CHAPTER 3

PROTECTED CONDUCT AND INTERESTS OF THE RIGHT TO FREEDOM OF RELIGION

3.1 GENERAL

Section 15 of the Constitution of 1996 reads:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

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

(3) (a) This section does not prevent legislation recognising-

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

The above section is the successor to section 14 of the Interim Constitution of 1993, which read:¹

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

(2) Without derogating from the generality of subsection (1) religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

(3) Nothing in this chapter shall preclude legislation recognising-
   (a) a system of personal and family law adhered to by persons professing a particular religion; and
   (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

The two respective sections serve the same structural purpose. The main difference in this respect is the protection of academic freedom under section 14(1) of the Interim Constitution and the protection thereof under section 16(1)(d) in the Final Constitution. The similarity between the Interim and Final Constitutions regarding the right to freedom of religion facilitates comparison.

See also Devenish “Freedom of religion, belief and opinion” 1995 Obiter 15; Freedman “Tax exemptions for religious institutions: Are they compatible with section 14 of the Interim Constitution?” 1996 De Jure 149; Franzsen “Chapter three and tax law. Privacy and religious freedom” 1995 De Rebus 169; Freedman “Protecting religious beliefs and religious practices under s 14(1) of the Interim Constitution: What can we learn from the American Constitution?” 1996 THRHR 667; Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights (1994) 155ff; Davis “Religion, belief and opinion” in Davis, Cheadle and Haysom (Eds) Fundamental Rights in the Constitution (1997) 102ff; Dlamini “Culture, education and religion” in Van Wyk, Dugard, De Villiers and Davis Rights and Constitutionalism (1995) 592ff; Carpenter “Beyond belief – religious freedom under the South African and American Constitutions” 1995 THRHR 684 regarding s 14 of the Interim Constitution. The view of Smith “Freedom of religion” in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman Constitutional Law of South Africa (1999) 19-5 that s 14(3) had the capacity to act as a claw-back clause in overriding all other constitutional guarantees cannot be supported. The aim of the Bill of Rights, under both the Interim and Final Constitutions, was the establishment of an entrenched, justiciable and normative order. Smith’s textual interpretation of s 14(3) negates that normative order and does not reflect the true purpose of the Bill of Rights. S 14(3) was therefore not supreme to other constitutional values. S v Lawrence; S v Negal; S v Solberg 1997 (10) BCLR 1348 (CC), 1997 (4) SA 1176 (CC) is the leading case in South Africa on freedom of religion and is based on s 14.

Smith “Freedom of religion under the Final Constitution” 1997 SALJ 217; Smith (n 1) 19-8.
Section 15 is the core guarantor of the right to freedom of religion in South Africa. The content of any right has to be determined in order to ascertain if its guarantees have been violated or not. In this Chapter an attempt will be made to analyse the interests and conduct protected by section 15. The analysis will be conducted with reference to the subsections and in light of the common elements and content of the right to freedom of religion as augmented by contextual rights.

In other words, an attempt will be made in this Chapter to establish that the right to freedom of religion in section 15 can be defined as the bearer of the right’s:

- Positive and negative; individual, collective and institutional; static and dynamic; internal and external; private and public right to,

- the protected conduct and interests of freedom of religious autonomy, freedom of religious choice, freedom of religious observance and freedom of religious teaching,

- as contextualised by the Bill of Rights.

---

4. See Rautenbach (n 3) 81ff regarding the protected conduct and interests of rights.
5. See Ch 3.2, 3.3, 3.4.
6. See Ch 3.5. Common elements are characteristics that can be ascribed to nearly all rights in the Bill of Rights. They explain features that rights have in common, applied here to freedom of religion.
7. See Ch 3.7. These elements explain the actual right to freedom of religion, distinct from the protected elements of other rights.
8. See Ch 3.6. A right can only be understood in context with all the other rights in the Bill of Rights. This is so because no right can exist in a vacuum, but is augmented and detracted from by other rights. In this Ch separate attention will be given to contextual rights, but most contextual references will be incorporated into the discussion of the content of the right.
9. See Ch 2.
The aim is therefore to provide a framework of the right to freedom of religion. This framework should not be viewed as a *numerus clausus* of protected conduct and interests, but rather as a structural stimulus for the fuller development of the right.

### 3.2 THE SCOPE OF SECTION 15(1)

Section 15(1) assures everyone the freedoms of conscience, religion, thought, belief and opinion. A brief analysis will be conducted into these components, their necessity and relation *inter se* with regard to the bearers of the right.

De Winter advances arguments for the protection and recognition of “principles” and not only “religion” as such.\(^{10}\) Thus, protection and recognition should be extended to all “principles” whether they are religious or non-religious. Such an approach deserves support, as there are bodies of non-religious thought cherished by religious and non-religious persons alike. Someone may therefore be motivated to action or inaction by secular or religious convictions. Serious problems would arise should only religious convictions be constitutionally inviolable, as is the case in the United States of America.\(^{11}\) Artificial constructions of what constitutes religion would then be the only option to ensure constitutional protection of a wide range of issues related to the individual conscience.\(^{12}\) Conversely, constitutional protection may only be extended to matters that are truly religious in nature, thereby creating a situation of constitutional under-protection.\(^{13}\) It is therefore essential to protect both secular and religious convictions in order to ensure the protection of belief systems not characterised as religious.\(^{14}\) Bodies of thought such as agnosticism, atheism, secular humanism, ethical culture and free thought would enjoy rightful constitutional

---

\(^{10}\) “Godsdienst als alibi” 1996 *Nederlands Juristenblad* 1 *passim*.

\(^{11}\) Labuschagne “Godsdienstige teistering in arbeidsverband” 1997 *SA Merc LJ* 393 397.

\(^{12}\) Labuschagne (n 11) 397 notes for instance that secular humanism is regarded as a religion in the USA. See Ch 1.4; De Winter (n 10) 4.

\(^{13}\) Such a position is evidenced by early US Supreme Court jurisprudence, such as *Davis v Beason* 133 US 342 (1890), requiring a relationship between an individual and a deity to qualify as a religion. See also Labuschagne (11) 397.
protection as matters concerned with freedom of conscience, thought and belief, rather than freedom of religion.\textsuperscript{15} Such an approach enjoys support in positive law. Van Dijkhorst J stated that:

“The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion.”\textsuperscript{16}

The constitutional protection of secular and religious convictions is also widely found in foreign jurisdictions.\textsuperscript{17} Such convictions have also found protection in many international instruments.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{14} See Hogg \textit{Constitutional Law of Canada} (1992) 947.
\item \textsuperscript{15} A proper definition of religion may then be followed not burdened and overextended by the protection of non-religious dogma. See Ch 1.4; Farlam “The ambit of the right to freedom of religion: A commentary on \textit{S v Solberg}” 1998 \textit{SAJHR} 298 308 note 20; De Waal, Currie and Erasmus \textit{The Bill of Rights Handbook} (2001) 290; Smith (n 2) 219.
\item \textsuperscript{16} Wittmann \textit{v Deutscher Schulverein, Pretoria} 1998 (4) SA 423 (T) 449B-C.
\item \textsuperscript{17} Such protection is of more recent import as earlier constitutions, such as the First Amendment to the US Constitution, only protected the right to freedom of religion; see also the Finnish Constitution (1919) s 18, the Norwegian Constitution (1814) s 2 and the Constitution of Luxembourg (1868) s 19. The right to freedom of conscience, religion and belief (or wording to the same effect) is to be found in the Constitutions of Slovakia (1993) s 24(1), Nigeria (1989) s 37(1), India (1950) s 25(1), Germany (1949) s 4(1), Belize (1981) s 11(1), Botswana (1966) s 11(1), Croatia (1990) s 40, Japan (1947) s 19 20 and Ireland (1937) s 44.1.2.
\item \textsuperscript{18} See the Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9; International Convention on the Elimination of all Forms of Racial Discrimination (1965) art 5(d)(vii); International Covenant on Civil and Political Rights (1966) art 18; American Convention on Human Rights (1969) art 12; Final Act of the Conference on Security and Co-operation in Europe (1975) principle VII; African Charter on Human and Peoples’ Rights (1981) art 8; Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). Tahzib \textit{Freedom of Religion or Belief. Ensuring Effective International Legal Protection} (1996) 3 84 note 75 is of the opinion that “freedom of religion or belief” in international law is a concept wide enough to embrace theist, atheist and non-theist beliefs. Naidu “The right to freedom of thought and religion and to freedom of expression and opinion” 1987 \textit{Obiter} 59 62 is of the opinion that the right to “freedom of thought, conscience and religion” extends, in national and international law, to moral, religious, philosophical and political views.
\end{itemize}
It follows, having established the range of convictions protected by section 15(1), that the relationship between the protected freedoms should be explained. Van der Vyver opines that:

“Freedom of conscience and freedom of religion share a certain common ground, but matters of conscience include persuasions that are not essentially religious in nature.”

Freedom of conscience is thus a wider concept than freedom of religion. This supposes, as deduced from the quote, that freedom of conscience is composed of a religious element and a non-religious element. “Conscience” should therefore be viewed as a collective noun that encompasses all conceivable elements regarding the dignity and the inviolability of the human mind. Freedom of religion, thought, belief and opinion would thus be elements of a free conscience. “Freedom of conscience” would then act as a reserve, rendering constitutional protection to elements of a free conscience not expressly enumerated in section 15 as such. The Constitutions of Botswana and Belize expressly state that no person may “be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion”. The Zambian Constitution furthermore states that “the said freedom [freedom of conscience] includes freedom of thought and religion”. These Constitutions acknowledge the argument advanced here, namely that freedom of conscience is composed of freedom of religion among other freedoms.

---

19 “Suspension, derogation and de facto deprivation of fundamental rights in Bophuthatswana” 1994 THRHR 257 267. Van der Vyver 265, however, is of the opinion that freedom of thought is the widest concept in this regard and not freedom of conscience, as contended here.

20 See Burger “’n Kursoriese oorsig oor die begrip gewete” 1991 THRHR 512 518 concerning theological views of what he terms “egte gewete” as being a “besondere diepsinnige, egosentrale, emosionele ervaring van persoonlike skuld”. Burger distinguishes the “egte gewete” from the term “conscience” as used in human rights' instruments by holding that the latter means “gedagte-, denk-, bewegings-, ideologiese-, godsdiensvryheid” 518. The latter exposition of conscience is preferred as constitutions protect the inviolability of the human conscience, rather than viewing the conscience as an instrument of personal guilt.

21 (1966) s 11(1).

22 (1981) s 11(1).

23 (1991) s 19(1).
It is important to note that the above discussion is concerned with the exposition of the free conscience of natural persons. Qualified juristic persons and other associations may also bear the right to freedom of religion.\textsuperscript{24} The quote of Van der Vyver notes that freedom of conscience and freedom of religion enjoy a measure of common ground. It has been submitted that the religious conscience of the individual fits the broader concept of a free conscience perfectly; the overlap is thus complete in this regard. The overlap, however, is absent where the bearer of the right is a juristic person or association, as the latter do not possess a conscience. The fact that such bearers are without a conscience, as explained, would obviously not negate their bearing the right to freedom of religion, as the right is not merely aimed at natural persons.

### 3.3 THE SCOPE OF SECTION 15(2)

Section 15(2) attests to the unwillingness of the drafters of the Constitution, contrary to North American experience, to erect an impregnable wall between religion and the state.\textsuperscript{25} The section expressly provides for religious observances to be conducted at state and state-aided institutions. It is important to note that a close relationship exists between section 15(1) and section 15(2), as the latter elaborates on a specific aspect of freedom of religion, while the former contains the broadest possible guarantees of freedom of religion. Therefore, it is submitted that section

---

\textsuperscript{24} See Ch 2.  
\textsuperscript{25} See Malherbe “Die grondwetlike beskerming van godsdiensvryheid” 1998 TSAR 673 696; Smith (n 1) 19-8 19-10, De Waal et al (n 15) 298, Freedman “Understanding the freedom of religion clause in the South African Constitutional Bill, 1996” 1996 Human Rights and Constitutional LJ of Southern Africa 35 36; Malherbe “n Handves van regte en onderwys” 1993 TSAR 686 703; Smith (n 2) 220; Devenish (n 1) 27; Du Plessis and Corder (n 1) 157; Dlamini (n 1) 597; O’Regan J in S v Lawrence (n 1) par 118 119. See also Ch 3.7.1.1 regarding state non-identification. The South African position would not accord with the North American experience where state and religion have been separated in a rigid and artificial manner. See Buckingham (n 1) 203ff regarding Canada and Pienaar “Diskriminasieverbod en religieusgerigte onderwys – wat hou die toekoms in?” 1993 TIRHR 210 217; Anonymous “The unconstitutionality of state statues authorizing moments of silence in the public schools” 1983 Harvard LR 1874 regarding the American position. The South African position would rather correspond to a certain extent
15(2) is an express and qualified restatement of an element implied by section 15(1).  

It is important to note that “religious observances” describe activities different to those described by “religious instruction”. An act would qualify as a religious observance if it has a religious character or can be described as a religious rite of sorts. Both the objective and subjective elements of the definition of religion is therefore to be satisfied in establishing if an act or rite qualifies as “religious”. Religious observances would include “the right to carry out the requirements of one’s own religion about special days or seasons on which certain religious duties are to be performed”. The latter quote, however, neglects to mention that observances are not merely limited to special days or festivals, but would include normal everyday observances such as scripture reading and prayer; for instance, at the start or close of the school day. A religious observance could therefore be described as an act entailing formal and informal, public and private actions and inactions motivated by religious convictions not amounting to religious instruction.

with the Dutch and German positions where the state accommodates religion, see Pienaar 212ff regarding the former and Smith (n 2) 220 regarding the latter.

See for example Ch 3.7.3 regarding freedom of religious observance, especially Ch 3.7.3.2, 3.7.3.5. Such a wide approach to s 15(1) and (2) would be concomitant with a wide interpretation of religious freedom as proposed by this study, see Ch 1.3.

See Malherbe “Die onderwysbepalings van die 1993 Grondwet” 1995 TSAR 1 6; Wittmann v Deutscher Schulverein (n 16) 449E; De Waal et al (n 15) 302 who also make the distinction.

See Wittmann v Deutscher Schulverein (n 16); De Waal et al (n 15) 302 for a discussion of the latter decision regarding religious observances.

See Ch 1.4 regarding the definition of religion.


See also Malherbe (n 27) 6. Smith (n 1) 19-11 is of the opinion that such observances at schools should not be run by the schools themselves, but rather by religious leaders represented at the schools. Such a possible requirement will, together with others, enjoy attention in Ch 5.5.2 as part of the discussion of the specific limitation of the right to religious observances at state and state-aided institutions. Malherbe (n 25) 696 notes that religious observances would include reading from scriptures, prayer, meditation and possibly the use of religious symbols, as well as the spreading of literature aimed at missionary work 697.
It is furthermore important to note the meaning of “state and state aided institutions”. These concepts have a wider import than merely schools and other educational institutions.\textsuperscript{32} Such institutions would then also include prisons and state hospitals.\textsuperscript{33} The test would therefore focus on the connection an institution has with the state, rather than its character as educational or other institution as such. Two approaches may be discerned in the application of section 15(2):

- Van Dijkhorst J attached a specific meaning used in education circles to “state-aided institutions”\textsuperscript{34} Accordingly private or independent schools would not qualify as state-aided, even though they may receive state subsidies.\textsuperscript{35} The effect of the construction in \textit{Wittmann v Deutscher Schulverein} was the non-recognition of the Pretoria German School, which received a state grant of more than one and a half million rand in 1996, as state-aided for the purpose of section 14(2) of the Interim Constitution.\textsuperscript{36} The qualified right to religious observances was therefore not guaranteed at the school; the effect of which was the enforcement of a particular religion on the basis of a written agreement between the School and parent, over the irreligious views of a pupil and her parent, and by implication over other religions in the school. Such a construction is supported by De Waal \textit{et al}\textsuperscript{37} and Smith.\textsuperscript{38} Section 29(3) establishes the right

\begin{itemize}
\item \textit{ibid.}
\item Foster, Malherbe and Smith “Religion, language and education: Contrasting constitutional approaches” 1999 \textit{Education & Law Journal} 211 221; Du Plessis (n 1) 461; Devenish (n 1) 27; Sachs J in \textit{S v Lawrence} (n 1) par 143. \textit{Sed contra} Van Dijkhorst J in \textit{Wittmann v Deutscher Schulverein} (n 16) 452G-I. See Von Campenhausen and Christoph “Staatliche Krankenhausfinanzierung als Erfüllung grundrechtlicher Ansprüche” 1985 \textit{Deutsches Verwaltungsblatt} 266 regarding religious freedom, the German state and hospitals.
\item \textit{Wittmann v Deutscher Schulverein} (n 16) 450G-454E.
\item The argument is based on the traditional meaning of the term “state-aided” in education legislation, such as the Education and Training Act 90 of 1979 that described a private school as being a school other than a state-aided or public school, see \textit{Wittmann v Deutscher Schulverein} (n 16) 451H. See also the further discussion of Van Dijkhorst J of similar differentiation in the Private Schools Act (House of Assembly) 104 of 1986, at 452B. The aim of such a construction is to ensure private schools the autonomy to decide the type of religion or religions, if any, to be observed at the school free from the provisions of s 15(2).
\item (n 16) 450G 454E 456A.
\item (n 15) 303.
\item (n 1) 19-20.
\end{itemize}
to create independent educational institutions while section 29(4) allows the state to subsidise such institutions. Section 15(2) and sections 29(3) and (4) recognise the existence of state and state-aided institutions as well as independent educational institutions. The aim is obviously to ensure a maximum range of freedom for independent schools even though they may receive a subsidy, such as the Pretoria German School. Therefore, section 15(2), as Van Dijkhorst J held, is not applicable to independent or private educational institutions, as they cannot be found to be state or state-aided as contemplated by section 15(2). Such institutions would thus enjoy the freedom to regulate the conducting of religious observances, if any, independent of section 15(2).

- It may be argued that any amount of state aid would qualify an institution, other than an educational institution, as being state-aided for the purpose of section 15(2). Such a broad construction would require careful limitation, for instance, by considering the type and the extent of the aid. Therefore, the greater the aid and the more direct the aid – such as subsidies – the greater the effect of section 15(2) and the less or more indirect the aid – such as rate cuts or exemptions – the smaller the intrusion upon that institution’s freedom of association in the regulation of its religious observance, if any.\(^\text{39}\) Such a view is concomitant with a broad interpretation of the right to freedom of religion viewed in conjunction with the limitation of the right, as proposed by this study.

The right in section 15(2) may be limited under the general limitation clause in section 36. Such religious observances would also be subject to the subsection’s own specific limitation clause, providing for the limitation of the right on authority of

\(^\text{39}\) See Van Dijkhorst J in Wittmann v Deutscher Schulverein (n 16) 451D-E regarding the right to freedom of association.
rules made by the appropriate public authorities keeping in mind that such observances must be conducted on an equitable free, and voluntary basis.\textsuperscript{40}

The effect of section 15(2) will be further explained and incorporated in the discussion of the content of the right to freedom of religion in this Chapter, where applicable.

\subsection*{3.4 THE SCOPE OF SECTION 15(3)}

Section 15(3)(a)(i) does not prevent legislation recognising marriages concluded under any tradition or a system of religious, personal or family law. Section 15(3)(a)(ii) does not prevent legislation recognising systems of personal and family law under any tradition or adhered to by persons professing a particular religion. Such recognition, however, must be consistent with the remainder of the Constitution.\textsuperscript{41} The provision reaffirms that the right to freedom of religion in section 15(1) extends to the protection of systems of personal and the family law as practised by different religions.\textsuperscript{42} A specific limitation clause, however, is prescribed in subsection three qualifying the right by providing that such marriages and systems of law may only apply upon their legislative recognition, which must be

\textsuperscript{40} See Malherbe (n 25) 695. Rautenbach “Introduction to the Bill of Rights” in De Beer (Ed) \textit{Bill of Rights Compendium} (2001) par 1A63. See Ch 5.5.2 regarding section 15(2) as specific limitation clause.

\textsuperscript{41} S 15(3)(b). Such a provision would have been superfluous had it only referred to the Bill of Rights, as legislation has to be consistent, as a matter of course, with the entire Bill of Rights and not merely one or a few provisions. The provision, however, refers to the Constitution as a whole and not only to the Bill of Rights. Ch 12 of the Constitution would be an example of provisions, other than those in the Bill that would be apt to be taken note of in this regard. S 211(3), for instance, states that the courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Legislation recognising customary marriages in the context of s 15(3) could qualify as legislation to apply under s 211(3). See also Buckingham (n 1) 336 in this regard.

\textsuperscript{42} See Malherbe 1998 (n 25) 697, contra De Waal \textit{et al} (n 15) 308; Du Plessis 1994 (n 1) 163; Du Plessis and Corder (n 1) 157. The protection of systems of personal and family law, in s 15(3), extends beyond the scope of religious systems, as it also mentions such systems of any tradition. S 15(3) merely reaffirms s 15(1) to the extent that the former relates to systems of religious law. It may be argued that s 15(3) in relating to non-religious systems of law reaffirms
consistent with the Constitution. Such a harsh limitation is necessitated in order to avoid widespread legal and social disruption should such marriages and systems be legally applied as a matter of course. The limitation clause also identifies the agent of the limitation, namely a legislative authority. Such an authority is not enjoined to enact such legislation as a matter of course. Political and social lobbying may therefore take place to move the relevant authorities to enact legislation catering for the application of systems of religious and customary law. Individuals and communities, including those of Islamic, Hindu, Jewish and traditional African persuasions, would have to petition government and political representatives in bringing about the intended recognition.

a similar implied provision protected under the individual's right to a free conscience or to the right to practice one's culture, see s 30 31.

Malherbe 1998 (n 25) 697. Such legislation is therefore subject to constitutional scrutiny and may not be interpreted to provide for a claw-back clause. The textual opinions of Smith (n 1) 19-5 19-12; Freedman (n 25) 36; Sinclair, as discussed by Davis (n 1) 109, that s 14(3) of the Interim Constitution acted as such a claw-back cannot be supported, as it cannot be argued that the aim of the provision was the subordination of the entire Constitution to such legislation. See Ch 5.5.3 regarding the specific limitation clause.

Malherbe (n 25) 697.

See Du Plessis and Corder (n 1) 157. The right to lobby legislative authorities would itself enjoy constitutional protection under the right to religious political lobbying, see Ch 3.7.1.4; s 19(1)(c).

See the relevant discussions of Bulbulia “Women’s rights and marital status” 1983 De Rebus 430; Omar “Islamic personal and South African law – some problems highlighted” 1981 De Rebus 485; Haq Nadvi “Islamic legal philosophy and the Qur’anic origins of the Shari’a law” 1989 TRW 89; Bulbulia “The ethical foundations and distinctive features of Islamic law” 1985 CILSA 213; Cachalia “Citizenship, Muslim family law and a future South African constitution: A preliminary enquiry” 1993 THRHR 392. See also Buckingham (n 1) 340 regarding the legal position of Islamic law in Canada.

See Friedman “Jewish divorces – a purposeful and pragmatic solution by the South African law commission” 1994 SALJ 97; Buckingham (n 1) 336.

The Constitution cleared up doubts whether African customary law is covered by s 15(3), as the latter extends to “any tradition” of persons and family law, thereby including systems that may not be described as religious, see Davis (n 1) 109; Buckingham (n 1) 336.

The effect of section 15(3) will be furthered explained and incorporated in the discussion of the content of the right to freedom of religion, where applicable.  

3.5 COMMON ELEMENTS OF THE RIGHT TO FREEDOM OF RELIGION

Common elements are characteristics that are common to most rights, such as an individual and collective dimension or a positive and negative dimension. The discussion below will focus on such elements in context of the right to freedom of religion. It is at the outset, however, important to outline the aim of this section. The chosen division highlights the fact that the right to freedom of religion affords bearers the right to believe or not to believe – the positive and negative element. Bearers themselves need to be categorised to explain the different modes whereby the right may come to expression, namely individual, collective or institutional expression. Expression of the right, however, does not bind bearers to their respective choices, as the dynamic element would ensure the renewal of religious expression. Change and renewal would have to be balanced against the static element that protects vested interests and rights from change, thereby ensuring consistency, if so desired. The expression of the right touches the innermost being of individuals, namely the voluntary belief in a set of principles or its rejection. This personal dimension enjoys recognition as the internal element of the right. Bearers may further choose to manifest their innermost convictions individually, collectively and institutionally. Convictions – the internal element – are then augmented by action and not merely confined to the realm of one’s conscience. Such manifestations are recognised as the external element of the right. A proper understanding of the range of external manifestations can be achieved by the identification of the private and public expression of belief. The framework of common elements will explore the fields to which the protected conduct and interests of the right to freedom of religion may be applied.

\[50\] See Cachalia (n 46) 404 406 408 regarding the various ways in which legislation may seek to apply religious law. See Ch 5.5.3; De Waal et al (n 15) 306 regarding the Recognition of
3.5.1 Positive and Negative Element

The South African right to freedom of religion includes the right to believe or not to believe. It is a common element of rights that the entitlement to a certain action includes the entitlement to a certain inaction. Therefore, the right to freedom of religion, as do other rights, focuses on the protection of choice with regard to possibilities of a common ilk. Freedom of religion as the right to believe and the right not to believe accords with international and foreign law.

The positive and negative elements of the right to freedom of religion may be summarised as follows:


See Malherbe 1993 (n 25) 703; Du Plessis and Corder (n 1) 156; Devenish (n 1) 17; Sachs J in S v Lawrence (n 1) par 148. See also Wulfsohn “Separation of church and state in South African law” 1964 SALJ 90 92; Sachs Protecting Human Rights in a New South Africa (1990) 44. Buckingham (n 1) 19 seemingly suggests that the right to freedom of religion does not include the right not to believe.

Rautenbach (n 3) 89; Rautenbach and Malherbe Constitutional Law (1999) 330ff, see also 330 note 68 for the few exceptions to the rule in the Bill of Rights.

The 1984 Geneva Seminar concluded that the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) includes the right to have a religion or no religion at all, see Dickson “The United Nations and freedom of religion” 1995 International and Comparative Law Quarterly 327 346. See also Naidu (n 18) 62; Benito, quoted in Lerner “Proselytism, change of religion and international human rights” 1998 Emory International LJ 477 528.

• The bearer of the right may choose to adhere to a religion or denomination – the positive right – or may choose not to believe in any religion – the negative right.\(^\text{56}\)

• The bearer who chooses to believe in religion as such may choose to believe in religion A – the positive right – and may choose to disbelieve religion B, or all other religions - the negative right.

• The bearer who chooses to believe in religion A may choose to believe in religion A’s belief 1 and practice 1 – the positive right – and may choose to disbelieve belief 2 and practice 2 – the negative right.\(^\text{57}\)

The right to freedom of religion implies a further set of positive and negative characteristics. The positive and negative elements, as expounded above, may collectively be described as the “positive” dimension of the right. The positive dimension therefore entails that the bearers may choose to exercise or not to exercise their right to freedom of religion. The negative dimension would then refer to the duties of the parties bound to respect the bearers’ right to freedom of religion.\(^\text{58}\) The explanation of the negative dimension as being merely a prohibition on state coercion in religious matters is too limited.\(^\text{59}\) The state’s duty, however,

\(^{56}\) See Devenish (n 1) 17; Shelton and Kiss “A draft model law on freedom of religion, with commentary” in Van der Vyver and Witte Religious Human Rights in Global Perspective vol 1 (1996) 562. Should the bearer of the right not believe in religion as such and join a society of free thinkers, such a move would be protected under the right to freedom of conscience, see Ch 3.2.

\(^{57}\) It must be noted that rights may be limited and that a member of a religious organisation refusing to express prescribed beliefs and practices may have their right limited by disciplinary action, such as excommunication. See also Du Plessis and Corder (n 1) 156 who note that the right to freedom of religion includes the right “not to believe” and the right “not to hold a belief”. Malherbe 1998 (n 25) 681. See also Rautenbach quoted in Malherbe 1998 (n 25) 681 note 54 who refers to the fact that many rights, such as the right not to be detained without trial in s 12(1)(b), are only stated with the regard to the duties of those bound by the respective provisions.

\(^{58}\) Smith (n 1) 19-2; Smith “The crime of blasphemy and the protection of fundamental rights” 1999 SALJ 162 168; Smith (n 2) 219; Dlamini (n 1) 592; Freedman “The right to religious
would imply a positive duty – namely the creation of a social order wherein religious freedom may flourish and develop – as well as a negative duty – namely refraining from coercion and unconstitutional practice regarding religious freedom.\textsuperscript{60} The above discussion illustrates that the positive and negative classification may prove to be difficult and confusing. Confusion may largely be avoided by referring to the right to believe or to act or the right not to believe or not to act in a particular situation rather than merely referring to the “positive” or “negative” aspects of the right that may hold a variety of meanings.

3.5.2 Individual, Collective and Institutional Element

The right to freedom of religion may be manifested individually, collectively\textsuperscript{61} and institutionally.\textsuperscript{62}

\textsuperscript{60}See Kommers (n 55) 461; Malherbe 1998 (n 25) 697.


\textsuperscript{62}The institutional element of the right is recognised by Witte (n 61) 23; Freedman (n 59) 107; Du Plessis (n 1) 166. The German Federal Constitutional Court refers, in BVerfGE 24 236 (1968), to the right of associations to internal freedom and to organise, thereby recognising the institutional element of the right. See Kommers (n 55) 447. Kommers also notes that the German Constitution (1949) s 7(3) allows churches to direct programmes of religious
The individual may therefore exercise the right to religious freedom entirely on their own. This reaffirms the fact that religious liberty is an intensely personal matter. As a matter of fact, certain elements of religious freedom focus on individuals as such, for instance the right to adopt a belief or the right to convert from one religion or denomination to another. Rights, however, would be incomplete and substantially weakened in practice should they only be capable of solitary exercise. Section 31 recognises the right of religious adherents to exercise their respective rights collectively with other believers. The right to freedom of association furthermore guarantees individuals and associations, and by implication the bearers of the right to freedom of religion, the right to associate and organise according to their wishes. Thus, the collective element of religious freedom finds contextual support in the right to freely associate. The individual may therefore generally practise their religion either alone or in community with others of a similar persuasion.

The institutional right to freedom of religion is frequently overlooked. The institutional element of the right is implicit in the recognition that the Constitution gives to the instruction in some public schools under the supervision of the state, thereby recognising the institutional element to the right of religious liberty. See Malherbe “A constitutional perspective on higher education” 1999 Stell LR 328 regarding universities as juristic persons and bearers of the institutional element of the right to academic freedom. See Ch 2 regarding organisations, whether they are incorporated or not, as the bearers of certain elements of the right to freedom of religion; it follows that the bearing of the right by such organisations could rightfully be described as an institutional element of the right to freedom of religion.

---

64 See Ch 3.7.2.
65 S 31(1) guarantees persons adhering to a religion the right to enjoy their religion together and the right to form religious associations. S 31(1) must be seen to add a collective dimension to the religious freedom as such, as guaranteed by s 15. See also Malherbe 1998 (n 25) 679; Freedman (n 59) 107.
66 S 17.
67 See Carpenter (n 1) 685 who notes the close relationship between the right to freedom of religion and the right to freedom of association. See also the remarks by Van Dijkhorst J in Wittmann v Deutscher Schulverein (n 28) 451E regarding the relationship between the two rights.
establishment of religious associations. In other words, the right to religious liberty is capable of being exercised not only by natural persons, individually and collectively, but also by qualifying institutions. A church or missionary organisation would be a prime example of such an institution. It could also be argued that an “institution” refers not only to a formal organisation but also to an informal collective unit, such as the family unit.

3.5.3 Static and Dynamic Element

The right to freedom of religion is composed of a static and dynamic element. This implies that the right may be employed to preserve or conserve aspects of religion on the one hand, while, on the other hand, protecting the changing of certain aspects of religion; for instance, aspects regarding observance and doctrine. The right may therefore act as both an agent for stability, as well as an agent of change. The individual, for instance, may choose to continue to adhere to a specific religion or denomination – the static dimension - or may choose to convert from that religion or denomination to another – the dynamic dimension – one is therefore allowed to

---

69 S 31(1)(b) The institutional aspect may also be derived from the fact that associations, whether they are incorporated or not, may exercise the right to freedom of religion; see Ch 2 regarding the bearers of the right. See also Freedman (n 59) 107; Witte (n 61) 23. Du Plessis (n 1) 166 notes that the right to freedom of association “enhances the institutionalised exercise of religious freedom”. The institutional element is also recognised and debated in foreign law, see Kommers (n 55) 471 regarding German law; Dhavan “Religious freedom in India” 1987 American Journal of Comparative Law 216 228 250 regarding Indian law.
70 See Kommers (n 55) 471. See also Witte (n 61) 23.
71 The Irish Constitution (1937) s 41 refers to the family, correctly but somewhat excessively, as the “natural, primary and fundamental unit group of society” and possessing “inalienable and imprescriptible rights, antecedent and superior to all positive law”. The state was furthermore enjoined to protect the family, its constitution and authority, see Hogan “Law and religion: Church-state relations in Ireland from independence to the present day” 1987 American Journal of Comparative Law 47 53. See also Kommers (n 55) 495 regarding the family as institution in the German Constitution.
72 Labuschagne “Religious freedom and newly-established religions in Dutch law” 1997 Netherlands International LR 168 174 recognises the static and dynamic element of religious liberty, but only with respect to the internal element of the right.
73 See Ch 3.7.1.2 regarding the right to procedural and formal religious development. Individuals and institutions would be affected by this dimension of the right, for they may wish to preserve aspects of religion or may choose to change certain aspects of religion.
The latter observation with respect to the change of religion is particularly necessary, as there are religions and denominations that forbid their members from leaving the faith.

3.5.4 Internal and External Element

The right to freedom of religion consists of an internal and external element. The internal element is described as the individual’s “spiritual integrity [that] forms the quintessence of the protection that freedom of religion offers”. Religious beliefs are expressed in manifestations motivated by the internal element, namely religious convictions. Religious freedom therefore entails the protection of both religious

---

74 Labuschagne (n 72) 174.
75 See Ch 3.7.2.1 regarding the right to convert from one religion or denomination to another.
76 The internal element is also known as the forum internum and the external element as the forum externum. The internal/external division is necessary in order to recognise both religious convictions – the internal element, but also the expression of such convictions – the external element. An express recognition and understanding of the internal and external characteristics as both enjoying equal protection would avoid situations whereby religious freedom is confined, as a matter of course, to the individual conscience without proper constitutional consideration of the external element. The US Supreme Court adopted an extreme position in Reynolds v United States 98 US 145 (1878) by only granting constitutional protection to religious convictions and not to its expression, see Devenish (n 1) 20 21. Although the extreme position softened, the same Court came close to restating it in Employment Division v Smith 494 US 872 (1989). McConnell “Free exercise revisionism and the Smith decision” 1990 Univ of Chicago LR 1109 1149 notes that constitutions make provision for exemptions to legislation. In other words, a religious duty may weigh more than a legislative duty, thereby granting an exemption to the performance of the legislative duty. An unbalanced focus on the effect of mere legislation, such as in the US, negates fundamental guarantees of religious expression where the two may clash. Therefore, a proper understanding of the internal/external division of the right is to be welcomed in order to ensure effective constitutional protection of both aspects and not merely one of them. Special attention should thus be given to the analysis of the external element in order to avoid its negation. See also Ch 3.5.5.
77 Labuschagne (n 72) 174. The internal element centres therefore in the conscience of the individual; see also Lerner (n 54) who notes that freedom of conscience and religion focus on the internal forum of the individual.
78 Labuschagne (n 72) 175ff. Religious organisations and their activities would be examples of the manifestation of beliefs. Such organisations, however, cannot claim an internal element as they do not possess a conscience; their activities, however, would resort under the external element of religious liberty. See also Jacobs and White The European Convention on Human Rights (1996) 211 212 who note that religious organisations do not possess a conscience. It is also important to note that s 15(2) and 15(3) pertain to the manifestation of religious beliefs in observances and in the practice of religious law, in other words, these subsections expressly
beliefs – the internal element - and religious practices – the external element.\textsuperscript{79} The individual’s change of religion would thus fall under the internal element of the right, whereas the expression of the new belief, individually and collectively, would fall under the external element of the right. The internal and external element of the right enjoys support and recognition in both foreign\textsuperscript{80} and international law.\textsuperscript{81} The argument is often advanced that the internal element of the right may not be subjected to limitation, whereas the external element of the right may be limited.\textsuperscript{82}

\subsection*{3.5.5 Private and Public Element}

cater for the external element of the right with regard to certain aspects of the right to freedom of religion.

\textsuperscript{79} See Shelton and Kiss (n 56) 572; Isensee “Bildersturm durch Grundrechtsinterpretation” 1996 Zeitschrift für Rechtspolitik 10 12, see, however, the views of Moens “The action-belief dichotomy and freedom of religion” 1989 Sydney LR 195ff. Freedman (n 25) 35; Freedman (n 59) 105; Malherbe 1998 (n 25) 680 also recognise that the right to freedom of religion protects not only the right to believe but also the right to act.

\textsuperscript{80} The German Federal Constitutional Court noted that an individual’s refusal to take an oath goes beyond the internal dimension of the right, thereby suggesting that convictions are not only held but also expressed, see BVerfGE 33 23 (1972); Krommers (n 55) 455. The Canadian Court in \textit{R v Big M Drug Mart} 13 CRR 64 (1985), [1985] 1 SCR 295 336 noted that the right to freedom of religion includes the right “to manifest religious belief by worship and practice”, quoted in Hogg (n 14) 950. The American Supreme Court found in \textit{Cantwell v Connecticut} 310 US 296 (1939) 303 that the “[First] Amendment embraces two concepts:- freedom to believe and freedom to act”. This quote was also supported in \textit{Torcaso v Watkins} (n 55) 492.

\textsuperscript{81} See Krishnaswami (n 61) 16 17 20 22; Labuschagne (n 72) 174 175 who note that the Universal Declaration of Human Rights (1948) allows the bearer to hold a belief, but also allows the bearer to manifest that belief. Furthermore, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); International Covenant on Civil and Political Rights (1966) art 18; American Convention on Human Rights (1969) art 12; Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1 6 all guarantee the individual not only the right to hold a belief, but also the right to manifest that belief, see especially art 6 of the latter instrument.

\textsuperscript{82} See \textit{Cantwell v Connecticut} (n 80) 303; Du Plessis (n 1) 158 160 161; Van der Vyver (n 19) 265 267; Jacobs and White (n 78) 211; Malcolm “Religion, tolerance and the law” 1996 \textit{Australian LJ} 976 980; Labuschagne (n 72) 174; Krishnaswami (n 61) 17; Buckingham (n 1) 46 50 171 182; Wulfsohn (n 51) 91; Lerner (n 54) 498 553 558; Du Plessis and Corder (n 1) 158; Choper \textit{Gilbert Law Summaries: Constitutional Law} (1994) 197; Sullivan “Advancing freedom of religion or belief through the Declaration on the Elimination of Religious Intolerance and Discrimination” 1988 \textit{American Journal of International Law} 487 492 493; Underkuffer-Freund “Religious guarantees in a pluralistic society: values, problems and limits” 1997 \textit{SAPL} 32 37; Meyerson \textit{Rights Limited} (1997) 2; Grinstein “Jihad and the Constitution: The First Amendment implications of combating religiously motivated terrorism” 1996 \textit{Yale LJ} 1347 1355ff; Moens (n 79) 195ff regarding support and criticism of the argument. The issue will enjoy closer attention in Ch 5 with the discussion of the limitation of the right to freedom of religion.
The right to freedom of religion possesses a private and public element.\(^{83}\) This element is closely linked to the external element of the right.\(^{84}\) In other words, bearers of the right may not only manifest their right in private but also in public.\(^ {85}\) Section 15(2) expressly guarantees the public expression of the right by allowing religious observances to be conducted at state and state-aided institutions under qualifying conditions; thereby restating and confirming the inherent presence of the public element in section 15(1). The manifestation of the religious freedom in private and public enjoys recognition and support in both foreign\(^ {86}\) and international law.\(^ {87}\)

### 3.6 CONTEXTUAL RIGHTS

Section 15 must be read “systematically in conjunction with other constitutional provisions in order to optimise the protection it offers”.\(^ {88}\) A host of provisions must therefore be considered in order to enhance and amplify the right to freedom of religion.\(^ {89}\) Such an approach is not confined to freedom of religion. Malherbe, for

---

83 See Shelton and Kiss (n 56) 562 563; Krishnaswami (n 61) 31.
84 Malherbe 1998 (n 25) 680 notes that the right to religious freedom may be manifested by public worship.
85 Private areas would include all places of residence, such as houses, flats, hostels, rooms, caravans etc – whether these places are owned or rented by the bearer. Public areas would include parks, schools, parliament and all other government buildings, shopping centres, streets, beaches etc. The public manifestation of the right would include acts such as the listing of a telephone number by a religious organisation in a telephone directory. Krishnaswami (n 61) 22 notes that the expression of the right in public would be easier to limit than the expression of the right in private, the reason being that the right to privacy in s 14 would be of stronger import in private places than in public places.
87 See the Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); American Convention on Human Rights (1969) art 12(1); Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(1).
88 Du Plessis and Corder (n 1) 158. The latter refer to s 14(1) of the Interim Constitution, the observation, however, is equally relevant with regard to the Final Constitution.
89 Du Plessis (n 1) 164. Du Plessis also notes that the Constitution does not refer to religious rights “elaborately” therefore necessitating other rights to bolster the right to freedom of religion. Dinstein (n 61) 160 notes that “[f]reedom of religion cannot be separated from other human
instance, discusses the scope of educational rights with extensive reference to religious liberty. Malherbe also approaches religious liberty from a comparative angle.

Du Plessis and Corder speak of “supporting rights” while Malherbe speaks of “tersaaklike bepalings” when referring to other rights in the discussion of the right to freedom of religion. It is submitted that the right to freedom of religion is viewed contextually in order to cultivate a proper understanding of its generous protection. This study therefore terms such complementary rights as “contextual rights”. Such rights would include the rights to freedom of association, education, equality, just administrative action, property, expression, movement, privacy, political rights, and human dignity. Section 31, that refers to the rights of members of religious communities, is an important right to be viewed in conjunction with other religious guarantees. The state’s duties should also be viewed contextually in that the state has certain obligations with regard to human rights including the right to freedom of religion.

---

rights: its full exercise involves respect for various fundamental freedoms that may, therefore, be regarded as complementary”, religious liberty is thus “virtually intertwined” with other rights.

90 1993 (n 25) 701ff; Malherbe (n 27) 6ff.
92 (n 1) 158.
93 1998 (n 25) 698.
94 S 18. See Malherbe 1998 (n 25) 679; Du Plessis and Corder (n 1) 158; Carpenter (n 1) 685; Dinstein (n 61) 162.
95 S 29. See Malherbe 1998 (n 25) 701ff; (n 27) 6ff; Du Plessis (n 1) 164; Dinstein (n 61) 163.
96 S 9. See Malherbe 1998 (n 25) 699; Du Plessis (n 1) 165.
97 S 33. See Du Plessis (n 1) 166.
98 S 25. See Ch 3.7.1.2.
99 S 16. See Ch 3.7.2.1; Dinstein (n 61) 161.
100 S 21. See Ch 3.7.3.6.
101 S 14. See Ch 3.7.1.2.
102 S 19. See Ch 3.7.1.4.
103 S 10. See Ch 3.7.1.
104 See, for instance, the reference to s 31 by Malherbe 1998 (n 25) 679; Freedman (n 59) 107.
105 According to s 7(2) the state must respect, protect, promote and fulfil the rights in the Bill of Rights. See also Malherbe 1998 (n 25) 698; Ch 4.1.
The effect of contextual rights will be further explained and incorporated in the discussion in this Chapter of the content of the right to freedom of religion, where applicable.

3.7 CONTENT OF THE RIGHT

An attempt will be made in this study to indicate that the right to freedom of religion is composed of five distinct, yet related, freedoms. These are the freedoms of religious autonomy, choice, observance, teaching and of the right to propagate a religion. Each one of these freedoms is composed of rights that guarantee and explain the elements of the respective freedom. The specific rights, as expounded in this study, are not exhaustive in number or content, thus leaving room for development.

*Freedom of religious autonomy* refers to aspects of the relationship between the state and religion, as well as other institutional aspects of religion. The freedom, however, is not confined only to institutional aspects of autonomy, but also refers to individual and collective elements of the right. Religious autonomy enjoys recognition in both foreign and international law.

---

106 See, for instance, Ch 3.7.1.1, 3.7.1.2.
107 See, for instance, Ch 3.7.1.3.
108 The Russian Constitution (1993) s 14(1) states that there may be no “state-sponsored” or “mandatory” religion. The Portuguese Constitution (1976) s 41(4) dictates the separation of churches and religious communities from the state. The Hong Kong Constitution (1990) s 141(4) allows believers and religious organisations to develop and maintain contact with other believers and religious organisations. The Nigerian Constitution (1989) s 11, furthermore, states that the federation or an individual state may not adopt a state religion. Importantly, the Constitution of Paraguay (1992) s 24(2)-(3) guarantees the independence and autonomy of the Catholic Church, as well as the independence and autonomy of all other churches and denominations. The German Federal Constitutional Court, BVerfGE 18 385 (1965), held that religious communities may administer their affairs independently, see Kommers (n 55) 492. It is submitted that the foregoing Constitutions illustrate freedom of religious autonomy of institutions and the individual (individually and collectively).
109 The “practice” of religion is guaranteed by the Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); International Covenant on Civil and Political Rights (1966) art 18(1); African
**Freedom of religious choice** focuses primarily on the expression of religious liberty by natural persons, individually and collectively, in accordance with the dictates of their conscience.\(^{110}\) Freedom of religious choice enjoys recognition in both foreign\(^{111}\) and international law.\(^{112}\)

**Freedom of religious observance** relates to the carrying out and honouring of the prescriptions of one’s faith; for instance, with regard to tenets concerning dress, conduct, rituals, services and holy days and feasts.\(^{113}\) Freedom of religious observance enjoys recognition in both foreign\(^{114}\) and international law.\(^{115}\)

---

\(^{110}\) Charter of Human and Peoples’ Rights (1981) art 8. It is submitted, that the practice of religion implies a measure of autonomy, in order to ensure its free and unfettered practice.

\(^{111}\) Rautenbach (n 3) 89 notes that the primary focus of human rights is the protection of the bearer’s right of freedom to choose, in this instance the bearer’s right to make religious choices. Freedom of conscience is therefore an important consideration in reviewing the freedom of religious choice, see Ch 3.2 with regard to the relationship between the individual’s freedom of conscience and freedom of religion.

\(^{112}\) The Constitution of Malta (1964) s 40(1) guarantees “all persons” the freedom to enjoy the exercise of their “respective modes of religious worship”. The Hong Kong Constitution (1990) s 15(1) gives everyone the right to adopt a religion or belief of their choice. The Constitution of Zambia (1991) s 19(4) also expressly guarantees the right to change one’s religion. It is submitted, that it may be deduced from the aforegoing Constitutions that the freedom to change one’s beliefs and also the manner in which one would like to express those beliefs find protection. The principle of freedom of religious choice, therefore, enjoys recognition and protection.

\(^{113}\) See the discussion of “religious observance” with regard to s 15(2) in Ch 3.3. See also Labuschagne (n 72) 176 regarding the meaning of “observance”. S 31(1)(a) guarantees persons belonging to religious communities the right to practise their religion, thereby guaranteeing the right to freedom of religious observance.

\(^{114}\) Freedom of observance is expressly recognised in the Constitutions of Zambia (1991) art 19(1); Slovakia (1993) art 24(2); Nigeria (1989) art 37(1); Hong Kong (1990) art 15(1). See also the Indian Constitution (1950) s 25(1).
Freedom of religious teaching includes both the right to religious instruction and the right to religious training and upbringing. The former relates to religious instruction in educational institutions, while the latter refers to general or special religious training provided by religious organisations - such as Sunday school classes and the presentation of courses on religion provided for the religious and/or non-religious – as well as the right of parents and guardians to instil their children or wards with religious values and to encourage religious belief by them. Freedom of religious teaching enjoys recognition in both foreign and international law.

Freedom to propagate a religion or denomination entails the protection both of the religious message propagated and its method of dissemination. Religious adherents are thus empowered to attempt the conversion of non-believers to their own persuasion, obviously by means of constitutionally acceptable methods. The

---

115 Dinstein (n 61) 150 discusses freedom of religious observance in relation to the International Covenant on Civil and Political Rights (1966) art 18(1). Freedom of observance is also recognised by the Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) art 1(1).

116 See Ch 3.7.4.3. See in general Malherbe 1993 (n 25) 701ff; Malherbe (n 27) 6ff. Meyerson (n 82) 29 recognises that “religious freedom clearly implies the freedom to teach one’s religion”.

117 See the Constitutions of Germany (1949) s 7(3) that provides for religious instruction in some public schools under the supervision of the state; Malta (1964) s 2(3) enjoins the providing of instruction in the Roman Apostolic faith in schools; Nigeria (1989) s 37(3) guarantees religious communities the right to provide religious instruction in institutions maintained by such communities; Portugal (1976) s 41(5) provides denominations with the right to teach their faith within their respective denomination. Importantly, the Paraguayan Constitution (1992) s 74 guarantees the right to a religious education. These Constitutions, although diverse in their approach, provide evidence that religious teaching forms an integral part, in one way or another, of the right to freedom of religion the world over.

118 Dinstein (n 61) 153 discusses freedom of religious teaching with regard to the International Covenant on Civil and Political Rights (1966) art 18(1). Religious teaching is also guaranteed by the Universal Declaration of Human Rights (1948) art 18; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1980) art 1(1) 6(e)(g). The latter articles guarantee the teaching of religion in appropriate places and also recognise the training of religious leaders.

119 See Ch 3.7.5.

120 See Ch 3.7.5.
right to attempt the conversion of others enjoys protection and recognition in both foreign\textsuperscript{121} and international law.\textsuperscript{122}

3.7.1 \textit{FREEDOM OF RELIGIOUS AUTONOMY}

3.7.1.1 The Right to State Non-identification

The mere classification of the relationship between the state and religion as belonging to a specific category does not in itself do justice to the study of such a relationship.\textsuperscript{123} Torfs opines that scepticism is required with regard to “long-standing terminology”.\textsuperscript{124} A study, therefore, should focus on content and substance rather than on superficial and sometimes artificial classification. Such an approach would require a spectrum of differentiation in order to avoid rigid and impractical classification.\textsuperscript{125} This spectrum could be used to indicate the intended position of a relationship or particular policy - the \textit{de jure} position – but can also, more importantly, be used to indicate the actual position of the relationship – the \textit{de

\textsuperscript{121} See the Constitutions of Singapore (1963) s 15(1); Slovakia (1993) s 24(1); Zambia (1991) s 19(1); Hong Kong (1990) s 15(1). The Constitution of Nepal (1990) s 19(1) denies people the right to attempt to convert others.

\textsuperscript{122} The American Convention on Human Rights (1969) art 12(1) expressly recognises the right to “disseminate one’s religion”. The Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); International Covenant on Civil and Political Rights (1966) art 18(1) guarantee the right to teach religion. Dinstein (n 61) 150 argues that the freedom to teach religion is not limited to teaching the faithful but includes “the right to propagate the faith among the uninitiated, in other words, there is a right to proselytise – or undertake missionary activities in order to gain converts”. The latter argument is also seemingly supported by the joint dissenting opinion of Foighel and Loizou JJ in \textit{Kokkinakis v Greece} 17 EHRR 397 (1993) 439, \textit{contra} the opinion, 430. See also Reid \textit{A Practitioner’s Guide to the European Convention on Human Rights} (1998) 346. Van der Vyver “Religious freedom and proselytism” 1998 \textit{Ecumenical Review} 419 deduces the right from the Universal Declaration of Human Rights (1948).

\textsuperscript{123} Krishnaswami (n 61) 46 observes that unjustified discrimination against a religion can only be ascertained upon a proper study of the situation rather than only classification.

\textsuperscript{124} “Church and state in France, Belgium and the Netherlands: Unexpected similarities and hidden differences” 1996 \textit{Brigham Young University LR} 945 962. The term laicisation, for instance, enjoys radically different meanings in France and Belgium.

\textsuperscript{125} Buckingham (n 1) 59 61 notes the existence of a spectrum accommodating a variety of relationships, but also observes differentiation within the respective relationships. Durham (n 61) 16 17 18 also discusses spectrums of differentiation.
The one extremity of the spectrum would be inhabited by absolute theocracies and the other extremity by militant atheism. The one spectrum range can thus be described as accommodating religious states while the other end supports secular states, both in various guises. “Secular” in this context signifies the absence of a state religion. Constitutional power sharing between the state and religion would represent the centre of the spectrum, namely a compromise.

---

126 Buckingham (n 1) 65 notes that a state need not only be officially secular but also de facto. The actual position and the intended position may correspond but this is definitely not always the case as Buckingham observes regarding the pre-1982 position of religion and education in Canada.

127 This is based on the constitutional models distinguished by Sachs (n 51) 46. Sachs explains theocracies as being “the acknowledgement of religious organizations as the holders of public power and of religious law as the law of the state” 46. The latter explanation is acceptable, however, a more severe form of theocracy would be the acknowledgement of a deity or deities as the direct rulers of the state, for example in the form of the pharaohs of ancient Egypt. “Theocracy” as understood by Sachs exemplifies many modern Islamic states that recognise the substantive role of religious leaders in state affairs and recognise Islamic law as the official code, see Buckingham (n 1) 60. The opposite end of the spectrum is described by Sachs as being a “secular state in which religious organizations are repressed” 46. The former Soviet Union would be an example of such a state supporting militant atheism, see Boiter “Law and religion in the Soviet Union” 1987 American Journal of Comparative Law 97; Schutte Godsdienstvervolging in die USSR tydens die Bewindstydperke van Lenin en Stalin 1917-1953 (1991 MA dissertation, RAU). The Soviet state tried to eradicate all religious belief, inter alia, by financing the Militant League of the Godless to suppress the church and mooted ideas of a Five Year Plan to eradicate religion, see Boiter 111. Also, the former president of Equatorial Guinea, Macias Nguema, banned the Roman Catholic Church to which 80% of the population belonged, see Shelton and Kiss (n 56) 580 note 56.

128 Sachs (n 51) 46 also makes reference to “religious” and “secular” states in this regard. The spectrum, however, would allow variations of each. England, for instance, has a state religion and the Crown appoints 26 Church of England bishops to the House of Lords, but the de jure position does not mirror the de facto position as England could hardly be described as a “religious” state or a “theocracy” except in theory, see Buckingham (n 1) 63. Saudi Arabia, on the other hand, is a religious state both in theory and in practice, see Buckingham 60.

129 Buckingham (n 1) 65 follows the same definition. See Pobee “Religion and politics in sub-Saharan Africa” 1993 Journal of Theology for Southern Africa 14 18. Sachs (n 51) 45 is of the opinion that secular does not always have to imply anti-religious policies, but rather the absence of a state religion and persecution of religion or certain religions. “Secular” as proposed by this study would mean the absence of a state religion, secular states, however, may pursue a number of policies regarding religion ranging from the accommodation thereof to its suppression. Importantly, “secular” should be distinguished from “secularisation” as the latter refers to the “gradual and relative loss of social importance of the religious element in society” – in other words an unbelieving populace rather than the absence of a state religion, see Torfs (n 124) 964. It should be kept in mind that although a state may be officially secular the impact of legislation may be of a religious nature. Blithe categorisation must not be followed in using the spectrum but rather substantive research in comparing the legal or intended position with the actual position. See also Buckingham (n 1) 65.
between the religious and secular state. The centre of the spectrum would also be characterised by states, although having no state-religion, that officially recognise only certain religions with the exclusion of others. The relationship between the state and religion can therefore be studied formally, namely whether the state has an official belief, and substantively, namely whether a particular state with an official belief represses or tolerates other beliefs and whether a particular state without an official belief practices favouritism or even-handedness when dealing with the right to freedom of religion.

History has been witness to endless clashes between the secular and the religious realms, each seeking to dominate the other. The development of a strong international state-system and negative reaction to state religions have spurred the separation of the state and religion. For example, constitutional drafters in the United States tried to ensure a secular state with the inclusion of the First Amendment to the American Constitution, which prohibited the establishment of any religion by the state and guaranteed the free exercise of religious freedom.

---

130 See Sachs (n 51) 46. Buckingham (n 1) 61 is of the opinion that Egypt would be an example of such a state as Islam and state institutions share a lot of power between them, for instance, a ban on proselytism exists in accordance with Islam but Islamic law does not constitute the code of law and regular elections are held.

131 See Krishnaswami (n 61) 47. Belgium would be such an example, no state religion is prescribed, yet the state recognises Catholicism, Protestantism, Judaism, Anglicanism and the Russian and Greek Orthodox Churches. Religions so recognised in accordance with s 117 of the Belgian Constitution (1831) enjoy privileges, such as state salaried ministers, that are not afforded religions not so recognised. See Alen (n 61) 267.


133 See Ch 1.2; Torfs (n 124) 965.

134 See Ch 1.2 regarding the development of the state and the subsequent separation of the state and religion. Krishnaswami (n 61) 47 opines that the separation of the two entities was encouraged by reaction against the adoption of state religions to the exclusion of other religions.

135 This has led to the strict separation of the state and religion culminating in an unacceptable hostility toward religion, see Malherbe 1998 (n 25) passim; Carpenter (n 1) passim. See also Anonymous “Constitutional law – establishment clause – Second Circuit holds that city’s display of a crèche in a public park does not unconstitutionally endorse religion” 1998 Harvard LR 2462; Smith “Relations between church and state in the United States, with special attention to the schooling of children” 1987 American Journal of Comparative Law 1; Klaaren “Book reviews” 1994 SAJHR 287; Wittmann v Deutscher Schulverein (n 16) 440F-446I; Stone, Seidman, Sunstein and Tushnet The First Amendment (1999); Anonymous “Constitutional law – First Amendment – Establishment Clause – Sixth Circuit court holds that opening school
Challenges between the state and religion have been described as the “confrontation model”. The confrontation model led to calls for the strict separation of the state and religion in order to avoid the excesses of state persecution of dissenters of the state religion; the modern state-system, especially in the West, has recognised that the complete or strict separation of the state and religion is unattainable. The fledgling state, however, has spread its wings, so much so that it has the ability to function independently and effectively. Ferrari, Buckingham, and Sachs oppose the confrontation model and the strict separation of the state and religion in favour of meaningful cooperation between the two entities for the good of society.

Arguments will now be advanced for the preference of cooperation between the state and religion rather than the attempted strict separation of the two in a supposed attempt to avoid confrontation.

South Africa, both as a Union and a Republic, has never known a state religion. The Interim and Final Constitutions reaffirm the absence of a state religion, as they

---

136 See Torfs (n 124) 965.
137 Ferrari, quoted in Torfs (n 124) 966, observes that the “liberal dream of giving religion only a private status has been abandoned, in stead of a weaker public role for religion”.
138 Quoted in Torfs (n 124) 966 notes that cooperation between the state and religion implies that both are no longer rivals but rather collaborators in the achievement of joint goals. Torfs 967 mentions recent examples of such cooperation in the Netherlands and France.
139 (n 1) 65ff. Buckingham 66 67 terms cooperation the “inclusive paradigm”. Both the state and religion are to enjoy separate spheres of autonomy, which may only overlap when a need for collaboration arises, such as the conducting of public or official religious observances. Such collaboration is to be conducted on a substantive and procedural level 68ff. The notion of autonomous spheres significantly overlaps with the analysis by Van der Vyver Die Juridiese Funksie van Staat en Kerk (1972) of “soewereiniteit in eie kring” as being the maximum measure of autonomy granted to religion in its dealings with officialdom.
140 (n 51) 45 46. Sachs supports collaboration between the secular state and religion on matters of mutual concern, which he prefers due to the South African situation and history.
141 See Ch 1.2. Devenish (n 1) 18 is of the opinion that the Nederduits Gereformeerde Kerk could be described as the de facto state church. Carpenter (n 1) 684 shares the view.
do not contain express provisions adopting a religion or denomination by the state.\textsuperscript{142} The Constitutional Court has considered the relationship between the state and religion in South Africa in the decision of \textit{S v Lawrence}.\textsuperscript{143} Chaskalson P, on behalf of the majority, held that the Constitution does not contain an establishment clause (especially not in the American mode) and that such a clause ought not to be read into religious liberty provisions; it was further held that the said provisions would only be impaired by coercive religious endorsement and not mere endorsement.\textsuperscript{144} O'Regan J also held that the Constitution does not contain an establishment clause, but added that religious guarantees are not only infringed upon by the state by coercive endorsement but in fact by endorsement as such.\textsuperscript{145} Sachs J did not refer to an establishment clause but rather held that the state may not favour or disfavour any particular worldview and that legislative drafters should go about the drafting of legislation in a “neutral” fashion.\textsuperscript{146}

The phrase “establishment clause” originated in American jurisprudence with the constitutional prohibition of the establishment of religion by the state. The terminology has also been adopted in other jurisdictions.\textsuperscript{147} The establishment clause has been implemented and interpreted to far reaching effect since the 1940’s by the United States Supreme Court.\textsuperscript{148} The decision in \textit{Everson v Board of Education} triggered the wall of separation doctrine by holding that: “The First

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{142} Many countries expressly state the lack of a state religion, such as the Constitutions of South Korea (1948) s 20(2); Russia (1993) s 14; Paraguay (1992) s 24(1); Nigeria (1989) s 11.
\item\textsuperscript{143} \textit{(n 1) passim.} See Farlam \textit{(n 15) passim}; Smith “Freedom of religion in the Constitutional Court” 2001 \textit{SALJ} 1; Freedman “Church-state relations and the right to religious freedom” 1999 \textit{TSAR} 156 for discussions of the decision.
\item\textsuperscript{144} \textit{S v Lawrence} \textit{(n 1) par 101 104.} It was said that such coercion may either be direct or indirect and would result in the obstruction of religious freedom.
\item\textsuperscript{145} \textit{S v Lawrence} \textit{(n 1) par 116 123.}
\item\textsuperscript{146} \textit{S v Lawrence} \textit{(n 1) par 160.} Van der Vyver “Constitutional perspective of church-state relations in South Africa” 1999 \textit{Brigham Young University LR} 635 654 opines that the position of Sachs J is akin to implied recognition of an establishment clause. This view is not shared as the substance of the opinion by Sachs J contradicts the establishment clause as understood in American jurisprudence and by the other judges in the case; namely, the fostering of a strict and absolute separation between the state and religion. An attempt will be made in the discussion to explain the incorrectness of the views of Van der Vyver in this regard.
\item\textsuperscript{147} S 116 of the Australian Constitution, the interpretation of the prohibition on establishment, however, is different to the United States approach in that a strict or absolute separation is not required, see Hanks \textit{Constitutional Law in Australia} (1991) 429 431.
\end{itemize}
\end{footnotesize}
Amendment has erected a wall between state and church. That wall must be kept high and impregnable. We could not approve the slightest breach.”\textsuperscript{149} The latter and other decisions have led to the attempted strict separation of the state and religion.\textsuperscript{150} The establishment clause is interpreted to advance “unambiguous neutrality on the part of the administration”.\textsuperscript{151} The state has to withhold itself from contact with religion or only engage in neutral contact. The American approach, however, is impractical and unworthy of support due to the following reasons:

- The establishment clause was conceived in a time of great conflict between the state and religion as personified by the persecution of religious minorities and dissenters, such as Baptists and Quakers.\textsuperscript{152} The confrontation model has now largely been replaced by the cooperation model that encourages collaboration between the state and religion regarding issues of mutual concern.\textsuperscript{153} The American approach is therefore outdated and no longer suited to changing times.

- The establishment clause was drafted in an age of weak states and minimalist government.\textsuperscript{154} The modern state, in contrast, has extended, and sometimes over-extended, its functions and reach to include issues traditionally the domain of religion, such as welfare and education issues.\textsuperscript{155} A refusal to include religion in the modern state evidenced by an approach of absolute neutrality and indifference would inhibit the enjoyment of religious liberty, for example if religion would be barred from public airwaves.\textsuperscript{156} Neutrality for the sake of neutrality

\textsuperscript{148} See Malherbe 1998 (n 25) 683; Devenish (n 1) 19 20.
\textsuperscript{149} 330 US 1 (1946) 18. Devenish (n 1) 19 20 quotes that the case marked a shift from Protestant jurisprudence to secular jurisprudence.
\textsuperscript{150} See Anonymous “The establishment clause, secondary religious effects and humanistic education” 1982 \textit{Yale LJ} 1196 1197.
\textsuperscript{151} Devenish (n 1) 20.
\textsuperscript{152} See Ch 1.2.
\textsuperscript{153} See Torfs (n 124) 965 966. The observation is very apt with regard to Western states.
\textsuperscript{154} See Anonymous (n 150) 1198 1199.
\textsuperscript{155} Anonymous (n 150) 1199 note 21.
\textsuperscript{156} Anonymous (n 150) 1199.
would be more damaging to the expression of religious liberty than in support thereof. “Neutrality” in broadcasting – namely the exclusion of religion – would have the discriminatory effect of promoting, encouraging and spreading secular and probably anti-religious views while denying religion its rightful place next to all other worldviews. \(^\text{157}\) The multi-functional state, therefore, should cooperate with religion rather than adopt a blanket exclusion of religion and religious views in public life which would paint religious guarantees into a corner should the state and religion threaten to overlap on certain issues. \(^\text{158}\)

- The achievement of neutrality stands central to the establishment clause. \(^\text{159}\) However, perfect neutrality is difficult in theory and impossible in practice. \(^\text{160}\) The separation of the state and religion can therefore never satisfy the principle of impregnable separation, as required in *Everson v Board of Education*, as the state has to, at least, render basic services to religious organisations and adherents, such as fire and police protection, as well as water and electricity supply. \(^\text{161}\) The state should also determine the meaning of religion in order to establish where the wall of separation lies, this implies the crossing of the wall to the “religious side” to determine the definition of religion. \(^\text{162}\) It should also be kept in mind that people do not merely discard their convictions in interaction with the state, thereby ensuring that all views – including religious ones – enjoy some public role rather than experiencing an absolute and artificial relegation to the private sphere; in other words, convictions constitute people. \(^\text{163}\) Law is a

\(^{157}\) See Anonymous (n 150) 1199.

\(^{158}\) See Buckingham (n 1) 67ff regarding cooperation between the state and religion.

\(^{159}\) See Devenish (n 1) 20; Malherbe 1998 (n 25) 690. Such neutrality, it is sometimes argued, is necessary to keep the religious and secular domains firmly apart.


\(^{161}\) Anonymous (n 150) 1199. Religion may thus not be denied “the benefits of facially nonreligious governmental activity” thereby scaling the wall of absolute separation. Devenish (n 1) 24 notes that neutrality, in the American sense, is not feasible or desirable.

\(^{162}\) Malherbe 1998 (n 25) 684.

\(^{163}\) Malherbe 1998 (n 25) 684; Underkuffer-Freund (n 82) 47. Malherbe also observes that officials are not simply robots engaged in the mechanical application of supposed neutral laws.
collection of values aimed at the regulation of society in the interest of peaceful and orderly co-existence. A strict separation of the state and religion, therefore, would require laws devoid of all religious influence, big or small. This is easier said than done as legislating constitutes a value-laden process and the distinction between religious and non-religious values may be extremely difficult to draw in attempting to render laws “valueless”.\textsuperscript{164} A serious infringement of the right to equality would occur should it be possible to draw a distinction between religious and non-religious values. The reason being that the latter would lead to a “preference for the secular in public affairs”.\textsuperscript{165} Secularism could then prevail as a counter faith, thereby negating the same reason for the exclusion of religion.\textsuperscript{166} Meyerson claims that the consequence of secularism being preferred over religion is unavoidable and acceptable.\textsuperscript{167} She justifies her conclusion by arguing that the state may limit religious liberty by employing neutral reasons “which are independent of particular intractable disputed religious views and those views’ own internal standards of justification”; such limitations should be acceptable to all reasonable people.\textsuperscript{168} State neutrality is therefore the lowest common denominator in satisfying all “reasonable” people. Such an approach would draw the same criticism as the American attempt at state neutrality and, therefore, is unworkable as it robs religious liberty of its full realisation in favour of supposed faceless neutrality.\textsuperscript{169} This supposed neutral approach “disestablishes” religion only to “establish” secularism, thereby proving that societies need values to function and that the discarding of one set of values would simply necessitate another set which according to the establishment clause attacks religious values. Burger, former Chief Justice of the United States Supreme Court, thus correctly opined that state neutrality “exhibits nothing less than hostility toward religion” as the establishment clause – intended to protect

\textsuperscript{164} See also Malherbe 1998 (n 25) 684.
\textsuperscript{165} See Carpenter (n 1) 691.
\textsuperscript{166} \textit{ibid}.
\textsuperscript{167} (n 82) 50. See Smith “Book reviews” 1998 \textit{SALJ} 790 regarding the views of Meyerson.
\textsuperscript{168} Meyerson (n 82) 12 21.
the “free exercise” of religion – turned against its ward in championing irreligion in the name of (Utopian) neutrality. Neutrality is therefore not neutral after all – but rather favouritism in sheep’s clothing.

- The establishment clause, furthermore, is not a closely defined concept or without controversy, especially in its country of birth. Witte notes that the legal analysis and reasoning in early establishment cases, notably in the 1940’s, could be described as selective and even sloppy by only focusing on certain exponents of the Enlightenment (such as Jefferson, Paine and Madison), as well as negating a federal approach by focusing on the history of Virginia in this regard. Some also decry the absence of consistency and coherent principles on the subject.

The establishment clause is a dated relic of the confrontation model and incompatible with cooperation in its present form. Modern multi-functional states cannot afford to adopt such a hostile and restrictive approach that attacks religion by supposedly advancing benevolent neutrality in protecting the expression of religious freedom. The establishment clause is at best misunderstood or open to interpretation and at worst flawed. In defining the ideal approach to religion it should be kept in mind that the state has to fulfil its duty in advancing the religious liberty of the bearers of the right while not advancing a particular religion as such to the detriment of religious liberty – the establishment clause does not make this important distinction in its approach to the relationship between the state and religion. Chaskalson P was therefore correct in holding that an establishment clause was not incorporated in the Constitution, as it would have far-reaching effects

---

169 See also the criticism of Malherbe 1998 (n 25) 688.
171 (n 61) 16.
172 See the discussion and references by Malherbe 1998 (n 25) 685. The confusion is in large measure due to the strict distinction between the establishment and free exercise clauses; however, the two are merely different sides to the same coin as the prohibition of “establishment” emanates from the right to “free exercise”, see Malherbe 685.
on the exercise of the right to freedom of religion.\textsuperscript{174} The minority concurring in O'Regan J's decision also holding that the right to freedom of religion is devoid of a strict separationist establishment clause deserves support.\textsuperscript{175} The judgment of Sachs J, wisely so, did not make any reference to the existence of an establishment in the Constitution in discussing the required relationship between the state and religion.\textsuperscript{176}

Having eliminated the strict wall of separation approach the constitutional approach to be followed between the state and religion may now be discussed. Section 2 states that the Constitution represents the supreme law and that all actions inconsistent with it are void. The Constitution is therefore the supreme law of the land subjecting all other societal forces and institutions to its provisions. Therefore, not only does the Constitution regulate the state and its activities but also the activities of the bearers of the right to freedom of religion.\textsuperscript{177} Therefore, societal interaction in all its guises – including the relationship between the state and religion – is subject to the Constitution. The above criticism and views by the Constitutional Court stating the absence of an American style establishment clause is to be

\textsuperscript{173} See the quote of McConnell in Carpenter (n 1) 690.
\textsuperscript{174} S v Lawrence (n 1) par 101. The undesirable effects would include a ban on the broadcast of religious services by the SABC and also the scrapping of public holidays with a religious connection. The duty of the state to advance religious freedom would also be negated should a strict separation be followed in the mould of the American establishment clause, see Malherbe 1998 (n 25) 689.
\textsuperscript{175} S v Lawrence (n 1) par 116.
\textsuperscript{176} It is however suggested that Sachs J disapproved of an American style establishment clause by implication as his judgment did not advocate the strict separation of the state and religion as desired by American jurisprudence but rather opted for an approach of pluralism and diversity, in the accommodation of religion. See S v Lawrence (n 1) par 146 147 148. The view Van der Vyver (n 146) 654 can therefore not be supported to the extent that it understands the minority judgment of Sachs J to include an establishment clause.
\textsuperscript{177} See Ch 2 regarding the bearers of the right to freedom of religion and Ch 4 regarding the binding effect of the right to freedom of religion. See Rautenbach and Malherbe (n 52) 11 24 25 regarding the supremacy of the Constitution.
supported because the Constitution caters for the limitation of rights by means of weighing competing interests rather than advocating a matter of fact and methodical approach of impossible absolute separation of the state and religion. Furthermore, sections 15(2) and 15(3) expressly recognise possible overlaps between the state and religion in the form of religious observance and recognition of religious systems of family law. Both the latter sections contain specific limitation clauses that require the weighing of interests and do not merely prescribe the automatic and full recognition of religious interests over the secular, or the reverse. The Constitution, therefore, does not prohibit contact between the state and religion. However, Malherbe notes that the right to freedom of religion will always contain an establishment clause with reference to the relationship between the state and religion. The comment is undoubtedly correct in describing the interaction, or the lack thereof, between the state and religion in general; in other words, the establishment clause is used as a synonym for the relationship between the two entities. Thus, the relationship between the state and religion, be it restrictive or accommodatory, could be classified as the “establishment clause”. However, it is submitted that the term “establishment clause” be laid to rest once and for all as the term evokes thoughts of secular hostility toward religion and has further led to great confusion rather than guidance in explaining the relationship between the state and religion.

The Constitution does not make enemies of the state and religion but foresees peaceful and beneficial interaction against a constitutional backdrop. It is submitted that the bearers of the right to freedom of religion may claim the right to state non-identification in the regulation of the relationship between the state and

---

178 See Ch 5. The judgment of Sachs J in S v Lawrence (n 1) is a sterling example of the weighing of competing rights and interests with the limitation provisions as fruitful backdrop in the creation of constitutional harmony rather than division and separation.

179 See also O’Regan J in S v Lawrence (n 1) par 115.

180 See Buckingham (n 1) 67 also argues in favour of interaction between the state and religion.

181 1998 (n 25) 687.

182 See Sachs J in S v Lawrence (n 1) par 162; Sachs (n 51) 46.
religion. The overlap and interaction between the state and religion must therefore not infringe upon the right to state non-identification, save in circumstances mandated by the limitation provisions. In other words, the right to state non-identification enjoins the state to treat and promote all religions and religious denominations in equal fashion. For example, the right to state non-identification would be infringed should the state favour the holy days or denomination over those of another. The state thus chose to identify more closely with one religion or denomination rather than advancing religious freedom as such by the creation of equal opportunities for all faiths. The specific advancement should pass constitutional muster in the form of the general limitation clause, section 36, or the specific limitation clauses. State and religious interaction is therefore not decried but rather the unconstitutional nature of such interaction. Absolute non-identification in the advancement of religious liberty is as impossible as absolute state neutrality in the separation of the state and religion. Thus, caution should be heeded in the application of the limitation clauses recognising these tensions, but also recognising that one may not shy away from realising religious freedom and interaction, merely because the achievement thereof will require careful and considerate constitutional balance of a wide range of values and aspirations. Sachs J accepted this challenge successfully in S v Lawrence having found that the state identified too closely with a particular religion; the limitation of the right to

---

183 The term was first developed by Herbert Krüger with regard to German jurisprudence. See Scholler “The constitutional guarantees of religious freedom in the Federal Republic of Germany” in Ellwein, Grimm, Hesse and Schuppert (Eds) Jahrbuch zur Staats- und Verwaltungs-wissenschaft vol 7 (1994) 121; Link (n 55) 3353; Kommers (n 55) 466. Importantly, it must be noted that this study prefers the term “state non-identification” as applied to the South African situation, the term, however, should not be viewed as a copy of the German meaning or position as the term may then take on a different meaning and context.

184 See Ch 5 regarding the limitation of rights.

185 The facts are loosely based on those of S v Lawrence (n 1).

186 This approach has been followed by Sachs J in S v Lawrence (n 1) where he found that the favouring of one religion by the state evidenced a higher degree of identification by the state with a particular faith, thereby infringing upon religious freedom. The limitation, however, was justified by the limitation provisions. This study would refer to the infringement as having been one of the right to state non-identification.

187 Malherbe 1998 (n 25) also discusses the importance of the proper application of the limitation clauses in the regulation of the relationship between the state and religion.
state-non-identification was thereafter justified by particular reference to reasonableness, tolerance and the reality of the South African democracy.\textsuperscript{188}

### 3.7.1.2 The Right to the Regulation of Own Affairs and Doctrine

The right to state non-identification regulates the relationship between the secular state and religion. The state and religion form two autonomous societal spheres both subject to the constitutional order.\textsuperscript{189} The freedom of autonomy enjoyed by the bearers of the right to freedom of religion is a necessary claim to ensure the true independence of religious expression, especially with regard to the regulation of own affairs and doctrine.\textsuperscript{190} For example, the express guarantees of section 31(1), that guarantee members of religious communities the right to practise their religion collectively and the right to form and join religious organisations, would be mere token rights should they not imply freedom of autonomy including the regulation of their own affairs by these organisations.\textsuperscript{191} The proper exercise and enjoyment of other elements of religious freedom could only occur with the maximum guarantee of autonomy concerning the regulation of own affairs and doctrine.\textsuperscript{192} Shelton and Kiss refer in this regard to “deregulation [that] should also increase individual and local control over religion, with more power to the laity”.\textsuperscript{193} The right to freedom of association further amplifies the right to allow religious organisations to require that

---

\textsuperscript{188} (n 1) par 162 163.
\textsuperscript{189} See Ch 3.7.1.1; Buckingham (n 1) 59ff.
\textsuperscript{190} See Ch 3.7.1.2. Autonomy is not a mere concept but a practical collection of rights and freedoms, as this section attempts to illustrate.
\textsuperscript{191} The secular identity of the state could only be maintained should the state grant bearers of the right freedom of autonomy. See Ch 2 regarding the bearers of the right. See Kommers (n 55) 492 regarding the similar position of autonomy in Germany.
\textsuperscript{192} Bearers of the right, therefore, need the autonomy to abide by the tenets of their faith regarding their freedom of religious choice, see Ch 3.7.2; freedom of religious observance, see Ch 3.7.3; freedom of religious teaching, see Ch 3.7.4; freedom of propagating a religion or denomination, see Ch 3.7.5.
\textsuperscript{193} (n 56) 581.
their members be conformist and to exclude non-conformists. This measure of autonomy is necessary to avoid the Soviet experience where official atheist fervour led to the creation of the subsidised Militant League of the Godless and calls for a Five Year Plan to eradicate all religious belief. The regulation of own affairs and doctrine could have avoided such situations whereby the state uses religion as a political instrument or puppet. American jurisprudence, in contrast, advocates the strict separation of the state from religion decrying the review by civil courts of issues related to religious affairs, such as doctrinal matters and church property disputes. However, Krishnaswami notes that such autonomy may not be absolute, although, a large measure of autonomy may be granted in religious affairs. Absolute freedom, therefore, is the ideal but must exist against the backdrop of constitutional limitation where the weighing of competing interests takes place. Elements of the right to the regulation of own affairs and doctrine may be identified as, but not limited to, the following:

- **Bearers of the right may establish, constitute and maintain their own bodies and organisations.** Religious organisations may thus decide on their own structure and composition. For example, religious organisations may choose

---

194 Per Van Dijkhorst J in *Wittmann v Deutscher Schulverein* (n 16) 451E. Therefore, bearers of the right to freedom of religion have the right associate with whom they please as dictated by their faith and organisational regulation.

195 See Boiter (n 127) 111. Militant atheism left all religions without any administrative offices and forced thousands of churches to close.

196 Stalin abolished atheist purges of religion in order to use the patriotic appeal of religious leaders to repel the German invasion of 1941, see Boiter (n 127) 112. A further example illustrating the need for this right would be Macias Nguema who compelled churches to start services in the “name of the president and his son” in the hope of creating a personality cult, see Shelton and Kiss (n 56) 580 note 56.

197 See *Presbyterian Church v Hull Church* 393 US 440 (1968) 449; *Jones v Wolf* 443 US 595 (1978) 602. See also the rest of Ch 3.7.1.1 regarding the doctrine of the strict separation of the state and religion.

198 (n 61) 49 50. Such a limitation of the right to the regulation of own affairs and doctrine is necessary to avoid situations where public and national security may be threatened; the state may therefore not always remain indifferent to religious issues.

199 See Ch 5.

200 See the guarantees in the Slovak Constitution (1993) s 24(3).

201 Alen (n 61) 265 266 mentions that s 16 of the Belgian Constitution guarantees “freedom of ecclesiastical organisation”, among other things, allowing the free internal organisation of
to pursue a national or international structure.\textsuperscript{202} Such organisations are further free to choose their own form of governance may it range from a monarchical to a democratic structure, in order to fit the beliefs advanced and espoused and to continue the traditions of the particular organisation.\textsuperscript{203} Organisations, in conjunction with the above, may decide on the distribution of power between their structures or office bearers by either following a centralised or decentralised distribution.\textsuperscript{204} The South African position would allow organisations to incorporate or not, commensurate with their respective wishes.\textsuperscript{205} The right would be open to limitation, for instance by administrative regulation or requiring religious organisations to register with the state.\textsuperscript{206} The

---

religious bodies. See also Shelton and Kiss (n 56) 565. The static and dynamic element of religious liberty would play an important role in decisions regarding the structure and composition of religious organisations, see Ch 3.5.3. Such bodies may choose to pursue an existing structure or may decide to renew and develop existing structures, for example, by the creation of new parishes and bishoprics or by adjusting the voting system at synods. Any prohibition regarding this formal development of the religious bodies must meet the limitation criteria. See \textit{Presbyterian Church v Hull Church} (n 197) 449 regarding the American position. The development of religion also finds support in international law, the preamble to the International Labour Organisation Covenant concerning Indigenous and Tribal Peoples in Independent Countries (1989) recognises the aspirations of indigenous people to develop their religions, see also Lerner (n 54) 536.

\textsuperscript{202} The Roman Catholic Church is the best example of a church employing an international structure and operating across borders.

\textsuperscript{203} Pope John Paul II supports the view that the Catholic Church is a monarchy, see Denis “Is democracy good for the church?” 1993 \textit{Journal of Theology for Southern Africa} 46. Religious organisations may also be democratic in nature, such as the election of church council members in the \textit{Nederduits Hervormde Kerk} and the \textit{Gereformeerde Kerke}, whereas other churches appoint or indirectly elect such councils, for example the \textit{Nederduits Gereformeerde Kerk}.

\textsuperscript{204} The Pope, for instance, has “supreme, full, immediate and universal ordinary power in the Church”; he also has the power to exercise his functions in a personal or collegial manner, according to the Code of Canon Law (1983), quoted in Denis (n 203) 47. The Catholic Church is an example of a hierarchical organisation with ultimate power vesting in the pontiff, whereas the Society of Friends (Quakers) is an example of a religious organisation with a very loose and decentralised structure.

\textsuperscript{205} This is in contrast with the British position where churches are not endowed with legal personality, see Van der Vyver “Religion” in Joubert and Scott (Eds) \textit{LAWSA} vol 23 (1986) par 227. See also Ch 2. Religious organisations may also choose to incorporate the entire organisation or merely individual congregations or both, see Du Plessis in Van der Vyver and Witte (n 1) 445; Ch 2.

\textsuperscript{206} The factors to be considered under s 36 would be of particular importance, eg by noting the nature of the right, s 36(1)(a) – namely the importance of maximum autonomy – and the importance of the purpose of the limitation imposed, s 36(1)(b) – by providing for the limitation
need for tolerance and diversity in this regard is clearly highlighted by Krishnaswami:

“However, it must be borne in mind that since the demands made by various religions upon their members are different and since varying degrees of importance are attached to different manifestations, uniformity of treatment may in reality lead to discrimination against some religions.”

Tolerance should be advanced in the limitation of the right to the regulation of own affairs and doctrine in order not to impugn upon beliefs and their expression in such matters.

- **Bearers of the right to freedom of religion enjoy the right to the regulation of their own doctrine.** Bearers of the right, such as churches, may compile confessions of faith, as well as alter or sustain current confessions. Religious organisations in order to ensure a register of bona fide organisations which do not take advantage of donations or tax exemptions. It is suggested that references to the regulation of own affairs and doctrine are generous enough to protect not only the regulation of administrative affairs but also doctrinal matters, see the guarantees in the Constitutions of Hong Kong (1990) s 141(1); Ireland (1937) s 44.2.1; Slovakia (1993) s 24(3). The suggestion is advanced as doctrinal matters may have great bearing upon the way in which a religious organisation decides to organise its structure. For example, whereas it may be acceptable to govern a church as a monarchy according to Catholicism, the same may be said by many Protestant churches in opting for a democratic structure. In other words, it would amount to constitutional under-protection should constitutional recognition be granted to one form of governance but not to another form, without valid reasons of limitation. The static and dynamic element of religious liberty would play an important role in decisions regarding the doctrine and confessions of religious organisations, see Ch 3.5.3. The static element would refer to the continuation of present doctrines and confessions, whereas the
organisations may also choose to practise and advance their own beliefs regarding such issues as the Eucharist, christening and abortion in agreement or disagreement with other denominations and religions or society at large.\textsuperscript{210} Freedom to regulate doctrine is a necessary element in ensuring true freedom of religious autonomy as religious liberty can only come to full expression if churches are free to regulate their own doctrine and confessions as they see fit. Liebenberg J found that a court may not pronounce on the acceptability, logic, consistency or comprehensibility of beliefs.\textsuperscript{211} Religious belief is therefore to be treated as sacrosanct as the courts, or the state for that matter, are not in a position to enquire into the “truth” or credibility of religious claims.\textsuperscript{212} Therefore, the state or the courts may not decide to settle on a particular religion or denomination, such as Lutheran Protestantism or Sunni Islam, as the true, better dynamic element of the right would refer to renewal, replacement and the reconsidering of such policies. For instance, the written law of Judaism symbolises the static element, whereas the oral law – the interpretation of the written law – symbolises the dynamic element of the right, as the latter accommodates change, see Friedman “Jewish divorces – a purposeful and pragmatic solution by the South African law commission” 1994 \textit{SALJ} 97 102. The development of religion also finds support in international law, the preamble to the International Labour Organisation Covenant concerning Indigenous and Tribal Peoples in Independent Countries (1989) recognises the aspirations of indigenous people to develop their religions, see also Lerner (n 54) 536.

\textsuperscript{210} The right to the regulation of own affairs and doctrine is especially apt for institutional exercise as it touches on issues of institutional organisation and doctrinal decisions. The beliefs of the individual would find proper and better protection under the guarantees of freedom of religious choice, which focuses on the individual conscience, see Ch 3.7.2. This does not mean that freedom of autonomy and freedom of choice are mutually exclusive, as individuals may just as well exercise their right to the right to state non-identification.

\textsuperscript{211} \textit{Christian Education SA v Minister of Education} 1999 (9) BCLR 951 (SECLD) 958E-F, 1999 (4) SA 1092 (SECLD) 1100I-J. See also Ch 1.4.2.

\textsuperscript{212}Nsereko (n 86) \textit{passim} observes, with regard to Botswana, that theology should be left to denominations. See regarding the American position \textit{United States v Ballard} 322 US 78 (1943) 86 87; It is not “in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate or in any manner control sermons delivered at religious meetings” \textit{Fowler v Rhode Island} 345 US 67 (1950) 70; Courts may not “penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities” \textit{Sherbert v Verner} 374 US 398 (1963) 402; \textit{Thomas v Review Board} 450 US 707 (1981). See also Link (n 55) 3353 regarding the similar German position.

98
or preferred faith in relation to other persuasions.\textsuperscript{213} Such an approach would negate the integrity of dissident doctrines and cause a serious violation of the right to state non-identification.\textsuperscript{214} This is not to say that the expression of such beliefs is not subject to limitation, as this would imply a \textit{carte blanche} ranging from charitable donations to holy wars. Public and private external religious expression may always be limited against a constitutional backdrop if a social end would be satisfied or promoted.\textsuperscript{215} In other words, the smoking of cannabis may be prohibited in private and public to promote general health and not because the court is of the opinion that the Rastafarian doctrine or confession is inferior to other persuasions, such as Methodism, because of political, moral or religious reasons.\textsuperscript{216}

- \textit{Bearers of the right may exercise their freedom of autonomy in the setting of guidelines for the admission of members to their organisations and in the appointment of employees.}\textsuperscript{217} Such autonomy in the regulation of one’s own doctrine is essential to fulfil doctrinal tenets and beliefs regarding these matters.\textsuperscript{218} Freedom of association plays an important role as contextual right in this regard. For example Van Dijkhorst J stated that:

\begin{footnotesize}
\textsuperscript{213} The Iranian Constitution (1979) s 12, however, declares the Twelver Ja’fari sect to be the “eternally immutable” version of Islam practised by the state.

\textsuperscript{214} See Ch 3.7.1.1. The state, in other words, has a duty to advance religious freedom as such rather than a particular brand of religion.

\textsuperscript{215} See Ch 3.5.4; Krishnaswami (n 61) 50.

\textsuperscript{216} The doctrine of the organisation and the minds of the adherents are not purged; its manifestation is merely limited. See Ch 5 regarding the limitation of convictions as held by individuals.

\textsuperscript{217} This right is ideal for institutional exercise as organisations are at the forefront in the admission of members and in the appointment of employees. See Buckingham (n 1) 297ff for an extensive discussion of freedom of religion and labour law. See also Laycock “Towards a general theory of the religion clauses: The case of church labor relations and the right to church autonomy” 1981 \textit{Columbia LR} 1373.

\textsuperscript{218} The principle has been regarded as important enough by some to include provisions regarding the appointment of clergy and related issues in the Constitutions of Slovakia (1993) s 24(3); Hong Kong (1990) s 141(3). See also Smith (n 2) 224.
\end{footnotesize}
“Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.”

Religious organisations, such as churches, may ensure conformity by requiring rites of passage in the induction of new members, such as christening and confirmation. Freedom of religious association may be further expressed by the setting of rules or guidelines for continued membership and acceptance. Such regulation does not only have to pertain to members but are just as relevant for the ordination of clergy and in the selection of office bearers. For instance, the College of Cardinals may elect a successor for life on the death of the reigning Pope; other churches may choose to elect a moderator for a fixed term; and the Jehovah’s Witnesses may choose to view all their members as ministers. However, the situation may arise whereby an individual may feel discriminated against being denied membership or ordination. Distinction, in principle, may be made and enforced in an attempt to cultivate and maintain an identity concomitant with religious belief. Absolute freedom to regulate one’s own affairs would cause intolerable inequality, whereas absolute equality would negate the freedom to regulate and to choose. Such an impasse would call for the constitutional weighing of competing interests.

---

219 Wittmann v Deutscher Schulverein (n 16) 451E.
220 This is also the position in international law, where the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 6(g) makes provision for the training, appointment, election or designation of succession of religious leaders. Religious organisations may administer their own affairs according to their beliefs, views and needs; therefore, they could require prospective clergy to follow a degree or certification course or set other requirements in order to be ordained or to be considered for the clergy.
221 See Smith (n 2) 224 who notes that all religions would probably fall foul of provisions barring all kinds of discrimination or as he puts it “chauvinism”.
222 See Rautenbach (n 3) 170.
223 See Rautenbach (n 3) 170; Ch 5. The following could suffice as examples. An aggrieved party may feel that her right to exercise her perceived religious vocation in entering the Catholic priesthood or in becoming an Imam is crushed by the barring of women from such positions. She may further advance that her right to be treated equally has been infringed together with her right to form associations of her choosing. Constitutionally the issue may be approached as follows: S 9(1) guarantees the right to be treated equally. Unequal treatment must withstand
The right to admit members and clergy would also imply the right to discipline such people in order to enforce conformity and encourage conduct in harmony constitutional muster. S 9(3) prohibits the state from discriminating unfairly on certain grounds, including religion and marital status. S 9(4) states that no person may discriminate unfairly against another on the grounds mentioned in s 9(3). Unfair discrimination is a severe form of unequal treatment affecting human dignity or a comparable value, see Rautenbach 168ff. A party who treats someone unequally regarding one of the grounds in s 9(3) carries the burden to prove that such unequal treatment does not amount to unfair discrimination, see s 9(5). A religious organisation, such as a church, refusing to ordain women or married men would be treating such people unequally according to s 9(1). The onus of proof would now rest on the church to justify the unequal treatment and to show that the unequal treatment does not amount to unfair discrimination, as the grounds overlap with those enumerated in s 9(3). Unfair discrimination is a more serious infringement of the right to equality; the limitation would thus require greater justification in surviving constitutional muster, see Rautenbach 185. It is submitted that the grounds of differentiation enumerated would amount to unfair discrimination in that differentiation will have a serious and complete effect on the aspirations of the aggrieved parties in their respective denominations. See Rautenbach 178 for a discussion of factors to be considered in deciding if discrimination is unfair or not. The limitation of the right should now be justified in accordance with s 36 to enable the limitation to survive. Rautenbach 185 is of the opinion that only the importance of the aim of the limitation could save it, s 36(1)(b). It is submitted that religious organisations may practise such unfair discrimination with the aim of preserving and expressing the tenets of their faith, thereby promoting the integrity and dignity of the organisation and its principles by regulating its own affairs and doctrine. Smith (n 2) 224 225 notes that few religions would survive a prohibition on all discrimination as many practices of unequal treatment constitute their faith. The right to freedom of religion together with freedom of association guarantee the right to choose to follow the dictates of your religious convictions individually, collectively and institutionally, whether in harmony with the views of others or not. The importance of the right to freedom of religion furthermore signifies the importance of the right to regulate own affairs and doctrine in doing justice in the bearers’ right to choose, see Ch 5. Smith 224; (n 1) 19-3, interestingly, notes that the right to equality may be employed to allow each religion to teach and manifest its doctrines according to its choosing, thereby justifying discriminatory religious practices by evoking the equality provisions. Many religious practices amounting to unfair discrimination, or only to unequal treatment, could, in light of the above, be continued as they enjoy constitutional protection – such as the requirements for ordination and confirmation to name but two discriminatory practices. See also De Waal et al (n 15) 292; Buckingham (n 1) 297ff; Boiter (n 127) 119; Hogan (n 71) 73; Nsereko (n 86) 859 860. Furthermore, controversy may cloud issues regarding racial discrimination in religious practices, such as the whites-only policy of the Afrikaanse Protestante Kerk. See also in general Robertson (n 30) 130; Mijnssen “Discriminatie en strafrecht” 1987 Nederlands Juristenblad 1053. It may be argued that the Dworkinian “moral position” should be employed to ease such situations by allowing discrimination rooted in true belief but disallowing discrimination that is mere naked racial prejudice masquerading in religious guise; beliefs should therefore be sincere, see Ch 1.4. Racial discriminatory practices based on true religious belief may still be subject to limitation. Eg religious racial discrimination may be limited in advancing non-racialism on which the Constitution is predicated, thereby protecting the racial dignity of all South Africans; racial discrimination may arguably also be limited in the maintenance of public order. It could also be argued that the spirit and purport of the Constitution would be incompatible with the inclusion of racial discrimination under the protected conduct and interests of the right to freedom of religion. See Mandla v Dowell Lee WLR 3 (1982) 932 regarding religion and racial discrimination in Britain and Oppenheim
with religious precepts and teaching. Religious organisations usually prescribe to codes of conduct that are used to gauge the actions of members and to discipline dissenters.

- The right to the regulation of own affairs includes the maintenance and establishment of contact and communication with “individuals and communities in matters of religion and belief at the national and international levels”. This element of freedom of autonomy is essential as some religious bodies and adherents may feel it necessary or themselves duty bound to maintain and establish contact within and across borders. For example, a Presbyterian congregation in Johannesburg would be free to interact with a Presbyterian congregation, or other organisations and individuals, in Cape

---


S 33 guarantees everyone administrative action that is lawful, reasonable and procedurally fair, see Burns Administrative Law under the 1996 Constitution (1999); Devenish, Govender and Hulme Administrative Law and Justice in South Africa (2001). See in general Wiechers Administrative Law (1985); Baxter Administrative Law (1984); Malherbe (n 62) passim. Administrative law protects parties to unequal relationships, such as with regard to disciplinary hearings and in the award of tenders. This is achieved by formal and substantive justice; the former includes the rules of natural justice, see Burns 139ff 165ff; Rautenbach and Malherbe (n 52) 232. S 33 would ultimately regulate administrative law and action with regard to the right to freedom of religion, as the right to administrative action is guaranteed to “everyone” and not limited to selected parties or to selected administrative law relationships. The spirit of the Constitution would also support such a generous interpretation, see Devenish et al 84 85. The Promotion of Administrative Justice Act 3 of 2000 affects s 33 and codifies the common law in this regard. The Act is binding on state organs, as well as juristic and natural persons, see s 1. Thereby including incorporated religious organisations; it is submitted that unincorporated religious organisations would also be bound by the Act as they are collections of natural persons exercising authority – otherwise the common law would continue to regulate unincorporated bodies. The views of De Waal et al (n 15) 292 holding that “just administrative action (s 33) does not apply to a disciplinary tribunal of a religious institution” cannot be supported. See Theron v Ring van Wellington van die NG Kerk Sendingkerk in SA 1976 2 SA 1 (A); Van der Vyver (n 205) regarding the common law position. See also in general Chafee “The internal affairs of associations not for profit” 1930 Harvard LR 993.


226 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 6(i). See also the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) art 2(5); Lerner (n 54) 534. This element is further supported in national law, see the Constitution of Hong Kong (1990) art 141(4). See also Shelton and Kiss (n 56) 563; Krishnaswami (n 61) 50.

227 See Krishnaswami (n 61) 50. It is not necessary to include the right to proselytism under this element, as proselytism is discussed in Ch 3.7.5.
Town. Likewise, an Anglican bishop may choose to attend a conference in Uganda or correspond with the Archbishop of Canterbury. This element, thus, would include interaction such as visits and the reception of visitors, as well as other forms of contact such as by telephone, telegram, facsimile, telex, e-mail, internet, courier, satellite, airwave and postal links. Such contact and communication would in principle be subject to limitation.\textsuperscript{228}

- \textit{Freedom of religion can only be meaningfully exercised if it is understood to include the right to construct, maintain and own property, as well as to dispose of such property.}\textsuperscript{229} It could also be argued that such a viewpoint is essential in order to allow bearers of the right true realisation of their own affairs thereby ensuring their autonomy. The right not to be deprived of property would serve as an important contextual right in this regard.\textsuperscript{230} Viewed contextually the right would encompass the ability to accumulate and control assets.\textsuperscript{231} The right to ownership would imply that protected conduct and interests may not be prejudicially affected without constitutional sanction.\textsuperscript{232} However, religious organisations are hardly free from strife and disagreement that quite often may

\begin{itemize}
\item See Ch 5. The maintenance of public order and national security could suffice as reasons for the issuing of visas and the checking of travel documents of visiting delegates and the like. See also Krishnaswami (n 61) 50.
\item For instance, a number of constitutions expressly regulate property related issues regarding the right to freedom of religion, see the Constitutions of India (1950) s 26 (c)-(d); Nepal (1990) s 19(2); Hong Kong (1990) s 141(2). See also Hogan (n 71) 54 regarding the Irish position. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 6(a) recognises the right to maintain and to establish “places” for the purpose of worship (and related activities). See also Shelton and Kiss (n 56) 568 regarding the Vienna follow-up meeting to the Helsinki Conference on Security and Cooperation in Europe. Such recognition is necessary to avoid and discourage religious discrimination by limiting property rights of bearers of the right to freedom of religion in order to restrict their religious practices, see Mayer “Law and religion in the Middle East” 1987 \textit{American Journal of Comparative Law} 127 148 note 53. See Kritzinger “Alienation of church property” 1983 \textit{SALJ} 723 regarding the common law position and pre-constitutional case law.
\item See Rautenbach (n 3) 208ff; Van der Walt \textit{The Constitutional Property Clause} (1997) regarding the right to property.
\item Rautenbach (n 3) 208.
\item See Rautenbach (n 3) 210. See also Ch 5.
\end{itemize}
Religious disputes often lead to property disputes. For example, a church, or other religious organisation, may divide into opposing factions leaving the fate of movable and immovable ecclesiastical property in dispute. Opposing factions may then decide to resolve the dispute among themselves. However, internal conflict resolution may not be sufficient or successful leading to arbitration or litigation. Internationally a number of approaches may be discerned in solving such matters before the courts. The American position is predicated on the strict separation of the state and religion, thereby prohibiting courts to pronounce on ecclesiastical matters – such as property disputes – except if “neutral principles” of law could be used in bringing a matter to a close. The English tradition was established by Lord Eldon LC who held that a court should enforce a trust instrument in so far as the latter regulates disputes and schisms. The implied trust theory should then be employed in the absence of an express trust clarifying the matter or where the express trust is silent on the issue. The English position, as regards its

---

233 See the valid remarks by Harms JA in Nederduitse Gereformeerde Kerk in Afrika (OVS) v Verenigende Gereformeerde Kerk in Suider-Afrika 1999 (2) SA 156 (SCA) 176E-F. Examples would include the schism between the Catholic and Orthodox Churches, the discord between Sunni and Shi’ite Islam and the persecution by the latter of the breakaway Bahai religion. South African examples would include the Evangelies Gereformeerde Kerk and the Afrikaanse Protestantse Kerk that broke away from the Nederduits Gereformeerde Kerk, in the 1940’s and 1980’s respectively.

234 See Watson v Jones 13 Wall 679 (1872) 728 729; Presbyterian Church v Hull Church (n 197) 449 452; Jones v Wolf (n 197) 600 602 603 604. See also Ogilvie (n 55) 395; Malherbe 1998 (n 25) 691. The effect of the American position has been a near abdication of judicial jurisdiction in ecclesiastical matters, save to enforce ecclesiastical resolutions without paying any attention to the process which was followed by religious organisations in reaching their conclusions, see Ogilvie 396. See Kommers (n 55) 491; BVerfGE 18 385 (1965) regarding the German position in such disputes.

235 Craigdallie v Aikman 3 ER 601 (1813) 606, quoted in Ogilvie (n 55) 382 383.

236 ibid. The implied trust theory postulates that property is held in trust for the benefit of the original or founding principles and doctrine of a religious body. Such property should therefore revert to adherents following the original position in property disputes – property may not merely devolve to the majoritarian view. See also Ogilvie (n 55); General Assembly of the Free Church of Scotland v Lord Overtoun; Macalister v Young [1904] AC 515 (HL). The principle, unfortunately, has not always been properly followed, as that the implied trust theory has been applied irrespective of the existence of an express trust regulating the position, see Ogilvie 385 386.
heightened awareness of judicial responsibility, is to be preferred to the American position, as Ogilvie opines:

“Ritual judicial expressions of reluctance to become involved insult litigants who have placed their last hope and trust in the civil courts when the organization – their church – which they would otherwise have prized more highly than the law courts is perceived to have failed them. It may be that the courts feel some unreasoned taboo about dealing with ecclesiastical cases. It may be that judicial reluctance is founded on modesty on the part of the judiciary in the face of religious claims. It may also be that expressions of reluctance disguise judicial disinterest, boredom, or intolerance for the claims of religious groups other than their own, if any. Yet, while expressions of reluctance are often coupled with judicial confessions of ignorance and bewilderment at doctrinal issues, the fact remains that courts frequently unravel far greater difficulties in other complex litigation than are posed by these theologically based property disputes.”

The strict separation of the state and religion has been shown to be impossible and undesirable, thereby discarding the American view that espouses such separation even in the hearing of all ecclesiastical matters. The Eldon principle supporting greater judicial responsibility in the settling of ecclesiastical disputes is also favoured in Canadian jurisprudence. The South African Constitution guarantees everyone access to courts for the resolution of disputes to which law may be applied, furthermore, it guarantees wide locus standi in the hearing of matters regarding the infringement of the Bill of Rights. The courts, therefore, may not be heard to say that ecclesiastical matters do not concern them in the least and that they merely pay deference to ecclesiastical tribunals.
without inspecting the facts. Judicial interest, where warranted, would reinforce the right to the regulation of own affairs as such interest could result in the enforcement of the views of a religious organisation into how the dispute should be resolved, for instance by applying the church constitution. The fact that the religious realm enjoys great autonomy in the regulation of its own affairs and doctrine does not warrant it to act outside the Constitution, the law or its own structure merely to enforce an artificial and damaging separation of the state and religion. The Supreme Court of Appeal has recognised the challenge of striking a balance between autonomy and advancing justice in the recent decision of *Nederduitse Gereformeerde Kerk in Afrika v Verenigende Gereformeerde Kerk in Suider-Afrika*. The court respected the autonomy of the church by applying the constitution of the latter in order to resolve the dispute. The court further saw to justice between the litigants by following a contextual interpretation of the church constitution inspecting the reasons behind certain clauses to ascertain their true meaning and intent in order to come to a sensible conclusion based on the views of the church. The court thus enforced the autonomy of the church and defended it by giving reasoned effect to the views and regulations of the church as expressed in its constitution, rather than paying mere deference to the actions of the general synod which had prejudiced more than one hundred congregations due to the improper application of the constitution.

---

241 Such an approach would come dangerously close to the discredited American position advocating strict separation between the state and religion, see Ch 3.7.1.1. Paying mere deference to religious tribunals could also lead to the infringement of the right to administrative justice, s 33; for example, by negating the rules of natural justice in having ecclesiastical tribunals decide matters as they see fit and in the process infringing the rights of the parties involved.

242 (n 233). The facts were as follows, the NGKA amended its constitution in order to merge with the NGSK in the creation of the VGK. More than one hundred congregations did not agree with the amendment and consequently ignored it. The SCA held that the amendments were not enforceable as they had violated the spirit and intent of the constitution of the church; therefore, the merger decisions which led to the disbanding of the NGKA were *ultra vires*. The aggrieved congregations thus had not lost their property as would have been the case had the actions of the general synod been in accordance with the church constitution, see 163G-166C.

243 The court applied the constitution of the NGKA in the resolution of the dispute, especially clauses 36.1, 36.2.

244 *NGKA v VGK* (n 233) 167B-H.
application of the constitution of the church. The position of the court may be compared to the first leg of the Eldon approach – namely the resolution of ecclesiastical disputes by applying the trust or constitution of the religious organisation. However, uncertainty exists regarding the position where an express constitution or similar instrument is lacking or absent on key issues. It is submitted that such situations should be handled by the balancing of all relevant information and facts peculiar to the situation and body in solving the matter. The conclusion of Krishnaswami can, in light of the above, be supported:

“In some instances such authorities have to adjudicate between rival elements within a religion, each of which claims the right to conduct services, to perform religious rites in a place of worship, or to appoint religious leaders. When such matters come before civil courts, lay judges must decide between the conflicting claims; and not infrequently they can do this only after taking cognizance of, and interpreting, the provisions of the religious law. This necessarily implies some interference in the

245 There is therefore no need for a mere mechanical application of the second leg of the Eldon principle, namely the implied trust theory which favours conservative strands over liberal strands and which may lead to the negation of the dynamic element of religious freedom in favour of a matter of fact approach of static expression. The second leg of the Eldon principle may well be considered, for instance, where a vast amount of assets was accumulated at the time of formation; thereby justifying the implied trust approach as donations may have been made in favour of old and established principles rather than more modern or differing views on theology. For instance, the mechanical application of the implied trust approach left the original members and clergy of the Free Church of Scotland, a minority, with all the assets of the church, whereas the mergers, the majority, were left with no assets, even though the minority comprised a mere 30 ministers out of an original total of 1100, see Free Church v Overtoun (n 236); Ogilvie (n 55) 383 384. Consideration may also be given to the balance of power between different factions; however, caution should be heeded in that courts should not merely capitulate to majoritarian interests but should scrutinise all facts. For example, a court may investigate the possibility of the existence of an unwritten constitution or existing uses or practices which may solve the dispute. It may be found that congregations constitute tacit legal persons in which case the awarding of property to a national majority may conflict with the wishes and ownership rights of local congregations. The goal would be the achievement of a constitutional balance in not over-limiting the right to regulate own affairs and doctrine, thereby negating autonomy; but, conversely, not allowing total freedom in the regulation of such matters as property disputes resulting in the infringement of administrative justice (for instance legitimate expectations). Total freedom in the regulation of own affairs and doctrine would thus damage religious freedom as anarchy could prevail with the courts unable to intervene. See also Ogilvie 386 398 for discussions of the above and other related issues.
management of religious affairs, but is inevitable in the circumstances.246

3.7.1.3 The Right to Religious Dignity

The right to freedom of religion is aimed at the protection of a class of conduct and interests as borne by the bearers of the right. Therefore, it could be argued that the right protects the expression and cultivation of the dignity of the bearers. In other words, the right exists as the founding principle for the advancement of individual, collective and institutional dignity in an attempt at creating a society predicated on mutual respect and tolerance.247 Section 10 of the Bill of Rights, the right to human dignity, is an important contextual right in this regard as it confirms and supports the inherent dignity accruing to religious liberty.248 However, the overlap between the right to human dignity and the right to freedom of religion may not always exhibit a perfect match, the reasons being twofold. Firstly, human dignity may function either as an independent right or as a contextual right, it may thus be independent from freedom of religion or it may act contextually with regard to a right other than that of freedom of religion.249 Secondly, the express right to dignity is only extended to natural persons, whereas the right to freedom of religion is guaranteed to both natural persons, individually and collectively, and to juristic persons and

246 (n 61) 50.

247 Religious dignity also enjoys a prominent position in German constitutional jurisprudence as a close relationship exists between dignity as the supreme constitutional value and the right to freedom of religion, see BVerfGE 33 23 (1972); Kommers (n 55) 454. The close relationship ensures that societies and individuals may develop their own identities in keeping with their convictions; thereby protecting the dignity of the beliefs of the bearers of the right to freedom of religion, see Kommers 454.

248 See Rautenbach (n 3) 193ff regarding the right to human dignity. The right to human dignity is predicated on the development of an own identity and personality. The achievement of the latter can only be meaningful through the joint exercise of other rights, such as freedom of religion and freedom of expression. It can thus be argued that the right to human dignity forms the basis of the protection of other rights. The right to human dignity would therefore have to be considered where its contextual rights are limited, as dignity itself may be compromised where other related rights are limited, see Ch 5.

249 See also Rautenbach (n 3) 194.
Therefore, the express right to dignity may be viewed contextually with regard to the dignity of natural persons and not contextually with regard to other bearers of the right to freedom of religion. It is thus necessary to recognise that religious liberty contains an inherent dignity component that is extended to all bearers of the right. Otherwise, if only the dignity of individuals is deemed worthy of constitutional protection, an intolerable situation of constitutional under-protection of dignity may arise, thereby weakening the right as a whole. The bearers of the right to freedom of religion, therefore, would all enjoy the right to advance and cherish their religious dignity while at the same time demanding due respect from those parties bound by the right.\textsuperscript{251} Although the state is not the only party bound to respect the right to freedom of religion it does have special duties to respect, protect, promote and fulfil religious liberty.\textsuperscript{252} It should also be noted that freedom of autonomy is particularly apt to accommodate the right to religious dignity as the principle of dignity is expressed by the free development of an own identity that in turn requires autonomy, as choices have to be exercised in order to realise own goals in the cultivation of an identity.\textsuperscript{253} The right to religious dignity, in principle, guarantees complete and total respect and dignity to the bearers of the right. Such an approach would be concomitant with the wide approach to the interpretation of rights, as advocated by this study; thereby ensuring maximum protection but yet also allowing operational space for the limitations provisions in limiting the right to fit different circumstances.\textsuperscript{254}

\textsuperscript{250} See Ch 2.
\textsuperscript{251} See Ch 4 regarding the duties of parties bound by the right to religious liberty.
\textsuperscript{252} See 7(2); Ch 4.
\textsuperscript{253} Rautenbach (n 3) 193 notes that autonomy is a requirement in the realisation of dignity. The comment, however, was made with regard to the express right to dignity in s 10. It is submitted that the same may be said with regard to the right to religious dignity as implied by s 15(1), as both the express and implied guarantees focus on the realisation, protection and expression of dignity, albeit with different goals. The right to religious dignity should also be viewed in conjunction with all five guarantees of the content of the right to freedom of religion, thereby not only strengthening the right as a whole but also the right to religious dignity.
\textsuperscript{254} See Ch 1.3, 5.
The state, as mentioned, is enjoined to take positive measures in advancing the right to freedom of religion in general and the right to religious dignity in particular. Societies have taken various measures throughout the ages in this regard. For example, the common law crime of blasphemy was developed over centuries in England in order to protect the dignity and importance of Anglicanism, in particular, and Christianity in general. Blasphemy has also taken on various meanings in English law that have ranged from the mere denial of the truth of the state religion – in other words including heresy and possibly apostasy – to a prohibition on the contumelious slander and ridicule of the Christian faith. The modern common law crime of blasphemy does not regard the denial of the truth of Christianity to be punishable as blasphemy, provided that such disbelief is respectfully expressed. However, the crime in England is only still confined to blasphemy against the Christian faith, especially the Anglican faith. Some societies have even deemed blasphemy to be such a serious crime that constitutional provisions have been drafted to protect religion. Blasphemy is also at issue in South African law. For example, section 47(2)(b) of the Publications Act 42 of 1974 allowed censorship should the publication of objects, public

255 It could be argued that a positive discharge of the duty would include the showing of due and equal respect by the state to all religions in its interaction with them in order not to infringe upon the right to state non-identification by the showing of favouritism to one creed, thereby not questioning or insulting the dignity of other religions, see also Ch 3.7.1.1. A further example would be evidenced by the showing of respect to the beliefs of all religions and not launching inquiries into the “truth” of religious tenets by the state or the courts, see Ch 1.4, 3.7.1.2.

256 See Kenny “The evolution of the law of blasphemy” 1922 Cambridge LJ 127; Poulter “Towards legislative reform of the blasphemy and racial hatred laws” 1991 Public Law 371. Blasphemy is a crime by statute, according to the Blasphemy Act of 1697, and at common law, see Wulfsohn (n 51) 93.

257 See Kenny (n 256) 128 who notes the views of one judge Steven who opined that the mere denial of the truth of the Christian faith would satisfy the requirements of the crime of blasphemy. See also the definition of blasphemy by Stewart and Burgess Dictionary of Law (1999) 46.

258 See R v Ramsay and Foote 48 LT 733 (1883); Bowman v Secular Society Ltd [1917] AC 406; Wulfsohn (n 51) 94.

259 Poulter (n 256) 372 373. Lord Scarman observed in Whitehouse v Lemon [1979] AC 617 658 that only Parliament possesses the power to expand the description of the crime in order to bring other religions within its protective scope.

260 S 100 of the Constitution of Norway (1814) provides that: “No person may be punished for any writing … unless he wilfully and manifestly has either himself shown or incited others to [show] … contempt of religion.”
entertainments or intended public entertainments and films be considered
blasphemous to the religious feelings or convictions of a segment of the South
repealed the Publications Act and made it an offence to advocate hatred based on
religion by the performance of a public play or entertainment or by the broadcast or
publication of such hateful material. It may be argued that the latter Act goes a
long way in the protection of religious dignity by the creation of the offence.
However, blasphemy is still a common law crime. “Blasphemy consists in the
unlawful and intentional publication of words or conduct whereby God is
slandered.” Van der Vyver observes that blasphemy “signifies the slander of the
Holy Trinity of Christianity only”. Various calls have been made for the scrapping
of the common law offence of blasphemy. As advanced, the right to freedom of
religion in the Constitution provides for the right to religious dignity that the state has
to promote. Furthermore, religious dignity is a crucial element of the right to freedom
of religion for it infuses the rest of the right by securing the dignity of the other

261 See Van Rooyen “Die rol van die Wet op Publikasies in die handhawing van morele
standaarde” 1988 SAPL 131 139 140 who observes that the effect of the provision was the
protection of the majority belief of each population group and not the protection of the religious
feelings of minority faiths represented by the different population groups. Such an approach
would be entirely unconstitutional as distinction is made between religions with a greater
following and those with a lesser following in the protection of dignity, thereby under-protecting
the dignity of smaller religious groups. Furthermore, the approach of population groups leads to
unconstitutional distinction on the grounds of race or ethnicity.

262 See s 29 (1)-(3); however, ss (4) renders the mentioned provisions inapplicable should the aim
of the broadcast, publication or performance be a bona fide discussion, documentary,
argument and so on. See also Van der Vyver (n 205) par 245 regarding other statutory
provisions.

263 See Smith (n 59) 162; Van der Vyver (n 205) par 245; Wulfsohn (n 51) 94. See also R v Webb
1934 AD 493 for a discussion, albeit dated, of the common law crime of blasphemy.


265 (n 205) par 245; Van Rooyen “Does the offence of blasphemy have a future under the South
African Constitution?” 1995 HTS 1127; Publications Control Board v Gallo (Africa) Ltd 1975 (3)
SA 665 (A) 671.

266 See Smith (n 59) passim; Labuschagne “Dekriminalisasie van godslaster” 1986 THRHR 434.
The calls are also based on the fact that prosecutions for blasphemy are rare, see regarding its
rarity Kenny (n 256) 127; Lerner (n 54) 508; O’Higgins “Blasphemy in Irish law” 1960 Modern
LR 151. Wulfsohn (n 51) 93 notes that there have been no prosecutions under the English
Blasphemy Act of 1697. England “Law and religion in Israel” 1987 American Journal of
Comparative Law 185 199 observes with regard to Israel that: “[C]ourts have shown little

111
elements of the right. Protection of religious dignity is therefore essential to avoid the debasement of the rest of the right.\textsuperscript{267} It is submitted that any moves to protect religious dignity should be aimed at the protection of the dignity of all the bearers of the right and not merely the largest or the most favoured persuasions in the religious community in order to avoid the under-protection of the right.\textsuperscript{268} Criminal sanction and other forms of public law prohibition, would, in principle, be constitutional avenues whereby the state should respect, protect, promote and fulfil the right to freedom of religion commensurate with its constitutional duty to do so.\textsuperscript{269} The protection so afforded should cover all forms of religious dignity in order to discourage the verbal or physical debasement of such dignity. It is submitted that the crime of blasphemy be recognised as an element in the overall protection of religious dignity, provided that the common law is developed to protect the dignity of all bearers of the right and in so far as the crime is not codified or supplanted by the Films and Publications Act. It is also important to note that the prohibition should further and protect the religious dignity of the bearers of the right and not the dignity of deities as such, as the latter do not constitute bearers of the right to freedom of religion and are therefore not directly covered by its generous protection (but rather indirectly by the protection of their adherents).\textsuperscript{270} The right to religious dignity, however, may come into conflict with the right to freedom of expression should such expression be limited in the furtherance of religious dignity. Such a situation would

\begin{itemize}
\item sympathetic of an individual’s hurt feelings by witnessing violations of religious law, such as the desecration of the Sabbath."
\end{itemize}

\textsuperscript{267} Carpenter (n 1) 694 695 seems to suggest, with regard to the protection of the right to freedom of religion, that limitations on free speech be allowed to “assist a fledgling democracy to overcome a legacy of insult and denigration and of tolerance for the views of others”.

\textsuperscript{268} See also the suggestions by Van Rooyen (n 265) 1131 regarding the expansion of the crime of blasphemy.

\textsuperscript{269} The Penal Code of Botswana, Laws of Botswana Ch 8:1 s 136, is an excellent example in this regard as its proscribes acts of religious insult directed at any class of people. The Penal Code also prohibits the disturbance of religious assemblies, the trespassing of burial sites, the disturbance of burials, as well as the writing or utterance of words intended to wound religious feelings, s 137-140.

\textsuperscript{270} Smith (n 59) 16 4 notes that the criminalisation of blasphemy in earlier times was thought to be rational as blasphemy was seen as a dangerous action whereby one bit the hand that fed you and thus had to be punished. Blasphemy should now be approached within the framework of the Bill of Rights; it should thus undergo a constitutional adaptation in order to survive.
call for the weighing of competing interests against the backdrop of the limitation provisions. The punishment of other criminal transgressions should also be viewed as constitutional, at least in principle, as such prohibitions may serve to strengthen, by direct or indirect means, the religious dignity of the bearers of the right to freedom of religion.

Religious dignity, apart from the above public law provisions, is also advanced and protected by private law measures. As a matter of fact, it may be argued that private law protection is essential in ensuring a healthy right to religious dignity.

The following observations are as relevant to statutory provisions as to the common law. S 16(2)(c) of the Bill of Rights expressly states that advocacy of hatred based on religion does not enjoy constitutional protection (the provision, however, does not ban such hate speech). Smith (n 59) 163 accordingly argues that blasphemy should be allowed bar religious hate speech. Such an approach cannot be supported, as it would create a claw-back situation by allowing blasphemous speech that may infringe the dignity of the bearers of religious freedom to be irrefutably constitutional so long as it cannot be described as "hateful". The right to freedom of expression, it must be kept in mind, is as susceptible to constitutional limitation as are all other rights, provided that competing interests are properly weighed and considered. In other words, the Films and Publications Act 65 of 1996 (the Act) goes a long way towards the protection of religious dignity but nor far enough. The Act does not criminalise all forms of hateful and conduct and speech, aimed at the bearers of the right, thereby possibly under-protecting the right to religious dignity. Furthermore, situations may also arise where a need exists for the criminalisation of conduct and speech aimed at infringing the right to religious dignity, that would then not be protected, as the crime of blasphemy may have been scrapped and the Act in its ambit may not cover such acts or speech. The crime of blasphemy is therefore necessary to provide comprehensive protection of the feelings of the bearers of the right to religious dignity, even though the right to freedom of expression may have to be limited in the process, the right to religious dignity may thus not be confined to situations of hate speech only.

Examples would include the common law crimes regarding the desecration of graves or bodies, see Snyman Strafreg (1999) 382 383; Klopper "Diefstal van 'n lyk" 1970 THRHR 38; Snyman “Confusion regarding the defence of ignorance” 1994 SALJ 1. Eg, the punishment meted out for the desecration of graves would reaffirm the religious dignity of the relatives and friends of the deceased, as well as the religious community to which the person belonged, see also Potgieter Aspekte van die Juridiese Beskerming van die Godsdiensgevoel (1987 LLD thesis, Unisa) 5. Other crimes, such as the prohibition on assault, would serve to strengthen religious dignity by discouraging and punishing attacks against members of religious communities, thereby also protecting their physical integrity as guaranteed by s 12(1) of the Bill of Rights.

For instance, the law of delict protects one’s dignitas, the latter includes the protection of the "godsdienstigevoel" which is predicated on the dignity and integrity of one’s religious feelings, see Neethling, Potgieter and Visser Deliktereg (1996) 319 347. See also Potgieter (n 272) passim. See Mohamed v Jassiem 1996 (1) SA 673 (A) and the discussion by Potgieter.
In conclusion, the right to religious dignity, in its manifold guises, should enjoy protection and attention in order to advance religious freedom as such, thereby strengthening the right itself but also the constitutional dispensation. Effective constitutional protection and recognition of religious dignity would strengthen the constitutional dispensation as religious individuals, communities and institutions may not justify disturbances of the peace and other unlawful actions to defend their dignity.\textsuperscript{274}

3.7.1.4 The Right to Religious Political Activity and Lobbying

Religious expression is a varied and still varying concept. Religious adherents may argue that religion represents a way of life that encompasses, influences and even dominates diverse spheres of existence. Some religious people may understand it to be a duty of their faith to participate in elections, whereas other people, especially the Hutterites and Mennonites, would consider political participation abhorrent to their faith. Religious expression could also be evidenced by political and social lobbying when religious adherents organise to effect change in society.\textsuperscript{275} Political and social action and inaction could thus be described as the manifestation of the expression of religious convictions and doctrine. Therefore, the protection of religious political activity and lobbying may not be cast aside in the absence of

\textsuperscript{274}See in this regard, especially with reference to blasphemy, Wulfsohn (n 51) 95; R v Gott 16 CAR 86 (CCA) (1921) as discussed by Kenny (n 256) 127 139; the European Court for Human Rights, for instance, allowed the banning of a blasphemous film by Austrian authorities in order to preserve the religious peace, see Otto-Preminger Institut v Austria 19 EHRR 34 (1994) and the discussion by Van Rooyen “Case of Otto-Preminger Institut v Austria” 1995 De Jure 229. Hofrenning “Lobbying, religious” in Wuthnow (Ed) The Encyclopedia of Politics and Religion vol 2 (1998) 480 482 483 notes examples of religious lobbying in the United States, United Kingdom, Italy, Ireland and South Korea. See also in general Holsti International Politics (1995) 265; Kegley and Wittkopf World Politics (1997) 181ff; Allum State and Society in Western Europe (1995) 270ff.

\textsuperscript{275} “Verfyning van die onregmatigheidstoets by laster en by die krenking van die godsdiensgevoel” 1997 THRHR 719. See also Labuschagne (n 11).
express political guarantees, as such conduct could be viewed as integral to meaningful religious expression.\textsuperscript{276} However, the Bill of Rights contains express and wide guarantees of political rights.\textsuperscript{277} The latter guarantees ought to be viewed contextually with regard to freedom of religion in order to ensure comprehensive and necessary protection of all related avenues of religious expression.\textsuperscript{278} In conclusion, it is important to note that bearers of the right to freedom of religion also possess other rights, such as political rights, that are not waived or compromised due to their religious beliefs.\textsuperscript{279}

3.7.1.5 The Right to Tax Exemption

\textsuperscript{276} Interestingly, Wulfsohn (n 51) 91 notes that “in the United States religious political movements and parties, organized religious pressure groups and church lobbying are considered outside the purview of the First Amendment”.

\textsuperscript{277} S 19.

\textsuperscript{278} For example, s 15(3) requires, by implication, the lobbying of government to pass legislation recognising systems of religious family law, see Du Plessis (n 1) 164; Ch 3.4. The formation of political parties and organisations predicated solely or partly on religious principles or based on the advancement of religious priorities or the addressing of religious concerns should be viewed as examples of the constitutional expression of religious political rights. The running of political parties on religious lines may therefore not be forbidden, as is the position in Mozambique; see Hall and Young “Recent constitutional developments in Mozambique” 1991 Journal of African Law 102 110. The Constitution of Portugal (1976) s 51(3) states that: “Without prejudice to the philosophy or ideology inspiring their programmes, political parties may not use names that contain terms directly related to any religion or church or use emblems which may be mistaken for national or religious symbols.” The South African Constitution does not contain a similar provision. It is submitted that the use of religious symbols or names, such as crosses or crescents or words such as “Islamic”, by religious political parties and groups is permitted under the Constitution. Such symbols and names, for instance, may be inherent to the party or organisation, just as a communist party may use the hammer and sickle. Such symbols and names may also be necessary to identify with supporters or target groups. However, the use of such names and symbols may be limited should intolerable confusion arise or should the dignity of believers or institutions be compromised; for instance if a political party refers to itself as the “Roman Catholic Party” whereas the Catholic Church may not support the party or political participation so conducted in its name. Bearers of the right to freedom of religion, ordained or not, should also be free to participate in politics, for example unconstitutional violation of the right to equality would arise should ministers of religion, or religious people at large, be barred from standing for election. The Constitution of Paraguay (1992) s 197(5) 235(5) that disqualifies clergymen and church ministers from serving as political office bearers can thus not be emulated in South Africa. The United States Supreme Court held that the First Amendment (containing religious rights guarantees) had been violated by the State Constitution of Tennessee that prohibited a clergyman from being a delegate to the Constitutional Convention of the state, see McDaniel v Paty 435 US 618 (1977).
Religious organisations and taxation have had a long and eventful relationship.\textsuperscript{280} The modern trend has been one of automatic tax exemption for religious organisations; as a matter of fact, a number of constitutional instruments provide expressly for such exemption.\textsuperscript{281} The South African Constitution does not contain express provisions regarding the tax exemption of religious organisations. However, religious organisations do enjoy tax exemption.\textsuperscript{282} The tax exemption afforded religious organisations, however, has been questioned in recent years.\textsuperscript{283} It is submitted that the right to freedom of religion grants religious organisations the

\begin{footnotesize}
\begin{itemize}
\item For example, King Edward I of England clashed with Pope Boniface VIII when the latter decided, in 1302, that the clergy may not be taxed without papal consent, Edward I, in retaliation, refused the clergy access to Royal Courts, see Hayes, Baldwin and Cole \textit{History of Western Civilization} (1962) 205. As a matter of fact, traditionally, church properties have not automatically been exempted from taxes, especially in the Anglo-American tradition; such properties were usually only exempted by legislative enactment, see Witte \textquotedblleft Tax exemption of church property: Historical anomaly or valid constitutional practice\textquotedblright\ 1991 \textit{Southern California LR} 363 371 375. Such exemptions were granted in accordance with the common law and in accordance with the equity law, see Witte 369 375. Modern tax exemptions in American law have been based on the usage of church property; for instance exemptions are granted if property is used for religious purposes – the common law influence – or if property is used for charitable purposes – the equity law influence, see Witte 394 395. See also Shelton and Kiss (n 56) 584.

\item See Shelton and Kiss (n 56) 577.

\item For example, the Constitutions of the American states of Alabama (1901) art IV § 91; Arkansas art (1874) XVI § 5; California (1879) art XIII §1.5; Colorado (1876) art X § 5; Kansas (1859) art XI § 1; Kentucky (1890) § 170; Louisiana (1898) § 230; Minnesota (1857) art IX § 1; North Dakota (1889) art XI § 176; Oklahoma (1907) art X § 6; South Carolina (1895) art X § 4; South Dakota (1889) art X § 6; Utah (1896) XII § 2; Virginia (1902) § 1902; Wyoming (1889) art XV § 10, quoted in Witte (n 280) 389 note 89. All 50 American states provide for tax exemption in one form or another, although not all by express constitutional means, see Burger CJ in \textit{Walz v Tax Commission} 397 US 664 (1969) 676. Religious organisations are also exempted from paying land tax in Belgium if the property in question is used for public worship, see Alen (n 61) 266.

\item See the Income Tax Act 58 of 1962 s 10(1)(f) 56(i)(j); Estate Duty Act 45 of 1955 s 4(h)(i); Stamp Duties Act 77 Of 1968 s 4(1)(f)(i); Transfer Duty Act 40 of 1949 s 9(1)(c), tax exemption from local taxes is also usually provided, see Buckingham (n 1) 120. See also Wulfsohn (n 51) 232.

\item See Franzsen (n 1) 171 and the reference to the Katz Interim Report of the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa. Franzsen suggests that the constitutional equality provision, with reference to the Interim Constitution, may be compromised by the granting of tax exemptions to religious organisations and not to non-religious organisations. However, religious organisations are not the only bodies to be exempted from the paying of tax. Freedman \textit{De Jure} (n 1) 154 suggests that the granting of tax exemptions to religious organisations may amount to a “forced and indirect donation” made by the taxpayer, thereby coercing individuals into supporting religion against their will. However, Freedman argues that the limitation upon the right to freedom of religion so imposed, namely

\end{itemize}
\end{footnotesize}
right to claim tax exemption. A number of reasons may be advanced in support of the contention. It may be argued that such exemption is necessary in order to secure institutional autonomy for religious organisations, as maximum autonomy is needed to ensure the free practice and expression of religion. Such a move would also acknowledge the historical struggle for dominance between the secular and religious realms and would assist in avoiding a recurrence of attempts to crush or negate religion by means of harsh taxation by helping to ensure the independence of religious organisations. It could also be argued that taxation may negate the autonomy and efficacy of religious organisations by discouraging and inhibiting donations should such contributions be taxed as revenue. The recognition of the right to tax exemption would also attest to a “benevolent neutrality toward churches and religious exercise generally so long as none was favored over others.”

Religious organisations also contribute to the realisation of the right to freedom of association by ensuring and contributing to the plurality of society, thereby satisfying the needs of a diverse nation – tax exemption would encourage the growth and expression of such heterogeneity. Tax exemption may also encourage the positive role fulfilled by religious organisations in society such as the diversification and strengthening of charitable and educational activities and projects, thereby lessening the burden on the exchequer. However, it is important to note that the implied right to tax exemption, like all other rights, is susceptible to constitutional

---

The indirect coercion, ought to be viewed as constitutional, thereby allowing the exemption to continue.

See for instance, regarding friction between the state and religion necessitating the existence of the right to tax exemption: Boiter (n 127) 108 who notes attempts by the Soviet government to destroy the “economic basis” of religion; Witte (n 280) 367 who notes arguments for the granting of tax exemption in order to avoid state hostility against religion by the imposition of taxes; Freedman De Jure (n 1) 155 who notes the need for tax exemption in order to avoid “the latent dangers inherent in the imposition of taxes on religious activities”.

Per Burger CJ in Walz v Tax Commission (n 281) 676 677. Such a “benevolent neutrality” would also lead to the advancement of religious freedom by providing a stimulus for religious activity.

Freedman De Jure (n 1) 155.

See the arguments noted and advanced by Witte (n 280) 388 408; Freedman De Jure (n 1) 155. Religious organisations may terminate such charitable activities should they be taxed.
A related topic to the present discussion would deal with the levying of taxes in favour of religion or the advancement of religious freedom.

3.7.2 FREEDOM OF RELIGIOUS CHOICE

3.7.2.1 The Right to Adhere to a Religion

A culture of human rights aims to entrench and protect the right to exercise free choice concomitant with one’s conscience in the cultivation of an identity and in order to preserve dignity. It may be argued that the right to adhere to a religion of

---

Notes:
288 Witte (n 280) 374 notes that, traditionally, the tax-exempted status of religious organisations was lifted in times of emergency, such as in times of “war, pestilence, poverty [and] disaster”. It is submitted that it would also be the case today where situations may arise necessitating an increased tax base. It may also be argued that the right may be limited should a religious organisation focus more on the generating of pure profit for the enrichment of itself; rather than focusing on religious and charitable activities, thereby not making a contribution to society by the realisation of the right to freedom of religion and/or aiding social upliftment. Tax exemption may also be revoked where racial discrimination is taking place in order to discourage such practices; as a matter of fact, the United States Supreme Court revoked the tax exempted status of a private university that practised racial discrimination as such activity could not be described as “charitable”, see *Bob Jones University v United States* 461 US 574 (1982). The limitation of the right should be measured against the general limitation clause, see Ch 5. (Regarding the American sales tax position, see: *Jimmy Swaggart Ministries v Board of Equalization* 493 US 378 (1990); *Texas Monthly Inc v Bullock* 489 US 1 (1988).

289 It seems to be debatable whether specific taxes may be levied – or general tax money used - in support of religion or in the advance of religious freedom; such taxes are considered unconstitutional in the United States, see *Everson v Board of Education* (n 149) 16. It may be argued that religious freedom is to be viewed as a constitutional value that has to be promoted in strengthening the constitutional order. Taxation may be one method of advancing the right, especially in light of the duty of the state to nurture the right, see s 7(2). However, situations should be avoided where taxes are raised or distributed in aid of only one or a few religions or denominations to the unreasonable exclusion of the remainder; see for instance Kommers (n 55) 484; BVerfGE 19 226 (1965); Krishnaswami (n 61) 51. The Constitution of India (1950) s 27 prohibits the raising of taxes for the benefit of a particular religion or denomination. It is submitted that the possibility of allowing a percentage of a taxpayer’s income tax, at the latter’s choosing, to be channelled to religious organisations or to be used for general religious purposes should be viewed as constitutional, as coercion is absent and freedom of religion is advanced. A 1979 Concordat between Spain and the Vatican and a 1984 Concordat between Italy and the Vatican allowed citizens to donate a percentage of their income tax to the Catholic Church, see Shelton and Kiss (n 56) 584 note 74.

290 See also Rautenbach (n 3) 89. This protection of choice is inherent to all human rights, especially to the right to freedom of religion in its manifold guises. Freedom of choice, therefore, should not be viewed merely as a part of the freedom of religious choice, but as playing a role in all five freedoms discussed in this study. Dinstein (n 61) 147 views the freedom to choose a religion as the quintessence of the right to freedom of religion. Labuschagne (n 72) 173 notes that the right to freedom of religion is built around the concept of
choice is a cardinal element of the right to freedom of religion.²⁹¹ The cardinal aspect may be further refined by stating that the right includes the possibility to adhere not only to a religion as such, but also to choose a denomination or grouping within a denomination to adhere to.²⁹² Bearers of the right should also be allowed to discuss, contemplate and debate specific religions or religious issues in general on a formal or informal and large or small scale; this aspect should also include the right to produce, own, use and study religious material such as holy books.²⁹³ The latter discussion and study of religion may even lead to the creation of a new religion or denomination or grouping within an existing religion or denomination.²⁹⁴ It

individual autonomy and adds that “[t]he autonomous, freely choosing individual is the centre around which the protection of this (and other) human right(s) is construed and legitimised”.

²⁹¹ For example, the right to choose would also impact on freedom of religious observance, as bearers of the right may choose to observe their faith or not. See also Dinstein (n 61) 147. The right to choose a religion to adhere to is also strongly protected in international law, see the Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Fundamental Rights and Freedoms (1950) art 9(1); International Covenant on Civil and Political Rights (1966) art 18(1) guarantees the right to “have or adopt a religion or belief of his choice”; American Convention on Human Rights (1969) art 12(1) guarantees the right to “maintain” a religion; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(1) ensures the right to have “a religion or whatever belief of his choice”. Sullivan (n 82) 495 observes that the right of individuals to maintain their beliefs “is central to the concerns that motivated the drafting of the [latter] Declaration”. The United States Supreme Court also expressly recognised the right to adhere to a religion of one’s choosing in Cantwell v Connecticut (n 80) 303. It could be argued that the right allows bearers the possibility to be “different” or the “same” according to the dictates of their conscience, see Sachs (n 51) 44 47. Stated differently, one may freely hold personal beliefs, see Smith (n 2) 219. It could also be argued that the right to adhere to a religion would include the right to acquaint oneself with all the different religions and to study and gain more information and experience of different faiths in order to make a reasoned choice in choosing one, if any. The Constitution of Mauritania (1991) s 5 seems to jeopardise the entitlement of the bearer of the right to freedom of religion to claim a religion of his choice, as the Constitution states that “Islam shall be the religion of the people and of the State” (emphasis added).

²⁹² See Dinstein (n 61) 147. One could therefore choose to adhere to the Orthodox faith rather than to Catholicism or Protestantism, and then more particularly to the Coptic Orthodox Church rather than the Greek, Serbian, Eastern, Ethiopian, Armenian or Syrian Orthodox Churches.

²⁹³ See Dinstein (n 61) 147 148 who notes that one may “challenge received beliefs”. This element of the right will find strong contextual protection under the right to freedom of expression (s 16) and under the right to freedom of association (s 18); it is also an example of the dynamic element of religious freedom as it allows and encourages change, see Ch 3.5.3. However, it should be kept in mind that any debate and discussion regarding religious matters should be conducted with the necessary respect in order not to offend the right to religious dignity, see Ch 3.7.1.3. See also Shelton and Kiss (n 56) 563.

²⁹⁴ See Dinstein (n 61) 148. This specific element of the right is a further prime example of the dynamic characteristic of religious liberty, see Ch 3.5.3. For example, the Protestant
is also important to note that the right to adhere to a religion includes the right to change one’s mind; in other words to leave a religion or denomination – or other religious grouping – for another or for none at all, the fact that this element has proven to be contentious may not be allowed to subtract from its constitutional importance or presence.\textsuperscript{295} The right to adhere to a religion would also include the right to convey, declare and express the beliefs held.\textsuperscript{296}

---

Reformation developed out of discontent with Catholicism and the Baha’i religion sprouted from Islam. An example of denominations being created would include the division of Protestantism, historically, between Anglicanism, Lutheranism and Calvinism. Groups may then further be formed, also sometimes referred to as denominations, within the different branches of a religion, such as the mushrooming of Protestant churches of all shapes and sizes in the United States. A grouping may also be formed within a religion as such, such as the establishment of Orders within the Catholic religion (with the approval of the Church); eg the Society of Jesus (Jesuits) founded by St Ignatius of Loyola to spread Catholic teaching and to stem Protestantism.

The right to discard a religious persuasion or grouping is not expressly mentioned in the Constitution; nonetheless, it may and must be implied, see Du Plessis and Corder (n 1) 156 who deduce the right from the “libertarian” purport of s 14(1) of the Interim Constitution. See also Malherbe 1998 (n 25) 680 who argues that issues such as the changing of beliefs fall under the exclusive control of each individual; Witte (n 61) 23. Therefore, the bearer of the right enjoys the right to believe in a religion or not to believe in a religion, the positive and negative element (see Ch 3.5.1). However, the static and dynamic element of the right, (see Ch 3.5.3), will allow the bearer to either persist in a belief or to change that belief. The Universal Declaration of Human Rights (1948) art 18 expressly includes the “freedom to change [a] religion or belief”; however, uncertainty exists regarding the binding nature of the Universal Declaration in international law due to the fact that the declarations are by nature not binding. However, it has been argued that the Universal Declaration has attained the status of international customary law, see Gildenhuys “The freedom to change one’s religion or belief in international human rights law” 2000 SAPL 151 153. See also Dugard International Law. A South African Perspective (2000) 240 regarding the Universal Declaration. The International Covenant on Civil and Political Rights (1966), however, is binding on its contracting parties but contains no express provisions with regard to the right to leave a religion, primarily in order not to offend countries practiseing Islamic law which prohibits the leaving of Islam (apostasy); see also Lerner (n 54) 511ff; Gildenhuys 160. Although the express provision of the Universal Declaration allowing one to change one’s religion was not repeated, the Covenant still protects the right to leave a religion as it may be argued that the right to adopt a religion includes the right to discard that religion, especially as coercion is prohibited in the adoption or maintenance of a religion, see art 18(2). The General Comment (1993) on the International Covenant also reaffirmed that the Covenant protects the right to change one’s religion, although the right is not expressly stated, see Lerner (n 54) 516. See also Dinstein (n 61) 148; Walkate “The right of everyone to change his religion or belief” 1983 Netherlands International LR 146 154. The existence of the right to change one’s religion is further expressly recognised by the European Convention for the Protection of Fundamental Rights and Freedoms (1950) art 9(1); American Convention on Human Rights (1969) art 12(1), as well as by the Constitutions of Nigeria (1989) s 37(1); Slovakia (1993) s 24(1); Zambia (1991) s 19(1). The Constitutions of Zimbabwe s 19(1); Botswana s 11(1); Swaziland s 11(1) contain the same provisions as the Zambian Constitution, see Blake and Litchfield “Religious freedom in Southern Africa: The developing jurisprudence” 1998 Brigham Young University LR 515 note 111. The right to change
Freedom of religious choice may only be truly free in the absence of coercion and fear. The state should, therefore, create an environment conducive to the unfettered and constitutional exercise of religious choice. Various other expressions of religious choice may be distinguished, such as the right to refuse medical treatment and the right to privilege; the latter and related topics will be discussed below.

3.7.2.2 The Right to Religious Objection

It has been proposed that the right to freedom of conscience is wide enough to include both religious and secular elements. The protection both of the religious and secular conscience should be viewed as important, especially in the context of the protection of human dignity. However, the Constitution does not only provide for the protection of religious (and secular) convictions but also extends its

---

296 In other words, the right to freedom of religion enables the bearer to express and manifest religious belief. See Ch 3.5.4, 3.5.5 regarding the manifestation of the right. The right to declare one’s religious belief could even encompass the right to attempt to convert someone to a particular faith, see Ch 3.7.5. Belief may also be manifested by conducting religious observances, see Ch 3.7.3. Bearers of the right may further choose to manifest their belief by donating their time, effort or money to a religious cause, see Kommers (n 55) 445ff; BVerfGE 24 236 (1968). The right to receive and solicit such voluntary contributions should also be recognised, see Shelton and Kiss (n 56) 563. The right to declare a religious belief would also include the right not to declare such beliefs; in other words, to keep religious convictions and opinions private, see Ch 3.5.1. For example, someone may not be forced to declare religious convictions in applying for a position, except in necessary situations such as where application is made for an ecclesiastical position, see also in general Kommers 446 461; Shelton and Kiss 562. The right not to declare religious convictions must be viewed contextually with regard to the right to privacy, s 14. Benito notes countries where people have been coerced into declaring their religious beliefs, namely Cyprus, Ecuador, Germany, Peru, Spain, Turkey and the Ukraine, quoted in Lerner (n 54) 529. Coercion into declaring one’s faith is unacceptable against the backdrop of the International Covenant on Civil and Political Rights (1966); see the General Comment (1993) on the latter, quoted in Lerner 515. The Constitutions of Spain (1978) s 16(2); Portugal (1976) s 41(3) safeguard the right not to declare a religious belief.

297 Such an approach would be consistent with the duties of the state to nurture religious liberty, see s 7(2). See also Ch 4 regarding the duties of the parties bound to respect the right to freedom of religion. See also Kommers (n 55) 461.

298 See Ch 3.2; Van der Vyver (n 19) 267; De Winter (n 10) passim.
protection to the expression, in deed and in word, of such convictions.\textsuperscript{300} A person may thus choose to participate in activities consistent with their faith or choose not to participate in activities inconsistent with that faith – or moral and secular convictions for that matter.\textsuperscript{301} Therefore, a person may lodge an objection based on religious convictions in order to justify a choice to refrain or to abstain from certain activities. Usually such objection does not pose constitutional problems in a private or social context, but it may when participation in activities is required and compulsory, such as in the case of military and scholastic programmes.\textsuperscript{302} However, it is essential to recognise the right to religious objection in order to realise true freedom of religious choice, especially with regard to military conscription.\textsuperscript{303} It,

\begin{itemize}
  \item S 10. In other words, the cause of human dignity is advanced by securing the protection of the human conscience.
  \item See Ch 3.5.4, 3.5.5, 3.7.2.1.
  \item In other words the right to a certain action – the positive element - would also include the right not to perform that action – the negative element, see Ch 3.5.1.
  \item Mennonites and Jehovah’s Witnesses, for instance, refuse to be conscripted for military service on religious grounds, see Buckingham (n 1) 34 86. See also Hartman v Chairman, Board for Religious Objection 1987 (1) SA 922 (O); Sachs (n 51) 48. See also Buckingham 361 362 regarding the current and historical positions of military service in Canada and South Africa; and Kommers (n 55) 443 458ff regarding the German position. See also Van der Vyver (n 205) par 249 for an exposition of the previous position regarding military conscription in South Africa.
  \item The right to objection, however, should protect both objections based on religious reasons and those based on secular reasons, as the aim is to protect the different manifestations of freedom of conscience. The Defence Amendment Act 132 of 1992 amended legislation to extend the category of objection to “conscientious objectors” rather than merely to “religious objectors”, see also Buckingham (n 1) 363. Sachs (n 51) 48 speaks of “philosophical” and “religious” grounds in this regard. The German Constitution (1949) s 4(3) also recognises such a wide ambit regarding the type of conviction protected, see Kommers (n 55) 443 458 459. See also Scholler (n 183) 118 121 for references to German law. The Constitution of Paraguay (1992) s 37 also recognises the right to conscientious objection on “ethical” and “religious” grounds, whereas the Constitution of Portugal (1976) s 41(6) merely states that the right to conscientious objection is safeguarded “in accordance with the law”. It has also been argued that the right to religious objection is implicit in the decision of \textit{S v Lawrence} (n 1) par 92 as the Court prohibited coercion in religious matters, thereby protecting bearers of the right to freedom of religion from coercion in matters such as military conscription, see De Waal \textit{et al} (n 15) 290. An objection, in order to succeed, should be sincere and truly rooted in religious (or secular) convictions of pacifism, see Kommers (n 55) 459 regarding the German position and Ch 1.4 regarding the similar approach suggested with regard to South African law. The severity of the objection should also be considered to decide if duties with a non-combatant role may still be assigned, such as messenger, clerical or arms manufacturing postings or if exemption should be granted to all military related duties, even where the objector would not be armed. See \textit{Thomas v Review Board} (n 212) regarding the American position and Kommers 459 regarding the German position, the latter does not extend objection to include refusals to work in the armament industry. The right to religious objection should apply not only in times of peace but
however, should be kept in mind that exemption from military service, or any other
duty, does not necessarily exempt the objector from alternative duties. In other
words, duty as such may not be escaped from but rather a specific duty. As
intimated, religious objection is not limited to military conscription alone but to all
fields where compulsory action or inaction may be required. For example, religious
(and secular) objection must be recognised in the context of compulsory scholastic

also in times of war (as is the position in German law, Kommers 459). However, it may be
argued that the granting of exemption in times of war may be more stringent in order to
increase the number of conscripts to fulfill pressing defense needs. It is suggested that an
objection to war should be to all war as such and not merely to the conflict at hand in order to
ensure effectual conscription; thereby meeting defense needs, even in regard of an unpopular
conflict, the position is also supported in foreign law, see Kommers 458 regarding German law
seems to be correct in advocating the extension of conscientious objection (by means of an
honourable discharge) to those who have been conscripted only to undergo a change of heart
by becoming pacifists. See also Devenish (n 1) 22. See Tahzib (n 18) 90 256 280ff regarding
international law and the Document of the Copenhagen Meeting of Representatives of the
Participating States on the Human Dimension of the Conference on Security and Co-operation
in Europe (1990) principle 18; Jacobs and White (n 78) 217 and Naidu (n 18) 63 regarding the
position in the European Union.

The German Constitution (1949) s 12(a) states that the duration of alternative service may not
extend the duration of military service. However, the German Constitutional Court validated a
law that extended the duration of alternative service by arguing that a longer period of
alternative service would equal a shorter period of military service, as the latter is of a harsher
nature and involves the later calling up of conscripts and the possibility of war, see Kommers (n
55) 460. Such a position seems to be correct as the substance of the service should be
considered to determine if it is a proper alternative and not merely the length of the service.
activities. Religious objection to the payment of taxes, however, should be questioned.

The right to religious objection may also be exercised with regard to issues of medical treatment. In other words, religious adherents may live in harmony with

---

305 Scholastic religious objection should be approached with great circumspection and sensitivity in order to protect the right to freedom of conscience of the party compelled and at the same time further meaningful education. S 15(2) recognises an instance of religious (or secular) objection by stating that participation in religious observances at state or state aided institutions (thereby including schools but also other institutions) may only be conducted on a voluntary basis, see Ch 3.3. S 15(2), however, would not apply to private institutions thereby creating greater space for the encouragement of religious or secular conformity consistent with the wishes of the institution, see Ch 3.3; Wittmann v Deutscher Schulverein (n 16) with regard to private schools. Scholastic religious exemption has often been applied in the United States, for instance, the promotion of patriotism does not justify compulsory saluting of the flag, see Lemon v Kurtzman; Committee for Public Education v Nyquist 413 US 756 (1973); Grand Rapids School District v Ball 473 US 373 (1985) (see Krishnaswami (n 61) 44 in general), high school attendance may be waived, see Wisconsin v Yoder 406 US 205 (1972), teachers may also be granted religious exemption in certain circumstances, quoted in Malherbe 1993 (n 25) 702. See also West Virginia v Board of Education v Barnette 319 US 624 (1943) regarding flag salutes sed contra Johnson v Deerfield 306 US 621 (1939); Minersville School District v Gobitis 310 US 586 (1940), quoted in Smith (n 135) 36.

306 For instance, when a Quaker withheld a portion of her taxes commensurate with budget military spending and donated the money to a peace fund, a Canadian court overrode her objection as it found that the link between her taxes and military spending was too remote to justify her religious objection (the Human Rights Commission of the United Nations also refused to entertain her subsequent complaint), see Buckingham (n 1) 361 362. The Dutch Hohe Raad has also refused to grant a Calvinist minister exemption from social security taxes on the basis that the minister had a religious objection to paying such taxes, see De Winter (n 10) 1. It is submitted that the decisions are to be supported as the link between taxation and the allocation of budget money may be too remote to unconstitutionally limit the right to religious objection. Where the link, however, is more tangible, such as in the case of social benefits, the right to religious objection may still be limited in order to achieve a desirable social end, such as the advancement of general welfare and health.

307 For instance people may refuse on account of their religious convictions to undergo certain medical procedures or may refuse to undergo medical treatment at all, see Krishnaswami (n 61) 45; Buckingham (n 1) 346ff; Katz “The doctor’s dilemma: Duty and risk in the treatment of Jehovah’s Witnesses” 1996 SALJ 484; Kommers (n 55) 449; BVerfGE 32 98 (1971). Traditionally, Jehovah’s Witnesses’ refusal at accepting blood transfusions is used as an example when the subject of religious objection is discussed; however, confusion exists at present among the Witnesses as to the acceptability of blood transfusion. At issue here is the principle of religious objection rather than the beliefs of a certain group or groups. It should be kept in mind that freedom of religion establishes the right to choose, and by implication the right to refuse, thereby creating the right to object to something on religious grounds. Distinction should not be made between reasons for refusing medical treatment in order to allow more flexible or inflexible reasons eg religious reasons rather than philosophical reasons or between different religions, see Strauss Doctor, Patient and the Law (1991) 32; Trahan “Constitutional law: Parental denial of a child’s medical treatment for religious reasons” in Kohl
the religious tenets that they hold by the expression of such beliefs in practice; for example, by refusing certain or all medical procedures as contradicting their belief system. The religious adherent, therefore, is master of their own destiny in accordance with their beliefs and wishes – a person may thus refuse medical treatment even if such a refusal would cause greater illness or death. A medical practitioner, in principle, should honour the wishes of the patient as long as such wishes are reasonably clear and understandable. The right of an adult to choose or not to choose medical treatment may be subject to constitutional limitation in order to advance general health or the welfare of society. The right of parents and guardians to raise their children and wards in accordance with their own religious convictions would include the right to decide on appropriate medical treatment for such children and wards in accordance with the faith being instilled. However, the right of parents and guardians to choose or not to choose medical treatment on

---

308 Strauss (n 307) 32. The proposition is also supported by the South African Law Commission Euthanasia and the Artificial Preservation of Life (1997), see Buckingham (n 1) 32. The “selfbeskikkingsreg” of the individual should thus be respected, see Strauss 33. A medical practitioner would in any case need the permission of the patient in order to conduct an examination and tests or in order to effect medical procedures such as operations or injections and stitches (an uninvited intrusion may even be treated as assault), see Strauss 31; Katz 484; Strauss Regshandboek vir Verpleegkundiges en Gesondheids personeel (1993) 11. The right to objection would safeguard the right of patients to choose to avail themselves of medical treatment or not to do so in accordance with their convictions. The right to religious objection would not only be consistent with the expression of religious beliefs but also with s 12 (the right to physical and psychological integrity) that allows the bearers of the right control and power over their bodies, see Buckingham 351.

309 A medical practitioner, therefore, should honour a “Living Will” whereby a patient expresses their wishes regarding procedures to be taken or not to be taken subject to revocation by the patient, see Strauss (n 307) 32. A practitioner may still administer emergency aid where the wishes of the patient cannot be discerned, see Strauss 31 94 regarding negotiorum gestio. In other words, medical aid should be forthcoming in instances where the patient is of unsound mind or no longer able to communicate any wishes and where a “Living Will” is absent, see Strauss 32. See also Phillips v De Klerk 1983 (T) (unreported) as discussed by Strauss 29 30 94; Buckingham (n 1) 350 351.

310 A contagious epidemic may require drastic measures affecting all people to prevent its spreading even though some people may object to the taking of medical precautions on religious grounds, see Krishnaswami (n 61) 45.

311 Such a right is also acknowledged in Canadian case law, see Buckingham (n 1) 347. The right is also recognised in American law, see Trahan (n 307) 307 313 325. See Robilliard “Religion,
behalf of their children may be limited in protecting the child or ward.\textsuperscript{312} It may also be noted that the right may not only be viewed as the right to object, but also as the right to follow traditional, unconventional or alternative medical measures in accordance with religious convictions.\textsuperscript{313}

It should be kept in mind though that the right to religious objection does not encompass illegal actions designed to frustrate the activity to which an objection is lodged; for instance, a person objecting to conscription may not undermine or frustrate the process unlawfully.

3.7.2.3 The Right to Swear an Oath

\begin{itemize}
    \item conscience and law” 1981 Northern Ireland Legal Quarterly 358 360 regarding the British position.
\end{itemize}

Parents may make “martyrs” of themselves but are not allowed to make “martyrs” of their children, see \textit{Prince v Massachusetts} 321 US 158 (1943) 170; Trahan (n 307) 310. The decision of the parents or guardians may thus be overridden to safeguard the best interests of the child; for example, in allowing an operation or blood transfusion against the wishes of the parents or guardians, see Krishnaswami (n 61) 45; Nsereko (n 86) 854 855; Buckingham (n 1) 172 352. The South African Constitution, for example, guarantees every child the right to “basic health care services and social services” (s 28(1)(c)) and to be protected from “maltreatment, neglect, abuse and degradation” (s 28(1)(d)). The best interests of the child should also be used as measurement regarding “every matter concerning the child” (s 28(2)). The minister, for example, may give permission for treatment should the parents or guardians refuse to do so, see the Child Care Act 74 of 1983 s 39(1). A woman may also not refuse to undergo a Caesarean section on religious grounds if the life of the baby would be at stake should the procedure not be carried out, see the reference by Katz (n 307) 491 to \textit{In re S} [1993] Fam 123, [1992] All ER 671. Immunisation may also be carried out against the wishes of the parents in light of a serious health risk, see \textit{Jacobsen v Massachusetts} 197 US 11 (1905), quoted in Malherbe 1993 (n 25) 702. Parents may thus not leave their children to die without any medical assistance, see \textit{New York Times} 2001/02/21. It has even been argued that the right of a major to choose or not to choose medical treatment (for themselves) may be overridden, should the decision not be in the interest of the person’s minor dependent children, see Strauss (n 307) 31. See also Strauss 34 regarding German law.

The right to specific medical treatment may also be limited in order, for instance, to preserve the environment where herbs may be extracted or to protect animals from sacrifices. The best interests of the child or ward should also be paramount with regard to the use of alternative remedies.
Great importance has been attached, historically in law, to the taking of an oath. The person swearing the oath calls upon a deity to witness what is being testified or attested to, the oath may also function as a reminder to the person to encourage the truth to be told in order to avoid possible divine judgment and punishment. It may, therefore, be said that the oath is an act with a religious qualification or element.

The oath is thus a form of religious expression whereby the person swearing it attempts to signify their sincerity and willingness in telling the truth, others are thus reassured of a person’s commitment to the truth by means of a religious instrument. It may thus be argued that a religious person may insist on swearing an oath where a pledge as to their sincerity is required in telling or attesting to the truth. The swearing of an oath may therefore be viewed as a right implicit in the realisation of a person’s religious freedom. Conversely, a person may also choose not to swear an oath in signalling a commitment to the truth, be it due to religious or secular reasons; therefore, the right to swear an oath includes the right not to swear an oath.

People should be allowed to swear an oath in accordance with their own

---

De Villiers Bewysreg en Litigasietegnieke (Studiemateriaal) (1999) 12 refers, in discussing the history of the law of evidence, that the taking of an oath in Ancient times sufficed in establishing a person’s innocence as it was thought to be unthinkable that someone could lie under oath, the so-called “suiveringseed”. Reference is also sometimes made to an oath whereby the person swearing it curses themselves, see Nel Eedaflegging by Getuienislewing in die Suid-Afrikaanse Reg (1974 LLD thesis, Potch) 3 4 (in the Bible and Roman Dutch law) 5 (in Roman law) 7 (the denial of the oath as a curse in Anglo-American law). See also Nel 33ff regarding the historical development of the oath in Roman Dutch law as well as regarding the position of the oath in South Africa prior to 1910 68ff.

314 See Wulfsohn (n 51) 96; Nel (n 314) 1 2.
315 The taking of an oath may thus not be seen loose from religion, see Nel (n 314) 2.
316 In other words, religious adherents may not only harbour beliefs but may also express such beliefs by wishing to state their commitment to the truth by means of an oath where a solemn commitment may be required of them, see Ch 3.5.4, 3.5.5. The swearing of an oath may thus not be abolished as this would limit the manifestations of some people’s religious expression. Interestingly, a request was made (but not discussed or heeded) at the 1960 National Party Congress to abolish the oath in courts, see Nel (n 314) 24. The 1965 Congress of the Suid-Afrikaanse Vrouefederasie called on the government to revise the swearing of an oath in courts; however, the 1964 Synod of the Gereformeerde Kerke called for the oath to take its rightful place in the administration of justice, see Nel 26 27.
317 See Ch 3.5.1. Such a person may then choose to pledge or affirm a commitment to telling or attesting to the truth. For instance, the Constitution, in schedule 2 (see also s 48 95 107 135), provides not only for an oath of office but alternatively for a “solemn affirmation”. Some people choose to refuse the swearing of an oath on religious grounds, such as the Mennonites, see Buckingham (n 1) 34; see also Kommers (n 55) 453; BVerfGE 33 23 (1972). Someone may
faith in order to realise the full expression of their religious liberty and also to ensure that they view the oath as binding on their conscience. Nevertheless, situations may arise in which the right to swear an oath may be limited.

3.7.2.4 The Right to Privilege

thus not be coerced into swearing an oath or a particular oath contrary to their beliefs, see Krishnaswami (n 61) 42; Shelton and Kiss (n 56) 562; An oath may also not be used as a religious test in order to allow only those willing to swear it to hold public office, see Torcaso v Watkins (n 55) 491. The Constitution of Botswana (1966) 11(4) states that: “No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief” (the Constitutions of Lesotho s 13(4); Swaziland s 11(4); Zimbabwe s 19(4); Zambia s 19(4) contain the same section). It may also be argued that the right to swear an oath could be viewed as concomitant with international law as numerous instruments ban coercion in religious matters, thereby banning coerced affirmations in lieu of oaths, or the swearing of a specific oath abhorrent to some, see the International Covenant on Civil and Political Rights (1966) art 18(2); Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(2).

A witness in civil proceedings, for instance, is allowed to swear an oath “in the form that most clearly conveys to him the meaning of the oath and which he considers to be binding on his conscience”, Van der Vyver (n 205) par 237 see also the Civil Proceedings Evidence Act 25 of 1965 s 39(2). The Criminal Procedure Act 51 of 1977 s 162(1), however, only allows an oath similar to the Christian and possibly the Muslim oath in criminal proceedings, see also Van der Vyver par 246. It is suggested that the Act be amended to reflect the civil law position by recognising religious diversity in the swearing of an oath in order not to offend the right to swear a religious oath and the right to equality (s 9) by only accepting one oath to the exclusion of all others. The following may also be noted, the Constitution of Iran (1979) s 67(1) prescribes a Muslim oath to be sworn by members of the Assembly, but also provides that “[m]embers belonging to religious minorities will swear by their own sacred books while taking this oath” in s 67(2), while the Constitution of Greece s 59(1) prescribes a Christian (possibly Orthodox) oath for members of Parliament but also provide for religious diversity regarding the swearing in of members belonging to other “religions or dogmas” in s 59(2).

For example, the old Arab tradition that required an oath to be sworn over seven stones sprinkled with the blood of the contracting or concerned parties, see Nel (n 314) 14. Such a tradition may be limited in order to protect human dignity and to preserve the dignity of the court proceedings. The right may also be limited should a copy of a holy book not be found (or may not be found within a reasonable time) whereby a witness may wish to swear by requiring that the witness swear without it or affirm the truth of the evidence to be rendered. Other practices may be limited which may cause cruelty to animals or also disrupt the dignity and order of the court, for example the slaughtering of an animal or the breaking of china (an old Chinese tradition) to seal an oath.
Privilege refers to the lawful withholding by a person or institution of relevant information from a court.\(^{321}\) Such a situation would have to warrant compelling reasons to justify depriving a court of relevant information. Traditionally, few instances of privilege have been recognised.\(^{322}\) For instance, privilege does not apply to the so-called “priest-penitent” relationship; therefore, a minister or other “religious adviser” may not withhold relevant information from a court made known to them in the course of their duties.\(^{323}\) However, numerous jurisdictions have identified the need for such a privilege.\(^{324}\)

The traditional stance, as outlined, has to be re-evaluated in light of the new legal order predicated on constitutional supremacy.\(^{325}\) It is submitted that the right to freedom of religion necessitates the recognition of an implied right of religious privilege, in both civil and criminal matters, in order to ensure the full realisation and

\(^{321}\) See De Villiers (n 314) 135; Freedman “A privilege for members of the clergy: Smit v Van Niekerk reconsidered” 1997 SACJ 74.

\(^{322}\) For example, the relationship between legal representative and client. The privilege protects the client by not allowing the legal representative from disclosing communication between the two parties without the consent of the client, with regard to the giving of legal advice or related to litigation, see De Villiers 137; Criminal Procedure Act 51 of 1977 (the Act) s 201. The reason for the privilege is to allow for open and frank discussion between representative and client in order to aid the administration of justice, see Schmidt Bewysreg (1989) 518. Marital privilege is also recognised, see De Villiers 135ff; the Act s 198.

\(^{323}\) Such a privilege is not expressly recognised by the Criminal Procedure Act 51 of 1977 (the Act). Van der Vyver “Die swygreg van kerkleraars” 1977 THRHR 217 220 opines that such a privilege may not be constructed from s 252. Smit v Van Niekerk 1976 (4) SA 293 (A) (confirming Smit v Van Niekerk 1976 (4) SA 304 (OKA)) has found that public policy grounds do not exist justifying the creation of such a privilege. S 202 allows for privileged relationships to be recognised if so required by public policy considerations, see Freedman (n 321) 79; Van der Vyver 221 regarding the decision. S 206 of the Act recognises privileged relationships at common law, namely English common law as applied on 30 May 1961. However, English common law does not recognise religious privilege, see Tapper Cross and Tapper on Evidence (1995) 496; Zeffert “Confidentiality and the courts” 1974 SALJ 432 444; Van der Vyver (n 323) 222ff. Schmidt (n 322) 518 observes that the privilege is also not recognised in civil matters, see also Van der Vyver 222. Therefore, the decision in Wissekerke v Wissekerke 1923 PH F5 (T) recognising religious privilege in divorce proceedings is to be disregarded, see Ritchings “Privilege of religious advisers” 1974 SALJ 167; Zeffert 444; Van der Vyver 222.

\(^{324}\) Jurisdictions would include the United States, see Van der Vyver (n 323) 225ff; Tapper (n 323) 496; Freedman (n 321) 79 and Canada where a case by case approach is followed to determine if privilege should be granted, except in the province of Newfoundland which recognises blanket religious privilege, see the Evidence Act RSN 1990 c E-16, quoted in Buckingham (n 1) 335. An Irish court has also recognised religious privilege (with regard to a Catholic priest) in Cook v Carroll [1945] IR 515, quoted in Hogan (n 71) 57.
effective protection of religious liberty.\textsuperscript{326} Confessing to a priest or taking a cleri-
yman into one’s confidence for religious guidance or advice may be seen as a religious or religiously motivated act; in other words, the manifestation of religious belief that is to be protected like all other manifestations of religious belief and devotion.\textsuperscript{327} The denial of religious privilege would merely discourage people to approach religious leaders in order to confess or to seek guidance and advice or even lead to religious leaders discouraging confessions thereby weakening the positive role that religious guidance can play in mending a broken and crime-ridden society by weakening the important relationship between society and religion.\textsuperscript{328}

The right to privacy should also be viewed as an important contextual right that protects the confidentiality of communications, for example confessions.\textsuperscript{329} It may

\begin{footnotesize}
\begin{itemize}
\item[325] S 2. See also Freedman (n 321) 75.
\item[326] Religious privilege could be recognised by means of express legislation, which is highly unlikely, or rather by developing the common law in terms of s 39(2) for it to reflect the Constitution to apply religious privilege to civil law matters to utilise s 206 of the Criminal Procedure Act 51 of 1977 (the Act) that recognises the common law in criminal matters. A person not wishing to reveal confidential communication may also claim a “just excuse” in terms of s 189(1) of the Act; the Constitutional Court held regarding the just excuse that the compulsion or punishment of unwilling witnesses may only be allowed if their rights (such as the right to religious privilege) may be limited to justify the compulsion or punishment should they refuse to testify, see \textit{Nel v Le Roux NO} 1996 (1) SACR 572 (CC), 1996 (4) BCLR 592 (CC), 1996 (3) SA 562 (CC); Freedman (n 321) 76 77. Authors such as Van der Vyver (n 323) 232; Zeffert (n 323) 445; Freedman (n 321) \textit{passim}; Buckingham 358ff have also advocated that religious privilege be recognised in South African law, albeit in different forms.
\item[327] The right to freedom of religion does not only extend its generous protection to beliefs but also to acts motivated by and founded in such beliefs, such as the seeking of guidance and confessing of wrongdoing, see Ch 3.5.4, 3.5.3. Buckingham (n 1) 358 also states that confession and guidance ought to be viewed as practices enjoying constitutional protection. See also Freedman (n 321) 80 who notes the American argument supporting religious confidentiality because “all persons have a fundamental right to exercise their religious beliefs freely”.
\item[328] Buckingham (n 1) 358 advances similar arguments in this regard, stating for instance that “[p]erpetrators of crimes can receive spiritual direction from clergy and be encouraged to make amends” and “[i]f courts do not recognise privilege for religious leaders, it is likely that these leaders will simply discourage confidences from their adherents”. Similar arguments are also advanced in the United States as the “clergy-communicant” relationship is said to provide psychological and spiritual sustenance contributing to a healthy society as problems may be discussed frankly and in complete confidence, see Freedman (n 321) 80. It is also important to note that some religious teaching, such as a Catholic sacrament, require their adherents to confess to their sins; the denial of privilege would only serve to weaken important precepts of such religions and may even bring the judicial system into disrepute in it having to prosecute unwilling priests for following their religion and refusing to break the sanctity of the confession, see Buckingham 354; Freedman (n 321) 81.
\item[329] S 14(d). See Freedman (n 321) 81 who notes a similar American argument.
\end{itemize}
\end{footnotesize}
also be argued that religious privilege may be deduced from the national and international prohibition on coercion in religious matters as the latter may be construed to include coercion to reveal confidential communication contrary to religious belief. It may be argued that freedom of religious choice should be granted to the person confessing to or taking the clergyman into their confidence; in other words, the “confessor” has the right to waive religious privilege allowing the religious adviser to reveal what was communicated in confidence to them – akin to the position regarding legal privilege. It may also be argued that situations may arise where the clergyman consulted would have to be afforded freedom of religious choice in deciding to maintain the confidence even though the confessor may waive religious privilege, as the clergyman may be bound by the faith concerned not to reveal any confidential communication under severe ecclesiastical penalty.

The right to religious privilege, however, may be limited in order not to frustrate the proper and effective administration of justice. The right may thus not be exercised

---

330 Regarding national law, it may be observed that the Constitutional Court viewed coercion in religious matters as an infringement of the right to freedom of religion that had to be justified, see S v Lawrence (n 1) par 97 104. Regarding international law, the International Covenant on Civil and Political Rights (1966) art 18(2) prohibits coercion in the maintenance and adoption of a religion; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(2) prohibits coercion that would impair a person’s choice to have a religion of their choice. See also Krishnaswami (n 61) 44 45.

331 It should be kept in mind that the clergyman and not only the religious follower may bear the right to freedom of religion; consequently, situations may arise that could call for the right of the clergyman to choose to divulge or not to divulge the confession, to be respected. Van der Vyver (n 323) 230 observes that uncertainty exists in the Roman Catholic Church whether a priest may break the confidence even if the confessor gave the priest permission to do so. Buckingham (n 1) 354 notes that historically a priest was subject to excommunication for breaking the confidence. Krishnaswami (n 61) 45 opines that no clergyman who receives information in confidence in accordance with their religion should be forced to reveal that information; therefore, should a priest receive information and that religion prescribes that the information must remain for ever secret the priest may claim the right to religious privilege, obviously subject to constitutional limitation.

332 The proper administration of justice is usually advanced as a reason for denying the existence of religious privilege; however, the proper administration of justice should be viewed as a reason to limit religious privilege rather than deny its existence, as its denial may, in light of the above, be considered unconstitutional. Van der Vyver (n 323) 226 quotes the requirements for religious privilege in the United States, it is suggested that these “requirements” may serve as examples of limitations of blanket religious privilege, namely: (i) the communication must be inspired by religious motives and not mere conversation or discussion; (ii) the person confessed to ought
without constitutional limitation as an intolerable situation may be created whereby all forms of evidence will be out of reach of the courts creating tension between the need for religious confidentiality and civil and criminal justice.

3.7.3 FREEDOM OF RELIGIOUS OBSERVANCE

3.7.3.1 The Right to Observe Religious Personal and Family Law

It has been explained and advanced that the right to freedom of religion does not only protect one’s conscience but also extends equal protection to acts motivated by religion. Religious freedom could thus be viewed as providing protection to the manifestation and observation of religion in its manifold guises. Many religions prescribe laws to which their followers ought to adhere in order to satisfy the requirements of that specific religion. For instance, a Muslim is supposed to marry and divorce in accordance with the tenets of Islamic law. It could be argued that the Constitution also protects the expression of religious law and related fields as constituting religious expression much like it protects a christening or funeral service. Section 15(3), however, imposes a limitation on the right by stating that such systems of law may be recognised by means of legislation. Recognition should also be consistent with the Constitution; in other words, the limitation clause does not create a claw-back clause protecting such systems, once recognised,

---

333 See Ch 3.5.4, 3.5.5.
334 See Malherbe 1998 (n 25) 697; Ch 3.4.
335 See Malherbe 1998 (n 25) 697; Ch 3.4, 5.5.3.
The right to freedom of religion, therefore, is realised by the enactment of legislation recognising systems of religious personal and family law. It should be noted though that judicial recognition merely renders legal force and effect, for instance, to a religious marriage ceremony. In other words, a person may freely choose to conduct and participate in such ceremonies even though judicial recognition and regulation may be absent. Judicial intervention in terms of section 15(3) does not “allow” such acts but merely attaches legal consequences to their performance. The right to practise religious law, therefore, would allow bearers of the right to choose to adhere to religious law, even though the objective law may not recognise the validity of such performances. Thus, a person professing a certain faith may choose to submit to a marriage in terms of religious law leading to the non-recognition by the state of that marriage should a civil ceremony not precede or follow the religious ceremony. Such a person may also not expect the state to recognise such an act in the absence of legislation foreseen by section 15(3). The children born from the union would thus be viewed as illegitimate. For example, there is thus a right to marry in accordance with religious law but not a right to have the marriage automatically recognised. Lobbying would have to take place in order to convince legislatures to recognise religious practices not yet so recognised.

3.7.3.2 The Right to Worship and Observe Religious Rites

---

336 S 15(3)(b). See Malherbe 1998 (n 25) 697; Ch 3.4, 5.5.3. It could also be observed that certain practices may not be recognised such as the *talaq* or Islamic divorce whereby a husband may decide to divorce his wife by uttering a set formula to her on a number of occasions. It could be argued that such a divorce would constitute unfair discrimination to the woman concerned and that it may be to the detriment of society as marriages may be terminated too easily, thereby possibly weakening a building block of society. Interestingly, art 9 of the European Convention for the Protection of Fundamental Rights and Freedoms (1950) is not violated where a country disallows all forms of divorce, see *Johnston v Ireland* 9 EHRR 203 (1986). Such a position would not be tenable in South Africa as a wide interpretation should be followed to the interpretation of religious freedom, thereby including the possibility of divorce concomitant with a specific religion, but only recognising such a divorce at law in terms of s 15(3).

337 See Du Plessis and Corder (n 1) 157; Du Plessis 1994 (n 1) 164.
Freedom of religious observance entails, as a manifestation of religious devotion and will, the right to practise religion by means of worship and the observance of rites. Such recognition would be concomitant with both foreign and international law. Therefore, bearers of the right may choose to exercise their right either individually, collectively or institutionally. For instance, an individual may choose to worship or conduct rites in solitude or they may choose to associate with like-minded people, such as during a religious service, in order to worship and conduct rites. The right may also be exercised institutionally, for example, where a church may choose to announce or to encourage worship by the tolling of bells or where an imam calls the faithful to prayer. Bearers may also choose to exercise the right in private or in public. For example, bearers may choose to worship at home or at ecclesiastical venues, as well as in public places and buildings. With

338 Chaskalson P, in S v Lawrence (n 1) par 92, agreed with a Canadian definition of the right to freedom of religion that expressly included the right to worship. See also Dinstein (n 61) 150ff; Shelton and Kiss (n 56) 563; Krishnaswami (n 61) 31 32. See also the views of Sachs (n 51) 44; Malherbe 1998 (n 25) 680.

339 For example, the Constitution of Singapore (1963) s 15(1) recognises the right to practise religion; the Constitution of Slovakia (1993) s 24(2) recognises the right to observe religious rites. The Indian Supreme Court has acknowledged, in The Commissioner HRE Madras v Sir LT Swamiar SCR 1005 (1955) 1023 1024, that religious liberty allows a religion to prescribe “rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion”, quoted in Krishnaswami (n 61) 19. Alen (n 61) 265 notes that Belgian constitutional law prohibits coercion in matters of worship or in the performance of religious rites, thereby recognising the right to choose to observe religion or not to observe religion. German law recognises that the exercise of religion, inter alia, includes “worship and practices such as the observance of religious customs like Sunday services”, as well as the “reception of sacraments” and the tolling of church bells, see Kommers (n 55) 446; BVerfGE 24 236 (1968). See also Labuscaghne (n 72) 179 180 regarding Dutch provisions regulating the summons to prayer and the tolling of church bells.

340 The Universal Declaration of Human Rights (1948) art 18 recognises the right to manifest religious beliefs by means of worship and observance. The International Covenant of Civil and Political Rights (1966) art 18(1) contains similar guarantees, so too the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(1) see also art 6. See also Dinstein (n 61) 150ff for a discussion of the International Covenant in this regard.

341 See Ch 3.5.2.

342 See also Kommers (n 55) 446; Shelton and Kiss (n 56) 563.

343 See also Kommers (n 55) 446.

344 See Ch 3.5.5 regarding the private and public element of religious liberty.
regard to the latter, section 15(2) expressly recognises the right to conduct religious observances at state and state-aided institutions.\footnote{See Ch 3.3 regarding the scope of s 15(2).}

The right to worship and observe religious rites would also include the right to choose the form of worship and type of rites to be conducted and observed, in order to render meaning to the exercise of the right and to allow maximum freedom in the regulation of own affairs.\footnote{See Ch 3.7.1.2.} For example, bearers of the right may choose to pray or to call upon the departed in exercising the right. Religious institutions may also choose to call upon their adherents to receive sacraments and to recite litanies in order to fulfil the tenets of the respective religion being practiced.\footnote{See also Kommers (n 55) 446.} Bearers may also choose to exercise the right or may choose not to exercise the right, or they may only choose to exercise the right in a particular fashion, thereby denying other rites incompatible with their religious tenets and beliefs.\footnote{See Ch 3.5.1 regarding the right to exercise or not to exercise a right.} Bearers of the right, therefore, should be free to decide and fix liturgy, such as the psalms or hymns to be sung or when the lesson should be read in accordance with their own beliefs, interpretations, teachings and texts.\footnote{Religious adherents and organisations must thus be free to observe rituals of “transformation”, “aversion”, “scapegoating” and of “restoration” to express their religious beliefs and in order to fulfil the requirements of their faith, see Fenn “Liturgy” in Wuthnow (Ed) \textit{The Encyclopedia of Politics and Religion} vol 2 (1998) 477ff. The right to worship and observe rituals would thus extend its protection to the fact that the Catholic faith prescribes adorned and ritualistic services, whereas Protestant services are usually unadorned and simplistic. Religious organisations should also be free to prescribe the texts to be used by their adherents at religious services and other observances. For instance, the Catholic Bible may be chosen instead of Protestant versions, or the 1933 Afrikaans translation of the Bible may be preferred instead of the 1983 translation.}

Bearers of the right to worship and observe rituals may also decide the form of observance and ritual, if any, to be conducted before death, such as Catholic last rites; or after death, such as a Christian funeral service, or burial in consecrated

\footnote{See Ch 3.3 regarding the scope of s 15(2).}
ground as opposed to a Hindu cremation. In other words, persons may decide to have their body honoured or disposed of in religious manner, thereby observing religious tenets, or they may choose not to observe any religious ritual.

The right to worship and observe rituals would have to include the right to manufacture and produce or procure items necessary for such conduct, such as holy books, communion wine and candles or robes. Such a provision would aid the full and meaningful realisation of religious liberty thereby empowering bearers of the right to express their beliefs properly.

Important contextual rights that amplify and contribute to the right to worship and observe rituals and rites include the rights to freedom of expression and freedom of association. It may also be noted that bearers of the right may not be coerced into performing rituals and observances contrary to their conscience and views.

---

350 See also the discussion and proposals by Krishnaswami (n 61) 34 35 64. Wulfsohn (n 51) 226 227 observes that religious funerals are allowed but that they are not compulsory. Dutch law also states that “lijkbezorging geschiedt overeenkomstig de wens of de vermoedelijke wens van de overledene, tenzij dat redelikerwijis niet geveergd kan worden” quoted in Labuschagne (n 72) 181 note 42.

351 See Shelton and Kiss (n 56) 563; Krishnaswami (n 61) 32 34 64. For example, Iran prohibits the sale, production and consumption of alcohol under severe penalty; however, Iranian Armenian Christians are allowed to produce alcohol for their own consumption, see Simpson and Shubart Lifting the Veil (1995) 332.

352 S 16(1)(b) that allow the freedom to receive and the freedom to impart ideas, in this regard, the conveyance of a religious message by means of worship and ritual. See also Ch 3.6 regarding contextual rights.

353 S 17. The right would allow religious adherents to congregate (or not to congregate) to worship or to perform rituals. Carpenter (n 1) 685 observes that the right to freedom of association allows bearers of freedom of religion the right to worship with whomever they please. See also Ch 3.6 regarding contextual rights.

354 See Ch 4 regarding the duties of parties bound by the right to respect the unfettered exercise of the right by the bearers, thereby disallowing coercion in observance or non-observance. Alen (n 61) 265 notes with regard to Belgian law that “[n]o person may be forced to participate in any way in the acts of worship or the rites of any religion”. Benito, quoted in Lerner (n 54) 529, identifies Barbados, Germany, Jamaica, Mauritius, Morocco, Pakistan, Spain, Switzerland and Turkey as countries where people are coerced “to participate in or not b participate in, ceremonies of a religion or belief not of one’s own”. The Constitution of Luxembourg (1868) s 20 expressly holds that “[n]o one may be forced to take part in any way whatsoever in the acts and ceremonies of a religion or to observe its days of rest”.

136
The right, however, may be limited in accordance with the limitation provisions. The right to worship and observe religious rites may arguably be limited in order to protect order, public safety and health.\(^{355}\) For example, religious observances may be limited if the place of observance, such as a condemned building, or the observance itself, such as bloodletting, may endanger the health of the observers or others. Furthermore, section 15(2) provides for the specific limitation of religious observances conducted at state or state-aided institutions.\(^{356}\) Religious observances may be conducted at such institutions provided that the observances follow rules made by the appropriate public authorities and provided that the observances are conducted on a free and equitable basis.\(^{357}\) An important consideration in the limitation of the right would be the fact that different religions ought to be treated equally in imposing limitations on their forms of worship and observance. For example, it would not suffice calling one religious meeting an “address” but calling another a “sermon” in order to limit one more than the other.\(^{358}\)

3.7.3.3 The Right to Observe Religious Days of Rest and Holy Days

The right to freedom of religion entails the manifestation of religious devotion and belief.\(^{359}\) Religious belief may thus be expressed in practice.\(^{360}\) It may be argued

---

\(^{355}\) All limitations must conform to the general limitation clause (s 36), see Ch 5. The International Covenant on Civil and Political Rights (1966) art 18(3) allows for its guarantees pertaining to the manifestation of religion or belief to be limited in the protection of order, health, public safety and in protecting the fundamental rights of others. See also Dinstein (n 61) 151.

\(^{356}\) See Ch 3.3, 5.5.2. See also Malherbe 1998 (n 25) 695ff.

\(^{357}\) S 15(2)(a)-(c). See also Ch 3.7.1.1.

\(^{358}\) See Rhode Island v Fowler (n 212) 70. In casu some religions were allowed to freely conduct religious exercises in a park, whereas another religion was prohibited from doing so without good reason. See also Ch 3.5.5.4, 3.5.5. See also Freedman THRHR (n 1) 672 673; Malherbe 1998 (n 25) 680; Nserek (n 86) 846 847.
that such expression could be evidenced by the observance of religious days of rest and holy days. This particular element of religious freedom finds support in international law. Religious adherents, therefore, may individually, collectively and institutionally honour and commemorate days and times of special religious significance concomitant with the tenets and interpretation of their faith. They may thus participate in special or normal activities required by their faith. The right, therefore, ought to extend its protection to the organisation and preparation of such days and times in order to ensure the success of the required religious observances. For example, an Easter service or the coming of Ramadan may be advertised by a religious organisation to encourage the faithful to express devotion and heed particular religious requirements.

However, difficulty may arise in a multi-faith and multi-cultural society as not all religions have the same number of religious days and festivals. Furthermore, such days and festivals do not always correspond in duration and date. Extreme differences may also exist within a particular religion with regard to the observation of religious occasions. For example, different Christian denominations celebrate Christmas on different days and not all denominations celebrate the same festivals. Confusion may also be compounded by the fact that not all religious adherents follow the same calendar. Religious pause days also differ, ranging from Friday to Sunday.

360 Chaskalson P, in S v Lawrence (n 1) par 92, accepted a Canadian definition of religious liberty that embraces the right “to manifest religious belief by worship and practice”.

361 The Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion or Belief (1981) art 6(h) stipulates that one may “observe days of rest and … celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief”. International support may also be deduced from guarantees allowing the manifestation, practise and observance of religion, see the Universal Declaration of Human Rights (1948) art 18; International Covenant on Civil and Political Rights (1966) art 18(1); European Convention for the Protection of Fundamental Rights and Freedoms (1950) art 9(1); African Charter on Human and Peoples’ Rights (1981) art 8. See also Dinstein (n 61) 150.

362 See Ch 3.5.2 regarding the individual, collective and institutional element of religious liberty. Sachs (n 51) 44 observes that religious liberty should entail the following in this regard: “If there are Muslims who wish to attend mosque on Fridays, and Jews who refuse to ride on a bus on
Questions arise with regard to official differentiation in the recognition of pause days and public holidays. For example, employees of a chain of stores were convicted for contravention of the Liquor Act 27 of 1989 (the Act). Mrs Solberg had sold wine on a Sunday although her grocers’ wine licence forbade the selling of wine on a Sunday; she appealed her conviction averring that the prohibition infringed her right to freedom of religion as she had been coerced into observing a Christian practice. Chaskalson P noted that:

“I am not unmindful of the fact that constraints on the exercise of freedom of religion can be imposed in subtle ways and that choice of Christian holy days for particular legislative purposes may be perceived to elevate Christian beliefs above others; and that as a result adherents of other religions may be made to feel that the State accords less value to their beliefs than it does to Christianity.”

The provision in question, however, did not prohibit grocery sales on a Sunday and did not “force people to act or refrain from acting in a manner contrary to their religious beliefs”. Chaskalson P also observed that Sundays are observed as days of rest or pause due to convenience and practice and not necessarily due to religious reasons – the day has thus taken on a secular as well as a religious character. No evidence of coercion impairing the freedom of religion of the appellant could thus be found as she had not been forced to observe a religious day as such but rather a national day of rest. Therefore, the link between the prohibition of the sale of liquor and Sundays as the Christian Sabbath (and other

---

363 Mrs Lawrence was convicted for selling alcohol on a weekday after closing hours, mr Negal sold liquor other than what the licence provided for, see S v Lawrence (n 1) par 2.
364 See S v Lawrence (n 1) par 2 83 85.
365 S v Lawrence (n 1) par 93.
366 S v Lawrence (n 1) par 94.
367 S v Lawrence (n 1) par 95 96.
368 S v Lawrence (n 1) par 97 104.
Christian days) was found too weak to infringe upon the Constitution – thereby causing the dismissal the appeal.\textsuperscript{369} O’Regan J, however, found that the prohibition had the effect of endorsing Christianity, by choosing days significant to Christians, but not other religions, thereby infringing the right to freedom of religion by favouring one religion over others.\textsuperscript{370} The infringement was also found not to have withstood constitutional muster, as the legislation did not achieve its purpose although the endorsement of Christianity was not “severe or egregious”.\textsuperscript{371} Sachs J also observed that the mere fact that Sundays have become secularised days of rest and the fact “that the day coincides with a day that has its origins in Christian practice cannot automatically mean that it continues to serve the sectarian purpose of compelling observance of that day as a Christian day of rest”.\textsuperscript{372} However, the prohibition did involve an endorsement of Christianity even though the endorsement may not have been powerful.\textsuperscript{373} The infringement was found to be constitutional as the purpose of the Act was the control of liquor sales and not the enforced observance of Christian days – thereby infringing marginally upon religious liberty.\textsuperscript{374} The infringement was therefore saved from invalidation.\textsuperscript{375}

The interpretative approaches of Sachs and O’Regan JJ are to be welcomed as they conform to the wide approach advocated in this study.\textsuperscript{376} It is submitted that Sachs and O’Regan JJ did not err in finding that religious liberty had been infringed as the state had identified more with some Christian denominations than with other religions and Christian denominations by deciding on a pause day coinciding with Sundays. The right to state non-identification had thus been infringed as the state did not treat all religions and denominations equally in deciding on a pause day.\textsuperscript{377}

\textsuperscript{369} \textit{S v Lawrence} (n 1) par 105 107 108.
\textsuperscript{370} \textit{S v Lawrence} (n 1) par 125 126 129.
\textsuperscript{371} \textit{S v Lawrence} (n 1) par 13
\textsuperscript{372} \textit{S v Lawrence} (n 1) par 156 see also 158.
\textsuperscript{373} \textit{S v Lawrence} (n 1) par 159 160.
\textsuperscript{374} \textit{S v Lawrence} (n 1) par 172 174.
\textsuperscript{375} \textit{S v Lawrence} (n 1) par 177.
\textsuperscript{376} See Ch 1.3.
\textsuperscript{377} See Ch 3.7.1.1.
Sachs J, however, correctly found that the identification with Christianity had been marginal and symbolic thereby justifying the mild intrusion upon the right to state non-identification. For example, Sundays (and the other Christian days mentioned by the Act) have become highly secularised and are internationally recognised as days of rest and not necessarily only as religious days.\textsuperscript{378} Turkey, for instance, has an overwhelming majority of Muslims yet decided on Sunday as the public day of rest rather than the Muslim equivalent. The regulation of liquor sales thus attempted to reduce liquor consumption on such days in order to promote an orderly society rather than to appease sensitive Christians and coerce non-Christians. The Act, however, would have fallen foul of the Constitution had its sole or primary aim been the recognition and enforcement of a religious observance, such as the Canadian Lord's Day Act foresaw.\textsuperscript{379} It may be argued that businesses closed on days of religious rest not recognised by the state may suffer economic loss if their activities were to be curtailed on recognised days; in other words, the practising of one’s faith may lead to financial loss by the observance of two days of rest. A possible solution would be the exemption of such businesses from normal regulation of economic activity pertaining to recognised days of rest.\textsuperscript{380} A less restrictive means of limiting the exercise of religious freedom would then be employed while still pursuing the secular aim of encouraging a day of rest.\textsuperscript{381}

### 3.7.3.4 The Right to Observe Dietary Practices

Religions often prescribe dietary observances. For example, Jews may insist on kosher food, whereas Muslims may prefer halaal food. Such dietary prescriptions are forms of religious observances and therefore religious practices deserving of

\textsuperscript{378} The American Supreme Court has also recognised that “Sunday Closing Laws” serve a secular rather than a religious function by enforcing a day of pause, see \textit{McGowan v Maryland} 366 US 420 (1960) 431ff.

\textsuperscript{379} The Act was also struck down due to its enforcement of a religious observance, see \textit{R v Big M Drug Mart} (n 80). See also Hogg (n 14) 948; Buckingham (n 1) 190.

\textsuperscript{380} See \textit{R v Edwards Books and Arts} [1986] 2 SCR 713; Hogg (n 14) 948ff; Buckingham (n 1) 191ff.
constitutional protection. In other words, the tenets of a religion are subscribed to by
the observance of dietary laws.\textsuperscript{382} The right to observe religious tenets and
prescriptions enjoys protection in foreign\textsuperscript{383} and international law.\textsuperscript{384} However, the
right to observe dietary laws does not only extend to the consumption of approved
foods but also to the refusal to partake of foods or drink disapproved of by one’s
religion.\textsuperscript{385} A variety of Protestant denominations also choose to avoid pork while
some Catholics choose not to eat meat on Fridays. It may also be argued that the
act of religious fasting is protected. For example, a Muslim may choose to follow
Islamic religious prescriptions and fast during the month of Ramadan.\textsuperscript{386} The right
should obviously also extend to the preparation and acquisition of approved foods
and drink in order to enable religious adherents to practise dietary laws.\textsuperscript{387} It may be
argued that the preparation of food extends to the ritual slaughter of animals in
accordance with religious requirements to render meat acceptable to a particular
faith.\textsuperscript{388} The right to bodily and psychological integrity of the person would be an
important contextual right in this regard as it protects the right of the individual to
control their own body.\textsuperscript{389} The right to privacy would also protect the right of the

\textsuperscript{381} S 36(1)(e). See Ch 5.
\textsuperscript{382} See Ch 3.5.4, 3.5.5 regarding the manifestation of religion.
\textsuperscript{383} The Constitution of Zambia (1991) s 19(1) guarantees the right to manifest religion and observe
religion. See also the identical wording in the Constitution of Belize (1981) s 11(1). The
Constitution of Guatemala (1985) s 36 guarantees the observance of religion.
\textsuperscript{384} The Universal Declaration of Human Rights (1948) art 18; International Covenant on Civil and
Political Rights (1966) art 18(1); Declaration on the Elimination of All Forms of Intolerance and
of Discrimination Based on Religion or Belief (1981) art 1(1) guarantee the right to manifest
religion by means of observance. See Dinstein (n 61) 150 who deduces the right to observe
dietary practices from the International Covenant. See also Krishnaswami (n 61) 36.
Labuschagne (n 72) 178 recognises that the ritual slaughter of animals falls within the ambit of
“observance” as contemplated by the International Covenant.
\textsuperscript{385} See Ch 3.5.1.
\textsuperscript{386} Bulbulia 1985 (n 46) 218 notes that “[d]uring the month of Ramadan [a Muslim] practises self
restraint to discipline his impulses by fasting every day from early dawn to sunset”.
\textsuperscript{387} See art 6(c) of the Declaration on the Elimination of All Forms of Intolerance and of
Discrimination Based on Religion or Belief (1981) which states that religious liberty includes
the right to acquire and to use materials related to the rites or customs of a religion.
\textsuperscript{388} See Labuschagne (n 72) 177ff regarding the slaughter of animals in accordance with religious
prescriptions in Dutch law. Labuschagne 178 recognises that the ritual slaughter of animals
falls within the ambit of “observance” as contemplated by the International Covenant on Civil
\textsuperscript{389} S 12(2)(b). See also Rautenbach (n 3) 199ff; Rautenbach and Malherbe (n 52) 365 366.
individual to make decisions “in respect of the conduct and interests protected by other rights”\textsuperscript{390} thereby enabling the bearer of the right to make decisions regarding the observance of religious dietary laws.

The state should also be mindful of its constitutional duty to respect, promote and fulfil fundamental rights.\textsuperscript{391} For example, the argument may be advanced that the state, where possible, ought to cater to the dietary needs of patients, prisoners and detainees at state institutions. The affected parties should be allowed to prepare their own food or to be supplied therewith by their next of kin or religious brethren should the fulfilment of its duty prove to be too onerous for the state.\textsuperscript{392}

Situations may arise calling for the limitation of the right to observe dietary practices. For example, certain acts or methods of ritual slaughter may be considered cruel and inhumane thereby justifying the limitation of the right in order to alleviate the suffering of animals concerned. Such a limitation could take the form of an absolute ban on certain methods and practices or their modification to ensure a more humane method of slaughter. The health of society should also be considered in limiting the right; for example, the slaughter of animals within city boundaries may be confined to abattoirs to promote general health and hygienic conditions.\textsuperscript{393}

3.7.3.5 The Right to Cultivate a Religious Appearance

Religious liberty includes the right to cultivate a religious appearance in order to follow the dictates of a particular religion.\textsuperscript{394} The right is also recognised in

\textsuperscript{390} Rautenbach and Malherbe (n 52) 367.
\textsuperscript{391} S 7(2).
\textsuperscript{392} See also Krishnaswami (n 61) 36.
\textsuperscript{393} See s 36(1)(b) and Ch 5.
\textsuperscript{394} Nsereko (n 86) 846 notes, with particular regard to Botswana, that religious liberty includes the manifestation of belief by \textit{inter alia} the growing or shaving of a beard and the apparel that one wears.
and international law. Religious requirements, therefore, may be observed by adhering to a dress code or by the growing of a beard or the fashioning of hair in a particular style. Male Sikhs may thus choose not to cut their hair and to wear a turban, whereas male Muslims may choose to grow a beard and Muslim women may prefer to be veiled. Churches and other religious organisations may also require attendants at services to dress modestly or to dress in accordance with a particular code. In other words, the right has an institutional dimension that allows religious organisations, such as mosques, the right to require compliance with dress codes or dictates within their buildings and places.

However, situations may arise calling for the limitation of the unbridled cultivation of a religious appearance. For example, the cultivation of an appearance may be limited in the pursuit of an important purpose, such as the need for discipline and uniformity. Uniformed forces may require the restriction of religious apparel and appearance in order to mould a disciplined force capable of the promotion of security and capable of acting as a deterrent. A school may also impose dress codes to promote discipline and instil a sense of pride in the institution. However, the relationship between the limitation and the purpose of the limitation should be thoroughly considered. It may be argued that a total ban on the cultivation of a religious appearance would render fundamental religious guarantees nugatory and serve to oust religion in toto from public life rather than to accommodate religious needs. Religious expression, therefore, should be recognised as a force in society

---

395 The Constitution of India (1950) s 25(2)(b) explanation 1 provides that “[t]he wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion”.

396 It may be argued that the right to “observe” religion, as guaranteed by the Universal Declaration of Human Rights (1948) art 18; International Covenant on Civil and Political Rights (1966) art 18(1); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(1) would include the right to cultivate a religious appearance, see Dinstein (n 61) 150. See also art 6(c) of the Declaration on the Elimination of Intolerance.

397 Dinstein (n 61) 150 notes that the right would include the growing of a beard and the “w]earing of characteristic clothes or headgear”.

398 See Ch 3.5.2 regarding the institutional element of the right.

399 S 36(1)(b). See Ch 5 regarding the limitation of the right to freedom of religion.

400 S 36(1)(c). See Ch 5.
that even the state has to respect, promote and fulfil.\textsuperscript{401} Purposes such as discipline and uniformity may thus be advanced provided that they are advanced with due sensitivity and respect for religious principles at issue.\textsuperscript{402} Situations may arguably call for the relaxation of dress requirements in order to accommodate, rather than stifle, religious expression.\textsuperscript{403} The same considerations ought to apply to private dress codes, for example in businesses. Religious dress ought to be allowed without compromising neat and acceptable dress commensurate with that particular environment. For instance, hard hats may be required by the mining industry in order to ensure safety in potentially dangerous circumstances. Krishnaswami aptly concludes by arguing that “persons whose faith prescribes [religious] apparel should not be unreasonably prevented from wearing it”.\textsuperscript{404}

3.7.3.6 The Right to Undertake Pilgrimages

The right to freedom of religion includes the right to undertake pilgrimages.\textsuperscript{405} The right to undertake pilgrimages is recognised both in foreign\textsuperscript{406} and international

\textsuperscript{401} S 7(2).
\textsuperscript{402} Buckingham (n 1) 169 argues that the South African courts must respect the religious dress of those who appear before them, both litigants and counsel, and not follow the restrictive approach of Canadian courts.
\textsuperscript{403} The American example should thus not be followed where a virtual ban exists on visible religious apparel in the armed forces, see Goldman v Weinberger 475 US 503 (1985); Efaw “Free exercise and the uniformed employee: A comparative look at religious freedom in the armed forces of the United States and Great Britain” 1996 Comparative Labor LJ 648; Shaskolsky Sheleff “Rabbi captain Goldman’s yarmulke, freedom of religion and conscience, and civil (military) disobedience” 1988 Israel Yearbook on Human Rights 197 regarding the American position. The British position is more laudable where religious expression is accommodated to a certain extent rather than discouraged, see Efaw 666. In a particular South African school Muslim girls were allowed to wear their prescribed capes, as long as they represented the colours of the school.
\textsuperscript{404} (n 61) 33.
\textsuperscript{405} Sachs (n 51) 47 mentions the undertaking of pilgrimages as a possibility to be protected by a Bill of Rights.
\textsuperscript{406} The Constitution (Basic Law of Government) of Saudi Arabia (1992) s 24 states that: “The state works to construct and serve Holy Places; it provides security and care for those who come to perform the pilgrimage and minor pilgrimage in them through the provision of facilities and peace.” See also Nsereko (n 86) 847.
Religious adherents may therefore undertake pilgrimages whether their faith enjoins them to do so or whether they wish to undertake a pilgrimage out of devotion without their faith requiring that of them. For example, “Islamic law imposes a mandatory duty on every Muslim to make a pilgrimage to the Kaba in the city of Mecca at least [once] during that person’s life.” Pilgrimages may be undertaken either individually or collectively. The right, arguably, also extends to the organisation of pilgrimages. Pilgrimages may be undertaken within South Africa or outside of the country. Thus, adherents of the Zionist Christian Church may decide to undertake an Eastern pilgrimage to the Northern Province, whereas Muslims may choose to undertake a pilgrimage to Saudi Arabia. However, the Bill of Rights only extends its protection to the undertaking of pilgrimages within its jurisdiction, namely South Africa. Pilgrims wishing to visit South Africa, whether they are citizens or not, would also be protected by South African constitutional guarantees upon their arrival and for the duration of their pilgrimage as the right is granted to all those present in the country. The planning of a foreign pilgrimage in South Africa and the first leg of such a pilgrimage undertaken in the country would enjoy South African constitutional protection. The rights to enter, leave and move within South Africa, as well as the right to a passport are important contextual rights which enable all pilgrims to realise the right to undertake pilgrimages and visit sites of religious significance. Once outside South Africa people undertaking a pilgrimage abroad would have to rely on foreign guarantees, as well as on international law, to protect the pilgrimage.

---

407 Mason “Pilgrimage to religious shrines: An essential element in the human right to freedom of thought, conscience, and religion” 1993 Case Western Reserve Journal of International Law 619 653 recognises the international right to undertake pilgrimages due to the fact that pilgrimages play an important role in many religions.
408 See also the similar comments made by Krishnaswami (n 61) 32.
409 Mason (n 407) 637.
410 See Ch 3.5.2; Krishnaswami (n 61) 32.
411 S 7(1).
412 See Ch 2.
413 See s 21 of the Bill of Rights that guarantees freedom of movement; Rautenbach and Malherbe (n 52) 372. See, regarding freedom of movement in general, Rautenbach Die Reg op Bewegingsvryheid (1974 LLD thesis, Unisa) passim.
Situations may arise that may call for the limitation of the right. Mason identifies and discusses the following internationally accepted purposes to be achieved in the limitation of the right to undertake pilgrimages, namely (i) the need to protect public safety, \(^{414}\) (ii) the need to protect order, \(^{415}\) (iii) the need to protect public health or morals, \(^{416}\) and (iv) the need to protect the fundamental rights and freedoms of others. \(^{417}\)

It is submitted that when the need for the limitation of the right to undertake pilgrimages arises, the exploration of alternative and less restrictive means of the limitation of the right be encouraged in order to allow the maximum freedom of movement, thereby realising an important religious guarantee. \(^{418}\)

### 3.7.4 FREEDOM OF RELIGIOUS TEACHING

#### 3.7.4.1 The Right to Religious Training and Upbringing

The right to religious training and upbringing is closely related to the right to religion in educational institutions. Both rights are concerned with the constitutional

---

\(^{414}\) Mason (n 407) 647 cites the large number of people visiting certain shrines as a reason to limit access in order to promote the security of the pilgrims but adds that access may not be completely denied merely because the number of pilgrims may prove cumbersome.

\(^{415}\) Mason (n 407) 647 648 notes that a state may preserve its existence and, therefore, may deny certain pilgrims entrance to a country or to a shrine where people “travel to religious shrines to incite violence or to undermine the authority of the host state”.

\(^{416}\) Mason (n 407) 648 notes the curbing of epidemics as a valid reason to limit the right to undertake pilgrimages in order to discourage large numbers of people from moving, thereby creating an opportunity for the spread of disease. Immunisation certificates, for instance, may be required of pilgrims to stem or to avoid a threatening epidemic.

\(^{417}\) Mason (n 407) 649ff proposes that clashing rights be balanced in order to give meaning to the rights of all, thereby realising not the rights of a segment of the populace only but realising the rights of all concerned by means of compromise. For example, the “untouchables” are excluded by their fellow Hindus from worshipping in temples; the Indian Supreme Court, however, ruled that legislation allowing them access to temples was valid, except during the celebration of certain festivals, thereby attempting to strike a balance between all the interests concerned, see Mason 650.

\(^{418}\) See s 36(1)(e).
relationship between faith and education. The right to religious training and upbringing is concerned with the training of adherents by religious institutions and the religious upbringing of children by their parents.

Religious training entails the training of religious leaders and followers by religious institutions to convey the tenets and practices of a particular faith. For example, a religious organisation, such as a church, is free to conduct Sunday school classes or to arrange ecclesiastical courses in order to educate adherents or other interested people in religion. Religious organisations should enjoy the right to train and educate current and prospective clergy to continue and expand a leadership class and to ensure the stability and quality of such organisations. The latter aspect of religious liberty is recognised in international law.

Situations may arise justifying the limitation of the right to religious training. For example, ecclesiastical institutions wishing to award nationally recognised and accredited qualifications may be required to register and to satisfy certain minimum requirements.

The other side to this right guarantees the rights of parents to ensure and design the upbringing of their children in conformity with their religious convictions. Parents, therefore, enjoy the right to create a home environment conducive to religion and the right to encourage their children to express religious views and participate in

419 See Dinstein (n 61) 153. The Constitution of Portugal (1976) s 41(5) guarantees the right to have religion taught within one’s own denomination. The Constitution of Slovakia (1993) s 24(3) guarantees churches and religious communities the right to teach religion. The USSR, however, prohibited “the formal teaching of religion by any church, except in seminaries, for training new clergy”, see Boiter (n 127) 108. People should also not be prohibited from leaving the country to be trained overseas, see Krishnaswami (n 61) 42.

420 See Krishnaswami (n 61) 41 42.

421 See the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) art 6(g); Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(8). See also Shelton and Kiss (n 56) 563 568.

422 S 36(1)(b). See Ch 5 regarding the limitation of the right to freedom of religion.
religious practices. Parents may thus elect to enrol their children at religiously minded schools or they may choose to excuse their children from religious activities conducted at school incompatible with their own religious beliefs. This important element of religious liberty enjoys due recognition in international law.\footnote{The International Covenant on Civil and Political Rights (1966) art 18(4) guarantees parents the right to direct their children’s education in conformity with their religious convictions, see also the American Convention on Human Rights (1969) art 12(4); Declaration in the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 5; Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7). See also Ch 3.7.1.}

The Bill of Rights holds that the best interests of the child are to be of paramount importance in every matter concerning the child.\footnote{S 28(2). The Supreme Court of Israel (HC 103/67 (1967)), for example, has held that parents must choose the same religion for their children as their own, otherwise parents would be disregarding the welfare of the children, see also Dinstein (n 61) 154. See also \textit{Allsop v McCann} [2000] 3 All SA 475 (C) regarding the best interests of the child where a dispute arises between divorced parents in respect of the child’s religious upbringing. See Nsereko (n 86) 855.}

Situations may thus arise justifying the limitation of the unbridled discretion of parents in directing the religion of their children should such direction not be considered to be in the best interest of the children as required by the Bill of Rights. For example, parents may be forbidden to condone the practice of self-immolation in the name of religious devotion or to encourage children to bring harm to themselves by other means.

The right to teach religion should be viewed as a very important part of religious liberty as it allows the perpetuation of religion. Without such a right one generation would be unable to convey religious doctrine, thereby denying religion a future.\footnote{The right to teach religion should be viewed as a very important part of religious liberty as it allows the perpetuation of religion. Without such a right one generation would be unable to convey religious doctrine, thereby denying religion a future. Furthermore, it may be argued that the right to teach religion implies the right to produce, own, procure, contemplate and study religious books and other works. The right to propagate religion,\footnote{See Dinstein (n 61) 153.} as well as the right to freedom of expression\footnote{See Ch 3.7.5.}}

Furthermore, it may be argued that the right to teach religion implies the right to produce, own, procure, contemplate and study religious books and other works. The right to propagate religion, as well as the right to freedom of expression would
serve as important contextual rights in regard to the right to teach religion, thereby amplifying the right.

3.7.4.2 The Right to Religion in Educational Institutions

Religious and educational issues are usually closely linked.\textsuperscript{429} It may be argued that section 15(1) contains the implied right to conduct religious observances at state and state-aided institutions. The existence of the latter right is confirmed by section 15(2) that states the right to conduct religious observance in public institutions.\textsuperscript{430} The special role of religion in education and the traditional relationship that exists between religion and education are therefore affirmed with regard to the observance of religion at public institutions such as schools.\textsuperscript{431} However, section 15(2) contains a specific limitation clause that allows such observances to be conducted subject to regulation, equity and free will.\textsuperscript{432}

It should be noted though that a distinction should be drawn between the observance of religion and the instruction of religion.\textsuperscript{433} The former refers to “individual or collective Scripture reading, prayers, moments of silence for personal devotion or meditation and, possibly, the exhibition of religious symbols”.\textsuperscript{434} Religious instruction, on the other hand, refers to the teaching of religion eg as a subject in schools and other educational institutions.\textsuperscript{435} The distinction relates not merely to the substance of both concepts but also to the fact that religious observance is expressly guaranteed by the Bill of Rights, whereas similar express

\begin{footnotes}
\footnotetext[429]{See Foster \textit{et al} (n 33) 212. See also Wulfsohn (n 51) 228ff; Van der Vyver (n 205) par 239 243 regarding the traditional relationship between the law, religion and education in South Africa.}
\footnotetext[430]{See Ch 3.3; Malherbe 1998 (n 25) 695.}
\footnotetext[431]{See Foster \textit{et al} (n 33) 221.}
\footnotetext[432]{See Ch 3.3, 5.5. Malherbe 1998 (n 25) 695; Foster \textit{et al} (n 33) 220.}
\footnotetext[433]{See Foster \textit{et al} (n 33) 221; Malherbe \textsuperscript{n 27} 6; De Waal \textit{et al} (n 15) 302 303 304; \textit{Wittmann v Deutscher Schulverein} (n 16) 449E.}
\footnotetext[434]{See Foster \textit{et al} (n 33) 221. See also Ch 3.3; Malherbe (n 27) 6.}
\footnotetext[435]{See Foster \textit{et al} (n 33) 221.}
\end{footnotes}
recognition of religious instruction is lacking.\textsuperscript{436} Foreign examples of the express recognition of the right to religious education, however, do exist.\textsuperscript{437} The right to provide for a religiously grounded subject or education is a right that may undoubtedly be exercised in private education. The Interim Constitution, for example, expressly recognised the right to establish educational institutions based on a common religion.\textsuperscript{438} The Final Constitution restated the right to establish and maintain “independent educational institutions” at private expense.\textsuperscript{439} Grounds for the establishment of such institutions, however, have been omitted. This omission does not bar someone to establish an education institution on religious grounds as nothing in the Constitution forbids such a move.\textsuperscript{440} The right to establish religious associations, arguably, would also protect the right to establish religious educational institutions.\textsuperscript{441} International law also recognises the right of parents (and guardians) to direct their children’s (or wards’) education in conformity with their own religious convictions.\textsuperscript{442} The right to establish independent educational institutions based on religion seems secure.

\textsuperscript{436} See Foster \textit{et al} (n 33) 221.

\textsuperscript{437} The Constitution of Paraguay (1992) s 74 guarantees the right to have a religious education. The Constitution of Germany (1949) s 7(3) also provides for religious classes in some state schools. The Dutch Constitution (1983) s 23 stipulates that: “Het openbaar onderwijs wordt, met eerbiediging van ieders godsdienst of levensovertuiging, bij de wet geregeld.” This has led to the recognition of public Christian tertiary institutions, see Plenbaar (n 25) 213 214.

\textsuperscript{438} See s 32(c). See Diamini (n 1) 187ff regarding religion under the Interim Constitution.

\textsuperscript{439} S 29(3). The Final Constitution stated that such institutions have to be set up using private finance, the granting of subsidies, however, is not excluded, see s 29(4). The Constitution thus cleared up confusion existing around the Interim Constitution regarding the financing of independent educational institutions. See Du Plessis (n 1) 164 165 regarding the confusion.

\textsuperscript{440} See Malherbe 1998 (n 25) 700. Malherbe, therefore, views s 29(3) as a manifestation of the right to freedom of religion.

\textsuperscript{441} S 31(1)(b).

\textsuperscript{442} The Convention Against Discrimination in Education (1960) art 5(1)(b) holds that: “It is essential to respect the liberty of parents, where applicable, legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities”, see also the similar provision in the International Covenant on Economic, Social and Cultural Rights (1966) art 13(3). The International Covenant on Civil and Political Rights (1966) art 18(4) guarantees parents the right to direct their children’s education in conformity with their religious convictions. See also the American Convention on Human Rights (1969) art 12(4); Declaration in the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 5(2); Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7). See the compilation of human rights’ provisions regarding education in Mashava (Ed) \textit{A...}
As mentioned, an express right to mandate the state to provide a religious education or an education with religious elements is not provided for. The provision of such an education by the state, however, is not expressly forbidden or discouraged.\textsuperscript{443} The state, though, is enjoined to provide a basic education to everyone.\textsuperscript{444} It may be argued that a basic education should include religion in some form or another in order to achieve a balanced result.\textsuperscript{445} However, the right of parents to direct their children’s education in conformity with their own beliefs should at least enable parents not to have their children exposed to religious aspects of education.\textsuperscript{446} Should religious classes form part of the public school system curriculum the attendance at such classes must be voluntary. Debate may also arise in respect of the format and content of such religious classes, for instance classes could be multi-faith orientated or each class could cater to a specific religion. Religious leaders may also be afforded the opportunity to conduct such classes in order to alleviate the burden on the school system. It is submitted, though, that little objection can be raised to the teaching of purely academic aspects of religion, such as religious history. However, it should be noted that no express right to religious education exists in regard of the public education system and the implied right to such instruction is by no means a foregone conclusion nor the format and content of such instruction. The guideline should be that peoples’ religious rights may not be infringed in the provision of education.

\textit{Compilation of Essential Documents on the Right to Education} (2000). See also Shelton and Kiss (n 56) 568.

\textsuperscript{443}See Hogg (n 14) 951ff; Foster \textit{et al} (n 33) \textit{passim} regarding the position of religion in Canadian public schools.

\textsuperscript{444}S 29(1)(a).

\textsuperscript{445}See the thoughts of Freund “Public aid to parochial schools” 1969 \textit{Harvard LR} 1680 1689ff.

\textsuperscript{446}See \textit{Wittmann v Deutscher Schulverein} (n 16) regarding the position of religious classes and observances at private schools. The International Covenant on Civil and Political Rights (1966) art 18(4) guarantees parents the right to direct their children’s education in conformity with their religious convictions, see also the American Convention on Human Rights (1969) art 12(4); Declaration in the Elimination d all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 5(2); Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7).
Questions have also arisen whether religiously inspired public institutions may maintain a religious character.\textsuperscript{447} It may be argued that such institutions ought to be able to continue espousing a particular religious character as such a move could be viewed as the fulfilment by the state of religious freedom as mandated by the Bill of Rights.\textsuperscript{448} Such advancement of religious liberty, however, should take cognisance of all religions represented in South Africa in order not to infringe upon the right to state non-identification by fulfilling and encouraging religious expression of a certain religion at the expense of others.\textsuperscript{449}

In conclusion, it may be said that the following general ideals with regard to education should be noted and heeded, namely the provision of education “directed towards the full development of the human personality and human dignity [that] should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace” and the provision of education in order to “enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace”.\textsuperscript{450} Education should be geared to engender respect and tolerance for religious diversity and expression, thereby creating a society that is conducive to the exercise of the right to freedom of religion.

\textbf{3.7.5 \hspace{1em} FREEDOM TO PROPAGATE A RELIGION OR DENOMINATION}

\textsuperscript{447} See, for example, the Potchefstroomse Universiteit vir Christelike Hoër Onderwys (Private) Act 19 of 1950 s 31(1). See Du Plessis (n 1) 164 165; De Waal \textit{et al} (n 15) 292.

\textsuperscript{448} S 7(2). See Ch 4.

\textsuperscript{449} See Ch 3.7.1.1.

The right to freedom of religion includes the right to propagate a religion or denomination in the hope to convert other people to a particular persuasion. Chaskalson P has also approved of a definition of freedom of religion that recognises the dissemination of belief as the manifestation of religion. The right to propagate a faith and to attempt to convert is also recognised in foreign and international law. Bearers of the right are thus entitled to spread information about their religion or denomination. Such information could include the history, tenets and theories of a faith. A particular persuasion may be propagated in order to encourage understanding and tolerance of that faith or to attempt to convince non-adherents to adopt the propagated views. Arguably, the right would not only protect the message propagated but also the method of propagation.

The broad interpretation of the right would possibly extend the protection afforded to a host of methods employed to advance a religious belief. For example,

---

451 Meyerson (n 82) 29 opines that “[r]eligious freedom clearly implies the freedom to teach one’s religion, including the freedom to try to convert others. ‘Zeal in spreading the faith’ – the original meaning of proselytism – is a way of manifesting one’s religion”. See also Smith (n 1) 19-2. S v Lawrence (n 1) par 92. See also the draft law of Shelton and Kiss (n 56) 563. The German Federal Constitutional Court recognised the right to proselytise, see BVerfGE 24 236 (1968); Kommers (n 55) 446. The Constitution of Russia (1993) s 28 recognises the right to disseminate religious belief; the Constitution of Zambia (1991) s 19(1) recognises the right to “propagate” religion; the Constitution of India (1950) s 25(1) also recognises the right to “propagate” religion. See also Nsereko (n 86) 847 regarding the position in Botswana.

452 The American Convention on Human Rights (1969) art 12(1) expressly recognises the right to “disseminate one’s religion”. The Universal Declaration of Human Rights (1948) art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(1); International Covenant on Civil and Political Rights (1966) art 18(1) guarantee the right to teach religion. Dinstein (n 61) 150 argues that the freedom to teach religion is not limited to teaching the faithful but includes “the right to propagate the faith among the uninitiated, in other words, there is a right to proselytise – or undertake missionary activities in order to gain converts”. The latter argument is also seemingly supported by the joint dissenting opinion of Foighel and Loizou JJ in Kokkinakis v Greece (n 122) 439, contra the opinion, 430. See also Reid (n 122) 346. See also Van der Vyver (n 122) 419 who deduces the right from the Universal Declaration.

453 See Krishnaswami (n 61) 41.

454 See Ch 1.3.
adherents and institutions may elect to disseminate belief by tracts, books, broadcast media and door-to-door visits.457

The right to propagate religion should be viewed as an important element of religious liberty as the propagation of faith in the hope of attracting converts is required by many religions of their followers. The right may also possibly be exercised to attract members from different denominations of a particular faith to one of its other denominations; for example, an Anglican may attempt to attract Presbyterians. However, adherents of a certain faith may attempt to attract someone belonging to an entirely different religion; for example, a Christian may attempt to convert a Hindu to Christianity. It may also be argued that religions may attempt to convert the secular, non-religious and unconcerned to a particular religion or one of its denominations. A religion may also be propagated in order to ensure and encourage the continued loyalties of current adherents or to motivate lapsed adherents.

Important contextual rights would include the right to freedom of expression allowing views and ideas to be spread and communicated.458 The freedom to express belief would serve to bolster the right to propagate religion by further enabling religious adherents to convey their views in the hope of gaining converts. The right to communicate with other religious people and institutions would also feature as a contextual right enabling the dissemination of religious views and the organisation of missionary activities.459 However, the most important contextual right amplifying the right to the propagation of religion is arguably the right to change one’s religion

457 See Lerner (n 54) 486 regarding door-to-door visits. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) 6(d) recognises the right to write and to issue and disseminate publications.

458 S 16(1)(b). See also Shelton and Kiss (n 56) 577.

459 See Ch 3.7.1.2. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 6(i). See also the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) art 2(5); Lerner (n 54) 534.
or belief.\textsuperscript{460} There would be very little use for the right to propagate religion in order to gain converts if the right of people to convert to a particular religion or faith was not recognised. The freedom should thus exist not only to invite people to join a particular religious creed but also for the invited to accept the invitation rendering meaning to the exchange of ideas. Freedom of religious choice would obviously allow the addressed to decline the invitation, as well as to refuse to listen to the dissemination of religious belief.

The propagation of religion has a violent and turbulent history.\textsuperscript{461} Some countries even banned, and still ban proselytism, such as Vietnam.\textsuperscript{462} Instances of forced conversions are continued to be reported.\textsuperscript{463} Apostasy is also considered punishable under threat of death by some.\textsuperscript{464} The propagation of faith is evidently a sensitive issue calling for proper and sensible limitation in the handling of a potentially explosive situation. However, a total ban on the propagation of religion and attempts to gain converts would in all probability fail constitutional muster as an

\begin{footnotesize}
\begin{enumerate}
\item See Ch 3.7.2.1; \textit{Garden Cities Incorporated Association v Northpine Islamic Society} 1999 (2) SA 268 (C) 268 272B.
\item See Buckingham \textsuperscript{(n 1) 92} 106 regarding the history of proselytism in South Africa; Stubbs “Persuading thy neighbour to be as thyself: Constitutional limits on evangelism in the United States and India” 1994 \textit{UCLA Pacific Basin LJ} 360 363ff 371ff regarding the history of proselytism in India and the United States; Behr \textit{The Last Emperor} (1987) 50 regarding China.
\item Lerner (n 54) 530. Lerner 530 also notes “the persecution of Jehovah’s Witnesses on ground of proselytism in Greece”. See \textit{Kokkinakis v Greece} (n 122); Jacobs and White (n 78) 214.
\item See Lerner (n 54) 530 regarding forced conversions in Egypt; \textit{The Weekly Telegraph} 2001/02/13 regarding forced conversions in Indonesia.
\item See Zubaida “Trajectories of political Islam: Egypt, Iran and Turkey” in Marquand and Nettler (Eds) \textit{Religion and Democracy} (2000) 69.
\end{enumerate}
\end{footnotesize}
important element of religious liberty would be extinguished, thereby denying the manifestation of religion. \(^{465}\) Limits, arguably, may thus be prescribed not only for the message propagated but also the method whereby that message is propagated.

The religious message propagated may be limited in order to avoid the denigration and belittlement of other religions and denominations. \(^{466}\) In other words, the content of a message may be limited to protect the right to religious dignity of others. \(^{467}\) A person, for instance, may aim to insult other people and religions rather than genuinely raise issues and arguments in the propagation of a faith in the hope to convert people. The content of the message may also be so malicious and crude as to cause grave offence and hurt, thereby requiring the limitation of the message to protect public order by dissuading the offended from taking matters into their own hands. Importantly, a message may be limited by requiring its modification, but a general religious message ought not to be suppressed \textit{in toto}. For example, the negative and hurtful elements of a message aimed at other beliefs may be excised to sanitise the message, rather than to deny an entire religion or denomination the right to propagate its beliefs. \(^{468}\) The right to freedom of expression will obviously be of crucial importance in limiting the propagation of a religious message. \(^{469}\) However, a message of religious propagation that incites religious hatred and war does not enjoy constitutional protection, thereby not requiring constitutional limitation of such expression. \(^{470}\)

---

\(^{465}\) S 36(1)(a). See Ch 5 regarding the limitation of the right.

\(^{466}\) S 36(1)(b).

\(^{467}\) See Ch 3.7.1.3.

\(^{468}\) S 36(1)(e). In other words, less restrictive means should be employed in limiting the right to propagate a religion, but at the same time protect the religious dignity of others.

\(^{469}\) See s 16(1)(b).

\(^{470}\) See s 16(2)(a)-(c). The International Covenant on Civil and Political Rights (1966) art 20 prohibits advocacy based on religious hatred, see Lerner (n 54) 515. International law is seemingly more restrictive than South African law, as it bans such advocacy, whereas the Constitution merely does not extend protection to such speech.
The method employed to propagate a message would also be susceptible to limitation where reasonable and justifiable.\textsuperscript{471} For example, it may be argued that the use of loudspeakers mounted on vans to convey a message be limited to ensure peace and quiet and the orderly flow of traffic.\textsuperscript{472} The harassment of unwilling passers-by on a street may also justify the limitation of the right in order to protect public order. It may also be argued that any religious propagation must be devoid of coercion.\textsuperscript{473} Coercion in religious matters is also prohibited in international law.\textsuperscript{474} It is submitted that coercion in religious matters may never pass constitutional muster. It is difficult, if not impossible, to conceive of a purpose so important in an open and free democratic society that it is capable of endorsing coercion in religious propagation. Religious freedom is an intensely personal right and coercion aimed at negating basic freedom of religious choice to adhere to a faith of one’s choice must be decried.\textsuperscript{475} However, it is important to note that the mere propagation of religion and suggestion of proposals are not to be equated with coercion. In other words, true religious propagation does not entail coercion. Coercion may be evidenced by a variety of practices, such as crude coercion in the form of forced coercions in the acceptance of a faith,\textsuperscript{476} the compulsion to attend sermons or to observe alien religious practices or the threat of penalties such as excommunication from the family or community.\textsuperscript{477} Coercion may also be more sophisticated, such as economic and financial inducements aimed at gaining converts. Financial aid should not, as a matter of course, be viewed as an impermissible coercive method.

\begin{itemize}
  \item \textsuperscript{471} See s 36(1); Ch 5.
  \item \textsuperscript{472} S 36(1)(b).
  \item \textsuperscript{473} See Chaskalson P in \textit{S v Lawrence} (n 1) par 104 who prohibited coercion in religious matters.
  \item \textsuperscript{474} The General Comment (1993) of the Human Rights’ Committee has condemned practices resulting in coercion to recant one’s faith or to convert someone to a particular faith, quoted in Labuschagne (n 72) 174. See also Lerner (n 54) 481. See also the International Covenant on Civil and Political Rights (1966) art 18(2); Declaration on the Elimination of All Forms of Religious Intolerance and of Discrimination Based on Religion and Belief (1981) art 1(2).
  \item \textsuperscript{475} See Malherbe 1998 (n 25) 680; Stubbs (n 461) 360; Nsereko (n 86) 845; Sachs (n 51) 43 regarding the personal nature of the right.
  \item \textsuperscript{476} See Lerner (n 54) 505.
  \item \textsuperscript{477} See Lerner (n 54) 486 529.
\end{itemize}
an impermissible method of propagation, as it would negate the manifestation of religious duty in the form of charity as practised by some.\textsuperscript{478} Coercion should thus be viewed as methods whereby the freedom to change or maintain a religion is impaired, whether by physical or other means of compulsion.

The right to privacy should be considered in determining the limits imposed on the right to propagate religion.\textsuperscript{479} Lerner opines with regard to privacy that the individual’s and “religious groups’ privacy, intimacy, isolation or [a] strong desire to defend its religious identity against any intrusion … constitutes an important consideration when attempting to establish the scope and limits of the right to proselytism”.\textsuperscript{480}

It is submitted that a case by case approach be followed in order to determine the merits of a particular situation to evaluate if the message propagated and method of propagation meet constitutional requirements.

\textsuperscript{478} See the discussion of economic coercion by Gildenhuys (n 295) 163ff. The German Federal Constitutional Court has prohibited a prisoner from bribing fellow inmates to renounce their religion for tobacco, see BVerfGE 12 1 (1960); De Waal \textit{et al} (n 15) 296.
\textsuperscript{479} S 14.
\textsuperscript{480} Lerner (n 54) 484.