On the Right to Wear Miniskirts

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According to news reports, women in various part of the country have recently been arrested or threatened with arrest for wearing miniskirts or even shorts – with the potential criminal charge being "public indecency".

First, what is "public indecency"? It is a common-law crime which consists of unlawfully, intentionally and publicly performing an act which (a) tends to deprave the morals of others or (b) outrages the public's sense of decency. Improper exposure of the body can indeed fall under this definition.

But one must also remember the requirement of "intentionality". Exposure of the body is not a crime unless the mini-skirt wearer appreciated that her fashion sense might outrage public decency. And who is the public? The average reasonable member of society who is, as one early court case put it, "neither a prude nor a libertine".

The law on public indecency must be applied within the boundaries of the Constitution. If it is applied selectively against one sex or one culture, then this would fall afoul of the requirement in Article 10 that all people are equal under the law.

Enforcing a law in a discriminatory way is just as bad as making a discriminatory law. And there seem to be several problems with enforcement in the cases reported.

Firstly, the crackdown on public indecency appears to be aimed solely at women – witness all those men who urinate in full public view on a daily basis, inspiring periodic public outrage but no police action.

Such selective application feeds into larger and more problematic gender issues – such as the idea that women "ask for rape" by dressing attractively, or that women are to blame for violence perpetrated against them because they "provoke" it with their own behaviour.

Secondly, clothes are an aspect of personal expression. Therefore, what one chooses to wear (or not to wear) is afforded some degree of protection by the Constitutional right to speech and expression.

Thirdly, the standard being applied by the police is reportedly whether or not the clothes in question meet "African" standards. This is an impermissibly selective approach to culture. Namibia is home to people of varying cultural backgrounds – not all of which are African.

Furthermore, even within the indigenous African cultures found in Namibia, there is a wide variation. Consider Himba dress for men and women, which exposes more than the average miniskirt. Consider the way in which some Herero clothes draw on extremely modest elements of Victorian style which entered the country along with Western missionaries in pre-colonial times. Consider the fact that many Namibians embrace global styles which can not easily be labelled African or unAfrican – such as business suits and "Mao jackets". Consider the swimming costumes worn by men and women of many cultural backgrounds on Namibian beaches, often leaving little to the imagination - where do they fit it?

The right to practise one's culture is not the same as the right to impose one's culture on someone else. The law cannot validly force everyone in Namibia to adopt the cultural tastes of any one group. The Constitution protects the right to practice "any" culture, so long as this does not impinge on the rights of others

In 2003, the South African Constitutional Court discussed the difficulty of applying standards of decency. This case involved a striptease club and a provision of the Liquor Act which made it illegal for a licence-holder to allow anyone on the premises "to perform an offensive, indecent or obscene act" or to appear or perform when "not properly clothed". The majority of the court found that the law in question was impermissibly broad because it

interfered with freedom of expression (seeing that it might also apply to theatrical performances).

Justice Albie Sachs, in a concurring opinion, noted that it is difficult to decide "what is objectionable in the eyes of the law, rather than what lies unbeautifully to the eye of the beholder". He cautioned that the law cannot be used to impose individual opinions of what is objectionable, and asserted that "it is for religious bodies, civil society and public opinion to deal with sinful and immoral behaviour, not necessarily for the law".

The Supreme Court of Canada made similar points in a 1985 case where it was called upon to decide whether a particular film was obscene. The Court applied "community standards", noting that this must not be measured with reference to those with the "lowest" standards, nor "exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind" - but rather by an average sense of contemporary community mores. The Court also emphasized that it is "*tolerance*, not taste that is relevant".

Namibia is a delightfully diverse society. Public indecency certainly has relevance for people who expose their private parts in public with an intention to shock, offend or insult others. But this law cannot be applied against one group in society – women wearing clothes considered by some police to be unacceptable in African culture – without offending hard-won Constitutional freedoms.

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