

Freedom of religion in South Africa: Then and now 1652 – 2008

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ABSTRACT

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This article is about freedom of religion in South Africa before and after 1994. It is often argued that the relationship between church and state, and the resultant freedom of religion, during 1652-1994 was determined by a theocratic model of the relationship between church and state. In a theocratic model it is religion and its teachings that determine the place and role of religion in society. This article argues that it was, in fact, a Constantinian model of the relationship between state and church which determined the place and role of religion in society between 1652 and 1994. In a Constantinian model it is the governing authority's understanding and application of religion that determines the place and role of religion in society as well as the resulting degree of freedom of religion. Examples from history are used to prove the point. The second part of the article discusses freedom of religion in South Africa after 1994.

1 INTRODUCTION

This article deals with freedom of religion in South Africa before and after 1994.

Before 1994, freedom of religion was not a constitutionally guaranteed right in South Africa. After 1994 (1996), freedom of religion has been guaranteed by section 15 of the Constitution. It cannot be said that there was no freedom of religion in South Africa before 1994, but to understand what that freedom of religion meant, one must understand what the relationship between the church and the state was before 1994. So the question that the first part of the article will try to answer is: what did freedom of religion in South Africa mean before 1994. The second part of the article will consider freedom of religion in South Africa after 1994. Because the answer to the question is closely connected to the relationship between church and state, this relationship before and after 1994 will receive due attention.

2 PART 1: FREEDOM OF RELIGION IN SOUTH AFRICA BEFORE 1994

2.1 Challenging the state-church theory

Many scholars have tried to define the relationship between church and state in South Africa between 1652 and 1994. Gerald Pillay (1995) divides the period in two parts. During the first 150 years, he says “that despite the presence of other Christian denominations and, indeed, other religions, there existed a state church”. Round about 1800 a period started in which religious pluralism was allowed to develop. The apartheid period was a disruption of this process towards pluralism. The DRC again gained influence in “Caesar’s household”. By 1980 the African independent churches had overtaken all the established churches in size and growth rate (Pillay 1995:86). As will be seen, I think Pillay’s description of the DRC as a state church between 1652 and 1800 can be challenged. To speak of the “influence in Caesar's household” after 1948 is true in a sense but must surely not be understood in the sense of a theocracy.

According to Andries Raath, the Reformational roots of the relationship between church and state in the early settlement at the Cape reflect more of the federal paradigm of the Zurich reformer Heinrich Bullinger than the influence of John Calvin. The federal paradigm means that society is not seen in terms of church and state; it is rather seen in terms of the people of God who are bound together in terms of the covenant into a Christian society (Raath 2000:30). Although this is not explicitly stated, it would seem that it would imply a theocratic view of society.

Tracy Kuperus views the relationship between church and state in South Africa primarily in terms of race relations. She is of the opinion that the Dutch Reformed Church’s (DRC or NGK) entanglement with race issues “began soon after the first white settlers arrived in South Africa” (Kuperus 1996:2). She argues that “the NGK’s heavy political involvement with the state began in the early 1900s when it advanced a Neo-Calvinist, ideological justification of apartheid” (Kuperus 1996:3). Between 1948 and 1978 the state and the DRC were virtually identical, according to her. “After 1961 the two entities became socially indistinguishable with the NGK following the state’s lead” (Kuperus 1996:3). From 1979 until 1994, the DRC and the state agreed on key issues like sanctions and violence.

The overlap in membership and white interests allowed both institutions to support one another. But by the 1980s the NGK had lost its influence as a dominant political player. The state fostered reform while the NGK could not offer full support, whether the issue was constitutional restructuring or educational reform (Kuperus 1996:15).

She argues that the reason why the DRC fell behind was because it “deferred to its conservative faction” (Kuperus 1996:19).

It is offered as a hypothesis – which will need further research – that theocracy and Constantinianism, especially the latter, must be seriously taken into account if we want to understand the history of the relationship between church and state in South Africa.

In an attempt to determine the degree of religious freedom in a country and the concurring relationship between church and state, various types of the relationship between church and state can be identified¹. For the purposes of this article the two concepts of

1 The North American scholar Cole Durham (1996:19-23) distinguishes no fewer than eight possible types of relationships between church and state, with some in-between possibilities too. The degree of freedom of religion is in concurrence with the type of relationship between church and state. In classifying the relationship between church and state he starts with (i) absolute theocracies where there is an absence of freedom of religion because the state recognises only one religion. He then moves on to (ii) the established church/religion type of relationship between church and state, where it can happen that one church/religion is granted the monopoly within the state although there can be degrees of toleration. From established churches the next type is (iii) endorsed churches/religions in which one specific church is usually endorsed by the state; (iv) then there are types of relationships where there is (v) cooperation between the state and all churches/religions in a variety of ways which also includes financial support. (vi) The next possibility is one where the state accommodates churches/religion – the state maintains a benevolent neutrality towards religion but does not necessarily support it by way of financial subsidies. Durham describes the last two relationships as types where there is absolute freedom of religion. (vii) There can also be a relationship of separation between church and state – but this is a rigid separation where any display and support of religion is deemed as inappropriate and religion is very much restricted. (viii) An eighth type of relationship is what can be called one of inadvertent insensitivity, which entails a recurrent pattern of legislative or bureaucratic insensitivity to distinctive religious needs. (ix) A last possible type of relationship that Durham distinguishes is one of hostility and overt

theocracy and Constantinianism are important. In the history of the relationship between church and state, two important trends can be distinguished, a distinction which proves to be very valuable. On the one hand there is the **Constantinian model** – it can also be called an Erastian model because of the thoughts of Thomas Erastus in this regard. Many well-known figures in the history of Christianity, like Constantine, Eusebius, Augustine, Luther and Calvin, were partly or completely sympathetic towards this model. On the other hand there is the **theocratic model**, which was advocated to a greater or lesser extent by the medieval church, Thomas Aquinas, many later Roman Catholic thinkers, as well as some historical Protestant streams (Hiemstra 2005:29). Constantinian and theocratic models for the relationship between church and state are not unique to Christianity. These models can also be found with regard to other religions and the way which they see their relation to the state and to the rest of society.

Both the Constantinian and theocratic models are positive about the role that religion should play in society – according to Christian thinkers, society should serve the Triune God and Christianity should provide direction to society. The models differ on who should be the guide or the leader in the role that religion plays in society. According to the *Constantinian model* the political authorities, often with their own understanding of what Christianity means, are dominant over church authorities. This means that the political authorities assist, influence and sometimes fully control and use the church. It also means that the state has a role to play in the advancement and support of the “true religion” even to the extent of using its coercive power. It is important to understand that this means Christianity or whatever religion, as it is understood by the political authorities or the state. According to the *theocratic model*, control over the role of religion in society resides with the church authorities and how they understand Christianity or the religion concerned – the church (or religion) should dominate the political authorities as well as the rest of society (Hiemstra 2005:28-29).

persecution towards religion. In this type of relationship, as in theocracy, there is an absence of religious freedom. See also J D van der Vyver (2002:7–8) and Hiemstra (2005:35).

2.2 Questioning the theocratic model

It has often been said that in the history of South Africa the relationship between church and state, and therefore the place of religion in society, was determined by a theocratic model. It was also argued that this theocratic model was basically derived from John Calvin. From his theology it found its way into article 36 of the Belgic Confession of Faith (Fourie 2006:160-161; Coetzee 2006:148ff)² and thus eventually became part of the scene in South Africa. In other words, religion was the dominant partner in the relationship. This article argues that it was not a theocratic model of the relationship between church and state that determined the place of religion in the South African society from 1652 to 1994, but rather a Constantinian model where the state, in various degrees, determined the position of church and religion in society without denying freedom of religion or, perhaps better said, without denying freedom of conscience, which cannot be equated with freedom of religion in the true sense of the word (see Berkhof 1975:200). This had already started in the Netherlands and was continued at the Cape after 1652 and later in the rest of South Africa until 1994.

In the Netherlands the Reformed Churches confessed the Dutch/Belgic Confession of Faith³. This Confession also became part of the Dutch Reformed Church that came to South Africa in 1652, as was also the case in the Dutch Reformed Churches in the other colonies of the Dutch Republic. Article 36 of the Dutch Confession states that

... the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, to remove and destroy all idolatry and false worship of the Antichrist; to promote the kingdom of Jesus Christ and to see that the Word of God is preached everywhere so that God might be

2 It is arguable whether the thoughts of Calvin on the relationship between church and state can indeed be characterised as theocratic and whether they are not much rather, as stated by Hiemstra and confirmed by events in history, as will be shown, of a Constantinian nature.

3 At the Synod of Emden, held in German East Friesland from 4–13 October 1571, the confessing character of the Reformed Church was underscored. The participants signed the Dutch Confession of Faith “to prove the unity in doctrine among the churches of the Netherlands”.

honoured and served by everyone, as He commands in His Word.

For the churches the intention of this article was to ensure that it was the government's task to enable churches to do their work. However it soon became clear in the Netherlands that the government saw it as their responsibility not only to enable the church but also to control ecclesiastical matters. In those early years after 1571 the government wanted churches to avoid constraint of conscience, they wanted to retain the authority to appoint Reformed ministers, they wanted a regulation by which elders would be chosen from among and by the city administration, and they even wanted a decisive vote in matters of doctrinal difference (Blei 2006:23-24). At the 1578 National Synod of Dordrecht the church underscored its independence in the appointment of ministers and the election of elders and deacons. However, the government would not agree to this, fearful that the church would interfere in matters of state (Blei 2006:24). In 1586 at the National Synod of The Hague, church and state came to an agreement. In a revised church order the desires of government were more or less met. The church retained the right to elect elders and deacons but the city administration could appoint one or two of its members as additional members on the church council. In the synod meetings the authorities were represented by political commissioners who had to assure that the meetings would never make decisions on governmental matters. They often intervened forcefully. In the appointment of ministers the government maintained its influence and often supported ministers with divergent opinions. As a public church (i.e. an officially recognised church for the whole nation), the Reformed church found that absolute freedom from state interference (Constantinianism) was and remained an unattainable ideal, and that it could not emphasise its own identity in an unlimited way (Blei 2006:25).

2.3 A Constantinian model

In South Africa between 1652 and 1994 the situation was no different. A few examples from history support this argument.

From 1652–1665, responsibility for religion and the spiritual care for the people at the Cape resided with the Political Council under the leadership of the commander (Vorster 1956:38). From 1665, when the Cape got its first permanent minister and church council, spiritual care and ecclesiastical matters were their

responsibility. However, all decisions that the church council took had to be submitted to the Political Council before they could be implemented. The Political Council elected elders and deacons from a pair of names that the church council submitted to them. Political Commissioners represented the Political Council at all the meetings of the different church councils. In the documents (Vorster 1956:39) there is ample evidence of the authority that the Political Council had in church matters: they appointed sick comforters and readers, placed ministers and church wardens, decided on the baptism of heathen children, the time and place of worship services, the care for widows and orphans, the founding of congregations and the building of churches. In 1689 the Political Council refused the request of the French refugees to install their own Church Council in Drakenstein (Resolutie van Politieke Raad 28 Nov 1689).

About the situation in the eighteenth century McCall Theal, as quoted by Vorster, writes: "The Church was in one sense merely an engine of the State, and was always and in every sense subordinate to the Council of Polity" (Vorster 1956:39). Apart from the matters mentioned above, many more examples of the Council of Polity controlling ecclesiastical matters can be added (Vorster 1956:39-43). In 1759 they even refused the churches at the Cape permission to continue meeting in a local major assembly, thus putting back the ecclesiastical development of the church in South Africa for many years.

All of the above attests to the fact that between the years 1652-1795 the Council of Polity had a typically Constantinian approach towards the church in South Africa: one of not merely protecting the church but also controlling it, just as it was the case in the Netherlands.

In 1795 the British took over the Cape for the first time; the occupation lasted until 1803. In the official Act of Surrender it was stated that the colonists would retain their existing privileges, including those pertaining to religious matters. Very soon it appeared that the authorities would lay claim to their patronage rights, such as that the political commissioner maintained his position in church meetings; the custom pertaining to the election of elders and deacons continued; and the authorities saw it as their legal right to remove a minister from a congregation without consulting the church council. Church councils had to take an oath of allegiance to the British monarch and in 1802 British troops were quartered in a church

building in Graaff-Reinet during military actions in the region (Van der Watt 1976:69).

During the time of the Batavian rule at the Cape, 1804–1806, the ideas of equality and tolerance were very prominent. Commissioner De Mist wanted a separation of church and state, which meant that there was no longer a privileged church. However, in practice, the government still controlled the church. The government appointed ministers in congregations, moved them to other congregations and paid their salaries, while the election of elders and deacons was also subject to the approval of the authorities. In new congregations the magistrate appointed the new church council, and the government determined the salary of ministers as well as baptismal, membership, marriage and burial fees. The financial statements of a congregation had to be approved by the magistrate. In some cases even the time of church services was determined by government. While there was no longer an established or public church in South Africa, churches in fact became not much more than a department of government (Van der Watt 1976:70).

In 1806 the British once again occupied the Cape. Once again there was a guarantee that that no exceptional changes would be made to church-state relations. The Church Ordinance of De Mist was to be maintained, and the government was determined to apply the Ordinance. The church was controlled in more than one way. The Political commissioner continued to have a seat in the church council of Cape Town congregation, and in 1814 the practice was expanded to include all the congregations; also, the names of chosen elders and deacons still had to be submitted to the government for approval. At one stage the governor required that he would make the choice of deacons from two names that had to be submitted to him; the official functions of a church minister was completely controlled by the government; the government appointed, placed and dismissed ministers and in some cases even disciplined them. Under the rule of Lord Charles Somerset it was a deliberate goal of the government to anglicise the Dutch Reformed Church – for this purpose it used the Scots ministers (Van der Watt 1976:70–71).

In 1843 the Church Ordinance of De Mist was replaced by Ordinance 7 of 1843. This Ordinance ostensibly made the church more free from control by the government, such as that Political Commissioners no longer took a seat in church meetings, and the

church received the power to regulate its own internal affairs. The Ordinance was presented under the heading of “The Separation of Church and State Petition”. Yet in practice the church remained subject to government in so far as the government controlled the church through the power of the purse and the privilege of presenting ministers to congregations. Furthermore, the Ordinance restricted the church with regard to its faith character, its organisation, its competence and its geographical limits (Kleynhans 1973:80-84). It was generally accepted that Ordinance 7 of 1843 severely restricted the freedom of the church (Van der Watt 1980:44-46).

The Dutch Reformed Church in South Africa (the Cape Province) eventually decided on 21 October 1957 to ask the Government to revoke Ordinance 7 of 1843.

The Dutch Reformed Church in South Africa declares and confirms its historical view that this Church as an organized body had an independent existence in own competence even though always subjected to the articles of law applicable to the church. Since the existence of the church is not dependent on the articles of law, Synod, given the legal advice which was obtained, mandates the Moderature to approach the authorities to revoke Ordinance 7 of 1843.

(Die Nederduitse Gereformeerde Kerk in Suid-Afrika verklaar en bevestig hiermee sy volgehoue historiese standpunt dat hierdie Kerk, as georganiseerde liggaam, steeds in eie kring ‘n selfstandige bestaan gevoer het, hoewel noodwendig onderhewig aan wettereregterlike bepalings wat van owerheidsweë van tyd tot tyd op die Kerk van toepassing verklaar is. Aangesien die bestaan van die Kerk dan nie van sodanige wettereregterlike bepalings afhanklik is of daarop gevestig is nie, besluit die Sinode hiermee dat dit aan die Moderatuur opgedra word om in die reses, ooreenkomstig regsadvies, die aangewese owerheidsinstansie te beweeg om die ter sake wettereregterlike bepalings, naamlik Ordonnansie 7 van 1843 en latere wetgewing wat dit wysig, te herroep) (Kleynhans 1973:95).

In 1948 the Nationalist Party came into power and very soon started to enforce its policy of apartheid on the whole of the country, including the churches. It cannot be said that there was no tolerance of different faith convictions in the country, but all along the government was controlling the churches through its policies. In many cases Afrikaans speaking churches not only subscribed to the policies of the government but also encouraged them. Examples of this include the Prohibition of Mixed Marriages Act 55 of 1949 which prohibited marriages between couples from different race groups; the Immorality Amendment Act 21 of 1950; Sexual Offences Act 23 of 1957; the Group Areas Act 77 of 1957; and the Native Laws Amendment Act 36 of 1957 with the so-called church section (section 29(c)). According to this section, non-whites could be prohibited from attending church services in white areas. Later it was explained that the intention was not to prohibit *bona fide* church meetings as long as these meetings were not used to disturb the public order (Van der Watt 1987:84-86). The fact remains that religion and elements of the freedom of religion were controlled by the policies of the government.

In December 1960 the Cottesloe deliberation took place between delegates from different churches in South Africa as well as members of the World Council of Churches. The Dutch Reformed Church was part of the deliberation. At the end of the deliberation a statement was issued with decisions, which were seen as very contentious by some. The most contentious of these regarded the following: (1) All race groups in South Africa were seen as living permanently in the country, sharing in all privileges and responsibilities. (2) The natural diversity among people is not eradicated by the unity of the body of Christ – yet the unity must also be expressed. This meant that nobody could be excluded from a church on the grounds of race or colour. (3) There are no scriptural grounds for prohibiting mixed marriages. (4) It is the responsibility of the authorities to look after matters such as insufficient salaries, job reservation, the negative effects of migratory labour on families; the planning of urban areas for people of colour in which ownership was taken into account; and the poor standard of communication between the different race groups and their leaders in the country.

After the delegates of the Dutch Reformed Church in Africa issued a statement in which they rejected any form of integration in South Africa, the delegates of the Dutch Reformed Church also

issued a statement in which they confirmed that the policy of differentiation was the only realistic solution for the problems of the country. However, they also stated that it was the task of the church to be the conscience of the government – in other words, it was the task of the church to test the whole of reality against the principles of Scripture.

The fact that the deliberation made some negative sounds towards the policy of the government caused reaction – some positive, some negative. The then Prime Minister, H F Verwoerd, reacted very negatively in his annual New Year radio address, stating that the decisions were not the official viewpoint of the Dutch Reformed Church. The official viewpoint would be put by the synods. In the press and in different congregations of the DRC there was heated reaction by members of the church. In 1961 the Federal Council of Dutch Reformed Churches, the Synodical Commission of the Orange Free State, as well as the synod meetings of Natal, South West Africa, the Transvaal and the Cape all rejected the Cottesloe decisions (Van der Watt 1987:105-112).

Although the DRC delegates to Cottesloe made it clear that they saw it as the task of the church to be the conscience of the government and to measure the whole of life against the principles of Scripture, the fact remains that the church in its major assemblies made a U-turn when it became clear that the Cottesloe decisions criticised the policy of the government. Once again the government succeeded in controlling the church – once again a Constantinian relationship between church and state prevailed.

Contrary to the argument of Kuperus that the DRC did not develop in its view on the relationship between church and state, and that it actually only deferred to its conservative members while the state continued with its reform efforts after 1979, this article argues that after Cottesloe there was serious reflection within the DRC on various matters regarding its relationship to the state. The argument is substantiated by the fact that the General Synod of the DRC came into being in October 1962. The church developed in its view on freedom of religion. In this regard it is very interesting to compare the formulation on freedom of religion in the first Church Order of the General Synod in 1962, where it was said: “The Church accepts with gratefulness the protection by the authorities as well as the recognition of its undeniable right to freedom of religion in confession and assembly with the proviso that these freedoms will

not be misused to undermine the foundations of state authority or to cause chaos in the public sphere” (Church Order 1962: art 65 c) and the formulation in *Church and Society* of 1990, paragraph 301: “The principle of religious freedom must be maintained at all times. This means that the government must be impartial to all churches and religions, that scope must be given in which the church may continue with its work without government interference and that no one will be discriminated against on account of their religious convictions” (*Church and Society* 1990:par 301). It is also significant how the DRC grew in its view on the relationship between church and state. In 1962 the Church Order reads: “The Church accepts with gratefulness the protection by the authorities” (Church Order 1962, art 65). In the same art 65 (Church Order 1962), the church claims that it is independent in its own competency, which means that the church has an inalienable right to freedom of religion in terms of its confession of faith and right of association. It also claims that it is the church's sacred calling to address the state and the world in a prophetic manner according to the gospel. The Church Order also makes no pronouncement on the state's duty towards the church as it appears in article 36 of the Belgic Confession of Faith. The article does declare that the church is subject to the laws of the country in as far as they are not in conflict with the word of God (see also Strauss 2003:253). In 1990 we read the following in paragraph 290 of *Church and Society*:

It is the task and calling of the government, as servant of God, to ensure peace, rest and justice, and to care for the welfare of all its subjects. The government is the only body which received the right from God to use the power of the sword in the pursuit of its calling. This implies *inter alia* that the government will create a climate in which it is possible for the true church of Christ to withstand all idolatry and false worship, by means of the proclamation of the Word of God, to oppose the kingdom of the antichrist and to promote the kingdom of Christ (*Church and Society* 1990:par 290).

Also, between 1960 and 1994 serious discussions took place within the church on the formulation of article 36 of the Dutch Confession of Faith: discussions which led to a reformulation to the effect that it was not the task of the state to promote the church, but that the state had to create favourable conditions in which the church could fulfil

its calling and task (*Church and Society* 1990:290). It is also very significant that in 1986 the DRC officially declared:

Belief in the Triune God, his revelation in Scripture and the expression of this in the accepted articles of Faith, is the only condition for belonging to the church of Jesus Christ; therefore this belief is the basic condition for becoming a member of a Dutch Reformed Church (*Church and Society* 1986:par 265).

In 1990 the following was decided:

Belief in the God of Holy Scripture as expressed in the three Formularies of Unity is the only condition for belonging to a Dutch Reformed congregation as congregation of the Lord Jesus Christ. Membership of all Dutch Reformed congregations are open to any believer who accepts the confession of the church (*Church and Society* 1990:par 251 & 252).

In those years serious reflection also took place in theological forums on the nature of the church and the kingdom of God. Much of this was formulated in the various editions of *Church and society* as well as in the writings of DRC theologians. The DRC realised that as a church it was not and could not be the handmaiden of the state, it had its own specific task and calling to fulfil. This realisation continues under the new Constitution, which guarantees freedom of religion for churches and religions in South Africa. In this regard it is very significant to note that already in 1986, long before 1991, the General Synod of the DRC declared that forced separation and division of peoples could not be considered a biblical imperative: “The attempt to justify such an injunction as derived from the Bible must be recognised as an error and be rejected” (*Church and Society* 1986:par 305). In 1990 the following wording was used:

While the Dutch Reformed Church over the years seriously and persistently sought the will of God and his Word for our society, the church made the error of allowing forced separation and division of peoples in its own circle, to be considered a biblical imperative. The Dutch Reformed Church should have distanced itself much earlier from this view and admits and confesses its neglect (*Church and Society* 1990:par. 283).

In conclusion to this part of the article it can be said that from 1652 until 1994 it was a predominantly Constantinian model of the relationship between church and state that to a greater or lesser degree controlled the relationship between church and state in South Africa. This meant that the church was subjected, nearly always with its own consent, to control by the authorities. From 1948 it can be said that the control by government was largely inspired by the political policies of the National Party. During these times one cannot speak of freedom of religion for churches and religions in South Africa – it was much rather a case of denominations and religions being tolerated. But it was also a toleration that went just as far as the policy of the government in power. Many examples from history, especially after 1781, right up until 1994 can be called as witness to this fact. At the same time it must be admitted that from 1961 onwards serious thinking on the relationship between church and state took place within the Dutch Reformed Church, although to a large extent a Constantinian relationship between church and state continued to exist up until 1994.

After 1994 with the new Constitution a new era with regard to freedom of religion came into existence in South Africa. Freedom of religion became a constitutionally guaranteed right. The question is what that means and how freedom of religion should be understood and managed in the new South Africa. This will be addressed in the next part of the article.

3 PART 2: FREEDOM OF RELIGION IN SOUTH AFRICA AFTER 1994

3.1 The new Constitution

In 1994 a new Constitution was accepted (it was finalised in 1996) and for the first time in the history of South Africa freedom of religion was guaranteed.

Under the current Constitution:

3.1.1 The South African State can be defined as a Constitutional State which means that the State makes use of a written Constitution and a Bill of Rights (Chapter 2 of the Constitution) to obtain unity among the diversity of legal groups and legal interests in the country.

3.1.2 The Constitution is the highest authority in the country (Constitution a.2).

3.1.3 The Constitution distinguishes between organs of the State (a.239) and organs of civil society [a.31(1)(b)].

3.1.4 According to the Constitution, persons from a certain language, cultural and religious group cannot be prohibited to enjoy, together with other members of their group, their culture, use their language and practice their religion [a.31(1) (a)].

3.1.5 The Constitution also provides for the possibility that the citizens of South Africa may form cultural, language and religious associations or other organs of civil society, maintain such associations and also join such associations [31(1) (b)].

3.1.6 The Constitution also guarantees the right to freedom of conscience, religion, thoughts, conviction and opinion [a15 (1)]. Under certain conditions religion may also be practiced at certain state or state aided institutions [a 15 (2)] while marriages may *inter alia* be conducted according to a religious system as long as it can exist in accordance with other sections of the Constitution [15 (3) (a) (i) and (b)].

3.1.7 The Bill of Rights in the Constitution is prescriptive for the State and organs of the State [a.8(1)] as well as for natural and legal persons, such as churches and religious communities [a.8(2)].

3.1.8 Section 36 of the Constitution makes it possible for the State as well as for organs of civil society to limit certain rights of the Bill of Rights [a.36].

- The State can limit rights either by way of an internal limitation section within a section [9(2), 15 (2) (a), 25 (2) and 29 (2)] or by means of an external law which is acceptable within the context of a just democratic society.
- Institutions of civil society can use the limitations clause [section.36] of the Constitution to limit certain sections of the Bill of Rights in their own internal constitutions and regulations, given the provisions and conditions made for such a limitation in section 36 (Landman 2006:6-8).
- Section 234 of the South African Constitution allows for charters of rights: “In order to deepen the culture of democracy established by the Constitution, Parliament

may adopt Charters of Rights consistent with the provisions of the Constitution.”

3.2 Religious pluralism in South Africa

Statistics show that there is a majority religion in South Africa – the Christian religion. However, within the Christian religion there is no majority denomination – they are all minority denominations. At the same time none of the other religions in South Africa can claim to be a majority religion – quite the contrary! With regard to religions and religious denominations there are no majorities in South Africa – they are all minorities (*South African Christian handbook* 2005-2006:28-34).

South Africa like many other countries in the world not only has a wide variety of Christian denominations but also a variety of religions that all exist within the boundaries of one state. There is indeed a plurality (multiplicity, diversity) of complementary, overlapping and mutually dependent institutions and associations which make up the social face of South Africa. One can say all of this is rooted in God’s creation and forms part of the Kingdom of God. They are all called to live *coram Deo* and are called to respond to the calling of God's rule over them. All these institutions, directions and contexts will in the end be responsible to God for the way in which they discern their task and do their work.

The principle of *complementary responsibilities* suggests that faithful living in each area of society must be determined by discerning, in the light of the Bible and creation, the nature and calling of each social area. This breaks with the classic liberal idea that autonomous individuals determine how institutions should function in society, including the state. Classic liberals want to limit the state with *external* constraint of “consent”, later understood as popular sovereignty functioning through the majority mechanism. The principle of complementary responsibilities limits societal institutions and the state in two ways: by calling them to be faithful to their God-given calling and by asking them to respect and serve other societal institutions which each have their own calling (Hiemstra 2005:21).

The fact that the plurality of institutions and associations are mutually interdependent means that no institution or association is

autonomous – a law unto itself; they all exist, or should exist, to enable humanity to achieve its true unifying purpose, namely to love God and neighbour (Hiemstra 2005:22–23).

Apart from the *plurality of institutions and associations* in the Kingdom of God, a *plurality of directions* is also a reality that has to be reckoned with. “The full reality of institutional plurality in society can be unfolded in many religious and ideological directions” (Hiemstra 2005:46). The fact that many of the ideological and religious directions of institutions and associations in society cannot be accepted by Christians does not mean that they should not be respected and tolerated. Disagreement does not make them less real or diminish the calling of both church and state to deal with the plurality of directions in society – each of course in its own way. “The state must respect and tolerate the convictions and conscience of its neighbours in a plurality of institutions within society while vigilantly executing its limited task of public justice” (Hiemstra 2005:47). The church must also respect the convictions of its neighbours in a society with a plurality of other directional individuals, institutions and associations. This does not mean that the church and Christians must approve of all the different directions in society; it does mean that the church and Christians cannot deny their existence. The church must also never forget that it has the undeniable task of proclaiming through word and deed the gospel of the Kingdom of God, calling all people, institutions and associations of whatever direction they may be to obedience to the Triune God.

All of this not only poses questions to government as to how it should cope with such a variety of religions: it is also a question of how these denominations and religions can co-exist and at the same time all enjoy religious freedom, feel safe and not be threatened.

3.3 Freedom of Christian people and guaranteed freedom of religion

A clear distinction must be made between the freedom of religion that every human being possess as a quality of life and freedom of religion as something guaranteed by the constitution of a country. Although there are examples in history of efforts by governments to give citizens a certain amount of freedom to practise their religion, like the *Edict of Milan* (315), the *Magna Charta* (1214), the *Edict of Turda* (1568) and the *Edict of Nantes* (1598); it was really only after the Second World War that international charters of rights were

accepted to protect freedom of religion. In this regard there are art 18 of the *Universal Declaration of Human Rights* (10 December 1948); art 18 of the *International Convention of Civil and Political Rights* (16 December 1966) (Malherbe 2007: Motivation art 6; Lerner 1996:86, 91); art 9 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome 1950/1953) (Malherbe 2007: Motivation art 6; Gunn 1996:305). Furthermore there is also the *African Charter for Human and Peoples' Rights* and the *Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief* (1981) and the *Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities* (1992) (Malherbe 2007: Motivation art 6).

For Christians the deepest foundation for freedom is that God created man in His image with the capability to choose to serve God. Man lost this freedom when he chose to follow the way of evil instead of the way of God. In Jesus Christ the freedom of those who believe in Him was restored. This is a freedom that is not dependent on any constitutional guarantee. This is one reason why Christianity was able to endure through many centuries and many regimes without having a constitutionally guaranteed right to freedom of religion. Where there is a constitutional guarantee for freedom of religion, it enhances the freedom that Christians have in Christ and offers Christians the opportunity to publicly proclaim their faith identity in Christ without any fear of prosecution or discrimination.

3.4 Freedom of religion as a constitutional right

It is difficult to put freedom of religion as a constitutional right into a simple definition. It is much more a concept that needs to be circumscribed. It is also a concept that can continue to develop in future. The Constitution describes freedom of religion in rather vague terms merely as "... the right to freedom of conscience, religion, thought, belief and opinion" [Constitution section 15 (1)]. It further states that "... religious observances may be conducted at state or state aided institutions", provided that these comply with certain conditions [Constitution section 15 (2)]. Section 15 (3) provides for "... marriages conducted under any tradition, or a system of religious, personal or family law". Primarily it is and remains the task of the religions and religious people of South Africa to identify those rights in a way consistent with their own religious identity and within the ambit that the Constitution and the laws of

the country allow. If the religions and religious people of South Africa do not accept this task it will be taken over by government, the courts of the country and society and it will be fulfilled in a way which will not necessarily further freedom of religion: a way that could once again promote Constantinianism. In fulfilling their task, churches and religions must be make very sure of their deepest roots and identity and also make sure of the rights and obligations that spring from those roots and identity. They must also take note of the Charter of Human Rights contained in the second chapter of the Constitution, as well as of the Acts of parliament which further describe the content and application of the rights concerned.

The following examples of such acts may be mentioned:

- Section 9 (the right to equality): the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000;
- Section 23 (labour rights): the Labour Relations Act, Act 66 of 1995;
- Section 32 (the right to access to information): the Promotion of Access to Information Act, Act 2 of 2000;
- Section 33 (the right to administrative justice): the Promotion of Administrative Justice Act, Act 3 of 2000.

Directly or indirectly, numerous other acts give effect to the rights in the Constitution as well, as in the case of health, housing, education, the environment, the rights of children, the right to vote, and the rights of accused persons and prisoners (Malherbe 2007: Motivation art 4). Religions need to position themselves with regard to the rights in the Constitution and acts that describe the content and application of those rights in a responsible manner in order to determine whether they can subscribe to them as a religion, or to acquaint themselves with the grounds on which they may want to limit those rights in their organisation.

3.5 A charter of religious rights for South Africa

Currently a Charter of Religious Rights for South Africa is being developed. It was put as a proposal to a workshop of churches and religions held in Stellenbosch on Thursday, 14 February 2007. After it was circulated very widely amongst churches and religious communities for their comments a few amendments were made on 29 May 2008. In the latest amended version of the *Proposed Charter*

for Religious Rights and Freedoms the following rights and obligations are identified – the rights and obligations are merely mentioned without going into all the subdivisions. The references are to the articles in the proposed amended *Charter of religious rights and freedoms for South Africa*.

- The right to believe or not to believe (art 1-2.4);
- The obligations of the state with regard to religious rights (art 3-3.2, art 9.3);
- The right to observe and exercise one's religion (art 4-4.5);
- The right to education consistent with ones religious convictions (art 7 and 8);
- The right to maintain particular matrimonial, family and personal legal traditions (art 5);
- The right to institutional freedom (art 9);
- The rights and obligations of religion with regard to the laws of the land (art 9.4, 10);
- The right of religion to freedom of expression (art 6-6.3);
- The right of religion to freedom of association (art 1-2.2);
- The right of religion to freedom of propagation (art 6.2);
- The right to religious dignity (art 6.3);
- The right of religion to solicit, receive, manage and spend voluntary financial and other forms of support and contributions art 11);
- The right of religion to conduct upliftment and charity work in the community and to establish maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose (art 12).

All of the above in fact describes what freedom of religion is. It can also be said in the words of John Witte (2003:37) that freedom of religion is

- (i) freedom of conscience;
- (ii) the free exercise of religion;

- (iii) religious pluralism;
- (iv) religious equality;
- (v) the separation of church and state; and
- (vi) the disestablishment of religion by the state.

4 CONCLUSION

Between 1652 and 1994 religion in South Africa, in line with the Constantinian model for the relation between church and state, was controlled either by the governing authority, the government or the policy of the ruling party. In the strict sense of the word there was no freedom of religion. Christian churches and other religions were tolerated and were subjected to the control of the government.

In 1994 (1996) South Africa got a Constitution which guaranteed freedom of religion. The Constitution does not clearly identify in detail what freedom of religion implies. It is the task of religions in South Africa to identify the religious rights that they claim. If they do not do this, the state will do it for them by way of either legislation or the decisions of the courts of the country – and this will not further the cause of religious freedom, but rather relegate South Africa to a Constantinian model of the relationship between church and State – a situation where the state controls religion.

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