CHAPTER 2

BEARERS OF THE RIGHT TO FREEDOM OF RELIGION

2.1 GENERAL

In this Chapter an attempt will be made to identify those parties who bear the right to freedom of religion. It is important to identify the bearers of the right in order to enable the courts to determine if anyone’s right has been infringed.\(^1\) The state could also only discharge its constitutional obligations in respecting, protecting, promoting and fulfilling the Bill of Rights properly by knowing whom the protected parties are.\(^2\) Public and judicial control over the honouring and respecting of the rights can only be effected satisfactorily once the identities of the benefiting entities have been established.\(^3\) It also goes without saying that the bearers of rights should be made aware of the protection afforded them, otherwise the Bill of Rights would not be worth the paper that it is written on.\(^4\)

An important distinction must be drawn between the bearing of a right and its enforcement. Section 34 regulates the enforcement of law in general:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

\(^1\) The identification of the bearers of the right is an important element in the approach to the application of the Bill of Rights. See Ch 5.2.

\(^2\) These obligations are listed in s 7 of the Bill. See Ch 4.1 regarding the state’s obligations.

\(^3\) See Rautenbach and Malherbe *Constitutional Law* (1999) 324 regarding the control and the enforcement of the Bill of the Rights.

\(^4\) *ibid.*
The enforcement of the Bill of Rights is enabled by section 38, which is a lex specialis of the general guarantees in section 34.\(^5\) Section 38 reads:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

The distinction to be drawn is that, whereas the bearer of a right is as a matter of principle entitled to its protection and may enforce the right in a court, the enforcement of that right does not require the bearing of that right. A litigant may enforce a right even though they do not possess it. An example would be an adult who institutes action on behalf of a child — without locus standi — regarding children’s rights. It also follows that someone acting in accordance with section 38 need not have suffered an infringement themselves, even though they may possess the compromised right.\(^6\) The Constitutional Court has also stated that:

“There would be no need … to construe section 7(4)(b)(i) as meaning that the person acting in his or her own interest must be a person whose constitutional right has been infringed or threatened. This is not what the section says. What the section requires is that the person concerned

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\(^5\) See Rautenbach Handves van Rege. Studiemateriaal (2000) 133ff. See also Rautenbach and Malherbe (n 3) 378 who correctly state that s 34 guarantees the right to a fair hearing in civil litigation, the right to a fair hearing in criminal matters being covered in s 35(3).

\(^6\) See Rautenbach (n 5) 134. See also Buckingham Realising Religious Freedom: The Applications and Limitations of the Canadian Understanding of Religious Freedom to South Africa (1998 LLD thesis, Stell) 163ff regarding the similar Canadian position and 167ff regarding South Africa.
should make the challenge in his or her own interest. It is for the Court to
decide what is a sufficient interest in such circumstances."\textsuperscript{7}

The rest of this Chapter will be devoted to establishing whether natural and juristic
persons and other associations may bear the right to freedom of religion.

2.2 NATURAL PERSONS: INDIVIDUALLY AND COLLECTIVELY

Every person, irrespective of their age, mental state or other distinctions, qualifies
as a natural person.\textsuperscript{8} The Constitution declares in section 7(1) that:

This Bill of Rights is a cornerstone of democracy in South Africa. It
enshrines the rights of all people in our country and affirms the
democratic values of human dignity, equality and freedom.\textsuperscript{9}

Fundamental rights are therefore extended to all people under South African
jurisdiction in other words to all natural persons. Section 15(1) reads that:

Everyone has the right to freedom of conscience, religion, thought, belief
and opinion.\textsuperscript{10}

“Everyone” would, by virtue of the provision in section 7 and on its own account,
extend to all natural persons.\textsuperscript{11} However, the word “everyone” is a wider term than
“all persons” and would also allow juristic persons and other associations to be
included as bearers of the right, and not to be treated as mere possible enforcers of

\textsuperscript{7} Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) BCLR 1 (CC) par 168, 1996 (1) SA 984
(CC) par 168. See also Rautenbach (n 5) 134.
\textsuperscript{8} Cronjé Die Suid-Afrikaanse Persone- en Familiereg (1994) 8. A natural person, like a juristic
person, is a legal subject capable of bearing, exercising and discharging rights, duties and
obligations.
\textsuperscript{9} Emphasis added.
\textsuperscript{10} Emphasis added.
\textsuperscript{11} See also Malherbe “Die grondwetlike beskerming van godsdiensvryheid” 1998 TSAR 673 678.
rights in terms of section 38. The fact that the right is borne by natural persons is further supported by section 31(1) which reads:

    Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
    (a) to enjoy their culture, practise their religion and use their language; and
    (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Natural persons would include citizens and non-citizens alike who find themselves on South African territory. This position would accord with international law. However, prior to 1945 the protection of the right to freedom of religion focused on minorities and groups rather than individuals. A shift took place with Roosevelt’s four freedoms in 1941, namely freedom of speech and expression, of religion and freedom from war or fear. The individual as such was now gradually becoming the focus of human rights. The United Nations Declaration of Human Rights of 1948 therefore recognised the right to freedom of religion as belonging to “everyone”. The right, as being afforded “everyone”, has also been recognised by the European

12 See Ch 2.3 regarding juristic persons and other associations.
13 Emphasis added.
14 Rautenbach (n 5) 45; Rautenbach and Malherbe (n 3) 325. The right to freedom of religion, for instance, extends to parents and guardians, see Malherbe (n 11) 678; Ch 3.7.4.1. The right also extends to arrested, detained and accused persons, see s 35(2)(f)(iii). See Jacobs and White The European Convention on Human Rights (1996) 215 regarding the exercise and limitation of prisoners’ religious rights; Standard Minimum Rules for the Treatment of Prisoners (1955) rules 6 41 42 66 77. Saudi Arabia is of the opinion that the right to freedom of religion accrues countries as such, rather than individuals, but such an interpretation is clearly not supported by the South African Constitution, as the latter guarantees the rights of natural persons, see Shelton and Kiss “A draft model law on freedom of religion, with commentary” in Van der Vyver and Witte (Eds) Religious Human Rights in Global Perspective vol 1 (1996) 573. The fact that the right to freedom of religion is territorially bound, is expressly mentioned in the freedom of religion sections of the Constitutions of Norway (1814) s 2 and Malta (1964) s 40(1).
15 International law must be considered in interpreting the Bill of Rights, s 39(1)(b). See also Ch 1.3.2.
16 See Ch 1.2.3.
18 ibid.
Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the International Covenant on Civil and Political Rights of 1966, the American Convention on Human Rights of 1969 and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981.\textsuperscript{20}

The unborn, as found by a High Court, are not natural persons, and therefore not the bearers of constitutional rights.\textsuperscript{21} The right to freedom of religion, however, would extend equally to children as to adults; an infringement of a child’s right must therefore be measured for its constitutionality.\textsuperscript{22} Factors to be considered in limiting a child’s right to freedom of religion would include its immaturity as well as the requirements for a proper and balanced education and upbringing – weighed against the parental right to educate children regarding religion.\textsuperscript{23} Children, therefore, are not merely the bearers of children’s rights alone and other rights only upon investigation.\textsuperscript{24} Children are the bearers of all rights bar their express exclusion.\textsuperscript{25}

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\textsuperscript{19} Art 18.
\textsuperscript{20} See Ch 1.3.2 for the texts of these and other relevant instruments.
\textsuperscript{22} Rautenbach (n 5) 47. See Ch 5 regarding the limitation clauses of the right to freedom of religion.
\textsuperscript{23} See Rautenbach (n 5) 47 48. See also Malherbe (n 11) 678; Ch 3.7.4.1. Such an approach to children’s rights would correspond with the interpretation followed here, namely interpreting the right’s protective ambit generously and then allowing competing interests to be weighed against the limitation clause. The factors then mentioned, such as immaturity, must be considered against the backdrop of factors to be considered in limiting a right in s 36(1), see Ch 5. The factors mentioned in the text would fall under the importance of the purpose of the limitation, s 36(1)(b). The extent to which the right is limited in pursuit of these purposes must also be considered, together with the relationship between the limitation and its purpose, as well as less restrictive means in achieving the purpose, s 36(1)(c)-(e).
\textsuperscript{24} Contra Woolman, quoted in Rautenbach (n 5) 47.
\textsuperscript{25} Such as the right of every adult citizen to vote and stand for public office in s 19(3). See also Rautenbach (n 5) 47 note 7. The Hong Kong Constitution (1990) s 20 provides expressly for children’s religious rights, as well as their limitation. The Constitution of Singapore (1963) s 16(4) recognises the right of parents and guardians to decide the religion of their children or wards under the age of 18. See also Malherbe’s views (n 11) 678 on parental rights pertaining to freedom of religion.
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Sections 15(2) and 15(3) affirm the entrenchment of certain religious rights in section 15(1) but also prescribe their specific limitation. The same bearers of rights in section 15(1) would therefore also bear the rights in the sub-sections, as the latter merely affirm certain components of the right to freedom of religion in subsection one.

Finally, it may be wise to compare the South African description of the bearers of the right to freedom of religion with those of other Constitutions, and conclude the Chapter by exploring the collective side to natural persons exercising their rights to religious liberty. As mentioned, the South African Constitution refers to “everyone” and “persons” as regards religious liberty and contains a general reference to “all people”. Internationally the right to freedom of religion, in the form of positive guarantees or discrimination prohibitions, is accorded to the following categories of bearers:

- “Citizens” in the Constitutions of Cambodia, China, France, India, Israel, Nepal, Russia, South Korea, Tibet, Bangladesh, Denmark, Finland, Pakistan and Singapore.

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26 See Ch 3.3, 3.4, 3.7.3.1, 5.5.
27 See Ch 1.3.2 regarding comparative law.
28 S 15(1).
29 S 31(1).
30 S 7(1).
31 The Constitutions referred to here may be found in Wuthnow (Ed) *The Encyclopedia of Politics and Religion* vol 2 (1998) 853ff; Mason “Pilgrimages 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* 619 631 note 47.
32 (1993) s 31(2) 43(1).
33 (1982) s 34 36(2).
34 (1958) s 77(3).
35 (1950) s 15(2) 16(2).
36 Declaration of Independence 1948. The state is enjoined to promote the equality of all citizens regardless of religion.
37 (1990) s 11(3).
39 (1948) s 11(1) 20(1).
41 (1972) s 41.
• “Everyone”, “no one”, “a person”, “each individual” and “all” or similar provisions in the Constitutions of Germany,\(^{46}\) Greece,\(^{47}\) Hong Kong,\(^{48}\) India,\(^{49}\) Luxembourg,\(^{50}\) Malta,\(^{51}\) Nepal,\(^{52}\) Portugal,\(^{53}\) Russia,\(^{54}\) Slovakia,\(^{55}\) Spain,\(^{56}\) Zambia,\(^{57}\) Botswana,\(^{58}\) Canada,\(^{59}\) Colombia,\(^{60}\) Cuba,\(^{61}\) Guatemala,\(^{62}\) Japan,\(^{63}\) Thailand,\(^{64}\) Italy\(^{65}\) and Singapore.\(^{66}\)

• Others categories would include extending religious rights to or prohibiting religious discrimination against “Spaniards”,\(^{67}\) “All inhabitants of the Kingdom”\(^{68}\) or only extending religious rights to the followers of certain religions, such as Christians, Jews and Zoroastrians.\(^{69}\)

It has been established that a natural person bears the right to freedom of religion in South Africa. It may be argued that such a person may associate with others in the joint exercise of their rights to freedom of religion, such as attending a church

\(^{42}\) (1953) s 67.
\(^{43}\) (1919) s 8.
\(^{44}\) (1981) s 20.
\(^{45}\) (1963) s 12(2) 16(1) 16(3).
\(^{46}\) (1949) s 3(3) 4(3) 12(a)(2).
\(^{47}\) (1975) s 13(1).
\(^{48}\) (1990) s 15(1).
\(^{49}\) (1950) s 27.
\(^{50}\) (1868) s 19 20.
\(^{51}\) (1964) s 40(1).
\(^{52}\) (1990) s 19(1).
\(^{53}\) (1976) s 13(2) 41(2) 41(3).
\(^{54}\) (1993) s 28.
\(^{55}\) (1993) s 12(2) 24(1) 24(2) 25(2).
\(^{56}\) (1978) s 16(2).
\(^{57}\) (1991) s 19(1) 19(2).
\(^{58}\) (1966) s 11(1).
\(^{59}\) (1982) s 2(a), Charter of Rights.
\(^{60}\) (1991) s 19.
\(^{61}\) (1976) s 54.
\(^{62}\) (1985) s 35.
\(^{63}\) (1947) s 19 20.
\(^{64}\) (1978) s 25.
\(^{65}\) (1947) s 19.
\(^{66}\) (1963) s 15(1).
\(^{67}\) Spanish Constitution (1978) s 14.
\(^{68}\) Norwegian Constitution (1814) s 2.
service or funeral together. Such an exercise of an individual’s right to freedom of religion together with those of others would enjoy protection under the collective element of the right,\(^\text{70}\) as well as under the separate rights to freedom of assembly and association.\(^\text{71}\) A host of individual rights are therefore exercised simultaneously, while each right still remains intact and distinct. Such a construction, it is submitted, is also supported by the International Covenant on Civil and Political Rights that allows a member of a minority to exercise his right to religious liberty “individually or in community with others”.\(^\text{72}\) The American Convention on Human Rights also guarantees the right to freedom of religion “either individually or together with others”.\(^\text{73}\) The intensely personal nature of the right necessitates its bearing by individuals.\(^\text{74}\) The view of Dinstein,\(^\text{75}\) holding that religious minorities enjoy the right to freedom of religion\(^\text{76}\) *qua* a group, cannot therefore be supported. An individual, however, may associate with others to such an extent that a collective bond is constitutionally recognised and protected or a new legal entity created, such as a juristic person.\(^\text{77}\) These issues will be dealt with below.

### 2.3 JURISTIC PERSONS AND OTHER ASSOCIATIONS

Section 31(1)(b) expressly recognises the right to form and maintain religious associations and other organs of civil society. Such associations would furthermore enjoy protection under the right to freedom of association.\(^\text{78}\) The latter right protects

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\(^{69}\) Iranian Constitution (1979) s 13.

\(^{70}\) See Ch 3.5.2.

\(^{71}\) S 17 18. See also Malherbe (n 11) 679; Carpenter “Beyond belief – religious freedom under the South African and American Constitutions” 1995 *THRHR* 684 685.

\(^{72}\) Art 27.

\(^{73}\) Art 12(1).

\(^{74}\) See Malherbe (n 11) 680; Labuschagne “Religious freedom and newly-established religions in Dutch law” 1997 *Netherlands International LR* 168 184 regarding the personal nature of the right.


\(^{76}\) As guaranteed by the International Covenant on Civil and Political Rights art 27.

\(^{77}\) See Malherbe (n 11) 679.

\(^{78}\) S 18.
the formation of groups as well as their distinctions in admitting and maintaining of members.\textsuperscript{79} The right to freedom of religion in section 15 also guarantees the establishment of religious organisations. Such guarantees are to be found in the collective and institutional elements of the right,\textsuperscript{80} as well as in the right to manifest one’s beliefs\textsuperscript{81} and the right to the regulation of own affairs.\textsuperscript{82}

It follows that a religious community may choose to associate in different ways. A religious organisation, at its core, is an association that is joined voluntarily and whereby the activities and membership of the whole is regulated in the pursuit of a religious goal.

Such associations of individuals may choose to incorporate or not to incorporate.\textsuperscript{83} Incorporation would lead to the organisation being a juristic person.\textsuperscript{84} In other words, the organisation enjoys a legal existence separate from those of its members or founders.\textsuperscript{85} The Constitution provides no definition as to what may constitute a juristic person; the latter would therefore be those entities recognised as such by South African law.\textsuperscript{86} Incorporation may take the following forms:

- Juristic persons may be incorporated at common law.\textsuperscript{87} The courts require that an association must have a continuous existence separate from those of its

\textsuperscript{79} See Pienaar “Konstitusionele voorskrifte rakende regspersone” 1997 \textit{THRHR} 565 576ff. See also Malherbe (n 11) 679; Carpenter (n 71) 685 regarding the right to freedom of association and religious liberty.

\textsuperscript{80} See Ch 3.5.2.

\textsuperscript{81} See Ch 3.5.4, 3.5.5. This right guarantees the external manifestation of one’s beliefs to the extent of allowing the formation of associations to manifest beliefs more forcefully and communally.

\textsuperscript{82} See Ch 3.7.1.2. Should religious adherents decide to regulate their own affairs by establishing an association to provide a hierarchy and structure, this right would protect such a move.

\textsuperscript{83} Buckingham (n 6) 120; Van der Vyver “Religion” in Joubert and Scott (Eds) \textit{LAWSA} vol 23 (1986) par 227.

\textsuperscript{84} \textit{ibid}.

\textsuperscript{85} Cronjé (n 8) 9. This would entail that the juristic person may sue and be sued in its own right, see Van der Vyver (n 83) par 228.

\textsuperscript{86} Rautenbach (n 5) 50.

\textsuperscript{87} Such persons would then be known as \textit{universitates}. 
members and it must be able to own property and may not seek profit.\textsuperscript{88} It is important, though not decisive, whether the association views itself as a juristic person.\textsuperscript{89} However, an association may expressly incorporate itself, by incorporating a provision to that extent in its constitution or articles of association.\textsuperscript{90} The St. John Apostolic Faith Mission, the Bantu Methodist Church of South Africa (as it was then called) and the African Congregational Church have been recognised as juristic persons at common law.\textsuperscript{91}

- The establishment and recognition of a juristic person may also take place by means of private legislation.\textsuperscript{92} The Apostolic Faith Mission of South Africa (Private) Act\textsuperscript{93} and the Methodist Church of Southern Africa (Private) Act\textsuperscript{94} are such examples.

- Juristic persons may also be incorporated in terms of legislation of general application. Buckingham\textsuperscript{95} notes that religious organisations may incorporate under the Non Profit Organisations Act.\textsuperscript{96} Oddly, religious organisations have also at times been incorporated as companies for profit under the Companies Act,\textsuperscript{97} for example, the Apostolic Faith Mission and a Durban sect.\textsuperscript{98}

\textsuperscript{88} Cronjé (n 8) 9.
\textsuperscript{89} \textit{ibid}.
\textsuperscript{90} See Buckingham (n 6) 120; Van der Vyver (n 83) par 227.
\textsuperscript{91} See Van der Vyver (n 83) par 227.
\textsuperscript{92} Cronjé (n 8) 9. However, see Rautenbach and Malherbe (n 3) 349 regarding the limitation of rights by means of a law of "general application" only.
\textsuperscript{93} 24 of 1961. See also Van der Vyver (n 83) par 227.
\textsuperscript{94} 111 of 1978. See also Van der Vyver (n 83) par 227.
\textsuperscript{95} (n 6) 120.
\textsuperscript{96} 107 of 1978. Organisations incorporated under the Act are subject to a certain level of regulation.
\textsuperscript{97} 61 of 1973.
\textsuperscript{98} See Van der Vyver (n 83) par 227.
Legal personality may be conferred either on the denomination, a congregation or on both. Religious organisations, though, do not always possess legal personality. Organisations not endowed with legal personality are usually referred to as “voluntary associations”. Such associations may pass their own rules and regulations, on which Van der Vyver comments that “[t]he validity and effect of such rules and regulations are not dependent on the legal subjectivity of the religious body in question, and they apply with equal force within the ecclesiastical body irrespective of whether it is a legal person or not”. Members of voluntary associations are considered bound to the association’s rules and regulations on the basis of contract. The Church of the Province of South Africa, the Anglican Communion, prefers not to incorporate due to historical reasons and is therefore without legal personality.

The question now follows: Are these religious associations capable of bearing the right to freedom of religion? Section 8(4) of the Constitution states that:

A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

The Constitution does not prescribe a *numerus clausus* of bearers of rights. It therefore does not only protect natural and juristic persons. The argument could therefore also be advanced that associations, regardless of legal personality, may

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100 contra Du Plessis (n 99) 445.
101 See Van der Vyver (n 83) par 227 228; Potgieter *Aspekte van die Juridiese Beskerming van die Godsdiensgevoel* (1987 LLD thesis, Unisa) 29ff.
102 (n 8) par 228. Footnote omitted.
103 *ibid*. See also Potgieter (n 101) 29ff.
104 Van der Vyver (n 83) par 227.
105 Rautenbach (n 5) 49.
106 *ibid*. 

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bear rights as their composition enjoys protection under the right to freedom of association.¹⁰⁷

Section 8(4) requires that regard must be had to the nature of both the right and the juristic person in question, in order to determine if the latter may bear the right. The right to freedom of religion, to this end, is one of the most important rights enshrined in the Bill of Rights.¹⁰⁸ The right would thus require effective enforcement and universal respect in order to fulfil its guarantees and avoid religious conflict in the expression of the right. Juristic persons are an essential element in religious life and valuable tools in realising such guarantees. For instance, members act through the institutions that they create by means of fund raising drives and clerical pronouncements on sensitive issues, such as abortion or the death penalty. Juristic persons, therefore, are very important in organising religious life and facilitating contact between confessions and with the secular world. Large numbers of South Africans, who are organised in religious organisations, would be disadvantaged at seeing their religious liberty not as effectively exercised as possible should such juristic persons not bear the right to freedom of religion. The denial of juristic persons of the right to freedom of religion would also leave a large number of legal entities without constitutional protection for their religious activities. A great many rights guaranteed by section 15(1) are also ideal for institutional exercise. Such rights would include:

- The right to state non-identification that regulates and fosters the relationship between the state and religion.¹⁰⁹ Qualified juristic persons would be ideal bearers of this right as they could intercede with the state on behalf of their constituents and ensure their own independence from the state, as well as the latter’s equal treatment of all confessions.

¹⁰⁷ ibid.
¹⁰⁸ See Ch 5.4.1; s 36(1)(a).
¹⁰⁹ See Ch 3.7.1.1.
• The right to the regulation of own affairs and doctrine.\textsuperscript{110} This would entail the juristic person regulating its own affairs as an entity, such as choosing its own confession and deciding on its amendment and expression in institutional form.

• The right to appoint religious adherents.\textsuperscript{111}

• The right to institutional privilege would be a prime example of institutional exercise by qualified juristic persons.\textsuperscript{112}

• The right to religious training would be hampered by a lack of recognition of juristic persons as bearers of the right to freedom of religion.\textsuperscript{113} Such recognition would afford proper opportunity for the protection of the right to freedom of religion in conjunction with the right to education, as enshrined in section 29, especially sub-section three.

Religious rights pertaining exclusively to the natural person’s conscience would obviously be excluded from the scope of the juristic person’s possible rights portfolio,\textsuperscript{114} such as the right to change one’s religion or denomination.\textsuperscript{115} The right to freedom of religion would impart juristic persons, such as churches and other religious organisations, with an exclusive religious goal or goals, but also organisations that are only partially devoted to enabling and fostering religious adherents and advancing religious aims.\textsuperscript{116} Institutional claims for constitutional

\begin{footnotes}
\footnote{110}{See Ch 3.7.1.2.}
\footnote{111}{See Ch 3.7.1.2.}
\footnote{112}{See Ch 3.7.2.4.}
\footnote{113}{See Ch 3.7.4.}
\footnote{114}{See Scholler “The constitutional guarantee of religious freedom in the Federal Republic of Germany” in Ellwein, Grimm, Hesse and Schuppert (Eds) \textit{Jahrbuch zur Staats- und Verwaltungswissenschaft} vol 7 (1994) 130 regarding the German position. Jacobs and White \textit{The European Convention on Human Rights} (1996) 211 212 note that an association is not capable of exercising the right to freedom of conscience.}
\footnote{115}{See Ch 3.7.2.1.}
\footnote{116}{See also BVerfGE 24 236 (1968); Kommers (n 21) 446 447.}
\end{footnotes}
protection of a goal, action or interest should therefore be founded on the religious guarantees in the Constitution to gain its protection.

Non-incorporated bodies, as explained, may also be the bearers of the right to freedom of religion. The above arguments advanced and qualifications proposed on the bearing of the right would be of equal force here. People organise themselves in order to effect change and ensure stability; bodies so charged in religious matters should be able to avail themselves of important constitutional guarantees. It would therefore be a serious infringement of the equality provisions of section 9 if only juristic persons were afforded the right to freedom of religion and not other associations; for instance, if the right to institutional privilege were afforded the *Nederduits Gereformeerde Kerk* but not the Anglican Church, merely because the latter exercised its legal choice not to incorporate, due to historical reasons.\(^\text{117}\)

Section 31(1)(b) of the Constitution, as explained, guarantees individuals the right to found religious organisations irrespective of their incorporation or not. The section therefore expressly enables religious adherents to organise. It would be strange indeed if one could constitutionally establish a body, only to discover that it cannot bear any rights related to the purpose for its very existence.\(^\text{118}\) This position accords

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\(^\text{117}\) Brink J in *De Vos v Die Ringkommissie van die Ring van die NG Kerk Bloemfontein* 1952 (2) SA 83 (O) 93H noted that there was much to be said in viewing the *NG Kerk* as a juristic person, the Anglican Church, however, is not a juristic person. See *Van der Vyver* (n 83) par 227; Fourie *Die Nederduitse Gereformeerde Kerk as Regspersoon in die Suid-Afrikanse Privaatregr* (1973 LLD thesis, Potch) *passim*. The Supreme Court of Appeal left the question undecided whether the *NGKA* is a juristic person; it, however, did find that the congregations of the church were juristic persons, see *NGKA v VGK* (n 99) 166I-J.

\(^\text{118}\) Rautenbach *General Provisions of the South African Bill of Rights* (1995) 42 is also of the opinion that juristic persons may be the bearers of the right to freedom of religion, with certain qualifications; see also note 60 regarding German law. See also Malherbe (n 11) 679; Freedman “The right to religious liberty, the right to religious equality and section 15(1) of the South African Constitution” 2000 *Stell LR* 99 107; Witte “The South African experiment in religious human rights. What can be learned from the American experience” 1993 *TRW* 1 23 who support the fact that religious associations may be bearers of the right to freedom of religion. The latter proposition also finds support in the application of the European Convention as associations may claim the right to freedom of religion; their religious guarantees under art 9 may therefore be violated, see Jacobs and White (n 114) 211; Cullen “The emerging scope of freedom of conscience” 1997 *European LR* 32 36ff; Naidu “The right to freedom of thought and
in principle with that of foreign jurisprudence, where a wide variety of bearers of the right to freedom of religion apart from natural persons are recognised.\textsuperscript{119}