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THE DIMENSIONAL ELEMENTS OF THE RIGHT TO FREEDOM OF RELIGION OR BELIEF IN THE SOUTH AFRICAN CONSTITUTION – AN EVALUATION IN LIGHT OF RELEVANT CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

SUMMARY

Current interpretations of the right to freedom of religion or belief (FoRB) in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) make important distinctions between two dimensions of the right – a *forum externum* and a *forum internum*.¹ This distinction is important since, according to current interpretations, the *forum externum* can be limited, whereas the *forum internum* is absolute. In South African human rights law, the protection of the right to freedom of religion or belief is scattered across various sections of the Bill of Rights and as a result, can be limited by the general limitation clause in sec. 36. Contrary to the mentioned international human rights documents, South African law does not consider any fundamental right (or parts thereof) to have an absolute character and aims to strike a balance on the limitation of conflicting rights (with the aim of reconciling them to each other). This distinction is amplified by the judicial interpretation of religious freedom rights and their individual, collective, public, and private manifestations. Consequently, this distinct approach to the codification and limitation of the right to religious freedom raises several important questions in comparison to the current dominant approach taken in the mentioned international human rights documents (where the two dimensions are currently being distinguished, resulting in the mentioned consequences regarding limitation). Most significantly, to what extent does South African law acknowledge the two

1 The *forum internum* refers to the internal realm (internal reality or realm of the mind or conscience), whereas the *forum externum* refers to the external realm (external appearance, “the realm of public, observable behaviour or the realm in which individuals are punished for crimes” [Roberts 2019:12]).

dimensions of the right? What is the difference in effect of the general limitation clause on the limitation of the two dimensions of religious freedom?

1. INTRODUCTION

The core international human rights instruments of the United Nations (UN)² denote a distinction between the two dimensions of the right to freedom of religion or belief (FoRB), *viz.* the right to have or adopt (or change) a religion of choice (the so-called *forum internum* or liberty of internal conscience), and the freedom to manifest a religion or belief (the so-called *forum externum*).³ This distinction is important, since the *forum externum* can be limited, whereas the *forum internum* is absolute.⁴

At first glance, such a distinction between the two dimensions is not clear in South African human rights law. In the *Constitution of the Republic of South Africa*, 1996,⁵ the protection of FoRB is spread across secs. 9, 15, 16, 18 and 31, which can be limited by a law of general application as per sec. 36. Contrary to current UN International Human Rights (UN IHR) law, South African law does not consider any fundamental right, or part thereof, to have an absolute character.⁶ It is rather aimed at striking a balance between conflicting rights,

2 For purposes of this article, the writers will focus specifically on the interpretation of FoRB based on the core international instruments, as established by the international human rights framework of the UN. Whilst regional systems (such as the European regional system) of international human rights law have been of crucial importance for the development of international human rights law, the scope of this article will be limited to UN international human rights standards. With respect to the UN framework, and in the context of religious freedom specifically, the following essential international documents will provide the basis for this discussion: Art. 18 of the UDHR; Art. 18 of the ICCPR; the UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience, and Religion in terms of Article 18 of the ICCPR*, CCPR/C/21/Rev.1/Add.4 of 27 September 1993; the UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, UNGA Res. 36/55, 73rd plenary meeting, 25 November 1981 (*Religious Discrimination Declaration*), and the Reports of the UN Special Rapporteur on freedom of religion or belief, <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx>.

3 Roberts (2019:12) concludes that current jurisprudence consistently (mis-) represents the *forum internum* as an internal realm (internal reality or realm of the mind or conscience), whereas the *forum externum* refers to the external realm (external appearance, “the realm of public, observable behaviour or the realm in which individuals are punished for crimes”). Such a presentation of FoRB as two distinct dimensions can be found in current UN IHR jurisprudence such as *General Comment No. 22:par. 3* and Bielefeldt *et al.* (2016), although Bielefeldt *et al.* interpret it as such for practical purposes only.

4 Art. 18 of the UDHR and Art. 18 of the ICCPR, read with *General Comment No. 22* and the *Religious Discrimination Declaration* (1981). See also UN “Rapporteur’s Digest on Freedom of Religion”; Sepúlveda *et al.* 2004:203; Petersen & Marshal 2019:17; Witte & Green 2012:8.

5 *Constitution of the Republic of South Africa*, 1996 (hereinafter, “the *Constitution*”).

6 In this regard, the *Constitution* differs from many other foreign constitutions or bills

with a view to limiting and reconciling such conflict. Consequently, the South African approach to the codification and limitation of FoRB raises several important questions when compared to current interpretations of FoRB in UN IHR law. Most significantly, to what extent does the South African law acknowledge the two dimensions of the right? What is the difference in effect of the general limitation clause on the limitation of the two dimensions of FoRB?

To answer these questions, the first part of this article considers FoRB and its constituting *forum internum* and *forum externum* as applied in current UN IHR law. Thereafter, South African jurisprudence regarding FoRB and the two dimensions are analysed and compared to the position in IHR law. Since South Africa is bound by international human rights instruments,⁷ the differences in limitation, interpretation, and application of FoRB and the constituting dimensions require deeper analysis. The final part of the article assesses whether the IHR approach to the limitation of FoRB and the distinction made between the two dimensions can be applied in South African jurisprudence and sec. 36 of the *Constitution*, taking into account the South African constitutional framework and existing critique against the strict legal distinction between *forum internum* and *forum externum* in IHR law.

2. THE DIMENSIONAL ELEMENTS OF THE RIGHT TO FREEDOM OF RELIGION OR BELIEF AND ITS POSSIBLE LIMITATION AS UNDERSTOOD IN INTERNATIONAL HUMAN RIGHTS LAW

2.1 General principles concerning the right to freedom of religion or belief

Art. 18 of the Universal Declaration of Human Rights (UDHR) affirms that

FoRB is a right that belongs to each human being. It is an individual right, conferred upon individuals and group of individuals, and which can be manifested through a community of believers acting together either privately or in public. It does not confer any rights or privileges upon religions or beliefs themselves.⁸

IHR law protects FoRB, as well as equality and freedom from discrimination on the basis of religion,⁹ with an inclusive and open understanding of the subject of protection. FoRB includes “thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others”.¹⁰ FoRB is, therefore, not limited to traditional faiths, but also encompasses other existential views derived from the inner

of rights, such as the United States Constitution that has no limitation clause at all or the German Constitution that only has specific limitation clauses (Currie & De Waal 2013:152).

7 Sec. 39(1) of the *Constitution*.

8 Evans *et al.* “Article 18: From rhetoric to reality”, <https://appgfreedomofreligionorbelief.org/media/Article-18-report-1710.pdf> (accessed on 3 August 2021).

9 Arts. 2 and 24 of the ICCPR and further elaborated on in the *Religious Discrimination Declaration* (1981).

10 *General Comment No. 22*:par. 1.

self, including theistic, non-theistic, polytheistic, and atheistic beliefs, as well as philosophical and cultural traditions, and conscience-based views.¹¹ This inclusive approach is restricted by the fact that such a belief or view must attain “a certain level of cogency, seriousness, cohesion and importance”.¹²

The open and inclusive approach is epitomised by the fact that relevant international human rights instruments view FoRB as a multifaceted right¹³ that recognises a range of normative core values or elements,¹⁴ which constitute a set of minimum standards in regard to its scope of protection.¹⁵ These normative core values of FoRB include, but are not limited to¹⁶ the freedom to have, choose, change or leave a religion or belief; the right to manifest one’s belief, either publicly or in private, through teaching, practice, worship, and observance; freedom from coercion; the right to conversion, *i.e.* the right to change a religion and to try to convince others to change their religion, including the right to disseminate religious convictions and missionary activities; freedom from discrimination on the basis of religious conviction; freedom from derogation; freedom from impermissible restrictions or limitations on religious freedom; parental liberty regarding the religious and moral education of their children, and the right to conscientious objection.¹⁷

Current UN IHR interpretations of FoRB tend to group these normative core values (and not without controversy)¹⁸ into two dimensions – the *forum internum* and the *forum externum*.

2.2 The legal distinction between the *forum internum* and the *forum externum* and its controversies

Art. 18(1) of the International Covenant on Civil and Political Rights (ICCPR) includes the mentioned normative core values, by clearly stating that FoRB includes the “right to *have* or to *adopt* a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to *manifest* his religion or belief in worship, observance, practice and teaching.”¹⁹

11 *General Comment No. 22*:par. 2. See also Bielefeldt 2013:47.

12 *Campbell and Cosans v United Kingdom*, judgment of 25 February 1982, App. Nos. 7511/76, 7743/76, Eur. Ct. H.R. (1982): 13. Bielefeldt *et al.* (2016:20) explain that “[w]hile the criteria of cogency, seriousness, and importance imply an existential urge based on profound convictions, the element of cohesion requires that the respective views show an impact on a person’s identity and practice in a somewhat coherent and holistic manner”.

13 Bielefeldt 2017:341.

14 United Nations “Rapporteur’s Digest on Freedom of Religion”, <https://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> (accessed on 6 November 2020).

15 Lindholm 2015:8. See art. 18 of the UDHR and art. 18 of the ICCPR. See also *General Comment No. 22* and the *Religious Discrimination Declaration* (1981).

16 Durham *et al.* 2013:xxxvi. See also Lindholm 2015:8-11.

17 *General Comment No. 22*.

18 See page 31 for a discussion of these controversies.

19 Emphasis added. But for some inconsequential differences, Art. 18 of the UDHR

Although a binary and hierarchical distinction between the *forum internum* and the *forum externum* is contested, the following values pertaining to FoRB would fall under each. Considered concurrently,²⁰ the *forum internum* refers to the freedom of choice to have or adopt a religion or belief, including the right not to adhere to any belief and to profess no religion; the freedom to retain and maintain a belief; the freedom to establish a new religion; the freedom to leave, change, supplement or replace one's existing belief, including the right to convert and not to be forced to convert,²¹ and the right not to be compelled to reveal one's thoughts and adherence or non-adherence to a religion or belief.

In turn, the *forum externum*, or the freedom to manifest religion or belief in worship, observance, practice and teaching, encompasses a broad range of acts that are intimately linked to giving direct expression to one's religion or belief.²² It covers private and public practices, whether committed by an individual or as part of a communitarian expression of faith, and also personal and infrastructural aspects of religious life.²³ However, it does not protect every act motivated or influenced by a religion or belief.²⁴

Although questioning the precise meaning and origin of the terms *forum internum* and *forum externum*, Roberts finds clear evidence that these terms have a *spatial meaning*:

the *forum internum* is consistently presented as an internal realm (whether the individual's internal reality or the realm of the mind, or conscience) whereas the *forum externum* is the external realm (whether the individual's external appearance, the realm of public, observable behaviour or the realm in which individuals are punished for crimes).²⁵

In other words, the two dimensions approach recognises that FoRB is to be protected in terms of its two distinctive yet interchangeable forms of existence in international law, *viz.* public and private.²⁶ The "distinction between *forum internum* and *forum externum* has been definitive for the articulation of a public-private divide in international law".²⁷ Yet, this distinction does not refer to the *geographical notion* of exercising or applying religion or belief in public or private. Both the *forum internum* and the *forum externum* can geographically

uses nearly identical wording.

20 *General Comment No. 22*:par. 5, read with art. 18 of the UDHR and art. 18 of the ICCPR.

21 Although the right to conversion in the sense of changing one's religion or belief and the right not to be forced to convert belong in the inner realm or religious freedom, the right to try to convert others belongs in the external dimension. Bielefeldt 2017:109.

22 Bielefeldt *et al.* 2016:93.

23 Bielefeldt *et al.* 2016:21.

24 *General Comment No. 22*:par. 8.

25 Roberts 2019:12.

26 Petkoff 2012:183. See also Sepúlveda *et al.* 2004:203.

27 Petkoff 2012:183-184.

be exercised in public or in private.²⁸ Rather, it refers to very specific parts of FoRB that constitute the relation of religion or belief to the internal realm of the person's conscience, as distinct from the relation of religion or belief to the external realm beyond the inner conscience of a person. The fundamental problem with such a spatial divide is that the compartmentalisation of the private and public spheres undermines the inextricable integration of religion or belief, for anyone who professes either, as part of the fundamental elements of their conception of all aspects of everyday life. In other words, such a legal divide regarding the spatial protection of FoRB in either public or private spheres of life "is not one which is readily apparent to believers, particularly for those for whom the display of religious clothing or symbols in public is central to their faith".²⁹

Apart from its spatial application, the distinction between the *forum internum* and the *forum externum* has "legal significance",³⁰ because these dimensions are afforded different levels of legal protection (although controversial and contested).³¹ The internal dimension of religion or belief enjoys an apodictic respect as one of the few unconditional norms in current interpretations of IHR law.³² No restrictions or limitations to the freedom to have or adopt a religion or belief of one's choice can ever be permitted.³³ Conversely, the external dimension may be qualified or limited in certain circumstances. Art. 18(3) of the ICCPR "allows for restrictions only in very exceptional cases" and the "test of legality of a prohibition of any act motivated by belief or religion is [...] extremely strict".³⁴ The following conditions need to be met for a restriction to be permissible:³⁵ prescribed by law;³⁶ necessary,³⁷ and in protection of a strictly limited set of well-

28 Bielefeldt 2020:17, fn. 28.

29 Roberts 2019:28.

30 Nowak 2005:412; Moeckli *et al.* 2010:223.

31 See Roberts 2019.

32 *General Comment No. 22*, read with art. 18 of the UDHR and art. 18 of the ICCPR. See also UN "Rapporteur's Digest on Freedom of Religion"; Bielefeldt *et al.* 2016:68.

33 *General Comment No. 22*:par. 3, read with par. 8.

34 Paras. 62 and 63 of the UN HRC "Elimination of all forms of religious intolerance: Report of the Special Rapporteur", <https://digitallibrary.un.org/record/558946?ln=en> (accessed on 7 November 2020).

35 Art. 1(3) of the *Religious Discrimination Declaration* (1981); par. 12 of Resolution 2005/40 on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 19 April 2005, E/CN.4/RES/2005/40. <https://www.refworld.org/docid/429c37774.html> (accessed on 7 November 2020); *General Comment No. 22*:par. 8. For a more detailed discussion of these requirements in the context of the *forum externum*, see Bielefeldt *et al.* 2016:559-565. For a discussion on the minimum requirements for limitations of human rights, see Sepúlveda *et al.* 2004:44.

36 "Prescribed by law", according to the Siracusa Principles, means "provided for by national law of general application" (UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter, the Siracusa Principles), 28 September 1984, E/CN.4/1985/4:par. 15, <https://www.refworld.org/docid/4672bc122.html> (accessed on 7 November 2020).

37 Par. 10 of the Siracusa Principles outlines "necessity" to imply that the limitation

defined public interests.³⁸ Violations and limitations of FoRB are, therefore, largely dependent on the understanding of the two dimensions of religious freedom. However, even though, under this interpretation of FoRB, the *forum internum* is protected unconditionally, whereas the *forum externum* may be limited, Bielefeldt *et al.* emphasise that the latter is in no sense less important than the former.

To do justice to freedom of religion or belief, these two dimensions should always be seen in conjunction. Although they differ in their degrees of legal protection, they are usually deeply interwoven in practice.³⁹

For many religious traditions, religion is “inextricably integrated into every facet of life”;⁴⁰ the dimensional distinction is thus effectively a legal construction and not a philosophical or theological distinction. Bielefeldt *et al.* note that the two dimensions should be viewed as a continuum, not as “a clear-cut separation of different spheres of life”.⁴¹ However, as a legal and practical construct, there is “a clear and sharp distinction between the aspects of FoRB that cannot be interfered with (in the *forum internum*) and the aspects that can, i.e. the manifestation of one’s religion or belief (in the *forum externum*)”.⁴² In other words, the limitation on the “exercise of rights and freedoms”⁴³ provides “a clear distinction between the ‘having’ aspect (*forum internum*) and its expression or manifestation (*forum externum*) [...] [t]he former cannot be limited but the latter can.”⁴⁴

Yet, these spatial and legal constructs, creating a binary and seemingly hierarchical distinction between the two dimensions, are not without convincing criticism. Roberts argues that references to the terms “*forum internum*” and “*forum externum*” and their legal distinction is mostly found in post-millennial literature.⁴⁵ The *travaux préparatoires* of art. 18 of the UDHR and ICCPR

be “based on one of the grounds justifying limitations” in the relevant ICCPR provision; that it “respond to a pressing public or social need”, pursue “a legitimate aim” and be “proportionate to that aim”. In its simplest form, “necessity” implies proportionality, i.e. that the restrictions imposed be proportionate to the seriousness of the harm the State seeks to prevent. Limitations should strive to strike a balance between two competing interests (Bielefeldt *et al.* 2016:553).

38 Those are either to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Restrictions are not allowed on grounds that are not specified in the Covenant, nor may such limitations be applied for purposes other than those for which they were prescribed. In addition, the restriction must be directly related and proportionate to the specific need on which they are predicated (*General Comment No. 22*:par. 8).

39 Bielefeldt *et al.* 2016:93.

40 Witte *et al.* 2012:15.

41 Bielefeldt (2017:314) states: “Just as freedom in the *forum internum* would be inconceivable without a person’s free interaction with his or her social world, freedom within the *forum externum* presupposes respect for the faculty of every individual to come up with new thoughts and ideas and to develop personal convictions, including dissident and provocative positions”.

42 Bielefeldt *et al.* 2016:566.

43 Art. 29 of the UDHR.

44 Bielefeldt *et al.* 2016:553.

45 Roberts 2019:35.

(pre-1950) do not reveal a binary and hierarchical distinction between the two dimensions.⁴⁶ The “intellectual scaffolding”, upon which the actual distinction is built, has largely been entrenched through superficial references and repeated and unsupported assertions, rather than proper engagement with primary materials.⁴⁷

Whichever interpretation of the two dimensions is correct, FoRB is guaranteed as a fundamental human right⁴⁸ and the binary distinction with differences in limitation between dimensions is the currently propagated, albeit controversial, position in UN IHR jurisprudence. Although the Latin concepts “*forum internum*” and “*forum externum*” are not expressly mentioned in art. 18 of the ICCPR, nor clearly supported in the *travaux préparatoires*,⁴⁹ current UN IHR jurisprudence propagates that there is a legal distinction recognised in international law and that the *forum internum* is protected absolutely and the *forum externum* not. *General Comment No. 22* notes that “[a]rticle 18 [of the ICCPR] distinguishes the freedom of thought, conscience, religion or belief [the so called *forum internum*] from the freedom to manifest religion or belief [the so-called *forum externum*]”.⁵⁰ Various commentators also confirm this distinction and consequences in the limitations of FoRB.⁵¹ Bielefeldt *et al.*, in line with Roberts, contend that the *forum internum* and the *forum externum* in art. 18 of the ICCPR “do not exist as two clearly separated domains” and that they overlap.⁵² Bielefeldt *et al.* further argue that the two dimensions should be understood in terms of a continuum and that they belong together.⁵³ Yet, for dogmatic clarity and for practical implications, they still advise to strictly distinguish between the two forums.⁵⁴ Therefore, as stated earlier, philosophically, the two dimensions are interrelated, but for legal application, the components should be distinguished.⁵⁵ This, therefore, means that, although contested, the dominant IHR law position is that the binary distinction is advocated for, for practical reasons and with different legal implications. Yet, this does not necessarily mean that the one dimension is more important than the other.

It is important to take note of such controversies, especially considering the question as to whether the current interpretation of the two dimensions is

46 Roberts 2019:48-63. This is the same for the European Convention on Human Rights (Roberts 2019:126).

47 Roberts 2019:42.

48 *General Comment No. 22*:par. 1, and preamble of the *Religious Discrimination Declaration* (1981). See Walter 2008:864; Sepúlveda *et al.* 2004:11.

49 Roberts 2019:15-16.

50 Witte *et al.* 2012:8. See also art. 1 of the *Religious Discrimination Declaration* (1981) and UNGA, Human Rights Council, Thirty-First Session, Report of the Special Rapporteur on Freedom of Religion (23 December 2015) UN Doc/HRC 31/18:par. 77.

51 For example, Taylor 2005:19; Evans 2012:5.

52 Bielefeldt *et al.* 2016:76, 82.

53 Bielefeldt *et al.* 2016:76, 82.

54 Bielefeldt *et al.* 2016:290.

55 Roberts (2019:74) argues that this practical versus philosophical distinction is difficult to reconcile.

suitable or prejudicial in the South African context (see discussion below).⁵⁶ However, for purposes of this article, the current interpretation of the two dimensions in UN IHR will form the basis of the further analysis – namely, the existence of a binary distinction, for practical purposes, as a legal construct. This, in turn, results in implications regarding differences in limitation in the two dimensions, but without the aim of creating a hierarchy of values within FoRB.⁵⁷

Although UN IHR jurisprudence currently accepts this distinction and the resulting consequences regarding limitation, certain nuances regarding the scopes of these dimensions, as they pertain to the “collective” and “individual” exercise of FoRB, require further explanation.

2.3 The “collective” and the “individual” within the two dimensions

There is a distinction to be made between the collective and the individual exercises of FoRB within the two forums. The *individual* enjoyment of FoRB is protected within both the *forum internum* (absolutely) and the *forum externum* (subject to limitation). From art. 18 of the ICCPR, it is also clear that the *collective* manifestation of religion or belief is protected but can be limited.⁵⁸ Given the enigmatic distinction between the dimensional elements at the collective level, it is less clear whether the collective exercise of FoRB within the *forum internum* is also granted absolute protection. Perhaps this reflects the controversies surrounding the actual distinction between the two forums. Nevertheless, Malherbe denotes a tendency in international law towards the explicit recognition of religious institutions as bearers of aspects of the right to religious freedom.⁵⁹ Evans⁶⁰ suggests that, at least at the European Court of Human Rights, there is a steady emergence of a corporate *forum internum*. Since religious communities traditionally exist in the form of organised structures, their religious autonomy may have some features that have the elements of both *forum internum* and *forum externum*.

Just as individuals are entitled to have their sphere of inner beliefs – their ‘forum internum’ – respected absolutely, so likewise is there a degree of enhanced protection for what might be called the ‘forum internum’ of the associative life of an organisation.⁶¹

56 The controversies surrounding this legal distinction, although touched upon later, are not central to the main research questions of this article: To what extent does the South African law acknowledge the two dimensions of the right (as found in international human rights law)? What is the difference in effect of the general limitation clause on the limitation of the two dimensions of FoRB?

57 It is not within the scope of this article to question how this came about or whether it should be this way.

58 In addition, specific safeguards are afforded to religious minority groups in terms of art. 27 of the ICCPR, which states that members of religious minorities may not be denied the right, in community with the other members of their group, to profess and practise their own religion.

59 Malherbe 1998:679.

60 Evans 2009:32.

61 Evans 2009:32.

In this instance, a parallel is drawn between the *forum internum* and the internal autonomy of religious institutions, with the contention that this might lead to the recognition of an absolute protection of the collective *forum internum*. Kiviorg argues that the boundaries between the *forum internum* and the *forum externum* are even more complex in relation to religious communities. Based on its communal nature, it could be argued that, at the collective level, everything constitutes a 'manifestation' of religion or belief and is subject to limitation.⁶² However, "there is a tendency to think that certain internal matters (like teachings, offices, structure and membership) fall completely (or mostly) into the competences of the religious community".⁶³ Interference may affect the collective autonomy as well as the autonomy of individuals in both the *forum internum* and the *forum externum*.⁶⁴ The difficulty encountered with drawing a clear distinction between dimensions concerning the collective also reflects controversies as to whether clearly separated dimensions are a good idea.⁶⁵ In his comparative study, Durham determines that there are common core areas of collective autonomy, but does not conclude with certainty any definitive absolute autonomy for the collective.⁶⁶ The debate as to whether FoRB is entirely an individual right (exercised in community with others), or also a fully developed community right has been complicated and unresolved.⁶⁷ It is certain that, if one is to say that a collective *forum internum* does exist, and the legal distinction between the two dimensions is upheld, there is no interpretative basis to argue that the limitation clause in art. 18(3) of the ICCPR is applicable to such a collective *forum internum*. This implies that, if such a collective *forum internum* does exist, it would be protected unconditionally. Therefore, the current UN IHR interpretation of the "two dimensions" in art. 18 of the ICCPR allows for one of two possibilities: the collective FoRB is always part of *forum externum*, and may be limited, or there is a collective *forum internum*, which must then be interpreted as being absolute. However, for purposes of this article, it is sufficient to note that, in accordance with current IHR interpretations, a high possibility of an absolute collective *forum internum* exists (whatever its scope may be) and that this might have important implications when compared with the South African context.

Whether the distinction between the two dimensions does or does not, should or should not exist, the current dominant interpretation thereof in UN IHR affects the right and its practical functioning and interpretation in the various ways described earlier. The subsequent consideration is how this current UN IHR construct and interpretation of the two dimensions and their

62 Kiviorg n.d.:135.

63 Kiviorg n.d.:135.

64 Kiviorg n.d.:135.

65 See page 32.

66 Durham 2001:686-714.

67 Evans 2017:96-98. Bielefeldt confirms that the right holders of FoRB are human beings and FoRB cannot be granted to religions or beliefs. He does state that, although the right holder remains the human being, it can be exercised as a collective (UNHRC "Report of the Special Rapporteur":paras. 12-14).

differences in limitation affects the understanding of FoRB in the South African human rights law.

3. FoRB IN SOUTH AFRICA: A COMPARATIVE INTERPRETATION OF ITS DIMENSIONAL ELEMENTS AND POSSIBLE LIMITATION

Sec. 39(1)(b)⁶⁸ of the South African *Constitution* states that, when interpreting the Bill of Rights,⁶⁹ international law *must* be considered – making the interpretation of FoRB in IHR law directly applicable to and necessary for the South African context.⁷⁰ Therefore, the clarification and application of *forum internum* and *forum externum*, as understood in international law (although controversial), is essential within South African human rights law. Differences in interpretation and application are all the more important, considering that South Africa is obliged to comply with its international treaty obligations,⁷¹ including the ICCPR, and *must* prefer any reasonable interpretation of law that is consistent with international law.⁷² Regarding FoRB, this task is further complicated in that, in UN IHR, the interpretation of FoRB and the two dimensions is contested and contains discrepancies as to the original intent regarding arts. 18 of the UDHR and ICCPR and current interpretations thereof.⁷³ This makes, from the South African perspective, any *reasonable interpretation of law that is consistent with international law* more complicated (as international law itself is inconsistent). This prompts a consideration of the most suitable IHR legal interpretation of FoRB for South African law. Furthermore, an exact transplantation of international law jurisprudence on FoRB to the South African constitutional context will also *not* be desirable or possible. However, a thorough analysis of the differences, their effect on FoRB in South African law, and some recommendations are long overdue.⁷⁴

As in IHR law, the interpretation of the presence of the two dimensions, resulting in limitation implications and surrounding controversies, will have a great effect on the scope and nature of FoRB in South African law. Therefore, this part of the analysis will investigate the problems and advantages of the current IHR interpretations as it pertains to the South African context. Initially, the scope and nature of the different sections of the South African *Constitution* relevant to the protection and limitation of FoRB will be discussed and

68 Sec. 39(1): “(1) When interpreting the Bill of Rights, a court, tribunal or forum – a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law ...” (emphasis added).

69 The Bill of Rights refers to Chapter two of the *Constitution*.

70 See also *Constitution*:secs. 231, 233.

71 *Constitution*:sec. 231(2).

72 *Constitution*:sec. 233.

73 See the discussion by Roberts 2019 above.

74 As mentioned in footnote 2, in the context of this article, the term “international human rights law” refers to the global system or framework of human rights established under the United Nations Charter.

compared to the IHR jurisprudence. The aim of this comparison is to indicate the similarities and differences in the protection of FoRB in South African law, the effect on the understanding of *forum externum* and *forum internum*, and how it relates to the limitation of FoRB in South African law. Finally, it will be indicated that South African law, when considering the current UN IHR interpretation, has not made a clear distinction between *forum internum* and *forum externum*, and does not acknowledge the absolute nature of *forum internum*.

3.1 An overview of FoRB in terms of the South African *Constitution*

The two main provisions regarding the protection of FoRB are secs. 15 and 31 of the South African *Constitution*.⁷⁵

Sec. 15 guarantees the right to freedom of religion or belief:

- (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.

Sec. 31 states that:

- (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 not be exercised in a manner inconsistent with any provision of the Bill of Rights.

⁷⁵ Secs. 8, 9, 16 and 18 of the *Constitution* are relevant to the protection of FoRB. These sections are discussed throughout.

Clearly, these two sections differ greatly from the provisions on FoRB in IHR law. The scope and nature of these two sections will be considered in the ensuing subsections.

3.1.1 Scope and nature of section 15

Similar to art. 18 of the ICCPR, “everyone”, whether individually or collectively, is entitled to freedom of religion in terms of sec. 15 of the *Constitution*. This includes the natural person⁷⁶ as well as the juristic person (churches, mosques, and so on),⁷⁷ in order to protect the fundamental rights of those natural persons that comprise the entity (to the extent required by the nature of the rights and the nature of that juristic person).⁷⁸ In addition, Rautenbach and Venter argue that such protection also extends to *all* associations, whether formally recognised as juristic persons or not.⁷⁹

Not only does sec. 15(1) include a wide scope of beneficiaries, but it has also been interpreted as encompassing elements of the right to have a religion or belief (the so-called *forum internum*) and the freedom to manifest religion or belief (the so-called *forum externum*) in its scope of protection (albeit implicitly). The Constitutional Court, in the case of *S v Lawrence, S v Negal, S v Solberg*,⁸⁰ adopted the definition of FoRB from *R v Big M Drug Mart Ltd*, stating that:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.⁸¹

The Constitutional Court, in the case of *Christian Education South Africa v Minister of Education*,⁸² held that the broad approach in *R v Big M Drug Mart* “highlights that freedom of religion includes both the right to have a belief and the right to express such belief in practice”.⁸³ Without this external protection, the right in sec. 15(1) is meaningless. “To artificially draw lines and exclude acts, but not beliefs, under freedom of religion, would be too restrictive an approach.”⁸⁴ According to Currie and De Waal, “[s]ection 15 protects religious liberty in the classic sense of a [...] claim to non-interference in the *belief in*

76 Currie & De Waal 2013:35. See also *Constitution*:sec. 8(2).

77 Currie & De Waal 2013:35. See also *Constitution*:sec. 8(4).

78 Malherbe 1998:679. See also Currie & De Waal 2013:37.

79 Rautenbach & Venter 2018:273-274. Regarding associative rights, see *Constitution*:sec. 18. This extension to all associations is even more probable in light of sec. 31(1)(b) (Malherbe 1998:679).

80 *S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (6 October 1997):par. 92.

81 *R v Big M Drug Mart Ltd* (1985) 13 CRR 64, 97.

82 *Christian Education South Africa v Minister of Education* ZACC 11, 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) (hereinafter, *Christian Education*).

83 See *Christian Education*:paras. 18, 19. See also Gildenhuys 2002:161.

84 Gildenhuys 2002:161.

and practice of religion or irreligion".⁸⁵ According to Farlam, the international consensus on the protection of religious practice requires that sec. 15(1) be interpreted as also protecting the manifestation and practice of religious belief.⁸⁶ He argues that one cannot 'read the protection of conduct associated with 'thought, belief and opinion' out of the section without doing undue violence to the text".⁸⁷ Such an interpretation would "unduly emasculate" secs. 15, 18 (freedom of association), 19 (the right to make political choices), and 21 (the right to freedom of movement and residence).⁸⁸ Furthermore, Malherbe argues that the right to live out one's religious convictions, implicit in sec. 15(1), is substantiated by the reference to "religious observance" in sec. 15(2).⁸⁹ Therefore, sec. 15 implicitly protects aspects of both dimensions of FoRB found in art. 18 of the ICCPR.

Based on the constitutional principles of human dignity and equality, the notions of "religion" and "belief" in sec. 15(1) of the *Constitution* are to be broadly construed and should not be limited in their application to traditional notions of faith or practices analogous to those of traditional religions. In other words, these notions protect adherents' right of freedom to any profound, identity-shaping convictions and related religious observances, as well as the freedom not to profess or practise any religion or belief. This is similar to the approach in art. 18 of the ICCPR.⁹⁰ However, Currie and De Waal argue that the same inclusive interpretation is not provided for in sec. 31.⁹¹

3.1.2 Scope and nature of section 31

Sec. 31 emphasises the protection of persons "belonging to a religious community", thereby accentuating the active association of an individual to a religious community.⁹² Sec. 31 protects "the communal aspects of religious practice",⁹³ on the one hand, and "the individual interests in affiliation-membership of, participation in and association with [...] religious communities",⁹⁴ on the other. It is effectively a participation right that protects

85 Currie & De Waal 2013:633 (emphasis added).

86 Farlam 2013:41-16.

87 Farlam 2013:41-14. Pieterse (2000:310-311) argues the contrary, stating that non-religious expression is protected by sec. 16 of the *Constitution*.

88 Farlam 2013:41-15, fn. 57.

89 Malherbe 2006:633.

90 See *General Comment No. 22*:par. 2.

91 Currie & De Waal 2013:316. This is because of the language used in those sections, which was specifically the aim of the drafters of the *Constitution*.

92 "Community", for purposes of sec. 31, means an identifiable group, united by a common religion, that is self-consciously a community. "Belonging" implies a tie between the claimant and the religious group based on the practice of the common belief and active involvement in the religious life of the community. Currie & De Waal 2013:629-630.

93 Currie & De Waal 2013:633 (emphasis added). For example, restrictions on the qualification of membership or the preservation of the community's religious traditions or customs.

94 Currie & De Waal 2013:628 (emphasis added). For example, in *Lovelace v Canada* (1985) 68 *ILR* 17, the community protected their communal interest in

the right of persons to *practise their religion in community with others*, and closely resembles the protection of religious minorities in art. 27 of the ICCPR.

Woolman notes that sec. 31 is a “hybrid right”, describing it as an “individual right of enjoyment of culture, language or religion”, and assuming the “existence of a community that sustains a particular culture, language or religion”.⁹⁵ In the *Christian Education* case, the Court confirmed that sec. 31 protects members of communities united by a shared religion.⁹⁶ It is significant for both individuals and the communities they constitute.⁹⁷ This is supported and strengthened by the right to freedom of association (sec. 18) and the right to freedom of expression (sec. 16).

3.1.3 Interrelatedness and reciprocity between sections 15 and 31

The existential and pragmatic nature of secs. 15 and 31 complicates a clear separation of “the individual religious conscience from the collective setting”.⁹⁸ “Religious practice often involves interaction with fellow believers. It usually has both an individual and a collective dimension”.⁹⁹ In the *Christian Education* case,¹⁰⁰ the Court interpreted the scope of application of secs. 15 and 31 as being distinct, but at the same time interconnected. It is clear from this case that sec. 31 is significant for both the individual and the community, and is closely connected with sec. 15 (this was confirmed in *Prince v President, Cape Law Society*¹⁰¹). Farlam¹⁰² agrees that sec. 31, read with sec. 18, strengthens rather than undermines FoRB as enshrined in sec. 15(1). Sec. 31(1)(b) on its own clearly allows for the establishment and maintenance of religious associations or institutions that facilitate the practice of religion.¹⁰³ However, if read with secs. 15 and 18, sec. 31 is strengthened, in that it grants religious institutions or communities a degree of autonomy and the ability to control the “entrance into, the voice of, and the expulsion from a community”.¹⁰⁴ Therefore, the division between these two sections should

a distinctive ethnic identity through legal mechanisms discouraging inter-ethnic marriages, which clashed with certain members’ individual right of participation in the life of the community.

95 Woolman 2013:58-31. Furthermore, the complexity of community rights is acknowledged by the authors and described in Woolman 2013:ch. 58.

96 *Christian Education*:par. 23.

97 *Christian Education*:par. 23. This hybrid scope complicates the interpretation and implementation of sec. 31, considering that individual and group interests may not always coincide, and balancing these two divergent aspects will be required. For a discussion in this regard, see Currie & De Waal 2013:627-628.

98 *Christian Education*:par. 19.

99 *Christian Education*:par. 19.

100 *Christian Education*:par. 23.

101 *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC):par. 39 (hereinafter, the *Prince* case). See also Woolman 2013:58-43.

102 Farlam 2013:41-4.

103 Currie & De Waal 2013:633.

104 Woolman 2013:58-40. See also *Taylor v Kurstag* 2005 (1) SA (362) (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (w):par. 38; *Wittmann v Deutsche Schulverein, Pretoria* 1998 (4) SA 423, 451 (T), 1999 (1) BCLR 92 (T), where such control was

not be overemphasised, as sec. 31(1)(a) does not separate the community aspect from the individual aspect into secs. 31 and 15(1), respectively, but rather strengthens the community aspect already entrenched in sec. 15(1). As a result, Woolman asks what does sec. 31(1) bring that sec. 15(1) does not. He opines that sec. 31 eliminates any doubt about what kind of protection sec. 15 “should be understood to afford South Africans”.¹⁰⁵

As mentioned earlier,¹⁰⁶ there is a high probability that current interpretations of art. 18 of the ICCPR provide for a “collective *forum internum*”. It should, therefore, be asked whether this is the case in secs. 15 and 31 and how the limitation of such a “collective *forum internum*” will differ in IHR law and South African law. It is argued that, if such a *forum internum* is not protected under sec. 31 (as argued by Currie and De Waal),¹⁰⁷ it is nonetheless protected under sec. 15(1).¹⁰⁸ In South African law, the existence of internal beliefs and doctrines of religious and belief organisations (in a collective sense) are acknowledged and almost never judged upon by secular courts. This is called the “non-entanglement doctrine”.¹⁰⁹ The doctrine implies that a religious community has a specific field of autonomy with regard to doctrine, as well as decisions and actions that may result from it, and that courts should refrain from intervening in doctrinal disputes by rather deciding such disputes on other applicable legal grounds.¹¹⁰ In the *Christian Education* case, the Constitutional Court stated that South African courts will not “embark upon an evaluation of the acceptability, logic, consistency or comprehensibility of [...] belief”.¹¹¹ A similar approach was followed by the Equality Court in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.¹¹² Examples of such a collective

confirmed.

105 Woolman 2013:58-43.

106 This probability is discussed on page 34.

107 Currie & De Waal (2013:633) argue that sec. 31 does not protect the “freedom of religious choice”.

108 Whether a collective (associative) *forum internum* exists, depends on the extent to which it is required, in order to protect the fundamental rights of those natural persons that comprise the entity. In other words, a collective *forum internum* will be recognised to the extent that non-recognition of, or interference with a religious belief of the entity violates or infringes on the individual members’ ability to freely choose, have, maintain, and adopt their religious belief, albeit that this collective *forum internum* will not be protected unconditionally as a result of the general limitation clause.

109 Malherbe 2006:650.

110 Malherbe 2006:641-642.

111 *Christian Education SA v Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE) at 958 (S. Afr.), confirmed in *Christian Education v Minister of Education* 2000 (4) SA 757 (CC) (S.Afr.).

112 *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 (4) SA 510 (Equality Court, TPA) (S. Afr.). See also Currie & De Waal 2013:417. This protection of the internal collective doctrinal beliefs of the religious institutions has been under threat by the *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000*:sec. 8(d), stating that discrimination based on gender includes “any ... religious practice, which impairs the dignity of women and undermines equality between women and men”. See also Durham *et al.* 2013:117.

forum internum would be issues that touch upon core doctrinal matters of religious communities, so that the interference in these matters would seem to affect not only collective religious autonomy, but also the autonomy of individual believers.¹¹³ This would include, as suggested by Durham, the inner domain of faith, doctrine and polity (dogma, teaching, and authority); the core ministry (worship, liturgy, counselling, confession, and teaching of clergy), and the core administration (appointing employees, church discipline, and financial issues).¹¹⁴ Considering that many of these elements intersect with the *forum externum*, the difficulties of maintaining two dimensions become clear when talking about the “collective *forum internum*”.

Based on the preceding analysis, sec. 15 clearly protects both the individual's and religious communities' right to freedom of religious or non-religious convictions and related observances. In addition, sec. 31 amplifies the participant's right to practise his or her religion in community with others, whether in public or private, as well as protecting the communal interests of the group as a whole, including the right to practise their religion collectively, whether in public or private. Within sec. 15, the protection of a “collective *forum internum*” or collective right to have a religion or belief can also be discerned based on the “non-entanglement doctrine” and legal decisions. Yet, although secs. 15 and 31 of the *Constitution* provide protection for both the communal and individual aspects of FoRB, art. 18 of the ICCPR is more explicit when it expressly refers to the exercise of FoRB (and both dimensions) as “either individually or in community with others”. There is also current jurisprudence on FoRB in IHR law, arguing that this “collective *forum internum*” could be absolute (or emerging as such) or, at least, “enhanced” (an interpretation that will best align with that of Roberts).¹¹⁵ However, within South African law, the “non-entanglement doctrine” and case law probably provide such a “collective *forum internum*” an enhanced protection, but, in light of sec. 7(3) of the *Constitution*,¹¹⁶ not absolute protection.

3.1.4 The public/private divide

South African jurisprudence on FoRB refers to the exercise of religion in “public” and “private”.¹¹⁷ However, what constitutes “public” and “private” practices of FoRB are not clearly delineated, and it does not equate to the current IHR distinction of *forum externum* and *forum internum*, respectively. This lack of distinction between the notions of “public” and “private” is evident in the *Christian Education* case, where the Court states that FoRB cannot “always be secured by defining it either as private or else as public, when [...] it is frequently both”.¹¹⁸ According to Bilchitz and Williams, FoRB in the

113 Kiviorg 2010:4.

114 Durham 2001:686-714.

115 See page 34.

116 See page 43.

117 See, for example, *Christian Education*:par. 39; *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005):paras. 88-91.

118 *Christian Education*:par 35. It should be noted that this distinction in the available

Constitution cannot be interpreted in a way that requires a strict separation between public and private (although some separation does exist).¹¹⁹ Hence, since the notions of “public” and “private” do not represent a separation of FoRB into different dimensions, it cannot equate the *forum internum* and the *forum externum*. This is contrary to IHR law, where, as Petkoff argues, the “distinction between *forum internum* and *forum externum* has been definitive for the articulation of a public-private divide in international law”.¹²⁰

Collectively and by implication, secs. 15 and 31 protect all the normative core values of FoRB as understood in IHR law. This is supported by the indivisibility, interrelatedness and interdependence of fundamental rights and freedoms, and also secs. 1-4 of the South African Charter of Religious Rights and Freedoms, which acknowledges the internal sphere (the right to choose, change and hold [or not hold] a belief – secs. 1 and 2) and the external sphere (the right to manifest the belief – sec. 4).¹²¹ However, when compared to current interpretations of UN IHR law, the South African *Constitution* does not classify these normative core values into two distinct dimensions. Without such a binary distinction between the two dimensions, the question remains as to whether there is a difference in the limitation of the two dimensions in South African law.

3.2 The limitation of FoRB and the absence of the two dimensions

As explained earlier, current interpretations of art. 18 of the ICCPR make a distinction between the two dimensions and, as a result, they are subject to different thresholds of limitation. While the *forum internum* of *individuals* is granted absolute protection (although contested), it is less clear whether such protection extends to the *collective forum internum* (which is probably indicative of the difficulties experienced with such a binary approach). The permissible limitations clause in art. 18(3) of the ICCPR makes no outright distinction in limitation between the *individual* and *collective* manifestation of FoRB (*forum externum*),¹²² thus indicating that *all manifestations* of FoRB may be subject to strict limitations under IHR law. In light of a lack of evidence regarding a legal distinction between the dimensional elements of FoRB in the South African *Constitution*, can it be assumed that *both* the *forum internum*

spheres of society where corporal punishment is allowed, was effectively overturned by the decision of the Constitutional Court in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.

119 Bilchitz & Williams 2012:163.

120 Petkoff 2012:183-184.

121 The South African Charter of Religious Rights and Freedoms (SACRRAF), <https://classic.iclrs.org/content/blurb/files/South%20African%20Charter.pdf>. The Charter clearly distinguishes the different elements of FoRB in the sense that the internal sphere is protected in secs. 1 and 2, and the external sphere in sec. 4. However, there is no indication that there are differences between them regarding their limitation.

122 As read with art. 18(1), which states that the freedom to manifest a religion or belief applies *regardless* of whether it is manifested individually or in community with others.

and the *forum externum*, whether individual or collective, may be subject to permissible limitations?

None of the human rights enshrined in the *Constitution*, whether fundamental or not, are absolute, and may, subject to strict requirements, be justifiably limited.¹²³ Sec. 7(3) clearly states, without exception, that the “rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill”. According to Farlam, a “number of commentators have suggested” the absolute protection of the *forum internum* in South African law.¹²⁴ Malherbe states that at least as far as it concerns the individual *forum internum*, such matters fall under the exclusive control of the person and do not affect anyone else.¹²⁵ According to Du Plessis, the limitation of FoRB in sec. 14 of the interim *Constitution*, applies exclusively to the freedom to manifest religious beliefs, and not the freedom to hold them. He also states that the freedom of conscience, thought and opinion, in so far as it has not been concretely manifested, is “probably” unconditional.¹²⁶ Yet, none of these statements have been confirmed in jurisprudence. De Vos is most accurate when he states that it “might well be that it will be easier to justify a limitation on a religious practice than on the hold or the manifesting of a religious belief”.¹²⁷

Therefore, as with all other human rights in the *Constitution*, FoRB does not apply absolutely, and permissible restrictions to the exercise thereof will be allowed.¹²⁸ First, both dimensional elements may be limited by sec. 36 of the *Constitution*. Secondly, in addition to the general limitation clause (sec. 36), the qualification or demarcation in sec. 31(2) limits the scope of the rights in sec. 31, in that such rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.¹²⁹ Sec. 31(2) reiterates elements of the general limitation clause and thus ensures that religious communities cannot use sec. 31 to shield practices that offend the constitutional rights of others.¹³⁰ These distinct limitation clauses will be discussed below.

3.2.1 General limitation clause – Section 36

Section 36 states that:

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

123 Rautenbach & Venter 2018:309-310. See also De Vos & Freedman 2014:347; Currie & De Waal 2013:150.

124 Farlam 2013:41-15, fn. 62. In this regard, see Partsch 1981; Nowak 1993; Du Plessis & Corder 1994:158.

125 Malherbe 1998:680.

126 Du Plessis 1996:464.

127 De Vos 2001:88.

128 Malherbe 2006:636.

129 *Christian Education*:par. 26.

130 Although secs. 15(2) and (3) also contain specific limitations clauses relevant to FoRB, a discussion of them will fall outside the scope of this article.

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.

Any restriction on the right to religious freedom must comply with the provisions of sec. 36, as set out above. When disputes occur that involve a conflict between religious freedom and other constitutional rights, the courts will apply the “proportionality test” and attempt to weigh the conflicting rights with an aim of conciliation.¹³¹ In other words, when considering the limitation of FoRB rights, whether it pertains to the religious conviction or a related conscience-based observance, the extent of the limitation must be reasonable and justifiable in terms of the factors listed above. Whereas individual and communitarian religious practices occasionally impact on the rights and freedoms of others, and may thus necessitate limitation, it is almost inconceivable that there may be reasonable and justifiable grounds for limiting those aspects of the *forum internum* that clearly fall under the exclusive control of the person and do not affect anyone else. This means that, although the *forum internum*, as understood in IHR law, is more difficult to limit under sec. 36, it is not protected absolutely. This is also evident by the fact that, in South African law, the internal beliefs of religious and belief organisations (in a collective sense) are almost never judged upon by secular courts. This strong, yet non-absolute, protection of the *forum internum* in South African law aligns with the suggestions by Roberts that there cannot be a clear-cut distinction between the two dimensions, but that they are rather on a continuum, integral and deeply interrelated.¹³²

3.2.2 Additional limitation clause – section 31(2)

The rights of religious communities in sec. 31(1) are subject to an additional limitation in terms of subsec. (2), which is not applicable to sec. 15. The *Christian Education* case confirmed that sec. 31 is a specific provision for the exercise and practice of religion in community with others,¹³³ thereby creating some distinction between the manifestation of religion or belief in communities and as individuals. Irrespective of whether it is an individual right or a collective right or both, the fact remains that sec. 31 applies where the individual exercises or practises his or her religion within, and as part of a community or the community does so as an entity. Consequently, a clear “extra limitation” exists under sec. 31(2) (in addition to sec. 36) when a religious community

131 Malherbe 1998:691. See also *S v Makwanyane and Another* 1995 (2) SACR 1 (6 June 1995); paras. 103-104.

132 Roberts 2019:227.

133 *Christian Education*: par. 20.

is involved. This is contrary to IHR law, where no distinction is made under art. 18(3) of the ICCPR, and therefore no difference in the limitation of the collective or individual manifestation of FoRB.

3.3 Comparison

Judging from the way in which the South African jurisprudence describes FoRB and the individual, collective, public, and private application thereof, there are several similarities and differences to IHR law.

First, in the South African *Constitution*, the collective aspects of FoRB, although interconnected with the individual aspects of FoRB, are at least in part subject to extra limitations in sec. 31(2). This is different from IHR, where both the individual and collective applications of FoRB are similarly limited. Within IHR, one point of contention is the uncertainty regarding the two possible interpretations of collective FoRB (within the current interpretation of IHR law), *i.e.* whether the entire collective FoRB is classified as *forum externum* and limitable under art. 18(3), or whether there is an absolute collective *forum internum*. However, this has not been confirmed in international law. Evidence suggests the emergence and existence of an absolute or “enhanced” collective *forum internum*. Similar to IHR, South African law acknowledges the protection of the collective aspect of FoRB beyond the manifestation of religion or belief to also include the collective adoption, changing, and holding of a religion or belief. However, there is no jurisprudence indicating that there is an absolute *forum internum* in South African law, whether individual or collective. Yet, as mentioned earlier, South African courts have mostly refrained from judging upon the internal doctrines and beliefs of religious and belief organisations.

Secondly, although all the normative core values contained in FoRB, as described in IHR law, are also protected in South African law, these aspects are not clearly grouped into the legal distinction described as the *forum internum* and the *forum externum*. This is more in line with the approach followed by Roberts¹³⁴ – an interrelated relationship between the two dimensions functioning on a continuum.

Finally, due to the lack of a clear separation and considering that all rights in the Bill of Rights may be limited,¹³⁵ it cannot be said that the *forum internum* and the aspects it contains are absolutely protected under the South African *Constitution*, although some allude to the possibility that this can be so or, at least, that it is more difficult to limit.

Although South Africa is obliged to comply with its international treaty obligations and favour a reasonable interpretation of law that is consistent with international law,¹³⁶ the mere transplantation of IHR law into another is neither possible nor desirable. As stated by Davis,

134 See page 32.

135 Rautenbach & Venter 2018:309-310. See also De Vos & Freedman 2014:347; Currie & De Waal 2013:150.

136 *Constitution*:secs. 39(1), 231(2), 233.

[n]otwithstanding pressures, both internal and external, on the country to ensure that its legal system is congruent with international human rights law, the indigenous history of the country plays a vital role in the interrogation of constitutional concepts of the nation state and, accordingly, in the development thereof.¹³⁷

Thus, an interpretation and implementation of FoRB should be followed that best preserve the underlying values of the *Constitution*, namely dignity, equality, and freedom. In addition, the *forum internum* and the *forum externum* legal construct is not without criticism and its application not without problems. Commentators such as Roberts question the existence of the current IHR law interpretation, advocating for a binary distinction with differences in limitation. This poses the following question: When South African law considers international law, which interpretation of UN IHR law concerning the *forum internum* and the *forum externum* should be followed?

4. THE TWO DIMENSIONS AND THE SOUTH AFRICAN CONTEXT – ARGUMENTS FOR AND AGAINST

4.1 The South African constitutional project as an argument *against* an absolute *forum internum*

In the context of FoRB, the cause of greatest disparity in interpretation between international law and the South African Bill of Rights is the perspective from which human rights are considered. In the IHR law context, the relationship between the *forum internum* and the *forum externum* is generally approached from a state obligation perspective, *viz.* promoting FoRB and safeguarding against possible state interference, as this is generally the nature and objective of public international law. As a result, “international human rights discourse does not address the question of the two forums beyond the existing perspective of the duties of the state and the public-private divide it introduces.”¹³⁸

In the domestic context, the codification of human rights, specifically the Bill of Rights, takes a contextual approach that focuses on balancing the different rights and interests of citizens, *i.e.* an individual and community-oriented focus on the recognition and protection of human rights that strives to strike a balance between competing interests.¹³⁹ To this extent, the primary aims of the South African Bill of Rights are to heal the divisions of the past through social justice and to establish a society based on human dignity, the achievement of equality, and the advancement of fundamental human rights

137 Davis 2003:195.

138 Petkoff 2012:189. For an explanation of the duties of the state, see Sepúlveda *et al.* 2004:203-207; Bielefeldt 2017; Bielefeldt *et al.* 2016.

139 See the South African Charter of Religious Rights and Freedoms, <https://www.strasbourgconsortium.org/content/blurb/files/South%20African%20Charter.pdf> (accessed on 7 November 2020).

and freedoms.¹⁴⁰ Accordingly, this approach allows for the justifiable limitation of *any* human right or freedom in accordance with sec. 36, including both the internal freedom of religious conscience and the external freedom of religious observance. Therefore, no right is absolute and a limitation is justifiable as long as it is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.¹⁴¹ This is also acknowledged in the “substantive equality” approach taken by the *Constitution* in the realisation of human rights.¹⁴² Therefore, in South African law, the *forum internum* can be limited, if it is in line with the achievement of the contextual aims of the *Constitution*, provided such a limitation is reasonable and justifiable based on the factors in sec. 36. Rendering any right or any part of a right absolute might pose a threat to the aims of justice, equality and freedom, and healing of the injustices of the past.

At first glance, this seems to be a significant departure from the current legal framework regarding permissible limitations of the two dimensions of religious freedom in IHR, as outlined above. In practice, the departure is less significant. As mentioned earlier, it will be much more difficult to justify a limitation of the traditional *forum internum* aspects. In this regard, a close intersection exists between the *forum internum* and the fundamental rights to the inherent human dignity (sec. 10) and privacy of a person (sec. 14). In the sphere of the internal dimension, the right to privacy protects a believer’s right not to be compelled to reveal his or her thoughts and adherence or non-adherence to a religion or belief.¹⁴³ Although the *Constitution* does not provide for such a legal distinction and absolute protection of the *forum internum*, the intersection of the inner existential nature of FoRB with the right to privacy and human dignity provides an additional layer of protection, as well as a constitutional expectation of self-restraint by the state from interference in personal or private matters of citizens. Within such an understanding, can there ever be an instance where the limitation of the *forum internum* can be justified, especially in the individual context? For example, if someone holds an orthodox or fundamentalist religious viewpoint, is there enough cause to prohibit such a belief? Or, if someone converts from one religion to another, has anyone else’s rights or freedoms been infringed? Thus, it will also be difficult to show, under sec. 36 of the *Constitution*, that the limitation of the individual’s freedom of choice regarding his or her belief can ever be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Regarding the collective *forum internum*, one might argue that the nature of holding a doctrine as a community, and the fact that such a collective “holding” is more easily translated into a collective manifestation

140 Sec. 1 read with the Preamble of the *Constitution*.

141 Sec. 36(1) of the *Constitution*.

142 For a discussion of the “substantive equality” approach in South African constitutional law, see Albertyn 2007:253-276.

143 Sepúlveda *et al.* (2004:203) explain this intersection as follows: “The guarantee of the value of freedom of thought and religion implies that one cannot be subjected to a treatment intended to change one’s process of thinking, be forced to express thoughts, to change opinion, or to divulge a religious conviction; thus, the right to freedom of thought, conscience, religion, belief and opinion is closely associated with the right to privacy.”

(and less privacy) might cause the collective *forum internum* to be more easily exposed to possible limitation than the individual *forum internum* in the *Constitution*. It would provide the courts with more jurisdiction in such cases, especially in light of the extra limitation clause applicable to the collective *forum internum* in sec. 31(2). However, even if the collective *forum internum* is more visible, the South African courts usually refrain from interfering with the doctrines and beliefs of faith communities by way of the “non-entanglement doctrine”, specifically because it does not have jurisdiction there.

The South African approach to FoRB, therefore, resonates mostly with the commentaries by Roberts, indicating that IHR law, when examining the *travaux préparatoires*, does not protect the *forum internum* absolutely, but rather places the two dimensions on a continuum, where they are interrelated. Rather than a clear line between the “absolute” protection of the *forum internum* and the “non-absolute” protection of the *forum externum*, there will be a “very high degree of protection” when the *forum internum* is the strongest, and a comparatively lower degree of protection when the *forum internum* relevance is weakest.¹⁴⁴ In this way, as indicated earlier, the limitation of the *forum internum* would be unlikely, but still possible. This is the current position in South African law. Such an approach also takes a flexible, holistic, and informed angle, where a wide range of factors are taken into account, in addition to the *forum internum* and *forum externum* elements of the right in question. This can be observed in the fact that sec. 36 requires the consideration of various factors in the balancing exercise when human rights compete against each other. The South African approach, therefore, seems to be less in line with the current interpretations of IHR law, indicating a binary distinction between dimensions with differences in limitation.

4.2 The interconnectedness of the two dimensions as an argument *for* and *against* an absolute *forum internum*

Even if there are few conceivable instances where the *forum internum* can be limited in South African law, the possibility still exists that the limitation of the *forum externum* may have a consequential effect that inadvertently impacts on or restricts aspects of the *forum internum*. A religion or belief is typically a-jurisdictional¹⁴⁵ and, therefore, the *forum internum* and the *forum externum* can and must overlap.¹⁴⁶ For example, prohibition of the wearing of a religious symbol might be viewed as a prohibition of forms of religious observance in public, but the choice of wearing such religious symbols is a deeply private religious decision. As stated by Roberts,¹⁴⁷ the *forum internum* is always present, even in cases involving the manifestation of religion, as manifestations flow from the *forum internum*. On the one hand, the absolute protection of the

144 Roberts 2019:228.

145 Berger 2002:47. At the European Court of Human Rights, see the cases of *Alexandridis v Greece*, Application No. 19516/06, 21 February 2008, and *Sinan Isak v Turkey*, Application No. 21924/05, 2 February 2010.

146 Berger 2002:47.

147 Roberts 2019:227-228.

forum internum strengthens FoRB, in that it enforces absolute refrain from violation in this area when the *forum externum* is violated. On the other hand, pretending that a strict division between the two dimensions is possible might create a false positive that, although the *forum externum* of one's belief is being demolished, one's *forum internum* will somehow stay intact. Scharffs and Durham conclude that the freedom to have or adopt a religion or belief of one's choice can be "impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs".¹⁴⁸ Therefore, even if there are few conceivable instances where the *forum internum* will be limited in the South African context, the lack of absolute protection for the *forum internum* can be problematic if the limitation of the *forum externum* also limits the *forum internum*, due to its interconnectedness, especially in light of the extra limitation clause relevant to the religious collective *forum internum* in sec. 31(2). However, absolute protection of the *forum internum* can also be a double-edged sword, as it might create the false positive perception that, even if the *forum externum* is affected, the *forum internum* will not be affected.

4.3 The issue of jurisdiction as an argument *for* and *against* an absolute *forum internum*

Even if there are instances where the *forum internum* can be limited within the South African context, the problem of jurisdiction arises. The *Christian Education* case explained that the proportionality exercise of sec. 36 is difficult in FoRB, since the competing interests to be balanced belong to completely different conceptual and existential orders (the secular and the spiritual).¹⁴⁹ Bielefeldt points out that "the language of law is not an existential language"¹⁵⁰ and, therefore, it can never reach the inner existential dimension of a person's conscience. Consequently, even if aspects of a person's *forum internum* are revealed privately and can be limited in South African law, it should be asked whether the law (and sec. 36) has jurisdiction to adjudicate on such a private aspect of human dignity and identity. Therefore, it is not merely a question as to whether the *forum internum* should be open to limitation or not, but more fundamentally, whether the law should find any application at all concerning the inner existential aspects of the *forum internum*. Thus, an absolute *forum internum* might protect these inner existential aspects against interference from law and government. In a sense, this problem of jurisdiction and refrain has been acknowledged by the South African courts in the application of the "non-entanglement doctrine" in cases of the collective *forum internum*. Furthermore, South African jurisprudence has in the past shown sensitivity towards religions and beliefs and their unique constructs and doctrines.¹⁵¹

148 Scharffs & Durham 2010:248. For a South African perspective, see *Prince v President, Cape Law Society & Other* 2001 (2) SA 388 (CC) or 2001 (2) BCLR 133 (CC):par. 24.

149 *Christian Education*:par. 33.

150 Bielefeldt 2013:46.

151 See, for example, the case of *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007). See also paras. 36 and 37 of *Christian Education*

On the other hand, an approach that strictly separates the two dimensions poses the question as to who should categorise the elements of FoRB and which criteria should be used. In the distinction between the *forum internum* and the *forum externum*, three “role players” view this line of distinction differently – international law, national (South African) law, and the holder of the right. From an IHR perspective, this distinction is based on the duties that states have towards citizens. From a South African perspective, the limitation of human rights and FoRB is based on its own historical, cultural, and political context. However, the perspective of the holder of the right (the adherent to an existential view or religion or the religious or belief community) will differ from that of IHR and national law. Adherents generally do not distinguish between the ‘holding’ of a belief and the ‘manifestation’ thereof; they simply live out their lives in accordance with their beliefs. For that reason, both dimensional elements of religion or belief are of indistinguishable importance to their human dignity, identity, interaction, and world view. Should the law have the jurisdiction to make decisions, on behalf of a religion or belief, regarding the distinction between what belongs to the *forum internum* and the *forum externum*, respectively?¹⁵² This can come across as authoritarian and illiberal.¹⁵³ Even the “continuum” model and “loose concentric circles model”, argued for by Roberts, may run into this problem.¹⁵⁴ Who is to determine that a normative core value of FoRB lies more to the *forum internum* side than to the *forum externum* side? It poses a particularly difficult challenge, as states are supposed to actively protect and promote FoRB, while exercising a specific self-restraint, in order to respect freedom and equality of all in their different convictions.¹⁵⁵ At the same time, it can be argued that the distinction between the two dimensions is a legal construct that enables the protection of FoRB by means of legal tools. Bielefeldt states that FoRB is distinguishable in this manner at a conceptual level, but that the two dimensions belong together at a phenomenological level (from the perspective of the religion or belief).¹⁵⁶ Such a *legal* distinction makes the protection of FoRB manageable at a legal level. However, because religion and belief belong to a different sphere not always understood by the legal realm, constant consideration should be given to the phenomenological levels of religion and belief when interpreting FoRB.

acknowledging the centrality of a religion or belief to the activities of an adherent and its relationship to self-worth and human dignity.

152 For example, the *forum internum* has been given a flexible interpretation by the European Court of Human Rights. The definition remains fluid and depends on a particular case, time, and context. It will vary from one country to another and according to national traditions. Therefore, at the European level, there are no comprehensive standards as to what each dimension entails. The state reshapes the public sphere against the background of each case. It makes the line of distinction between the two spheres unclear, causing an overlap. Petkoff 2012:186.

153 Petkoff 2012:189-191.

154 Roberts 2019:228. The “loose concentric circles model” groups cases according to the ECtHR’s characterisation in terms of the strength of the relevance of the *forum internum*.

155 Bielefeldt 2013:67.

156 Bielefeldt 2020:17.

4.4 Balancing of pros and cons

The constitutional project of “healing the divisions of the past” makes an absolute *forum internum* irreconcilable to the South African context. However, although not clear, it remains improbable that most of the parts of the *forum internum* under the South African *Constitution* will ever be limited, even though it is theoretically possible. Yet, the interconnectedness between the *forum internum* and the *forum externum* creates the possibility that limitation of the latter may indirectly also limit the *forum internum*. On the one hand, absolute protection of the *forum internum* will assist in weakening indirect limitation via the *forum externum*. On the other hand, absolute protection of the *forum internum* might cause the false positive or false assumption that the *forum internum* is automatically protected in cases of limitation of the *forum externum*. This opens the door to a lack of due diligence, in that authorities may assume that violation of the *forum externum* does not influence the *forum internum*.

Regarding the issue of jurisdiction, an absolute *forum internum* clearly prevents the law from interfering within the jurisdiction of the inner realm of religion and belief. At the same time, a clear distinction between the two dimensions inevitably requires some legal interference in determining the scope of each dimension. Such a legal distinction can provide a platform for additional strengthening of FoRB, by protecting the *forum internum* unconditionally. If this can be coupled with a sensitivity towards, and consideration of the perspectives of religion or belief itself (also regarding the scope of the two dimensions), such a construct can strengthen the protection of FoRB in South Africa.

The fact remains that strict recognition of a *forum internum* and a *forum externum* runs contrary to the constitutional project, where no right, or parts thereof, is absolute and to be used to further the injustices of the past. Some of the pre-democratic concerns in this regard may stem from the endorsement of a specific conception of the Christian religion by the apartheid government.¹⁵⁷ Furthermore, a lack of will from authorities (to consider the perspectives of religions or beliefs)¹⁵⁸ will mean that the scope of the two dimensions and its application will be informed by the courts and lawmakers. It is also questionable whether state structures have the jurisdiction to decide these matters. Such a distinction will be contrary to the South African approach, where there is no strict categorisation of religion or belief into different spheres or dimensions.

5. CONCLUSION

There are several reasons to conclude that the differences in limitation between the *forum internum* and the *forum externum* concerning FoRB do

157 De Vos & Freedman 2014:485.

158 Current suggestions by the South African *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities* indicate a lack of sensitivity to the internal workings of religious institutions. In this regard, see Du Plessis 2019.

not exist in South African human rights law, with the effect that the general limitation clause (sec. 36) will apply to FoRB in its entirety.

The first reason is that there is no clear-cut jurisprudence confirming that this distinction exists. In fact, existing jurisprudence points away from it. The *Constitution* clearly states that no right is absolute. This is to prevent violations of human dignity, equality, and freedom, by providing unlimited power through an absolute human right. The provision of a general limitation clause further confirms this, considering it applies to all human rights in the Bill of Rights.

Secondly, the aims of IHR law are to enforce state duties towards the protection of FoRB by the implementation of the two dimensions. On the other hand, FoRB within the South African *Constitution* should be considered in context, in order to strike a balance between competing rights or interests (which is also clear from art. 36). All human rights and their balancing should be viewed through the lens of healing the divisions of the past and creating a society based on human dignity, the achievement of substantive equality, and the advancement of fundamental rights and freedoms.

Finally, a strict division between dimensions with clear-cut differences in limitation is not without criticism. The creation of different spheres by law on behalf of religion is not without philosophical concerns about the competence and suitability of law regarding existential aspects of humanity. Conversely, having the absolute protection of the *forum internum* safeguards a fundamental part of human dignity, privacy, and personhood.

The current interpretation of IHR law – the presence of a legal distinction between the two dimensions – will probably not be accepted unequivocally within the South African democratic context, as it runs contrary to the constitutional project. South African law probably falls more comfortably in the proposal made by Roberts regarding the original intentions of FoRB – a continuum between the two dimensions without a binary distinction. At the same time, it is of paramount importance for the South African judiciary to be aware of the special and absolute protection provided to the *forum internum* in current IHR law, and the effects its violation (whether directly or indirectly *via* the *forum externum*) can have on the human dignity, freedom, and equality of a person – something which the South African constitutional project aims to protect.

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