CHAPTER 1

INTRODUCTION TO THE RIGHT TO FREEDOM OF RELIGION

1.1 GENERAL INTRODUCTION

1.1.1 The Constitution

The Constitution of the Republic of South Africa of 1996 consolidated and affirmed the radical legal and social change wrought by its predecessor, the Interim Constitution of 1993. The new constitutional dispensation replaced the system of parliamentary sovereignty.

The current constitutional dispensation is predicated on the supremacy of the Constitution; and not, as was previously the case, the supremacy of Parliament. For example, section 2 of the Constitution provides that: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Importantly, Chapter 2 of the Constitution contains the Bill of Rights, and section 7(1) states in this regard: “The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” The Bill of Rights thus aims to empower the bearers of its rights by shielding the protected conduct and interests from unlawful limitation. The aim of

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1 See also Rautenbach and Malherbe Constitutional Law (1999) 18ff. The Constitution of 1996 will be referred to either as the “Constitution” or the “Final Constitution”. References to sections without qualification must be taken to refer to the Final Constitution, unless a different intention may be discerned from the context.

2 See Rautenbach and Malherbe (n 1) 147 148 191 192. See also, in general, Walker “Dicey’s dubious dogma of parliamentary sovereignty: A recent fray with freedom of religion” 1985 Australian LJ 276; Du Plessis “Enkele opmerkings oor die Christelike fundering (en verwerp) van menseregte” 1990 THRHR 403; Potgieter “Menseregte: Verwyder die skyn van Christelikheid” 1990 THRHR 413; Coetsee “Hoekom nie ’n verkling van menseregte nie?” 1984 TRW 5.
South Africa as a constitutional democracy, therefore, is the justification of the exercise of private and public power.

1.1.2 **Aim of the Study**

The right to freedom of religion forms an integral part of the Bill of Rights in particular and the Constitution in general.\(^3\) The present dispensation requires a study of the entrenched rights in order to gauge the extent of the particular protected conduct and interests and to ensure a proper understanding of the dynamics of the interaction between rights in the Bill of Rights. The present study is such an attempt to define and explain the right to freedom of religion. The right to freedom of religion impacts upon a variety of important issues that are deserving of analysis and exposition in order to evaluate the nature and extent of the impact, *inter alia*, on issues such as the relationship between the state and religion; the regulation of own affairs and doctrine; the changing of one’s faith; religious privilege (confidentiality); religious observance; religious objection; religious teaching; and proselytism. The supremacy of the Constitution can only effectively be evidenced in practice by attempts to analyse and interpret the constitutional guarantees of the right. It is necessary to understand the constitutional scope and limitation of the right to freedom of religion, as religion constitutes a social force of unity and division that has influenced and shaped the face of civilisation for millennia. Religion is still a societal presence capable of generating great support or opposition; the right to freedom of religion should thus be understood and expounded upon in order to ensure maximum liberty while still maintaining coherence to constitutional norms, thereby strengthening the new dispensation.

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\(^3\) See the Preamble of the Constitution; s 15(1)-(3) 31(1)-(2) 35(2)(f)(iii) 48 95 107 135; sch 2.
1.1.3 Structure of the Study

The primary occupation of the study is the analysis of the right to freedom of religion in South Africa. The right can only meaningfully be understood by considering and referring to relevant foreign and international law. Reference will be made in the course of the exposition to such law in order to contextualise the South African position.

The study is divided into six Chapters. The aims and components of each Chapter may be highlighted as follows:

- The topic is introduced in Chapter 1 by attempting to explain the historical development of the right to freedom of religion, both in national and international context. The interpretation of the right, namely that of contextual and wide interpretation of religious guarantees is also highlighted. Furthermore, the legal definition of religion is also considered in order to give meaning to the terms “religion” and “religious” in the course of the study. It is suggested that “religion” consists of objective and subjective elements, the former gauging the content of a doctrine while the latter gauges the sincerity of the claimant of the right.

- An attempt will be made in Chapter 2 to discuss the bearers of the right, namely natural persons (individually and collectively) and juristic persons and other associations, in order to concretise the right by the identification of those who are entitled to its protection. It is suggested that an association need not be incorporated to claim the protection of the right, thereby extending the scope of the right to freedom of religion.

- In Chapter 3 an attempt is made to distinguish and discuss the protected conduct and interests of the South African right to freedom of religion. The latter will be attempted by considering the scope of the components of section 15. It
will be argued that section 15(1) constitutes the main guarantee of the right, whereas sections 15(2) to (3) confirm, expound and qualify particular elements of section 15(1) in regard to religious observances and religious marriages and law, respectively. The contextual rights that influence religious liberty will also be identified and incorporated into the discussion of the content of the right. It is suggested that the actual substantive content of the right may be divided into the freedoms of (i) religious autonomy; (ii) religious choice; (iii) religious observance; (iv) religious teaching; and (v) propagation of a religion or denomination. Each of the component freedoms will be subdivided into constituting elements that will be expounded to further explain the reach of the right to freedom of religion.

- The aim with Chapter 4 is the discussion of the binding effect of the right to freedom of religion. In other words, the duties of the parties bound by the right will be given attention, as well as, briefly, the bodies envisaged and enjoined by the Constitution to promote and protect the right to freedom of religion.

- An attempt will be made in Chapter 5 to explain the constitutional limitation of the right to freedom of religion. The approach to the application of the Bill of Rights as followed by Rautenbach and Malherbe is accepted to provide a framework with which to apply the limitation test; it is also employed as framework for the division of Chapters 2 to 5. The content of the general substantive limitation test, section 36, is considered to provide guidance in the limitation of the right. It is suggested that tolerance of religious diversity and expression will feature prominently as a limitation precept. Tolerance is not to be understood as substantive acceptance of diversity, but merely as accepting the existence and expression of such diversity. However, specific limitation clauses are also prescribed in the limitation of the right. Such clauses are discussed and divided, as with the general limitation clause, into their constitutive components. It is suggested that the specific limitation clauses are to be viewed as qualifications
of one or more of the elements of the general limitation test and not as alternative tests.

- Chapter 6 is the concluding Chapter in which the conclusions of the study are briefly summarised in order to provide an overview of the contribution.

1.2 THE HISTORICAL DEVELOPMENT OF THE RIGHT THE FREEDOM OF RELIGION

1.2.1 General

The right to freedom of religion has had a long and turbulent history. This section will attempt to explain the origins of the right as it is known today. The discussion will focus on the development of the right both in national and international context.

1.2.2 National Context

Religious intolerance has been a feature of life since time immemorial. The question to be answered is: Why has this always been the case? It is submitted that, historically, the answer is to be found in the following two propositions:

- The belief by religious people in the *exclusivity* of the *truth* to which they adhere.\(^4\) Such beliefs of exclusivity are by nature not harmful and fall firmly within the ambit of religious freedom.\(^5\) However, the seeds of intolerance are planted when people adhering to exclusive beliefs are under the impression that they should persecute those of a different persuasion.\(^6\) People of a different religious


\(^5\) See Ch 3.7.2.1.

\(^6\) Tierney (n 4) 35.
ilk should, so follows this twisted logic, be forced to conform to the persecutors’ truth, which is right. Such convictions have been the cause of problems in the religious realm since early times, but have been a particular potent force of intolerance when they became enforced by societies, especially in the form of theocracies or state religions.

- Theocracies are “the acknowledgement of religious organisations as the holders of public power and of religious law as the law of the state”.\(^7\) Thus, societal institutions enforce compliance with a particular set of beliefs. Such a state of affairs has been described by Tierney as “theocratic absolutism”.\(^8\) Theocracies can be divided into several forms, the most primitive being societies where a leader or leaders are believed to be imbued with divinity, examples of which would include the pharaohs of ancient Egypt, the Inca of the Inca Empire and Japanese emperors.\(^9\) Societies that have accepted a particular faith as the only or dominant one for that society have proven to be potentially as harmful as theocracies in enforcing their religious beliefs – to the detriment of religious liberty. Religious structures are not entirely, or at all, part and parcel of governmental institutions in these societies; such structures are however still followed or respected by the government to a negative extent.\(^10\) India, for instance, has known a number of state religions with varying degrees of tolerance of dissidents, namely Buddhism under Emperor Asoka (274 – 237 BC), Islam (from the end of the tenth century to the middle of the eighteenth century) and Christianity under the British.\(^11\)

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8 (n 4) 22.
9 See Tierney (n 4) 22; Buckingham (n 7) 29. The belief in the divinity of Japanese emperors only came to an end after Japan’s defeat at the hands of the Allies in the Second World War in 1945.
10 See Ch 3.7.1.1.
The propositions described above are born out of a fusion between state or society and religion. Interaction or cooperation between the state and religion is not to be decried, except to the extent discussed. A healthy relationship between these two institutions would have gone and will still go a long way in solving the problem of religious intolerance. Recent history has shown that not the mere elevation of a faith to the position of state religion, but also the denial of all faiths as a feature of state policy, exemplifies severe religious intolerance. Such states are described by Sachs as being: “Secular state(s) in which religious organizations are repressed.”\(^{12}\) Prime examples of such a state of affairs would be the former Union of Soviet Socialist Republics,\(^{13}\) North Korea, Pol Pot’s Cambodia and a host of other states. See Boiter\(^{14}\) and Schutte\(^{15}\) for discussions of Soviet persecution of religion. The question begs to be answered, modern setbacks notwithstanding, how the historic narrow-mindedness gave largely way to the modern enlightened view of religious liberty.\(^{16}\)

Although many world religions espoused theories of religious tolerance, the recognition of the right to freedom of religion cannot be traced to all of them. Examples of such calls for tolerance would include:

- King Asoka, patron of Buddhism, who said of tolerance: “Acting thus, we contribute to the process of our creed by serving others. Acting otherwise, we harm our own faith, bringing discredit upon the others. He who exalts his own belief, discrediting all others, does so surely to obey his religion with the

\(^{12}\) See also Buckingham (n 7) 60.  
\(^{13}\) Carpenter “Beyond belief – religious freedom under the South African and American Constitutions” 1995 *THRHR* 684.  
\(^{16}\) though not yet universal.
intention of making a display of it. But behaving thus, he gives it the hardest blows."\(^{17}\)

- Mohammed, founder of Islam, held: “To the Christians of Narjan and its neighbouring territories, the security of God and the pledge of Mohammed the Prophet, the Messenger of God, are extended for their lives, their religion, their land, their property.”\(^{18}\)

- Regarding Christianity,\(^{19}\) the following may be quoted from the Biblical book of Leviticus: “And if a stranger sojourn with thee in thy land, ye shall not do him wrong. The stranger that sojourns with you shall be unto you as the homeborn among you, and thou shalt love him as thyself.”\(^{20}\)

Christianity, as will be explained in due course, played the fundamental role of all religions, together with the labours of European scholarship, later transplanted to the Americas, in recognising the right to freedom of religion and agitating for its protection.

Christians were severely persecuted in the Roman Empire, and eventually the religion was banned and suppressed.\(^{21}\) This persecution was the result of the Christian refusal to worship pagan gods, an act required of all in the Roman Empire.\(^{22}\) Christians were, therefore, regarded as immoral and even atheist, a sect harmful to society that needed to be eradicated because of its monotheism.\(^{23}\) The persecution was not only at the hands of Romans, but also Jews and other groups,

\(^{17}\) Krishnaswami (n 11) 1ff.

\(^{18}\) ibid.

\(^{19}\) ibid.

\(^{20}\) 19:33 – 34, quoted in Krishnaswami (n 11) 2.

\(^{21}\) Hayes, Baldwin, and Cole History of Western Civilization (1962) 44. See also Buckingham (n 7) 30 and Suggit “Renewal in worship: Constancy and change” 1993 Journal of Theology for Southern Africa 3.

\(^{22}\) Hayes \textit{et al} (n 21) 44ff and Suggit (n 21) 3.

\(^{23}\) ibid.
so much so that an early Christian complained: “We have no interest in this age except to get out of it as quickly as we can.”

Christianity, however, withstood the persecution and managed, in a relatively short period of time, to become the dominant religion in Rome. An early milestone in the protection of the right to freedom of religion was achieved, when the Christian Emperor of Rome, Constantine, declared in the Edict of Milan in 313 that:

All who choose [the Christian] religion are to be allowed to continue therein, without let or hindrance and are not in any way to be molested … At the same time all others are to be accorded the free and unrestricted practises of their religions; for it accords with the good order of the realm and the peacefulness of our times that each should have the freedom to worship God after his own choice; and we do not intend to detract from the honour due to any religion or its followers.

The Edict of Milan followed on the earlier edict of the Emperor Galerius that granted tolerance in 311. Buckingham notes that such edicts imposed voluntary limits on power, as later bills of rights would do. The edict of 313 could thus have constituted an excellent and lasting example for the legal recognition of the right to freedom of religion by decreeing tolerance of all religions. Religious liberty, however, suffered a setback as the Edict of Milan proved to be short-lived. It was supplanted by an edict of the Emperor Theodosius I in 380 that declared Trinitarian Christianity to be the state religion. Many Christians criticised Theodosius’ edict calling for a return to the previous recognition of freedom of conscience. Their

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24 Suggit (n 21) 3ff.
25 Quoted in Buckingham (n 7) 30. See also Hayes et al (n 21) 45; Tierney (n 4) 20; Suggit (n 21) 3.
26 Buckingham (n 7) 30 note 3.
27 (n 7) 30.
28 already in such early times.
29 Buckingham (n 7) 30; Hayes et al (n 21) 46.
30 Buckingham (n 7) 30.
calls were unfortunately in vain, as the late Roman Empire punished heresy\textsuperscript{31} with death, the lynching of heretics was even carried out by fanatic mobs after the fall of the Roman Empire in 476.\textsuperscript{32} The Roman Catholic Church also became less tolerant of dissent, as it grew as an institution that became more jealous of its monopoly and position.\textsuperscript{33} This development was good in part. The emergence of the Catholic Church as a strong entity brought it into conflict with the secular forces of the day.\textsuperscript{34} This conflict was beneficial to the development of the separation of state institutions and those of religion, an essential ingredient in the recognition of true freedom of religion.\textsuperscript{35} This separation nearly occurred under Constantine, but was avoided by Theodosius’ edict and the collapse of the Roman Empire.\textsuperscript{36} The Ancient, and later Medieval, mind still had to make great strides to comprehend the state and church as two distinct estates, as Kuttner illustrates:

“No matter how violent were the recurrent conflicts between Church and state in the Middle Ages, the medieval mind had no difficulty in seeing ecclesiastical and secular society as but two aspects of a higher unity: as two estates, each with its own order of jurisdiction, and yet fused to be one, in the city whose king is Christ.”\textsuperscript{37}

Counting down to the recognition of the distinction between these two potent forces in society, still more than a thousand years into the future, the struggle continued unabated, with the secular wanting to dominate the clerical and the clerical the secular.\textsuperscript{38}

\textsuperscript{31} Heresy is understood to be a deliberate departure from the accepted doctrine of the church. Heresy in those times had mostly to do with divergent opinions regarding the concept of the Holy Trinity, such as Arianism’s rejection of the concept, see Hayes \textit{et al} (n 21) 47.
\textsuperscript{32} Tierney (n 4) 30.
\textsuperscript{33} \textit{ibid}.
\textsuperscript{34} Tierney (n 4) 22ff; Buckingham (n 7) 31; Abraham “Declaration on religious rights and responsibilities: A Catholic response” 1994 \textit{SALJ} 344 348.
\textsuperscript{35} See the discussion above.
\textsuperscript{36} Tierney (n 4) 22.
\textsuperscript{37} \textit{The History of Ideas and Canon Law in the Middle Ages} (1980) 1, quoted in Abraham (n 34) 348.
\textsuperscript{38} Buckingham (n 7) 31.
Pope Gelasius (492 – 496) and other medieval church leaders asserted the exclusion of bodies of religious thought and practice from the grasp of temporal rulers.\textsuperscript{39} The freedom of the Catholic Church came under threat during the reign of the Frank, Charlemagne (742 – 814),\textsuperscript{40} who convened a council of bishops at Frankfurt in 794 to condemn the decision in 787 of the Second Council of Nicea. The Council had condemned the Byzantine Church’s veneration of iconoclasts, but had upheld the veneration of saints and the usage of images.\textsuperscript{41} Pope Leo III tried to reassert the Catholic Church’s authority, and gain influence over Charlemagne and his political affairs, by crowning him Holy Roman Emperor in 800 in Rome.\textsuperscript{42} The Holy Roman Empire was not to last, but the question of temporal and ecclesiastical relations continued much as before.\textsuperscript{43} The Papal Revolution, however, was looming large on the horizon.

Pope Gregory VIII (1073 – 1085) famously championed the cause of an independent Church and clergy when he declared himself prepared to die for the “freedom of the Church”.\textsuperscript{44} The Investiture Contest erupted with the Pope refusing to condone the practice of lay investiture any longer.\textsuperscript{45} This overt and radical act gave rise to civil wars in Germany and Italy, after the King\textsuperscript{46} of Germany, Henry IV, accused Pope Gregory of being a pseudo-pope, where after the Pope promptly dethroned the King.\textsuperscript{47} The ensuing struggle saw Henry paying homage to the Pope at Canossa, and the Pope fleeing Rome in the face of the rampaging Henry.\textsuperscript{48} The Concordat of Worms of 1122 had to secure an uneasy peace after the passing

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\item \textsuperscript{39} Tierney (n 4) 22.
\item \textsuperscript{40} or Charles the Great.
\item \textsuperscript{41} Hayes \textit{et al} (n 21) 120 note 1; Tierney (n 4) 23. Charlemagne, a pious and religious king, had taken it upon himself to advance the cause of religion, to the detriment of the separation of church and state.
\item \textsuperscript{42} Buckingham (n 7) 31ff; Hayes \textit{et al} (n 21) 120ff.
\item \textsuperscript{43} Buckingham (n 7) 32.
\item \textsuperscript{44} Tierney (n 4) 23. Pope Gregory was also known as Hildebrand, see Hayes \textit{et al} (n 21) 115.
\item \textsuperscript{45} Lay investiture involved the appointment of bishops by kings, yet another intolerable overlap between the temporal and ecclesiastical.
\item \textsuperscript{46} later Emperor.
\item \textsuperscript{47} Tierney (n 4) 23.
\item \textsuperscript{48} \textit{ibid}.
\end{itemize}
away of both King and Pontiff. Pope Boniface VIII brought simmering tensions to the fore when he issued a bull, the \textit{Unam Sanctum} in 1302 declaring papal authority over all things temporal and ecclesiastical with the words: “It is altogether necessary for every human creature to be subject to the Roman pontiff.” The French King, Phillip IV, duly captured the Pontiff, who died soon afterwards. A French Pope was soon elected, Clement V, who was of weak character and allowed King Phillip to maintain the papacy at Avignon – the “Babilonian Captivity”. The Captivity lasted from 1309 to 1377, with the Roman papacy only restored in 1378; the Great Schism ensued with a dual papacy for approximately 50 years.

Tierney observes that the freedom of churches from state control, though important, is but one element inherent to the right to freedom of religion. This observation is quite correct, as freedom of religion is not merely composed of an institutional element but also an individual and other elements. The Roman Catholic Church’s arduous struggle had been one for institutional dignity, recognition and independence, rather than one for the individual’s free conscience. The efforts of the Catholic Church were also not aimed at cultivating an atmosphere tolerant of religious dissent. As a matter of fact, the affirmation of the Church’s institutional omnipotence could lead, and did lead, to arguments that religious truth is revealed institutionally, endowing the Church with a duty to uphold and enforce communal values to avoid societal fragmentation. Such notions, although alarming, did not

\footnotesize{\bibitem{49} \textit{ibid.}\bibitem{50} See Tierney (n 4) 23; Buckingham (n 7) 32; Hayes \textit{et al} (n 21) 325.\bibitem{51} \textit{ibid.}\bibitem{52} Hayes \textit{et al} (n 21) 325.\bibitem{53} Hayes \textit{et al} (n 21) 325 327; Buckingham (n 7) 32.\bibitem{54} (n 4) 24.\bibitem{55} See Ch 3.5.\bibitem{56} Tierney (n 4) 24.\bibitem{57} \textit{ibid.}\bibitem{58} Franck “Is personal freedom a Western value?” 1997 \textit{American Journal of International Law} 593 600. See also Tierney (n 4) 31.}
silence the voices advocating (limited) freedom of conscience and religious tolerance. For example:

- Pope Gregory I (590 – 604) wrote in a letter incorporated into canon law that: “Just as the Jews ought not to be allowed more than the law concedes, so too they ought not to suffer harm in those things that the law does concede to them.”\(^59\) This tolerance was rooted in the Christian belief that non-Christians could not be coerced into the faith.\(^60\) St. Paul for instance, argued that a free will, absent of force, was a *condictio sine qua non* for a genuine act of faith to prevail.\(^61\)

- St. Thomas of Aquinas (1125 – 1274), the Dominican friar, taught that actions undertaken contrary to one’s conscience were tantamount to sin.\(^62\) Following one’s conscience was the key to personal salvation, as humans were endowed with reason.\(^63\) This doctrine also found support in two pronouncements of Pope Innocent III (1198 – 1216).\(^64\) This doctrine can rightly be viewed as a building block of the concept of inviolability of the conscience, although it enjoins the obeying of the conscience as a matter of duty and not out of the recognition of religious liberty.\(^65\)

- Medieval Christian scholars were the source of an important doctrine in the recognition of the right to freedom of religion – the teaching that everyone possessed natural rights.\(^66\) The doctrine can be traced to the work of late twelfth

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59 Tierney (n 4) 26. On Pope Gregory, see Hayes *et al* (n 21) 87 91 92 96 126.
60 Tierney (n 4) 25 26.
61 Franck (n 58) 595.
63 Franck (n 58) 595ff.
64 Tierney (n 4) 25. These pronouncements were incorporated into the Ordinary Gloss to the Decretals, namely: “[O]ne ought to suffer any evil rather than sin against [the] conscience.”
65 Tierney (n 4) 25.
66 Tierney (n 4) 26.
The philosopher, William of Ockham, interpreted Scripture to substantiate his contention that “God and nature” conceded rights and liberties to the “faithful” that not even the Pontiff could jeopardise. Ockhamism was elaborated on by Gerson in the fifteenth century. It was believed that Christians enjoyed these rights against the church, but that non-Christians did not possess them. The groundwork was laid, unintentionally so, for the full recognition of the right to freedom of religion incorporating the separation between church and state. However, it would take a revolution to see these developing concepts through.

The Roman Catholic Church was in a troubled state in the late Middle Ages. Morals were slipping, clerical competence and conduct became questionable and an administrative crisis had developed in the wake of the Great Schism. Dissident voices grew louder, eventually culminating in the Protestant Reformation of the sixteenth century. The hegemony of the Roman Catholic Church had been broken, as the adherents of the new faith, Anglicans, Lutherans and Calvinists, gained ground. However, Protestant leaders were at first as intolerant of dissent as their Catholic adversaries. Catholic and Protestant communities, however, were forced to coexist, a certain recipe for conflict but ultimately religious tolerance developed. Switzerland is an example of the gradual development of

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67 Tierney (n 4) 27.
68 Tierney (n 4) 28.
69 Tierney (n 4) 29.
70 Tierney (n 4) 30.
71 Tierney (n 4) 22.
72 Buckingham (n 7) 32.
73 Hayes et al (n 21) 327ff.
74 Buckingham (n 7) 32; Hayes et al (n 21) 351ff; Tierney (n 4) 34ff; Abraham (n 34) 348; Worden (Ed) Stuart England (1986) 17ff.
75 Hayes et al (n 21) 351, Abraham (n 34) 348.
76 Hayes et al (n 21) 351 352 355 361ff.
77 For example: Martin Luther’s (1483 – 1546) revulsion at Jews and Catholics and John Calvin’s (1509 – 1564) burning of the Spaniard Servetus, see Tierney (n 4) 34; Hayes et al (n 21) 356.
78 The struggle between religions in the Low Countries in the Eighty Years War (1568 – 1648) could serve as an example, see Van der Walt “CNO – pas dit nog by die eise van die tyd” 9
religious liberty in post-Reformation Europe.\textsuperscript{79} The first Peace of Kappel of 1529 afforded cantons the right to decide which faith, Catholicism or Protestantism, its inhabitants would follow.\textsuperscript{80} Catholic and Protestant cantons exercised joint authority over communes known as “common bailiwicks”.\textsuperscript{81} The majority of church-goers decided the religion of such communes, binding the minority.\textsuperscript{82} The second Peace of Kappel of 1531 provided for the improvement that Catholic minorities in “common bailiwicks” could live side by side with Protestant majorities.\textsuperscript{83} Full equality between these two confessions was eventually achieved in 1712, save for a temporary setback under Napoleon in 1803.\textsuperscript{84} Full recognition of the right to freedom of religion was eventually achieved under the Revised Federal Constitution of 1874.\textsuperscript{85}

Initially France made great strides in ensuring religious liberty. The Edict of Nantes of 1598 provided complete freedom of conscience, civil equality and limited freedom of worship to the Huguenots who were Protestants.\textsuperscript{86} These guarantees were unfortunately revoked in 1685 leading to an increase in the number of fleeing Huguenots.\textsuperscript{87} The Huguenots’ rights were partly restored in 1787. The French Revolution of 1789 culminated in the full recognition of the right to freedom of religion of adherents of all faiths.\textsuperscript{88} Clause 10 of the Declaration of the Rights of Man and of the Citizen (1789) stated that:

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\textit{\textbf{October 1991 Die Kerkblad 25; Pont “Algemene kerkgeskiedenis. ’n Inleiding tot die Nederlandse kerkgeskiedenis van die beginjare tot 1795” 1994 HTS Supplementum 6.}}

\\textsuperscript{79} Krishnaswami (n 11) 4.
\textsuperscript{80} Krishnaswami (n 11) 4.
\textsuperscript{81} Krishnaswami (n 11) 4.
\textsuperscript{82} Krishnaswami (n 11) 4.
\textsuperscript{83} Krishnaswami (n 11) 4.
\textsuperscript{84} Krishnaswami (n 11) 4.
\textsuperscript{85} Krishnaswami (n 11) 4.
\textsuperscript{86} Buckingham (n 7) 33; Krishnaswami (n 11) 4ff.
\textsuperscript{87} ibid.
\textsuperscript{88} Krishnaswami (n 11) 5.
\end{flushright}
No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.  

The cognitive advance in religious liberty was unfortunately short-lived due to the Reign of Terror, the restoration of the monarchy and the establishment of Catholicism as the state religion. The right to freedom of religion did eventually return to France.

The evolvement of religious liberty took on an interesting turn in Britain. Religious equality had to be achieved, not only between a majority of Protestants and a minority of Catholics, but also between a majority of Anglicans and other Protestants. In 1615, during the reign of King James I (1567 – 1625), an anonymous pamphlet called for the granting of liberty to Puritans, but the inflicting of death on Catholics; whereas the Catholic Guy Fawkes (1570 – 1606) attempted to blow up Parliament in the famed Gunpowder Plot of 1605.

The very Anglican King Charles I (1625 – 1649) was dethroned and eventually beheaded, after the Puritans under Oliver Cromwell (1599 – 1658) emerged victorious in the English Civil War of 1642 to 1649. Puritanical Presbyterians now dominated Parliament and repressed the Church of England. However, the victors had a mixture of religious adherents in their ranks – such as Congregationalists, Baptists, Muggletonians and Fifth Monarchy Men – who called for the recognition and protection of their faiths. Enforced Presbyterian conformity would have been undesirable and unworkable in the Commonwealth, whereupon Cromwell granted

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89 Quoted in Buckingham (n 7) 36.
90 Buckingham (n 7) 36ff; Hayes et al (n 21) 529ff 534ff. See Burke Reflections on the Revolution in France (1790, reprinted 1986) for contemporary thoughts on the French Revolution.
91 Buckingham (n 7) 37.
92 Tierney (n 4) 35; Worden (n 74) 19 53; James “Bonfire, burning, bigotry?” November 2000 BBC History Magazine 85.
93 Worden (n 74) passim.
94 The last Muggletonian is believed to have died in the 1970’s.
The restoration of the monarchy in 1660, under King Charles II (1660 – 1685), saw the return of the privileged position of the Church of England. The winds of change had started to blow and the initial tolerance culminated in the full recognition of the right to freedom of religion in modern Britain. This recognition can be charted briefly as follows:

- The Toleration Act of 1698 catered for the exemption of dissenting Protestants from certain penalties.

- The repeal in 1828 of the Test and Corporation Acts ended the role of the Church of England as the exclusive upholder of the national religious standard.

- The Catholic Emancipation Acts of 1829 and 1832 treated Roman Catholics in similar fashion to dissenting Protestants. Catholics could now contest parliamentary seats and their churches and charities enjoyed legal status.

- In 1846 the Toleration Act of 1698 was extended to Jews.

The role of the Low Countries in recognising the right to freedom of religion is unfortunately frequently overlooked. Witte has described the Pacification of Ghent of 1576, the Religious Peace of Antwerp of 1578, the Ordinance and Edict Upon the Fact of the Execution of Both Religions of 1578, as well as the Union of Utrecht of

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95 Tierney (n 4) 36.
96 ibid. Tolerance was granted in the form of the Toleration Act of 1650, see Franck (n 58) 612.
97 Worden (n 74) 95 145 147ff 178ff; Franck (n 58) 612.
98 Although Britain is without a written constitution, the country’s accommodation and recognition of religious diversity, equalled in few other countries, speaks for itself. See Krishnaswami (n 11) 5.
99 Krishnaswami (n 11) 5. See also Buckingham (n 7) 33.
100 Krishnaswami (n 11) 5.
101 ibid.
102 ibid.
103 ibid.
1579 as noteworthy prototypes of the United States Constitution. For instance, section XIII of the Union of Utrecht declared:

“Dat een yder particulier in zijn Religie vrij sal moegen blijven, ende dat man nyemant ter cause van de Religie sal moegen achterhaelen ofte ondersoucken, volgende de voorsz. Pacificatie tot Ghendt gemaeckt.”

The Dutch constitutional drafters also capitalised on this heritage of religious liberty. For instance, the first Dutch Constitution of 1814 alluded to the right to freedom of religion in section 134, and the Constitution of 1815 expressly recognised the right in section 190. These examples were also emulated in the most recent Constitution of 1983.

Religious reform in the post-Reformation era, as described above, was fuelled by a number of noteworthy thinkers. Tierney for example highlights the following:

- Roger Williams, a devout Christian, viewed full freedom of conscience, including the right to freedom of religion, as a divine command.

- Pierre Bayle, a Huguenot, provided arguments in defence of a free conscience.

- John Milton, the English writer, used texts by St. Paul to substantiate the view that the use of force in religious matters ran counter to Christianity.

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106 See Den Dekker-Van Bijsterveld (n 105) passim.
107 See Den Dekker-Van Bijsterveld (n 105) 10.
108 Ibid.
109 See Den Dekker-Van Bijsterveld (n 105) 48ff.
110 Tierney (n 4) 36; Krishnaswami (n 11) 7.
111 Tierney (n 4) 37 38 42.
• Dirck Coornhert, a Dutch philosopher, viewed religious freedom as “a part of the authentic teachings of Christ”.113

• Benedict de Spinoza used the doctrine of natural rights to deduce the right of freedom of religion.114

• William Penn, the Quaker, advocated support for the recognition of the inalienable right to a free conscience.115

• John Locke116 supported “the liberty of conscience” as everyone’s “natural right” and also wrote in his Letter Concerning Toleration in 1689 that “no man by nature is bound to any particular church or sect, but every one joins himself voluntarily to that society in which he believes”.117

Advances were not only being made in the recognition of the right to freedom of religious conscience, thereby condemning enforced conformity, but events started to favour a society where such enforcement would become a difficult goal to attain. The Thirty Years War had finally come to an end in 1648 with the Peace of Westphalia.118 The Peace had the effect of establishing modern diplomacy and the system of sovereign states, still known today.119 Thus, the state as an entity was now gradually placed above Christianity.120 The separation of church and state caused the waning of enforced conformity as a legitimate object of governance.121 Although the persecution and wars raging after the Reformation had the eventual effect of

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112 Tierney (n 4) 39.
113 ibid.
114 Tierney (n 4) 42.
115 ibid. See also Krishnaswami (n 11) 7.
116 ibid.
117 Krishnaswami (n 11) 3.
118 Hayes et al (n 21) 402.
119 Hayes et al (n 21) 404.
120 Buckingham (n 7) 32ff.
strengthening religious liberty, as is evident from the above discussion, the immediate effects were displacement and emigration.\textsuperscript{122}

The immigrants to the current United States of America, at first, emulated, the religious intolerance and excesses of their European roots.\textsuperscript{123} The southern Colonies, for instance, chose to establish the Anglican Church and some northern Colonies chose the Dutch Reformed Church, Congregational Church and Puritan sects, which resulted in the persecution of Baptists, Quakers and other non-conformists.\textsuperscript{124} The exceptions though were Rhode Island, inspired by Roger Williams, Pennsylvania and Delaware.\textsuperscript{125} Establishment, however, had reached such proportions in Virginia that Thomas Jefferson and James Madison started to oppose it, advocating the separation of church and state.\textsuperscript{126} The movement for freedom of religious conscience and the separation of church and state prevailed and culminated in the incorporation of a Bill of Rights in 1791 into the Constitution of 1787.\textsuperscript{127} The First Amendment to the Constitution reads:

\begin{quote}
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.
\end{quote}

The First Amendment augmented Article VI of the Constitution that reads:

\begin{quote}
[N]o religious Test shall ever be required as a Qualification to any Office or public Trust in the United States.
\end{quote}

\begin{footnotes}
\textsuperscript{121} Malcolm (n 4) 977.
\textsuperscript{122} Buckingham (n 7) 34; \textit{Everson v Board of Education} 330 US 1 (1946) 8.
\textsuperscript{123} Franck (n 58) 615; Underkuffler-Freund “Religious guarantees in a pluralistic society; values, problems and limits” 1997 \textit{SAPL} 32; \textit{Engel v Vitale} 370 US 421 (1961) 427; Krishnaswami (n 11) 7.
\textsuperscript{124} Underkuffler-Freund (n 123) 32.
\textsuperscript{125} Franck (n 58) 615; Krishnaswami (n 11) 7.
\textsuperscript{126} \textit{Everson v Board of Education} (n 122) 11ff.
\textsuperscript{127} Krishnaswami (n 11) 8; \textit{Torcaso v Watkins} 367 US 488 (1961) 491ff.
\end{footnotes}
These so-called “Religion Clauses” of the American Constitution proved to be a milestone in the historical development of the right to freedom of religion, as it was the first time that modern constitutional guarantees had addressed religious liberty. The example was set and constitutional guarantees pertaining to religion have become standard in constitutions.\(^{128}\)

The right to freedom of religion developed over a very long period of time in South Africa. For example, commissioner-general De Mist’s Church Order of 1804 only allowed religious ceremonies and public gatherings of religions that were extant in 1803, when the Batavian Republic won control of the Cape Colony.\(^{129}\) Establishment also reared its head with the establishment of the *Nederduitsch Hervormde Kerk*, until 1866, and thereafter the *Nederduits Gereformeerde Kerk* in the Boer Republic of the Orange Free State.\(^{130}\) The Constitution of the *Zuid-Afrikaansche Republiek* also made provision for the establishment of the *Hervormde Kerk*, from 1858 to 1889.\(^{131}\) The Union of South Africa, 1910 to 1961, and the subsequent Republic knew no such establishment.\(^{132}\) The state did harbour a bias towards the Calvinist tradition though that skewed the relationship between religion and the state.\(^{133}\) This imbalance was corrected with the constitutional

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\(^{128}\) See for instance the earlier discussion of the historical development of freedom of religion in Switzerland culminating in constitutional guarantees. The American example was also closely followed in the Philippines, see Krishnaswami (n 11) 7. In Russia the discriminatory position in Czarist times came to an end in 1917 with the enactment of a law guaranteeing freedom of religion by the Provisional Government, see Krishnaswami 6. The act was however subverted by Communism, see Boiter (n 14) *passim*. Constitutional provisions protecting religious freedom, however, did prevail to a certain extent after the collapse of Communism in 1989. Constitutional protection of religious liberty also returned to Germany after its subversion in Nazi times, see Krishnaswami 10; Koomers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 444 445.


\(^{130}\) *ibid.*

\(^{131}\) *ibid.* Roman Catholics were refused residence in the *ZAR* until 1870. The franchise was, at one stage, extended exclusively to the members of the *Hervormde Kerk*.

\(^{132}\) Van der Vyver (n 129) 179; Van Niekerk “Render unto Caesar … ’: A study of the Sunday observance laws in South Africa” 1969 *SALJ* 27.

protection of the right to freedom of religion, for the first time in the interim Constitution of 1993\textsuperscript{134} and ultimately in the Constitution of 1996.\textsuperscript{135} South Africa had arrived, albeit late, in the arena of constitutional protection of the right to freedom of religion.\textsuperscript{136}

The historical development of the right to freedom of religion, in national context, was\textsuperscript{137} a process marked by positive and negative moments:

- The sterling example of recognition set by Constantine in 313 was unfortunately not followed through, as the edict of Theodosius in 380 illustrated. However, the seeds of an inviolable conscience especially as regards religion were planted and nurtured during dark times by Catholic scholars – at times unintentionally so – such as St. Thomas of Aquinas.

- The Protestant Reformation led to the fuller development of the concept and the emergence of the modern state in 1648 that ensured the separation of religion and the state. These occurrences eventually culminated in the constitutionalisation of the right to freedom of religion in the First Amendment to the American Constitution in 1791. This has been emulated in similar fashion by all self-respecting states hence.

\textsuperscript{134} S 14. See also De Waal et al (n 133) 289.
\textsuperscript{135} S 15.
\textsuperscript{137} and still is in some respects.
Seeing that the right to freedom of religion has a proud, but nonetheless difficult, Western heritage, the question may be asked if this right should find exclusive application in the West. The answer to the problem is an emphatic “no”. The cognitive development of the concept and the application thereof, should be pursued by all and sundry as advancements aimed at engendering respect for human dignity.  

1.2.3 International Context

The international recognition of the right to freedom of religion preceded the recognition of the right in national context. Religious minorities were protected by international treaties in order to avoid their persecution by hostile majorities. Examples of international recognition would include:

- The treaty between King Francis I of France, and Sultan Suleiman I of the Ottoman Empire of 1536 that ensured the religious freedom of French merchants living in the Ottoman realm.

- The Treaty of Osnabrück of 1648 attempted to protect Protestants in Catholic states and vice versa.

- The Treaty of Berlin of 1878 enjoined the Ottoman Empire, Bulgaria, Montenegro and Serbia to recognise their religious minorities.

\[138\] Franck (n 58) 593 619 625 argues convincingly, using Sweden and other examples, that the right to a free conscience should not be seen as a value confined exclusively to the West.

\[139\] Krishnaswami (n 11) 11; Gunn "Freedom of religion or belief. Ensuring effective international protection" (Book review) 1996 American Journal of International Law 707. In other words, recognition of religious diversity that was absent in national action had to be secured by international action.

\[140\] Buckingham (n 7) 37.

\[141\] Krishnaswami (n 11) 11.

\[142\] ibid.
• The League of Nations, established after the First World War, developed a petition system whereby religious minorities could lodge complaints if their rights, according to treaties administered by the League, had been infringed.\textsuperscript{144}

The Second World War of 1939 to 1945 saw the League of Nations finally laid to rest and unprecedented religious persecution gripping the world.\textsuperscript{145} The excesses of the War led to the creation of the United Nations Organisation in 1945, with its Charter detailing its aims as: “Promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion.”\textsuperscript{146} The Universal Declaration of Human Rights of 1948 set the standard for the recognition of the right to freedom of religion in international context by providing in article 18 that:

\begin{quote}
Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in teaching, practice, worship and observance.\textsuperscript{147}
\end{quote}

The international recognition of the right has flowered since 1948,\textsuperscript{148} with recognition being given in the American Declaration of the Rights and Duties of

\begin{footnotesize}
\begin{enumerate}
\item ibid; Buckingham (n 7) 37ff.
\item ibid.
\item Quoted in Buckingham (n 7) 39. Emphasis added.
\item Quoted in Tahzib \textit{Freedom of Religion or Belief. Ensuring Effective International Legal Protection} (1996) 500. The Universal Declaration is technically not binding on states; there is support though, for the contention that it has acquired the force of binding law through almost universal acceptance, see Mason “Pilgrimage to religious shrines: An essential element in the human right to freedom of thought, conscience and religion” 1993 \textit{Case Western Reserve Journal of International Law} 619 621; Gildenhuys “The freedom to change one’s religion or belief in international human rights law” 2001 \textit{SAPL} 151 153. See also Dugard \textit{International Law. A South African Perspective} (2000) 240 regarding the Universal Declaration.
\item See Tahzib (n 147) 500ff for an exhaustive list of international instruments containing reference to the right to freedom of religion.
\end{enumerate}
\end{footnotesize}

1.3 INTERPRETING THE CONSTITUTION

1.3.1 General

As the right to religious freedom is guaranteed by the South African Constitution, its content and meaning must be determined in order to ensure the proper application of the right. For this purpose the relevant provisions of the Constitution need to be interpreted. According to Rautenbach and Malherbe:

“The interpretation of a constitution entails that meaning is attached to its provisions and that the meaning of a particular provision is determined by employing various sources.”\textsuperscript{157}

The most correct meaning of the text is accordingly ascertained in order to apply it properly.\textsuperscript{158} It should be kept in mind though that there can never only be one correct

\textsuperscript{149} Art III.
\textsuperscript{150} S 9.
\textsuperscript{151} Art 5.
\textsuperscript{152} Art 18.
\textsuperscript{153} Par 5.
\textsuperscript{154} Art 12 16.
\textsuperscript{155} Principle VII.
\textsuperscript{156} Art 1.
\textsuperscript{157} (n 1) 42. See also Rautenbach \textit{Handves van Regte. Studiemateriaal} (2000) 26; Botha \textit{Wetsuitleg. ’n Inleiding vir Studente} (1998) 143ff.
interpretation of a provision, as different interpreters might attach different meanings to it depending on influencing factors.\textsuperscript{159} The interpretation of legal texts must, therefore, be approached from much the same viewpoint regarding the mechanics of interpretation, in order to ensure a measure of consistency in such a fluid domain. To this end two models of interpretation are distinguished:

- The textual approach entails that the intention of the legislature is equated with the literal or plain meaning of the text.\textsuperscript{160} Secondary aids, such as an act’s long title and chapter headings, may only be used should ambiguity or absurdity arise from the literal meaning. Tertiary aids may be used should secondary aids fail, these would include common law presumptions.\textsuperscript{161}

- The contextual approach emphasises the text as interpretation tool in conjunction with contextual aids in order to ascertain the purpose in the enactment of the legislation.\textsuperscript{162} Botha divides this approach into the initial phase, the research phase – aimed at determining the object with the legislation, and the concretisation phase – aimed at reaching an interpretation by combining the aim of the text with the factual situation using the Bill of Rights as backdrop.\textsuperscript{163} The plain textual meaning, in other words, must give way to the true purpose of the act, where the two are in conflict.\textsuperscript{164}

The traditional approach in South Africa to interpretation has been one of textual interpretation.\textsuperscript{165} The demise of parliamentary sovereignty and the dawn of an entrenched Constitution incorporating a Bill of Rights in 1993 necessitated a fresh

\begin{itemize}
\item Botha (n 157) 2.
\item See Rautenbach and Malherbe (n 1) 42; Rautenbach (n 157) 26. Factors such as language, point in time, national values and history, as well as knowledge of foreign and international systems may effect the interpretation radically.
\item Botha (n 157) 27ff. Steyn \textit{Die Uitleg van Wette} (1981) approves of the textual approach.
\item See Botha (n 157) 57ff.
\item Botha (n 157) 31.
\item (n 157) 39ff 81ff 117ff.
\item Botha (n 157) 32.
\end{itemize}
The supremacy of the textual meaning has now been replaced by a system of supreme values whereby laws may stand or fall. Interpretation is thus by implication contextual as laws have to be measured against a wider constitutional order. Values contained in fundamental rights should also be subjected to contextual interpretation by weighing competing rights against each other in ensuring an effective balance. A contextual approach is furthermore implicit in the constitutional interpretation provisions. The protective scope of the fundamental rights, as a matter of policy, must also be constructed generously in order to afford proper protection to the bearers of the right, see the discussion below.

1.3.2 Constitutional Interpretation Provisions

The Constitution, in section 39, contains provisions regarding the interpretation of the Bill of Rights. These provisions will be considered briefly.

Section 39(1)(a) provides that:

When interpreting the Bill of Rights, a court, tribunal or forum –

a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

This section establishes a peremptory value based approach to the interpretation of the Bill of Rights. A particular brand of values is to be advanced, namely, those

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165 Botha (n 157) 33.
166 That had been advocated much earlier in Schreiner JA’s minority opinion in *Jaga v Dönges* 1950 (4) SA 653 (A).
167 Botha (n 157) 35.
168 *ibid*; Rautenbach (n 157) 30.
169 See for example Mokgoro J in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) par 302.
170 S 39. See Ch 1.3.2.
171 See Ch 1.3.3.
founding an open and democratic society. Democratic values worthy of protection are furthermore enumerated in the very important section one. These values would include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. The traditional body of values, *ubuntu*, is also important in the interpretation of the Bill of Rights, in this instance the right to freedom of religion.

**Section 39(1)(b) provides that:**

> When interpreting the Bill of Rights, a court, tribunal or forum –
> b) must consider international law.

The rule of law entrenched in this section is peremptory. A court, tribunal or forum *must* therefore consider international law. It is important to note that a South African presiding officer is not bound to follow such law as a matter of course, but is bound to give such law careful thought in interpreting the Bill of Rights. The exception to the above would be treaties or instruments that have been incorporated into South African law; such law must be applied, bar possible unconstitutionality. The following list provides a collection of some international instruments to be consulted:

- **American Declaration of the Rights and Duties of Man (1948): Article III**
  Every person has the right to freely profess a religious faith, and to manifest and practice it both in public and in private.

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172 See Rautenbach (n 157) 30; Rautenbach and Malherbe (n 1) 45; Botha (n 157) 43ff.
173 See Rautenbach (n 157) 30; Botha (n 157) 101ff; Rautenbach and Malherbe (n 1) 11 12. *Ubuntu* refers to a practical philosophy of tolerance, solidarity, morality, humaneness and equity.
174 Rautenbach (n 157) 32; Rautenbach and Malherbe (n 1) 45; Botha (n 157) 43.
175 S 231 232 233 of the Constitution. See also Rautenbach (n 157) 32; Rautenbach and Malherbe (n 1) 45ff.
176 Quoted in Tahzib (n 147) 49ff. Reference to the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) and other instruments not mentioned here will be made at relevant places in the text.
• **Universal Declaration of Human Rights (1948): Article 18**

  Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

• **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950): Article 9(1)**

  Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

• **International Covenant on Civil and Political Rights (1966): Article 18**

  1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

  2. No one shall be subject to coercion which would impair his freedom to adopt a religion or belief of his choice.

• **Proclamation of Teheran (1968): Paragraph 5**

  The primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity. For the realization of this objective, the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, and of conscience and of religion, as well as the
right to participate in the political, economic, cultural and social life of his country.

- **American Convention on Human Rights (1969):** *Article 12*
  1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.
  2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

  **Article 16**
  1. Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sorts or other purposes.

- **African Charter on Human and People’s Rights (1981):** *Article 8*
  Freedom of the conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

- **Convention on the Rights of the Child (1989):** *Article 14*
  State Parties shall respect the right of the child to freedom of thought, conscience and religion.

- **Charter of Paris for a New Europe (1990):** *Paragraph 5*
  We affirm that, without discrimination, every individual has the right to: freedom of thought, conscience and religion or belief.
Section 39(1)(c) of the South African Constitution provides that:

When interpreting the Bill of Rights, a court, tribunal or forum –

c) may consider foreign law.

This section is considered as being superfluous because its exclusion would not have prohibited the courts from continuing their tradition of considering foreign law.177 There is a wealth of foreign sources, such as constitutions and case law, on the topic of the right of freedom of religion that may be consulted to elucidate the South African right.178 This study will make use of extensive foreign reference in defining the protective scope of the right to freedom of religion.179

The values entrenched by the Bill of Rights must be promoted at all times when interpreting legislation and developing common and customary law.180 The Bill of Rights may not be interpreted to invalidate all rights and freedoms conferred by legislation, common and customary law, merely because they happen to fall outside the ambit of the Bill.181 Such rights and freedoms, however, must not be inconsistent with the Bill.182 Religious rights and freedoms existing outside of the protective ambit of the Bill, therefore, continue to exist and may be added to or detracted from, provided that such addition or subtraction is consistent with the Bill of Rights.

1.3.3 Constitutional Interpretation Policy

177 Rautenbach (n 157) 35; Rautenbach and Malherbe (n 1) 46; Botha (n 157) 44.
178 See Mason (n 147) 631ff for examples of foreign constitutional religion clauses. Courts, however, must avoid a mere “blithe adoption of alien concepts or inapposite precedents”, according to Kriegler J in Bernstein v Bester 1996 (4) BCLR 449 (CC), 1996 (2) SA 751 (CC) par 133. See also Rautenbach (n 157) 35ff. See the comparative approach by Van Dijkhorst J in Wittmann v Deutscher Schulverein, Pretoria 1998 (4) SA 423 (T) 439I-448J. See, in general, Van Zyl Beginsels van Regsvergelyking (1981) passim.
179 S 39(2). See also Rautenbach (n 157) 43; Botha (n 157) 43.
180 S 39(3). See also Botha (n 157) 44.
181 ibid.
An important distinction must be drawn in order to effect proper constitutional interpretation; that is between the interpretation of a right and its limitation by means of the general and specific limitation clauses.\textsuperscript{183}

This distinction has unfortunately been blurred by calls for narrow or restrictive interpretations of fundamental rights, in order to ensure that only values “worthy of constitutional protection” receive such protection.\textsuperscript{184} The following reasons are usually advanced to justify this interpretation approach:

- The Constitution does not afford protection to values not inherent to it.\textsuperscript{185}

- The avoidance of expansive interpretation will lead to less judicial intervention, as the courts will have to adjudicate fewer infringements.\textsuperscript{186}

- The strict standard whereby the general limitation clause limits rights will be maintained in following a narrow interpretation.\textsuperscript{187}

Exponents and examples of the narrow approach would include:\textsuperscript{188}

- Woolman\textsuperscript{189} in South Africa and Hogg\textsuperscript{190} in Canada.

- The European Commission on Human Rights, in Strasbourg, refused to interpret the right to freedom of religion, thought and conscience to include a right to conscientious objection.\textsuperscript{191}

\textsuperscript{183} See Rautenbach (n 157) 85ff.
\textsuperscript{184} \textit{ibid.}
\textsuperscript{185} \textit{ibid.}
\textsuperscript{186} \textit{ibid.}
\textsuperscript{187} \textit{ibid.}
\textsuperscript{188} See the examples mentioned by Rautenbach (n 157) 85ff.
\textsuperscript{189} Quoted in Rautenbach (n 157) 86.
\textsuperscript{190} \textit{Constitutional Law of Canada} (1992) 857.
• Choper advocates a restrictive approach to interpretation by supposing that the scope of the right to freedom of religion must be limited internally.\textsuperscript{192} Such an internal limitation must be achieved by using the definition of religion as a method to narrow the protective ambit of the right.

• Underkuffer-Freund\textsuperscript{193} questions if the ambit to the right to freedom of religion\textsuperscript{194} in South Africa extends in equal measure to the right to belief and to act in accordance with such beliefs.

• Valticos J in his minority decision in \textit{Kokinakis v Greece}, the leading European case on the right to freedom of religion, limits the scope of the right to proselytism by avoiding a broad interpretation of the protection it affords bearers.\textsuperscript{195}

• Chaskalson P in the leading religious freedom case in South Africa held that endorsement by the state of a religion void of coercion would not infringe upon the provisions of the Interim Constitution regarding freedom of religion in section 14.\textsuperscript{196}

However, Rautenbach advances convincing reasons for a wide interpretation of entrenched rights.\textsuperscript{197}

\textsuperscript{192} \textit{Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses} (1995) 63. See also Freier “Reading out the establishment clause” 1996 \textit{Yale LJ} 2291 2292 for a discussion of Choper’s views.

\textsuperscript{193} (n 123) 46.

\textsuperscript{194} S 15.

\textsuperscript{195} 17 EHR 397 (1993) 429, \textit{contra} the majority.

\textsuperscript{196} \textit{S v Lawrence; S v Negal; S v Solberg} 1997 (10) BCLR 1348 (CC), 1997 (4) SA 1176 (CC) par 104. See also Farlam “The ambit of the right to freedom of religion: A commentary on \textit{S v Solberg}” 1998 \textit{SAJHR} 298 301.

\textsuperscript{197} (n 157) 86ff.
• The Bill of Rights, including the general limitation clause, must be viewed in its entirety to determine whether something is worthy of constitutional protection.\textsuperscript{198}

• A value-laden approach to constitutional interpretation does not require as a matter of course that a provision must be construed narrowly.\textsuperscript{199}

• The courts will also not be swamped by trivial infringements of rights, as a proper evaluation of the limitation clause will guide litigants quite easily in determining the validity of their claims.\textsuperscript{200}

• Guidelines will have to be formulated to assist in interpreting rights narrowly; such an exercise, however, is redundant as the procedures and factors subscribed by the general limitation clause\textsuperscript{201} suffice in the proper determination of the protected scope of a right.

Exponents and examples of the wide approach would include the following:

• The German Federal Constitutional Court.\textsuperscript{202}

• A Canadian judge, La Forest J, gave a particularly wide interpretation to the right to freedom of religion by including the right of parents to choose their children’s medical and other treatments within its ambit.\textsuperscript{203}

\textsuperscript{198} ibid.
\textsuperscript{199} ibid. See also \textit{S v Makwanyane} (n 169) par 325.
\textsuperscript{200} ibid.
\textsuperscript{201} S 36(1). See also Ch 5.4.
\textsuperscript{202} BVerfGE 24 236 (1968). See also Kommers (n 128) 446.
\textsuperscript{203} \textit{B(R) v Children’s Aid Society of Metropolitan Toronto} 26 CRR (2d) 202 (1995) par 105, quoted in Buckingham (n 7) 347.
• The court found, in *Attis v Board of School Trustees*, that the Canadian right to freedom of religion must not be subjected to “internal limits”, but must only be limited under the general limitation provision.\(^{204}\)

• The majority in *Kokkinakis v Greece* attached a wide interpretation to the right to proselytism.\(^{205}\) The court consequently found that Greece had infringed the right of the applicant.

• Sachs J found in *S v Lawrence* that the liquor law did breach the right to freedom of religion, but that the breach survived the limitation test.\(^{206}\)

It is submitted that the correct approach to interpreting the right to freedom of religion, and all other rights, would be the wide approach expounded above. Such an approach would lead to a healthy realisation of the protected ambit of the right, yet leaving the door open to limiting the right, where justified.

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\(^{204}\) 35 CRR (2d) 1 (SCC) (1996), quoted in Buckingham (n 7) 293.

\(^{205}\) (n 196) 418ff 424.

\(^{206}\) (n 197) 1236A-B 1238A-B. See also Farlam (n 196) 303.
1.4 LEGAL DEFINITIONS OF RELIGION

1.4.1 General

Seeking a definition of religion has been described as being complex, difficult, undesirable, unnecessary and impossible. However, a method of defining religion is essential in order to ascertain whether the right to freedom of religion had been infringed. The approach to the application of the Bill of Rights followed to this end requires that claimants to the right prove that they are entitled to the protection of the right; claimants would, therefore, have to prove that their beliefs

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207 The following definitions of religion have been proposed: Geertz: “(Religion is) a system of symbols which acts to establish powerful, pervasive and long-lasting moods and motivations in men by formulating conceptions of a general order of existence and clothing these conceptions with such an aura of factuality that the moods and motivations seem uniquely realistic”, quoted in Labuschagne “Religious freedom and newly-established religions in Dutch law” 1997 Netherlands International LR 168 172; Lessa and Vogt: “Religion, like the wider cultural system of which it is part, affirms notions of what reality is all about, what it ‘means’, and how one is to act within it”, quoted in Labuschagne 172; Yinger: “Religion can be defined as a system of beliefs by which a group of people struggles with the ultimate problems in life”, quoted in Labuschagne 172; Labuschagne: “[Religion is] a functional test of someone’s beliefs in the context of cultural practices and symbols that explain the general order of existence” 173; Sachs J: “Religion is not just a question of belief or doctrine. It is part of a way of life, of a people’s temper and culture” in Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) par 33; Raath: “Met sy gebed, psalm en gesang, verkondiging en verneming van Gods Woord, gebruik van sakramente, sending en evangelisasie, ensovoorts, wend die mens hom (vertikaal) direk en onmiddellik tot God. Ons noem dit godsdiens (in enger sin). Die mens dien God ook met al sy ander aktiwiteite, waaronder alle kultuurvorming … Die vervulling van hierdie omvattende roeping is ook ‘n diens van God. Ons noem dit religie” (footnotes and accentuation omitted) “Grondbeginsels van ‘n Calvinistiese regsleer” 1985 Obiter 48 64; Sadurski “On legal definitions of ‘religion’” 1989 Australian LJ 834 defines religion according to the relationship between church and state, in other words the establishment clause, and the free exercise of religion. The distinction based on establishment and free exercise is not used in this study, see Ch 3, the proposed definitions will, therefore, not fit this study. See Alen (Ed) Treatise on Belgian Constitutional Law (1992) 266ff regarding the position in Belgium and Reid (n 191) 344 regarding the European Union.

209 Buckingham (n 7) 8; Underkuffler-Freund (n 123) 45.
210 Labuschagne (n 207) 169.
212 ibid.
are religious to bring them within the scope of section 15.\textsuperscript{213} Thus, a definition of religion will have to be sought in order to establish if the right to freedom of religion is at issue in a set of facts.\textsuperscript{214} Rastafarians, therefore, would have to justify their beliefs as religious in order to have their expression or infringement considered under the right to freedom of religion, as was done by the plaintiff in \textit{Prince v President of the Law Society, Cape of Good Hope}.\textsuperscript{215}

A functional approach should be adopted regarding the concept of religion in legal context. Theological or pure philosophical approaches should be avoided in favour of a practical method that would enable courts and practitioners alike to deal swift and effectively with religious matters. It is submitted that the approach of Liebenberg J, in \textit{Christian Education SA v Minister of Education}, should be followed in dealing with religion from a legal perspective.\textsuperscript{216} This approach would require two enquiries before the courts may treat a matter as residing under the right to freedom of religion, namely:

- The objective requirement – does the belief or doctrine relied upon qualify as a religion?\textsuperscript{217}

- The subjective requirement – does the claimant sincerely believe in the religion?\textsuperscript{218}

\subsection*{1.4.2 Objective Requirement}

\textsuperscript{213} See Ch 5.2 regarding the approach to the application of the Bill of Rights.
\textsuperscript{214} See also Freedman (n 133) 35; Labuschagne (n 207) 169; Labuschagne “Godsdienstige teistering in arbeidsverband” 1997 \textit{SA Merc LJ} 393 397.
\textsuperscript{215} 1998 (8) BCLR 976 (C) 979D-J.
\textsuperscript{216} 1999 (9) BCLR 951 (SECLD) 958E-F, 1999 (4) SA 1092 (SECLD) 1100I-J.
\textsuperscript{217} See also Freedman “Protecting religious beliefs and religious practices under s 14(1) of the Interim Constitution: What can we learn from the American Constitution?” 1996 \textit{THRHR} 667 671.
\textsuperscript{218} See also \textit{United States v Ballard} 322 US 78 (1943); Freedman (n 217) 671; Choper \textit{Gilbert Law Summaries: Constitutional Law} (1994) 201.
This requirement, as mentioned, involves the evaluation of a set of beliefs to establish whether it would qualify as a religion. Such an evaluation supposes a set of guidelines as to what constitutes a religion. A religion, broadly construed, is a “collection of beliefs”\(^{219}\) evidenced by “social practice”.\(^{220}\) Although true, the definition requires refinement. It is submitted that a set of beliefs should be measured for the following characteristics in order to qualify as a religion.\(^{221}\)

- A belief in a Supreme Being or Beings;
- a belief in a transcendent reality;
- a moral code;
- a world view that provides an account of humanity’s role in the universe and around which an individual organises their life;
- sacred rituals, holy days and festivals;
- worship and prayer;
- a sacred text or scriptures;


\(^{221}\) These characteristics are largely taken from Freeman “The misguided search for the constitutional definition of ‘religion’” 1983 *Georgetown LJ* 1519 1553 as quoted by Buckingham (n 7) 9. The only addition to the views of Freeman has been the addition of “Supreme Beings”, as a religion may be concerned with more than one deity, see Dinstein “Freedom of religion and religious minorities” in Dinstein and Tabory (Eds) *The Protection of Minorities and Human Rights* (1992) 146; Nsereko “Religious liberty and the law in Botswana” 1992 *Journal of Church and State* 843, where religion is described as “beliefs in gods or beings”. Examples of religions with multiple deities would be the traditional religion of the Igbo, see Uchendu *The Igbo of Southeast Nigeria* (1965) 94ff and, of course, Hinduism.
• the existence of a social organisation that promotes a religious belief system.

A flexible approach should be followed in evaluating a set of beliefs using these characteristics. Buckingham describes the flexible approach thus: “The more of these eight features a belief system has, the more closely it resembles a religious paradigm. Thus, a religion need not have all eight, but a belief system that has only one or two of the above would be less likely to be considered a religion”.222 Such a flexible approach is necessitated by the changing concept of religion.223 The flexible approach to the evaluation of a set of beliefs could therefore account for the recognition of Theravada Buddhism – which is non-theist – as a religion.224 Such recognition could be based on the historical acceptance of Theravada Buddhism as a religion by some, as well as its relation to theistic Buddhist creeds. However, flexibility in recognising religions must not be overstretched, as has been the case in American jurisprudence where Ethical Culture and Secular Humanism have been recognised as religions.225 Such philosophies, including atheism and agnosticism, enjoy protection under the right to freedom of conscience and not under the religious component thereof.226

The courts (or the state – when for instance drafting legislation) may not, in the process of evaluating beliefs, make pronouncements on religious doctrine regarding its sophistication, acceptability, logic or comprehensibility.227 Therefore,

222 (n 7) 9.
223 Labuschagne “Die begrip ‘godsiens’ in godsiensvryheid: ‘n Bewussynsantropolopiese ekskursie na die evolusiekern van die reg” 1997 De Jure 118 133. Du Plessis “Doing damage to freedom of religion” 2000 Stell LR 295 304 also advocates a flexible approach to the evaluation of religious beliefs and renders criticism on the court a quo’s evaluation of the claimant’s religious beliefs in Christian Education (n 217).
224 Theravada Buddhism was recognised as a religion in Hartman v Chairman, Board for Religious Objection and Others 1987 (1) SA 922 (O).
225 See Choper (n 218) 201; Torcaso v Watkins (n 127); Anonymous “The establishment clause, secondary religious effects and humanistic education” 1982 Yale LJ 1196 1209.
226 See Ch 3.2 for a discussion of the components of the right to freedom of conscience in s 15(1). See also Smith “Freedom of Religion” in Chaskalson, Kentridge, Marcus, Spitz and Woolman (Eds) Constitutional Law of South Africa 19-1; Farlam (n 196) 308 note 20.
227 Christian Education SA v Minister of Education (n 216) 1100-J; Smith (n 226) 19-2. See also Kommers (n 128) 452 454 459; Grinstein “Jihad and the Constitution; The First Amendment implications of combating religiously motivated terrorism” 1996 Yale LJ 1347 1355 1370ff;
a court is not empowered to pronounce upon the truth or credibility of a religion, denomination or religious tenet.\(^{228}\) For instance, a Rastafarian may believe in the smoking of cannabis just as a Hindu may believe in the cremation of the dead without a court declaring such beliefs to be “absurd” or “false”, thereby discrediting the dignity of the respective religions. Constitutional limitations, however, may be placed on religious practices aimed at the achievement of a desirable social end – such as crematoria regulations. Douglas J, for instance, stated that:

> “Men may belief what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law … If one could be sent to the jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.”\(^{229}\)

Link opines correctly that:

> “Neutralität bedeutet, daß der Staat die Pilatusfrage nach der Wahrheit – der konfessionellen, religiösen oder weltanschaulichen – nicht mehr stellt und sie schon gar nicht autorotativ entscheidet.”\(^{230}\)

Therefore, the right to state non-identification would prohibit such negative pronouncements on religion either by the state or the courts.\(^{231}\) The right to the regulation of own affairs and doctrine would also protect religious beliefs from such

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\(^{228}\) See *United States v Ballard* (n 218) *passim*.

\(^{229}\) *United States v Ballard* (n 218) 86 87.


\(^{231}\) See Ch 3.7.1.1.
intrusion, as would the right of an individual to adhere to a religion or denomination of their choice.

1.4.3 Subjective Requirement

The subjective requirement comes into play once it has been established that a set of beliefs qualifies as a religion. This requirement establishes whether someone really believes in a specific religion or denomination, as asserted. The sincerity of someone claiming to adhere to a religious belief and its tenets is therefore scrutinised in order to establish if faith is expressed and not mere outward recognition or superficial acceptance of something religious. This requirement is essential in detecting and avoiding spurious and opportunistic claims based on freedom of religion. Support for the subjective requirement is to be found in American, Zimbabwean, German, Canadian and South African jurisprudence.

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232 See Ch 3.7.1.2.
233 See Ch 3.7.2.1.
234 United States v Ballard (n 218) 81 82; Choper (n 219) 201; Kommers (n 128) 459 notes the requirement in regards to conscientious objection.
235 Boiter (n 14) 100.
236 Freedman (n 217) 671. Sincerity, however, is notoriously difficult to gauge. Sadurski (n 208) 837 suggests the evaluation of the following criteria in ascertaining the sincerity of a claim: “The conformity of his claim with the written or empirically verifiable traditions and proscriptions of the religion or cult, congruence between the professed religious tenets and one’s actions, the willingness to undertake alternative duties and burdens, equally onerous but neutral from the point of view of that religion’s proscriptions, etc.”
237 United States v Ballard (n 218); Choper (n 218) 201; Wisconsin v Yoder 406 US 205 (1971) 235; United States v Lee 455 US 252 (1981) 257, where the state did not challenge the sincerity of the beliefs of the Amish; Goldman v Weinberger 475 US 503 (1985) 514, where the appellant’s “sincere” claim was mentioned in the dissenting opinion of Brennan J; United States v Seeger 380 US 163 (1965) 176 185, where the Court spoke of a “sincere and meaningful belief”.
238 In re Chikweche 1995 (4) SA 284 (ZS) 289I-J, 1995 (4) BCLR 533 (ZS) 538F.
239 Kommers (n 128) 459.
240 See Buckingham (n 7) 284.
241 Christian Education SA v Minister of Education (n 216) 1100I-J.