

The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion – a South African perspective*

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“The [South African] bill of rights confirms and entrenches the values of human dignity, freedom and equality, in respect of all branches of law and in all relations amongst private persons and between organs of state and private persons. This is how it should be in a democratic, constitutional state.”¹

1 Introduction

The relationship between the concepts of constitutionalism, secularism and an individual’s fundamental right to freedom of religion has been strenuous over many centuries. Continuous power struggles between state institutions and religious bodies have been extensively documented in various legal, political and philosophical books and journals. Although the world has developed significantly from some decades ago, the interaction between the three concepts still creates many political and legal disputes and this often accounts for an uneasy or unstable triangle, in domestic legal systems, global political relations and international law alike.

2 Defining and distinguishing between the concepts of constitutionalism, secularism and freedom of religion

From an historical perspective, it is recognised that the interplay between the concepts of constitutionalism, secularism and the right to freedom of religion has given rise to issues of great complexity. Before such complexities are discussed, it is essential, to understand what in essence each of the three concepts entails. In the first instance, the principle or concept of constitutionalism refers to a system of government which is directed by a constitution of a particular country or state. The concept symbolises a state that is founded on the law and where the government derives its powers from the law. The law is mainly manifested in the form of a written and often supreme constitution. Governmental powers are limited to those powers set out in the law and the state (government) is also bound by the law.² Secularism in

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¹ Rautenbach “The bill of rights applies to private law and binds private persons” 2000 *TSAR* 296 316. This article is submitted with modesty in recognition of the immeasurable contribution of Prof Rautenbach to the South African constitutional debate and development. A true giant in public law is saluted!

² See the term “constitutionalism” in Collins *Concise Dictionary* (2000) 317. Refer also to the discussion of the term “constitutional state” in Rautenbach and Malherbe *Constitutional Law* (2004) 10.

turn refers to worldly things as opposed to sacred things. The concept or principle in essence proclaims the doctrine that rejects the favouritism of any religion combined with the attitude that religion itself should have no place in civil affairs.³ Lastly, the concept of freedom of religion consists of two parts. The first part, freedom, relates to so-called personal liberty. It includes the quality of being free, to enjoy political or civil liberties and to have a measure of independence or autonomy. Religion in this context is generally understood to mean the belief in, worship of or obedience to a supernatural power which is divine in nature or has control over human destiny.⁴

On a closer investigation, it would seem that the right to freedom of religion is the most complex in nature of the three concepts. Freedom of religion has had a long and turbulent history. Some commentators have indicated that religious intolerance has been a feature of human existence since time immemorial.⁵ It is said that Christianity played the most fundamental role in the initial development of the right to freedom of religion. After the establishment of the first Christian church, in the year after Christ's death and resurrection, Christians were severely persecuted and eventually the religion of Christianity was banned and suppressed by the Roman empire. Especially the refusal of Christians to worship and obey pagan gods brought onto them the wrath of the dominant state authorities. History, however, shows that Christianity survived this persecution and later became the dominant religion in the Western world.⁶ For most centuries thereafter, the relationships between church and state and between religion and the law were dominated by state politics and religious doctrine in many parts of the world. This historic relationship is quite complex and it is often said that the power struggle between the church and the state was unholy.⁷ It was in reaction to the religious persecution by the state that the idea of religious protection as a human right developed. Some of the earliest advocates of religious freedom combined calls for religious tolerance with calls for a secular state where no single religion is favoured over another. The overall importance of the right to freedom of religion therefore seems self-explanatory. Some commentators even go as far as to say that religion is an equally integral part of a human being as breathing. It relates to people's deepest beliefs about the existence of God and the relationship between God and mankind. Disputes or disagreements relating to this relationship often leads to conflicts and even wars.⁸

In light of these comments, it comes as no surprise that the right to freedom of religion has been incorporated in many national and even international legal documents. Most democratic systems regulate the right to freedom of religion by setting and implementing state policies of non-interference.⁹ This development is often regarded as the initial movement towards creating a so-called secular state.¹⁰ It is further notable that the right to freedom of religion incorporates a number of diverse

³ Refer to the definition of "secularism" in Collins (n 2) 1361.

⁴ Collins (n 2) 570 and 1266.

⁵ See Van der Schyff "The historical development of the right to freedom of religion" 2004 *TSAR* 259.

⁶ Van der Schyff (n 5) refers to the Roman emperor Constantine who declared Christianity as the state religion in 313 AD (261 ff).

⁷ Currie and De Waal *The Bill of Rights Handbook* (2005) 336-337.

⁸ See Malherbe "Enkele kwelvrae oor die grondwetlike beskerming van die reg op godsdienstvryheid" 2006 *TSAR* 629.

⁹ The modern state has taken over many of the functions which were previously performed by the church. Such functions typically include aspects relating to education and welfare.

¹⁰ There are commentators who argue that the denial of religion in the public sphere leads to privatisation and marginalisation of religion in a society. See Currie and De Waal (n 7) 337.

elements. These elements include both a liberty component as well as an equality component. From a liberty point of view, it entails freedom of choice of an individual without governmental interference. The equality part in turn presupposes that the individual should be free from government practices which either favour one religion over another or religion over non-religion. In this respect, some commentators argue that the relationship between the state and religion is essentially governed by two principles, *ie* the right to freedom of religion on the one hand and the separation between state and religion on the other.¹¹ Most modern states thus seek to incorporate the two principles in their domestic legal systems and try to achieve an acceptable balance between the concepts of secularism (exclusion of religion from state bodies) on the one hand and the protection of the right to freedom of religion (the so-called “religion clause”) on the other.¹²

3 *A brief South African historical overview*

In South Africa, the development of the concepts of secularism, constitutionalism and the right to freedom of religion, was in many ways unique. Before the dawn of the democratic dispensation, the former South African state was often perceived to favour Christianity.¹³ Such favouritism was specifically attributed to the Calvinistic background of the government. When the new constitutional dispensation was negotiated, the constitutional drafters were seemingly mindful of the uneasy relationship between secularism and religious freedom. They seemed sensitive not to create a strict separation between church and state or to allow a too relaxed system where the state could easily favour one religion over another. On a closer inspection of the constitutional provisions, it would seem that a compromise was reached in the wording of both sections 14 of the interim constitution,¹⁴ and its successor, section 15 of the constitution of 1996. It will be discussed later, that although the constitution does not prevent the state from recognising or supporting religion *per se*, the state is constitutionally required to treat various religions both equitably and equally.¹⁵

With the aforementioned background in mind, it is the specific focus of this research to investigate the manner in which the South African state in particular, but other states in general, should go about to ensure the equitable and equal treatment of applicable religions. The challenge and importance of ensuring religious equity and subsequent equality is specifically highlighted in a number of recent controversies that occurred in South Africa. The most recent and highly controversial incident happened in 2006, when a Danish newspaper published a number of cartoons which apparently depicted the prophet Mohammed as *inter alia* a terrorist. The publications led to a wide spread outcry and public protest by Muslims worldwide. The protests and insurrection also spilled over to South Africa. A local newspaper was considering to publish the mentioned cartoons when a high court interdict was

¹¹ For more on this see Freedman “The right to religious liberty, the right to religious equality and s 15(1) of the South African constitution” 2000 *Stell LR* 100.

¹² See *eg* the first amendment to the constitution of the USA. The first amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” In *Everson v Board of Education of Ewing Township* 330 US 1 (1947) the supreme court held that the clause against the establishment of religion by law was intended to “erect a wall of separation between church and state”.

¹³ Note *S v Lawrence, Negal and Solberg* 1997 4 SA 1176 (CC).

¹⁴ *ie* the interim constitution, Act 200 of 1993.

¹⁵ See Currie and De Waal (n 7) 337.

sought to prevent the publishing of the cartoons or caricatures or drawings.¹⁶ The judge found that the cartoons were indeed insulting, demeaning and undignified, and that it ridiculed Islam and its founder. The court held that the cartoons advocated hatred and created a stereotyping of Muslims, in a way that is harmful to the achievement of the core values of the South African nation and thereby reinforce and perpetuate patterns of discrimination and inequality. The judge stated that he needed to strike an appropriate balance between the competing constitutional values of freedom of expression and human dignity. It was concluded that the publication of the cartoons would demean the dignity of the prophet Mohammed, and an order was made to interdict the publishing of any representations of the prophet. In a contrasting matter of 2004, *Van Loggerenberg v 94.7 Highveld Stereo*,¹⁷ the majority members of the broadcasting complaints tribunal found in a matter relating to a joke made on regional radio about the miraculous conception and birth of Jesus Christ, that although the joke was objectionable, offensive and ill-conceived, it did not constitute advocacy of hatred based on religion that would constitute incitement to cause harm.¹⁸ The majority of the tribunal, in contrast with the *Jamiat-ul-Ulama* case, emphasised that the right to freedom of expression is essential to an open and democratic society based on freedom and equality.

Both examples mentioned above highlight the underlying legal question that is alive in most modern legal systems namely: should religions be treated equally in a secular constitutional state where fundamental rights, such as the rights to freedom of religion, equality and human dignity are entrenched and protected? This question is therefore the underlying focus of this article and will be discussed from a South African constitutional perspective.

4 *The constitutional foundation relating to the concepts of secularism, constitutionalism and the right to freedom of religion*

The commencement of both the interim constitution and the Constitution of the Republic of South Africa, 1996, has signalled the introduction of a new and often challenging constitutional transformation for the entire South African multi-racial, multi-cultural and multi-religious society. Both constitutions incorporated universally accepted constitutional principles such as the rule of law, separation of powers, constitutionalism and the recognition and protection of universally accepted fundamental rights. Under this dispensation of constitutional supremacy various constitutional issues have surfaced and developed. Many of these issues are of fundamental importance for developing South African society and the broader Southern African region.¹⁹

¹⁶ See *Jamiat-ul-Ulama of Transvaal v Johncom Media Investment Ltd* – case no 1127/06 (T) (unreported). See also Carpenter “Freedom of speech and cartoons depicting the Prophet Mohammed” 2006 *THRHR* 684-691. Refer also to Malherbe “The Mohammed cartoons, freedom of expression and the infringement of the right to religious dignity” 2007 *TSAR* 332-333. According to Malherbe, there seems to be general consensus by writers that the state must act fairly towards all religions and may not commit or allow any unfair discrimination against any person or any religious group. Under s 7 of the constitution the state has a positive duty to protect and secure the right to religious equality.

¹⁷ 2004 5 *BCLR* 561 (BCT).

¹⁸ In a dissenting judgment, it was held that the remarks indeed crossed the boundaries of fair speech and as such ridiculed the Christian faith and should not be allowed.

¹⁹ Since the constitution is the supreme law of the state, all laws or conduct inconsistent with the constitution are invalid. See ss 2 and 172 of the constitution respectively. See also Malherbe “The constitutionality of government policy relating to the conduct of religious observance in public schools” 2002 *TSAR* 391 393 ff.

During the twelve years since the commencement of the new constitutional order in South Africa under the constitution of 1996, the judicial authorities have been called upon many times to resolve issues or disputes relating to the interpretation and application of the principles of secularism, constitutionalism and the right to freedom of religion. Although the constitution directly provides for the protection of the right to freedom of religion and also prohibits any unfair discrimination on *inter alia* the ground of religion, it does not however directly define the principles of constitutionalism and secularism. These principles can however be deduced from various sections incorporated in the constitution. Apart from the fact that the constitution is the supreme law of the South African state and that the state is also bound by the constitution, which subsequently confirms the incorporation of the principle of constitutionalism,²⁰ the concepts of secularism and freedom of religion are intertwined in section 15.²¹ The constitution further incorporates various other provisions which either individually or collectively have an impact on the topic of this research. These provisions are briefly mentioned below.

The constitution determines that South Africa is a country that belongs to all who live in it and that the people should be united in their diversity. The constitution is specifically adopted as the supreme law of the Republic with the aim to *inter alia* establish a society based on democratic values, social justice and fundamental human rights. The government is based on the will of the people and every citizen is equally protected by the law.²² Under the founding provisions of chapter I of the constitution, provision is also made for *inter alia* the promotion and respect for other languages used for religious purposes in South Africa.²³ The constitution also incorporates a comprehensive bill of rights wherein various national and international accepted fundamental (human) rights are entrenched and protected. According to the constitution, the bill of rights is a cornerstone of democracy in South Africa and it enshrines the rights of all people and affirms the values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights set out in the bill of rights and rights are subject to limitations contained or referred to in section 36 or as mentioned elsewhere in the bill.²⁴ The principle of constitutionalism is promoted further since the constitution determines that the bill of rights applies to all law and it binds the legislature, executive and judiciary as well as all other organs of state. Both natural and juristic persons are bound by provisions of the bill of rights if, and to the extent that, a provision is applicable.²⁵

In building on the founding provisions of equal protection for all people and general achievement of equality,²⁶ the bill of rights specifically includes an equality clause. The provision states that everyone is entitled to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. The promotion to achieve equality is further authorized by legislative or other measures.²⁷ The state may not unfairly discriminate, directly or indirectly, against anyone

²⁰ ss 5 and 8 of the constitution.

²¹ s 15(1) of the constitution.

²² See the preamble to the constitution read with the founding provisions of s 1 and the supremacy confirmation in s 2.

²³ s 6(5)(b)(II) of the constitution.

²⁴ s 7(1)-(3) of the constitution.

²⁵ s 8(1)-(2) of constitution.

²⁶ preamble and s 1(a) of constitution.

²⁷ See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Note that the concepts of religion, conscience and belief are some of the prohibited grounds listed in s 1(1) of the act. S 6 forbids discrimination on any of the prohibited grounds if such discrimination would be unfair. Unfair discrimination may be determined under ss 13 and 14 of the act.

on one or more grounds, including the ground of religion and no other person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds mentioned in the section.²⁸ Apart from other fundamental rights, such as human dignity, life, freedom and security of the person and privacy, the constitution also includes a specific right directed at freedom of religion, belief and opinion.²⁹ For purposes of this research section 15 is of significant importance:

- “(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
 (2) Religious observances may be conducted at state or state-aided institutions, provided that –
 (a) those observances follow rules made by the appropriate public authorities;
 (b) they are conducted on an equitable basis; and
 (c) attendance at them is free and voluntary.
 (3) (a) This section does not prevent legislation recognising –
 (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
 (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”

The bill of rights also protects other fundamental rights which often have an impact on religious disputes. Such rights include the right to freedom of expression, freedom of association and the right to cultural, religious and linguistic communities.³⁰ In support of section 15(1), the right under section 18 of freedom of association is generally regarded to include the right not to associate. This is similar to the position under the right to religion which includes the right not to believe.³¹ The bill of rights also protects cultural, religious and linguistic communities. Section 31 states:

- “(1) 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.
 (2) The rights in subsection (1) may [however] not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

The bill of rights further affords every detained person and sentenced prisoner the right, *inter alia*, to communicate with or be visited by that person's chosen religious counsellor.³² Since the rights in the bill of rights are not absolute, they may be limited but only in accordance with section 36 or where elsewhere provided for in the constitution.³³ During states of emergencies, it is interesting to note that the right to religion is indeed derogable. Only with reference to section 9, it would seem, is the principle of equality in respect of unfair discrimination on *inter alia* the ground

²⁸ s 9(1)-(5) of the constitution. Note that discrimination on one or more of the listed grounds is unfair unless it is established that such discrimination is fair.

²⁹ ss 10, 11, 12, 14 and 15.

³⁰ ss 16, 18 and 31 of the constitution. These refer to (a) The right to freedom of expression does not extend to propaganda for war; (b) incitement of imminent violence or (c) advocacy of hatred that is based on *inter alia* religion and that constitutes incitement to cause harm (s 16(2)).

³¹ See also Rautenbach “Haatspraak en die reg op vryheid van uitdrukking in Suid-Afrika” 2007 *TSAR* 551 ff. It is generally accepted that religious freedom also includes the right to reject religion. Refer to Currie and De Waal (n 7) 339.

³² s 35(2)(f)(iii) of the constitution.

³³ ss 7 and 36 of the constitution.

of religion, non-derogable.³⁴ Finally the bill of rights concludes that when rights are interpreted, the values that underlie South Africa's open and democratic society, based on human dignity, equality and freedom, must be promoted. International law must be considered and foreign law may be looked at.³⁵ The constitution furthermore mandates the establishment of certain state institutions with the purpose to strengthen constitutional democracy in the Republic. From a religious and secular view point, both the South African human rights commission and the commission for the promotion and protection of the rights of cultural, religious and linguistic communities are important.³⁶ It is against this background that the question relating to equal protection and treatment of religions by a secular state must be examined and evaluated.

5 *An analysis of the South African constitutional foundation*

Although section 15 of the constitution is regarded as the "religion clause", it must be read in conjunction with many other sections in the constitution and the wording of the section should be carefully considered and interpreted. Various interesting aspects appear from the basic structure of the particular section.³⁷

The first aspect is the fact that section 15, and also section 31 to a lesser extent, formally constitutionalise the right to freedom of religion.³⁸ This is indeed a positive development since no previous South African constitution have entrenched and protected a religious provision in a similar fashion. During the negotiations for a new constitutional dispensation for South Africa, the constitutional drafters recognised the important need to incorporate and protect a right to religious freedom.³⁹ But section 15 goes much further. It not only protects religion, but also belief, thought, conscience and opinion. It also includes the right not to believe at all and thus to be a sceptic, agnostic or an atheist. The section also includes views derived from political, sociological or philosophical convictions or ideologies.⁴⁰ In essence, the aim of section 15 seems to ensure that every person is free to adhere to deeply held beliefs and values, without concerning itself with the origin of such beliefs or values.⁴¹ Some commentators argue that the protection given under section 15 is not subject to the actual confirmation that a person is an adherent of a particular religion or that he or she is indeed affiliated with a particular religious

³⁴ See the table of non-derogable rights in s 37 of the constitution.

³⁵ See s 39(1)(a)-(c) of the constitution.

³⁶ See ss 181, 184-186 of the constitution respectively.

³⁷ It was mentioned above that s 15 should be read in conjunction with s 31 as well as other rights such as equality (s 9), human dignity (s 10), privacy (s 14), freedom of expression (s 16) and freedom of association (s 18). Since there is no hierarchy of rights, the rights should be read and interpreted holistically and not in isolation.

³⁸ See Van der Schyff (n 5) 269. It is often argued that the guarantee of religious freedom provides the legal foundation which prevents a state from establishing a theocracy or an established church.

³⁹ Some commentators specifically point out that the constitutional drafters never had the intention to use the bill of rights or the constitution in general, so as to erect a strict wall to separate church and state in South Africa. See Du Plessis and Corder *Understanding South African Transitional Bill of Rights* (1995) 155; Farlam "Freedom of religion, belief and opinion" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2005) 41-49.

⁴⁰ It is argued that views on aspects of abortion or euthanasia could potentially be protected under s 15(1), even if such views stem from personal morality and not from a religious background or conscientious belief.

⁴¹ They can be derived from religion, personal views on morality or even from a secular outlook of the world.

institution.⁴² It is a further important feature that section 15(1) does not explicitly protect certain practices, which are directly linked or motivated by religion. Read in conjunction with sub-sections 15(2) and (3) and also section 31, such practices are indeed also protected.⁴³

A second important aspect is that section 15 should not be seen as a so-called “establishment clause”. Contrary to the position under the constitution of the United States of America, section 15 does not demand a strict separation between church institutions and state institutions.⁴⁴ Although no strict wall of separation between church and state has been erected, the state is however not free to identify or promote a particular religion. In *S v Lawrence, Negal and Solberg*,⁴⁵ it was held that an explicit endorsement of one religion over others, was not permitted in South Africa’s new constitutional order. The state may not show a special affinity or support to a particular religion. According to some writers, the apex of the right to freedom of religion lies in the balance between positive and negative identification of religions by the state.⁴⁶

A contentious and somewhat uncertain issue is whether section 15 also contains a guarantee of religious equality. The right to religion has both a positive and a negative dimension. From the positive perspective, an individual is free to accept, reject or change his or her religious beliefs without direct or indirect coercion from the state. The state may therefore not prevent a person from adopting a particular belief or to manifest such a belief in practice. The negative dimension in turn protects a person from direct or indirect coercion by the state in matters of faith.⁴⁷ Apart from the two dimensions, the concept of religious equality also reflects so called international sub-dimensions. It is argued that it includes a non-establishment sub-dimension, which prohibits the state from establishing a theocracy or to establish or even endorse a specific church. Then there is the non-preferentialist sub-dimension, which prohibits the state from preferring one religion to another. This sub-dimension entails that the state must treat all religions in an equitable manner. Finally there is the non-accommodationist sub-dimension, which prohibits the state from discriminating between believers and non-believers. Both believers and non-believers must be treated equally and the state may not prefer one religion over another or religion to non-religion.⁴⁸ It would seem and is so argued that section 15 incorporates all three the internal sub-dimensions in order to achieve and protect religious

⁴² See Farlam (n 39) 41-13.

⁴³ According to Farlam (n 39), it would seem that the South African constitutional court has adopted the so-called Canadian approach whereby the concept of freedom of religion also incorporates the right to entertain such beliefs, to declare them openly and to manifest such beliefs by worship, teaching or dissemination – 41-16.

⁴⁴ In *Lemon v Kurtzman* 403 US 602, 91 SCT 32 05 (1984) it was stated that a statute would qualify as an establishment clause if: (i) it has a secular purpose; (ii) if its primary effect is neither to advance nor inhibit religion; or (iii) if it does not foster excessive government entanglement with religion.

⁴⁵ (n 13).

⁴⁶ Farlam (n 39) 41-26.

⁴⁷ The right to freedom of religion is not only a so-called freedom right, *ie* freedom from interference, but it has both individual and collective application. See ss 8 and 31 of the constitution. See also Malherbe “Die grondwetlike beskerming van godsdiensvryheid” 1998 *TSAR* 673 680. The freedom aspect is often referred to as the principle of voluntarism. People are free to choose, change or organise themselves according to their religious convictions or preferences.

⁴⁸ Although the equitable treatment of religions stems from the establishment clause (s 15), the equal treatment of people or institutions based on their religious convictions is founded on the provisions of the equality clause (s 9).

equality.⁴⁹ The achievement of religious equality is not only an ideal of individual countries but it is also an important principle of international law relating to the concepts of religion, secularism and constitutionalism. Although the extent of this research does not allow for a comprehensive investigation of relevant international law requirements, it is however beneficial to summarize some of the more important provisions relating to the concept of freedom of religion.

6 *Some applicable requirements of international law*

According to the South African constitution, when rights set out in the bill of rights, such as the right to freedom of religion, belief and opinion or the right to equality are to be interpreted by a court, tribunal or forum, such institutions:

- (a) must promote the values that underlie the South African open and democratic society, which is based on the core values of dignity, equality and freedom, and
- (b) must consider international law and
- (c) may consider foreign law.⁵⁰

The importance of international law is therefore self-evident. According to Dugard, South Africa's new constitutional order and particularly section 39 of the bill of rights sets the scene for a renaissance of international law both in South Africa's foreign policy and in the jurisprudence of its courts.⁵¹ From an international law position, the sources of international conventions (treaties) and the provisions of international customs are important. Without diminishing the importance of customary international law, this research will only briefly refer to applicable provisions of (codified) international law, particularly international human rights law.

- (a) Universal Declaration of Human Rights (1948): Under article 2 of the declaration, everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind such as religion. Article 7 states that all people are equal before the law and are entitled to equal protection of the law, without any discrimination. Freedom of religion is further protected under article 18. The article states that everyone has the right to freedom of thought, conscience and religion which includes also freedom to change one's religion or belief.⁵²
- (b) International Covenant on Civil and Political Rights (1996): The covenant builds on the universal declaration. It also protects aspects such as equality (a 3 and 26) expression (a 19) and assembly and association (a 21-22). On the

⁴⁹ See Freedman (n 11) 109-110. Some commentators go even further and argue that the right to freedom of religion also includes a right to religious dignity. According to Malherbe (n 16) 333, religious dignity would be violated where the state elevates one religion above another or where the beliefs, rituals and icons of a particular religion are ridiculed. It is also argued that when s 9(3) is read together with s 15 of the constitution, the state is prohibited from discriminating against any religion or religious group. In South Africa, the right to freedom of religion is therefore said to include a free exercise component and an equal-treatment component. See Currie and De Waal (n 7) 338 and *Taylor v Kurtstag NO 2004 4 All SA 317 (W)*.

⁵⁰ Read s 39(1)(a)-(c) together with ss 9 and 15 respectively. Note also Mureinik "Let's privatise God" *Mail and Guardian* (1995-11-10) 11. According to him, a right to freedom of religion also includes a claim to religious equality. If a government has to treat all religions equally, then it cannot adopt one religious view and use it to promote or develop a particular government policy.

⁵¹ See Dugard *International Law: A South African Perspective* (2000) 25.

⁵² See Mtshaulana, Dugard and Botha (eds) *Documents of International Law* (1996) 172-174.

issue of religion, article 18 states that everyone shall have the right to freedom of thought, conscience and religion which shall include freedom to adopt a religion or belief of choice and to manifest such religion or belief in worship, observance, practice and teaching. No person shall be subject to coercion which would impair his or her freedom to adopt his or her religion of choice.⁵³

- (c) International Covenant on Economic, Social and Cultural Rights (1967): This covenant specifically incorporates the principle of non-discrimination. States undertake not to discriminate on *inter alia* the ground of religion.⁵⁴ Discrimination and unequal treatment of people on *inter alia* the ground of religion is thus clearly not permitted.

International legal instruments, similar to the South African constitution, confirm that the rights they contain are not absolute and that limitations may occur. The rights to religion and equal protection as well as the right to non-discrimination on the ground of religion are accordingly not absolute rights and may be limited. The uniform requirements under international instruments regarding limitations are that such limitations must be permitted or prescribed by the law and that rights or freedoms may not be exercised or performed contrary to the fundamental rights and freedoms of others.⁵⁵ The position in international instruments is also echoed in the most common regional human rights instruments. Under the African Charter on Human and Peoples' Rights (1980), the rights of equality, non-discrimination and freedom of conscience and the free practice of religion are to be guaranteed.⁵⁶ Member states shall further recognise such rights and freedoms and shall undertake legislative or other measures to give effect to them.⁵⁷ Similar protection is confirmed in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)⁵⁸ and by the American Convention of Human Rights (1970).⁵⁹ In respect of foreign legal jurisdictions, reference may be made to article 4 of the German constitution, section 2(a) of the Canadian charter of rights and freedoms, and the first amendment to the constitution of the United States of America. The purview of this research does not allow for an investigation of such legal systems. One may, however, conclude that the provisions of international law are basically mirrored in the constitution of South Africa, and that the jurisprudence in both systems could be very useful for comparative analysis. Keeping the above background in mind, certain dictums from South African courts on the theme of religious equality should be considered.

7 *Important judicial precedents in South Africa on religious equality since 1994*

With the commencement of the new South African constitutional dispensation, the South African courts, including the constitutional court have been called upon on regular intervals, to adjudicate legal disputes where the principles of constitutional-

⁵³ See Mtshaulana, Dugard and Botha (eds) (n 52) 182.

⁵⁴ See a 2 of the ICESCR.

⁵⁵ See a 29 of UDHR and also a 14 of the International Convention on the Rights of the Child (1989). See also Mtshaulana, Dugard and Botha (eds) (n 52) 176 and 270 respectively.

⁵⁶ a 2, 3 and 8 of the ACHPR.

⁵⁷ a 1 of the ACHPR.

⁵⁸ a 9 and 14 respectively. A 9 protects the right to freedom of religion and add that limitations as are prescribed by law and which are *necessary in a democratic society may be enforced*.

⁵⁹ a 12 (religion) and a 24 (equal protection). See also a 5(2) of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1991).

ism, secularism and in particular the right to freedom of religion have been at issue. Interesting comments and discussions on the rights in the constitution have been put forward and many are fundamentally important in relation to the topic of this research:

(a) *S v Lawrence, Negal and Solberg*⁶⁰

The three appellants were separately charged with contraventions of the Liquor Act.⁶¹ The appellants all defended the charges under the conception that particular provisions of the Liquor Act were inconsistent with the interim constitution, and accordingly invalid. The Liquor Act *inter alia* prohibited the selling of liquor other than table wine under a grocer's wine licence. It also set certain restrictions on the hours and days on which sales could be effected and also prohibited the selling of wines on certain closed days, which included Sundays, Good Friday and Christmas Day.⁶² It was contended on behalf of Ms Solberg specifically, that the prohibition against selling wine on Sundays was inconsistent with her right to freedom of religion, belief and opinion which was guaranteed by section 14 of the interim constitution.⁶³ In writing for the majority, Chaskalson P held in relation to the appellant's contention that the purpose of prohibiting the selling of wine on closed days was to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays, that section 90 of the Liquor Act does not prohibit grocery stores from doing business on Sundays and does not force people to act or refrain from acting in a manner contrary to their religious beliefs. He pointed out that in South Africa, Sundays have acquired a secular as well as a religious character.⁶⁴ No evidence was placed before the court that the provisions of section 90 of the Liquor Act interfered with the appellant's freedom of religion or the freedom of religion of any other person, or to serve any other religious purpose. In relation to the equal protection of religions, he, however, made the following important concessions:

"The Constitution deals with unequal treatment and discrimination under s 8. Unequal treatment of religions may well give rise to issues under s 8(2), but that section was not relied upon by the appellant in the present case. To read 'equitable considerations' relating to State action into s 14(1) would give rise to any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the 'establishment clause' of the US Constitution."⁶⁵

Contrary to the judgment of Chaskalson P, O'Regan J provided a minority judgment in which she disagreed with the conclusions of the majority relating to the challenge of Ms Solberg. On the particular aspect of religious treatment, O'Regan J stated:

"The stipulation of voluntariness is not the only precondition established by s 14(2). The subsection requires that, even where attendance is voluntary, the observance of such practices must still be equitable. In my view, this additional requirement of fairness or equity reflects an important component of the conception of freedom of religion contained in our Constitution. Our society possesses a

⁶⁰ 1997 4 SA 1176 (CC).

⁶¹ Act 27 of 1989.

⁶² 1186C-D and also s 2 of the Liquor Act 27 of 1989.

⁶³ S 14 of the interim constitution is very similar to s 15 of the Freedom Charter, which is the main focus of this research.

⁶⁴ 1209B-D.

⁶⁵ 1211B-C.

rich and diverse range of religions. Although the State is permitted to allow religious observances, *it is not permitted to act inequitably.*⁶⁶

O'Regan J further commented that:

“In determining what is meant by inequity in this context, it must be remembered that the question of voluntary participation is a consideration separately identified in s 14(2). The requirement of equity must therefore be something in addition to the requirement of voluntariness. It seems to me that, at the least, *the requirement of equity demands the State act even-handedly in relation to different religions.*”⁶⁷

According to O'Regan J, the requirement that the government act even-handedly does not demand a commitment to a scrupulous secularism, or a commitment to complete neutrality. At times, the giving of full protection to the right to freedom of religion will require specific provisions to protect the adherents of a particular religion. The requirement of even-handedness in itself may produce different results depending upon the context which is under scrutiny. However, the explicit endorsement of one religion over others would not be permitted in South Africa's new constitutional order. According to O'Regan J, it is not sufficient for South Africans to be satisfied in a particular case that there is no direct coercion of religious belief. The courts will also have to be satisfied that there has been no inequitable treatment or unfair preference of one religion over others.⁶⁸ For purposes of the Solberg case, O'Regan J stated that she could not accept that the legislature's purpose in enacting the definition of “closed day” was a secular one, but that it displayed an endorsement of Christianity which was in conflict with the constitution and also did not meet the test of justification required by section 36.⁶⁹

Sachs J also provided a separate judgment, although he concurred in the majority judgment of Chaskalson P, albeit for different reasons. According to Sachs J the concept of an open society in South Africa is a central feature of the bill of rights and a lay element in the interpretation of the right to freedom of religion. He regards an open society as a pluralistic one in which there is no official orthodoxy or faith.⁷⁰ The constitution, according to Sachs J, is about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. Sachs J was of the view that the identification of Sundays, Good Friday and Christmas Day as closed days indeed involved an endorsement by the state of the Christian religion in a manner that is “problematic” in respect of section 14.⁷¹ He went on to say that the objective of the right to freedom of religion is to keep the state away from favouring or disfavouring any particular world view. He further made the valid point that aspects that may be trifling to some may be hurtful or oppressive to others. He finally held that the facts

⁶⁶ 1215F-G – emphasis added. It is submitted that this view of O'Regan J is the correct interpretation of s 15 of the constitution. According to O'Regan J the constitution requires more from the state than to just refrain from coercion in religious matters. The state must also refrain from favouring one religion over another and must act fairly and equitably. Note also Farlam “The ambit of the right to freedom of religion: A comment on *S v Solberg*” 1998 *SAJHR* 320.

⁶⁷ 1215H.

⁶⁸ 1216C-F and 1217A.

⁶⁹ *Cf* 1217H-I and 1219H-I.

⁷⁰ 1225C-D.

⁷¹ s 15 under the final constitution.

of the case indeed involved a breach of section 14 of the interim constitution but that such infringement was sanctioned by the limitation provision in the constitution.⁷²

(b) *Christian Education South Africa v Minister of Education*⁷³

The central question was whether the fact that parliament which had enacted a law⁷⁴ that prohibited corporal punishment in schools, had violated the rights of parents of children in independent schools, who, in line with their religious convictions, had consented to its use. It was contended before the court that corporal punishment is a vital aspect of Christian religion and that according to the Christian faith, parents continue to comply with their biblical responsibility by delegating their authority to punish their children to the teachers. After providing an overview of the applicable constitutional provisions, Sachs J, writing for a unanimous court, and after adopting an approach most favourable to the appellant, stated the following:

“The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”⁷⁵

Sachs J further confirmed that 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 very important. On the issue of religious equality he stated as follows:

“It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. As the Court said in *Prinsloo v Van der Linde and Another*, the essence of equality lies not in *treating everyone in the same way, but in treating everyone with equal concern and respect*. Permission to allow the practice to continue would, in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.”⁷⁶

In conclusion the court held that, after all factors were weighed, the scales had to come down in favour of upholding the generality of the schools act and the appeal was accordingly dismissed.

⁷² 1241E. It seems that Chaskalson P, on behalf of the majority of the court favoured a narrow interpretation of s 14 (now s 15), which then only included the right to liberty. O’Regan J and Sachs J on the other hand seem to favour a broader approach whereby s 14 (now s 15) would include both a *liberty* and *equality* component. Refer to Freedman (n 11) 102.

⁷³ 2000 4 SA 757 (CC).

⁷⁴ South African Schools Act 84 of 1996.

⁷⁵ 779C-E.

⁷⁶ 781H-782B – emphasis added.

(c) *Prince v President, Cape Law Society*⁷⁷

In the *Prince* case, the appellant was an adherent of the Rastafarian religion. He wanted to gain admission to the attorney's profession but because of previous convictions for the possession of cannabis, the Cape Law Society refused to register his articles. The majority of the court again confirmed the importance of the right to freedom of religion in an open and democratic society based on the values of human dignity, equality and freedom. Although the case did not directly concern the principle of religious equality, the court stated that if cannabis could be possessed and used for religious purposes that must be so whether the executive consents to it or not, and whether the person concerned is a Rastafari or an adherent of some other religion.⁷⁸ It seems clear that the special treatment or exception for a particular religion would not be acceptable to the court as it would treat one religion differently from another. The court concluded that the failure of the state to make provision for an exemption in respect of the possession and use of cannabis by Rastafarians is thus reasonable and justifiable under the South African constitution.⁷⁹

(d) *Islamic Unity Convention v Independent Broadcasting Authority*⁸⁰

The case related to clause 2(a) of the code of conduct for broadcasting services under schedule I of the Independent Broadcasting Authority Act.⁸¹ Clause 2(a) provides that broadcasting licensees shall, *inter alia*, not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of the population. In considering certain complaints against a particular broadcast by the applicant before the court, it was held that the code indeed limited freedom of expression protected under section 16 of the constitution, but that since rights are not absolute, limitations in accordance with section 36 could be permissible. The court however held that the code went beyond the categories set out in section 16(2) of the constitution and was therefore unconstitutional.⁸² The court again emphasised that competing rights must be balanced according to the facts of the case.

(e) *Minister of Home Affairs v Fourie*⁸³

Under the South African common law, the definition of a marriage was regarded as a union of one man and one woman. Read together with the Marriage Act,⁸⁴ the marriage of persons of the same sex was not permitted. The main legal question before the court was whether the prevention of concluding a "marriage" between people of the same sex, denied them equal protection of the law and produced unfair discrimination by the state against them on the basis of their sexual orientation. Two *amici* submitted a number of arguments from a religious point of view in support of the argument that by its origin and nature the institution of marriage cannot sustain the intrusion of same-sex unions. It was submitted that such unions could never be regarded as marriages and to disrupt and alter an institution of centuries-

⁷⁷ 2002 2 SA 794 (CC).

⁷⁸ 843G-H.

⁷⁹ 844B, read with s 36 of the constitution.

⁸⁰ 2002 4 SA 294 (CC).

⁸¹ Act 153 of 1993.

⁸² 314-315.

⁸³ 2006 1 SA 524 (CC).

⁸⁴ Act 25 of 1961.

old significance to many religions, would infringe and violate the right to religious freedom protected in the constitution.⁸⁵ In writing for the majority justices of the court, Sachs J again mentioned the following interesting aspects. He started off by confirming that the argument of the *amici* raised important issues concerning the relationship foreshadowed by the constitution between the sacred and the secular. Both concepts underlie the fact that in an open and democratic society, and although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the greater majority must be taken seriously. He emphasised the fact that religious bodies play a large and important part in public life and that they are part of the fabric of public life. But, religion is not just a question of belief or doctrine. It is part of a person's culture, and for many believers is a significant part of their way of life.⁸⁶ Sachs J then made the following interesting statement:

"It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies."⁸⁷

Sachs J then went further and stated:

"In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. ...

The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all."⁸⁸

In conclusion, the court held that the right to freedom of religion under section 15 and the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1) of the constitution, and their right not to be discriminated against unfairly in terms of section 9(3) of the constitution.⁸⁹ In view of the aforementioned legal framework, a number of comments relating to the interaction between the principles of constitutionalism, secularism and the right to freedom of religion may be made. The question how equality between religions should be achieved will be highlighted in the following concluding remarks.

⁸⁵ 558I and 559A.

⁸⁶ 559B-H.

⁸⁷ 560E-G.

⁸⁸ 561B-562A.

⁸⁹ 569C-E.

8 *Some critical comments and conclusion*

It is argued that the concepts and interaction between the concepts of secularism, constitutionalism and the right to freedom of religion are of great importance to all modern states. The creation and maintenance of an acceptable balance between the three concepts is however a constitutional challenge that has been on the minds of policy makers, constitutional scholars and legal philosophers for centuries. Notwithstanding all the developments of the modern state, there seems to be an international revival in the search for a sustainable and acceptable model of a secular body politic which simultaneously permits and protects the important fundamental right of freedom of religion. The search seems to be an ongoing one since no perfect or universal model has yet been achieved or is likely to be achieved soon.

Many factors are in play in the development of a universal model of co-existence between the concepts of secularism, constitutionalism and freedom of religion and each particular jurisdiction or legal system has to cope with both universal and distinctive home grown elements. One such important universal element is the principle of religious equality. Whenever religions are treated unequally and without the same respect and importance, both political and civil instability and strife can be expected. A truly secular state should therefore ensure that an acceptable measure of equality between competing religions or even between religion *per se* and *agnosticism* is achieved. In treating certain religions differently without justification from others, either directly or indirectly, a recipe for division and quarrel is created. Within the intrinsic triangle of secularism, constitutionalism and the right to freedom of religion, the concepts should be interpreted and applied in such a fashion as to support and strengthen one another as opposed to resisting each other as vicious adversaries.

South African courts recognise the protection and commitment of equality under the constitution not only as a core value but also as a substantive right in section 9. However, case law seemingly focuses more on the principle of equity rather than equality. Although one must distinguish between the two principles it is submitted that they are interrelated. According to O'Regan J in *S v Lawrence, Negal and Solberg*⁹⁰ the principle of equity demands from the state to act even-handedly in relation to different religions. Equity thus relates to some measure of equality which in turn is specifically protected under the constitution. Since religions and their tenets are not the same, the requirement of even-handedness will and should depend on each particular set of circumstances. Any direct or explicit favouritism or unequal treatment of one religion over another should not be permitted. This view seems to have been supported also by Sachs J, who mentioned that the state must acknowledge different belief systems in a constitutional framework of equality and non-discrimination. He added that the purpose of the establishment clause (section 15) aims to prevent the state from favouring any particular religion or world view.⁹¹ It is further agreed and confirmed by the courts that in South Africa, which is recognised as an open and democratic society based on the values of human dignity, equality and freedom, the right to freedom of religion is very important. In the *Christian Education case*,⁹² Sachs J again agreed that the indifferent treatment of religions could constitute unfair discrimination based on the equality right protected under

⁹⁰ (n 62).

⁹¹ Both Sachs J and O'Regan J seem to favour a broad interpretational approach to s 15 which would include an equality component – (n 66).

⁹² (n 73).

the constitution. Such equality however does not demand that people or religions are treated exactly in the same manner but that they are treated with equal concern and respect. Such an approach would result in religions being treated equitably and would not easily be regarded as being in conflict with the equality protection under the constitution. In the *Prince* case this approach was again confirmed.⁹³ In the *Prince* case it was essentially held that the special treatment in the use of cannabis for religious purposes could not be permitted. Such reasoning is however open to criticism. Although some expert evidence presented in the case has indicated that the use of cannabis is not a central part of the Rastafarian religion. The position would have been different if such use was indeed a fundamental tenet of the religion. Allowing such a practice for religious purposes could then not be said to amount to unequitable and consequential unequal treatment of other people who do not belong to such a religious community. Religious equality does not require exactly the same treatment but rather treatment with equal respect and concern.⁹⁴ It seems safe to say that the principle of religious equality is indeed protected and entrenched under the South African constitution.

A further interesting legal question relating to the subject of this research is whether the principle of religion should be defined narrowly or extensively. In the *Fourie* case Sachs J clearly favoured a wide interpretation of the principle of religion.⁹⁵ According to his definition, religion is more than just belief or religious doctrine. It can also include world-views which people regard as fundamentally important. It is submitted that such an approach and definition is problematic and not supportable. If religion is also defined to include secular beliefs such as the philosophy of humanism for example, then the original and widely accepted distinction between the secular world and sacred world would be unnecessarily blurred and confused. Religion in essence refers to the belief in, worship of or obedience to a super natural power which is divine in nature. Without the element of a divine power, which falls outside the worldly context of human experience, the original purpose and definition of religion is misinterpreted and distorted. This would then have a negative impact on the important division between church and state and between the sacred world and the secular world. The separation between religion on the one hand and the secular world on the other would then become confused and cosmetic. It is submitted that religion must be interpreted in its original context and should not be equated with a world-view of a secular character.⁹⁶

The balancing act of the three constitutional concepts is a particularly important challenge for the South African constitutional dispensation. In a short period of time, the South African courts, allowing for a purposeful and extensive constitutional interpretation of the rights and values that underlie the new legal order, have already taken positive steps in balancing the concepts. All three concepts have been given constitutional recognition, albeit sometimes indirectly, and the courts seem to have developed a sensitive approach. In order for this approach to be further developed and sustained, it is imperative for all state bodies, especially the judicial authorities, to ensure that the principle of religious equality is pursued and achieved. Whenever one religion or philosophical viewpoint is favoured or even

⁹³ (n 77).

⁹⁴ Cf the reference to *Prinsloo v Van der Linde* in the *Christian Education* case (n 73).

⁹⁵ (n 83).

⁹⁶ This interpretation seems to be supported by the specific wording of s 15 of the constitution. If the definition of religion could also include secular principles, then there seems to be no rational reason to distinguish between the concepts of conscience, thought, belief and opinion.

seemingly advantaged over another, then the already intrinsic uneasy triangle between secularism, constitutionalism and the right to freedom of religion is placed in further jeopardy. With reference to the two examples mentioned at the beginning of this article, when the publication of cartoons of the central figures of a particular religion is banned or when criticism of a particular faith or religion is smothered and suppressed but the similar lampooning of another faith or religion is permitted, then the state is failing to ensure religious equity and subsequent equality, is encroaching on religious dignity and is ultimately creating an environment for inter-faith intolerance and possible religious fundamentalism.⁹⁷

SAMEVATTING

DIE INHERENTE SPANNINGSVERHOUDING TUSSEN DIE STAATSREGTELIKE KONSEPTE VAN KONSTITUSIONALISME, SEKULARISME EN DIE REG OP VRYHEID VAN GELOOF IN SUID-AFRIKAANSE PERSPEKTIEF

Die Suid-Afrikaanse gemeenskap, soos talle ander gemeenskappe in die wêreld, word gekenmerk deur groot verskille in mense se sienings oor geloof en religieuse oortuigings. Sodanige verskille veroorsaak en bevestig die voortdurende spanningsverhouding tussen konstitusionalisme, sekularisme en die reg op vryheid van geloof. Die feit dat al drie konsepte direk en indirek in die grondwet van 1996 opgeneem en beskerm word, plaas die verhouding tussen die staat en godsdien in 'n nuwe regsraamwerk. Binne sodanige regsraamwerk veroorsaak die konsep van konstitusionalisme dat sekere grense van die beginsels van sekularisme en die reg op vryheid van geloof binne die staatsregtelike bestel geskep word. Die vraag word derhalwe dikwels gevra hoe die staat gelykheid tussen verskillende geloofsoortuigings moet verseker. Alhoewel die Suid-Afrikaanse grondwetlike bestel nie 'n absolute skeiding tussen godsdien en staat vereis nie, blyk dit uit verskeie regsbronne dat die staat nie een geloof bo 'n ander mag bevoordeel nie en dat die staat versigtig moet optree sodat godsdienstige billikheid en gelykheid beide teoretiese en praktiese beslag behoort te verkry.

⁹⁷ Most commentators submit that the conclusion of the court in the *Jamiat-ul-Ulama* case (n 16) was correct, albeit for different reasons. It is fundamentally important for the state to treat all religions equitably and it would be difficult to justify any unequal treatment of one religion over another. This would be in conflict with *inter alia* ss 15, 9 and 10 of the constitution. See Malherbe (n 16) 337 and Carpenter (n 16) 691.