CHAPTER 5

THE LIMITATION OF THE RIGHT TO FREEDOM OF RELIGION

5.1 GENERAL

The right to freedom of religion does not entitle bearers of the right carte blanche in the exercise and manifestation of religious belief. Situations may arise justifying the limitation of religious liberty. The maintenance of peace and order, for instance, can only be achieved by the limitation of rights under certain circumstances in order to curtail and prevent conflict borne out of unbridled individual, collective and institutional expression.¹ For example, the need for limitation is evident from the potential of conflict between religions and between denominations of the same faith, as well as with secular forces.² The possibility of the limitation of religious freedom is recognised by section 7(3) that states:

The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.³

An attempt will made in this Chapter to explore and explain the constitutional limitation of religious freedom by paying attention to the approach to the application of the Bill of Rights⁴ and the limitation test to be employed.⁵ The constitutional factors to be considered will also be reviewed,⁶ as well as the specific limitation provisions.⁷

⁴ See Ch 5.2.
⁵ See Ch 5.3.
⁶ See Ch 5.4.
⁷ See Ch 5.5, 5.6.
5.2 APPROACH TO THE APPLICATION OF THE BILL OF RIGHTS

Legal stability requires a consistent approach to be followed in order to provide a structure with which to effect proper constitutional limitation of religious liberty. This study accepts the approach to the application of the Bill of Rights as followed by Rautenbach and Malherbe.\(^8\) The approach focuses on the interpretation of constitutional guarantees,\(^9\) followed by their application to the relevant facts.\(^10\) The approach requires the following requirements to be satisfied:

- The bearers of the right to freedom of religion are to be established through interpretation.\(^11\) The question must then be answered whether the person complaining of an infringement of their right is an actual bearer of religious liberty.

- The protected conduct and interests of the right to freedom of religion are to be established through interpretation.\(^12\) The question must then be answered whether such conduct and interests of the complainant had been infringed as alleged.

- The parties bound to respect religious freedom, as well as their duties in respecting the right are to be established through interpretation.\(^13\) The question must then be answered whether the supposed violator is bound to respect religious freedom, and if so, whether they have fulfilled such duties.

\(^{8}\) (n 1) 321 322. A similar approach can also be discerned from S v Zuma 1995 (4) BCLR 401 (CC), 1995 (2) SA 642 (CC) par 21; S v Makwanyane 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC) par 100; Freedman “Protecting religious beliefs and practices under s 14(1) of the Interim Constitution: What can we learn from the American Constitution?” 1996 THRHR 667 673. See also Rautenbach (n 3) 12.

\(^{9}\) See Ch 1.3 regarding the wide interpretation of the right to freedom of religion. See also Rautenbach and Malherbe (n 1) 321ff.

\(^{10}\) See Rautenbach and Malherbe (n 1) 321ff.

\(^{11}\) See Ch 2.

\(^{12}\) See Ch 3.

\(^{13}\) See Ch 4.
• The requirements to limit the right to religious freedom are to be determined through interpretation. The question must then be answered whether the limitation of the right to freedom of religion of the complainant complies with constitutional limitation provisions.¹⁴

The complainant has to prove that they bear the right to freedom of religion and that their right had been infringed by the violator. The onus thereafter shifts to the violator to prove that the infringement had been constitutionally justified.¹⁵ It is important to note that no burden of proof exists in regard of the application of the Bill of Rights to a particular set of facts that has been proved.¹⁶ The Constitution contains no provisions regarding the standard of proof to be applied; the standard of proof applied by the courts is equal to that of civil matters, namely a preponderance of probabilities.¹⁷

5.3 THE LIMITATION TEST EMPLOYED

Section 36(1), the general limitation provision, reads:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

¹⁴ See Rautenbach and Malherbe (n 1) 322 regarding the approach to the application of the Bill of Rights.
¹⁵ See Rautenbach and Malherbe (n 1) 323.
¹⁶ See Rautenbach and Malherbe (n 1) 323; Rautenbach (n 3) 13.
¹⁷ See Rautenbach and Malherbe (n 1) 323.
“Law” indicates that religious freedom may be limited in terms of legislation, common law and customary law. Section 36(1) enables all legislative bodies to limit religious freedom; any action taken should obviously lie within that body’s sphere of competence. Persons and institutions that are not legislative bodies may also limit religious freedom should they do so “in terms of law”, in other words laws may empower such agents of limitation.

The requirement that any limitation of religious liberty must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” constitutes the substantive limitation test. In other words, a standard is mandated against which infringements of religious liberty must be measured in order to establish if a valid constitutional limitation had taken place. The South African limitation test corresponds with foreign and international law. The substantive test implies a balance between the limitation and its purpose worthy of a democratic society, in other words a proportionality test. The balance should thus not attest to a “closed, undemocratic society in which dignity, freedom and equality of people are not

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18 See Rautenbach and Malherbe (n 1) 348; Rautenbach (n 3) 100ff; Carpenter “Beyond belief – religious freedom under the South African and American Constitutions” 1995 THRHR 684 693. See also Müller v Switzerland 13 ECHR 212 (1988) 226 regarding the requirements of a norm in order to be described as “law”. The Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (1991) par 38 requires that participating states may only limit the religious rights of migrant workers in accordance with the law.

19 See Rautenbach and Malherbe (n 1) 107; Smith “Freedom of religion under the Final Constitution” 1997 SALJ 217 223; Carpenter (n 18) 693.

20 See Rautenbach and Malherbe (n 1) 349; Rautenbach (n 3) 102. The executive authorities should have a measure of discretion to limit rights, such as the right to religious freedom, in order to effect proper administration, see Rautenbach and Malherbe 349. Executive authorities are, therefore, not mere mechanical functionaries but are called to exercise choices in the implementation of legislation.

21 See Rautenbach and Malherbe (n 1) 107; Smith “Freedom of religion under the Final Constitution” 1997 SALJ 217 223; Carpenter (n 18) 693.

22 The reasonable and justifiable democratic society test is also found in the Constitutions of Malta (1964) s 40(3); Zambia (1991) 19(5)(b) with regard to religious liberty.

23 The democratic society standard in the limitation of religious freedom is required by the Universal Declaration of Human Rights (1948) art 29(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(2).

24 See Rautenbach and Malherbe (n 1) 349 350. Chaskalson P held, in S v Makwanyane (n 8) par 104, that s 36(1) requires “the weighing of competing values, and ultimately an assessment based on proportionality”. See also O.Regan J in S v Lawrence; S v Negal; S v Solberg 1997 (10) BCLR 1348 (CC), 1997 (4) SA 1176 (CC) par 130; Sachs J in Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) par 31 32 33 34 35 50 51; S v Manamela 2000 (3) SA 1 (CC), 2000 (5) BCLR 49 (CC), 2000 (1) SACR 414 (CC) par 32 33.
cherished”. The preamble to the Constitution, as well as section one, will both serve an important purpose in identifying the correct measure to be applied as they allude to the qualities of an open and democratic society. Morren suggests that democracy and human rights ought to be seen as synonyms, as a valued democracy enables the enjoyment of rights and freedoms in large measure, as opposed to authoritarian governance. Therefore, the aim of a democratic society in the limitation of religious freedom should be, after careful weighing of competing rights and interests, the maintenance of as much of the infringed right as possible in order to protect and enable the exercise of religious freedom as freely and as openly as possible. A democratic society would thus take note of the position of the individual and a variety of interests as opposed to requiring blind, unreasoned and unflinching obedience to the arbitrary exercise of power by a single grouping. It may be argued that tolerance of religious diversity and difference would be a virtue of such an open and democratic society that does not penalise or discourage a multitude of views in favour of public orthodoxy. The European Court for Human Rights has also decided that religious tolerance is to be viewed as a characteristic of a democratic society. Tolerance should thus be exercised in the limitation of religious expression, diversity and manifestation in order to allow the realisation of religious guarantees. However, religious freedom should not be tolerated to the

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25 Rautenbach and Malherbe (n 1) 350.
26 See Rautenbach (n 3) 107.
29 See Morren (n 27) 24.
31 See Kokkinakis v Greece 17 EHRR 397 (1993) 411.
32 Den Hartogh (n 28) passim draws the important distinction between tolerance and broadmindedness; tolerance does not ajoining the acceptance of views but merely their
extent that acts contrary to a democratic society are suffered, thereby negating the democratic human rights order itself. Sachs J has identified the ideal requirement to test the limitation of religious freedom in the pursuit of constitutional tolerance and understanding:

“I shall attempt to apply the sensibilities and perspectives ... of the reasonable South African (of any faith or of none) who is neither hypersensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution. In my opinion, such a reasonable South African is a person of common sense immersed in the cultural realities of our country and aware of the amplitude and nuanced nature of our Constitution. He or she neither attempts relentlessly to purge public life of even the faintest association with religion for fear of otherwise descending the slippery slope to theocracy, nor, at the other extreme, regards religiously-based practices of the past to be as natural and non-sectarian as the air one breathes simply because of their widespread acceptance.”

The importance and inviolability of the individual conscience coupled with the intensely personal nature of the right to freedom of religion constitute valid reasons why an open and democratic society could not allow limitations to be imposed on beliefs held, as opposed to their actual manifestation. Bearer
of the right to freedom of religion should thus enjoy the unbridled democratic freedom to think and believe as they may please, whereas even exemplary democratic standards may invariable require the limitation of religious expression. This approach would be concomitant with international law.\textsuperscript{35}

The process of weighing competing interests and rights in judging the constitutionality of the factual infringement of the expression of religious freedom does not exist in a vacuum, but rather functions against the background of a tolerant, diverse and democratic society. In this regard, the Constitution prescribes certain factors to be considered in the achievement of a reasoned and deliberated conclusion pertaining to the manifestation of religious liberty. These factors will be considered in due course.

5.4 RELEVANT FACTORS

Sections 36(1)(a) to (e) enumerate five factors to be considered in the determination whether an infringement of religious liberty passes constitutional muster. It should be kept in mind that these factors are not the only factors to be considered in the determination of the justifiability and reasonableness of the limitation, but that all factors, expressly mentioned or

\textsuperscript{35} The International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3) provide only for the limitation of the manifestation of religion, and not for religious thought or belief. See also Van Dijk and Van Hoof \textit{Theory and Practice of the European Convention on Human Rights} (1990) 397.
otherwise, are to be reviewed and evaluated. Rautenbach and Malherbe opine that:

“Although a particular court or commentator will consider the factors in an order that suits their predilections, convenience and understanding, it is not advisable to follow any predetermined, strict order … all factors relate to one another, they overlap to a greater or lesser extent, and they all serve a single purpose, namely to assist us in applying the general limitation test to a particular limitation.”

The factors, therefore, are not to be viewed as distinct tests replacing the general substantive limitation test, but merely as factors related to it. The factors may also serve to influence the substantive test, for example they may lead to a more stringent limitation criterion to be developed such as requiring necessity rather than reasonableness in order to justify the limitation of religious freedom as such or of some of its elements in particular.

The factors, therefore, are aids to assist in the proper application of the general substantive limitation test, thereby avoiding a haphazard and arbitrary limitation of religious liberty. The express factors will now each be considered in turn.

5.4.1 The Nature of the Right

The nature of the right to freedom of religion “refers to what is being protected by the right, the importance of the right and its form of exercise in an open

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36 See s 36(1); Rautenbach and Malherbe (n 1) 350; Rautenbach (n 3) 108.
37 Rautenbach and Malherbe (n 1) 350-351 (footnote omitted).
38 See Rautenbach (n 3) 109; Rautenbach and Malherbe (n 1) 351.
39 See Rautenbach and Malherbe (n 1) 351; Smith (n 21) 223; Smith “Freedom of religion” in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (Eds) Constitutional Law of South Africa (1999) 19-12 opines that: “Perhaps one can simply say it would be unreasonable to limit freedom of religion in an open and democratic society unless it was really necessary.”
40 See Rautenbach (n 3) 110.
and democratic society”. The protective ambit of the right is to be viewed not only in scope, namely all the elements of religious liberty, but also the depth, namely the reach of each element. However, the primary aim in the evaluation of the nature of religious freedom should be the importance of the right to freedom of religion. The importance of religious liberty to South Africa as an open and democratic society is clearly evidenced by the statement of Sachs J:

“There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the important ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending epochs and national boundaries.”

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41 See Rautenbach and Malherbe (n 1) 352 353; Rautenbach (n 3) 110. Counsel in Prince v President of the Law Society, Cape of Good Hope 1998 (8) BCLR 976 (C) 986A-D clearly referred to the protected interests of religious freedom in international law and opined as to the importance of the right. Friedman JP mentioned counsel’s arguments under the nature of religious freedom, at 984E.
42 See Ch 3.
43 Rautenbach (n 3) 111; Malherbe (n 33) 692.
It is imperative to note the reference to human dignity in the quote, as it adds weight to the importance of religious liberty as such by nature of the fact that human dignity grounds and infuses all other rights, a limitation of religious freedom, therefore, may also infringe human dignity, thereby requiring added justification for the infringement of religious liberty.  

The importance of the right to freedom of religion is an important feature of international law as it is protected in all major instruments and in a host of additional international enactments. Religious freedom is also an important feature of foreign law. Thus, the right may be more important than some other rights, thereby creating the possibility of more stringent limitation criteria.

The nature of religious freedom relates not merely to the abstract importance of the right but also to its practical importance, namely the importance of a specific exercise of a particular element of religious freedom. Attention should thus be paid to the general importance of religious freedom in conjunction with its importance in a particular situation. For example, the right to undertake pilgrimages is an important right, not only because it forms part of the important broader guarantee of freedom of religion, but also because pilgrimages play a special role in the lives of many religious adherents. This may be further refined, because the right to undertake pilgrimages would play a more crucial role in the lives of those obligated by their faith to undertake

Tierney “Religious rights: An historical perspective” in Witte and Van der Vyver (Eds) Religious Human Rights in Global Perspective vol 2 (1996) 17; Buckingham (n 2) 7 14 16. See s 10 of the Bill of Rights. See also Rautenbach (n 3) 193ff; Sachs (n 32) 43.


See the list of international constitutional religion clauses as compiled by Wuthnow (Ed) The Encyclopedia of Politics and Religion vol 2 (1998) 853-863. Kommers The Constitutional Jurisprudence of the Federal Republic of Germany (1997) 443 notes that religious expression in German law constitutes a special kind of expression that rises above normal expression. See also Naidu (n 45) 62. See also Buckingham (n 2) 135 regarding the important position of religious liberty in Canadian law.

See Rautenbach and Malherbe (n 1) 359; Rautenbach (n 3) 111.
such a journey than those who are merely *encouraged* to undertake one. The subjective importance and experience of the right must thus be considered in the determination of the true nature and importance of the infringed right at hand.\(^49\) The important nature of religious freedom, or one of its elements, should be viewed in context with other factors in order to require a very important purpose for the justification of the limitation of religious freedom or for the increased consideration of less restrictive measures in the achievement of the aim with the limitation. The extent of the limitation should also be scrutinised, as well as the proportionality between the limitation and its aim in order to effect proper protection of the conduct and interests of religious freedom. In other words, increased vigilance in the limitation of the right to freedom of religion could very well require a more stringent limitation test to be applied, such as necessity rather than reasonableness in justifying an infringement.\(^50\) The importance of religious freedom in general and in particular is an important factor to consider in weighing competing rights and interests in deciding if religious freedom had been limited in accordance with the Constitution or not.

5.4.2 The Importance of the Purpose of the Limitation

The importance of the purpose of the limitation of religious freedom requires the purpose of the limitation to be established and its importance to be measured against an open and democratic society as background.\(^51\) This requirement assists the proper weighing of competing values and interests. The important nature of the right to freedom of religion, for instance, would require the pursuit of an important goal in the limitation of the right. In other words, the limitation of religious liberty in pursuit of an unimportant or marginal goal would be difficult to justify, if not near impossible viewed in the light of the

\(^49\) For example, Conradie J, in *Garden Cities Incorporated Association v Northpine Islamic Society* 1999 (2) SA 268 (C) 272D-G 273E, found the amplification of the call to prayer to be non-essential to the Islamic faith, thereby prohibiting its amplification in the particular matter. The essential nature of the call to prayer as such, however, was not in contention.

\(^50\) See Rautenbach (n 3) 111. Smith (n 21) 223 opines that: “Perhaps one can simply say it would be unreasonable to limit freedom of religion in an open and democratic society unless it was really necessary.”

\(^51\) See Rautenbach and Malherbe (n 1) 352; Rautenbach (n 3) 112; Malherbe (n 34) 693.
gravity of the protected conduct and interests. The measure to be applied in the determination of the importance of the limitation should be that of an open and democratic society predicated on religious tolerance and the encouragement of the maximum and free expression of religious guarantees. The substantive limitation test can also be influenced by the importance of the aim pursued. Different goals, arguably, could lead to different measures to be applied in judging the constitutionality of the infringement, for example necessity instead of reasonableness.\(^{52}\)

The right to freedom of religion may only be limited in the pursuit of a legitimate and properly identified aim.\(^{53}\) However, the general limitation provision does not provide for goals to be pursued in the limitation of religious freedom, or any other right for that matter. Goals, however, are still within the review of the limitation provision as they should not be at odds with the needs and aspirations of an open and democratic society based on human dignity, equality and freedom.\(^{54}\)

A number of goals has been identified that could possibly serve as reasons to limit religious freedom. These include and are not limited to: The maintenance of public order,\(^{55}\) the maintenance of public safety or security,\(^{56}\) the protection

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\(^{52}\) See Rautenbach (n 3) 112. It could be argued that the more important the measure, the less stringent the substantive test to be applied; other factors, however, should still be carefully scrutinised such as the extent of the limitation.

\(^{53}\) A legitimate aim refers to the fact that the goal must fall within the legal competence of the body or person pursuing the limitation, see Rautenbach (n 3) 112.

\(^{54}\) See also Malherbe (n 34) 693.

\(^{55}\) See the Universal Declaration of Human Rights (1948) art 29(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(2); International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3); Convention on the Rights of the Child (1989) art 14(3); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985) art 5(1)(e); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) art 12(3). See the Constitutions of Bangladesh (1972) s 41; Burkina Faso (1991) s 7; Cambodia (1993) s 43(2); China (1982) s 36(3); Denmark (1953) s 67; El Salvador (1983) s 25; Greece (1975) s 13(2); Guatemala (1985) s 36; Ireland (1937) s 44.2.1; India (1950) s 25(1); Malta (1964) s 40(3); Pakistan (1981) s 20; Spain (1978) s 16(1); Thailand (1976) s 25; Tunisia (1991) s 5; Zambia (1991) s 19(5)(a). See also Krishnaswami (n 30) 34 50 54; 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 619 647; Nsereko (n 1) 849.
of personal safety, the interests of defence, the protection of the beliefs or other rights of others, the protection of (public) health, the protection of the education system of the state, the protection of morals, the peaceful

56 See the International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3); Convention on the Rights of the Child (1989) art 14(3); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985) art 5(1)(e); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) art 12(3). See the Constitution of Cambodia (1993) s 43(2); Hong Kong (1990) s 15(3); Malta (1964) s 40(3); Zambia (1991) s 19(5)(a). See Marlette (n 34) 693, Mason (n 55) 647.

57 For example, requiring someone to wear safety clothing or headgear rather than religious apparel, see Buckingham (n 2) 301ff 309.

58 See the Constitution of Zambia (1991) s 19(5)(a).

59 See the Universal Declaration of Human Rights (1948) art 29(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(2); International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3); Convention on the Rights of the Child (1989) art 14(3); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985) art 5(1)(e); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) art 12(3). See the Constitutions of Cambodia (1993) 43(2); Malta (1964) s 40(3); Zambia (1991) s 19(5)(b). See Sullivan (n 34) 494 in respect of the limitation of proselytism. See also Mason (n 55) 649; Krishnaswami (n 30) 18 54; Buckingham (n 2) 287.

60 See the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(2); International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985) art 5(1)(e); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) art 12(3). See the Constitutions of Hong Kong (1990) s 15(3); India (1950) s 25(1); Malta (1964) s 40(3); Zambia (1991) s 19(5)(a). See also Malherbe (n 34) 693; Krishnaswami (n 30) 18 54; Buckingham (n 2) 287.

61 See the Constitution of China (1982) s 36(3). The South African Constitutional Court has also validated a prohibition on corporal punishment in all schools in the interest of protecting pupils from degradation and indignity and in the interest of uniform norms and standards, thereby disallowing religiously motivated corporal punishment, see Christian Education South Africa v Minister of Education (n 44) par 39 43 44 50; De Waal, Currie and Erasmus The Bill of Rights Handbook (2001) 294.

62 See the Universal Declaration of Human Rights (1948) art 29(2); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 9(2); International Covenant on Civil and Political Rights (1966) art 18(3); American Convention on Human Rights (1969) art 12(3); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 1(3); Convention on the Rights of the Child (1989) art 14(3); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (1985) art 5(1)(e); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) art 12(3). See the Constitutions of Bangladesh (1972) s 41; Burkina Faso (1991) s 7; Costa Rica (1977) s 75; Denmark (1953) s 67; El Salvador (1983) s 25; Finland (1919) s 8; Hong Kong (1990) s 15(3); Ireland (1937) s 44.2.1; Italy (1947) s 19; India (1950) s 25(1); Pakistan (1981) s 20; Thailand (1978) s 25; Zambia (1991) s 19(5)(a). It must be noted that the United Nations is of the opinion that "limitations on the freedom to manifest a religion or belief for the purpose of protecting
resolution of ecclesiastical property disputes,\textsuperscript{63} the protection of the family unit against religious excess,\textsuperscript{64} the best interests of the child,\textsuperscript{65} the sanctity of contractual obligations,\textsuperscript{66} safeguarding “the peace, good order and comfort of the community”,\textsuperscript{67} the prevention of “the perpetration of frauds under the cloak of religion”,\textsuperscript{68} the combating of racial discrimination,\textsuperscript{69} the maintenance of military discipline and conformity,\textsuperscript{70} the control of dependence-producing substances;\textsuperscript{71} the pursuit of national security in the face of religiously inspired subversion or unrest,\textsuperscript{72} the protection of employees of religious bodies against exploitation,\textsuperscript{73} the regulation of the flow of traffic,\textsuperscript{74} the prevention of harm,\textsuperscript{75} and the general welfare of a democratic society.\textsuperscript{76}

Any inquiry should, however, not merely focus on a stated or single purpose but on the “overall purpose and effect” of the limitation.\textsuperscript{77} Courts should also

morals must be based on principles not deriving exclusively from a single tradition”, quoted in Malherbe (n 34) 693. See also Krishnaswami (n 30) 34 40 41 54; Mason (n 55) 648; De Waal \textit{et al} (n 61) 296. A minister of the Botswana Government has also said that worship may take place provided that it does not amount to public indecency, see Nsereko (n 1) 849.

\textsuperscript{63} See \textit{Jones v Wolf} 443 US 595 (1978) 602.
\textsuperscript{64} See the quote in Moens (n 34) 207.
\textsuperscript{65} See Ch 3.7.2.2; s 28(2); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) art 5(2); \textit{Allsop v McCann} [2000] 3 All SA 475 (C). See Nsereko (n 1) 855 regarding the position in Botswana. See also Krishnaswami (n 30) 45.
\textsuperscript{66} See \textit{Garden Cities v Northpine Islamic Society} (n 48) 272H. Conradie J stated that the contention that the prohibition on the call to prayer infringed the religious freedom of all Muslims was stated too dramatically, at 217B; the infringement may have been overstated but it is submitted that the right was nevertheless limited, thereby justifying its limitation by upholding the contractual obligation that served to restrict the amplification of the call to prayer.
\textsuperscript{67} See \textit{Cantwell v Connecticut} 310 US 296 (1939) 304.
\textsuperscript{68} See \textit{Cantwell v Connecticut} (n 67) 304. See also Nsereko (n 1) 861 862; Krishnaswami (n 30) 33.
\textsuperscript{69} See \textit{Bob Jones University v United States} 461 US 574 (1982).
\textsuperscript{70} See \textit{Goldman v Weinberger} 475 US 503 (1985) 507 508 509 510.
\textsuperscript{71} See \textit{Prince v President of the Law Society} (n 41) 986E 988I; \textit{Prince v President, Cape Law Society} 2000 (3) SA 833 (SCA) 845 par 12; Buckingham (n 2) 153 154.
\textsuperscript{72} See Grinstein (n 34) 1367. See also Krishnaswami (n 30) 50; Nsereko (n 1) 849.
\textsuperscript{73} See Nsereko (n 1) 855 856.
\textsuperscript{74} Krishnaswami (n 30) 22 notes that the manifestation of religion in public, such as processions, may be limited to ensure the proper flow of traffic.
\textsuperscript{75} See De Waal \textit{et al} (n 61) 295 296.
\textsuperscript{76} See the Universal Declaration of Human Rights (1948) art 29(2). See Krishnaswami (n 30) 34 40 54 who lists examples.
\textsuperscript{77} See O’Regan J in \textit{S v Lawrence} (n 24) par 127 129.
be mindful of the fact that the purpose of a limitation may change, for example, from religious motivations to secular motivations.\textsuperscript{78}

\textbf{5.4.3 The Nature and the Extent of the Limitation}

The nature and the extent of the limitation of the right to freedom of religion refer to the method that is used to limit the right and how it affects the protected interests and conduct.\textsuperscript{79} A determination must also be made about whom the limitation affects.\textsuperscript{80} This element plays an important role in the weighing of other relevant factors in the determination of the reasonableness and justifiability of the limitation of religious freedom. For example, the nature and extent of a limitation is important in order to properly review alternative methods in the achievement of an aim with comparable effectiveness, as is required by section 36(1)(e). The aim pursued by the limitation is also put into perspective, for instance, it was contended that the use of cannabis in religious observances was a severe and complete infringement of an important right; the court, however, found the infringement reasonable in order to counter a dangerous practice.\textsuperscript{81} The nature and extent of the limitation may also be relevant in the development of more stringent limitation requirements.\textsuperscript{82} For example, Sachs J observed (with regard to the Interim Constitution):

\begin{quote}
*Although the s 14 right is in general a weighty one, not each and every breach carries the same weight. A trivial breach of a specially protected right might be easier to justify in terms of s 33 than a grievous infringement of an ‘ordinary’ right. The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification. Conversely, the lighter the transgression, the less stringent the requirements of justification.*
\end{quote}

\textsuperscript{78} See the passage by Brennan J, quoted by Sachs J in \textit{S v Lawrence} (n 24) par 156.
\textsuperscript{79} See Rautenbach and Malherbe (n 1) 354. See also Malherbe (n 34) 694. For instance, O’Regan and Sachs JJ, in \textit{S v Lawrence} (n 24) par 132 172 173, found the infringement of religious freedom \textit{in casu} to be slight.
\textsuperscript{80} See Rautenbach (n 3) 114.
\textsuperscript{81} See \textit{Prince v President of the Law Society} (n 41) 986F-G; \textit{Prince v President, Cape Law Society} (n 71) par 12.
\textsuperscript{82} See Rautenbach and Malherbe (n 1) 354; Rautenbach (n 3) 114.
Thus, I have no doubt that any State action which interfered directly with or compelled a particular form of religious observance would rarely pass the test of reasonableness and necessity, if at all, and then only if the most compelling justificatory circumstances were established. Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the State. At the other extreme, there are transgressions of s 14 so marginal in themselves, or so slight in relation to manifestly legitimate objectives with which they are inextricably interlinked, that the burden of persuasion on the facts imposed by s 33 would be far easier to discharge.83

It may be added that the duration of the limitation should also be considered in order to gauge the impact and severity of the limitation to justify its reasonableness.84 The extent of the limitation is also important to consider, as international law prohibits the destruction of any right.85 It may thus be argued that a democratic society sensitive to international law precepts would not endorse limitations of religious liberty that would lead to the *de facto* and complete destruction of the right under the guise of constitutional limitation; the extent of such an intrusion would be too severe to justify. Religious liberty, therefore, should be more than a mere token paper right. Reasonableness and the South African reality should prevail in the justification and determination of the extent and nature of the intrusion of the limitation of the right to freedom of religion.

### 5.4.4 The Relation Between the Limitation and its Purpose

The relation between the limitation of the right to freedom of religion and its purpose establishes whether the limitation can protect or promote the purpose

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83 S v Lawrence (n 24) par 168 (footnotes omitted).
84 Krishnaswami (n 30) 33 notes that limitations on the right to undertake pilgrimages are serious infringements of religious liberty and should thus only be of a temporary nature. Krishnaswami 41 also notes that limitations on the dissemination of faith should only temporarily be imposed and removed as quickly as possible.
85 See the Universal Declaration of Human Rights (1948) art 30.
and, if so, “to what extent is the purpose promoted or protected?”.

Therefore, this factor establishes if the limitation is capable of the achievement or promotion of the purpose envisaged by the limitation. Limitations on religious liberty that are utterly incapable of promoting the postulated aims will thus not be constitutionally justified, as the limitation of an important right such as the right to freedom of religion would be in vain. In other words, limitations should be worthwhile and useful in relation to the constitutionally justified aims and goals that they claim to pursue, otherwise no relation would exist between the limitation and its purpose. The requirement that a limitation must be pursued that is capable of promoting a legitimate aim is usually referred to as the “rational relationship test”.

The inquiry into the relation between the limitation and its purpose furthermore requires investigation of the extent to which the limitation achieves the purpose and not merely whether the limitation can or cannot promote the purpose at all. The measure of promotion or achievement, therefore, is gauged to ascertain the effectiveness of the limitation. In other words, the strength of the rational relation comes under scrutiny. To this end distinction is usually made between an under-inclusive and over-inclusive limitation in pursuit of the purpose.

An under-inclusive limitation promotes the purpose, but does so in a deficient manner; in other words, the limitation could be adapted in order to achieve the purpose more efficiently. O’Regan J, for example, held that the selective restriction of alcohol sales, on Christian holy days only, did not satisfy the purpose of alcohol sales’ regulation sufficiently enough to counter the

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86 Rautenbach and Malherbe (n 1) 355. See also Rautenbach (n 3) 117; Malherbe (n 34) 694.
87 See Rautenbach and Malherbe (n 1) 355; Rautenbach (n 3) 117; Malherbe (n 34) 694.
88 See also Rautenbach and Malherbe (n 1) 355; Rautenbach (n 3) 117; Malherbe (n 34) 694.
89 For example, counsel for the appellant, in Prince v President of the Law Society (n 41) 986H, conceded that the limitation of freedom of religion in casu did advance its purpose. Friedman JP, at 986F-G, also observed that the limitation “undoubtedly inhibits the use of cannabis”.
90 See Tribe American Constitutional Law (1988) 1306; Rautenbach and Malherbe (n 1) 355; Rautenbach (n 3) 117. See Buckingham (n 2) 280 282 who cites examples of a “rational connection” from Canadian case law.
91 See Rautenbach (n 3) 117 118.
infringement of religious liberty by favouring Christian holy days to the exclusion of the holy days of other religions.\textsuperscript{92} The limitation was thus too narrow in its scope in order to achieve its aim as completely as possible.\textsuperscript{93}

An \textit{over-inclusive limitation}, on the other hand, promotes the purpose to an excessive degree. In other words, the right to freedom of religion is restricted more than would reasonably be required by a tolerant, open and democratic society in order to do justice to the purpose. The United States armed forces, and the United States Supreme Court by justifying the limitation, pursued the legitimate aim of the military to nurture discipline and ensure conformity to an excessive, if not harmful, extent by the enforcement of a prohibition in the air force on all visible religious apparel, irrespective of its conservative or unobtrusive nature.\textsuperscript{94} It could be argued that a legitimate and justified interest was pursued to the extent of negating an important element of religious freedom, namely the manifestation of religious devotion in the cultivation of a religious appearance, whereas discipline could still have been achieved if religious expression had been accommodated and not banned.\textsuperscript{95} Krishnaswami also cautions against limiting the right to undertake pilgrimages and the right to disseminate faith too severely in pursuit of legitimate aims.\textsuperscript{96}

Harmony should thus be strived for in the relationship between the limitation and its purpose. The limitation should fit the purpose as neatly as possible. Sachs J, for example, found that the important moral and pedagogical purposes, as well as the duty of the state to protect people from violence, would be frustrated should an exemption be created for parochial independent schools to administer corporal punishment in accordance with the religious

\textsuperscript{92} \textit{S v Lawrence} (n 24) par 132. She also held, at par 131, that the aim of creating a uniform day of rest was negated by the fact that only the sale of alcohol had been restricted on certain days and not that all grocery stores had to close. The limitation of creating a common day of rest was thus not properly pursued.

\textsuperscript{93} See also Malherbe (n 34) 694 695.

\textsuperscript{94} See \textit{Goldman v Weinberger} (n 70) 508 509 510. See also 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 \textit{Comparative Labor LJ} 648; Shaskolsky Sheleff “Rabbi captain Goldman's yarmulke, freedom of religion and conscience, and civil (military) disobedience” 1988 \textit{Israel Yearbook on Human Rights} 197.

\textsuperscript{95} See Ch 3.7.3.5.

\textsuperscript{96} (n 30) 33 41.
convictions of the parents.\footnote{Christian Education South Africa v Minister of Education (n 24) par 50.} The complete limitation in all schools of a religiously inspired practice, at least for some, was thus judged to be a competent and necessary limitation in order to achieve the stated purposes. Both the Cape High Court\footnote{Friedman JP, in Prince v President of the Law Society (n 41) 986G, found that the extent and nature of the limitation of religious observances was not \textit{unreasonable}; thereby indicating that the limitation fit the purpose.} and the Supreme Court of Appeal\footnote{Hefer JA, in Prince v President, Cape Law Society (n 71) 856B, observed that the lifting of the cannabis prohibition for one section of the population would render the population as a whole inadequately protected. In other words, a sufficient pursuit of the purpose (namely the protection of society against dangerous substances) would require a blanket prohibition on cannabis irrespective of its religiously motivated use.} found the limitation of the right to observe religious rites to be justified and reasonable in upholding criminal penalties and other discriminatory decisions based on the forbidden use of cannabis. It was thus found that the purpose pursued in forbidding cannabis justified the limitation of the right to freedom of religion where the substance was used for observances; in other words, the limitation fit the purpose.

The principle of proportionality between the limitation and its purpose that underlies and infuses the general substantive limitation test is further evidenced by this factor.

### 5.4.5 Less Restrictive Means to Achieve the Purpose

The consideration of less restrictive means to achieve the purpose establishes whether the purpose of the limitation of the right to freedom of religion can be achieved “more or less equally effectively by less drastic means”\footnote{Rautenbach and Malherbe (n 1) 356. See also Carpenter (n 18) 695; Rautenbach (n 3) 118.}.\footnote{See Malherbe (n 34) 695; Rautenbach (n 3) 118.} The aim is thus to reduce the extent of the limitation of religious liberty by considering and employing less restrictive means in order to reach comparable effects to those of more restrictive means.\footnote{See Sherbert v Verner 374 US 398 (1962) 407; Thomas v Review Board 450 US 707 (1980) 718; Goldman v Weinberger (n 70) 525 regarding American law. Canadian provincial legislation provided for Sunday as a common day of rest; an exemption, however, was created for stores of a certain size to conduct business on Sundays should...}
Counsel for the appellant in *Prince v President of the Law Society, Cape of Good Hope* argued for less restrictive measures in order to combat drug abuse, rather than an absolute cannabis prohibition, as the latter would severely infringe the right of the appellant to observe his religion. Friedman JP denied the assertion that the purpose could have been pursued by less restrictive means, as a partial lifting of the prohibition would affront South Africa’s obligations under international law and because an exemption for *bona fide* religious use of cannabis would also add to the heavy burdens already carried by the police. The Supreme Court of Appeal sustained the decision by the Cape High Court as “one shudders at the thought of the consequences of lifting the ban to Rastafarians themselves and, more importantly, to society generally”. The alternative method of exemption would thus not have been a reasonable and equally efficient method in pursuit of the regulation of dangerous substances.

Sachs J has also found that the purpose of reducing alcohol intake could not have been achieved by means of lesser intrusion than the increased regulation of alcohol sales on “closed days”, even though the method caused a largely symbolic and marginal infringement of the right to freedom of religion by the selection of Christian holy days as “closed days” to the exclusion of the days of other religions. The Constitutional Court has also refused to grant an exemption to independent schools to administer corporal punishment, as that would have frustrated the moral and pedagogical aims with the national prohibition on such punishment, as well as the fact that the state has to uphold its duty to lessen violence. The exemption would also have been difficult to monitor. Stated differently, an exemption would not have

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103 (n 24) 986I-J.
104 *Prince v President, Cape Law Society* (n 71) 855H.
105 *S v Lawrence* (n 1)par 174 176.
106 *Christian Education South Africa v Minister of Education* (n 24) par 50.
generated the same effectiveness in pursuit of the stated aims; the alternative method was thus deficient.

A range of reasonable alternatives would usually exist that would be capable of effective pursuit of a particular aim. The courts should thus be cautious not to negate a particular choice, as decided upon by the agent of the limitation, where reasonable alternatives had been considered in deciding upon that particular method of limitation. Finally, it may be observed that this factor does not question the purpose of the limitation, but the method employed to satisfy the purpose reviewed against a background of reasonable and effective alternatives.

5.5 SPECIFIC LIMITATION CLAUSES

5.5.1 General

A specific limitation clause is usually applicable to a particular right, such as the right to freedom of religion, or group of rights. The aim of such a clause is to qualify the limitation of that particular right in regard to one or more of the elements of limitation provisions. A specific limitation clause may thus qualify the general limitation test with regard to the agent of the limitation, specific procedures to be followed in the limitation of the right, the purpose in pursuit of which the right may be limited, the measure to be employed to justify the limitation, or the circumstances under which the right may be limited. The effect of the qualification may set stricter or more lenient requirements for the limitation of the right to freedom of religion, it may also clear up uncertainty in regard of aspects of the limitation or it may merely restate elements of the general limitation test without any substantive qualification. It is important to note that a specific limitation clause merely qualifies the general limitation test in regard to one or more of the above elements.

108 See Rautenbach (n 3) 118 119; S v Manamela (n 24) par 95.
109 See Rautenbach and Malherbe (n 1) 357; Rautenbach (n 34) 119; Malherbe (n 34) 695.
110 See Rautenbach and Malherbe (n 1) 346 347; Rautenbach (n 3) 97 98 99 regarding the elements of limitation clauses.
111 See Rautenbach and Malherbe (n 1) 357ff; Rautenbach (n 3) 119 120 121.
aspects; it does not attempt to replace the general test or to act as its alternative.\textsuperscript{112} The general limitation test still sets the standard of justifiability and reasonableness for the limitation of the right to freedom of religion in South Africa as a tolerant, open and democratic society predicated on human dignity, equality and freedom, paying due regard to all relevant factors. Therefore, a specific limitation clause merely contextualises the application of the general limitation test to a particular right, where the constitutional drafters deemed such express qualification necessary. In other words, the test remains that of a democratic society; a specific limitation clause merely sheds light on the democratic standard as applied to a particular right.

\textbf{5.5.2 Section 15(2) as Specific Limitation Clause}

Section 15(2) confirms that the right to freedom of religion, as guaranteed under section 15(1), is wide enough to include the right to conduct religious observances at state and state-aided institutions.\textsuperscript{113} The right to conduct such observances, however, is stated with an express qualification. Such observances may only be justified if they are (i) conducted in accordance with rules made by appropriate public authorities, (ii) are conducted on an equitable basis, and (iii) with attendance at them being free and voluntary.\textsuperscript{114}

A specific limitation clause has thus been included in section 15(2) that qualifies the application of the general limitation clause to the stated religious observances.\textsuperscript{115} The specific limitation clause identifies the agent of the limitation, namely “appropriate public authorities”; the procedure to be followed is also stated, namely “rules” made by the agent.\textsuperscript{116}

\textsuperscript{112} See also Rautenbach and Malherbe (n 1) 357.
\textsuperscript{113} See Ch 3.3 (also with regard to the right itself and not only the limitation of the right); Malherbe (n 34) 695. See, in general, Foster, Malherbe and Smith “Religion, language and education: Contrasting constitutional approaches” 1999 \textit{Education \\& Law Journal} 211 220ff 243; Chaskalson P par 103, O’Regan J par 117ff, Sachs J par 143 in \textit{S v Lawrence} (n 24); Smith (n 39) 19-10ff; Smith (n 21) 220ff; \textit{Wittmann v Deutscher Schulverein, Pretoria} 1998 (4) SA 423 (T).
\textsuperscript{114} S 15(2)(a)-(c). See also Malherbe (n 34) 695. Foster \textit{et al} (n 113) 220; Rautenbach “Introduction to the Bill of Rights” in De Beer (Ed) \textit{Bill of Rights Compendium} (2001) par 1A63.
\textsuperscript{115} See Ch 3.3; Malherbe (n 34) 691 695; Foster \textit{et al} (n 113) 220; Rautenbach “Introduction to the Bill of Rights” in De Beer (Ed) \textit{Bill of Rights Compendium} (2001) par 1A63.
\textsuperscript{116} See also Malherbe (n 34) 695. Foster \textit{et al} (n 113) show that the requirement of “appropriate public authorities”; in terms of schools, refers to governing bodies.
to the agent and method of limitation, arguably, qualify the general provision that rights in the Bill may only be limited by a “law of general application”. 117 Furthermore, it may be advanced that the references to the agent and method of limitation refer to the nature of the limitation that is to be considered under section 36(1)(c). 118 It could also be argued that the specific limitation clause increases the difficulty whereby the right may be limited by requiring the right to be limited under “rules” made by “appropriate public authorities”; the general requirement that a “law of general application” may limit rights is thus refined and narrowed. 119

The references to the conducting of observances on an equitable, free and voluntary basis may serve as refinements of the general substantive test that requires limitations of rights to be reasonable. 120 In other words, light is shed on the content of reasonableness as applied to the specific right on observances, thereby avoiding confusion in the limitation of the right. Section 36(1)(b) is also, possibly, qualified by the identification of the purposes of the limitation, namely, the conducting of religious observances on a “free and equitable basis”, as well as guaranteeing “free and voluntary attendance” at such observances. 121 The express mentioning of the purposes would indicate their importance in the limitation of the right to conduct religious observances at state and state-aided institutions.

The specific limitation clause, furthermore, stipulates the circumstances under which the limitation will operate, namely with regard to religious observances at state and state-aided institutions. 122 The general limitation clause is thus qualified in a variety of ways by sections 15(2)(a) to (c).

O’Regan J explained that the requirement of equity refers to the equitable treatment of different religions, as well as the equitable treatment of both the

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117 See s 36(1); Ch 5.3.
118 See Ch 5.4.3.
119 See s 36(1).
120 See s 36(1); Ch 5.3 regarding the general limitation test.
121 S 36(1)(b).
122 ibid
religious observant and non-observant. However, differences of opinion exist with regard to the meaning of the requirement. Chaskalson P opined that the provision of “equitable basis” does not entail that a school (and, arguably, all other affected institutions) must “make provision for prayers for as many denominations as there may be within the pupil body; rather it seems to ... require education authorities to allow schools to offer prayers that may be most appropriate for a particular school”. In other words, a school may retain a particular religious character if that would be the most fitting for its particular community. Conversely, Smith opines that it may be most suitable to allow religious leaders of as many religions and denominations that are represented in the school to each conduct voluntary observances there. “In that way each believer may worship at school as much as any other.” According to such a construction the concerned school, or, arguably, other relevant institution, would not conduct the observances themselves but would allow religious leaders to do so, thereby creating a multi-confessional or secular identity for the institution. However, each case should be treated on its own merits which may lead to different practices at different institutions, provided a particular arrangement may be described as equitable in a democratic society. It may be said though that the practice of bland and neutral observances designed not to offend any religious view, nor to endorse or represent any such view should not be considered as equitable, and thus constitutional, as such observances merely act as the lowest common denominator, thereby devoing supposed religious observances of any real religious character, content and meaning.

123 S v Lawrence (n 24) par 119-122.
124 S v Lawrence (n 24) par 103.
125 (n 21) 222; Smith (n 39) 19-11.
126 Smith (n 21) 222; Smith (n 39) 19-11.
127 See also Smith (n 21) 222; Smith (n 39) 19-11.
128 See also Foster et al(n 113) 222.
129 See also Van Dijkhorst, in Wittmann v Deutscher Schulverein (n 113) 449D; Smith (n 21) 221, Smith (n 39) 19-11 opines that such a bland approach would “automatically discriminate against the ornate and doctrinally specific supplications of, say, the Roman Catholic, in favour of the comparatively unadorned and universalist liturgy which constitutes the average Protestant ceremony”. The use of bland prayers was also nullified by the United States Supreme Court, albeit on different grounds, as such prayers offended the establishment clause, see Lee v Weisman 505 US 577 (1992). See also, in general, Swomley “Myths about voluntary school prayer” 1996 Washburn LJ 294.
Section 15(2)(c) enjoins that attendance at religious observances at state and state-aided institutions must be “free and voluntary”. The provision, obviously, bars direct and indirect coercion regarding the attendance at such observances.\textsuperscript{130} Attendance and participation at the conducting itself of religious observances must be optional without pressure being applied to those, a member of staff or other member of the institution, who do not wish to participate or attend.\textsuperscript{131} Difference of opinion exists with regard to the meaning of free and voluntary attendance in so far as the requirement prohibits coercion in the practice of religious observances. Some argue that the observance of religion at the intended institutions is inherently inequitable and coercive, and that a “substantive” reading of the section comes close to reading the section out of the Constitution.\textsuperscript{132} It may be said that the Constitution or a particular reading of the text may never be allowed to negate or nullify the rights enshrined in the document. The right to conduct religious observances at relevant institutions exist and may not be ignored by an exaggerated emphasis on the right to excuse oneself from the attendance or participation at such observances. If the latter would be the case the right to abstain would weigh heavier than the right to attend and participate, thereby leaving an important constitutional guarantee meaningless regardless of the fact that it features in both the Interim and Final Constitutions. Van Dijkhorst J held that the right to conduct religious observances at state and state-aided institutions “cannot be nullified by the sensitivities of those who have the right to abstain but choose not to do so”.\textsuperscript{133} In other words, it is the duty and purpose of the law to find equitable solutions for conflicting interests rather than merely denying a particular right in favour of another without attempting to strike a balance between the two.\textsuperscript{134} The achievement of such a balance would undoubtedly include the creation of constructive activities for those who

\textsuperscript{130} See Chaskalson P par 103, O’Regan J par 120 in \textit{S v Lawrence} (n 24). See also Foster \textit{et al}(n 113) 222.

\textsuperscript{131} See Smith (n 21) 220 221; Smith (n 39) 19-10; Foster \textit{et al}(n 113) 222.

\textsuperscript{132} Smith (n 39) 19-5 made the observation with regard to s 14(2) of the Interim Constitution, see also 19-10. See also Smith (n 21) 220; Foster \textit{et al} (n 113) 222 who mention the argument.

\textsuperscript{133} \textit{Wittmann v Deutscher Schulverein} (n 113) 450B. See also \textit{Wittmann} 449Gff; \textit{McCollum v Board of Education} 333 US 203 (1948) 232.

\textsuperscript{134} See Foster \textit{et al}(n 113) 222.
wish to abstain, in order not to render the right to abstain so “unattractive as to constitute a disincentive to the exercise of the right”.  

Foster et al refer with regard to the rules regulating religious observances that the intended observances “do not depend on the existence of such rules and, in the absence of any rules, one is entitled to conduct such observances. Otherwise a particular authority may effectively thwart the exercise of the right by simply failing to make the relevant rules”.  

The contention may be supported, as the approach would ensure the exercise of the right in the face of sheer denial. However, the aggrieved parties may also possibly seek a mandamus to compel the responsible authority to exercise its duty in the facilitation of the right by making the necessary rules to allow religious observances to be conducted at an institution on an equitable, free and voluntary basis.

5.5.3 Section 15(3)(a) as Specific Limitation Clause

Section 15(3)(a) must be viewed as the confirmation of the existence of a right, in section 15(1), to have religious marriages and systems of personal law recognised. Such a construction is necessary in order to render meaning to the inclusion of section 15(3)(a) in the Bill of Rights. For, there would be no purpose and sense in including the section in the Bill of Rights if the section did not represent a right, as any enshrined right would cut the inclusion down as if had not been included.

The automatic application of the right to the recognition of religious marriages and systems of personal law, however, would cause grave legal uncertainty.

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135 Smith (n 21) 221; Smith (n 39) 19-10.
136 (n 113) 222.
138 See Ch 3.3, 3.7.3.1; Malherbe (n 34) 691 695 697. Sed contra De Waal et al (n 61) 308. See in general Carpenter (n 18) 692; O’Regan J par 117 118, Sachs J par 143 in S v Lawrence (n 24); Rautenbach and Malherbe (n 1) 368.
139 Botha Wetsuitleg. ‘n Inleiding vir Studente (1998) 59 discusses the presumption that “effectual and purposeful legislation” is presumed to have been intended, therefore, a meaningful interpretation should be given to s 15(3) rather than one that would in effect deny its existence.
and social disruption. Therefore, section 15(3)(a) not only implicitly recognises the right to the recognition of the said institutions, but also places an instant limitation on the right; namely that legal recognition may only take place upon national legislation that affords the respective marriages and systems the necessary acknowledgement. The general limitation test is thus qualified by the specific limitation clause with regard to the purpose pursued, namely the advancement and protection of legal certainty and social stability by the limitation of the right to have the relevant marriages and systems recognised ipso facto. The importance of the purpose is also amplified by the fact that the purpose is deemed to be so important as to limit the right until the limitation is lifted by Parliament. Parliament, thereby, is identified as the agent of the limitation, as the limitation continues until it is lifted by parliamentary legislative enactment; this, arguably, qualifies the nature of the limitation. The extent of the limitation is obviously severe as the right may only be exercised upon parliamentary recognition, thereby qualifying the extent of the limitation. However, the provisions of section 15(3)(a) clearly establish and justify the relation between the limitation and its purpose, namely the limitation of the right in the absence of intervention by Parliament. Also, the provisions of section 15(3)(a) patently disallow less restrictive means to be employed in the pursuit of the purpose, as the section clearly stipulates the detail and manner of the limitation.

The effect of section 15(3)(a) is not only to explain and detail the limitation of the right to recognition of religious marriages and systems of personal law, but in doing so it justifies a severe limitation of the right in a tolerant, open and democratic society. The requirement that the limitation may only be discontinued, partly or completely, by means of national legislation confirms the severity of the limitation, as provincial legislatures or other sources of law

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140 See Ch 3.3, 3.7.3.1. 141 See ss 15(3)(a). See also Rautenbach (n 115) par 1A63. 142 See s 36(1)(b); Ch 5.3, 5.4.2. 143 See s 36(1)(b); Ch 5.4.2. 144 See s 36(1)(c); Ch 5.4.3. 145 See s 36(1)(c); Ch 5.4.3. 146 See s 36(1)(d); Ch 5.4.4. 147 See s 36(1)(e); Ch 5.4.5.
may not continue or discontinue the limitation in terms of section 15(3)(a). Religious individuals, communities and institutions, therefore, must lobby Parliament to adopt legislation that would satisfy their aspirations.  

Religious marriages may possibly still gain recognition, even though Parliament might not enact the relevant legislation in terms of section 15(3)(a). Such an end would be achieved by the development of the common law by the courts in order to grant recognition to unions previously not judicially recognised. A court, however, should promote the spirit, purport and object of the Bill of Rights whenever it develops the common law. The infringement of a right, either under the present common law or under a development of the common law, must be tested against section 36(1) in order to gauge the constitutionality of the law.

However, section 15(3)(a) does not only extend to religious institutions, but also extends to marriages and systems of personal law “under any tradition”. Customary law, therefore, would be included, not merely religious law. Section 15(3)(a) thus extends its protection and limitation to both freedom of conscience and religion. Parliament, however, has moved to extend recognition to marriages contracted under customary law. Proposals on the recognition of marriages contracted under Muslim law are currently under review by the Department of Justice.

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148 See Du Plessis and Corder (n 34) 157; Du Plessis (n 34) 164. 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).
149 See Rylant v Edros 1997 (1) BCLR 77 (C), 1997 (2) SA 690 (C). Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319 (SCA); De Waal et al (n 61) 307 308. See also, in general, Kerr “Back to the problems of a hundred or more years ago: Public policy concerning contracts relating to marriages that are potentially or actually polygamous” 1984 SALJ 445; Forsyth Private International Law (1996) 103; Seedat’s Executors v The Master (Natal) 1917 AD 302; Ismail v Ismail 1983 (1) SA 1006 (A).
150 See s 39(2); Ch 1.3.
151 S 15(3)(a)(i)-(ii). See also Smith (n 21) 222; Smith (n 39) 19-5 19-12.
153 See De Waal et al (n 61) 307; Moosa “The Divorce Amendment Act. The cart before the horse?” October 1999 De Rebus 32.
However, the above is not the end of the matter. The recognition of religious law (and customary law) must not offend the rest of the Constitution.\textsuperscript{154} This provision and the similar section 31(2) will be discussed in due course.

5.5.4 **Section 15(3)(b) and Section 31(2) as Specific Limitation Clauses**

Section 15(3)(b) provides that the recognition of religious law in terms of section 15(3)(a) must be consistent with the remainder of section 15, as well as with the remainder of the Constitution.\textsuperscript{155} Section 31(2) provides that the right of persons to establish and join religious associations must be exercised in a manner consistent with the remainder of the Bill of Rights.

Smith opines that section 15(3)(a) “is rendered nugatory, as [section 15(3)(b)] does not protect this type of legislation [the recognition of religious law] from any constitutional provision which is likely to threaten it”.\textsuperscript{156} The state proposed a similar argument in *Christian Education South Africa v Minister of Education* with regard to section 31(2) by arguing that an exemption to the corporal punishment prohibition for some independent schools would be unconstitutional.\textsuperscript{157}

The above approaches render the important constitutional guarantees protected by sections 15(3)(a) and 31(1) useless whenever any other applicable provision conflicts, even in the slightest of ways, with any one of the above two sections. Therefore, sections 15(3)(a) and 31(1), as a matter of course, would be subordinated to other provisions with no recourse due to sections 15(3)(b) and 31(2).

It is questionable whether such harsh and destructive specific limitation clauses could have been envisaged and intended as the purposes of sections 15(3)(b) and 31(2). The application of the sketched approaches would render the provisions of sections 15(3) and 31 ineffective and purposeless for all.

\textsuperscript{154} Section 15(3)(b).
\textsuperscript{155} See Ch 5.5.3, 3.3, 3.7.3.1.
\textsuperscript{156} Smith (n 21) 223. See also Smith (n 39) 19-12.
\textsuperscript{157} (n 24) par 17.
intents and purposes, whereas rules of interpretation usually presume that a provision is intended to be effectual and purposeful.\footnote{158} In other words, the harsh, automatic and absolute limitation and deference of the two sections, whenever they are in conflict with other provisions, would render the inclusion of sections 15(3) and 31 questionable, as their inclusion would ensure an effect no different to that of their exclusion from the Bill of Rights. The approaches favoured by Smith and the state could thus not conceivably reflect the true purpose of the inclusion of sections 15(3)(b) and 31(2). The automatic denial of the exercise of the right to establish and join religious associations would seriously damage the collective and institutional element inherent to section 15(1).\footnote{159} Such a denial would also impact negatively on the extent to which the right to freedom of association would be able to protect religious associations.\footnote{160} Thus, on this interpretation, the effectiveness of these other rights also becomes doubtful. The effective denial of the collective and institutional element of religious liberty would also contradict foreign\footnote{161} and international law.\footnote{162}

The aim of section 15(3)(b) is the prevention of the immunisation of the relevant legislation from constitutional scrutiny.\footnote{163} Sachs J identified the aims of section 31(2) as (i) the prevention of the “privatisation” of “constitutionally offensive group practices” from “external legislative regulation or judicial control”, as well as (ii) the regulation of “oppressive features of internal relationships primarily within the communities concerned”.\footnote{164} The aim of each provision, therefore, is not to render it useless in practice, but to qualify section 36(1)(b) regarding the purpose for which the right may be limited. Both

\footnote{158} See Botha (n 139) 59.
\footnote{159} See Ch 3.5.2.
\footnote{160} S 18.
\footnote{161} See the Constitutions of Hong Kong (1990) s 15(1) 141(1)-(4); India (1950) s 26; Nigeria (1989) s 37(1) 37(3); Portugal (1976) s 41(4); Russia (1993) s 28; Singapore (1963) s 3(a)-(b) 16(2); Slovakia (1993) s 24(2)-(3); Zambia (1991) 19(1) 19(3).
\footnote{162} Kokkinakis v Greece (n 31) 418; Freedman (n 8) 672 673; 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); 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).
\footnote{163} See Malherbe (n 34) 697.
\footnote{164} Christian Education South Africa v Minister of Education (n 24) par 26.
sections should not be viewed separately to the general limitation test but as a qualification of that test. The stated purposes, however, are relevant in regard to most rights but not always expressly mentioned. The two sections thus aim to achieve the weighing of relevant factors, interests and constitutional rights in determining limits for the exercise of the respective rights that would not be repugnant to a tolerant, open and democratic society.

Malherbe opines in regard to section 15(3)(b) that:

“In hierdie geval dien die besondere beperkingsbepaling om aan te dui dat wetgewing nog eers deur die een of ander wetgewende instelling geskep moet word en dat waar regstelsels wat deur sulke wetgewing erken word, beperkings op regte in die grondwet ople, sodanige beperkings aan die voorskrifte van artikel 36 moet voldoen.”

The automatic denial of the rights concerned in each section would actually offend the true purpose of that section, namely the constitutional limitation of the right concerned and not its complete negation that would render each right concerned a “non-event”.

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165 Sachs J viewed s 31(2) separately to s 36 in *Christian Education South Africa v Minister of Education* (n 24) par 27.
166 (n 34) 697.