RELIGION AND THE PUBLIC SPHERE: TOWARDS A MODEL THAT POSITIVELY RECOGNISES DIVERSITY

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ABSTRACT
What model of the relationship between religion and state is optimal for South Africa? In order to identify the possibilities that exist, this article engages in a critical evaluation of the differing models of the state-religion relationship that have been adopted internationally. Part I seeks to identify, from a philosophical perspective, the advantages and disadvantages of particular models. Part II then focuses more closely on the particular historical and social context of South Africa as well as the most important constitutional provisions and case law. We shall argue in this section for what we term a ‘positive recognition’ model of the relationship between religion and state in South Africa, which emerges from the values underlying the Constitution. The model is not predicated on a strict, inflexible separation between the public and private realms. It requires the state to recognise the significance of religious identities to individuals and to take active measures to enable individuals to realise those identities. Importantly, it must do so in a manner that treats differing religious (and other philosophical) conceptions of the good equally. The last part of the article seeks to illustrate the implications of this model in practice in relation to two important practical questions where the state-religion relationship is implicated: public holidays of a religious character and the presence of religion at state ceremonies.

I INTRODUCTION
The relationship between religion and state has taken many forms across the history of political communities. Theocracies and established religions no longer dominate. The separation of religion and state has been recognised as an important principle of liberal democracies yet in itself can be understood in differing ways and is compatible with a range of practical instantiations. If we are given the opportunity to re-configure the relationship between religion and state in a particular country, what model is optimal? In South Africa, this question is not merely hypothetical: the final Constitution of the Republic of South Africa, 1996 is a transformative one, requiring a fundamental shift in society in the direction of greater social justice. This process requires a revision of existing social structures, relationships and institutional practices. The relationship between religion and state is perhaps one of the most important to capture and delineate adequately.

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1 K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146.
This relationship is one that can be approached from several angles. The starting point must be the South African constitutional text itself. Interestingly, unlike a constitution such as that of the United States, there is no express clause mandating a separation between religion and state (often referred to as an establishment clause). This fact does not mean that such a separation should not be inferred from other clauses or the values underlying the constitutional order. The gap that exists in the Constitution, however, offers us an invitation to consider which form of this relationship would be optimal for South African society. This article seeks to respond to this invitation by considering differing models of the state-religion relationship and their suitability for the South African experience.

Using the purposive and value-based interpretive method adopted in South Africa, it does so through engaging important principles of political morality and the particular context of South Africa.

Part I outlines and critically evaluates the various models that have been developed to capture the state-religion relationship. Some of these may be rejected as undesirable in a liberal democracy that holds equality, dignity and freedom as core values. Other models may respect these values, and even function adequately in some states; yet, they may not be suitable for South Africa. This discussion will seek to evaluate the key values and principles that are at stake in deciding on such a model. Part II focuses more closely on the particular historical and social context of South Africa as well as the most important constitutional provisions and case law. We argue that the right to religious freedom in South Africa should not only be seen as a ‘negative’ right but includes a positive, active dimension. The right to equality, it is contended, should play a central role in ensuring equal affirmation by the state of different expressions of religion. The relationship between dignity and religion is seen to be highly significant. Ultimately, these factors lead us to defend what we term a ‘positive recognition model’ of the relationship between religion and state in South Africa. Ambitiously, we argue that the country seeks to establish a society that celebrates the diverse identities of its members. This process does not require a strict separation of religion and state, and it neither favours religion over non-religion, nor a majority religion over minority religions. Religion should also not artificially be confined to the ‘private sphere’: the domain of the ‘public’ can, within some limits, embrace the particular identities of individuals. The last part of this article summarises the contours of this model and considers what it entails for two important practical questions where the state-religion relationship is implicated: public holidays of a religious character and the presence of religion at state ceremonies.

2 This has been recognised by the Constitutional Court in S v Lawrence; S v Nagel; S v Solberg 1997 4 SA 1176 (CC) paras 99–102 (Chaskalson P); paras 116, 118–9 (O’Regan J).

3 P Farlam ‘Freedom of Religion, Belief and Opinion’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa 2 ed (2003) Chapter 41, 26 does offer a brief consideration of alternative models. However, we hope in this article to engage with the differing models in greater depth and in light of arguments rooted in political philosophy, in order to provide a more comprehensive analysis against which the South African context can be considered.
II Exploring Models of State-Religion Relationships

The variety of state-religion relationships can be viewed as lying on a spectrum. It is important to emphasise that this spectrum is continuous, and so there is a great deal of overlap between the models. Although the models provide a useful starting point for discussion, they must not be seen as rigid. Moreover, labels in this area can be misleading, often suggesting more disagreement than in fact exists. Our analysis of these models shall seek to highlight some of the crucial values and questions at issue in this discussion. A sense of what is at stake in deciding on an adequate model will set the scene for a consideration of the South African context and developing existing models to suit this context. We shall begin by a brief analysis of two models at the extreme ends of the spectrum of state-religion relationships. Although it is fairly obvious from the outset that neither of these models will be adequate, the reasons why this is so provide important criteria that are of relevance in evaluating the other more promising models.

(a) Theocracy

Theocracy involves a substantive fusion of the state and the majority religion. Thus, in a theocracy, the law of the state would be identical with the law of a particular religion, and individuals would be compelled to follow the dictates of that religion. The state would also essentially be identified as having a strongly religious character, such as a Christian or Islamic state. An example of a theocracy today would be Iran.

There are many reasons for rejecting the theocratic model of state-religion relations. First, theocracies violate the freedom of individuals to choose the religious course that their lives should take. They do this as they impose a particular ‘conception of the good’ onto those who reside in such states whether they agree with it or not. Theocracies imply a degree of coercion into the doctrines and practices of a dominant religion: this will, of necessity, impact upon the freedom of those who are not religious, those who subscribe to a religion other than that of the state, and those who are part of the same religion as the state, but who have a different understanding of that tradition. The theocratic model also fundamentally inhibits the freedom of individuals to change religious traditions: state power has the potential to entrench a dominant position relating to religion which then cannot easily change. This inevitably impacts upon the freedom of individuals to reform and revise their

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4 If seen in a linear way, it is often argued that the greatest protection for religious freedom rests in the middle; some contend that the picture should be one of an open loop or horse shoe, with the most religious freedom located at the top, and the least religious freedom located at either open end. See also, W Cole Durham ‘Perspectives on Religious Liberty: A Comparative Frame Work’ in J Van de Vyver & J Witte (eds) Religious Human Rights in Global Perspective (2006) Figure 3, 18.

5 John Rawls recognises the central interest of individuals in being able to ‘revise one’s conception of the good’: see J Rawls Political Liberalism (1996) 30.
religious beliefs. A theocracy thus encourages the homogeneity of religious views and actively discourages recognition of the full diversity that exists within most political communities.

Importantly, this fusion of religion and state also, as has been mentioned, privileges a particular religious tradition over others. As such, it is not only freedom that is violated but also the equal treatment of different religious traditions. Within the theocratic model there may, of course, be differing degrees of toleration towards those who do not conform. However, ultimately even the most tolerant and benevolent theocracy cannot treat all religions equally and thus must prioritise the religion of some over others. Importantly, this means that the religious identities of some will be given state sanction, affirmed and recognised; other religions will not be accorded a similar status. This cannot but lead to a situation where other religious practices have an ‘outsider’ status and to a sense of alienation of some individuals from the state itself. This in turn can also impact upon the dignity or sense of worth of individuals with minority religious views. It also raises important questions concerning the legitimacy of exercising state power in a way that privileges a particular religious view.

As early as John Locke’s A Letter Concerning Toleration, it was argued that the legitimacy of state power depends on the presence of justifications that are acceptable to everyone. Indeed, Ronald Dworkin more recently elaborates upon this argument. He argues plausibly that individuals have no reason to accord legitimacy to a political community unless it displays equal concern and respect for all its citizens. By privileging a particular religious view, the state ultimately fails to accord such equal concern and respect to those that differ from the dominant religious position and so undermines its legitimacy as a state for all its citizens. Dworkin also goes on to argue that the state may legitimately seek to satisfy the internal or personal preferences (preferences for the assignment of goods or opportunities for oneself) of its citizens but not to satisfy their external or moralistic preferences (individual preferences for the assignment of goods or opportunities for others). External preferences as law are an

6 The right to change religion or belief is explicitly protected in art 9 of the European Convention on Human Rights. It is arguably a key part of freedom of religion and belief; one’s right is not truly protected if one cannot change one’s mind. On the right to change religion and belief within the scope of religious freedom, see Durham (note 4 above) 28.
7 J Locke A Letter Concerning Toleration Latin and English Texts (Martinus Nijhoff 1963) 15–23. Locke argues the state is constituted ‘only for the procuring, preserving, and advancing of … civil interests’, which include, amongst other things, life, liberty, and health. Power is not conferred on the state to decide religious matters because faith is a personal matter that cannot be forced upon individuals by others. See also, Rawls (note 5 above) 137.
10 Dworkin (note 8 above) 234–8.
insult to the moral equality of citizens. The minority must suffer because others find the lives they propose to lead disgusting, which seems no more justifiable in a society committed to treating people as equals, than the proposition we earlier considered and rejected as incompatible with equality, that some people must suffer disadvantage under the law because others do not like them’. See also Dworkin (note 8 above) 275.

12 Meyerson (note 9 above) 51–2.

13 Rawls (note 5 above) 48–51.

14 Locke (note 7 above) 97–101. The problem of stability is also at the core of Rawls’ account of Political Liberalism (note 5 above) 140–4.

15 Durham (note 4 above) 8.

16 However, a state that respects equality and diversity should be seeking to adopt a ‘principled pluralism’ model, rather than one of ‘pragmatic pluralism’; see R Ahdar & I Leigh Religious Freedom in the Liberal State (2005) 84–7.

17 See, for example, Locke (note 7 above) 53, 57, 61.

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attitude towards religion. It is difficult to think of recent states that take such an outwardly hostile stance (although, of course, the effect of many separatist policies may be hostile, as will be seen below). Winfried Brugger uses the example of Communist governments before the collapse of the Soviet Union. The most extreme form of what we term the ‘animosity model’ (‘softer’ versions will be discussed under the more aggressive separatist models) consists of ‘[a]dversarial tones towards religion [which] in general point to militant secularism, often combined with the goal of not only eliminating but also replacing religious themes and promises with secular ones’.

It is apparent that many of the criticisms of the theocratic model will also apply to the animosity model. Firstly, the state here adopts a particular attitude or approach that is hostile to religion. As such, it seeks to coerce individuals not to be religious (indeed, in Soviet times, there were bans on religious practices). This clearly violates the freedom of individuals to choose the religious beliefs and practices they wish to adopt. Secondly, it encourages homogeneity and fails to respect the full diversity of citizens’ beliefs. Thirdly, the state here privileges atheism (or at best agnosticism) over other religious views and thus fails to accord equal respect to all citizens. This will lead, fourthly, to the problem of an alienation of religious people from the state and a failure to affirm their worth and dignity. Fifthly, the very legitimacy of the state (by failing to accord equal respect to the differing world-views in its midst) will be called into question, which in turn will undermine relationships of cooperation and reciprocity. This in turn can lead, sixthly, to a problem of political instability with religious citizens being alienated from the state.

This discussion of these two extreme models has served to highlight a number of criteria that are of importance in evaluating more adequate models. It is to a consideration of these models that we now turn.

(c) Established and endorsed religions
Towards the theocratic end of the spectrum lies the establishment or endorsement of a particular religion by the state. This section will focus on the core of the model that may be labelled ‘formal unity of state and church with substantive division’. According to Brugger, this model (of which Great Britain and Greece are examples) displays the following characteristics: separate organisational structures; differing objectives (common good/salvation); independent decision-making processes; no state authority exercised by the church; and the religious freedom of followers and non-followers is largely respected. The formal

19 Ibid 33.
20 It should be apparent that the lines between the different models are blurred rather than sharp and that, on the one hand, there can be an overlap between this model and the theocratic one, and on the other, between this model and the cooperationist one. See Durham (note 4 above) 20.
21 Brugger (note 18 above) 40.
22 Ibid.
unity exists largely for historical and cultural reasons and is evident in public ceremonies where the endorsed religion takes pride of place.  

Though this model is not subject to all the criticisms discussed thus far, it remains problematic. It is important to understand that this is not because the state is using public power to enforce a conception of the good that reasonable people may disagree with (as is the case with the theocratic and animosity models), but that it is using public power to endorse such a conception of the good. Firstly, it is clear that one religion is given a privileged position in relation to others. Jeroen Temperman, for instance, argues that even where the religious rights of all are substantively respected, establishment implies differential treatment and gives the appearance of discrimination.  

Establishment suggests favouritism by the state of one particular religious view, to the detriment of other religions, non-religion, and minority sects within the state religion. Concrete inequalities will often be produced but are masked by the dominance of the established religion. Thus, many people, for instance, do not perceive the unfairness involved in having public holidays on Christian days whilst not providing time off for those whose religious holidays fall at other times of the year.

Secondly, this favouritism, as has been mentioned, aligns the state with a particular religion. That alignment means that the state effectively will be perceived to identify with the religion of a particular grouping in society. This may encourage Anglicans in the United Kingdom, for instance, to identify with the state; but, what about Jews, Catholics, Muslims and atheists? The symbolic effect of establishment is to cast as ‘outsiders’ those who do not share the affirmed religious identity. That cannot but create a degree of alienation between those who are outside the framework of official endorsement and whose identities are not affirmed. In a sense, this can also be seen as an intangible yet important violation of the dignity of outsiders. As Judge O’Connor famously stated:

23 Attempts are often made at justification of this state of affairs in terms of secularisation – religious symbols and activities in the public sphere have lost their original religious meaning – and trivialisation – any symbolic effect is too minimal to require change. W Sadurski ‘Neutrality of Law towards Religion’ (1990) 12 Sydney LR 420, 428–30, warns that the ‘secularisation’ and ‘de minimis’ arguments are rarely sound; they should be treated with much caution, and addressed specifically to the circumstances of the case in question.


25 We are aware of some responses to this objection but the limits of this article do not allow an exhaustive engagement with the arguments for and against establishment. See, for instance, Ahdar & Leigh (note 16 above) 127–54 for arguments in defence of the establishment of religion; see Meyerson (note 9 above) 53–7; and Temperman (note 24 above) 161–7 for arguments against.

26 There are some conflicting views in this regard. Ahdar & Leigh (note 16 above) 145, quote the British Muslim scholar, Tariq Modood, as noting ‘the “brute fact” that not a single article or speech could be found by any non-Christian faith in favour of disestablishment’. They suggest that instead, secular reformers have been using minorities (claiming the desire to accommodate them) to justify courses of action that these secular elites have decided upon by themselves to advance their own purposes’.
(c) Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favoured members of the political community.\(^{27}\)

Thirdly, a related problem that flows from this would be the alienation of minority communities that may have some impact upon the manner in which individuals perceive the *legitimacy* of the state. In turn, this could raise problems of political stability. Finally, the symbolic effect of endorsement may also be to grant greater *power* and prestige to the authority structures of the endorsed religion(s) than any others.\(^{28}\)

### (d) Separation models

Given the problems with endorsing a church, the next model suggests that, in solving these problems, there should be a strict separation between the state and religion. Separation models come in various forms and degrees. Some separation models are extremely aggressive in enforcing the distinction between religion and state to the point where the state (or at least public sphere) is perceived to be hostile towards religion. At certain points, France appears to have veered towards this model. In such a situation, the state becomes engaged in ‘an ideological defence of the secular cause, which might include criticism or scepticism towards religion’.\(^{29}\) In these circumstances, the state could be said to endorse an anti-religious attitude. Such a form of separation would attract many of the same criticisms that could be lodged against the ‘animosity’ and ‘endorsement of religion’ models.

However, a regime of separation ‘does not in and itself dictate that state’s approach toward religion: the separation may be a result of a positive attitude toward religion and a need to preserve it (as in the United States), or as a consequence of a negative attitude toward religion, stemming from the desire to preserve the state’s secular character (as in France)’.\(^{30}\) We shall focus on what we take to be the most defensible separation model that ‘denotes an intention on the part of the state not to affiliate itself with religion, to not consider itself a priori bound by religious principles … and to not seek to justify its actions by invoking religion’.\(^{31}\)

Some of the jurisprudence in the US has usefully outlined the content of this model. The First Amendment of the US Constitution provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’.\(^{32}\) The ‘establishment clause’ was designed to erect a


\(^{28}\) See Part III below for arguments as to why this model is particularly ill-suited to South Africa.

\(^{29}\) Temperman (note 24 above) 140.


\(^{31}\) Temperman (note 24) 140.

‘wall of separation’ between the state and religion, and is elaborated upon by Justice Black in *Everson v Board of Education*:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.\(^{33}\)

This passage shows the close link between the ‘establishment’ clause and the ‘free exercise’ clause: the prohibition on having an established religion is designed to maximise religious freedom in the sense that no person will be constrained to follow or support a particular set of beliefs.\(^{34}\) A notable feature of this view is a strong distinction between the public and the private: the realm of the state and polity is free from religion whilst the private realm remains open for individuals to believe and practice as they wish. Such a separation can also be good for religion in not subjecting it to any form of control by the public sphere.\(^{35}\) The separation view can also be defended from the point of view of the equal treatment of differing religions. By the state or public sphere refraining from endorsing a particular religious view, the space is opened for all religious views to be accorded equal protection within the state. Indeed, this point is often captured by the language of ‘neutrality’: separating the state from religion, it can be argued, means the state is ‘neutral’ between competing conceptions of the good and does not prejudice any particular view.\(^{36}\)

Despite the strong tradition in liberal constitutionalism of separation models, they nevertheless are subject to several important criticisms. First, it is contended that, despite protestations of neutrality, in fact, separation often prejudices those with religious world-views. According to McConnell, ‘[t]he beginning of wisdom in this contentious area of law is to recognize that neutrality and secularism are not the same thing’.\(^{37}\)

Wojciech Sadurski, for instance, argues that what neutrality requires will depend on circumstances, but that strict separation is not always neutral.\(^{38}\) Neutrality should be judged in relation to a baseline of action or non-action from a neutral agent (ie the state). Departures from the baseline are

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33 *Everson v Board of Education* 330 US 1 (1947) (Justice Black) 15.
34 Shetreet (note 30 above) 90–1.
35 See Justice Jackson (dissenting) in *Everson* (note 33 above), 27. See also Temperman (note 24 above) 136.
36 Rawls (note 5 above) 191–5.
38 Sadurski (note 23 above) 433–4.
judged as non-neutral. The problem lies in defining a neutral baseline. An example can help illustrate this point. Should the state, for instance, fund prison chaplains? To do so would seem to involve the state giving funding for religious instruction to inmates in state prisons and so violate the strict neutrality of the state. Inmates, however, are removed from their normal environment where they have access to prayer and spiritual leaders, and are placed in an environment where, without state action, they would not be able to realise their religious convictions. To retain the ability of individuals in such circumstances to exercise their religious freedom would require them to be provided with religious services. Simply removing religion from prisons is thus not neutral.

This leads to the second important criticism of the separation models and the very firm distinction between the private and the public central to them. The model fails to acknowledge that the two spheres can and must overlap. The above example suggests how the state in its running of prisons, or for that matter the military or schools (all supposedly in the public sphere), necessarily impacts upon the private choices of citizens. Similarly, laws that prohibit citizens from displaying religious symbols or wearing religious clothing (such as have recently been passed in France and Belgium) highlight the fact that whilst somebody walking in a town square might be seen to be ‘in public’, their choice of what to wear and how to present themselves is a deeply private one. As Rex Adhar and Ian Leigh write:

> From the perspective of the adherent, religion cannot be left in the home or on the steps of Parliament. The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout. Unlike the powers of the liberal state, the religious conscience is profoundly a-jurisdictional.

Religion forms part of the very personal identity of those who are religious, and an attempt strictly to separate the public and private does not seem possible. Indeed, such a separation violates freedom: forcing someone to take off their head-covering in public would be extremely coercive. It could also violate the requirements of equal treatment. Those who are religious are forced to compartmentalise their identity whereas those who are not need not do so. This again demonstrates the lack of neutrality that separation models can bring about. The problem of alienation in turn could rear its head as well. This is not to suggest that individuals can legitimately expect the state to enforce or endorse their own religious convictions which would violate the freedom and equality of others; nor that they have a right to seek to impose those convictions on the whole of society. What is important, however, is that

39 School prayer is a more complex example, as the baseline of neutrality is unclear. For religious people often the exclusion of religious prayer from a public space is not neutral.


41 There is some complexity here as it can be argued that the removal of head-coverings may protect the equal treatment of men and women in the public sphere. For reasons of length, we cannot consider this conflict in more detail here.
the state does not require them to leave their religious identities behind – which pervade their lives – when they enter the public sphere.

Finally, the separation model suggests that, for neutrality to occur, what is necessary is for the state to withdraw from having any connection with religion. It is important to recognise that this model is fundamentally one that sees freedom and equality in largely ‘negative’ terms: the absence of constraint and engagement with religion which allows individuals equally to do what they wish. As we have seen, for many religious people a complete absence of engagement with religion is not itself neutral. Even if we reject that point, however, there is a real question as to whether it is desirable for the state to withdraw from matters relating to the fundamental identities of its citizens, or whether it should rather actively be involved in enabling citizens to realise those very identities. Can the public sphere not perhaps do more than withdraw from this space but actively celebrate the identities of its different citizens? We now turn to models that envisage some relationship between the state and religion but not one that involves endorsement.

(e) Accommodation and cooperation

Accommodation and cooperation models will be considered together. The core of these models stands in contrast to the established church model, and the separation model in that ‘[s]tates may cooperate or interrelate with religions, or accommodate religions, without treating a specific religion preferentially’.

Both models contain a great deal of overlap, and their scope very much depends on how they are defined. Accommodation connotes a degree of endeavour by the state to take into account the needs of those who are religious in the public sphere. If people have specific requirements connected to their religion, then this will justify, for instance, an exemption from a general duty imposed by the state. Cooperation goes further than this, suggesting an active relationship between different religions and the state: this does not merely involve accommodating needs, but working together with religious bodies within the public sphere.

Cole Durham provides useful indications of the scope of the two models. The cooperationist state may ‘provide significant funding to various church-related activities, such as religious education or maintenance of churches, payment of clergy, and so forth … The state may also cooperate in helping

42 We will return to this question in relation to the model that should be adopted for South Africa.
43 We note here that the US is often seen to exemplify a different model, namely ‘strict separation in theory, and accommodation in practice’. For examples of the gap between theory and practice, see M Weiner ‘Neutrality between Church and State: Mission Impossible?’ in Brugger & Karayanni (note 18 above) 437, 447. Neutrality in the US has been described as being, at best, ‘aspirational’ (Weiner 451) and at worst a disguise used by the Supreme Court in the interests of self-preservation (McCreary v ACLU 125 S Ct 2722 (2005) (Justice Scalia dissenting) 2751). This position has little to commend it in that it abrogates the protection for minorities that is required by constitutional judicial review. Moreover, it creates uncertainty and lacks transparency, with the consequent impact on the rule of law.
44 Temperman (note 24 above) 93.
with the gathering of contributions (such as the ‘church tax’ in Germany). The accommodation model, on the other hand:

may insist on separation of church and state, yet retain a posture of benevolent neutrality toward religion. Accommodationism might be thought of as cooperationism without the provision of any direct financial subsidies to religion or religious education. An accommodationist regime would have no qualms about recognizing the importance of religion as part of national or local culture, accommodating religious symbols in public settings, allowing tax, dietary, holiday, Sabbath, and other kinds of exemptions, and so forth.46

Cole Durham and Paul Farlam both argue for the accommodation model as that which is most likely to maximise religious freedom.47 As can be seen, the view on these models is that the state should not simply refrain from involving itself with religion but can actively advance the religious identities of its citizens. There is also no sharp division between private and public, though there may be limitations placed on religion in the public sphere. Unlike the endorsement model, equal treatment of differing religious positions is central. Neutrality is conceived of not as the absence of the state in its engagement with religion but the pursuit of a relationship with differing religions on equal terms.

The problems with accommodationist and cooperationist models relate to the positive relationship that is created between religion and the state. The first and difficult problem involves working out what ‘equal treatment’ of differing religions in fact means. The state could, for instance, seek to advance the differing religious identities of members to a similar extent. However, some religions may have extremely expensive requirements or need significant exemptions, whereas others are much easier to accommodate. Is it fair, for instance, to devote a greater quantity of resources to one religion than to another?48 If not, then perhaps equality should be judged by the devotion of equal resources to each religion. Yet, if those resources are sufficient for some but not others, then that may also lead to a claim of unfairness, for instance, on the grounds of rendering the equal provision of resources as an end in itself, rather than considering what these resources enable people to do with them.49

In relation to exemptions, the problem would arise as to how to judge whether the special treatment required would in fact render people equal or rather provide unfair advantages for some.

A second major problem concerns why religion should necessarily be given preferential treatment over other conceptions of the good. If religion is not to

45 Durham (note 4 above) 20–1.
46 Ibid 21.
47 Durham (note 4 above) 24; Farlam (note 3 above) 41-27. Farlam adopts similar reasoning, but does not consider the problems of the accommodation model. We attempt to further explore this model, examine both its implications and problems and then develop it into what we term a ‘positive recognition’ model which is rooted in specific features of the South African context.
48 This is a version of the ‘expensive tastes’ objection that Ronald Dworkin levels at the notion of ‘equality of welfare’. See R Dworkin Sovereign Virtue The Theory and Practice of Equality (2000) 48–59.
49 This would be a counter-objection by those favouring equality of welfare or a capabilities view. See, for instance, R Goodin ‘Egalitarianism, Fetishistic and Otherwise’ (1987) 98 Ethics 44–9; and M Nussbaum Women and Human Development (2000) 68–9.
be treated differently, then other philosophical perspectives and moral views must be accorded similar treatment by accommodating and cooperating with them as well. There are strong pragmatic reasons why this may be difficult: imagine, for instance, in Germany that tax collection is to occur not only for major religions but also environmental groups, scientific societies, and moral lobby groups. The state would, it seems, be swamped with having to collect taxes for a diversity of groups in society. This would suggest a constraint that positive action should only occur where it is possible to perform across diverse conceptions of the good. If religion is to be treated differently, then we need a good rationale for doing so that can justify this preferential treatment even to those who are not religious.

The difficulties of attaining equality and dealing with the full diversity of views leads Durham to recognise that the cooperation model increases the chances of alienation and coercion of minorities: there is a danger that smaller religious communities are accorded second-class status and, ‘to the extent that public funds are directly supporting programs of major churches, there is a sense that members of religious minorities are being coerced to support religious programs with which they do not agree’.\(^50\) This would be an even more significant problem for those who are not religious. The concerns raised by Durham regarding cooperation are echoed by Temperman in relation to accommodation. ‘[I]n most cases of apparent “accommodation of religion”, the arrangement is not, upon closer inspection, as non-preferential as the term suggests’. In fact, ‘[c]onstitutional accommodation of religion in practice, more often than not, translates into practices of cooperation and support from which some (but not all) religions and beliefs benefit’.\(^51\) He continues: ‘[m]ost of the Constitutions which envisage a form of cooperation between the state and religions in practice translate into preferential treatment of the predominant religion or of the dominant, traditional religions’.\(^52\) This in turn can lead to significant alienation of minorities from the state itself.

The accommodation and cooperation models also raise significant problems concerning the representation of religious groupings. Given the existence of internal diversity in religious groupings, it will be necessary for the state in deciding whether to accommodate a group or to cooperate with it, to engage with the leadership or representatives thereof. By recognising a particular grouping or leadership structure, the state could be said to be granting greater power to that grouping over other voices within the community. The state must thus when dealing with religious groupings seek to avoid disempowering minorities within those particular denominations.\(^53\)

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\(^{50}\) Ibid 24; see also Sadurski’s concerns (note 23 above).

\(^{51}\) Temperman (note 24 above) 94.

\(^{52}\) Ibid 101.

\(^{53}\) This and other problems of representation occur in Germany. For example, a lack of representatives recognised by the relevant Islamic communities mean that Islam generally cannot benefit from public corporation status, and make it difficult to determine the curricula for religious instruction in public schools. G Robbers ‘Religious Freedom in Germany’ (2001) BYU LR 643, 657–8.
III THE SOUTH AFRICAN CONTEXT AND EXPERIENCE

‘Different regimes of accommodation have emerged in different states for different reasons; moreover, they all have different legal consequences’.\(^{54}\)

As has been mentioned, the South African Constitution does not expressly identify the model of the state-religion relationship that is to be adopted. Consequently, in determining how this important relationship is to be cast, we need to engage in an act of construction and interpretation. We do so by employing the broad approach to interpretation of the Constitution used by the South African Constitutional Court. That approach involves an engagement with the historical and social context in which the Constitution exists. It also requires taking the text seriously but is fundamentally ‘purposive’, recognising that the Constitution must be constructed in light of its central purposes and values, which include most importantly freedom, equality and dignity.\(^{55}\) This method of interpretation we shall argue leads to the conclusion that what we term the ‘positive recognition’ model would best capture the relationship between religion and state in South Africa.

(a) Historical and social context

The transformative nature of the South African Constitution requires an engagement with history and an understanding of the mistakes of the past to build a better future.\(^{56}\) In light of this, it is necessary to examine briefly the role of religion under apartheid.\(^{57}\)

The first key point to make is that Christianity was the favoured religion by the apartheid government. In \textit{S v Lawrence}, Sachs J outlines the many areas in which a bias towards Christianity was expressed. For instance, censorship laws conformed to the dictates of a conservative Christian morality. Primary and secondary education in schools was expressly understood as a form of Christian national education. Retail trading was restrained on Sundays and public holidays with a Christian character (Good Friday, Ascension Day, Christmas Day) and the showing of films was prohibited on those days. Hindu and Muslim marriages were not recognised by the state as they were potentially polygamous and not in accordance with Christian values. Same-sex sexual conduct was criminally proscribed and same-sex relationships

\(^{54}\) Temperman (note 24 above) 93.

\(^{55}\) This interpretive approach is outlined in \textit{S v Makwanyane} 1995 (3) SA 391 (CC) paras 9–10.

\(^{56}\) Makwanyane ibid para 156 (Ackermann J), paras 219–23 (Langa J), paras 262–3 (Mahomed J), para 302 (Mokgoro J), paras 322–3 (O’Regan J). For a critical view on the use of history by the Constitutional Court, see P de Vos ‘A Bridge Too Far?: History as Context in the Interpretation of the South African Constitution’ (2001) 17 \textit{SAJHR} 1.

\(^{57}\) We cannot offer a comprehensive treatment here but simply identify some of the salient features that have implications for the state-religion relationship in the future. For a little more detail and engagement with the meaning of the past for current constitutional controversies, see D Bilchitz ‘Should Religious Associations be Allowed to Discriminate?’ (2011) 27 \textit{SAJHR} 219.

\(^{58}\) \textit{S v Lawrence; S v Nagel; S v Solberg} 1997 4 SA 1176.
were not accorded any recognition. Farlam concludes on this basis that ‘[p]rior to 1994, Christianity was South Africa’s unofficial state religion’.

A number of important points can be drawn from an engagement with this past. First, the favouring of Christianity did not completely restrict the freedom to believe in other religious systems. There was indeed a measure of religious freedom under apartheid and so South Africa could not be said to have been a theocracy. Nevertheless, its legal edifice did impose a number of Christian practices and restrictions on members of other faiths. The endorsement of Christianity thus was more severe than ‘the formal unity; substantive division’ model outlined above, though did not quite reach the level of theocracy. This analysis also highlights the fact that the past treatment of religion saw an avowal of a particular world-view that violated the equal treatment of religions. Indeed, a particular version of Christianity was given pride of place by the state: persons with differing religious practices were subject to certain Christian restrictions (such as Sunday trading laws) and symbolically were constructed as ‘other’ than the mainstream.

A second key point is that the church under apartheid did not remain separate from the state sphere, but played an active role in public policy. The Dutch Reformed Church (DRC) ‘played an important legitimizing role concerning the South African state throughout the apartheid years’. Indeed, as Johann Kinghorn puts it:

> [t]he formulation of and the policy of separate development in 1950 was the one and only occasion in the history of apartheid when the DRC was demonstrably the first to initiate and propagate a certain concept. In all other cases the Church merely reflected a broad opinion, or even trailed the political process. But, for once, in 1950 it was at the forefront.

Thus, ‘[r]eligion, specifically the [Dutch Reformed Church] traditions, provided the theological justification to keep discriminatory laws in place, and Reformed churches were favoured by the Apartheid government.’ To balance the picture, it is also important to point out that progressive religious bodies played an important role in organising resistance to apartheid. Importantly, this history suggests that religion does not remain neatly confined within the

59 These elements of the edifice of laws favouring Christianity are outlined in Sachs’s judgment in *Lawrence* (ibid) paras 149–52 and in Farlam (note 2 above).
60 Ibid 41-1.
65 See, for instance, the essay by J Cochrane ‘Christian Resistance to Apartheid: Periodisation, Prognosis’ in Prozesky (note 63 above) 81 ff.
realm of the private sphere and has an impact on the domain of the political. This history also suggests that religion can have a negative impact upon the public sphere and thus its influence needs carefully to be understood and regulated such that it does not undermine the values of the new order.

This brief discussion of the historical context of religion in South Africa already suggests that certain models will be inappropriate for the new South Africa. The past that the Constitution reacts against is one where some were restricted as a result of the beliefs of others and some were treated unequally as a result of beliefs they did not share. This is inappropriate in a new society founded upon the values of freedom and equality. Indeed, as O’Regan J puts it:

> The requirement of equity in the conception of freedom of religion as expressed in the [interim] Constitution is a rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society.  

These reflections will clearly rule out both theocratic and animosity models.

The negative impact of state endorsement of religion is also evident from South Africa’s past. Indeed, as Sachs J states:

> any endorsement by the state today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.  

That leaves us with two remaining possibilities: separation or accommodation/cooperation models. The history of religious involvement in public affairs could be used to argue strongly in favour of separation: after all, religious legitimisation of apartheid brought the DRC into disrepute but also helped advance an unjust state of affairs whilst marginalising dissenting voices. On the other hand, it could well be contended that the historical example shows the artificiality of the public/private distinction and the impossibility of separating religion from the domain of the public. History alone will thus not help us make a choice between these remaining models.

Social context is of importance too in identifying an appropriate relationship between religion and state. The statistics show that South Africa is a relatively religious country: over 80 per cent of members believe in God.  

The breakdown of

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66 Lawrence (note 58 above) para 122 (O’Regan J).
67 Ibid para 152.
68 Unfortunately, the last comprehensive survey of religious beliefs and identity in South Africa comes from the 2001 Census <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf>. Regrettably, the 2011 Census did not have questions relating to religion and thus a more recent accurate picture is hard to attain.
religious affiliation is as follows: 79.8 per cent are Christian, 0.2 per cent are Jewish, 1.2 per cent are Hindu, 1.5 per cent are Islamic and 0.3 per cent identify as having African traditional beliefs. What is evident from these facts is that most South Africans have a strong religious identity. A model that might be appropriate for a less religious society would not be adequate for one that exhibits the trends of religiosity in South Africa. It is in this historical and social context that we must now turn to interpret the key elements of the Constitution that deal with the state-religion relationship.

(b) Text and purposes

The main provisions relating to religion and state exist in the Bill of Rights itself. The implications of this are quite important: there are no abstract provisions dealing with the connection between religion and state; rather, the relationship is to be delineated in the context of its impact upon the rights of individuals. Underlying these rights are three central universal values, freedom, equality and dignity, which, as we shall argue, play an important role in identifying the optimal model for South Africa.

(i) Freedom

The key freedom right in the Constitution is s 15. It reads as follows:

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.

Section 15(1) has been interpreted by the Constitutional Court to include protection for the following freedoms of individuals:

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.72

70 This number was split more or less evenly between conventional or mainline Christian churches (considered to include Reformed churches, Anglican, Methodist, Presbyterian, Lutheran, Roman Catholic and Orthodox churches and the United Congregational Church of South Africa), and independent churches (considered to include Zionist churches, iBandla lamaNazaretha and Ethiopian-type churches).
71 2001 Census (note 68 above).
72 Lawrence (note 58 above) para 92 (Chaskalson P) quoting Dickson CJ in R v Big M Drug Mart (1985) 13 CRR 64.
These elements strongly suggest that the right to religious freedom cannot be interpreted in a way to require a strict separation between the public and the private. A right ‘to declare religious beliefs openly’ only makes sense if it can be exercised in public. Similarly, the right ‘to manifest religious belief by worship and practice’ would be empty if prohibited in public. Sachs J expressly recognises in the *Fourie* case (dealing with same-sex marriage) that religion is not merely confined to the private sphere: He states that:

> religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes ... They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life.

The strict separation model thus does not appear to be in accordance with the interpretation given to this right by the Constitutional Court, which recognises no artificial divide between the public and private within the identities and lives of the religious.

Moreover, it is important to note that s 7(2) of the Bill of Rights places an obligation upon the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. These obligations do not simply require the state negatively to abstain from harming rights (even civil and political rights) but actively to take positive steps to promote and fulfil the rights in the Bill of Rights.

Section 15(2) provides clearer support for the proposition that there will be no wall of separation between religion and state in South Africa by allowing for religious observances at state institutions. Individuals are to be enabled to express their religious identities positively within the public realm. This section thus rules out any form of strict separation model. The restrictions placed on this right are also of key importance to consider as they recognise that the relationship between religion and the state in the public sphere cannot be unqualified and must be regulated. The circumstances under which such expressions of religion are legitimate are essentially ones that follow fair and prescribed procedures, and ensure that the freedom and equality of others are respected.

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73 Du Toit (note 64 above) 690 suggests African culture historically has also lacked a strict separation between the public and the private sphere; see also concerns from the Muslim community relating to the dualism created by separation, at 694–5.

74 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 90 (Sachs J) (footnotes omitted).

75 Sachs J’s recognition does come with important caveats: religious doctrine cannot be used to interpret the Constitution and the law can only recognise diversity to the extent that fundamental rights are not infringed. See ibid para 94. I have sought to explore the limitations of religious freedom in Bilchitz (note 57 above).

76 *Rail Commuters Community Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 69 (O’Regan J).

77 See also *Lawrence* (note 58 above) paras 99–102 (Chaskalson P) 116, 118–9 (O’Regan J).
Section 15(3) is also significant in indicating expressly that the state may use one of its core powers (that of legislating) to recognise the particular religious identities and legal systems of individuals within the polity. Indeed, personal and marital laws are often those that have particular significance and importance within religious traditions, and the state may thus use its public powers to grant express recognition to such systems. This provision again suggests that religious systems are not to be banished to a particular private sphere, but may even attain legislative recognition. The condition placed upon such recognition is equally important: that these systems are congruent with the Constitution and the Bill of Rights. Recognition may thus be accorded, provided the religious system adheres to the deepest values of the Constitution and respects the fundamental rights of all in South African society. Section 31(1) and (2) recognise a similar right of religious communities to practise their religion in association with others provided that the right is exercised in accordance with the Bill of Rights.

This discussion of the textual provision on freedom of religion in the Bill of Rights indicates, as has been argued, that a separation model will not be appropriate for South Africa. A more positive relationship along the lines of accommodation and cooperation appears to be the most desirable and supported by the Constitution itself. The exact contours of such a model, however, need to be engaged with as well as the difficulties that it raises. The values of equality and dignity, we shall argue, can assist in providing more specification as to the kind of model of the relationship between religion and state that should exist in South Africa.

(ii) Equality

Religion is mentioned in the Bill of Rights again in the context of the right to equality. Section 9(3) provides that ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including … religion, conscience, belief’. This prohibition is directed at discrimination against ‘anyone’. If the state discriminates against a particular religious grouping, it could well be argued that it discriminates against the individuals who make up this grouping. Moreover, it could also be argued that ‘anyone’ does not simply refer to individuals but groupings and institutions as well. Read in this way, the state may not favour one particular religious world-view over any other. Interestingly, the prohibition on discrimination is not limited to religion but includes also the notion of ‘conscience’ and ‘belief’. Arguably, this means that the state does not only have a duty to be fair to those with religious world-views but also those with other deeply-held philosophical convictions as well. We have outlined the historical backdrop against which such a prohibition in relation to discrimination on grounds of religion and

conscience makes sense given the strong preference that existed in favour of a particular form of Christianity in the past.

There has been some debate following *S v Lawrence*, concerning whether the right to freedom of religion should be read to include a requirement of equitable treatment of differing religions. Chaskalson P was of the view that the right in question should be seen to prohibit coercion and should not include an equality dimension.\(^79\) Chaskalson P was, however, in the minority on this point in the *Lawrence* case. Both Sachs J and O’Regan J held that a wider interpretation of the right to freedom of religion is required:

> [a]ccordingly, it is not sufficient for us to be satisfied in a particular case that there is no direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others.\(^80\)

O’Regan J explains her reasons why this is not permitted as being:

> because it would result in the indirect coercion that Black J adverted to in *Engel v Vitale*. And secondly because such public endorsement of one religion over another is in itself a threat to the free exercise of religion, particularly in a society in which there is a wide diversity of religions.\(^81\)

Sachs J expressly approves of the point that coercion is not required for a violation of the right in question and that favouritism towards a particular faith divides ‘the nation into insiders who belong, and outsiders who are tolerated’.\(^82\) In our view, Sachs J and O’Regan J are correct in holding that s 15 must be read to include a requirement of equitable treatment, particularly given the fact that the interpretation of this right must be harmonised with the requirements of s 9 of the Constitution.

The existence of a requirement that the state engage in a positive and equal relationship with differing religious (and other) world-views raises a number of problems that have been outlined above in relation to the accommodation/cooperation models. The Court has had reason to pronounce on some of these problems in the case law that has arisen. What is clear, firstly, is that equality in South Africa does not entail identical treatment and is meant to apply across difference.\(^83\) The question arose in *Christian Education SA* where the Court was required to decide the constitutionality of an exemption for a Christian set of schools from the general state prohibition on corporal punishment.\(^84\) Whilst the exemption was not granted on grounds relating to the rights and dignity of

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\(^79\) P Farlam ‘The Ambit of the Right to Freedom of Religion: A Comment on *S v Solberg*’ (1998) 14 SAJHR 298, 310–8 approves of this position. Both Chaskalson P and Farlam seem to interpret equality as entailing identical treatment. We argue that this is a misunderstanding, and equality rather involves treating individuals with equal concern and respect, which will not always amount to identical treatment. In our view, this point together with the requirement that s 9 (equality) & section 15 (freedom of religion) be read consistently with one another, help resolve a number of the objections raised by Farlam, 314–6 (for reasons of length, we leave the matter here).

\(^80\) *Lawrence* (note 58 above) para 123.

\(^81\) Ibid.

\(^82\) Ibid para 179.

\(^83\) As such, the problem of what is to be equalised rears its head significantly – we shall deal with this below under the value of dignity.

\(^84\) *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
the children, the argument that such an exemption would discriminate unfairly in favour of Christian Education was rejected. Sachs J wrote:

It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.  

Indeed, an exemption in such a circumstance may be necessary to accord equal respect to the beliefs of this particular community. Far from being a departure from equality, differential treatment may thus be required to give expression to the dictates of equality. This sentiment was affirmed in Pillay, where it was held that the Constitution does not require identical treatment, but that all be accorded equal concern and respect.

A second important point related to equality was dealt with in the Fourie case where the Court found that exclusion of same-sex couples from civil marriage was unconstitutional. One possibility in remedying this state of affairs would have been for the state to do away with civil marriage for everyone. The Court, however, rejected what it termed the ‘equality of the graveyard’ approach, where advantages are not given to any party, or, alternatively, equal disadvantage is conferred on all. Instead, a solution must be found that embodies ‘equality of the vineyard’, which enables individuals to flourish equally.

A final important point the Court made in Fourie related to the claim that broadening the definition of marriage to include same-sex couples ‘would discriminate against persons who believed that marriage was a heterosexual institution ordained of God, and who regarded their marriage vows as sacred’. This argument was expressly rejected by Sachs J who held that the right to equality does not extend to imposing one’s views on others, or indirectly coercing those who disagree into conformity with them. The right to religious freedom will generally protect people’s internal preferences, but not their external preferences. Those who objected to same-sex marriage in Fourie were entitled to their own views on marriage, and to act accordingly. However, there is no violation of equality or freedom of religion if others with differing beliefs are given the right to marry in a manner that contravenes the views of the religious objectors. The state must equally enable both parties to realise their visions of the good without imposing the vision of one upon the other. Thus, accommodation of those who wish to marry members of the same sex did not constitute unfair discrimination against those who object to such marriages. This holding is clearly of great importance with respect to the state relationship with religion, because it allows the state to recognise and enable

85 Ibid para 42 (Sachs J).
86 MEC for Education KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC) para 103 (Langa CJ).
87 Fourie (note 74 above).
88 Ibid para 149 (Sachs J).
89 Ibid para 93.
90 Ibid.
particular religious identities without discriminating against those who do not share them.

The question though still remains as to how we are to conceptualise what equal treatment entails where such treatment is not identical. What is it that must be equalised in the state’s engagement with differing world-views? This question requires engagement with the last value in the South African Constitution, the value of dignity.

(iii) Dignity

The Constitutional Court has placed great emphasis on the value and right of human dignity in the Constitution. In Dawood, O’Regan J gives expression to the importance of dignity as follows:

The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.91

Dignity, as understood by the Constitutional Court, centrally involves the idea that every individual has an equal worth, which underpins their entitlements to decent treatment. The notion of dignity has also played a crucial role in the Court’s jurisprudence on equality. In deciding whether unfair discrimination has taken place, one of the key factors outlined is the impact of a discriminatory measure on the dignity of an individual.92 The answer the Court thus gives to the question as to what should be equalised appears to be ‘equality of dignity’.93

How then does dignity relate to freedom of religion, conscience, belief and opinion? A possible answer to this question can again be found in the Dawood case where the Court had to consider the relationship between dignity and the protection of marriage and family life. O’Regan J reasoned as follows:

The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance.94

In this passage, the court connects dignity with aspects of people’s lives that are of central significance to them and their identities. The line of reasoning appears to be that dignity requires protection for the worth of individuals; that worth is (at least partially) expressed through their being able to make meaning and achieve personal fulfilment in their own unique manner and through developing their own identities; and thus, treating an individual with dignity must require protection and respect for individuals’ meaning-seeking

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91 Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; v Minister of Home Affairs 2000 (3) SA 936 (CC) para 35 (O’Regan J).
92 Harksen v Lane NO 1998 (1) SA 300 (CC) paras 46 & 53 (Goldstone J), para 91 (O’Regan J).
94 Dawood (note 92 above) para 37.
activities and their unique identities. As Stu Woolman puts it, ‘[a]n individual’s capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues’.\(^5\) A central aspect of life that is of significance to many individuals is their religious (and other) conceptions of the good. Treating individuals with respect for their equal dignity must thus involve respecting the religious identities of individuals. The requirements of equality mean that the state must strive to recognise and respect these identities equally. ‘Unity and equality will remain an elusive dream if they turn a blind eye to people’s uniqueness, and if they fail to pursue equality within the context of their diversity.’\(^6\)

Furthermore, an important component of an individual’s dignity is the notion of self-worth. If we understand that as social beings, our individual identities and sense of worth are formed in relation to the environment in which we live, it is of great importance that our social context creates a positive sense of self-worth in individuals. Rawls, importantly, recognised the idea of self-respect as a social primary good of individuals that they need in order to pursue other goods they value.\(^7\) The Constitutional Court has also recognised the importance of self-worth in the lives of individuals.\(^8\) According to Brand AJ, ‘[i]n terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values … [I]t protects both the individual’s reputation and his or her right to a sense of self-worth’.\(^9\) In the religious context, Sachs J recognised that ‘[r]eligious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights’.\(^10\) Individual self-worth can of course be severely impacted upon by disrespectful treatment and a failure to accord an individual recognition of their uniqueness. Thus, respect for the dignity of an individual will require treatment that involves positive recognition of an individual’s unique identity (which includes their religious identity). It is important to recognise that such a conception of respect for dignity requires individuals to display respect for others’ identities that differ from their own as well: reciprocity requires mutual respect and that no individual seeks to attempt to impose their vision of the good on others.

Thus, we reach the conclusion that respect for dignity in this context requires affirmation of the uniqueness of individuals. Given the differences between individuals in a heterogeneous society, this will entail the recognition and

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\(^6\) R Malherbe ‘Some Thoughts on Unity, Diversity and Human Dignity in the New South Africa’ (2007) 1 TSAR 127, 132.

\(^7\) Rawls (note 5 above) 82 &180. See further, J Rawls ‘Social Unity and Primary Goods’ in S Freeman (ed) Collected Papers John Rawls (2001) 363. See also Rawls (note 5 above) 318–9: ‘The importance of self-respect is that it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out. Without self-respect nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them.’

\(^8\) Le Roux v Dey 2011 (3) SA 274 (CC) paras 138 (Brand AJ), and 154, 189 (Froneman J and Cameron J); Khumalo v Holomisa 2002 (5) SA 401 (CC) para 27 (O’Regan J).

\(^9\) Le Roux ibid para 138 (Brand AJ) (footnote omitted).

\(^10\) Christian Education (note 85 above) para 36 (Sachs J).
celebration of different religious (and other) conceptions of the good within society in a positive manner. Excluding religion from the public sphere would require individuals to bifurcate their identities and thus the public sphere would fail to demonstrate respect for the whole of such a person’s identity. To do so would also require individuals to leave their differences behind as they enter the public sphere: this would represent an illegitimate and unnecessary attempt at homogenisation. A model founded on equal dignity will thus seek actively to celebrate and affirm the diverse identities in society both in the public and private realms. Sachs J in Fourie eloquently expressed the demands of an ethic founded on ‘equality of dignity’:

Equality means equal concern and respect across difference … At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society … The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.101

As Sachs J suggests, the vision underlying the South African Constitution is not one that just seeks passively to tolerate difference. Indeed, arguably difference was recognised under apartheid but dealt with through a regime of separation and inequality. This again suggests why the notion of a separation between religion and state and a strong public/private divide is inappropriate in the new South Africa. The challenge then in post-apartheid South Africa is to create a sense in which the unique identities of all are affirmed equally and celebrated in the public sphere itself. Active and positive recognition of difference is needed. The next part of this article seeks to consider what this means for the model of the state-religion relationship and how it might work in practice.

IV THE POSITIVE RECOGNITION MODEL AND APPLICATIONS

(a) The contours of the positive recognition model

What model then is appropriate to capture the relationship between religion and the state? Though the most desirable model, as we have argued, will itself be a species of an accommodation/cooperation model, neither of these notions is entirely appropriate in our view. Religion and the individual identities connected with it are not simply to be accommodated: the word itself suggests a type of grudging recognition of difference, a ‘making space’ for something, a tolerance yet not full affirmation. Cooperation too is not the appropriate notion: it suggests two equal spheres engaging and working with one another, which is not entirely accurate. The notion also fails to capture the interconnections that already exist between the realms of religion and the state. Instead, we suggest what we term a ‘positive recognition’ model, which

101 Fourie (note 74 above) para 60 (footnotes omitted).
is rooted in the central values and understandings explored in part III. The key elements of the model are as follows:

1. The model is rooted in the idea of the equal worth of individuals across their differences.
2. The model recognises that individuals must not be coerced by the state into violating beliefs that are of central significance to them. ‘Negative’ freedom is thus protected.
3. The model goes further and recognises that the state must also seek to create the enabling conditions under which positive expressions of identity can occur. This does not mean that the state should be required to set up religious structures for people but should create the enabling environment in which they can do so for themselves.
4. The state should not seek to create a strict separation between religion and state. Religion may legitimately enter the public sphere under certain conditions: these will involve equal treatment of all religions, ensuring the fundamental rights of all are respected and requiring religious believers to exhibit reciprocity in recognising and supporting democracy and the fundamental rights of those who differ from their own understandings of the world.
5. The model requires the state to adopt an even-handed approach between religious and other philosophical beliefs of significance to individuals.
6. A central requirement of this model is the equal positive recognition of all differing identities. This entails fair but not necessarily identical treatment, and equal concern and respect for all. Advantages, exemptions and accommodations may be conferred upon some groups; this does not in itself disadvantage others, nor treat them with any less respect. The model will not allow the external preferences of some to be imposed on others.
7. Neutrality on this model is understood as equal recognition, not separation. The public and the private are not strictly divided from one another. Religion in the public sphere can then be recognised subject to the provisos mentioned in points 4 and 6 above.

The discussion thus far has taken place at a relatively high level of abstraction. Some would argue that these components of the model all sound desirable yet the key problem is putting them into practice. In particular, the idea of equal positive recognition raises a number of pragmatic problems. We believe these will have to be engaged with each in their own context and unique solutions can be found rooted in the values and general principles outlined above. Nevertheless, to try and provide more specificity to this model, and to explicate how we envisage it will work, we shall now engage with two examples relating to religion in the public sphere: firstly, we deal with public holidays of a ‘religious character’; and secondly, we deal with state ceremonies.
(b) Public holidays with a religious character

The issue of public holidays with a religious character arose in the case of *S v Lawrence*, perhaps the primary case dealing with the relationship between religion and state that has been heard to date. The case concerned a challenge to provisions of the Liquor Act that prohibited the sale of liquor on Sundays, Good Friday and Christmas Day. The applicants argued that this was a violation of their right to religious freedom, given that the restriction was rooted in a Christian set of values that were being imposed upon them.

Though three judgments were delivered in this case, O'Regan J's judgment in our view appears best from the point of view of the positive recognition model. She recognises there is no strict separation between religion and state in South Africa (a matter in which all the judgments concur). The protection of religious freedom she holds involves both an absence of coercion and a requirement of equitable treatment of differing religions. It can also require positive protection for the adherents of differing religions. The singling out of Sunday, Good Friday and Christmas Day could only properly be explained on the basis of their religious significance for Christians. She thus does not seek to avoid the problem as Chaskalson P does; nor does she provide a strained justification for the focus on these days, as Sachs J does. After concluding that the right had been violated, O'Regan J finds that the limitation on the right to religious freedom is not justifiable: there was a lack of a clear legitimate purpose for the restriction, the focus on days with religious significance was arbitrary, and there was doubt whether such a measure would effectively achieve any legitimate objective.

Though O'Regan J's judgment is the most persuasive in these circumstances, we believe it raises wider questions concerning the permissibility of having public holidays with religious significance. South Africa continues to have at least two such days (and arguably three): Good Friday and Christmas Day. Sundays continue to be the main day of rest. Though the number of restrictions on these days has decreased, banks and many businesses close on public holidays. Moreover, every individual is entitled not to work on those particular days, and if they work, they are entitled to more pay. These benefits can be said, indirectly, to favour those of a Christian faith: Jews, for instance, have to take a portion of their annual leave for their religious days (where work is prohibited) and thus suffer some prejudice from the recognition of Christian religious holidays. Moreover, it could be argued that the symbolic effect of such recognition again suggests an unequal treatment of one religion in relation to others. Should only public holidays that lack religious significance be acceptable under the new constitutional order?

102 Note 58 above.
103 Para 122.
104 Easter Monday is a borderline case: it has very little religious significance in and of itself though it is hard to see that it did not result from a close connection with Easter, which is a holiday of Christian significance.
105 Section 18 of the Basic Conditions of Employment Act 75 of 1997.
This question highlights a number of important features of the positive recognition model. As has been mentioned, the model does not embrace the notion that the only way in which religions can be treated fairly is for them to be absent from the public realm. The other extreme possibility would be to recognise a public holiday on every day of religious significance to particular groupings in South Africa. That would be wholly unfeasible for the economic life of the country. Pragmatically, it thus seems that there is no choice but to have a limited number of days of religious significance that are positively recognised. Given that the vast majority of South Africans are Christian, and would wish to take off work on days of major religious significance to them (and many in fact do so), it is justifiable for such days to be Christian public holidays, taking into account the social context of South Africa (this would change in other countries such as Israel or Turkey, where the majority of populations are Jewish and Muslim respectively). This state of affairs should expressly be recognised as giving expression to the religious identities of the majority rather than being falsely given a secular justification. That could be achieved by symbolically designating these days as ‘Christian holidays’ and thus distinguishing them from other ‘Public holidays’ which embrace the whole nation.

Doing so, however, means that measures must be taken positively to affirm the identities of other religious minorities in the society. Our suggestion would be that the law recognise individuals belonging to religious minorities are entitled to three days of religious leave in addition to their annual leave (or other leave entitlements). This would entail the state taking positive legislative measures to ensure that minorities who may be prejudiced by the recognition of a Christian public holiday are enabled to realise their own identities. Such a law could be extended to those who are not religious and need time off to realise their comprehensive conceptions of the good (perhaps for example by being involved in environmental activism or the like). In addition, given that some religions such as Judaism can have up to ten days where work is prohibited, the law should provide that individuals must be granted annual leave on any day on which they are not entitled to work by virtue of their religious practices. Such a provision means that Jewish individuals, for instance, are not entitled to receive favourable treatment in relation to others but must be able, in terms of the law, to comply with the dictates of their faith. This approach avoids the dangers that minorities will be seen as ‘tolerated outsiders’;106 they are instead to be positively recognised. The state for all intents and purposes retains its neutrality, and any appearance of partiality is to be justified as a result of pragmatic constraints.107

The same points in our view would apply to days of rest. Practical realities require a unified day of rest be chosen. Choosing the day that reflects the desire

106 See Sachs J (note 83 above).
107 For other possible justifications for allowing majority preference in such circumstances, see Lawrence (note 58 above) paras 157–8 (Sachs J); see also Ahdar & Leigh (note 16 above) 86, who suggest the extent to which a state can be completely neutral is questionable.
of the majority is a reasonable and democratic solution, provided that efforts are made positively to recognise the religious freedom of all by advancing the interests of minority members of society. 108 Minorities should be entitled to take off their particular day of rest and, so far as is possible, prejudice to their interests be avoided. This accords equal respect to all citizens. 109

(c) State ceremonies

The second example we wish to discuss concerns the role of religion at state ceremonies such as a presidential inauguration. A strict separation model would require that religion be absent from any such ceremony. The positive recognition model, however, would not require the exclusion of religion but the equal affirmation of differing religious identities. In South Africa, it is currently customary for several religious leaders, who offer prayers on behalf of their followers and the nation, to be present at presidential inaugurations. This accords with the importance of actively recognising the religious identities of South Africa’s citizens whilst also acknowledging that these identities are themselves diverse. The symbolic effect of having multiple religions is to recognise that South Africans are diverse and no religious tradition expresses the thoughts and views of all. Moreover, the presence of such religious leaders affirms the identities of those who are religious at such ceremonies.

There are two objections that can be raised in connection with these practices. The first would argue that there are clearly a limited number of slots for religious leaders at state ceremonies such as a presidential inauguration. The problem that arises concerns which religions are to be represented and who represents those religions. The state could be said to favour particular religions if they are always present and endorse majoritarian or powerful leadership blocs within denominations. Our view is that it is important to recognise these problems and not, for instance, to focus only on dominant sects and leadership structures. The existing Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities could be tasked with registering religious groups if they wish to do a prayer at an inauguration. There could then be a rotation between differing religious groups that expresses the full diversity of South Africa. It may be legitimate to ensure, for instance, that one out of the four slots at an inauguration is always reserved for a Christian religious group given the dominance of this religion in South Africa and the need to ensure that the majority of the country is not alienated from what occurs in the public sphere. The denomination of Christianity, however, could vary as well as the leaders that give the prayers. Where there is dissension within a group concerning who should represent them, the leaders of differing factions should alternate where it comes to

109 See the interesting discussion by Gavison & Perez (ibid), who argue that the legitimacy of days of rest reflecting majority culture depends on the accommodation of minority groups. This is necessary to respect the individual well-being of members of such groups.
representing their grouping. All other religions should rotate with perhaps the second slot being reserved for religions with stronger numbers or historical significance in the polity. Thus, the difficulties involved in dealing with religions fairly, do not mean that the state should require religion to withdraw from its involvement in such ceremonies; nevertheless, the state must be mindful not to favour particular groupings and should instead adopt policies and solutions that address this problem.

The last issue concerns whether the presence of religious leaders at a state ceremony necessarily prejudices those who are not religious. We believe that it does not. As Christian Education and Fourie recognised, the fact that a benefit is conferred on a particular party does not mean that this implies discrimination or unfair treatment of another. Such a benefit may be required in order to comply with the dictates of equality itself. In our view, this is an instance of where this principle must be applied. Those who wish for a religious presence at a presidential inauguration have a world-view that recognises spiritual significance in addition to the domain of human affairs (the political, the pragmatic, etc). To leave out a religious component from such events constitutes a signal that the spiritual is excluded from such important moments: this is to send a symbolic message that the human or material is all that exists and to marginalise those (the vast majority of South Africans) who reject this view. By including differing religious leaders, a gesture is made to recognise that for many in South Africa, the spiritual domain is an integrated and fused part of their experience of the world. By refusing to endorse any particular religion, the state recognises that there are a plurality of points of view relating to the spiritual domain. In order positively to recognise those who believe that such a spiritual domain does not exist, a pragmatic solution seems possible: an announcement could explain that prayers are being offered for those who believe that a spiritual domain is important whilst not suggesting that this is of significance to all South Africans.

V CONCLUSION

This article has sought to investigate the relationship between religion and state that is appropriate for South Africa. Various models that have been adopted internationally were critically evaluated from a philosophical perspective. We then turned to consider the particular historical, textual and social context of South Africa. It was argued that a form of accommodation/cooperation model would be best suited for South Africa. The contours of such a model, however, needed to be drawn from a particular engagement with the South African context and, in particular, the values underlying the Constitution. We argued that, in South Africa, it was particularly important that differing religious (and other) world-views be treated equally. Moreover, respect for the equal dignity of citizens requires that the state not withdraw from its relationship with religion but rather be required positively to recognise the differing identities of its citizens. This led us to outline what we termed a ‘positive recognition model’ of the relationship between religion and state. In the last
section of this article, we sought to outline, in the context of two examples, the meaning of this model in practice. We believe an engagement in future research with further practical examples will help draw out the significance of this model for our society. It will also be necessary carefully to develop an understanding of the limits of religion in the public sphere and how far the state can be expected to go in the positive recognition of differing religions and treating them equally.

We believe that South Africa offers the possibility of a new model of the relationship between religion and state that may avoid some of the pitfalls of those that have been adopted in other countries. This positive recognition model may genuinely be of interest to other countries grappling with similar circumstances and diverse societies. South Africa is still in the early days of drawing the contours of the relationship between religion and state: we hope that as its unique model unfolds, it will create the conditions in which the diverse identities of all individuals in its midst can flourish and be celebrated.