

Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom?

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Date Submission

9 July 2018

Date Revised

3 February 2019

Date Accepted

4 February 2019

Date published

12 March 2019

Editor Prof O Fuo

How to cite this article

Henrico R "Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom?" *PER / PELJ* 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5315>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5315>

Abstract

In democratic pluralistic and secular societies, freedom of religion is a fundamental right to be enjoyed by all individuals and religious organisations. A unique feature of this human right is the extent to which it is premised on a personal belief. The latter can be "bizarre, illogical or irrational", but nevertheless deserving of protection in the interests of freedom of religion. However, when the expression of a religious belief or practice transgresses the civil or criminal law it must be dealt with in the relevant legislative framework to hold the transgressor liable. Measures taken by the state to regulate religious bodies in terms of a general supervisory council or umbrella body are an unreasonable and unjustifiable interference with freedom of religion, and hence unconstitutional. I am of the view that the right to freedom of religion depends for its constitutional validity – and viability – on there being no interference (or regulation) by the state except in instances as provided for in terms of relevant legislation.

Keywords

Secular; freedom of religion; belief; regulation; legislative framework.

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1 Introduction

Writing laws is easy, but governing is difficult.¹

All democratic societies are characterised by the role of the rule of law in maintaining governance and good order. In many ways this is a modern-day and jurisprudential manifestation of the Hobbesian social contract to which we have undertaken to hold ourselves bound in exchange for protection by the state.² However, whilst we enjoy the protection of the state, we abhor its undue interference in our freedoms. Implicit in law is a set of norms regulating all forms of conduct in our society. Freedom of religion is guaranteed under the *Constitution of the Republic of South Africa, 1996*³ (the *Constitution*). It is to be enjoyed by individuals⁴ and religious associations⁵ or persons belonging to a religious community for the purpose of practising their religion.⁶ Recently, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (the CRL Rights Commission) made representations to Parliament for legislation to be passed seeking to regulate and control religious bodies⁷ in South Africa. These representations have been received with mixed responses. The purpose of this article is firstly to examine the feasibility of some of the proposed regulations. Secondly, and more significantly, these envisaged regulations should be assessed against the impact they are likely to have on religious freedom in South Africa. In section 3 this article looks at the significance of religious freedom in a democracy. Section 4 examines the proposals put forward by the CRL Rights Commission, discounting them as essentially ineffective and unfeasible. Section 5 discusses the reasons why state regulation of religious freedom should not be permitted. Section 6 contains concluding observations which contend that any system of state

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¹ Tolstoy *War and Peace* 200.

³ See Milonakis and Fine *From Political Economy to Economics* 11; Glendon 2004 *Northwestern Journal of Human Rights* 1-11.

³ Section 15(1) of the *Constitution of the Republic of South Africa, 1996* provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

⁴ Section 15(1) of the *Constitution*.

⁵ Section 31(1) of the *Constitution*. The term "association" is used in this paper in the broadest sense of referring to religion-based groups, such as churches, religious communities, and organisations which have as their purpose to bring individuals together to share in and participate in the practice of a collective religious ideology, faith or belief.

⁶ Section 31(1) of the *Constitution*.

⁷ The term "bodies" is used, for the purpose of this paper, interchangeably with reference to religious associations as referred to in fn 5 above.

regulation of religious freedom is anathema to the ethos of constitutionalism in South Africa.

2 A vignette of religious freedom in South Africa

For the most part, South Africa has always been a society in which many religious faiths have been permitted to express their beliefs freely. This phenomenon predates the constitutional dispensation. During apartheid certain church bodies were associated with the ruling minority class. In fact, such church establishments went so far as to place their spiritual endorsement on the race segregation policy of the legislature. In this sense, they were arguably more than complicit in apartheid laws; they endorsed racial segregation as divine law. However, it is not the author's contention that the unbecoming religious practices - considered later in this article - stemmed from a racial past or even derived from the policy of apartheid in South Africa. Sunday Observance laws, for example, were applicable to all inhabitants of South Africa.⁸ The point, as borne out in this article, of exploiting individuals on the basis of their religious beliefs, and trying to regulate organisations promoting such beliefs is not a racial issue and cannot be said to be the product of apartheid. Significantly, during the apartheid legal order there was nothing that directly prevented religious bodies⁹ from exercising their religious beliefs in a particular manner subject, however, to the dictates of the apartheid regime.¹⁰

The coming into operation of the constitutional dispensation in South Africa saw no concomitant increased notional practical sense of religious freedom. By and large, the various religious faiths in South Africa simply continued pursuing their spiritual goals. Even those churches which had formerly been used as spiritual vanguards of the ruling minority party were permitted to continue unhindered in the expression of their religious beliefs — albeit with non-partisan motives. It would be hyperbolic to describe the South Africa since the advent of democracy as deeply religious. However, with a population of 55,7 million,¹¹ the fact remains that South African society is a vastly pluralistic society emblematic of a diversity of cultures. This fact also informs the sundry religions we find in South Africa.¹² It could, perhaps be

⁸ See Van der Vyver 2000 *Emory Int'l L Rev* 779-781.

⁹ The term refers loosely to churches, religious faiths, and organisations of faith-based communities.

¹⁰ An example would be that the *Group Areas Act* 41 of 1950 would prevent a church from building a church hall to be used by non-white members of the church in a geographical area zoned for the white minority population of the country.

¹¹ Stats SA 2016 <http://www.statssa.gov.za/publications/publications/P0318/P03182016.pdf>.

¹² According to the 2015 General Household Survey, religious affiliations per province are grouped under what appears to be a finite nomenclature, namely Christian; Muslim; Ancestral tribal, Animist or other African Traditional Religions (ATR); Hindu;

described as a society in which religious freedom is celebrated in a comingling, pluralistic society.¹³ The significance for all religions¹⁴ in this society is that they can all claim constitutional protection for their faiths, which can be accommodated under the constitutional precept of freedom of religion.¹⁵

Generally speaking, it would not be entirely accurate to refer to South Africa as a secular state.¹⁶ The term "religiously neutral state" would be more appropriate.¹⁷ Whilst no official or formal state policy in terms of which religion is enforced on the citizens or members of the country exists,¹⁸ allowance is made for the state to participate in and sponsor religions, but only on a basis of the equal treatment of religions.¹⁹ Religious freedom in South Africa is not controlled by a supervisory body and neither is our

Jewish; Other religion; Nothing in particular; and Do not know (Stats SA 2015 <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> 30). But this table must be read in the context that each recognised religion has the potential to embrace other forms and types of religions. "Other traditional African religions" can constitute any amount or sum of religions or affiliations. By the same token the Hindu faith can include mainline Buddhism but does not necessarily exclude Sikhism and Jainism. Alternatively, to what extent should or could Confucianism or Taoism also be considered a religion under the umbrella term of "Other religion"? For further reading see Marshall 2013 *IJRF* 8-10. Where reference to ATR is concerned, the term is used loosely to refer to the wide variety of religious practices in Africa, which range from more formal recognised religions such as Catholicism and Protestantism to the well-known Zion Christian Church – with its headquarters at Zion City of Moria, east of Polokwane – to more traditional forms of worship of a ceremonial nature extending into deeply-held cultural beliefs and traditions. For further reading on ATR see Van der Vyver 2008 *AHRLJ* 342-343; Hackett "Tradition, African, Religious, Freedom?" 92-95; Mndende 2013 *NGTT* 74-82; Chimuka 2016 *Studie Historiae Ecclesiasticae* 129-133.

¹³ See Benson 2008 *CCR* 298-299; Farrow *Recognising Religion in a Secular Society* 83-93; Benson 1999 *UBC Law Rev* 520-551.

¹⁴ At the time of writing this paper only the 2015 General Household Survey Report on religions in South Africa was available. The information from the 2016 survey in this regard does not appear to differ significantly from Stats SA's General Household Survey 2015.

¹⁵ Neither the individual right to freedom of religion under s 15(1) nor the associational right thereof under s 31(1) in terms of the respective provisions of the *Constitution* are absolute. S 31(1) is in itself a limitation clause; however, both ss 15 and 31 are subject to the general limitation clause of the *Constitution* as expressed in terms of s 36(1)(a)-(f).

¹⁶ In terms of the terminology of "worldly" or "non-sacred" as used by Venter *Constitutionalism and Religion* 20.

¹⁷ Van der Vyver and Green 2008 *AHRLJ* 345.

¹⁸ See Leatt 2007 *JSR* 29-44; Ismail 2001 *Ind Int'l & Comp L Rev* 563-586; Cook 2013 *Yale J L & Human* 437; Ferrari 2011 *IJRF* 35. Although South Africa's national anthem contains the words "God bless Africa" and the Preamble to the *Constitution* refers to "May God protect our people" this has been interpreted by the constitutional court as relevant to "ceremonial deism" as opposed to any particular religious reference in *Ex Parte Speaker of the Western Cape Provincial Legislature* 1997 4 SA 795 (CC) as pointed out by Van der Vyver and Green 2008 *AHRLJ* 345.

¹⁹ Van der Vyver and Green 2008 *AHRLJ* 345.

society regulated as a theocracy.²⁰ Instead it is one in which allowance is made for the pursuit of individual and collective freedoms, subject to the rule of law.²¹ Such rights and freedoms were curtailed under the authoritative regime of apartheid, but the limitation and restriction of rights in this historical context was insufficient to suggest that South Africa was ever ruled in terms of a theocracy. The fact that the Dutch Reformed (NG) Church played a dominant role in endorsing the political policies of the executive ruling minority elite does not suggest that the state imposed a particular form of religion on the population. There is no official "establishment clause" in the South African Constitution ensuring separation between state and religion. However, that this separation does in fact exist is borne out by the reality of the absence of any suggestion of state interference in the affairs of religious freedom. Support for this is found in the National Policy on Religion and Education²² (hereafter the Policy), which expressly provides as follows:

Under the constitutional guarantee of freedom of religion, the state neither advancing nor inhibiting religion, must assume a position of *fairness*, informed by parity of esteem for *all religions* ...²³

The US, which is regarded by many as the pinnacle of democracy, liberty and freedom, is also known for being a secular country,²⁴ this opinion being attributable to what has been referred to as the "establishment clause". In

²⁰ Such as countries where religion is imposed by the state upon its citizens as a way of life, where in effect an individual is left with no choice but to adhere to the official recognised religion, failing which the result can be persecution as well as prosecution by the state authorities. This is especially the case in Islamic states (known as *dawla islamiyya* or caliphate states) governed by Sharia law. For further reading in this regard, see Moosa 2001 *J L Relig* 185; Pew Research Centre 2013 <http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-overview/>. According to this source, an overwhelming percentage of Muslims in countries across the world actively seek Islamic law (Sharia) to be the official law of the land which governs their conduct, whilst some subjects argue that the law should apply only to Muslims. Such an Islamic state must also be seen in the context of Islamic fundamentalism and the problems related thereto, such as the Al-Qaeda attack on the World Trade Centre in New York on 11 September 2009; the ongoing dispute over the Brotherhood in Egypt, and the terrorist group Islamic State (IS) in Iraq and Syria. In this regard see Al-Dawoody *Islamic Law of War* 111. Pope Francis condemned religious fundamentalisms as "deviant forms of religion" following the December 2014 terrorist attacks in Paris and the ongoing strife in the Middle East, according to Moloney 2015 <https://www.wsj.com/articles/pope-denounces-deviant-forms-of-religion-1421067797>. Also see Sedgwick 2015 *Perspectives on Terrorism* 39; Al-Dawoody 2015 *Kansai U Rev L & Pol* 103-104; Stilt 2010 *Tex Int'l LJ* 76-78.

²¹ For further reading see Campos 1994 *Colum L Rev* 1825; Lenta 2005 *SALJ* 363-366.

²² South African Government 2003 https://www.gov.za/sites/default/files/gcis_document/201409/religion0.pdf.

²³ South African Government 2003 https://www.gov.za/sites/default/files/gcis_document/201409/religion0.pdf.

²⁴ In terms of a strict separation between state and religion.

terms of the *US Constitution*, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".²⁵ In *Everson v Board of Education*²⁶ Justice Black stated:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, or prefer one religion over another...

Effectively, what emerges from this model is a situation in which there is no relation between the state or government and any religious affiliation and/or the practice thereof. Rawls²⁷ advocates that this form of government is to be encouraged, since the state refuses to use any particular form of religious ideology which it imposes on its citizens. Religion and the freedom to practice one's beliefs are matters left to the conscience and personal subjective belief of each and every person. This is not a realm into which the government (state) intends venturing. For reasons advanced in section 4 of this article, interference with the right to religious freedom is best left to the adjudicative interpretation and discretion of our courts.

Canada serves as an example of another country which is extremely diverse in terms of its population make-up and yet secular in terms of its relation between state and religion.²⁸ The significance of the Canadian framework is the degree to which it has expressed the urgency of and need for an inclusive all-embracing approach to accommodating diverse views in a pluralistic society. In this sense Canada is said to be inclusively secular.²⁹ The diversity of views celebrated in a pluralistic society which has been recognised in Benson refers to the Canadian Appeal court decision in *Chamberlain v Surrey School Board*,³⁰ in which Gonthier J states the following:

... nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy ... The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.³¹

²⁵ *US Constitution (First Amendment)*.

²⁶ *Everson v Board of Education* 330 US 1 (1947) 15.

²⁷ See Rawls *Political Liberalism* 29-33.

²⁸ See Berman, Bhargava and Laliberté *Secular States and Religious Diversity* 103; Van Praagh 2001 *Can Bar Rev* 605; Moon *Law and Religious Pluralism* 2; Roald 2011 <https://www.cmi.no/publications/file/4239.pdf> 152-153; Benson 2007 *Emory Int'l L Rev* 111-165; Benson 2010 *JSR* 17-41; Berger 2002 *Can J L & Soc'y* 39-68.

²⁹ Benson 2008 *CCR* 295-313.

³⁰ *Chamberlain v Surrey School Board* 2000 80 BCLR (3d) 181 (CA).

³¹ *Chamberlain v Surrey School Board* 2000 80 BCLR (3d) 181 (CA) para 137.

The brief reference to the US and Canada contextualises the approach adopted by our constitutional court regarding religious freedom. In *Minister of Home Affairs v Fourie*,³² Sachs J observed:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner...³³

Significant similarities may be drawn between such liberal democracies like Canada and the US and a fledgling democracy like South Africa in relation to the guarantee of religious freedom; namely, that it is a freedom in respect of which the state must desist from interfering. Alternatively, where it does play some role it must at the very least ensure that it accords equal recognition to all religions and does not favour one above another.

In the next part of this paper I will discuss how the CRL Rights Commission purports to persuade parliament to regulate religious freedom in South Africa. Why such proposals are for the most part lacking in cogency and rationality appears from the discussion.

3 The CRL Rights Commission and its proposals to parliament

The CRL Rights Commission is a state institution established in terms of Chapter 9 of the *Constitution* to support democracy.³⁴ Its function is to investigate, advise and report on religious rights issues.³⁵ It is a juristic, independent statutory body regulated by the *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act* (the *CRL Rights Commission Act*),³⁶ from which it essentially derives its statutory wherewithal to fulfil its constitutional

³² *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

³³ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) paras 94-98.

³⁴ Established under s 181(1)(c) of the *Constitution*.

³⁵ Section 185(2), as read with subsections (1) and (3) of the *Constitution*. The CRL Rights Commission's mandate includes the rights of cultural and linguistic communities; but for the purposes of this paper only religious communities (bodies) are considered.

³⁶ *Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act* 19 of 2002, especially s 3(a)-(b). The powers given to the CRL Rights Commission under the *CRL Rights Commission Act* include, but are not limited to, bringing any relevant matter (such as an infraction of the criminal or civil law) to the attention of the authority or organ of state, and making recommendations in respect of such a matter; see s 5(1)(k).

functions.³⁷ As its name implies, it is a state organisation, and hence an arm of the national executive. There is no denying the fact that the CRL Rights Commission is an organ of state as this term is defined under section 239 of the *Constitution*. The significance of this is discussed in greater detail below. Whilst a Chapter 9 state institution may be lauded for researching and investigating a particular issue, the extent to which its recommendations purport to regulate religious freedom is entirely another matter. Put differently, where such recommendation(s) constitute the basis of notional or even conceptual state regulation of a religious freedom, they should be regarded with circumspection for reasons advanced in Part 5 of this article. Firstly, it is important to look at what gave impetus to the CRL Rights Commission and its proposals to parliament. Secondly, the nature of the proposals will be considered.

During the course of 2016, sporadic incidents occurred in South Africa where certain church congregations fell prey to malevolent practices on the part of their pastors or ministers. One such incident involved a self-styled proclaimed prophet at the Mount Zion General Assembly Church, commonly known as the "prophet of doom", who sprayed an insecticide with the brand name Doom³⁸ in the faces and on the bodies of congregants during church services for purported healing purposes.³⁹ In 2015 headlines were made by a pastor who made congregants eat snakes, drink petroleum and remove their clothing as part of their religious worship.⁴⁰ A year earlier congregants of another religious body had been ordered by their pastor to eat grass as a means of bringing them closer to God.⁴¹

The widespread media coverage of such events culminated in the CRL Rights Commission issuing a Report of the Hearings on Commercialisation of Religion and Abuse of People's Belief Systems (the Report). Prior to the issuance of the Report, the CRL Rights Commission conducted certain investigative studies with the aims, *inter alia*, of procuring a "societal" understanding pertaining to individuals falling victim (and becoming gullible)

³⁷ Other Chapter 9 state institutions supporting democracy, with the aim of strengthening the constitutional democratic precept of the Republic, include the Public Protector; the South African Human Rights Commission; the Commission for Gender Equality; the Auditor-General and the Electoral Commission. See ss 181(1)(a)-(f), as read with subsections (2)-(5) of the *Constitution*.

³⁸ The offender, Lethebo Rabalago, was subsequently criminally charged for contravening agricultural legislation and causing grievous bodily harm and sentenced to imprisonment or paying a fine in respect thereof. See Motau 2018 <http://ewn.co.za/2018/02/09/he-s-doomed-prophet-of-doom-found-guilty>.

³⁹ Reilly 2014 <http://www.dailymail.co.uk/news/article-2537053/Lawn-Christians-South-African-preacher-makes-congregation-eat-GRASS-closer-God.html>.

⁴⁰ NemaKonde 2015 <https://citizen.co.za/news/south-africa/423976/pastor-mnguni-makes-congregation-eat-snakes/>.

⁴¹ Reilly 2014 <http://www.dailymail.co.uk/news/article-2537053/Lawn-Christians-South-African-preacher-makes-congregation-eat-GRASS-closer-God.html>.

to practices as outlined above; of identifying causes relating to the commercialisation of religion and traditional healing;⁴² of investigating "miraculous claims [made by certain] religious leaders; [of realising] the legal framework [regulating] the religious and traditional sectors; and [of formulating] findings and recommendations that address the status quo on commercialisation of religion and traditional healing".⁴³

The Report's findings are based on data derived from the random sampling of religious bodies and hearings that took place over the nine provinces of South Africa over a period of merely four months.⁴⁴ Some eighty-five religious leaders representing various religions in South Africa were called to "face-to face" interviews with the CRL Rights Commission.⁴⁵ The recommendations of the CRL Rights Commission⁴⁶ included the establishment of a so-called Peer-Review Committee (the PRC) which is envisaged to be an umbrella organisation representative of particular religions in South Africa. A chosen member for each of the aforesaid religious denominations will form the PRC, which will act as a self-regulatory body aimed at ensuring, *inter alia*, accountability and the mediation of disputes arising from religious associations or organisations.⁴⁷ The Report expressly attempts to dispel any concerns⁴⁸ about state control or regulation of the constitutionally-enshrined freedom of religion.⁴⁹ The CRL Rights Commission also recommends that the current *CRL Rights Commission Act* be amended so that the CRL Rights Commission has more powers to intervene in cases where there has been abuse,⁵⁰ and specifically that the CRL Rights Commission be given the necessary power (through

⁴² This was in response to complaints that members of the public were falling victim to church ministers using their religious doctrines and teachings to demand that donations be made in the form of tithing or offerings as an atonement for their sins.

⁴³ CRL Rights Commission 2017 <http://www.crlcommission.org.za/docs/Report%20On%20Commecialization%20of%20Religion%20and%20Abuse%20of%20People's%20Believe%20Systems%20final.pdf> (the Report) 6.

⁴⁴ 03 November 2015 to 23 March 2016. The Report 10.

⁴⁵ The Report 13. Some of the religious organisations included Freedom of Religion South Africa (FOR SA); the South African Council for the Protection and Promotion of Religious Rights and Freedoms; the *Nederduitse Gereformeerde Kerk*; the Lutheran Church of South Africa; the Seventh Day Adventists, and Incredible Happenings Ministries. Eighteen of the religious organisations made written submissions. See PMG 2017 <https://pmg.org.za/page/CRL%20Rights?via=homepage-feature-card> 42. Since the content of the Interim CRL Commission Report by and large was adopted in the CRL Rights Commission Final Report (referred to in this paper as "the Report") it is not necessary to go into any further detail of the Interim CRL Rights Commission Report.

⁴⁶ Which were tabled for review before the Parliamentary Committee

⁴⁷ The Report 47.

⁴⁸ In terms of representations, submissions and objections.

⁴⁹ The Report 27-28, 30, 34 and 38.

⁵⁰ This could, for example, refer to instances where a pastor infringes a fundamental human right of a worshipper.

amendments to the *CRL Rights Commission Act*) to ensure that religious bodies "get their [houses] in order".⁵¹ In ensuring that this is the case, the Commission will be the juristic body that will remain the final arbiter in all matters falling under the purview of the PRC⁵² and thereby "ensure that freedom of religion is guaranteed in the country and that the religious sector is given space and capacity to resolve its challenges and make all recommendations to [the CRL Rights Commission]".⁵³ This is a significant feature of the Report, the importance of which is again suggested in Part 5 of this article.

The merit (or rather, lack thereof) of the Report must certainly depend on certain procedural aspects. In this regard, the Report can roundly be criticised for adopting a "random sampling" methodology in circumstances where it took account of the views of a mere twenty-eight religious institutions and interviewed only eighty-five religious leaders, thus giving inadequate weight to the fact that 94,8 per cent of the South African population is affiliated in some or other way to a religion.⁵⁴ It was also noted by the participants (the religious leaders) who had been summoned to attend the CRL Rights Commission's hearings (held before the Report was compiled) that no mention had been made of any intention by the CRL Rights Commission to propose statutory amendments in relation to the regulation of religion in South Africa.⁵⁵

The point of contention, for the purposes of this article, is the substantive issues which the Report raises. These were diverse and varied. They ranged from concerns that church members were being subjected to (religious) rituals and practices that were unethical or impacted negatively on their human rights; to the abuse of media privileges (by spiritual leaders), such as the use of TV slots to advertise themselves, their faith or holy products; to the deification and hero-worship of church leaders by church members; to subjecting members to fundamentalist thoughts such as refusing to send their children to schools or dissuading them from using banking facilities; to the use of a personal bank account as the religious association's account; and to failing to register as a non-profit organisation and to maintain financial records.⁵⁶ The concept of "commercialisation" played a role, inasmuch as concerns were raised by the CRL Rights Commission in relation to congregants who were asked to make monetary

⁵¹ The Report 35.

⁵² The Report 48.

⁵³ The Report 48.

⁵⁴ Stats SA 2015 <https://www.statssa.gov.za/publications/P0318/P03182015.pdf> 27-29.

⁵⁵ See FOR SA and SACRRF 2017 <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/171017SARRF.pdf> (the Response).

⁵⁶ The Report 19-20.

donations to various religious institutions which may not have been registered as non-profit organisations, or the manner in which tithing was collected, namely by means of a hand-held bank-card device.⁵⁷

In response to the aforesaid substantive concerns, Freedom of Religion South Africa (FOR SA) and other interested parties⁵⁸ sought to jettison the CRL Rights Commission's proposal relating to any legislation that would in any way seek to interfere with freedom of religion by way of regulation. The cogency of their submissions (hereafter referred to as the Response) in this regard was premised on the following:

- religious practices that were potentially harmful, dangerous or unethical had to be dealt with in terms of the existing civil and criminal legislative framework;⁵⁹
- instances of "commercialisation" of religion should be understood within the confines of its being nothing out of the ordinary for congregants to offer tithing to religious associations, but that instances of specific alleged irregularities could be reported and investigated by the authorities on a casuistic basis;⁶⁰
- to the extent that certain religious associations were said to be flouting advertising laws, not paying tax or not complying with minimum statutory requirements, these were simply cases of individual religious bodies contravening the law. They needed to be referred to the appropriate state institutions for possible prosecution or investigation to cause them to comply;⁶¹ and
- as opposed to imposing any form of regulation on religious freedom, religious bodies should be afforded the opportunity of availing themselves of a participatory process by all stakeholders with a view to adopting a "Code of Ethics"⁶² against which religious bodies could

⁵⁷ The Report 16 and 19.

⁵⁸ Namely the South African Council for the Protection and Promotion of Religious Rights and Freedoms as well as various denominations (including many of the major churches, denominations and faith groups in South Africa). See the Response.

⁵⁹ The Response 20-29.

⁶⁰ The Response 29-30.

⁶¹ The Response 30-37.

⁶² The South African Charter of Religious Rights and Freedoms (the Charter) was a document drafted over several years by a committee of academics, religious leaders, religious scholars, international legal experts and government commissions. It was finally adopted at a public ceremony at the University of Johannesburg on 20 October 2010 in terms of s 234 of the *Constitution*. The Charter serves to supplement the Bill of Rights in the form of giving recognition to freedom of religion and the rightful place

ensure a measure of high standards, and where ethics were observed at all times.⁶³

Intrinsic to the aforesaid submissions was the abiding concern that the regulation of religion in South Africa, on the basis proposed by the CRL Rights Commission, constituted a violation of the constitutional guarantee to freedom of religion in the country — an anathema to our constitutional dispensation. Some of these concerns are addressed in Part 5 below.

4 Regulation is not in the interest of religious freedom

The earliest judicial pronouncement upon the meaning of a religious belief in South African case law dates back more than four decades, when Rumpff CJ in *Publication Control Board v Gallo (Africa) Ltd*⁶⁴ held that:

Religious beliefs are highly subjective and are founded on faith. [Religion] is not a sphere in which objective concepts of reason are particularly apposite.⁶⁵

This view of religion as a matter of personal reflection in terms of belief was to a large extent prophetic of what the South African Constitutional Court would endorse in *Lawrence, Negal, Solberg v State*,⁶⁶ wherein Chaskalson P conceded that the court was unable to offer a better definition of freedom of religion than that given in the Canadian authority of *R v Big Drug Mart Ltd*,⁶⁷ wherein Dickson CJC observed:

The essence of the concept of religion is the right to entertain such religious *beliefs* as a person chooses, the right to declare religious *beliefs* openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.⁶⁸

it is to occupy within the *Constitution*. Significantly, the Charter could form fertile material for a "Code of Ethics". An emphasis is placed on "future unwarranted state interference with religion". See Malherbe 2011 *BYU L Rev* 622-623. Article 3, as read with 3.1 of the Charter, refers to the notional absence of state regulation in religious freedom and endorses our "religiously neutral" model of secularism by providing that "[e]very person has the right to impartiality and protection from the state in respect of religion... The state must create a positive and safe environment for the exercise of religious freedom...". Also see SACRRF 2010 <https://www.strasbourgconsortium.org/content/blurb/files/South%20African%20Charter.pdf>.

⁶³ The Response 7.

⁶⁴ *Publication Control Board v Gallo (Africa) Ltd* 1975 3 SA 665 (A).

⁶⁵ *Publication Control Board v Gallo (Africa) Ltd* 1975 3 SA 665 (A) 673B-C. Emphasis added.

⁶⁶ *Lawrence, Negal, Solberg v State* 1997 4 SA 1176 (CC).

⁶⁷ *R v Big Drug Mart Ltd* 1985 1 SCR 295.

⁶⁸ *R v Big Drug Mart Ltd* 1985 1 SCR 295 para 92. Emphasis added.

Later, in *Christian Education South Africa v Minister of Education*, Sachs J, writing for the minority, referred to the sanctity of freedom of religion in the following vein:

There can be no doubt that the right to freedom of religion, belief, and opinion in an open and democratic society contemplated by the Constitution is important... Yet freedom of religion goes beyond protecting the inviolability of the individual *conscience*. For many believers their relationship with God or creation is central to all their activities... Religious belief has the capacity to awake concepts of *self-worth and human dignity which form the cornerstone of human rights*.⁶⁹

And in the matter of *Prince v President of the Law Society of the Cape of Good Hope*,⁷⁰ the Constitutional Court once again relied on the aforesaid *dictum* of Dickson CJC in *R v Big M Drug Mart Ltd*,⁷¹ finding that "religion" was to be understood thus:

Religion is a matter of *faith and belief*. The *beliefs* that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational... The believers should not be put to the proof of their *beliefs or faith*. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion...⁷²

A cumulative understanding of the above case law is that religion is a deeply-held personal belief. Whilst it is something that can probably be determined objectively, such cases make clear that the belief itself is not required to accord with what the reasonable person (a non-believer) would regard as sensible. Our courts have given their endorsement to an understanding of religion, and by necessary implication, the expression thereof, even where it happens to be "bizarre, illogical or irrational". The latter adjectives do not in and of themselves constitute a danger (or threat) to any other person or their basic human rights, provided of course that such beliefs are not acted out in a manner that does exactly that. The case law also gives impetus to the notion that religion (and its concomitant freedom) is a "moral force"⁷³ to be accommodated in South Africa, a feature of our democracy which can and should not be unduly interfered with by the body politic. More significantly, this endorses the principle that our courts, not the state, must function as the arbiters of determining – albeit in the form of

⁶⁹ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36. Emphasis added.

⁷⁰ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

⁷¹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) para 40.

⁷² *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) per Sachs J para 97. Emphases added. Also see *Dlamini v Green Four Security* 2006 11 BLLR 1074 (LC) para 16.

⁷³ Van der Vyver and Green 2008 *AHRLJ* 344.

judicial regulation – the extent of religious freedom and the reasonable and justifiable limitations to be imposed upon thereon.

It should be noted that there is absolutely no reason why human rights violations or abuses cannot be dealt with in terms of the existing legislative framework or common law⁷⁴ in South Africa.⁷⁵ The effective prosecution of the "prophet of doom" is testimony to this very fact. The same applies in respect of the other concerns addressed by the CRL Rights Commission, such as non-compliance with statutory requirements.⁷⁶ It is not the contention of the CRL Rights Commission that human rights abuses are a commonplace occurrence in relation to religious bodies. In point of fact, this is mentioned merely once in the CRL Rights Commission's Report.⁷⁷ Moreover, in the Foreword to the Report⁷⁸ reference is made to recent controversial news reports and articles in the media concerning pastors

⁷⁴ Where individuals are charged in respect of common law offences or conceivably even pursued on civil charges in a civil court.

⁷⁵ Enforcement of any abuses or violations of rights can be addressed in terms of legislation such as the *Schools Act* 84 of 1962; the *Animals Protection Act* 71 of 1962; the *Prevention and Combatting of Corrupt Activities Act* 12 of 2004; the *Prevention of Organised Crime Act* 121 of 1998, or under the Code of Advertising Practice of the Advertising Standards Authority of SA. Our law reports are replete with examples of instances where legislative and constitutional rights have been impugned and in which instances our courts have handed down judgments in favour of the prejudiced applicants. In the instance of the prophet of doom case, the Magistrate's court in Polokwane found him guilty on five charges of assault with intent to do grievous bodily harm and of contravening the *Agricultural Stock Remedies Act* 36 of 1947 (Anon 2018 <https://www.news24.com/SouthAfrica/News/day-of-doom-for-pastor-as-court-finds-him-guilty-of-assault-20180209>). See for example: *Afriforum v University of the Free State* 2018 2 SA 185 (CC) in which the court upheld the adoption by the university of a new language policy; *EFF v Speaker of the National Assembly* 2018 2 SA 571 (CC) in which the court made clear what the public protector's remedial action was and that the State President had in fact violated the *Constitution* (para 108); in *Occupiers of Erven 87 & 88 of Berea v Christiaan Frederick* 2017 5 SA 346 (CC) the court enforced the provisions of s 26(3) of the *Constitution* preventing the illegal eviction of occupiers of land (property); the North Gauteng High Court in Pretoria (per Prinsloo J) set aside a decision by the Gauteng Department of Education to admit more learners than the number for which the school had capacity (Mitchley 2018 https://www.huffingtonpost.co.za/2018/01/15/afrikaans-medium-school-wins-court-battle-against-education-department_a_23333959); and in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) the court found that the President is obliged to hear the families of the victims before exercising his prerogative to grant parole to offenders in terms of s 84(2)(J) of the *Constitution*.

⁷⁶ For example, the non-registration by churches as non-profit organisations in terms of the *Non-Profit Organisations Act* 71 of 1997 or non-compliance by churches with the *Income Tax Act* 58 of 1962. Other relevant legislation in this regard would be the *Banks Act* 94 of 1990; the *SA Reserve Bank Act* 90 of 1989; the *Deeds Registries Act* 47 of 1937; the *Companies Act* 71 of 2008 and the *Immigration Act* 13 of 2002.

⁷⁷ The Report 19.

⁷⁸ The Report 4.

giving rise to questions whether religion has become a commercial institution.

As previously mentioned, the agitation has more to do with the proposal by the CRL Rights Commission that the religious sector be regulated by means of a peer-review council that will ultimately be overseen by the CRL Rights Commission by means of proposed amendments to the *CRL Rights Commission Act*. It is envisaged that the Peer-Review Council (the Council) will sit in determination of which church pastor receives a licence to operate a particular religion. Moreover, the powers of the Council (to be established in terms of legislation which must be passed by parliament) will include, but not be limited to, deciding on whether a particular religious leader has a licence to practice and where religious groups may conduct their practices, and acting as a mediator between religious groups and the state.⁷⁹ No details are forthcoming from the CRL Rights commission as to the financial and/or logistic means by which the Council will be established.

In the history of South Africa there has never been a statutory (regulatory) body that has granted religious bodies licences to operate or practice their beliefs. The counter-argument could well be made that what is sought to be achieved is not the regulation of beliefs *per se*, but of the organisations which promote certain beliefs. For reasons which appear below, it becomes evident that the regulation of any belief by anybody or institution is well-nigh impossible.⁸⁰ As such, it is to the extent that any attempt is made to regulate organisations and religious bodies that a concern looms. The CRL Rights Commission seeks to justify its argument in this regard by relying on a rather tenuous argument that seeks to regulate⁸¹ religious bodies in accordance with section 22 of the *Constitution*.⁸² The regulation of trades, professions and certain occupations in accordance with necessary legislative prerequisites is necessary in any democratic society. Adherence to certain basic standards of service delivery and professionalism or even codes of ethics is thus ensured. All of these are objectively determined and readily capable of assessment in terms of whether a member or professional association is compliant. The same cannot be applied to religious institutions on account of the fact that the essence of what they believe (or worship) is not conducive to any stringent definition of what is logical, reasonable or rational. The freedom is spiritual in nature, and save for

⁷⁹ The Report, for example 34-39.

⁸⁰ Take for example, the belief which some people have in relation to being vegan or a psychic. The regulation thereof, save to the extent that the expression of such a belief interferes unlawfully with another person, is essentially not capable of being monitored.

⁸¹ The Report 39, 41.

⁸² Which provides that all citizens have the right to choose their trade, occupation or profession freely.

instances of infractions of the civil or criminal law, there is simply no reason to regulate religious freedom in a free and democratic society. This very aspect of the right in question, namely that it is one which is so vexed with personal beliefs and views, makes it more suitable that in instances where one seeks to limit religious freedom a court, as opposed to a regulatory body, should be the adjudicator. This matter is dealt with in greater detail below.

The creation of the Council (which is to consist of committees for each religion in South Africa)⁸³ is extremely far-fetched inasmuch as the CRL Rights Commission perceives that the Council can be effectively democratically representative of the wide spectrum of religions in South Africa.⁸⁴ A more worrying aspect of the Council is the extent to which it would be deemed as being a regulatory body over religious freedom in South Africa. An even more overarching concern is that of the *CRL Rights Commission Act's* being amended to give the Commission additional powers to act as the overall supervisory body heading the Council. This, the CRL Rights Commission contends, will ensure that freedom of religion is guaranteed in South Africa.⁸⁵ However, the means through which this is to be achieved, namely regulation as envisaged, is disproportionate in all the circumstances. This statement is premised simply on the fact that the ultimate recommendation sought by the CRL Rights Commission cannot be viewed as helpful, appropriate, or necessary.⁸⁶ Put differently, the way in which it seeks to address the problems addressed in the Report constitutes an unjustifiable and unreasonable limitation of the right to freedom of religion.

Whilst no right in the Bill of Right is absolute, it is critical to our democratic order that in a pluralistic society that is becoming ever more crowded, with space – not only geographically but notionally and conceptually – becoming narrower, "freedom in all areas of life becomes ever more valuable".⁸⁷ Numerous commentators have observed that the most basic freedom in a democratic society is religious freedom, and any attempt by the state to regulate this freedom gives rise to disquietude.⁸⁸ The dubious protection afforded freedom of religion (or the lack thereof) in societies like China, Afghanistan or Pakistan is a paradox. Citizens of such countries may have the apparent fundamental rights (which should include freedom of religion) but they are restricted in the manner in which their freedom of religion is

⁸³ The Report 45.

⁸⁴ The Response 52.

⁸⁵ The Report 38-39

⁸⁶ See Schlink 2012 *Duke J Comp & Int'l L* 293.

⁸⁷ Schlink 2012 *Duke J Comp & Int'l L* 298.

⁸⁸ See Coertzen 2014 *2014 AHRLJ* 140-141; Coertzen 2012 *NGTT Supplementum* 2 178; Ssenyonjo 2009 *ICON* 275.

exercised by means either of imposing a particular state-recognised religion or of emphasising state national interests as supreme above individual rights.⁸⁹

It bears mentioning that the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA), in considering the Report of the CRL Rights Commission, has been unpersuaded by the proposals either to establish a regulatory Council or to amend the *CRL Rights Commission Act*. COGTA supports the initiative by religious bodies to engage in further dialogue with a view to adopting a "Code of Ethics" based on the Charter.⁹⁰ The stance adopted by COGTA is encouraging.

As previously stated, the CRL Rights Commission is an organ of state.⁹¹ Its status as a Chapter 9 constitutional institution does not detract from the fact that it is part of the executive arm of government. Whilst its purpose may be noble and honourable, its status as a state institution cannot (and should not) be ignored. Moreover, the powers of the CRL Rights Commission exercised in terms of the Constitution and the *CRL Rights Commission Act* are administrative in nature. This means that the exercise of its public powers or the performance of its public functions renders it subject to judicial review.⁹² The CRL Rights Commission repeatedly makes the point that it does not countenance interference by the state in religious freedom.⁹³ However, one is presented with the express contradiction appearing from the CRL Rights Commission's proposal that it (the Commission) will issue registration certificates to religious bodies, in consultation with the Council.⁹⁴ On the one hand, the CRL Rights Commission attempts to distance itself from any notional sense of state regulation of religious freedom in South Africa. On the other hand, and to the extent that the CRL Rights Commission advocates its proposals as an organ of state, the conclusion is unavoidable that religion in South Africa, and the extent of its freedom, will ultimately be subject to regulation should its proposals be accepted. Regulation by the Council or the CRL Rights Commission as an umbrella body (both of which will constitute organs of state), essentially constitutes an overreach on the part of the state into the realm of individuals forming the societal and

⁸⁹ Venter *Constitutionalism and Religion* 92-96; Malherbe 2011 *BYU L Rev* 619 and the authorities cited at fn 39.

⁹⁰ FOR SA 2018 <https://forsa.org.za/parliamentary-committee-drafts-response-to-the-crls-report-on-regulation-of-religion/>.

⁹¹ It also falls within the definition of an organ of state as provided for under s 1 of the *Promotion of Administrative Justice Act* 3 of 2000.

⁹² See Hoexter *Administrative Law* 206-210 especially the authority cited at fn 264.

⁹³ The Report; see for example 27, 30, 34, 39.

⁹⁴ The Report 39.

participatory compact of our democratic order who are entitled to exercise their freedom of religion as under sections 15 and 31 of the *Constitution*.

Infractions of the law, as well as instances of non-compliance which are sought to be enforced through the arm of the law, are matters which fall under the purview of the judicial arm of government as opposed to the executive or legislative arms. This separation of powers, which is essential to the success of our institutional democracy, ensures the fulfilment of two functions. Firstly, our judges, as the independent branch of the government, preside over matters involving disputes which potentially impact upon religious freedom. Due to the nature of the right at issue, our constitutional court has made it clear that such disputes must be adjudicated in a "nuanced and context-sensitive form".⁹⁵ It is inherent in such an approach that the fundamental right to religious freedom is unlikely to be considered in a rough-shod manner but will be treated with the respect it is duly accorded in cases where claims are made for its limitation or restriction. Secondly, placing the determination of disputes about the freedom of religion in the hands of the judiciary, as opposed to "entrusting" religious freedom regulation to an organ of state avoids the inherent anticipatory pitfall of such organ of state having to justify its actions and conduct. It is our judiciary and not the executive or an organ of state which must have the final say⁹⁶ on how religious freedom is to be given content and expression under the *Constitution*. This is the best guarantee of protecting freedom of religion in our constitutional dispensation.

5 Conclusion

The CRL Rights Commission is attempting to persuade parliament to amend the *CRL Rights Commission Act* in a way that would ultimately permit it to oversee a statutory body which would ultimately act as a self-regulatory council. Religious freedom in South Africa is one of the few rights which has not been blighted with a history of either intervention on the part of the state or restrictions in terms of its expression. Ironically, at a time when South Africa is able to celebrate its Bill of Rights and recently founded constitutional dispensation, attempts are being made by the CRL Rights Commission through its proposals to unduly restrict and limit the country's religious freedom. Whilst not dispelling the concerns raised regarding isolated instances of human rights abuses and other non-compliance with statutory regulations (in terms of practising as a religious association), it

⁹⁵ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 30; Henrico 2012 *Obiter* 503; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 35 ILJ 209 (SCA) para 32.

⁹⁶ See Powell "Law as Justification" 65 ff.

must be understood that all such matters can and should be addressed within the current, existing legislative framework of the country. More importantly, any attempt to restrict or limit religious freedom is a matter which should not be decided by a regulatory body, whether in terms of a self-regulatory scheme or otherwise, on account of the fact that such body ultimately constitutes an organ of state and is part of the executive. Determinations of such disputes are best left to our courts as the independent branch of government. To do so would ensure that the matter was dealt with in terms of the tenets of justice and, more significantly, would guarantee that a court of law, and not the state, sits as the ultimate adjudicator of religious freedom.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
ATR	African Traditional Religions
BYU L Rev	Brigham Young University Law Review
Can Bar Rev	Canadian Bar Review
Can J L & Soc'y	Canadian Journal of Law and Society

CCR	Constitutional Court Review
COGTA	Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs
Colum L Rev	Columbia Law Review
CRL Rights Commission	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
Emory Int'l L Rev	Emory International Law Review
FOR SA	Freedom of Religion South Africa
ICON	International Journal of Constitutional Law
IJRF	International Journal for Religious Freedom
Ind Int'l & Comp L Rev	Indiana International and Comparative Law Review
J L Relig	Journal of Law and Religion
JSR	Journal for the Study of Religion
Kansai U Rev L & Pol	Kansai University Review of Law and Politics
NGTT	Nederduitss Gereformeerde Teologiese Tydskrif
PMG	Parliamentary Monitoring Group
PRC	Peer-Review Committee
SACRRF	South African Council for the Protection and Promotion of Religious Rights and Freedoms
SALJ	South African Law Journal
Tex Int'l LJ	Texas International Law Journal
UBC Law Rev	University of British Columbia Law Review
Yale J L & Human	Yale Journal of Law and Humanities