CHAPTER 4

BINDING EFFECT OF THE RIGHT TO FREEDOM OF RELIGION

4.1 VERTICAL APPLICATION

The vertical application of the Bill of the Rights constitutes the traditional function of bills of rights. Bills of rights have historically been aimed at the limitation and regulation of the exercise of state power in regard to private individuals and interests. Section 8(1) of the South African Bill of Rights constitutes the same function by binding the state to the Bill:

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

The South African position accords with international instruments that also enjoin the state to respect human rights such as religious liberty.

It is arguably important to establish the extent and content of the duty of the state, in its various guises, to uphold the Bill of Rights. Section 7(2) highlights the position of the state, as follows:

The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

The duty to respect the Bill of Rights means “not to violate the rights, or stated differently, to limit them only in accordance with the provisions of limitation clauses”. The state should thus take note of and attempt to understand the

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3 Rautenbach and Malherbe (n 1) 329. See also Rautenbach (n 1) 57 82. See also the summaries regarding the international position made by Krishnaswami Study of Discrimination in the Matter of Religious Rights and Practices (1960) 53 54. The state
right to freedom of religion in order to endeavour to respect the full and unbridled extent of religious liberty as foreseen by the Bill of Rights. The state should respect the right of bearers of religious freedom to choose a religion or to continue to adhere to a particular religion or to forsake that faith for another. Inevitably, situations may arise where absolute respect of the exercise of the right to freedom of religion may prove to be impossible or questionable. The protected conduct and interests of the right should then be respected, taking into account the limitation provisions. In other words, the right to undertake pilgrimages, for example, may not be limited without heeding and respecting the limitation provisions. The duty to respect religious freedom, therefore, means the limitation of the right where reasonable and justifiable as opposed to the arbitrary infringement of constitutional guarantees. The state should thus constitutionally obey religious freedom, such as the right to conduct religious observances at state and state-aided institutions.

The duty to protect the Bill of Rights means “to take steps to prevent the violation of” religious freedom. The state may thus not merely stand by and ignore the limitation of religious liberty by private parties on the ground that the state is not the violator. The state should prevent and punish or redress the violation of religious freedom. Such a positive duty resting on the state to act in the interest of religious liberty by prohibiting religious discrimination by private persons enjoys support in international law. Laws prohibiting religious discrimination...
hate speech and blasphemy may serve as examples of measures that may be implemented to protect the religious dignity of bearers of the right against infringement. The state should thus prevent the infringement of religious liberty by non-state parties and it should also deter the future infringement of the right; affected individuals may also be supplied with legal avenues to protect their own rights. If religious intolerance is viewed as attitudes that may motivate religious infringement it may be argued that the state must take educational measures to discourage religious intolerance.

The duty to *promote and fulfil* the Bill of Rights means “to take steps to facilitate the exercise of rights”. The state is enjoined to create a society in which the expression of religious freedom may flourish and develop. The creation of an environment conducive to religious liberty would accord with German law. The state must facilitate the exercise of the right by informing people and institutions of their interests and conduct protected by the right to freedom of religion. Section 15(3) also provides scope for the fulfilment and recognition of the right to practise religious personal and family law by enabling parliament to enact legislation recognising such systems. Section 15(3) provides ample opportunity for an activist stance in the advancement of religious liberty.

In conclusion, it may be observed that section 7(2) dispels the myth of and attempts at the strict and absolute separation of religion and the state. The state has a positive duty, in other words the state is called to action, to

*Rights* (1998) 348 observes with regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) that “[p]ositive obligations may arguably arise requiring the State to take steps to protect the exercise of religious freedom from others”. See also Krishnaswami (n 3) 23 53.

See Ch 3.7.1.3.

See Sullivan (n 7) 507.

See § 4(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) art 13(2); Sullivan (n 7) 505.

See Rautenbach and Malherbe (n 1) 329. See also Rautenbach (n 1) 57 82.


See Ch 3.4, 3.7.3.1.

See also Ch 3.7.1.1.
respect, protect, promote and fulfil religious freedom.\(^\text{15}\) The state as a party bound to uphold religious liberty has to nurture and protect religious expression in order to render bearers of the right meaningful opportunities in the realisation of important constitutional guarantees. The call to action would, however, be near impossible to react to should the state attempt to effect an unrealistic separation between itself and religion.\(^\text{16}\) Section 7(2) thus prohibits hostility and disapproval by the state of religion, as the state is a constitutional agent of religious freedom.

4.2 HORIZONTAL APPLICATION

A modern function of bills of rights has been the direct regulation of private relationships and actions. In other words, constitutional guarantees of religious freedom protect bearers of the right not only vertically, against infringement by the state, but also horizontally, against infringement by private individuals and organisations.\(^\text{17}\) Section 8(2) reads in this regard that:

A provision of the Bill of Rights binds a natural person or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.\(^\text{18}\)

The nature of the right to freedom of religion and the duty imposed by the right must be considered to determine the applicability of section 8(2).\(^\text{19}\) It is submitted that religious guarantees are particularly vulnerable to private violation given the manifold examples of religious intolerance in private interaction. Thus, the state is not the only possible violator of religious liberty, but also religious and non-religious private interests. The duty imposed by

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\(^{15}\) See Malherbe “Die grondwetlike beskerming van godsdiensvryheid” 1998 TSAR 673 698.

\(^{16}\) See Malherbe (n 15) 699.

\(^{17}\) See Rautenbach and Malherbe (n 1) 340.

\(^{18}\) The uncertainty that surrounded the Interim Constitution regarding the horizontal application of the Bill of Rights has been cleared up by s 8(2) providing that private persons are bound by the right, see Rautenbach and Malherbe (n 1) 341; Henrard “The accommodation of religious diversity in South Africa against the background of the centrality of the equality principle in the new constitutional dispensation” 2001 Journal of African Law 51 57.

\(^{19}\) See Rautenbach and Malherbe (n 1) 344; Rautenbach (n 1) 78.
religious freedom is not the acceptance of different views, but essentially one of tolerance of different views in the preservation of the sanctity of the different conscience and the manifestation of religious devotion.\textsuperscript{20} It would be particularly wise to bind not only the state but also private persons in the achievement of religious tolerance.

Interestingly, private parties bound to uphold the right to freedom of religion are themselves the bearers of rights in the Bill of Rights, if not religious liberty itself. Persons accused of infringing the religious liberty of others may claim in defence that they were merely exercising a constitutional right themselves. For example, someone may claim that her right to freedom of religion is infringed by an ecclesiastical ban on female ordination. Conversely, a church may claim that it was merely exercising its right to regulate its own affairs and doctrine by excluding certain classes of people from specific positions.\textsuperscript{21} To determine whether the religious liberty of the complainant has been affected by another private person in the exercise of a right the weighing of rights and interests must take place against the backdrop of the limitation provisions.\textsuperscript{22} In other words, the limitation provisions are to be used as instruments of mediation in resolving conflict and friction between competing rights.\textsuperscript{23} Concerned parties should thus acquaint themselves with the range of protected conduct and interests of conflicting rights at issue, such as religious liberty in order to properly effect section 8(2) in the application of the Bill of Rights to private relationships.

All factors are to be considered in the application of section 8(2) and not only the mentioned nature of the right and the duty imposed by the right.\textsuperscript{24} An important issue to be considered is the nature of the relationship between the concerned parties.\textsuperscript{25} The Bill of Rights would be particularly applicable in the

\textsuperscript{20} See Labuschagne “Religious freedom and newly-established religions in Dutch law” 1997 Netherlands International LR168 184 185; Ch 5.
\textsuperscript{21} See also Rautenbach (n 1) 77 who discusses a similar example. See also Ch 3.7.1.2.
\textsuperscript{22} See Rautenbach and Malherbe (n 1) 343; Rautenbach (n 1) 77.
\textsuperscript{23} See Ch 5.
\textsuperscript{24} See Rautenbach (n 1) 78.
\textsuperscript{25} See Rautenbach (n 1) 78.
governance of unequal private relationships.\textsuperscript{26} For example, the unequal relationship between an individual and a religious organisation, be it in regard of an ordination dispute or disciplinary action, would provide possibilities for the disregard and infringement of rights. The application of the Bill of Rights to such a private relationship would encourage the proper exercise of religious rights and the justification of the exercise of power threatening to jeopardise someone’s protected conduct and interests. Guarantees of administrative justice should be recognised as important elements in the application of the Bill of Rights to unequal relationships with regard to religious liberty.\textsuperscript{27}

Bearers of the right to freedom of religion (as well as bearers of other rights) are, arguably, enjoined to recognise and respect the freedom of religion (and other rights) of others. Section 8(2), therefore, enhances and amplifies the realisation and protection of religious guarantees by widening the scope of parties bound to respect private religious interests.

In conclusion, both the state and private persons are enjoined to heed the religious rights of others in the creation of a constitutional culture aimed at the establishment of a society based on the proper justification of the exercise of power.\textsuperscript{28} The Constitution envisages the advancement of religious liberty by enjoining the Pan South African Language Board to promote and ensure respect for Arabic, Hebrew, Sanskrit and other languages used for religious purposes in the country.\textsuperscript{29} The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Human Rights Commission have an important role to play in monitoring compliance with the religious guarantees of the Constitution in order to promote respect and tolerance with regard to religious issues both from vertical and horizontal spheres.\textsuperscript{30}

\textsuperscript{26} See Rautenbach (n 1) 78.

\textsuperscript{27} See s 33; Ch 3.7.1.2; Du Plessis “The protection of religious rights in South Africa’s Transitional Constitution” 1994 Koers 151 166 167; Devenish, Govender and Hulme \textit{Administrative Law and Justice in South Africa} (2001) 84 85.

\textsuperscript{28} See Mureinik “A bridge to where: Introducing the Interim Bill of Rights” 1994 \textit{SAJHR} 31 32.

\textsuperscript{29} S 5(b)(ii).

\textsuperscript{30} See s 181(1)(b)-(c) 184 185 186. See also Rautenbach (n 1) 167.