

Pieter Coertzen

# Religious Freedom and a South African Charter of Religious Rights and Freedoms

## Abstract

This article is about freedom of religion and the consequences that it has in South Africa. Firstly the South African scene is sketched – a country with many pluralities. The question is whether this must necessarily lead to a clash and conflict or whether dialogue and co-operation is possible. The road of dialogue and co-operation was chosen and this led to a South African Charter of Religious Rights and Freedoms and the establishment of a South African Council for the Protection and Promotion of Religious Rights and Freedoms. Along the way leading to the Charter an attempt is made to determine what freedom of religion means, what the role of the state is in this regard and what the character of a christian contribution should be to the dialogue and co-operation in a country of pluralities.

## 1. The South African Scene

### 1.1 *Plurality of peoples*

Total population: 49,9 million

- Black 39 682 600 million (79,4%)
- White 4 584 700 million (9,2%)
- Brown 4 424 100 million (8,8%)
- Indian 1 299 300 million (2,6%)<sup>1</sup>

### 1.2 *Plurality of Languages*

#### 1.2.1 *Eleven official languages*

#### 1.2.2 *Languages spoken in households:*<sup>2</sup>

- IsiZulu 23,82%
- IsiXhosa 17,64%

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<sup>1</sup> SouthAfrica.info The Official Gateway. [http://www.southafrica.info/pls/procs/iac.page?p\\_tl=2779&p\\_t27372&p\\_t3=0&p\\_t...](http://www.southafrica.info/pls/procs/iac.page?p_tl=2779&p_t27372&p_t3=0&p_t...) 13/4/2011.

<sup>2</sup> SouthAfrica.info The Official Gateway, 13/4/2011.

– Afrikaans	13,35%
– Sepedi	9,39%
– SeTswana	8,2%
– English	8,2%
– SeSotho	7,93%
– Xitsonga	4,44%
– SiSwati	2,66%
– ThsiVenda	2,28%
– siNdebele	1,59%
– Other	0,48%

### 1.3 Plurality of Religions

1.3.1 Christianity is the majority religion in South Africa – Christians 80%<sup>3</sup>

1.3.2 Jewish	0,2%
1.3.3 Islam	1,5%
1.3.4 Hinduism	1,2 %
1.3.5 Buddhism	0,0%
1.3.6 African indigenous	0,3%
1.3.7 No religion	10,7% <sup>4</sup>

### 1.4 The position of Christianity

Within Christianity there is no majority denomination<sup>5</sup>

1.4.1 Mainstream Churches Tot.: 39,9%

– Reformed	7,2%
– Anglican	3,8%
– Methodist	7,4%
– Lutheran	2,5%
– Presbyterian	1,9%
– Congregational	1,1%
– Roman Catholic	7,0%

1.4.2 Pentecostal/charismatic 7,3%

1.4.3 Other Churches 9,5%

1.4.4 African Independent 32,6%

## 2. Clash or a dialogue and co-operation?

The term “the clash of civilizations” was first used 1990 by Bernard Lewis in an article titled *The Roots of Muslim Rage* (*The Atlantic Monthly*, September,

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<sup>3</sup> *South African Christian Handbook 2007–2008*. Tydskriftemaatskappy van NG Kerk, Wellington 2007.

<sup>4</sup> *South African Christian Handbook 2007–2008*, 69.74.

<sup>5</sup> *Idem*. 69.

1990). In 1992 Samuel P. Huntington in a lecture at the American Enterprise Institute formulated his theory of a *clash of civilizations* which he then developed further in an article *The Clash of Civilizations?*.<sup>6</sup> In his lecture and article Huntington responded to Francis Fukuyama's book *The End of History and the Last Man* (1992). In his article Huntington writes "It is my hypothesis that the fundamental source of conflict in this new world (the world after the Cold War) will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating of source conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principle conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future".<sup>7</sup> About civilization Huntington writes "A civilization is a cultural entity. Villages, regions, ethnic groups, nationalities, religious groups, all have distinct cultures at different levels of cultural heterogeneity." – A civilization is thus the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes humans from other species. It is defined both by common objective elements, such as language, history, religion, customs, institutions, and by the subjective self-identification of people.<sup>8</sup>

Given these characteristics of civilizations and cultures South Africa can clearly be in line for a clash between civilizations. There is for instance the Zulu festival of Ukubuthwa as an typical Zulu cultural festival<sup>9</sup> (le Roux, 2009:13); recently when president Zuma married his third wife and there were outrages against it, he claimed that polygamy was part of the Zulu culture and that he saw nothing wrong with it, he claimed that he had a right to be a polygamist; nowadays when one goes into Absa banks there are pamphlets available for Muslim customers indicating special bank services in accordance with Sharia laws.<sup>10</sup> Many more examples can be cited from the different cultures in South Africa. Diverse elements of religious and customary pluralism is indeed present in the South African society. The question is how must Christianity and in fact all religions in South Africa react to this diversity. In response to the theory of the clash of civilizations the former Iranian president Mohammad Khatami introduced the idea of *Dialogue Among Civilizations*. The term *Dialogue among Civilizations* became more known after the United Nations adopted a resolution to name the year 2001 as the year of *Dialogue among Civilizations*. This article is an attempt to contribute to this dialogue and the eventual co-operation

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<sup>6</sup> Huntington, Samuel: 'The Clash of Civilizations'. In: *Foreign Affairs*, Vol. 72, No 3, Summer, 1993, 22–49.73.

<sup>7</sup> Huntington: *Clash*, 22.

<sup>8</sup> Ibid. 24.

<sup>9</sup> Roux, A. le: *Afrika veroordeel Zoeloe-ritueel*. Die Burger, 30 September 2009, 13.

<sup>10</sup> ABSA *Islamic Banking, Banking the Shari'a way*, s.a.

between religions in South Africa and at the same time make a contribution from the perspective of Reformed theology.

### 3. Perspectives on Plurality

#### 3.1 *The reality of pluralities*

Plurality is a reality in our modern world, and definitely also so in South Africa as can be seen from the above mentioned statistical facts.

The Canadian political scientist J. L. Hiemstra distinguishes a plurality of *institutions and associations*, a plurality of *directions* and a plurality of *cultural contexts* in society.<sup>11</sup> In every society there are a plurality of institutions associations which are complementary, overlapping and mutually inter-dependent. This means i.a. that no institution or association is outonomous – a law unto itself – they all exist, or should exist to enable humanity to achieve its true unifying purpose – which for christians will mean to love God and neighbour. About the plurality of directions Hiemstra writes “The full reality of institutional plurality in society can be unfolded in many religious and ideological directions.”<sup>12</sup> The pluralism of directions which unfolds in a many religious and ideological directions<sup>13</sup> is also something very real in many societies, it entails both a confessional and a social element. Confessional pluralism is aimed at entertaining and accommodating a diversity of religious expressions and organizations in a community. The social aspect of religious pluralism is aimed at entertaining and accommodating a diversity of social institutions such as churches, synagogues, mosques and other religious associations, families, schools, welfare institutions, academic and civil associations – they all play a very important role in the keeping and expansion of religion. All these religious institutions also play a very important role against the interference of the state in religious affairs; the establishment of religious rights, as well as supplying vital sources for theology, morality, charity, and discipline in society<sup>14</sup>.

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 diminishes the calling of both religions and the 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 neighbors in a plurality of institutions within society while vigilantly

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<sup>11</sup> Hiemstra, John: ‘Church, State and Kingdom of God’. Overview. *Rec Focus. Quarterly Journal from the REC Commissions*, 5, Number 2, June 2005, 21–25.

<sup>12</sup> Hiemstra: *Church, State*, 46.

<sup>13</sup> *Ibid.* 46.

<sup>14</sup> Witte, John: *Religion and the American Constitutional Experiment. Essential Rights and Liberties*. Westview, Boulder 2000, 44–45.

executing its limited task of public justice"<sup>15</sup>. The religions, including 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, but it does mean that the church and Christians cannot deny their existence or belittle them. The church must also never forget that it undeniably has the 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.

Hiemstra also identifies a third kind of diversity namely that which he calls *contextual plurality*. This refers to the fact that diverse cultures around the world and throughout different historical eras have developed the cultural and social potential of creation in different ways. Hiemstra concedes that some of these developments may be due to the sinful nature of mankind, but more often these unique geographical and historical contextual developments are simply different legitimate responses to God's creation<sup>16</sup>.

### 3.2 Freedom of religion

K. Blei defines freedom of religion in terms of the Universal Declaration of Human Rights (1948). From this he points out that religious freedom has both an individual and a social side. Religious freedom also means more than just having a religion and upholding inner convictions and feelings. Freedom of religion includes the right that everybody can express their religion and faith in worship, teaching, practice, and maintenance. This view of religious freedom means that individuals and religious groups want to live their religion, act according to it, and be witnesses to the truth of their faith, also in public. According to Blei, freedom of religion also relates to the fact that the religious convictions of people usually contain views on how they think society should be organized. He also points out the important fact that freedom of religion implies that the authorities must accept the responsibility and duty to respect and guarantee the right to freedom of religion. This responsibility is not accomplished if the authorities just steer away from an active involvement in religious matters. "It is not just a matter of keeping 'hands off' from religious communities in their territory and leaving them alone. On the contrary, active engagement by the state is required in order to make religious freedom a reality to all religious people. The state should create the possibilities and facilities so that freedom can really be enjoyed and implemented. Otherwise, the principle of religious freedom is in danger of being doomed to remain just a nice principle without significance in practice."<sup>17</sup> At the same time, it can also

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<sup>15</sup> Hiemstra: *Church, State*, 47.

<sup>16</sup> *Ibid.* 23–24.

<sup>17</sup> Blei, K.: *Freedom of Religion: Principle and Practice*. <http://www.antenna.nl/ikvoud/docs/div/presentation-blei.html>

be said that just as the state has an active responsibility to guarantee and promote freedom of religion, churches and religious communities have a similar responsibility – they must see to it that their order and structures are adequate for the practice of freedom of religion.

In his attempt to define religion, John Witte distinguishes between the functional and institutional dimensions of religion. The functional dimension entails all *beliefs and actions* that concern the ultimate origin, meaning, and purpose of life, of existence. It also involves the *responses* of the human heart, soul, mind, conscience, intuition and reason to revelation, to transcendent values, to what Rudolf Otto once called: the “idea of the holy”. The institutional dimension entails a *creed which* defines the accepted cadre of beliefs and values concerning the ultimate origin meaning, and purpose of life. A *cult*: which defines the appropriate rituals, liturgies and patterns of worship and devotion that give expression to the beliefs. A *code of conduct*: which defines the appropriate individual and social habits of those who profess the creed and practise the cult and a *confessional community*: which defines the group/individuals who embrace and live out the creed, cult, and code of conduct, both on their own and with fellow believers.<sup>18</sup> Fundamental to freedom of religion is the recognition of (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<sup>19</sup>. In a country like South Africa with its plurality of religions within the boundaries of one state these are very useful distinctions on the one hand for the state to know what the essential rights and liberties of religions are vis-à-vis the state but also to empower religions to know what their rights are and to contribute to the common good of the country.

#### 4. The nature of a Christian contribution to the dialogue and co-operation

Because Christians are called to seek justice<sup>20</sup> one can argue that they are also called to political involvement, as well as involvement in society. The belief that God’s redemption is at work in this present world is one of the reasons why Christians ought to engage in political activity. According to reformed theology Christians must bring Christ’s renewing influence to bear on public life, furthering the cause of God’s Kingdom in this world in obedience to Scripture. In a country like South Africa this will of necessity entail both dialogue and co-operation with other religions and cultures. As a

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<sup>18</sup> Witte, John: ‘Introduction’. In: John Witte & Johan D. van der Vyver: *Religious Human Rights in Global Perspective. Religious Perspectives*. Marthinus Nijhoff Publishers, The Hague 1996, xxv.

<sup>19</sup>Witte: *Religion and the American Constitutional Experiment*, 37.

<sup>20</sup> Amos 5,15.24.

matter of fact the make-up of the pluralistic South African society offers a unique opportunity for dialogue and co-operation between the religions in our country for the sake of the good of all the citizens of the land and as a witness to the common grace of God. As to the nature of Christian involvement the following characteristics can be mentioned:

#### *4.1 Modesty*

Christians must always be cautious to claim that they speak for the Lord. Smidt quotes Skillen "We must constantly act with an attitude of true humility. We should undertake every civic duty, every political action – we can add every dialogue and co-operation – with the avowed understanding that they are not God's will but only our response to God's will. The attitude of humility will lead us to be modest and self critical in our claims and stated intentions."<sup>21</sup> A true understanding of freedom of religion ought to keep Christians from an uncompromising claim that they alone have the answers to the problems of the land and nobody else can make any meaningful contribution. At the same time Christians must witness to the fact that they have a very important contribution to make.

#### *4.2 Toleration*

Toleration is a second important characteristic of a Christian contribution to dialogue and co-operation. Tolerance does not mean indifference or relativism. Genuine toleration calls for peaceful co-existence despite the fact that there are areas where real disagreement exists. Forbearance/toleration means permitting the other with whom we disagree to exist and, when appropriate to persuade and engage others by word. In the present age, prior to the full establishment of the kingdom of God that will be fully inaugurated with the second coming of Christ, we must exercise genuine tolerance – an action that defends both truth and co-existence.<sup>22</sup> In Article 8 of the Preamble to the SA Charter of Religious Rights and Liberties it is clearly stated that the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of toleration among the people of South Africa.<sup>23</sup>

#### *4.3 Mutual Respect*

A Third contribution that Christians can make to the dialogue between religions in South Africa is one of respect for the other. To differ from a person and even to differ in a very fundamental way does not mean that one

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<sup>21</sup> Smidt, Corwin: 'The Principled Pluralist Perspective'. In: P. C. Kemeny: *Church State and Public Justice. Five Views*. IVP Academic, Downers Grove Illinois 2007, 147.

<sup>22</sup> Smidt: 'The Principled Pluralist Perspective', 147–149.

<sup>23</sup> *SA Charter of Religious Rights and Freedoms*, Preamble 8.

need not respect that person. For Christians it is very important to always remember that every human being is created in the image of God and as such every person deserves our respect and we are under the obligation to show them respect and to treat them with respect. Article 6, 5 (b) of the Constitution of South Africa states that it is the task of the Pan South African Language Board to promote respect for all languages used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.<sup>24</sup> Article 7 of the Constitution states that the Bill of Rights in the Constitution (Chapter 2), affirms the democratic values of human dignity, equality and freedom. All of this point to the respect that the citizens of SA owe each other and which is in any case a calling for Christians in their fulfilling of the commandment to love their neighbours. Article 8 of the Preamble to the SA Charter of Religious Rights and Liberties highlights the role that a Charter can play in the fostering of a spirit of mutual respect among the people of South Africa when it states “The recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people in South Africa.”<sup>25</sup>

#### *4. 4 Dialogue and co-operation*

In a pluralistic country like South Africa people that share the same kind of values due to their religious convictions, although they do not necessarily belong to the same religious community, need to engage in dialogue and co-operation in the matters that concern all of us; they also need to co-operate with each other in order to articulate and find that which is the best for the country and all its citizens –, the elderly as well as the children, blue collars as well as white collars, single persons as well as married couples and families, government as well as subjects. Article 7 of the preamble to the SA Charter of Religious Rights and Freedoms underlines the importance of the contribution of religion for the furthering of the common good of the people of South Africa. This will need that religions co-operate with one-another.<sup>26</sup>

## 5. A Charter of Religious Rights and Freedoms as part of the dialogue and cooperation

### *5.1 The Constitutional position of Religion in South Africa*

The South African Constitution describes freedom of religion in rather vague terms merely as “ [...] the right to freedom of conscience, religion, thought,

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<sup>24</sup> SA Constitution, art. 6, 5 (b).

<sup>25</sup> SA Charter of Religious Rights and Freedoms, Preamble, 8.

<sup>26</sup> Ibid. 7.



belief and opinion".<sup>27</sup> It further states that "[...] religious observances may be conducted at state or state aided institutions" given that it complies with certain conditions<sup>28</sup> Article 15 (3) provides for "[...] marriages conducted under any tradition, or a system of religious, personal or family law."<sup>29</sup>

Article 9(3) of the Constitution stipulates that the state may not unfairly discriminate directly or indirectly against any one on one or more grounds, including, amongst other religion.<sup>30</sup>

In article 31 the rights of religious, cultural, and linguistic communities are stated namely to enjoy their culture, practice their religion and use their language as well as to form associations and organs of civil society.<sup>31</sup> Article 185 has stipulations on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities<sup>32</sup> while article 234 provides for the possibility that Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.<sup>33</sup>

Primarily it is and remains the task of the religions and religious people of South Africa to identify their religious 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 can again work Constantinianism in hand. In fulfilling their task churches and religions must 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

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<sup>27</sup> *SA Constitution*, article 15(1).

<sup>28</sup> *Ibid.*, article 15(2).

<sup>29</sup> *Ibid.*, article 15(3).

<sup>30</sup> *Ibid.*, article 9(3).

<sup>31</sup> *Ibid.*, article 31.

<sup>32</sup> *Ibid.*, article 185.

<sup>33</sup> *Ibid.*, article 234.

environment, the rights of children, the right to vote, and the rights of accused persons and prisoners".<sup>34</sup> 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 avail themselves of the grounds on which they may want to limit those rights in their organization.

## 5.2 *Why a Charter of Religious Rights and Freedoms?*

Many reasons can be given why a Charter of Religious Rights and Freedoms can be useful. We find most of these reasons formulated in the Preamble to the Charter.

### 5.2.1 *Preamble article 1*

"WHEREAS human beings have inherent dignity, and a capacity and need to believe and organise their beliefs in accordance with their foundational documents, tenets of faith or traditions"<sup>35</sup>

Human beings have the inherent, dignity, capacity and need to believe and to organise their beliefs in accordance with their foundational documents, tenets of faith or tradition. The reference to the "inherent dignity" of humans refers to the Universal Declaration of Human Rights of 1948 which reads "recognition in the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."<sup>36</sup> One can also say that human beings have an inherent need to be religious and to direct his, her or their belief and actions in relation to an ultimate origin, meaning, purpose of life, existence of what is for them "the holy"<sup>37</sup> Each and every human being responds with his, her and their heart, soul, mind, conscience, intuition and reason to revelation, transcendent values, to what is for them "the holy".<sup>38</sup> In addition to this response human beings also have the need to organise their religious beliefs. This can find expression in a creed, a cult, a code of conduct as well as in a confessional community.<sup>39</sup>

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<sup>34</sup> Malherbe, E. F. J.: *Motivation for a Charter of Religious Rights and Freedoms*. 2007, article 4. Photocopy, SA Council for the Promotion and Protection of Religious Rights and Freedoms.

<sup>35</sup> *SA Charter*, Preamble, 1.

<sup>36</sup> Quoted from Witte, John: *The Reformation of Rights. Law, Religion, and Human Rights in early Modern Calvinism*. Cambridge University Press, Cambridge – New York – Melbourne – Madrid – Cape Town – Singapore – São Paulo – Delhi 2007, 32.

<sup>37</sup> Witte: 'Introduction', xxxiii.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

The preamble to the Charter and all the bodies and individuals who endorse it recognise this inherent dignity, capacity and need of all human beings and thereby also recognise the important place of religion in society. Each religion will of course recognise it in terms of their own religion, thoughts, beliefs, opinions<sup>40</sup> and theology. For many Christians and Christian denominations, but also for other religions, the recognition will be done on the ground that man was created in the *image* of God and that God calls his people to recognise, obey and honor Him. The renowned Jewish academic Irwin Cotler sees the essence of religion as that “we are all created in the image of God – organized around the inherent dignity of the human person, and the equal dignity of all persons”<sup>41</sup> which is then organized. Other Christians claim that the “inherent dignity” of the human person stems from human beings *created* by God. The “rights” that people and concurrent associations have are granted to them by God with a specific purpose. This then also brings along certain duties to which persons and associations must adhere.<sup>42</sup>

### 5.2.2 Preamble article 2

“WHEREAS this capacity and need determine their lives and are worthy of protection.”

Article 2 of the Preamble firstly states that the capacity and need for mankind to believe and to organise their religious beliefs is something that determines the lives of human beings.

Many see the right to freedom of religion as the most fundamental human right. Witte quotes Georg Jellinek from his work *Die Erklärung der Menschen- und Bürgerrechte: Ein Beitrag zur moderner Verfassungsgeschichte* (Leipzig, 1895), 42 that religious human rights is “the mother of many other rights”<sup>43</sup>. Cotler writes that the Jewish religion and Jewish religious rights are at the core, the foundation of universal human rights as a whole. He then continues that “violations of Jewish religious rights – be they through forced conversions, expulsions, inquisitions, pogroms, and yes genocide – have been one of the most persistent and enduring hatreds in all of human history.”<sup>44</sup> For Riffat Hassan the Qur’an is *the* Magna Charta of human rights and a large part of it’s concern is to free human beings from the bondage of traditionalism, racism, sexism, slavery or anything else that prohibits human beings from

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<sup>40</sup> SA Constitution, article 15(1).

<sup>41</sup> Cotler, Irwin: ‘Jewish NGOs and Religious Human Rights: a Case Study.’ In: John Witte & Johan D. van der Vyver: *Religious Human Rights in Global Perspective. Religious Perspectives*. Marthinus Nijhoff Publishers, The Hague 1996, 236.

<sup>42</sup> Stoker, H. G.: ‘’n Kursoriese Besinning oor Menseregte’. In: Stoker, H. G.: *Oorsprong en Rigting*, Band 1. Tafelberg-Uitgewers, Kaapstad 1967, 114–115.

<sup>43</sup> Witte: ‘Introduction’, xxxiii.

<sup>44</sup> Cotler: ‘Jewish NGOs’, 236–237.

actualizing the Qur'anic vision of human destiny embodied in the classic proclamation: Towards Allah is thy limit.<sup>45</sup>

The second part of the Preamble 2 states that the capacity and need of human beings are worthy of protection. The South African Constitution in article 234 allows for Parliament to adopt Charters of Rights consistent with the provisions of the Constitution.<sup>46</sup> Already in 1990 Judge Albie Sachs wrote "Ideally in South Africa, all religious organisations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities. [...] It would be up to the participants themselves to define what they consider to be their fundamental rights."<sup>47</sup>

Freedom of religion is guaranteed by article 15 of the Constitution but about the content of this right very little else is said. The South African Charter of Religious Rights and Freedoms is exactly an attempt by the religious communities in South Africa to take up the opportunity offered by Article 234 of the Constitution and to define what they consider to be their fundamental rights. The Charter is a document which comes from a large number of religious communities in South Africa and in it they say what they consider to be their fundamental rights. The determination of religious rights can not be left only to the legislature or to the courts of the country to decide. The religious communities themselves are the bodies to take up this responsibility and they are compelled to this by the SA Constitution that guarantees freedom of religion.

### 5.2.3 Preamble article 3

"WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions."

The notes under article 2 of the Preamble has already referred to the viewpoints from different religions about the centrality and importance of religion. Religion is not something separate that does not belong in the public place. "Religious belief embraces all of life including the state"<sup>48</sup> In the case *Christian Education v Minister of Education* in 2000 the following was said about the role of religion in the lives of people "For many believers, their relationship with God or creation is central to all their activities."<sup>49</sup>

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<sup>45</sup> Hassan, Riffat: 'Rights of Women Within Islamic Communities'. John Witte & Johan D. van der Vyver: *Religious Human Rights in Global Perspectives. Religious Perspectives*. Marthinus Nijhoff Publishers, The Hague 1996, 370.

<sup>46</sup> SA Constitution, article 234.

<sup>47</sup> Sachs, Albie: *Protecting Human Rights in a new South Africa. Contemporary South African Debates*. Oxford University Press, Cape Town 1990, 46–47.

<sup>48</sup> SA Charter of Religious Rights and Freedoms, Preamble, 3.

<sup>49</sup> *Christian Education South Africa v Minister of Education* 200(4) SA757 (CC), para. 36.

Very important in this regard is the fact that the Constitution of South Africa protects the right to freedom of religion.<sup>50</sup> The South African Constitution also recognises that there is no wall of separation between religion and the activities of the state when it allows that in compliance with certain conditions religious observances may be conducted at state or state aided institutions.<sup>51</sup> The Constitution further allows for the recognition of marriages concluded under any tradition, or a system of religious, personal or family law or “systems of personal and family law under any tradition or adhered to by persons professing a particular religion.”<sup>52</sup> Article 31 of the Constitution allows for the forming, joining and maintaining of religious, linguistic and cultural associations and other organs of civil society given certain provisos while article 185 provides for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>53</sup>

All of this makes it important that there must be an equitable regulation of the relationship between the state and religious institutions. For this reason the SA Charter of Religious Rights and Freedoms is a very important and necessary document because by defining and providing details about the content of the religious rights which religions claim, it can help the state to treat all religions in SA on an equitable base. This can help to secure, keep and promote the relatively good relationship that exists between religions and the state in South Africa.

#### 5.2.4 Preamble article 4

“WHEREAS religious institutions are entitled to enjoy recognition, protection and co-operation in a constitutional state as institutions that function with jurisdictional independence.”

Preamble article 4 states the right of religions in South Africa to enjoy recognition, protection and co-operation in a constitutional state. The *raison d’être* for a Charter of Religious Rights and Freedoms is that it spells out what the rights are for which religions can claim recognition, protection and co-operation from a constitutional state. In the last part of the article it is said that religious institutions are institutions that function with jurisdictional independence. The meaning of what is understood under this jurisdictional independence is to a large part spelled out in the five sub-articles of article 9 of the SA Charter of Religious Rights and Freedoms: the right to determine own confessions, doctrines and ordinances; the right to self-decision in these matters, the right to regulate own affairs; the right of authority over own affairs; the right that the judiciary of the country shall respect the authority over own affairs and respect for confidentiality in own affairs and

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<sup>50</sup> *SA Constitution*, article 15(1).

<sup>51</sup> *Ibid.*, article 15(2).

<sup>52</sup> *Ibid.*, article 15(3).

<sup>53</sup> *Ibid.*, article 31 and 185.

communications.”<sup>54</sup> By spelling all of the above out clearly it can help to restrict unnecessary involvement of the state in the affairs of religions.

It is important that article 9.5 of the Charter states that every religious institution is subject to the laws of the land and that any non-observance of a law resulting from the exercise of the rights in the Charter must be justified by the religion.<sup>55</sup> Although it is not said in article 9.5, such justification of the limitation of rights by a religion must be done in terms of article 7.3 of the Constitution of SA.<sup>56</sup>

#### *5.2.5 Preamble article 5*

“WHEREAS it is recognised that rights impose the corresponding duty on everyone in society to respect the rights of others.”

This article in the Preamble states is clearly that every right in the Charter to which religions in South Africa can lay claim brings with it a corresponding responsibility and duty. The one person or body’s right to freedom of religion entails the duty to also recognise the other person or body’s right to freedom of religion. In this sense the Charter fulfills a very important role as a road-map of what the religious rights are that every person, be it an individual or an association, can claim and at the same time what the religious duties are that every person – individual or association – has to obey. Rights never apply without limitations. When a religious body imposes limitations on the rights of its adherents it has the duty to prove that the limitation is done in concurrence with its faith identity or to protect its faith identity. The SA Charter of Religious Rights and Freedoms may never be used to legalise or even open the possibility for criminal activities or actions prohibited by law.<sup>57</sup>

#### *5.2.6 Preamble article 6*

“WHEREAS the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.”

Religion apart from its involvement with individuals in society, is also involved with many other social entities for example, marital unions, families, corporations, social institutions, etc. etc. – that which can be called the plurality of associations. However it can be said the state is the most encompassing

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<sup>54</sup> *SA Charter of Religious Rights and Freedoms*, article 9.

<sup>55</sup> *Ibid.*, article 9.5.

<sup>56</sup> *SA Constitution*, article 7(3).

<sup>57</sup> Malherbe, E. F. J.: *Motivation for a Charter of Religious Rights and Freedoms*. 2007, article 7. Photocopy, SA Council for the Promotion and Protection of Religious Rights and Freedoms.

entity in its own right<sup>58</sup> which a religion/church can encounter in its earthly existence. The state encompasses and co-ordinates, inter-alia by its legislation and policies, all individuals, corporations, and institutions, which include religions, within its sphere of authority.

Christians believe that the authorities are divinely instituted; in other words, it is an instrument of the sovereignty of the Lord Jesus Christ, or to say it in still other words, the state is the great human representative of Christ's sovereignty over the whole of creation – even if a state itself does not always recognize itself as such. This is also why, with reference to Romans 13,6, many Christians confess that state authorities are God's servants who are executing their God-given command. This conviction brings to the fore a remarkable parallel between church and state in that the center of the church's existence is simultaneously also the final center and authority of and over the state – Jesus Christ the Lord!

Apart from being divinely instituted the state is also a historical institution, a human, cultural response to God's call to do justice in the public relations that exist in our lives. Through the course of history the state has taken on many different forms such as kingdoms, principalities, empires, commonwealths, tribal arrangements etc. Sometimes these arrangements were more just and at other times less just. Sometimes they were even straightforwardly unjust, but they were always ways of structuring the political life in their times and contexts. In the same way contemporary states are our societies' better or worse answers to God's call to concretely structure political life. This implies that states may be reformed so that they can deal in a more just manner with society.<sup>59</sup>

The state, as embodying a political community, can be characterized by its specific concern, to ensure that people and institutions, directions and contexts are publicly integrated in just ways. The state that has this as its main task is always territorially bound and should function by way of legal rule with the intent to bring about public justice.<sup>60</sup> In other words, such a state will then be obliged to recognize, integrate and protect the plurality of individuals, associations, directions and contexts which fall under its authority. For the church this will mean – as for all other institutions and associations – that the state must allow them the space and the freedom they need to fully respond to their God-given calling. However, should the actions of institutions or associations fail to achieve their essential tasks, or distort the lives of others or harm their members, the state must act to ensure that just public relations exists between all and that the common good shared by all societal actors is achieved.

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<sup>58</sup> Vyver, Johan van der: *Leuven Lectures on Religious Institutions, Religious Communities and Rights*. Peeters, Leuven 2004, 35.

<sup>59</sup> Hiemstra: *Church, State*, 39–40.

<sup>60</sup> *Ibid.* 40–46.

The preamble to the Charter formulates this as that the governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society.

#### 5.2.7 Preamble article 7

“WHEREAS religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good.”

In this article of the Preamble the encompassing role of religion in all areas of life is once again mentioned as in article 3. Now however emphasis is placed on the qualitative value of religion. The added value that religions can bring to societies and to a country. “Religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom and rights an obligations”. The article then goes further to state that religious belief also deepens “our understanding of the importance of community and relationships in our lives and in society.” And when all of this happens it will contribute to the common good of a country.

It is good that all these values that religion can bring to a country is mentioned one after the other in the Charter. The State can take note of the important contribution that religions can make to a country. But just as rights bring about obligations so these values also call religions to take stock of the quality of their contribution to society. The deepening of the values mentioned will not take place *ipso facto*. Religions will have to see to it that they deepen these values in their members and followers. At the same time the deepening of the values and the attainment of the common good in society is an excellent opportunity for religions to dialogue and co-operate.

#### 5.2.8 Preamble article 8

“WHEREAS the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa.”

A last reason why a Charter of Religious Rights and Freedoms is necessary is mentioed in article 8 of the Preamble. If the rights of religious communities and institutions, as mentioned in the Charter, are recognised and protected it will contribute to a spirit of mutual respect and tolerance among the people of South Africa. It has been said “religion is high voltage; it can energize much or eletrocute many.”<sup>61</sup> History is full of examples that illustrates the power of

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<sup>61</sup> Stackhouse, Max: ‘Why Human Rights Needs God: A Christian Perspective’. In: Elizabeth M. Bucar & Barbara Barnett: *Does Human Rights Need God?* Eerdmans, Grand Rapids 2005, 27.



religion. The South African Charter of Religious Rights and Freedoms is an honest attempt to help the people of South Africa to foster mutual respect and tolerance for each other through the power of their religious beliefs.

### *5.3 The South African Charter of Religious Rights and Freedoms as endorsed on 21 October 2010*

The content of the Charter is grouped under specific headings in what follows:

#### *5.3.1 The right to believe or not to believe (art 1)*

Charter article 1: Every person has the right to believe according to their own religious or philosophical beliefs or conviction (hereinafter convictions) and to choose which faith, worldview, religion or religious constitution to subscribe to, affiliate with or belong to.

#### *5.3.2 No force or indoctrination to believe (2–2.3, 2.5[see also 6.2])*

Charter article 2: No person may be forced to believe, what to believe or what not to believe, or to act against their convictions.

Charter article 2.1: Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.

Charter article 2.2: Every person has the right to have their convictions reasonably accommodated.

Charter article 2.3: Every person has the right on the ground of their convictions to refuse (a) to perform certain duties, or to participate or indirectly to assist in, certain activities, such as of a military or educational nature, or (b) to deliver, or to refer for, certain services, including medical or related (including pharmaceutical) services or procedures.

Charter article 2.5: No person may be subjected to any form of force or indoctrination that may destroy, change or compromise their religion, beliefs or worldview.

Charter article 6.2: Every person has the right to share their convictions with another consenting person.

#### *5.3.3 Religious rights and medical treatment (2.3(b); 2.4)*

2.3(b): Every person has the right on the ground of their convictions to refuse (b) to deliver, or to refer for, certain services, including medical or related (including pharmaceutical) services or procedures.

2.4: Every person has the right to have their convictions taken into account in receiving or withholding medical treatment.

5.3.4 *The obligations of the state with regard to religious rights*  
(art 3–3.2, art 9.3).

Charter Articles 3–3.2: Every person has the right to the impartiality and protection of the state in respect of religion.

3.1 The state must create a positive and safe environment for the exercise of religious freedom, but may not promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion. In approving a plan for the development of land, the state must consider religious needs.

3.2 No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.

Charter article 9.3: The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or prescribe matters of doctrine and ordinances.

5.3.5 *The right to freedom of association* (art 1; 4, 4.2)

Charter article 1: Every person has the right to believe according to their own religious or philosophical beliefs or conviction (hereinafter convictions) and to choose which faith, worldview, religion or religious institution to subscribe to, affiliate with or belong to.

Charter article 4: Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their convictions, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, arrangements, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.

Charter article 4.2: Every person has the right to associate with others, and to form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.

5.3.6 *The right to observe and exercise religion* (art 4–4.4)

Charter Article 4: Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their convictions, which may include but are not limited to reading and discussion of sacred texts, confession, proclamation, worship, prayer, witness, arrangements, attire, appearance, diet, customs, rituals and

pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.

Charter article 4.1: Every person has the right to private access to sacred places and burial sites relevant to their convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.

Charter article 4.2: Every person has the right to associate with others, and to form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.

Charter article 4.3: Every person has the right to communicate within the country and internationally with individuals and institutions, and to travel, visit, meet and enter into relationships or association with them.

Charter article 4.4: Every person has the right to conduct single-faith religious observances, expression and activities in state or state-aided institutions, as long as such observances, expression and activities follow rules made by the appropriate public authorities, are conducted on an equitable basis, and attendance at them is free and voluntary.

*5.3.7 The right to maintain particular matrimonial, family and personal legal traditions (art 5).*

Charter article 5: Every person has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution. Legislation that is consistent with the Constitution may be made to recognise marriages concluded under any tradition, or a system of religious, personal or family law, or to recognise systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

*5.3.8 The right to freedom of expression (art 4.3, 6–6.3)*

Charter article 4.3: Every person has the right to communicate within the country and internationally with individuals and institutions, and to travel, visit, meet and enter into relationships or association with them.

Charter article 6: Every person has the right to freedom of expression in respect of religion.

Charter article 6.1: Every person has the right (a) to make public statements and participate in public debate on religious grounds, (b) to produce, publish and disseminate religious publications and other

religious material, and (c) to conduct scholarly research and related activities in accordance with their convictions.

Charter article 6.2: Every person has the right to share their convictions with another consenting person.

Charter article 6.3: Every religious institution has the right to have access to public media which access must be regulated fairly.

*5.3.9 The right to share convictions with consenting persons (art 6.2).*

Charter article 6.2: Every person has the right to share their convictions with another consenting person.

*5.3.10 The right to religious dignity (art 6.4).*

Charter article 6.4: Every person has the right to religious dignity, which includes not to be victimised, ridiculed or slandered on the ground of their faith, religion, convictions or religious activities. No person may advocate hatred that is based on religion, and that constitutes incitement to violence or to cause physical harm.

*5.3.11 The right to education consistent with one's religious convictions (art 7)*

Charter article 7: Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.

Charter article 7.1: The state, including any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.

Charter article 7.2: Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities.

Charter article 7.3: Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children enrolled in that institution (or their parents) who do not subscribe to the religious or other convictions practised in that institution waive their right to insist not to participate in the religious activities of the institution.

*5.3.12 The right to receive and provide religious education (art 8)*

Charter article 8: Every person has the right to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction.

*5.3.13 The right to institutional freedom (art 9.1–9.4)*

Charter article 9: Every religious institution has the right to institutional freedom of religion.

Charter article 9.1: Every religious institution has the right

- (a) to determine its own confessions, doctrines and ordinances,
- (b) to decide for itself in all matters regarding its doctrines and ordinances, and
- (c) in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.

Charter article 9.2: Every religious institution is recognised and protected as an institution that has authority over its own affairs, and towards which the state, through its governing institutions, is responsible for just, constructive and impartial government in the interest of everybody.

Charter article 9.3: The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or prescribe matters of doctrine and ordinances.

Charter article 9.4: The confidentiality of the internal affairs and communications of a religious institution must be respected. The privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected insofar as the interest of justice permits.

*5.3.14 The rights and obligations of religion with regard to the law of the land (art 9.5).*

Charter article 9.5: Every religious institution is subject to the law of the land. A religious institution must be able to justify any non-observance of a law resulting from the exercise of the rights in this Charter.

*5.3.15 Tax, charitable and other benefits may be given to religious institutions (art 10)*

Charter article 10: The state may allow tax, charitable and other benefits to any religious institution that qualifies as a juristic person.

5.3.16 *The right to solicit, receive, manage and spend voluntary financial and other forms of support and contributions (art 11).*

Charter article 11: Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.

5.3.17 *The right to conduct upliftment, social justice, developmental, charity and welfare work.*

Charter article 12: Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.

## 6. Conclusion

*The South African Charter of Religious Rights and Freedoms* was publically endorsed on 21 October 2010 in the Board Room of the University of Johannesburg. The keynote speaker was the Honourable Deputy Chief Justice of South Africa Mr Dikgang Moseneke. Short papers were also given by Prof Marinus Wiechers former Vice Chancellor of the University of South Africa; Dr Nokuzola MnDende, Prof Iain Benson and Prof Rassie Malherbe. After the addresses the Charter was endorsed by representatives of the religious communities. There were representatives of the Jewish community, the Muslims (both the Muslim Judicial Council and the Ismaeli community), various groupings of the the Hindus; The National Council of the Baha'is of South Africa; representaives of African Traditional Religions as well as African Independent Churches. Twenty four Christian denominations and religious bodies also endorsed the document as well as representatives of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Womens organisations, Youth Movements, the Education Desk of the Dutch Reformed Church, the Griekwa Independent Church, the Religious Department of the South African Broadcasting Corporation; The Evangelical Alliance of South Africa; The Commission for Religious Freedom of the Evangelical Alliance; the Open Doors Society, Trans World Radio and Media Production Houses.

After the endorsement ceremony a *South African Council for the Promotion and Protection of Religious Rights and Freedoms* was established. This body is now the owner of the copyright of the Charter and has as one of its tasks to eventually take the Charter to Parliament to be accepted as a law of the land.

In the meantime bodies that have endorsed the Charter can call upon it's existence in the exercising of their religious rights and the courts of the land have to take note of the existence of a SA Charter of Reilious rights and Freedoms.

The most basic human right, freedom of religion, is the driving force behind everything that has happened. South Africans are very fortunate that our Constitution guarantees freedom of religion. The Charter is an attempt by all mentioned above, as well as those that will join in future, to use the space created by our Constitution for freedom of religion.