, can predispose us to embrace such matters as the false notion of a neutral public sphere that is not neutral at all when we perceive that the only beliefs that are stripped out of it are religious ones. Similarly, like secularism itself, convergence liberalism (my term, not Gray’s) tends to take the analysis in an anti-religious direction – often implicitly. This is the reason why recognizing these errors is so important. Gray described the two main approaches to liberalism in relation to pluralism as follows:

Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view, toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism’s future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.

The predominant liberal view of toleration sees it as a means to a universal civilization. If we give up this view and welcome a world that contains many ways of life and regimes, we will have to think afresh about human rights and democratic government. We will refashion these inheritances to serve a different liberal philosophy. We will come to think of human rights as convenient articles of peace, whereby individuals and communities with conflicting values and interests may consent to coexist.<sup>42</sup>

South African jurisprudence tends to favour both a religiously *inclusivist* conception of the public sphere (which I shall discuss in a moment) and a plural conception of the public sphere along the lines that Gray urges with reference to *modus vivendi*. Though the *Randhart* decision, referred to earlier, throws some doubt as to how the public sphere will include religion alongside non-religious beliefs, there are passages in earlier decisions that strongly support an inclusive public sphere. Thus, the Court in the *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae) (Fourie)* decision wrote:

[T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’.

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42 Gray 2000:105. For a more recent review of the concerns about convergence, see Lauwers 2017:29-63, comparing the work of Gray with that of Galston at 33-36.

In each case, space has been found for members of communities to depart from a majoritarian norm.<sup>43</sup>

Of course, where accommodation is at issue, the problem is not majoritarian versus minority status but, rather, whether the person will be accommodated within a group that does not acknowledge his/her viewpoint (whether majority or minority). While majority/minority evaluation has some role to play in assessing such matters as historic exclusion, it ought not to deflect us from the important task of determining whether a particular claimant is not being accommodated, whether or not that claim emanates from a minority or majority viewpoint. In fact, a strong argument can be made that too robust a focus on minority status converts a minority claim for access into a minority claim of dominance – hardly something that should be sheltered under the principles of inclusion referred to in the above passage from *Fourie* and in the theoretical work of philosophers such as Gray.

#### 4. Variant understandings of the term ‘secular’: Religiously inclusive versus religiously exclusive – Examining the historical origins of ‘secularism’

It is all too common to note that a term such as ‘secular’ is used in only one way (as meaning “non-religious” rather than, say, neutral as between belief systems). If ‘secular’ means “the opposite of religious” or “non-religious” and yet it is the public realm to which we attach the term ‘secular’, it can be observed that the public is, by way of this use, stripped of full public involvement for religious believers alongside other kinds of believers. I suggest that this way of using ‘secular’ is deeply flawed and will tend to lead us in the direction of religious exclusivism in a manner that does not fit with a fairer understanding of the public sphere – one we might call religiously inclusive.

In this way of using ‘secular’ as an opposition to ‘religion’ or the ‘sacred’ in what might be termed the religiously *exclusive* sense, ‘secular’ is a trope for ‘non-religious’. This is a common meaning, but not one that fits with other approaches, in which inclusivity of religious believers is deemed to be consistent with what Lenta<sup>44</sup> has elsewhere called a “presumption in favour of the government’s being required to grant an exemption [for religious belief]”.<sup>45</sup> Such an approach, according to Lenta, means “departing from the principle of uniformity”.<sup>46</sup> I am of the opinion that Lenta’s approach in this area is correct and useful and that his earlier headscarf article should

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43 *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (*Fourie*):paras. 60-61 per Sachs J.

44 Lenta 2005:352, 363-371; Lenta 2007:296; and Lenta 2008:259-293.

45 Lenta 2007:307.

46 Lenta 2007:307.

be read alongside his *Pillay* commentary. In particular, Lenta's description of the differences between the French approach to *laïcité* and the Canadian approach to multicultural inclusivism (which he believes is closer to the South African approach) is important.<sup>47</sup>

One can reject, for instance, the French version of "neutrality" in which, for example, all displays of religious symbols are banned, as not neutral at all, but fail to perceive that what undergirds such a false conception of "neutrality" is, in fact, the ideology of "secularism" which is, on one reading (which I argue is the most accurate historically) an *anti-religious* ideology, not simply a response to historical religious strife. To have such a notion as an anti-religious ideology or "anti-religion" in mind is a useful category when assessing different theories of the state, religion and accommodation.

As with the term 'secular', which can hide an anti-religious conception (for many people, secular *simply means* "non-religious" – when the term did not mean that originally, but referred to the *saecularum* (or periods of time),<sup>48</sup> so can 'secularism' be wrongly equated with neutrality.<sup>49</sup> It is important, therefore, to examine what we mean when we use terms such as 'secular' or 'secularism', since using them without unpacking them can predispose us to outcomes that result in unfairness without us realizing this. In this instance, a decision from the Canadian courts can be of some illustrative assistance. The judgements of the Court of Appeal of British Columbia and the Supreme Court of Canada in the *Chamberlain v. Surrey School Board (Chamberlain)* decision were based on a very different factual background (School Trustee's decisions about "gay parenting" books in a Kindergarten classroom) as well as, obviously, different statutory and constitutional language than *Pillay*. These differences noted, the decisions offer useful insights in a South African context about how to approach pluralism in the *modus vivendi* sense to which Gray refers. In the unanimous decision of the British Columbia Court of Appeal, Mr Justice McKenzie, subsequently upheld on this point by the Supreme Court of Canada, succinctly encapsulated the pluralist or inclusive sense of 'secular' as follows:

*In my opinion, "strictly secular" in the School Act can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of*

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47 The developing South African approach might well be said to accept a "co-operation" of Church and State rather than any American notion of "strict separation". The principles of such co-operation and useful distinctions about avoidance of both atheistic and religious theocracy are neatly set out in Sachs 1990:43-49. See also Woolman 2007:Chapter 58.

48 On the changing meanings of 'secular', see Benson 2000:519-549, and Chadwick 1975:88-106.

49 Something similar occurred in Canada, where a Commission, made up of two academics including noted philosopher Charles Taylor, endorsed "open secularism" and defined secularism at variance with its history. See Benson & Nguyen 2017.

*a conscience that is religiously informed or not. That meaning of strictly secular is thus pluralist or inclusive in the widest sense.*

No society can be said to be truly free where only those whose morals are not influenced by religion are entitled to participate in deliberations related to moral issues of education in public schools. In my respectful view, “strictly secular” so interpreted could not survive scrutiny in light of the freedom of conscience and religion guaranteed by sec. 2 of the Charter [conscience and religion] and equality rights guaranteed by sec. 15.<sup>50</sup>

What is mentioned in this instance about moral positions applies equally to religious and cultural beliefs in a public school setting such as *Pillay*. Simply put, convictions emanating from religious beliefs ought to be at no disadvantage, in terms of public access and respect, to those beliefs of others that do not emanate from religious convictions. When the case reached the Supreme Court of Canada, all nine judges agreed with the reasoning of McKenzie J as to the religiously *inclusive* meaning of ‘secular’. In Canada, that term now means religiously *inclusive*, not exclusive.<sup>51</sup> Mr Justice Gonthier for himself and Justice Bastarache, who would have upheld the Board’s decision and, therefore, wrote in dissent on that part of the decision, mentioned the following about the ‘secular’:

*In my view, Saunders J. [the trial judge] below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that “... Canada is founded upon principles that recognize the supremacy of God and the rule of law”. According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not*

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50 *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181 (C.A.); reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.); paras. 33 and 34; per McKenzie J.A. (emphasis added). For a detailed analysis of this decision, see Benson & Miller 2010.

51 *Chamberlain v. Surrey Sch. Dist. No. 36*, [2002] 4 S.C.R. 710, 749 (Can.) Madam Justice McLachlin, who wrote the decision of the majority, accepted the reasoning of Mr. Justice Gonthier on this point, thus making his the reasoning of all nine judges in relation to the interpretation of ‘secular’.

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imperil community living, must be capable of being accommodated at the core of a modern pluralism [my emphasis, IB].<sup>52</sup>

The approach of the Supreme Court of Canada and the implicit recognition in *Pillay* that a public school must accommodate a variety of beliefs (religious or cultural) are at stark variance with the approaches taken by countries such as France in which “strict separation” notions or ideas framed from secularist presuppositions take the public realm in a very different direction from the one being reached for in decisions such as *Pillay* and *Chamberlain*. It could be argued that the decision in *Randhart*, not discussed in greater detail in this instance than what has been covered already, may, if the result is not carefully managed, lead to a stripping of religions from the public sphere in contradiction to the respect for religion referred to in *Pillay*, *Fourie* and, in words at least, *Randhart* itself.<sup>53</sup>

The Constitutional Court of South Africa came to a similar conclusion about the public sphere, although one might disagree with the placing of “sacred” and “secular” in opposition in the way it is done in the following passage. In *Fourie*, a more careful and nuanced understanding of the public realm as a sphere of “co-existence” is set out in the following passage from the judgement of Sachs J as follows:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other ... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all ...* It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.<sup>54</sup>

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52 *Chamberlain v. Surrey Sch. Dist. No.*:par. 137.

53 I have suggested elsewhere that a “legal presumption in favour of diversity” would be a useful addition to the judicial tool chest. See Benson 2017a:3-27.

54 *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae)*:paras. 94-98 (emphasis added, IB). Justice Sachs’s conception of differing beliefs co-existing *within* the public realm is of significant importance and sets the stage, along with the approach of Justice Gonthier in *Chamberlain*, for a redefinition or, better yet, re-understanding of what might be termed central public terminology.

In line with what I have touched upon earlier, it would have been a better description of the relationship between the state (law and politics) and the religions and religious believers and their communities to have described these as part of a co-operative relationship in which there is jurisdictional separation but, as the passage correctly noted, co-operation within “the same public realm”. The characterization of the division in the above passage as “secular” and “sacred” at the outset does not assist this later conceptualizing since, for a religious citizen, the public order of the State also has its own *sacred* dimension (everything within creation being, in a sense, “Graced” or “holy”). Such citizens are perfectly entitled to function fully within the public sphere and be accommodated and offer others accommodation there. The public might best be understood as a realm of competing belief systems. It is better to simply state and make clear that the public realm includes all kinds of believers, whether atheist, agnostic or religious. When certain types of conflicts emerge, the role of the law is to order the relationships according to the principles of justice. When the majority of people use the term ‘secular’, they mean “public” and it would aid clear thinking in this area if they said so in the future.

## 5. What about a straightforward “expression rights” claim for accommodation?

In discussing *Pillay*, there is another conundrum that will arise in future, given the language of the relevant constitutional section. Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by secs 9(3) and (4) of the South African *Constitution*, which reads: “(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

The decision in *Pillay* focused on the two categories of “religion” and “culture”, with the important holding that culture must be accommodated akin to religious accommodation – *pace* Justice O’Regan’s concerns about the extent to which culture and religion differ in terms of the community and the individual.<sup>55</sup> This leads to the following important question: What becomes of the analysis of accommodation if a student’s objection to wearing a uniform or part of a uniform is based on conscience, belief, expression or opinion *simpliciter*? Since a term such as ‘belief’ is also a protected category, what analytical tools are we to bring to bear on assessing the importance and *bona fides* of a belief or expression claim that some aspect of uniform wearing is offensive to a student? Are religious or cultural beliefs elevated in terms of protection? Should they be? Should we try to accommodate claims that are not expressly based on religion or culture? Should “belief” and “conscience” attract a similar type

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55 *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*: paras. 141-148.

of protection and respect as “religion” and “culture”? Textual and judicial authority suggest that they should, but I want to suggest a caution in this area if too ready an impulse to include actually works against protecting core notions under each term.<sup>56</sup> The term ‘religion’ has been the subject of considerable legal development (not all of it positive, as some scholars suggest and I shall discuss later), but this is as it should be. Should “conscience” and “belief” not also be subjected to comparable analysis?

The wearing of religious headwear and hairstyles (dreadlocks) has been held, by a South African court, to be justifiable under the rubrics of “expression” and “religion”. Since the context of the expression was “religious”, however, and the logic of a full-scale application of a “right to expression” for every student who wished to “express herself” by wearing what she wished would certainly vitiate uniform dress codes for schools, it is strange that the judgement in the decision did not make more of the clearly religious ground for the breach of the school uniform code and the requirement for the school to accommodate.<sup>57</sup>

In his companion piece in this volume on *Pillay*, Lenta mentions Scottishness and kilt-wearing as cultural aspects that might have to be accommodated in light of the reasoning in *Pillay*. One wonders how and whether a belief sheltered by, for instance, iconoclastic or eccentric expressions of individual will (as kilt-wearing, to all reasonable opinion, certainly is not), but nonetheless a “belief” or “expression”, would be analysed. What weight is placed on the balancing scales where uniforms are weighed not against religious or cultural beliefs and membership (which, the cases show, can marshal significant social arguments for their respect), but against what may seem merely idiosyncratic whims or expressions of pique, adolescent rebellion or ego? If the test, in this instance, is subjective (as it is with religion and now culture after *Pillay*), what other factors will be placed alongside such a claim in order to evaluate the balancing? The cases do not assist us in this instance.

What we have most recently in this emerging area are general guidelines allowing maximal scope for judicial development. The Supreme Court of Canada has made it clear that it wishes to, in principle, avoid rank-ordering rights.<sup>58</sup> Is this agnosticism, about which rights are weightier than

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56 Sec. 15(1) of the South African *Constitution* 108/1996 provides that: “Everyone has the right to freedom of conscience, religion, thought, belief and opinion” and the rubric of the section is “Freedom of religion, belief and opinion.” In the *Randhart* decision, the Court referred to the importance of equitable treatment for the beliefs of those who are not themselves religious.

57 *Antonie v Governing Body, Settlers High School, and Others* 2002 (4) SA 738 (C):par. 16, per Van Zyl J and Van Reenen J: “Most importantly, adequate recognition must be given to the offender’s need to indulge in freedom of expression, which may or may not relate to clothing selection and hairstyles, as provided in s 4.5.1 of the schedule.”

58 *Dagenais v Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, where, at par. 72, Chief Justice Lamer stated: “When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved

others, sustainable? Is it wise? More importantly, is it real? In the recent decision from the Canadian Supreme Court touching upon the freedom of religion in relation to civil laws, the majority judgement began by affirming that multiculturalism and pluralism must be protected and affirming what it termed “an evolutionary tolerance for diversity and pluralism”, but noting the fact-specific and nuanced application that defies “bright-line application”:

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada’s fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.<sup>59</sup>

The recent decision of the French administrative court to the effect that the wearing of a *niqab* (concealing the face of an individual, except for the eyes) is a ground for denial of citizenship, as it is “inconsistent with Republican values”, may have parallels in other countries that do not share France’s secularist approach<sup>60</sup> – but what would such reasons be in countries that acknowledge both subjective tests for religious respect claims and have rejected the rank-ordering of rights? Might it be the case, for example, that some of the approaches currently being taken to access rights conflicts can no longer apply in certain circumstances? As Galston has noted:

Autonomy is one possible mode of existence in liberal societies – one among many others. Its practice must be respected and safeguarded, but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place.<sup>61</sup>

The same must be said for alternative conceptions of such matters as approaches to certain kinds of medical ethics and understandings of the relationships between male and female within different cultural groups. With respect to medical practice, for example, one group’s “access to

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that fully respects the importance of both sets of rights.” In *Trinity Western University v British Columbia College of Teachers* [2001] 1 S.C.R. 772, Justice Iacobucci, in giving the reasons of the Court, stated at par. 29: “Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.”

59 *Bruker v Marcovitz*, 2007 SCC 54:paras. 1-2. See also Boonstra & Benson 2017.

60 Bennhold 2008.

61 Galston 2005:24. Lauwers’ is a searching discussion of various of the issues referred to in this article and I am indebted to it and many conversations over the years with its author (now Justice Lauwers of the Court of Appeal for Ontario, Canada).

choice” on abortion is another group’s “murder of the innocent”, and one group’s concern that referrals for certain medical procedures are not taking place is another group’s concern that such referrals are even considered as required. This latter recognition about differing views on gender or sexual orientation is likely to draw into sharp resolution the difference between what I have called “convergence liberalism” and the idea of mutual co-existence between different and differing communities of belief *whose starting assumptions – legal to hold, preclude ever agreeing on the outcomes*. The “muslim head-covering issue” is already framing this kind of discussion in some countries, just as surely as “same-sex marriage” is framing it in others.

In his earlier writings, Lenta hints, without giving a definitive viewpoint on the matter, that a *niqab* might be distinguished from a headscarf on the basis that, in certain contexts, facial covering could be inefficient or lead to “making identification and communication difficult”, thus avoiding the requirement to accommodate such a face-covering in a public setting.<sup>62</sup> He may be correct, in this instance, but it seems that we must be wary of imposing what I have identified, in this article, as “convergence liberalism” assumptions under the guise of advancing, for instance, gender equity in relation to assessments of headscarves or other facial coverings. In fact, a host of commentators on the “muslim veil issue” have analysed the wearing of headscarves from perspectives other than “equality”.<sup>63</sup>

To what extent headscarves or face-coverings should or should not be accommodated in public settings such as public school classrooms or government offices must be based upon nuanced and careful line drawing. I do not believe that in a Canadian or South African context a blanket gendered approach or “Republican values” conclusion of the kind that the French have embraced is likely to be the path ahead, since, in both Canada and South Africa, a more nuanced community of communities conception of pluralism is being advanced rather than a “one-size-fits-all” conception of the public sphere such as one observes in France or, to a lesser degree perhaps, the United States.

## 6. A concluding observation about equating “culture” with religion

If it is true, as Donne famously observed, that “no man is an island”,<sup>64</sup> then it might be fair to ask if one person can be a culture? What are the requirements in order for something to constitute a “culture”? The judgement in *Pillay* does not help us in this instance. What are the rules or requirements of entrance, exit and membership (to name but three) for a “culture?” Is something validly cultural simply because I say or believe it is? If, like religion, protection and recognition extend to those aspects

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62 Lenta 2007:319.

63 For a useful review of arguments, see Bakht 2012:71-108.

64 Donne 1974:1215.

that are voluntarily chosen as well as obligatory (and what would be the obligatory aspect of “a culture of one” except mere assertion of the will?), should we be concerned that the important category of culture could be thinned out to nothingness, inflated to the point of explosion, by lack of definition? If this concern is accurate, as I think it is, too broad a conception of culture can have the paradoxical result that, in trying to give strength to the concept, we actually weaken it.<sup>65</sup> It has already been pointed out that turning “religion” into an individually assessed matter can have the damaging effect of reducing and weakening the category. Berger has observed that one of the most profound implications of the relationship between religious commitment and assessing a contemporary liberal order (his focus is on religion and Canada, but it would apply *mutatis mutandis* to both religion and culture in South Africa) is that:

... there is a fundamental, though eminently explicable, shortfall at the core of liberal legal discourse about religious liberties. Religion is not only what law imagines it to be. Law is blind to critical aspects of religion as culture. That being so, even if successful at accommodating or tolerating what it understands to be religion, aspects of religion as culture remain entirely unattended to and, therefore, unresolved in their tension with the constitutional rule of law. And with this insight we come to one important part of the explanation for why the story we tell about law and religion has proven so unsatisfactory: law – in whose capacity to tolerate, accommodate, and “make space” for cultural claims we place so much faith – fails to appreciate religion as culture.<sup>66</sup>

In my opinion, Berger is correct, in this instance, about the limitations of law’s self-understanding and in the various strands I have attempted to weave together in this article close by suggesting that what has been identified as a weakness about law in relation to religion will apply equally to its understanding about “culture”. If religions are cultures or subcultures, the overlay of complexity becomes even more interesting than the judgement in *Pillay* might at first suggest. If we fail to appreciate religion as culture by rendering religion down to the Procrustean bed of individualist liberal notions of a certain kind, we could, if we are not careful, do something similar to culture by rendering it down to merely individual preferences.

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65 Alongside the lack of analysis shown in the *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay* judgement’s simple equating of “culture” with “religion” (or Justice O’Regan’s suggestion that the most important aspect of religion is its “individual” nature), one should examine the rigorous discussion of religion in its personal and communitarian aspects in the reasons of Malan J in *Taylor v. Kurtstag No and Others* 2005 (1) SA 362 (W). In this instance, the rules of entrance, membership, exit and excommunication in the context of Orthodox Judaism are most helpfully arrayed. Surely, something similar is necessary for “belief”, “conscience”, and so on, in order to avoid their being trivialized.

66 Berger 2008:295. The limits of law, its jurisdiction as it were, are discussed in some detail in a recent volume. See Benson 2017b:xxi-xl.

Perhaps the solution, if there is one, in this complicated area of religion, culture and law is to begin by, as I have suggested, overcoming some of the dualisms that stand in the way of understanding how things really are culturally. What this means practically is that we ought to avoid some of the areas already identified in this article. We should try and avoid the “either/or” characterizations that can be shown to be unfair or inaccurate and recognize that many of the dualisms touched upon cause more trouble than they are worth. Thus, liberalism of the right kind, which Gray urges us to maintain, should not be an anti-communitarian notion; similarly, liberty need not foist upon us an illiberal idea of convergence, but, in fact, requires that we develop better and more conscious modes and principles of adaptation for *modus vivendi* – or living together with disagreement; the public sphere should be understood as *inclusive* of all kinds of belief systems (whether atheist, agnostic or religious) rather than a-religiously “secular” (when by “secular” we mean “stripped of religion”); when the issue is accommodation we ought not to be too concerned about minority/majority viewpoints – and certainly not as a requirement for there to be accommodation; that religion and culture should both be interpreted as personal *and* communitarian, since communities are formed by, and depend on people.

These are a few of the more obvious pitfalls that lie under the weeds of established practice. In his monumental work *The interpretation of cultures*, Geertz suggests that, in properly understanding culture and cultures (and religions, therefore), stands our ability to understand what we have in common. Geertz offers no cosy solution to “the problem of religion” or “the problem of culture”, nor does he offer particular guidelines to the multitudinous principles of co-operation and difference that will have to be developed by the law once we begin avoiding such matters as the settled dualisms just identified. What Geertz does suggest, however, is that our inherited conceptions of what we are and what data are relevant to evaluating our lives together will be essential to recognizing the relationship between individuals and communities that can form a richer, more inclusive base for the development of legal principles in the future.

Man is to be defined neither by his innate capacities alone, as the Enlightenment sought to do, nor by his actual behaviours alone, as much of contemporary social science seeks to do, but rather by the line between them, by the way in which the first is transformed into the second, his generic potentialities focused into his specific performances. It is in man's *career*, in its characteristic course, that we can discern, however dimly, his nature, and though culture is but one element in determining that course, it is hardly the least important. As culture shaped us as a single species – and is no doubt still shaping us – so too it shapes us as separate individuals. This, neither an unchanging subcultural self nor an established cross-cultural consensus, is what we really have in common (emphasis in original).<sup>67</sup>

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67 Geertz 1973:52.

To this we might add that we are persons in relation and that much of what matters to us is the wide variety of relationships to which we are committed, whether these are based on blood, clan, tribe or creed and whether these relationships are consciously or unconsciously experienced and lived out. These familial, community, and associational relationships, whether focused upon activities or beliefs, or, as is usually the case, upon both, are what make up our cultures, our societies, our nations and our states and it is these that the law will either support or, in Berger's powerfully ambiguous term, "render".

*Pillay* suggests that we must accommodate different cultures and religions and embrace a *modus vivendi* rather than an illiberal convergence. This is good as far as it goes – which is not very far. However, this article suggests that, for the law to avoid rendering both culture and religion down to ghostly parodies of what they should be, requires that law, as best it can, look beyond many of its current assumptions and come up with richer categories of analysis than many of those that are currently readiest to hand. When the recent decision in *Randhart*, touched on briefly earlier, is placed alongside the older one of *Pillay*, it is clear that something is needed to ensure that religions are included in the public sphere alongside not only each other, but also those who do not like, appreciate or respect religions. Inclusion requires principles that may assist both the development of a morally rich conception of the common good and that are consistent with living together despite differences of beliefs. It might well be that "virtues" developed alongside religions and from within them over millenia will provide the basis for public school curricula that are respectful, diverse and helpful to moral citizenship in diverse societies. The language of "values" is manifestly incapable of this important work. One of the most important tasks facing societies in the West is to identify the foundational problems that "values" cause and move beyond them to genuinely moral language such as the virtues shared by the religious and non-religious alike. As a cardinal virtue, justice is something about which we all need education.<sup>68</sup>

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68 For a critique of the relativism and subjectivism of "values" and their insufficiency as any base for moral or ethical education, see Benson:2017c.

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