

Freedom of Religious Teaching as an Element of the Right to Freedom of Religion in South Africa

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Abstract

The article serves an introduction to the discussion relating to the constitutional relationship between religion and education in South Africa. The right to religious teaching and upbringing and the right to religion in educational institutions are discussed as constituting the freedom of religious teaching as contemplated under the right to freedom of religion.

1. Introduction

The advent of the new constitutional order in South Africa has abolished the sovereignty of parliament by mandating the Constitution as the supreme law of the Republic.¹ The Constitution includes an impressive Bill of Rights; the values enshrined therein are to be applied in shaping and developing society. The Bill guarantees, among other rights, the right to freedom of religion.² It has been argued that the right to freedom of religion comprises the freedoms of religious autonomy, religious choice, religious observance, propagation of a religion or denomination and religious teaching.³ The aim with this contribution will be for it to serve as a brief exposition of the two rights constituting the freedom of religious teaching: namely, the right to religious training and upbringing and the right to religion in educational institutions.

2. The right to religious training and upbringing

The right to religious training and upbringing is closely related to the right to religion in educational institutions. Both rights are concerned with the constitutional relationship between faith and education. The right to religious training and upbringing is concerned with the training of adherents by religious institutions and the religious upbringing of children by their parents.

Religious training entails the training of religious leaders and followers by religious institutions to convey the tenets and practices of a particular faith. For example, a religious organisation, such as a church, is free to conduct Sunday school classes or to arrange ecclesiastical courses in order to educate adherents or other interested people in religion.⁴ The Constitution of Portugal guarantees the right to have religion taught within one's own

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¹ S. 2 of the Constitution of the Republic of South Africa. See also Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional Law*, Butterworth, Durban, p. 25; Botha, C. (1998), *Wetsuitleg: 'n Inleiding vir Studente*, Juta, Kenwyn, p. 1. An unqualified reference to a s. must be understood to refer the Constitution, unless a different intention may be discerned.

² S. 15(1).

³ Van der Schyff, G. (2001), *The Right to Freedom of Religion in South Africa*, LL.M. thesis, Rand Afrikaans University, Johannesburg, pp. 79-160. See also in general De Groof, J. (2000), 'Some international and comparative aspects of education rights and policy', in: De Groof, J., Malherbe, R. and Sachs, A. (eds), *Constitutional Implementation in South Africa*, Mys & Breesch, Ghent, pp. 173, 192-193; De Groof, J. and Bray, E. (eds) (1996), *Education under the New Constitution in South Africa*, Acco, Leuven, regarding education in South Africa.

⁴ See Dinstein, Y. (1992), 'Freedom of religion and religious minorities', in: Dinstein, Y. and Tabory, M. (eds), *The Protection of Minorities and Human Rights*, Nijhoff, Dordrecht, p. 153.

denomination.⁵ The Constitution of Slovakia⁶ guarantees churches and religious communities the right to teach religion. The former USSR, however, prohibited 'the formal teaching of religion by any church, except in seminaries, for training new clergy'.⁷ People should also not be prohibited from leaving the country to be trained overseas.⁸

Religious organisations should enjoy the right to train and educate current and prospective clergy in order to continue and expand a leadership class and to ensure the stability and quality of such organisations.⁹

The latter aspect of religious liberty is recognised in international law.¹⁰ The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief¹¹ and the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe.¹²

Situations may arise justifying the limitation of the right to religious training. For example, ecclesiastical institutions wishing to award nationally recognised and accredited qualifications may be required to register and to satisfy certain minimum requirements.¹³

The other side to this right guarantees the rights of parents to ensure and design the upbringing of their children in conformity with their religious convictions.¹⁴

Such an interpretation would be in conformity with the International Covenant on Civil and Political Rights¹⁵ that guarantees parents the right to direct their children's education in conformity with their religious convictions.¹⁶ Parents, therefore, enjoy the right to create a home environment conducive to religion and the right to encourage their children to express religious views and participate in religious practices. Parents may thus elect to enrol their children at religiously minded schools or they may choose to excuse their children from religious activities conducted at school incompatible with their own religious beliefs. This important element of religious liberty enjoys due recognition in international law.¹⁷

The Bill of Rights holds that the best interests of the child are to be of paramount importance in every matter concerning the child.¹⁸ Situations may thus arise justifying the limitation of the unbridled discretion of parents in directing the religion of their children should such direction not be considered to be in the best interest of the children as required by the Bill of Rights. For example, parents may be forbidden to condone the practice of self-immolation in the name of religious devotion or to encourage children to bring harm to themselves by other means.

The right to teach religion should be viewed as a very important part of religious liberty as it allows the perpetuation of religion. Without such a right one generation would be unable to convey religious doctrine, thereby denying religion a future.¹⁹ Furthermore, it may be argued that the right to teach religion implies the right to produce, own, procure, contemplate and study religious books and other works. The right to propagate religion,²⁰ as well

⁵ (1976) s. 41(5).

⁶ (1993) s. 24(3).

⁷ See Boiter, A. (1987), 'Law and religion in the Soviet Union', *American Journal of Comparative Law*, p. 108.

⁸ Krishnaswami, A. (1960), *Study of Discrimination in the Matter of Religious Rights and Practices*, p. 42.

⁹ See Krishnaswami, footnote 8 above, p. 41 and p. 42.

¹⁰ See also Shelton, D. and Kiss, A. (1996), 'A draft model law on freedom of religion, with commentary', in: Van der Vyver, J.D. and Witte, J. (eds), *Religious Human Rights in Global Perspective* vol. 1, Nijhoff, The Hague, pp. 563-568.

¹¹ (1981) Art. 6(g).

¹² (1989) Art. 16(8).

¹³ S. 36(1)(b). See Van der Schyff, footnote 3 above, pp. 167-197 regarding the limitation of the right to freedom of religion.

¹⁴ Children are persons under the age of 18, see also s. 28(3). Interestingly, the Constitution of Singapore (1963) s. 16(4) states that: '[T]he religion of a person under the age of 18 years shall be decided by his parent or guardian.'

¹⁵ (1966) Art. 18(4).

¹⁶ See also the American Convention on Human Rights (1969) Art. 12(4); Declaration in the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) Art. 5; Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7).

¹⁷ See also Van der Schyff, footnote 3 above at p. 82.

¹⁸ S. 28(2). The Supreme Court of Israel (H.C. 103/67 (1967)), for example, has held that parents must choose the same religion for their children as their own; otherwise parents would be disregarding the welfare of the children, see also Dinstein, footnote 4 above at p. 154. See also *Allsop v. McCann* [2000] 3 All SA 475 (C) regarding the best interests of the child where a dispute arises between divorced parents in respect of the child's religious upbringing. See Nsereko, D.D. (1992), 'Religious liberty and the law in Botswana', *Journal of Church and State*, p. 855.

¹⁹ See Dinstein, footnote 4 above at p. 153.

²⁰ See Van der Schyff, footnote 3 above at p. 155.

as the right to freedom of expression²¹ would serve as important contextual rights in regard to the right to teach religion, thereby amplifying the right.

3. The right to religion in educational institutions

Religious and educational issues are usually closely linked.²² It may be argued that section 15(1) contains the implied right to conduct religious observances at state and state-aided institutions. The existence of the latter right is confirmed by section 15(2) that states the right to conduct religious observance in public institutions.²³ The special role of religion in education and the traditional relationship that exists between religion and education are therefore affirmed with regard to the observance of religion at public institutions such as schools.²⁴ However, section 15(2) contains a specific limitation clause that allows such observances to be conducted subject to regulation, equity and free will.²⁵

It should be noted though that a distinction should be drawn between the *observance* of religion and the *instruction* of religion.²⁶ The former refers to 'individual or collective Scripture reading, prayers, moments of silence for personal devotion or meditation and, possibly, the exhibition of religious symbols'.²⁷ Religious instruction, on the other hand, refers to the teaching of religion, for example as a subject in schools and other educational institutions.²⁸ The distinction relates not merely to the substance of both concepts but also to the fact that religious observance is expressly guaranteed by the Bill of Rights, whereas similar express recognition of religious instruction is lacking.²⁹ Foreign examples of the express recognition of the right to religious education, however, do exist.³⁰ The right to provide for a religiously grounded subject or education is a right that may undoubtedly be exercised in private education. The Interim Constitution of 1993, for example, expressly recognised the right to establish educational institutions based on a common religion.³¹ The Final Constitution restated the right to establish and maintain 'independent educational institutions' at private expense.³² Grounds for the establishment of such institutions, however, have been omitted. This omission does not bar someone to establish an educational institution on religious grounds as nothing in the Constitution forbids such a move.³³ The right to establish religious associations, arguably, would also protect the right to establish religious educational institutions.³⁴ International law also recognises the right of parents (and guardians) to direct their children's (or wards') education in conformity with their own religious convictions.³⁵ The right to establish independent educational institutions based on religion seems secure.

²¹ See s. 16(1)(b).

²² See Foster, W.F., Malherbe, R. and Smith, W.J. (1999), 'Religion, language and education: Contrasting constitutional approaches', *Education & Law Journal*, p. 212. See also Wulfsohn, J.G. (1964), 'Separation of church and state in South African law', part 2, *South African Law Journal*, p. 228 et seq.; Van der Vyver, J.D., 'Religion', in: Joubert, W.A. and Scott, T.J. (eds) (1986), *Law of South Africa* vol. 23, Butterworths, Durban, paras. 239-243 regarding the traditional relationship between the law, religion and education in South Africa.

²³ See Van der Schyff, footnote 3 above at p. 63; Malherbe E.F.J. (1998), 'Die grondwetlike beskerming van godsdiensvryheid', *Tydskrif vir die Suid-Afrikaanse Reg*, p. 695.

²⁴ See Foster e.a., footnote 22 above at p. 221.

²⁵ See Van der Schyff, footnote 3 above, pp. 63 and 188. Malherbe (1998), footnote 23 above at p. 695; Foster e.a., footnote 22 above at p. 220.

²⁶ See Foster e.a., footnote 22 above at p. 221; Malherbe, E.F.J. (1995), 'Die onderwysbepalings van die 1993 Grondwet', *Tydskrif vir die Suid-Afrikaanse Reg*, p. 6; De Waal, J., Currie, I. and Erasmus, G. (2001), *The Bill of Rights Handbook*, Juta, Ndabeni, pp. 302, 303 and 304; Wittmann v. Deutscher Schulverein, footnote 16 above, 449E.

²⁷ See Foster e.a., footnote 22 above at p. 221. See Van der Schyff, footnote 3 above at p. 63; Malherbe (1995), footnote 26 above at p. 6.

²⁸ See Foster e.a., footnote 22 above at p. 221.

²⁹ See Foster e.a., footnote 22 above at p. 221.

³⁰ The Constitution of Paraguay (1992) s. 74 guarantees the right to have a religious education. The Constitution of Germany (1949) s. 7(3) also provides for religious classes in some state schools. The Dutch Constitution (1983) s. 23 stipulates that: 'Het openbaar onderwijs wordt, met eerbiediging van ieders godsdienst of levensovertuiging, bij de wet geregeld.' This has led to the recognition of public Christian tertiary institutions, see Pienaar, G. (1993), 'Diskriminasieverbod en religieusgerigte onderwys – wat hou die toekoms in?', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, pp. 213 and 214.

³¹ See s. 32(c). See Dlamini, C., 'Culture, education and religion', in: Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D. (eds) (1995), *Rights and Constitutionalism: The New South African Legal Order*, pp. 187ff regarding religion under the Interim Constitution (1994).

³² S. 29(3). The Final Constitution stated that such institutions have to be set up using private finance, the granting of subsidies, however, is not excluded, see s. 29(4). The Constitution thus cleared up confusion existing around the Interim Constitution regarding the financing of independent educational institutions. See Du Plessis, L.M. (1994), 'The protection of religious rights in South Africa's Transitional Constitution', *Koers*, pp. 164-165 regarding the confusion.

³³ See Malherbe (1998), footnote 23 above at p. 700. Malherbe, therefore, views s. 29(3) as a manifestation of the right to freedom of religion.

³⁴ S. 31(1)(b).

³⁵ The Convention Against Discrimination in Education (1960) Art. 5(1)(b) holds that: 'It is essential to respect the liberty of parents, where applicable, legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities', see also the similar provision in the International Covenant on Economic, Social and Cultural Rights (1966) Art. 13(3). The International Covenant on Civil and Political Rights (1966) Art. 18(4) guarantees parents the right to direct their children's education in conformity with their religious convictions. See also the American Convention on Human Rights (1969) Art. 12(4); Declaration in the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) Art. 5(2); Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7). See the compilation of human rights' provisions regarding education in Mashava, L.V. (ed) (2000), *A Compilation of Essential Documents on the Right to Education*, Centre for Human Rights, Pretoria. See also Shelton and Kiss, footnote 10 above at p. 568.

As mentioned, an express right to mandate the state to provide a religious education or an education with religious elements is not provided for. The provision of such an education by the state, however, is not expressly forbidden or discouraged.³⁶ The state, though, is enjoined to provide a basic education to everyone.³⁷ It may be argued that a basic education should include religion in some form or another in order to achieve a balanced result.³⁸ However, the right of parents to direct their children's education in conformity with their own beliefs should at least enable parents not to have their children exposed to religious aspects of education.³⁹ Should religious classes form part of the public school system curriculum, the attendance at such classes must be voluntary. Debate may also arise in respect of the format and content of such religious classes, for instance classes could be multi-faith orientated or each class could cater to a specific religion. Religious leaders may also be afforded the opportunity to conduct such classes in order to alleviate the burden on the school system. It is submitted, though, that little objection can be raised to the teaching of purely academic aspects of religion, such as religious history. However, it should be noted that no express right to religious education exists in regard of the public education system and the implied right to such instruction is by no means a foregone conclusion nor the format and content of such instruction. The guideline should be that peoples' religious rights may not be infringed in the provision of education.

Questions have also arisen whether religiously inspired public institutions may maintain a religious character.⁴⁰ It may be argued that such institutions ought to be able to continue espousing a particular religious character as such a move could be viewed as the fulfilment by the state of religious freedom as mandated by the Bill of Rights.⁴¹ Such advancement of religious liberty, however, should take cognisance of all religions represented in South Africa in order not to infringe upon the right to state non-identification by fulfilling and encouraging religious expression of a certain religion at the expense of others.⁴²

4. Conclusion

It may be suggested that the following general ideals with regard to education should be noted and heeded: namely the provision of education 'directed towards the full development of the human personality and human dignity [that] should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace' and the provision of education in order to 'enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace'.⁴³ Education should be geared to engender respect and tolerance for religious expression and diversity, thereby creating a society that is conducive to the exercise of the right to freedom of religion.

³⁶ See Hogg, P.W. (1992), *Constitutional Law of Canada*, Carswell, Toronto, p. 951 ff.; Foster e.a., footnote 22 above, *passim* regarding the position of religion in Canadian public schools.

³⁷ S. 29(1)(a).

³⁸ See the thoughts of Freund, P.A. (1969), 'Public aid to parochial schools', *Harvard LR*, p. 1689 et seq.

³⁹ See *Wittmann v. Deutscher Schulverein, Pretoria*, footnote 16 above regarding the position of religious classes and observances at private schools. The International Covenant on Civil and Political Rights (1966) Art. 18(4) guarantees parents the right to direct their children's education in conformity with their religious convictions, see also the American Convention on Human Rights (1969) Art. 12(4); Declaration in the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) Art. 5(2); Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe (1989) principle 16(7).

⁴⁰ See, for example, the Potchefstroomse Universiteit vir Christelike Hoër Onderwys (Private) Act 19 of 1950 s. 31(1). See Du Plessis, footnote 32 above, pp. 164-165; De Waal e.a., footnote 26 above, p. 292.

⁴¹ S. 7(2). See Van der Schyff, footnote 3 above at p. 161-166.

⁴² See Van der Schyff, footnote 3 above at p. 82.

⁴³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) Art. 13(2).