

CHARTERS OF RELIGIOUS FREEDOM: THE *MAGNA CARTA* (1215), ORDINANCE NO. 7 OF 1843 (SOUTH AFRICA), AND THE SOUTH AFRICAN CHARTER OF RELIGIOUS RIGHTS AND FREEDOMS (2010)

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ABSTRACT

In June 2015 a conference was held in Oxford to commemorate the 800th Anniversary of the *Magna Carta* (the Great Charter). In 1865 Ordinance no. 7 of 1843 was hailed as the *Magna Carta* of the Dutch Reformed Church. At the conference in Oxford a paper was given on the “*Magna Carta* and South Africa”. This article grew out of that paper. In the article, the historical developments of religious freedom in different time periods are touched upon to end with the South African Charter of Religious Rights and Freedoms (SA Charter), which was signed by many religions in South Africa on 20 October 2010 – its Constitutional setting and background while the differences between the *Magna Carta*, Ordinance no. 7 of 1843 and the SA Charter are accentuated. The biggest difference between the three documents are that the *Magna Carta* and Ordinance no. 7 of 1842 were documents that originated from the authorities and were granted to the churches, while the SA Charter is a document that grew from the religious communities itself.

Keywords: *Magna Carta*; freedom of religion; the *Magna Carta* of South Africa; the South African Constitution; the South African Charter of Religious Rights and Freedoms (SA Charter)

INTRODUCTION

The *Magna Carta*, sealed by King John at Runnymede, is known as a very important founding document of Western democracy. Apart from the democratic rights that it granted, it also granted religious rights – although it calls these rights the freedom of the church. Today the *Magna Carta* is hailed as a fundamental document for democracy.

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In 1843 Ordinance no. 7 was brought before the Legislative Council of the Cape in South Africa under the heading “The Separation of Church and State Petition”. By 1847 Ordinance no. 7 of 1843 was hailed in the Dutch Reformed Church as a document that ensured the freedom of the church. By 1865 it was called the *Magna Carta* of the Dutch Reformed Church in South Africa. Various court cases, however, showed that Ordinance no. 7 of 1843 did indeed not bring about freedom for the Dutch Reformed Church and also the other churches in the country; to the contrary, it kept the churches bound to the decisions of the courts. It was only after 1996 that the new Constitution of South Africa guaranteed freedom of religion for everyone (individuals and religious institutions) in South Africa. The new Constitution also allowed for the possibility that Parliament may adopt charters of rights consistent with the provisions of the Constitution.¹ As a result, the South African Charter of Religious Rights and Freedoms (hereafter the SA Charter) was developed to describe what religions in South Africa can understand their religious rights and freedoms to be.

THE MAGNA CARTA

When the *Magna Carta* was sealed at Runnymede on 15 June 1215 the introduction to the Charter read:

Know that we, from reverence of God and for the salvation of our soul and those of all our ancestors and heirs, for the honor of God and the exaltation of the Holy Church and the reform of our realm on the advice of our reverend fathers, Stephen Archbishop of Canterbury
...proclaim the following:

In the first place we have granted to God and by this our present Charter have confirmed, for us and our heirs forever that the English Church shall be free, and shall have her rights entire/undiminished and her liberties inviolate/unimpaired.²

Through the past 800 years much has been said and written about the *Magna Carta*, one of the youngest publications being that of Robin Griffith-Jones and Mark Hill (QC) *Magna Carta, Religion and the Rule of Law* – which is truly an excellent publication helping us to understand the meaning and heritage of this very important document. With a view to what follows, a few remarks are appropriate.

Sections one and two of the Charter state it clearly that the *Magna Carta* was:

...granted to God...and confirmed, for us and our heirs in perpetuity – that the English Church shall be free, and shall have her rights entire and her liberties inviolate.

1 The Constitution of the Republic of South Africa, 1996. Act 108 of 1996, article 234.

2 Robin Griffith-Jones and Mark Hill, eds., *Magna Carta, Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2015), 3–4.

What exactly those rights and liberties (freedoms) were in those years is an open question. Richard Helmholz has summarised their likely range as: episcopal elections free from royal interference (realised more or less effectively as the kings were more or less strong); special privileges for the clergy; and the consignment of some areas of life to the judgment of the Church.³ Important here is to note that the rights and freedoms were privileges that were given to the people by the Crown⁴ and that is apparently why it is said that they were realised more or less effectively as the kings were more, or less, strong. It is probably against this background that the following remark of Hindley must be understood:

During the 16th century, the interpretation of *Magna Carta* shifted. Henry VII took power at the end of the turbulent Wars of the Roses, followed by Henry VIII. Extensive propaganda under both rulers promoted the legitimacy of the regime, the illegitimacy of any sort of rebellion against royal power, and the priority of supporting the Crown in its arguments

This notion of the freedom of the church as formulated in the *Magna Carta* is contrary to the current concept of religious freedom as something that is inherent to a religion, this would mean that a church or any religion has the right to freedom as an inherent quality and it is not dependent on a grant by the state or a king or any other authority.

Also noteworthy is the remark of Helmholz that the freedom of the church in the *Magna Carta* meant “the consignment of some areas of life to the judgment of the Church”.⁵ We hear this kind of reasoning also in the South Africa of 1843 when it was said that the Dutch Reformed Church (DRC) of South Africa can be granted freedom which according to section 3 of Ordinance no. 7 of 1843 was “the power of regulating its own internal affairs”. However, the British government in the South Africa of 1843 kept its hold over the DRC through the power of the purse; and through the power of presenting ministers; and by insisting that the government must approve of each new Church Order of the DRC – so the Church was not really free.⁶ Also important is the role that the Church and the Bishops played in the birth of the *Magna Carta*.

While early twelfth century legal collections treat royal power as personal and speak simply of the rights of the King, at the beginning of the next century men will talk of rights of the Crown. But if these ideas were giving emphasis to royal authority, an equally powerful train of thought stemming from the Church was teaching that kingship was an office and that a king carried

3 Richard H. Helmholz, *The Oxford History of the Laws of England, Vol. 1* (Oxford: Oxford University Press, 2004), 55–56; Griffith-Jones and Hill, *Magna Carta*, 4–5.

4 James C. Holt, ed., *Magna Carta and the Idea of Liberty* (New York: John Wiley & Sons, 1972), 1.

5 Helmholz, *The Oxford History of the Laws of England*, 55–6; Griffith-Jones and Hill, *Magna Carta*, 4–5.

6 Evert P. J. Kleynhans, *Die Kerkregtelike Ontwikkeling van die Nederduitse Gereformeerde Kerk in Suid-Afrika 1795–1962*. Unpublished D.Th. dissertation (Stellenbosch: Stellenbosch University, 1974).

heavy responsibilities. In 1215 Archbishop Stephen Langton was a powerful influence behind such views with the emphasis he laid on John's coronation oath.⁷

Holt also refers to an anonymous writer from the beginning of the thirteenth century, who produced a new edition of the laws of Edward the Confessor in which he made additions to the traditional text. In the title to a specific section he gives a hint that he is concerned with the rights of the Crown and on the other with the office of the King. We then read:

The King ought by right, to preserve and defend completely in their integrity and without dilapidation, all lands and honors, all dignities and rights and liberties of the Crown of this kingdom, and restore with all his power to their due and former state the *iura regni* which has been dispersed, destroyed or lost.⁸

At the side of this he can state that the king is the "Vicar of God who has the duty to protect" and defend the people of God and Holy Church, and within a few lines he is subjecting him very strictly to the advice of the magnates of the realm and prescribing that he should rule according to the law.⁹

A last remark is the fact that the *Magna Carta* was sealed in a time that the so-called Gregorian Church Reformation was going on. More about this Reformation can be read below. The Roman Catholic Church was pursuing a theocracy, i.e. a system of church-state relationships in which the church is the more powerful partner that dictates how things should be. The church is also the main source of authority in this relationship. Perhaps that was the reason why the Pope excommunicated the rebel barons and suspended Bishop Langton early in September 1215 and why, later in September 1215, he declared the *Magna Carta* to be "not only shameful and demeaning but also illegal and unjust" since John had been "forced to accept" it, and accordingly the charter was null and void of all validity forever. "Under threat of excommunication, the King was ordered not to observe the charter, nor the barons try to enforce it."¹⁰ For the Pope and the theocratic position of the Roman Catholic Church, the *Magna Carta* was indeed a big threat. It was this theocracy of the Roman Catholic Church that would play a very important role to ignite the Reformation of the sixteenth century when Martin Luther made known his 95 theses on 1 November 1517 and burnt the *Corpus Iuris Canonici* in Wittenberg in 1520. Thereby he actually stated that the Roman Catholic Church and the Pope did not have the powers they claimed to have. These were powers that threatened the freedom of religion of Christians.

7 James C. Holt, "Rights and Liberties in *Magna Carta*," in *Magna Carta and the Idea of Liberty*, edited by James C. Holt, (New York: John Wiley & Sons Inc., 1972), 42.

8 Holt, "Rights and Liberties in *Magna Carta*," 42.

9 Holt, "Rights and Liberties in *Magna Carta*," 42.

10 *Wikipedia*, The Free Encyclopedia, s.v. "*Magna Carta*", https://en.wikipedia.org/wiki/Magna_Carta (accessed 15 June 2015).

CHURCH AND STATE IN THE WESTERN WORLD

A recapture of the relationship between church and state during different times in history can help us to understand freedom of religion in the *Magna Carta* as well as later on in South Africa.

The relationship between church and state from Constantine until 1075

In 312 Emperor Constantine was converted to Christianity and in 380 Trinitarian Christianity became the official religion of the Roman Empire. This ultimately fused Roman and Christian laws and beliefs, which in turn had a big influence on the relationship between church and state. The Roman Empire was seen as the universal body of Christ on earth embracing all persons and things. The emperor was viewed as both head of the church and king of the empire, reigning supreme in both spiritual and temporal matters.¹¹ The Roman imperial understanding of the relationship between church and state was largely continued in the West after the fall of Rome to various Germanic tribes in the fifth century. Before their conversion many of the pagan Germanic rulers were already seen as divine, being both the cultic and military leaders of their people. After their conversion to Christianity they lost their divinity but continued as sacral rulers of the Christian churches in their territories. Christianity was an important source for their authority in their effort to extend their rule over the plurality of peoples under their regime.

The Papal Reformation of 1075

The Reformation of the Roman Catholic Church between 1050 and 1150 AD, also called the Papal Revolution,¹² changed the relationship between the church and state as it had existed since the time of Constantine, from a Constantinian or Caesero-papal relationship to a theocratic relationship. In a revolutionary manifesto known as “Papal Prescriptions” (*Dictatus Papae*) (1075), Pope Gregory VII declared, in 27 articles, that the Church of Rome was instituted by Christ; that only the bishop of Rome was universal, and that emperors and kings had no authority over the church. Only the Pope had the authority to install and dismiss bishops; only the Pope could call and control church councils, install and administrate abbeys and bishoprics. Only the Pope could make new laws according to the need of the time. Papal courts were courts for the whole of the Western Christendom and believers could approach them on any issue that had a spiritual implication – and all issues did have a spiritual side.¹³ With this papal manifesto

11 Cornelis van der Wiel, *Geschiedenis van het Kerkelijk Recht* (Louvain, Peeters, 2007), 19.

12 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge MA and London: Harvard University Press, 1999), 85ff.

13 Berman, *Law and Revolution*, 95–6.

the so called Constantinian or Caesero-papal paradigm¹⁴ for the relationship between church and state was turned over in favour of a theocratic paradigm in which the Pope had absolute power. Apart from the total control which it exercised over individuals, society and the church, the Roman Catholic Church also controlled the limited rights of orthodox Christians, Jews, Muslims and heretics within Western Christianity.¹⁵ The Pope even had the power to dispose of kings while all princes had to kiss his feet.¹⁶ It was indeed a revolutionary turnover from a position of control by the Caesar to one of Papal or theocratic control by the Roman Catholic Church.

All these control measures and many more eventually found their way into the *Corpus Iuris Canonici* – the books of Canon Law of the Roman Catholic Church, which subjected rulers and citizens, laity and clergy, inhabitants and strangers to the authority of the Roman Catholic Church. Berman is of opinion that the Roman Catholic Church was in fact the first modern Western State that wanted to rule over all other states with its theocratic authority.¹⁷ It was against this church with its theocracy and the resulting suppression of central truths from the Bible, that the Reformation of the sixteenth century took place.

The relationship between church and state after 1075 and at the time of the Reformation

It is not to say that the theocratic rule by the Roman Catholic Church since 1075 was simply accepted by the different rulers in the West.¹⁸ There is much historical evidence to the contrary that in many countries of Europe the rulers sustained or tried to sustain the old Constantinian paradigm. Theologians like Zwingli and Erastus also advanced a system of church-state relations in which the worldly authorities effectively ruled over the Church – this would later become known as the Erastian system of church-state relations.¹⁹ After the Council of Basel (1431) the National States asserted their guardianship over the church. In England there was a national church already since the fourteenth century, which became the Anglican State Church in 1531 under the rule of Henry VIII, who in that year declared himself the head of the Anglican Church. In 1478 the Inquisition in Spain was taken over by the state while in Germany the different national rulers had much authority in the different provinces – an approach that was

14 This paradigm for church-state relations was later on also called the Erastian paradigm for church-state relations. See footnote 25.

15 John Jr. Witte, *Religion and the American Constitutional Experiment. Essential Rights and Liberties* (Boulder Colorado: Westview Press, 2000), 11–2.

16 Berman, 1999, *Law and Revolution*, 95.

17 Berman, 1999, *Law and Revolution*, 113.

18 Hendrikus Berkhof and Otto J. de Jong, *Geschiedenis der Kerk* (Nijkerk: Uitgeverij G F Callenbach BV, 1975), 186.

19 See footnote 24.

asserted with the peace of Augsburg in 1555.²⁰ In Geneva Calvin did try to bring in greater freedom for the church from the worldly authorities, but even there the political authorities insisted on their position of authority over the church – we find proof of this in article 165 in the Church Orders 1561.²¹ In the Netherlands we also find that after many years of fighting and bloodshed the Reformed Churches became the privileged or established church, protected by, but in fact also subjected to, the political rulers.²²

SOUTH AFRICA AND *MAGNA CARTA*

In 1652 the Dutch Reformed Church, as the established church in the Netherlands since 1651,²³ was brought to the southern tip of Africa by the Chartered Dutch East Indian Trading Company. Part of their mandate was to see to it that the Reformed religion would be spread amongst the indigenous peoples. The same model for the relationship between the church and the authorities at the Cape that existed in the Netherlands, namely the so called Constantinian or Erastian²⁴ model, was also upheld at the Cape – the authorities protected the church but at the same time also controlled it.

In 1795 the Cape was handed over to the British who, on grounds of article 7 of the Act of Capitulation, took it for granted that all rights and duties that the DEIC had, passed on to them and that they were obliged to take over the governance of all institutions, also the church at the Cape. One big difference for the DRC was that it no longer had any correspondence with the church in the Netherlands and could also no longer rely on any advice from the classis of Amsterdam. All authority over the church now rested with the governor at the Cape and in the last instance with the British government in London. At the Cape there was no longer anybody who could intervene on behalf of the

20 Berkhof and De Jong, *Geschiedenis der Kerk*, 115, 160.

21 *Ordonnances Ecclésiastique*, 1561, art 165, In *Die Grondslae van ons Kerklike Reg*, by Adrianus Pont, (Pretoria, Cape Town: HAUM, 1981).

22 Otto J. de Jong, *Nederlandse Kerkgeschiedenis* (Nijkerk: Uitgeverij G F Callenbach N.V., 1972), 224.

23 De Jong, *Nederlandse Kerkgeschiedenis*, 224.

24 Erastus, Thomas (7 September 1524 – 31 December 1583). Erastus was a Swiss physician, philosopher and theologian who taught medicine at the new Faculty of Medicine at the University of Heidelberg from 1559. In 1559 Frederick III made him a Privy Councillor and a member of the church consistory. In his theology he followed and propagated the views of Huldrych Zwingli and in his 100 theses argued that sins committed by Christians should be punished by the state, and that the church should not withhold Sacraments as a form of punishment. His name is preserved in Erastianism, a doctrine of church-state relationship that he himself never taught. He ineffectually resisted the efforts of the Calvinists, led by Caspar Olevian, to introduce the Presbyterian polity and discipline which were established in Heidelberg in 1570, on the Geneva model. One of the first acts of the new church government system was to excommunicate Erastus on charges of Socinianism. The ban was only removed in 1575, Erastus declaring his firm adhesion to the doctrine of the Trinity. He returned to Basel in 1580 where he was made professor of ethics in 1583. He died on 31 December 1583 (*Wikipedia*, The Free Encyclopedia, s.v. “Thomas Erastus,” https://en.wikipedia.org/wiki/Thomas_Erastus (accessed 15 June 2015); Encyclopaedia Britannica, “Thomas Erastus/Swiss physician and theologian,” <https://global.britannica.com/biography/Thomas-Erastus> (accessed 16 November 2016).

church. The new government did not allow any interference from outside in the matters of the church. The state was the highest authority and the governor interfered in all kinds of ways with the matters of the church and saw himself as the highest authority.²⁵ At the same time it must also be remembered that the British themselves came from a Constantinian or Erastian system of church-state relations. It was, therefore, not strange that they applied the same system at the Cape, it fitted in well with the tradition at the Cape.

In 1802 the Cape was handed over to the Batavian Republic. Without consulting the churches, Commissioner-general De Mist forced a Church Order onto the churches as a law of the state. Once again there was a church-state relationship in which the state authorities had supreme authority over the churches and in which the government undertook to provide for the churches; while the churches from their side had to further the virtues and good order of its members for the sake of the state. Through its voluntary undertaking to support and keep the churches, the state ensured that the churches remained dependent on the state. The Church Order of De Mist also provided for a general meeting or synod of the Dutch Reformed Church to be held every two years under the supervision of the state. In terms of this provision the very first Synod of the Dutch Reformed Church met in 1824 in Cape Town. This Church Order also was clearly the result of an Erastian-system of church-state relationship which subjected the church to the state.

In all kinds of ways the state interfered in the matters of the church, while the church had to get the permission of the state for just about anything it wanted to undertake. The fact that the Dutch Reformed Church until 1824 did not have a synodical structure at its disposal did not help matters in any way. On advice of the political commissioners at the synod of 1824 it was decided to accept the Church Order of De Mist as the constitution of the church. While the General Regulations (*Algemeen Reglement*) was accepted as necessary, changes and improvements had to be made for the sake of the changing times. Increasingly however, there came differences of opinion between the state and the church and this made that the synod of 1837 appointed a commission consisting of the Revs T. J. Heroldt, G. W. A. van der Lingen and A. Faure to revise the Church Order. They presented a revised Church Order to the synod of 1842. Already at the synod of 1837, the differences between the political commissioners and the Dutch Reformed Church reached such intensity that it was decided to appeal to the governor to inform him of the interference of the representatives of the state in the matters of the church.²⁶ This resulted in a letter from the governor dated 17 January 1840, in which the governor declared that it was his wish that the church be free from any secular interference in all spiritual and ecclesial matters. In all other matters in which the church did not have the authority to take decisions it was his intention to place the church under

25 Daniel Lategan, "Na Driehonderd Jaar," *Die Gereformeerde Vaandel*, Deel XX, nr 2 (April 1952): 57.

26 Daniel Lategan, "Mag Ons Vergeet?" *Jaarboek van die Nederduitse Gereformeerde Kerke* (1943): 87-8.

the authority of the civil courts. Through these measures he hoped to end all the appeals from the church to the governor. The Commission for the Review of the Church Order continued with their work and presented revised church laws to the synod of 1842. The political commissioners at the synod complained about the diminished rights that were awarded to them in the revised church laws and the extended rights that were given to the church. Once again the Dutch Reformed Church decided to approach the governor. The whole matter of the relationship between church and state was then discussed in the presence of the governor, the political commissioners and the Attorney General Sir William Porter. The Attorney General was asked to draw up a memorandum, which he did. In the memorandum it was recognised that the church had the authority to revise its own laws, which in this case included the Church Order of De Mist. The revised church laws, however, had to be sanctioned by the state. The political commissioners also had to refrain from interfering with pure spiritual matters. The matters mentioned in the memorandum allowed synod to continue with the revision of the church laws. The revised laws were approved by synod and sent to the governor for his approval.

On 22 July 1843 the Attorney General informed the Legislative Council that an Ordinance would be necessary to repeal the Church Order of De Mist and replace it with the revised church laws of the synod. On 31 July 1843 he brought the concept legislation before the Legislative Council under the heading of “The Separation of Church and State Petition”.²⁷ In his explanation he pointed out that synod was the only competent body to make laws for the church and that neither the governor nor the Legislative Council had the authority to do this. He also pointed out that the rights of the state and the laity (the members of the Dutch Reformed Church) were safeguarded, since the revised church laws had to be approved by the Legislative Council as an addendum while the rules regarding financial matters had to be published in a special government proclamation. He also pointed out that the political commissioners would no longer be part of meetings of the church.²⁸ The concept document was then sent to the church for its approval. The church proposed two changes – one regarding the doctrines of the church and the second regarding the right of the governor to appoint ministers. Since all the presbyteries of the church had to approve of the document, the second reading in the Legislative Council was postponed until 7 November 1843. On 8 November 1843 the Ordinance was proclaimed as Ordinance no. 7 of 1843. On 15 March 1844 the Ordinance, together with the revised church laws and Proclamation 10 of 1844 was sent to the imperial government in London. The imperial government requested an additional report which the Attorney General provided. On receipt of the report, the imperial government approved the Ordinance on condition that article 5 be amended to state that the right to the appointment of ministers resided in the Queen and not in the Governor at the Cape. In order to comply with this request, Ordinance no. 16 of 1845

27 Phillip B. van der Watt, *Die Loedolff-saak en die Nederduitse Gereformeerde Kerk 1862–1962. 'n Kerkhistorie-Kerkregtelike Studie* (Cape Town: Tafelberg Publishers, 1973), 37.

28 Lategan, “Mag Ons Vergeet,” 88.

was passed on 1 December 1845. On 24 June 1847 the imperial government announced the approval of Ordinance no. 16 of 1845. On 11 November 1851, Ordinance no. 2 of 1851 was passed by the Legislative Council at the Cape to revive Ordinance no. 7 of 1843 as amended.²⁹

Within the Dutch Reformed Church Ordinance no. 7 of 1843 was seen by some as a document which liberated the Dutch Reformed Church. At the synod of 1847 the praeses of the synod spoke of “the freedom which our church association received from the state since our last meeting” (de vrijheid welke dit ons kerkgenootschap van Staatswege, sedert onze laatste bijeenkomst hebbe bekomen).³⁰ In 1865 Prof. N. J. Hofmeyr, one of the two first professors at the Theological Seminary which opened in Stellenbosch in 1859, wrote that the Dutch Reformed Church saw Ordinance no. 7 of 1843 as her charter of freedom, “as her *Magna Carta*”.³¹ Also Prof. B. B. Keet writes in 1925 that although Ordinance no. 7 of 1843 is open for improvement “it is rightly called the *Magna Carta* of the Dutch Reformed Church in South Africa”.³² Prof. Bouke Spoelstra of the Reformed Churches in South Africa agrees with the opinion of Prof. Keet about the ordinance, namely that it was the *Magna Carta* of the Dutch Reformed Church.³³

Right from the beginning, however, there were also voices who felt that the Ordinance was not really something that guaranteed the freedom of the Dutch Reformed Church from interference by the State. Already at the meeting of the Presbytery of Cape Town 1843, there served a letter from the Rev. G. W. A. van der Lingen in which he expressed his regret that he was not in a position to send in a request to the Legislative Council that the church may remain free from the administrative-despotic draft legislation (Ordinance no. 7) which would lead to the same unfruitful efforts, divisions and schisms in the Dutch Reformed Church in South Africa as already experienced in the Dutch Reformed Church in the Netherlands.³⁴ In 1854 Adv. C. J. Brand pointed out in the case of *Weeber and Van der Spuy* that if the Dutch Reformed Church wanted to institute a second synod for the eastern districts of the Cape colony, they would not be able to do so without new legislation by the Legislative Assembly.³⁵ Advocate Brandt’s remarks clearly show that Ordinance no. 7 of 1843 did not really free the Dutch Reformed Church from intervention and approval by the state authorities.

29 Lategan, “Mag Ons Vergeet.” 88.

30 Acta Synodi 1847, K.K.A., S 1/8, p. 6. In: Van der Watt, “Die Loedolff-saak,” 37.

31 Nicolaas J. Hofmeijr, *De Kerk en de Regtbank. Beschouwingen en Onderzoekingen naar aanleiding van de Jongste bemoeijingen der Regtbank met die Zaken der Gereformeerde Kerk* (Cape Town: N. H. Marais, 1865), 9.

32 Barend B. Keet, *Na Honderd Jaar. Die Regeringsvorm van die Nederduitse Gereformeerde Kerk aan de Gereformeerde Beginselen Getoetst. Toespraak gehouden bij de sluit van die Theologische Kweekschool, Oktober 1924* (Stellenbosch: Pro Ecclesia-Drukkerij, 1925), 4.

33 Bouke Spoelstra, *Die Doppers in Suid-Afrika 1760–1899* (Cape Town: Nasionale Boekhandel BPK, 1963), 38.

34 Notule, Ring van Kaapstad, 1843, K.K.A., R 1/6, p 154 in: Van der Watt, “Die Loedolff-saak,” 35.

35 See Kleynhans, *Die Kerkregtelike Ontwikkeling*.

Although the Ordinance freed the church from the Church Order of De Mist, it very soon became clear that the Ordinance bound the church to the state and hampered it in its organisation, powers and boundaries – this was proven in more than one court case in which the Dutch Reformed Church became involved after 1843. Through an order of the court the delegates from outside the Cape Colony had to leave the meeting of the synod in 1862; and it was not until 1962 after Ordinance no. 7 of 1843 was revoked by Parliament, that the Dutch Reformed Church in South Africa (the Cape Colony) could join with the Dutch Reformed Churches from the other provinces of South Africa in a General Synod without the approval of the state.

However, it seems that even then the Constantinian or Erastian model for the relationship between church and state was not completely dismissed. In the first Church Order of the General Synod in 1962 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,” as if freedom of religion is something that the state grants to the church and which the church has to accept with gratitude.

In conclusion to this part of the article it can be said that from 1652 until 1994 it was still predominantly a Constantinian model:

- That to a lesser or larger 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.
- Since 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 really speak of freedom of religion that churches and religions had in South Africa – it was much rather a case of denominations and religions being tolerated. 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.

A SOUTH AFRICAN CHARTER OF RELIGIOUS RIGHTS AND FREEDOMS

In 1996 a new Constitution for South Africa was approved. With the new Constitution a new era for church-state relations in South Africa started – actually not only new church-state relations but new relations between the state and religions as well as between

religion and religion. In the Constitution religion (churches) are dealt with in article 9(3)³⁶ where it is stated that there can be no discrimination against a person on grounds of religion; article 31 which says that a person belonging to a religious community has the right to enjoy and practise their religion, form, join and maintain religious associations and other organs of society.³⁷ Article 185 provides for a “Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities”.³⁸ Very important for religions in South Africa, is article 15 of the Constitution which states:

1. “Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”
2. “Religious observances may be conducted at state-aided institutions, provided that:
 - (a) those observances follow the rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance is free and voluntary.”

The third part of article 15 allows for marriages in South Africa to be concluded under any tradition, or a system of religious, personal or family law.³⁹ Also important for religions is the fact that article 7(2) of the Constitution reads that: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”⁴⁰ All of these are very strong securities and opportunities for religions in South Africa since 1996. Added to all of these securities, there is also article 234 of the Constitution which, for the deepening of the culture of democracy, allows parliament to adopt charters of rights consistent with the provisions of the Constitution.⁴¹ Religions in South Africa took up this challenge and in the past few years have developed a “South African Charter of Religious Rights and Freedoms” (SA Charter) which they have endorsed, and are now in the process of taking the SA Charter to parliament. The Dutch Reformed Church has already decided to make the SA Charter part of their official documentation so that it can be taken up in the Church Order Book of the Church.⁴² In a sense it can be said that the Constitution (1996) and the SA Charter are much more of a *Magna Carta* for religions in South Africa than Ordinance no. 7 of 1843, which was hailed as such during the nineteenth and twentieth centuries. This SA Charter was not something that was given to religions

36 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 9(3).

37 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 31.

38 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 185.

39 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 15.

40 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 7.

41 The Constitution of the Republic of South Africa, 1996, Act 108 of 199, Section 23.

42 Agenda vir die 14de Vergadering van die Algemene Sinode van die Nederduitse Gereformeerde Kerk, http://www.kerkargief.co.za/doks/acta/AS_Agenda_2011.pdf (accessed 15 June 2015) (2011): 286; Kerkorde van die Nederduitse Gereformeerde Kerk met Reglemente, Beleid, Funkisionele Besluite en Riglyne, <http://www.ngkerkas.co.za/wp-content/uploads/kerkorde3.pdf> (accessed 15 June 2015) (2011): 131–135.

and churches in South Africa – like the *Magna Carta* of 1215 was given to the church in England by the King, even if he had to be forced to do it. It was also not like Ordinance no. 7 of 1843, that was written for the Dutch Reformed Church by the government of the day. That is also the reason why at times during the history the *Magna Carta* could be ignored by the king and rulers of the day. The first article of the preamble to the SA Charter⁴³ states that every person has a right to freedom of religion because as “human beings they have an inherent dignity, and capacity and need to believe and organise their beliefs in accordance with their foundational documents, tenets of faith or traditions”. In some religions it is said that human beings have the right to freedom of religion because they are created in the image of God, freedom of religion is an “inherent/ontological” right that every person has, it is not something that is given to a person by someone else and that can be taken away again.

Freedom of religion implies the right of religions to the free exercise of the religion; the right for a plurality of religions to exist in one country; the equality of all religions under the Constitution and before the laws of the land; the separation of religion and the state and the disestablishment of religion by the state. For a religion as such, be it a church or whatever other religion, freedom of religion entails institutionally that it has a right to:

- i. a creed/creeds, which defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life;
- ii. a cult, which defines the appropriate rituals, liturgies and patterns of worship and devotion that give expression to the beliefs;
- iii. a code of conduct, one can also call it a church order in the case of churches, which defines the appropriate individual and social habits of those who profess the creed and practise the cult; and lastly
- iv. the right to be a confessional community which defines the group/individuals who embrace and live out the creed, the cult and the code of conduct both on their own and with fellow believers.⁴⁴

According to the SA Charter freedom of religion entails the following:

3. The right to believe and the right to what you may believe or not believe (art. 1).
4. The right not to be forced about your belief (art. 2).
5. The right to impartiality and protection of the state in respect of religion (art 3).
6. Every person’s right to private or public, individual or joint observance or exercise of their religion (art. 4).

43 The South African Charter of Religious Rights and Liberties 2010. Available at www.CRRF.org. The SA Charter states in 12 articles what freedom of religion means in South Africa.

44 Witte, *Religion and the American Constitutional Experiment*, 37.

7. The right of persons to maintain traditions and systems of religious personal, matrimonial and family law that is not inconsistent with the Constitution (art. 5).
8. The right of every person to freedom of expression in respect of religion (art. 6).
9. The right of every person to be educated or to educate their children or have them educated in accordance with religious or philosophical convictions (art. 7).
10. The right of every person to receive and provide religious education, training and instruction. The state may subsidise such education, training and instruction (art. 8).
11. The right to institutional freedom – the right of every religion to determine its own confessions, doctrines and ordinances and to regulate its own affairs (art. 9). 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 the Charter (art. 9).
12. The right of all religions in South Africa who qualify as a juristic person to receive tax, charitable and other benefits from the state (art. 10).
13. The right of every religious person 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 (art. 11).
14. Every religious person has the right to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community and also to establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose (art. 12).⁴⁵

IN CONCLUSION

From 1652–1994 the state authorities in South Africa always had a say to a larger or lesser degree in the affairs of first the Dutch Reformed Church and later on in the affairs of all churches and religions in South Africa. It was a typical Constantinian situation of the state protecting churches but at the same time also controlling them. Understanding this relationship between state and church in South Africa sheds a completely new light on the accusation often made, that it was the church(es) through a theocratic relationship with the state which were responsible for the ideology and practice of apartheid. It was not theocracy – where the policies of the church indeed control society – but much rather the Constantinian relationship between church and state that was largely responsible for the state ideology of apartheid. It must, however, also be recognised that the churches often asked the government for apartheid measures to be taken

The new (post-1994) situation in South Africa for religions, brings about most definite freedoms – not only for Christian churches but for all religions; while at

45 The South African Charter of Religious Rights and Freedoms, articles 1–12.

the same time it also brings certain obligations. It is of little avail if religions have constitutional guarantees for freedom of religion and a “Charter of Religious Rights and Freedoms” (which spells out what religious rights those religions can claim), but religions themselves do nothing to appropriate those rights. If religions do not claim and use the religious space provided for them in the Constitution and the SA Charter, the consequence will be that any right that they claim will be adjudicated in terms of the laws of the land. A religion, for instance, cannot limit the rights of employees in terms of labour relations if its own approved Order does give proof that freedom of religion in terms of labour relations has not been appropriated by the religion in its own rules. A religion can also not claim special rights with regard to disciplinary hearings and limit for instance the rights of accused with regard to legal representation, if it does not show proof that it has used the right to freedom of religion to make sure that its disciplinary hearings are done in accordance with its faith identity. All of this makes it very important for churches and religions to make very sure that their Church Order or rules of order conform to their faith identity. That is what the Church Order of Dordt (1619) wanted to do with regard to the life of Reformed Churches in the Netherlands – unfortunately the relationship between state and church did not always allow for that because the Reformed Churches became the established church in the Netherlands, which meant that it was officially recognised by the state but also controlled by the policies of the state. Freedom of religion in a constitutional state creates the opportunity for churches and other religions to create their own Order, as long as it can be shown that the Order is based in the faith identity of the church or religion and that the limitation of the rights of members are also in conformity with the church’s faith identity; even if they are in contradiction to the laws of the land.

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