

REGULATION OF RELIGIOUS GROUPS IN SOUTH AFRICA AND INTERNATIONAL HUMAN RIGHTS STANDARDS

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ABSTRACT

In recent times, South Africa has had to contend with multiple challenges pertaining to religion and the manner in which it is being manifested. Cases abound of people allegedly engaging in acts such as gulping petrol, being placed in deep freezers and pesticides sprays as part and parcel of religion and religious practices. There are reports suggesting that some are involved in crimes such as money laundering, extortion, fraud, sexual acts and other illegal acts claiming that these acts are religious acts. This state of affairs has awakened reactions from various sections in South Africa's Society more importantly, the commission which deals with religious matters - the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) which has responded to these realities by making a call for regulation of religious activities. The CRL Commission hopes that regulating religious groups will help address and bring to an end some of these practices, which according to it, are unacceptable. The CRL Commission contends, among others, that people should face reality and stop engaging in such practices and belief systems. However, some religious organizations such as Freedom of Religion South Africa (FOR SA) and others have been rejecting such proposals by the CRL Commission claiming CRL Commission is not the right organ to regulate religious practices and such is interfering with freedom of religion as guaranteed by the Constitution. Those religious organizations even question the CRL Commission's mandate and powers. Although CRL Commission claims to regulate religious practices so that it may end controversial practices, some people remain committed to their beliefs and religious practices, going as far as to demand that the government, including chapter nine institutions such as the CRL Commission should steer clear of interfering in their religious choices. Amidst all this, it is not in dispute that some of the religious practices in some churches have an element of criminality. All these surrounding circumstances make the issue of religious practices and regulation a complex one. This research assesses the practicality and constitutionality of regulating religious beliefs and practices by measuring the CRL Commission's proposals against both international human rights standards and South Africa's national laws. This research evaluates the constitutional mandate and objectives of the CRL Commission and also addresses the question of whether there are some legal frameworks in place that can effectively address the concerns raised by the CRL Commission such as criminality and other alleged unlawful acts. This study went as far as assessing how other countries addressed any related act which might have occurred in their countries. In addressing these issues, the methodology used is doctrinal.

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ABBREVIATIONS

FOR SA	: Freedom of Religion South Africa
CRL COMMISSION	: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
THE CONSTITUTION	: The Constitution of the Republic of South Africa Act 108 of 1996
SA	: South Africa
INT LAW	: International law
VCLT	: Vienna Convention on the Law of Treaties
ECHR	: European Convention of Human Rights
UDHR	: Universal Declaration of Human Rights
SAHRC	: South African Human Rights Council
ICCPR	: International Covenant on Civil and Political Rights
IDLO	: International Development Law Organization
SAPS	: South African Police Services
CRL ACT	: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002
NPO	: Non Profit Organizations
NPA	: National Prosecuting Authority
SACRRF	: South African Charter of Religious Rights and Freedoms
COGTA	: Parliamentary Portfolio Committee of Cooperative Governance and Traditional Affairs
SARS	: South African Revenue Services
ASA	: Advertisement Standards Authority
PBO	: Public Benefit Organization
DSD	: Department of Social Development
PAYE	: Pay As You Earn
SACRFF	: South African Council for the Protection and Promotion of Religious Rights and Freedom

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION	1
1.1 Introduction	1
1.2 Problem statement	9
1.3 Aims and Objectives	9
1.4 Research Questions	10
1.5 Research Methodology	10
1.6 Literature Review	11
1.7 Chapter Outline	20
CHAPTER TWO: THE RELIGIOUS RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND SOUTH AFRICAN LAW	21
2.1 Chapter's Background	21
2.2 Understanding Religion and Belief	23
2.3 The South African Normative Framework on the Right to Religion	27
2.3.1 Religious rights under section 15 of the Constitution	28
2.3.2 The religious rights under section 31 of the Constitution	30
2.3.3 The Constitutional provision and its content	31
2.3.4 The court's approach and interpretation of the right to religion under South African law	32
2.4 The South African Charter on Religion	37
2.5 Limitations of Right to Religion in South Africa	38
2.6 The Right to Religion under International Human Rights Law	43
2.6.1 The status of International law in South Africa	44
2.6.2 The provision of the right to religion under various International treaties	45
2.6.3 The right to religion based on the authoritative guidance from General comments	46
2.6.4 Other interpretation and application of the right to religion under International law	47
2.6.5 Limitation discussed from the International Human Rights law perspective	49
2.7 Conclusion	52
CHAPTER THREE: THE ASSESSMENT OF THE MANDATE OF THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUASTIC COMMUNITIES COMMISSION AND THE MECHANISMS IT HAS CONSIDERED TO REGULATE RELIGIOUS ORGANISATIONS	54
3.1 Chapter's Background	54
3.2 The Mechanisms Proposed by the CRL Rights Commission	55

3.2.1. Accredited Umbrella Organizations	56
3.2.2. Peer Review Committee	57
3.2.3. The Peer Review Council	58
3.2.4. Licensing and Registration	58
3.2.5 The power and role of CRL Commission in giving effects to the suggested Proposals	59
3.3 The Constitutional Mandate of the CRL Rights Commission	60
3.3.1 Objectives of the CRL Commission	61
3.4 The Human Rights Implications of the Mechanisms Proposed by the CRL Rights Commission	61
3.4.1. Background of arguments	62
3.4.2. Peer Review Committee and Umbrella Organizations	63
3.4.3. Licensing and De-licensing	66
3.4.4. Registration and Accreditation	71
3.4.5. Worship Centers	75
3.4.6 Other general insights	76
3.5 The Constitutionality of the Mechanisms of the CRL Rights Commission	80
CHAPTER FOUR: AN ASSESSMENT OF THE ADEQUACY OF EXISTING LEGAL AND POLICY FRAMEWORK TO ADDRESS CONTROVERSIAL RELIGIOUS PRACTICES AND HOW OTHER COUNTRIES TACKLED CONTROVERSIAL RELIGIOUS PRACTICES	88
4.1 Chapter's background	98
4.2 Enforcement of laws	89
4.2.1 Freedom of religion and the Rule of law	89
4.2.2 Legislations in place	93
4.2.3 Case law on reliance on criminal law to address concerns by the Commission	98
4.2.4 The Doom Case	101
4.3 The Approach in other countries: Lesson for South Africa	105
4.4 Conclusion	106
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATION	108
5.1 Introduction	108
5.2 Conclusions	108
5.3 Recommendations	110
BIBLIOGRAPHY	114

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF RESEARCH

The right to religion is enshrined in the Constitution of South Africa of 1996.¹ Section 15 found in Chapter 2 of the Constitution of South Africa² states that everyone has the right to freedom of religion, belief and opinion. It is to be noted that the provision does not read: ‘right to religion and belief’ but rather ‘right to freedom of religion and belief’. The word ‘freedom’ has a lot to tell. It could suggest that one is free to practice such religion according to what a certain religion requires. Section 31 of the Constitution entitles persons belonging to a cultural, religious or linguistic community, the right –(a) to enjoy their culture, practice their *religion* and use their language; and (b) to form, join and maintain *cultural, religious* and linguistic associations and other organs of civil society. Section 9(3) of the Constitution prohibits the state from unfairly discriminating against anyone on one or more grounds, including, among others, religion, conscience and belief.

Chaskalson P, who delivered the majority judgment, referred with approval to the definition of freedom of religion in the case of *Big M Drug Mart*,³ that:

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

Notably, South Africa is a state party to international human rights treaties and the right to religion has also been expressed in various international human rights instruments. For example, Article 18 of the Universal Declaration of Human Rights (UDHR), which was adopted without dissenting vote by the General Assembly of the United Nations in 1948, states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in

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

² As above.

³ *R v Big M Drug Mart* (1985) 13 CRR 64 97.

teaching, practice, worship and observance.⁴ This fundamental human right has also been entrenched in the International Covenant on Civil and Political Rights (ICCPR) and has been reaffirmed by the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief that was approved by the General Assembly of the United Nations in 1981. Article 18 of the ICCPR⁵ crafts this right in a manner similar to that in article 18 of the UDHR by providing that:

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

With the right to freedom of religion, conscious and thought explicitly guaranteed under both international law and South Africa’s law, people, either individually or as a group, have sought to exercise this right. One way of doing this has been through the formation of churches. Within the context of South Africa, there are several churches formed and operating today as a means to advance their religious rights. In some of these churches, rituals are performed in practicing the right to freedom of religion. For many, this right is so fundamental in that it forms part of their daily lives and activities.⁶ Religion influences the decisions and choices some of these individuals make.⁷ It also remains crucial in their capacity to relate in a meaningful manner not only with themselves but also, their communities.⁸ Religious gatherings have also been found to provide a support system for individuals and to nurture and offer a framework for individuals. Studies have also established that the support system that results from religious groups and gatherings ensures social stability and growth.⁹ There is also no doubt that religious belief has the capacity to awaken concepts of self-worth.¹⁰ It was accordingly pointed

⁴ Article 18 of the Universal Declaration of Human Rights (1948) adopted by the UN General Assembly resolution 217 10 December 1948, entered into force 1976, UN Doc. A/Res/217.

⁵ International Covenant on Civil and Political Rights adopted United Nation General assembly (1966) Resolution 2200A (XXI) on 16 December 1966, Came into force from 23 March 1976 in accordance with Article 49 of the covenant, RES/2200A

⁶ *Christian Education South Africa v Minister of Education 2000 4 SA 757; 2000 10 BCLR 1051 (CC)* Para 36.

⁷ N 5 above.

⁸ As above.

⁹ As above.

¹⁰ As above.

out in *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*,¹¹ that “Religion is not just a question of belief or doctrine. It is part of a people’s temper and culture and ... way of life.”¹²

Furthermore, the court in the case above reiterated that Religious communities of South Africa have a right to remain free to believe, teach, preach and live out our religious convictions and beliefs, without the control and interference of the State.¹³ Banda concluded that the country’s (South Africa) secular liberal Constitution guarantees freedom to religious bodies, allowing all religious bodies to exist in South Africa.¹⁴ So it is thus not bound in one religion.¹⁵ Therefore, there is a separation between the state in South Africa and religion. Since South Africa is a secular state and not bound by any religion, it is then bound to respect and help protect the constitutional right to freedom of religion and its association.¹⁶

The court in *Fourie’s case*¹⁷ highlighted the foregoing view by noting that In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. It was furthered that the function of the Court is to recognize 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.”¹⁸

¹¹ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC).

¹² As above at paragraph 90.

¹³ As above.

¹⁴ C Banda ‘Redefining Religion? A Critical Christian reflection on CRL Rights Commission’s proposal to regulate religion in South Africa’ May 2019

https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa. (Accessed 28 October 2019)

¹⁵ See section 7 of the Constitution of South Africa of 1996.

¹⁶ As above.

¹⁷ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC)

¹⁸ As above at paragraph 94 – 98

There is therefore no doubt that the exercising of the right to religion comes with so many benefits or advantages not just for individuals but the community at large. In recent times, however, much has been reported in South Africa regarding acts and conduct being practiced in pursuance of the right to freedom of religion. News reports have shone a light on preachers' potentially "harmful practices" and controversial religious practices including, church members, including those below the age of 18, "consenting" to having sexual intercourse with church leaders, with the hope that the sexual act has a cleansing power to get rid of bad luck,¹⁹ using pesticide spray on congregants whereas manufacturers warned against using pesticide.²⁰ The reports suggest further that in other churches, people are eating dogs, snakes, mice and some are expected to pay substantial amounts of money before blessings and prayers could be said over them and in which such blessings do not manifest at all.²¹ Blessed water and oils are sold to congregants at a high marked-up price which then question the nature of the church - whether it's an Non-Profit Organization(NPO) or a business.²²

With all these controversies and the alleged illegal acts, questions may arise regarding how far the right to freedom of religion should be exercised. Some organizations, including chapter nine institutions such as the CRL Commission have been left with no option but to intervene, thus, effectively making calls for regulation of religious groups and practices.²³ The CRL commission is a state institution established in terms of chapter 9 of the Constitution to support democracy.²⁴ Its function is to investigate, advice and report on religious rights issues.²⁵ It is a juristic, independent statutory body regulated by the Commission for the Promotion and Protection of the Rights of Cultural,

¹⁹ Zimbabwe Daily 'The angels in 'Gucci': Bushiri, Magaya and the gospel of prosperity' 09 February 2019 <https://www.thezimbabwedaily.com/news/309971-the-angels-in-gucci-bushiri-magaya-and-the-gospel-of-prosperity.html> (accessed 24 July 2019).

²⁰ As above.

²¹ As above.

²² J Savage 'The Flood Of False Prophets And Pastors In Africa' 18 April 2018 <https://www.modernghana.com/news/848376/the-flood-of-false-prophets-and-pastors-in-africa.html> (accessed 24 July 2019).

²³ As above.

²⁴ The Constitution for the Republic of South Africa Act 108 of 1996.

²⁵ C Collison 'State is trying to control religion and it doesn't listen to us' 30 August 2017 <https://mq.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019)

Religious and Linguistic Communities Act (CRL Commission Act),²⁶ from which it essentially derives its statutory wherewithal to fulfill its constitutional functions.²⁷ In light of controversies and incident in religious communities, the chairperson of the CRL Commission said “freedom of religion cannot be an endless freedom that can be used to exploit the poor and vulnerable in society.”²⁸

In 2015 it was announced that the CRL commission was launching an investigation into South African religious bodies.²⁹ The investigation would focus on how they collected and spent their money, and whether they abused their members’ good faith.³⁰ In theory all religious groups were being investigated but it does appear that Pentecostal churches³¹ are under the most scrutiny.³² As it was noted above, The CRL Commission is an independent body, but its independence is open to debate because the president appoints its members.³³ Since the investigation was launched, its chairperson, Ms. Thoko Mkhwanazi-Xaluva, has spoken in interviews regarding the need to “regulate religion”.³⁴ She further contended that if practices of trades and professional fields such as medicine, nursing, engineering and law can be regulated by medical council, law societies and nursing council then religion can also be regulated as other trade and profession as they all have practices.³⁵

²⁶ Commission for the Promotion and Protection of the Rights of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

²⁷ As above.

²⁸ Parliament of the RSA ‘Portfolio Committee on COGTA meets with CRL Commission to discuss seven Angel Ministries’ 20 March 2018 <https://www.parliament.gov.za/press-releases/portfolio-committee-cogta-meets-crlcommission-discuss-seven-angel-ministries> (accessed 20 November 2019)

²⁹ B Simelani ‘Religious rights body calls for stricter religious regulation, again’ 28 February 2019 <https://www.dailymaverick.co.za/article/2019-02-28-religious-rights-body-calls-for-stricter-religious-regulation-again/> (accessed 23 June 2019)

³⁰ As above.

³¹ [Pentecostalism is a form of Christianity that emphasizes the work of the Holy Spirit and the direct experience of the presence of God by the believer. Pentecostals believe that faith must be powerfully experiential, and not something found merely through ritual or thinking. Pentecostal churches are energetic and dynamic. Its members believe they are driven by the power of God moving within them. – see BBC ‘Pentecostalism’ 02 May 2009](https://www.bbc.co.uk/religion/religions/Christianity/subdivisions/Pentecostal_1.shtml) https://www.bbc.co.uk/religion/religions/Christianity/subdivisions/Pentecostal_1.shtml (Accessed 10 May 2021)

³² Simelani (n 29 above)

³³ T Tastard ‘Christianity and Crisis in South Africa Today’ 28 February 2017 <https://providencemag.com/2017/02/christianity-crisis-in-south-africa-today/> (accessed 20 July 2019)

³⁴ Collison n25 above.

³⁵ Simelani (n29 above).

Mkhwanazi-Xaluva, has even on occasion stated that “We are against the promotion of fantasies.”³⁶ The CRL Commission has also expressed dissatisfaction with the rise of controversial religious practices, going as far as to note: “We don't know how many churches there are. The government doesn't know. I can wake up and start up a church tomorrow. There's no law that stops me from doing that.”³⁷ According to the CRL Commission, people claim to open churches because they believe that they have a calling (which in simple words from religious perspective can be defined as permission from God for someone to lead or be a pastor).³⁸ It is a mere calling which leads people to open churches and there are no other procedures or laws which they should fulfill or take note of in order to successfully open their churches to practice their beliefs.³⁹ Several churches are being opened and many unlawful and controversial acts are reported as part of their rituals. With this state of affairs, the CRL Commission has time and again made calls for the regulation of religion and religious practices.⁴⁰ The CRL Commission even proposed an amendment to the CRL Act to allow them to deal with some of the challenges.⁴¹

Amidst the proposals by the CRL Commission, Freedom of Religion South Africa (FOR SA), a civil society organization and other interested parties, has started a petition to block the proposed regulation of religion in South Africa as proposed by the CRL Rights Commission, stating that the proposals contained in the CRL Report represent an unacceptable erosion of the rights to freedom of religion and association guaranteed by the South African Constitution.⁴² Parliamentary Portfolio Committee of Cooperative Governance and Traditional Affairs (COGTA) also rejected the proposal by the CRL

³⁶ As above.

³⁷ Simelani (n29 above).

³⁸ As above.

A calling is a belief by Christians believing that God allowed them to lead or do a certain thing.

³⁹ As above.

⁴⁰ As above.

⁴¹ Ramphel L 'CRL to amend Act to clamp down on controversial religious leaders' 11 July 2017 <http://www.capetalk.co.za/articles/263916/crl-to-amend-act-to-clamp-down-on-controversial-religious-leaders> (accessed 25 February 2020)

⁴² See Section 31 of the Constitution for the Republic of South Africa Act 108 of 1996. See also Hoaxology 'State control of Religion in South Africa?' 28 November 2016 <https://www.incontextinternational.org/2016/11/28/state-control-of-religion-in-south-africa/> (accessed 23 May 2019).

Rights Commission (though accepted some) on the basis of its constitutionality.⁴³ Paul Botes contended that government cannot regulate spiritual matters.⁴⁴ He further said “We are directed by God. The bible is our constitution”.⁴⁵ Errol Jacobs, a pastor at Eldorado Park Believers alleged that the report’s recommendation of the CRL Commission are “demonic” and remind him “of the coming of the anti-Christ”.⁴⁶ He adds that the result is that the commission – and by implication, the government – is on a collision course of conflict with the religious community.⁴⁷ Liverson Mdongo highlighted that the report by the CRL Commission to regulate religion amounts to state control of religion. There should always be, in any democracy, a distinction between religion and state.⁴⁸

Michael Swain, who is a director of Freedom of Religion South Africa in his response regarding the proposed measures to be adopted by the CRL Commission states “we live in a society that has the rule of law. We are all subject to those laws. Those laws are there for our protection.”⁴⁹ He contended that the problem is that these laws are not being enforced. He gave examples that “when you see somebody is being assaulted, you should call the SAPS [South African Police Service]. When someone has a prayer meeting for 20 people and the next day they bank R1.5-million, that is potentially money-laundering – and you can’t hide that behind freedom of religion.”⁵⁰ He furthermore stated that, in rejecting the regulation by the CRL Commission in those instances (controversies quoted above) the relevant authorities should intervene, “We have said from the beginning that the commission is the wrong organ to speak on this issue, because they are a state institution. It is up to [the religious leader] to keep our

⁴³ Parliament of the RSA ‘Portfolio Committee on COGTA meets with CRL Commission to discuss seven Angel Ministries’ 20 March 2018 <https://www.parliament.gov.za/press-releases/portfolio-committee-cogta-meets-crlcommission-discuss-seven-angel-ministries> (accessed 20 November 2019)

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ As above.

⁴⁹ FOR SA ‘PRESS RELEASE: Concerns and Obligations to CRL Recommendation to license Religion in South Africa’ 11 July 2017 <https://forsa.org.za/press-release-concerns-and-objections-to-crl-recommendation-to-license-religion-in-south-africa/> (accessed 25 February 2020)

⁵⁰ C Collison ‘State is trying to control religion and it doesn’t listen to us’ 30 August 2017 <https://mg.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019).

house in order.”⁵¹ Nokuzola Mndende who is the founder of the Eastern Cape-Based Icamangu Institute says that the Commission does not value traditional African religions. She states “it still defines us like they did during colonial times – under ‘culture’.”⁵²

The argument of whether or not religious practices should be regulated has been a long-standing one with no conclusion for quite some time now. On 26 October 2016, the CRL Rights Commission released its Preliminary Report on the ‘Commercialization’ of Religion and Abuse of People’s Belief Systems.⁵³ The report recommends the regulation of religious institutions and religious practitioners in South Africa.⁵⁴ However, FOR SA is of the opinion that it is not for the State, or any other body, to decide which religious grouping qualifies as ‘religion’, or to sit as ‘judge’ over the doctrines of religious institutions, and decide whether they can operate.⁵⁵ FOR SA is of the view that there are viable alternatives to every problem the Commission has identified.⁵⁶

It was specifically highlighted in the case of *Prince*⁵⁷ that in the constitutional democracy such as South Africa, a critical task which is to demarcate the border between the terrain in which disputes lie in the courts and those controversies which are better on a terrain belonging to the legislature and/or the executive. The problem is exacerbated by the fact that law inevitably underpins both the conduct of individual citizens and of the State. All forms of human interaction, either between individuals or between individuals in the State, are sourced in a law which permits, prohibits or circumscribes the relevant conduct whether the latter are positive or negative.⁵⁸ Therefore, In light of the above background, the main issue that this research engages with is the practicality of regulating religious beliefs and practices by measuring the CRL Commission’s proposals against normative framework on human rights from both international human rights standards and South Africa’s national law. It also addresses the question of

⁵¹ As above.

⁵² As above.

⁵³ CPLO ‘Regulating Religion’ <http://www.cplo.org.za/wp-content/uploads/2016/02/BP-418-Regulating-Religion-November-2016.pdf> (accessed 19 July 2019).

⁵⁴ N 20 above.

⁵⁵ Hoaxology (n42 above)

⁵⁶ CPLO n52 above.

⁵⁷ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

⁵⁸ *Prince* case as above at paragraph 1.

whether there are in fact no frameworks (viable alternatives)⁵⁹ in place that can effectively address the concerns raised by the CRL Commission. This study also went as far as briefly assessing how other countries, which encountered similar controversial religious practices, have addressed such challenges which can be a lesson that South Africa may adopt in dealing with religious controversial issues.

1.2 PROBLEM STATEMENT

Formation of churches has in some instances been considered to be a sham, a platform for illegal and controversial activities, with these alleged illegal and controversial activities deemed to be in furtherance of the right to freedom of religion.⁶⁰ Now concerned by what is transpiring in these churches, the CRL commission has severally made calls for the regulations of religion and religious practices with a hope that it will address the problem it identified in its investigations. The issue to be resolved is whether such intervention would be consistent with the normative framework of human rights law under national and international law regarding the right to freedom of religion. The other issue is whether it is the right body to 'regulate' and resolve matters concerning religious rights - whether such regulations still falls under its power mandated by the Constitution⁶¹ and also the CRL Commission Act.⁶² If such intervention is not be in agreement with normative human rights law under national and international law, then, how can the existing laws be relied on to address the negative effects of these controversial practices?

1.3 AIMS AND OBJECTIVES

AIMS

The research aims, mainly, to assess a way in which South Africa can address controversial religious practices. This will assess whether the proposed interventions by the CRL Commission would be in accord with national and international human

⁵⁹ CPLO n52 above.

⁶⁰ E.S. Nwauche 'Distinction without Difference: The Constitutional Protection of Customary Law and Cultural, Linguistic and Religious Communities – A comment on' *The Journal of Legal Pluralism and Unofficial Law* (2009)

⁶¹ The Constitution of the Republic of South Africa of 1996.

⁶² Act 19 of 2002.

rights standards or whether there are already any existing laws in place that can be relied upon to address the criminal and illegal nature of some religious practices.

OBJECTIVES

The objectives of this research are:

1. To critically analyze the normative human rights framework on the right to religion under both international human rights law framework and South African law.
2. To analyze whether the regulations suggested by the CRL Rights Commission would be in accord with the normative human rights framework on the right to freedom of religion.
3. To assess whether there are some existing laws that can be relied on to address the illegal nature of some of the controversial religious practices by some religious groupings.
4. To assess how other foreign countries have dealt with any controversial religious practices that may have occurred in their countries.

1.4 RESEARCH QUESTIONS

The main question is how can South Africa tackle controversial religious practices? This question will be assessed through the following sub-questions:

1. What does the normative human rights framework provide on the right to freedom of religion under both international human rights law and South African law?
2. What are the measures being considered by CRL Commission to respond to controversial religious practices and whether would these measures be consistent with the normative human rights framework on the right to religion?
3. Are there any laws in place currently or what are some of existing laws that can be relied on to address the illegal nature of some of the controversial religious practices by some religious groupings?
4. How other countries handled controversial religious practices which were taking place in their countries?

1.5 RESEARCH METHODOLOGY

This research adopts a doctrinal method of research. The doctrinal method is one that focuses on written/textual materials, archival and desktop research and it entails analysis and review of sources. This method is good for this research because the questions raised are of a nature that can be answered adequately without necessarily demanding one to conduct practical research in the form of interviews and field studies. Since this study intends to evaluate and assess human rights framework regarding religious rights and also reviewing the laws in place in addressing the problem, the doctrinal method is suitable for this research. In using this method, reference will be made to primary and secondary sources of law. The primary sources to be analyzed include Constitutions, legislation and judicial precedents whereas the secondary sources to be consulted involve textbooks, dissertations, journals articles, internet sources and other written work which might be useful and relevant to this paper.

Furthermore, reviews of secondary and primary sources will not only be limited to South Africa's system but will also include the insights of other jurisdictions including sources from countries like Botswana, Rwanda and United States of America. These countries have encountered similar religious controversies and it would be important to refer to them in addressing the same in SA. It is to be emphasized that this is not a comparative study. Rather, by referring to these countries, the research merely seeks to draw insight from them on how they have dealt with religious controversies that may have arisen within their countries. The insights drawn, therefore, are for purposes of construal of recommendations and to inform conclusions on the code of best practice that SA can adopt regarding these religious practices.

1.6 LITERATURE REVIEW

Religion and Belief including its liberties has not been the great deal in the past years. Although there are enough studies on freedom of religion however they have not addressed controversial religious practices in light of religious liberties and permitted limitations of such. This is why there is confusion regarding several current practices on the name of religion which many are controversial. Such controversial acts raised confusion as there is freedom of religion, laws and the duty of the state to impose those laws. The question is what should happen when religious acts on basis of freedom of

religion are breaching the laws of the country? This matter can be categorized as new under democratic era. Therefore this research intends to analyze such on a democratic perspective. This paper will discuss the liberties of religious communities against mechanisms proposed by the CRL Rights Commission. It will also discuss the permitted practices and manifestations in the name of freedom. It will also evaluate the permitted limitations to impose over practices and manifestations that are currently rejected. It will further evaluate the meaning of interference and permitted impetus of interference.

Religion may be, amongst others, a matter of forming churches and attending them. It is prominently a constitutional matter.⁶³ The right to freedom of religion is guaranteed by the Constitution itself.⁶⁴ Religious practice is, therefore, not a purely ecclesiastical issue from which our courts may be excluded.⁶⁵ International law, as already noted, also guarantees this right.⁶⁶ However, international human rights framework does not precisely define religion and belief.⁶⁷ The South African law as well does not define the term religion and belief in its provision though it stipulates that limitations must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and one prescribed by law.⁶⁸

Religious provision was thus interpreted in the case of *Prince v President of the Law Society of the Cape of Good Hope*,⁶⁹ Dickson observed that “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...”⁷⁰ Van Der Walt in his words to the above observation noted that “the wish to condemn and the desire to understand do not combine easily, and if we ignore the effect of language on understanding we will

⁶³ Section 15 and 31 of the South African Constitution of 1996.

⁶⁴ As above.

⁶⁵ N Moleya 'Equality for all religions and cultures in the South African legal system' 01 July 2018 <http://www.derebus.org.za/equality-for-all-religions-and-cultures-in-the-south-african-legal-system/> (accessed 23 June 2019).

⁶⁶ Article 9 of the ICCPR and Article 18 of UDHR (see n4 and n5 above)

⁶⁷ R Traer "Religion" in International Law <https://www.religionhumanrights.com/Research/religion.intlaw.htm> (accessed on the 19 June 2019).

⁶⁸ Section 35 of the Constitution of RSA act 108 of 1996.

⁶⁹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) 2002 2 SA 794 (CC).

⁷⁰ As above paragraph 97.

no doubt tend to condemn only what we do not understand.”⁷¹ The foregoing statements buttress the view that often; religious practices are criticized by individuals who fail to grasp the sacred nature of religion. Since CRL Commission is contending to regulate religious group, the question may arise on how far the Commission understands issues regarding other people’s religion - whether it does know what certain religions require.

The limitation of religious freedom has been questioned after emerging of controversial acts in the name of religion. Ngcobo in the case of *Prince v President of the Law Society of the Cape of Good Hope*⁷² highlighted that: Human beings may freely believe in what they cannot prove and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, this does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.’⁷³ Van Der Walt in interpreting the latter highlighted that 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.⁷⁴ This research intends to evaluate views of Van Der Walt and other scholars who interpreted limitations of religious freedom. This research will also discuss the permitted limitations that can be imposed on the controversial practices in the name of freedom of religion.

Though the provision under South African national law and International level just provided ‘freedom of religion’, such is however not defined. Chaskalson in the case of *Big M Drug Mart*⁷⁵ noted the essence of the concept of freedom of religion - as the right to entertain religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.⁷⁶ This research will evaluate the extension of “the right to entertain beliefs” as the nature of the religious liberties.

⁷¹ AJ Van der Walt ‘Modernity, normality, and meaning: the struggle between progress and stability and the politics of interpretation’ Stellenbosch (2000).

⁷² *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

⁷³ As above,

⁷⁴ JD Van De Vryer & MC Green ‘Law, religion and human rights’ (2008) African Human Rights Journal

⁷⁵ *Big M Drug Mart* case (n 2 above)

⁷⁶ As above.

Furthermore, Manifestation is one of the critical challenges regarding religious freedom and it is one of the main issues which led the CRL commission to make a call for regulation because of its controversy.⁷⁷ Since several scholars wrote on importance of religious freedom,⁷⁸ this research intends to interpret the ‘freedom of religion and its manifestation’ as provided for under International law, more importantly how far manifestation should stretch and where it may be limited or a manner which may be prohibited to manifest. This can be done by taking into consideration scholars like Freedman.⁷⁹ Freedman gave an important view that no state can, for example, permit practices such as enforced polygamy, ritual murders, or public disturbances simply because they are mandated by religious beliefs.⁸⁰ The state must be able to limit those practices, whether religious or not, which endanger the life and health of others or which limit the rights of others or which create public disturbances or undermine public morals.⁸¹ This research aligns itself with the view of scholars like Freedman in assessing how far religious practices should stretch and what are the limitations of this right. It should, however, be noted, that some scholars, in advocating for religious rights, have failed to accord regard to the principle of limitation of rights which will be assessed on this study.

According to Sachs J, in the case of *MEC for Education v Pillay*,⁸²

“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

⁷⁷ Simelani (n29 above)

⁷⁸ Refer n3, 16, 51 and 59 above.

⁷⁹ C Rautenbach et al ‘Culture and (religion) in Constitutional Adjudication’ 2003

https://www.researchgate.net/publication/26634942_Culture_and_Religion_in_Constitutional_Adjudication (accessed 19 October 2019)

⁸⁰ As above.

⁸¹ K Rajagopal ‘Polygamy is not a religious practice, government tells Supreme Court’ 11 April 2017

<https://www.thehindu.com/news/national/polygamy-is-not-a-religious-practice-government-tells-sc/article17915070.ece> (accessed 10 July 2019).

⁸² *MEC for Education: KwaZulu-Natal & Others v Pillay & Others* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) paragraph 47 and 53.

their activities... Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights.”⁸³

CRL Commission is an organ of the state institution as this term is defined under section 239 of the Constitution.⁸⁴ Since Sachs discussed that for many believers their relationship with God or creation is central to all their activities this research will therefore evaluate whether the proposed mechanisms by the CRL Rights Commission amounts to interference or not. The powers of the CRL Commission are of importance concerning regulations of religious bodies as proposed by the Commission. This study discusses the powers of the Commission against the mechanisms the Commission proposed. As the dispute by FOR SA and other concerned organizations and institutions, it would be very useful to interpret powers of the CRL Commission conferred by the Constitution and by the CRL Commission Act.⁸⁵ Several religious institutions are rejecting regulations as proposed contending that the government cannot regulate spiritual matters.⁸⁶ The case of *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another*⁸⁷ once highlighted that a court should only become involved in a dispute involving religious doctrine where it is strictly necessary for it to do so.⁸⁸ Even then it should refrain from determining doctrinal issues in order to avoid entanglement.⁸⁹ The doctrine also draws from the widely accepted principle that a state (and its organs) should be able to ensure religious freedom and equality.⁹⁰ The case law also gives impetus to the notion that religion (and its concomitant freedom) is a “moral force” to be accommodated in South Africa, a feature of South African democracy which can and should not be unduly interfered with by the body politic.⁹¹ The research intends to assess the mandate of CRL Commission regarding its proposals to address current controversial practices.

⁸³ As above paragraph 47 and 53.

⁸⁴ N1 above.

⁸⁵ Collison (n25 above)

⁸⁶ As above.

⁸⁷ *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another 2015 (1) SA 106 (SCA)*

⁸⁸ As above at *paragraph 39*.

⁸⁹ As above.

⁹⁰ As above at paragraph 97.

⁹¹ As above.

The court in *Fourie's case*⁹² highlighted the above view that:

“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 recognize 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...”⁹³

Henrico gave views from Rawls whom 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.⁹⁴ Religion and the freedom to practice one's beliefs are matters left to the conscience and personal subjective belief of each and every person.⁹⁵ Henrico concluded that Interference with the right to religious freedom is best left to the adjudicative interpretation and discretion of our courts.⁹⁶ This study also assess the duty of a state where religious freedom violates other freedom. It was also the problems found by the CRL Rights Commission which led to proposals, so this study will also assess whether such controversial acts can be addressed by the existing laws or not.

According to Savage in his discussion of newly formed churches, small churches are springing up everywhere, including classrooms, small sheds or someone's veranda.⁹⁷ Hive observes that in the last 20 years or so, SA has been witnessing the mushrooming and proliferation of churches. Many of them are neither legally registered nor spiritually genuine.⁹⁸ He further highlighted that some of these churches are owned by husbands and wives, or boyfriends and girlfriends.⁹⁹ Self-enrichment, self-gratification, extortions and a “get-rich-quick” ambition are the prime motives behind the existence of such

⁹² *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC)

⁹³ As above at paragraph 94 – 98.

⁹⁴ R Henrico ‘Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom?’ (12 March 2019) University of Western Cape, South Africa.

⁹⁵ As above

⁹⁶ As above.

⁹⁷ J Savage ‘The Flood of False Prophets And Pastors In Africa’ 18 April 2018

<https://www.modernghana.com/news/848376/the-flood-of-false-prophets-and-pastors-in-africa.html> (accessed 24 July 2019).

⁹⁸ G Hive ‘South Africans Protest against Fake Pastors’ <https://ghkings.com/south-africans-protest-fake-pastors/> (accessed 04 June 2019)

⁹⁹ As above

churches.¹⁰⁰ He adds that false prophetic claims are usually made and propagated with the sole aim of boosting attendance.¹⁰¹ Savage submits further that “to some, being a pastor is the easiest profession, after dropping out of school. To be a pastor one needs to study at a religious institution, learn the scriptures thoroughly, follow the theological training and complete seminary courses. After studying, he is then ordained as a pastor” however Savage argues that in Africa, “the story is different. Only a few take on the challenge to go to school.”¹⁰² He also adds that the sharp increase of fake pastors is tearing African societies apart.¹⁰³ The CRL Commission took Savage view and which is why it proposed the religious regulation which is alleged to minimize controversies contended in South Africa. Though Savage may have highlighted the problem of controversial practices and how other countries have dealt with it, this study intends to evaluate how such controversial acts may be dealt with in a democratic perspective by interpreting the laws in place if they are failing to address the problem (this will be evaluated from the cases regarding religious controversies and criminal acts in the churches which are already concluded) and if yes, then whether there is a need of new laws or regulations by the CRL Commission would be reliable to address controversies.

Amidst other claims highlighted by Savage above paragraph,¹⁰⁴ he also adds that it is not wrong to preach but the fact that many use God’s name to commit crime is very disturbing.¹⁰⁵ In other words he submits that on some of the new forming churches, people are committing crimes and use churches to hide such crimes. This research intends to evaluate such with the views of Swain in his words “we live in a society that has the rule of law. We are all subject to those laws. Those laws are there for our protection. The problem is that these laws are not being enforced...”¹⁰⁶ Furthermore, Selley took the same view in his observations noting that regarding the CRL

¹⁰⁰ As above.

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ Hoaxology ‘State control of religion in South Africa?’ 28th November 2016

<https://www.incontextinternational.org/2016/11/28/state-control-of-religion-in-south-africa/> (accessed 23 May 2019).

¹⁰⁶ C Collison ‘Sate is trying to control religion and it doesn’t listen to us’ 30 August 2017

<https://mg.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019).

Commission proposal, there are existing laws in place to catch the unscrupulous pastors and what the commission proposes will open the legal framework to restrict freedom.¹⁰⁷ The research will evaluate if indeed the current laws in place are failing to address such problem or not.

Savage, as much discussed above, highlighted that the problem in African countries is the fact that there is no law which stops a man from practicing his faith.¹⁰⁸ Mkhwanazi-Xaluva, the chairperson of the CRL commission, took Savage's view in responding to the controversial religious practices.¹⁰⁹ She notes: "We don't know how many churches there are. The government doesn't know. I can wake up and start up a church tomorrow. There's no law that stops me from doing that."¹¹⁰ Based on the above allegations, there is no doubts that the current practices of faith or religious organizations are becoming a problem, no wonder the CRL Commission contends to regulate the faith-based organizations.¹¹¹ Taking to consideration of the statements noted by the CRL Commission and Savage claiming that "there are no laws in place to stop a man from practicing his faith",¹¹² this research intends to evaluate whether the government institutions – specifically The CRL Commission, have the mandate to regulate how "a man from practicing his faith" and more importantly whether the laws in place are unable to "stop a man from practicing his faith".¹¹³

The public played a major role in exerting pressure on the government to have religious groups regulated.¹¹⁴ Such pressure led for the proposal of regulations of religious groups.¹¹⁵ That came out as a result of several incidents such as drinking of petrol, eating grasses, resurrections at church and allegations that some foreign church-

¹⁰⁷ As above.

¹⁰⁸ Savage n97 above.

¹⁰⁹ Simelani n29 above

¹¹⁰ As above.

¹¹¹ As above.

¹¹² As above.

¹¹³ Savage (n97 above)

¹¹⁴ L Ann 2019 'Ramaphosa to take on so-called pastors who cheat South Africans' 28 February 2019 <https://sadcnews.org/2019/02/28/ramaphosa-to-take-on-so-called-pastors-who-cheat-south-africans/> (accessed 24 July 2019).

¹¹⁵ As above.

leaders are the ones who fake, deceive and victimize people.¹¹⁶ It was alleged to be a good concern, however, not all religious gathering are involved in controversial religious practices. Moreover, not the entire South African community is religious or Christian. As such, allegations that the South African community is being victimized would be far-fetched. Those who are alleged to be victims are part of such beliefs and take part in those rituals despite others finding the said rituals far from genuine. This leads one to the argument of McKaiser who raises the issue whether the state has a duty to protect one from subjecting themselves to harm such as giving away their life's savings, drinking paraffin or allowing themselves to be sprayed by Doom.¹¹⁷ One commentator was concerned that "It doesn't make sense that we celebrate Christianity but also allow people to be played by these fake pastors."¹¹⁸ Kevin, another commentator, claimed that it is within the states own interest to protect people from self-harm.¹¹⁹ He deemed state intervention warranted by way of regulation "because eventually the state becomes burdened with that person."¹²⁰ Although these conversations have mainly been featuring on social media and internet articles from both a political and social perspective, this research intends to evaluate them through a human rights law lens.

1.7 CHAPTER OUTLINE

CHAPTER ONE: DISSERTATION'S OUTLINE.

It consists of introduction, problem statements, literature review and outlines of chapter.

CHAPTER TWO: NORMATIVE FRAMEWORK ON THE RIGHT TO RELIGION UNDER INTERNATIONAL HUMAN RIGHTS LAW AND SOUTH AFRICAN NATIONAL LAW.

This chapter will discuss the provision of the law concerning religious rights at the international human rights law. South Africa ratified international treaties which create a binding obligation upon such ratification. South Africa has to enforce the provisions of

¹¹⁶ C Maxon 'Fake pastors and their followers: This is why the 'God business' is thriving in SA' 07 March 2019 <https://city-press.news24.com/Voices/fake-pastors-and-their-followers-this-is-why-the-god-business-is-thriving-in-sa-20190307> (accessed 10 June 2019)

¹¹⁷ E McKaiser 'Should the state step in if people let bogus pastors harm them, asks Eusebius' 01 March 2019 <http://www.702.co.za/articles/339672/should-the-state-step-in-if-people-let-bogus-pastors-harm-them-askseusebius> (accessed 04 July 2019).

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ As above.

the treaty in good faith and cannot invoke the provisions of national law as a basis for failing to give effect to the provisions of a ratified treaty. This chapter will analyze the provisions of such treaties concerning religion and belief. It will further discuss the scope of the right to religion as provided for under international human rights law and it will also evaluate how other countries apply international human rights law. It will also assess what the South African courts have said regarding the human rights framework concerning religious rights.

CHAPTER THREE: AN ASSESSMENT OF THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUASTIC COMMUNITIES COMMISSION MECHANISMS TO BE ADOPTED BY CRL COMMISSION AND MANDATE OF THE CRL COMMISSION.

This chapter will focus on the mechanism proposed by the CRL commission, by discussion of such proposed mechanisms by the Commission and more importantly whether such proposed mechanism would be in alignment with International human rights law and South African law (mainly constitution) standards.

CHAPTER FOUR: AN ASSESSMENT OF THE ADEQUACY OF EXISTING LEGAL AND POLICY FRAMEWORK TO ADDRESS CONTROVERSIAL RELIGIOUS PRACTICES AND HOW OTHER COUNTRIES TACKLED CONTROVERSIAL RELIGIOUS PRACTICES.

This chapter analyses the existing legal framework if it can be relied on to address the illegality that surrounds some of the controversial religious practices. This is important because in case having found that the regulations do not measure up to national law and international law, then the recommendation would be for the state to implement already existing laws rather than regulation as advocated for by the CRL Commission. in extent to find ways to address controversial religious practices, this chapter will further and briefly analyze how other countries have addressed the related practices which are problematic in South Africa.

CHAPTER FIVE: CONCLUSSION AND RECOMMENDATIONS.

This chapter will provide a conclusion and recommendation from the entire dissertation.

CHAPTER TWO: THE RIGHT TO RELIGION UNDER INTERNATIONAL HUMAN RIGHTS LAW AND SOUTH AFRICAN NATIONAL LAW.

2.1. INTRODUCTION

The International Development Law Organization (IDLO)¹ has been encountered with several consultation questions such as how should the law address tensions between religious traditions and human rights? How can a law help move beyond tolerance towards true coexistence and respect? How can rites be balanced with rights? How do we ensure that liberty is used as a shield not a sword? What does freedom of religion or belief actually look like in a society?² The right to freedom of religion or belief forms an integral part of the catalogue of human rights to which every individual is legally entitled.³ Serious violations of this right can disrupt the enjoyment of other human rights⁴ and undermine the equal protection of law.⁵ Ensuring that laws and policies concerned with freedom of religion or belief align with international human rights standard and the national standards is not an easy task.⁶

IDLO highlighted that Governments around the world are struggling with a wide range of complex issues like secularism; the construction and maintenance of places of worship, private devotion in public places, defamation and apostasy, national security and the intersection of freedom of religion or belief with other human rights.⁷ The challenge is to address these and other issues in an effective, fair and sustainable manner.⁸ In some instances, entire communities have suffered discrimination or outright persecution because of their religion or beliefs.⁹ Grievances rooted in persistent and serious social,

¹ International Development Law Organization 'Freedom of Religion or Belief and the Law: current dilemmas and lessons learned' (2016) - "IDLO is an intergovernmental organization devoted to empowering people and enabling governments to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. It enables governments and empowers people to reform laws and strengthen institution to promote peace and justice"

² As above.

³ see also article 18 of ICCPR and article 18 of UDHR

⁴ Such as right to freedom of association, human dignity, right to assembly etc.

⁵ See section 9 of the current South African Constitution (1996)

⁶ IDLO n1 above.

⁷ As above.

⁸ As above.

⁹ As above

economic, legal or political inequality risk triggering protracted violence and even armed conflict.¹⁰

International human rights law does not precisely define religion and belief.¹¹ The South African law as well does not define the term religion and belief in its provision although it stipulates that limitations to all guaranteed rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹² In support of the above statement, Mokhoathi and Rembe¹³ find that the South African Constitution does not give a proper clarification of the reservations or limitations of religious freedom.¹⁴ Section 15 of the South African Constitution¹⁵ explains religious liberties without indicating what ought to happen when these provisions infringe on human rights.¹⁶ Having an understanding of what the human rights obligations of South Africa are will help us assess whether proposed measures on regulation of religion in South Africa is on par with human rights standards. It is for this reason that the main objective of this chapter is to discuss the normative human rights standards on the right to religion as both the international and national level.

South Africa has ratified international treaties which create a binding obligation upon such ratification.¹⁷ As such it has to enforce the provisions of these treaties in good faith and cannot invoke the provisions of national law as a basis for failing to give effect to the provisions of a ratified treaty.¹⁸ This chapter analyzes the provisions of such treaties concerning freedom of religion and belief. It further discusses the scope of the right to freedom of religion as provided for under these instruments and it will also evaluate how

¹⁰ As above

¹¹ R Traer "Religion" in International Law

<https://www.religionhumanrights.com/Research/religion.intlaw.htm> (accessed on the 19 June 2019).

¹² Sec 36 of the Constitution of RSA act 108 of 1996.

¹³ J Mokhoathi and N S Rembe, 2017, 'Religious liberties and the Constitution of South Africa: A Call for religious accountability', <https://doi.org/10.7833/116-1-1145> accessed (09 January 2020)

¹⁴ As above

¹⁵ The Constitution of the Republic of Africa Act 108 of 1996.

¹⁶ n3 above.

¹⁷ See University of Minosota 'Ratification of human rights treaties – South Africa'

<http://hrlibrary.umn.edu/research/ratification-southafrica.html> (accessed 20 November 2019)

¹⁸ See United Nation Treaty Collection

https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml (accessed 10 December)

the treaty bodies concerned with the enforcement of the rights enshrined in these treaties have interpreted the right to religion at the international level.

Moreover, this chapter assesses what the South African courts have said regarding the right to religion under South Africa's democracy. As demonstrated in the introductory chapter, there have been calls for regulation of religious practices in South Africa, thus, the chapter will also assess what international human rights law and South African law say regarding the scope, nature and extent of limitation of the right to religion. In discussing the normative framework of the right to religion, the chapter starts with the discussion of the national framework and then proceeds to the international framework.

2.2 UNDERSTANDING 'RELIGION' (AND BELIEF)

Religion is a special form of world view which is based on the faith in the supernatural powers, and includes a set of moral values and types of behavior, rituals and gathering of people into the organizations (a church, a religious community etc.).¹⁹ Killian J said that the idea of whole or the wholeness of life is like glue that holds religion and life together.²⁰ Religion is not simply a department or compartment of life, rather, it is life.²¹ Throughout history, religion and belief have been powerful unifying forces, bringing people of different languages, cultures and historical backgrounds together to share precepts, practices and values.²² The spread of religions among diverse groups of people and territories is a testament to the power of beliefs and traditions.²³ Many religions on their adherents and their percepts promote peace, humanity and compassion.²⁴

Religion remains a major component of the daily lives of most people across the African continent, and for many, it constitutes their very being.²⁵ In *Minister of Home Affairs v*

¹⁹ Religion case study <https://casestudyhub.com/case-study-on-religion/> (accessed 08 March 2020)

²⁰ As above.

²¹ As above.

²² P L.Heck, common ground: Islam, Christianity, and Religious Pluralism, Georgetown University press, 2009

²³ As above.

²⁴ As above.

²⁵ E C Lubaale "Assessing the Human Rights Implication of Calls for Regulation of Faith-Based Organisations" (2019)33 *Speculum Juris* 11-25

*Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*²⁶ Sachs J stated in this regard:

“Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programs. They command ethical behavior from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people’s temper and culture and for many believers a significant part of their way of life. Religious organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.”²⁷

More importantly, crafting the interpretation and meaning altogether with the above paragraph, Sachs J, in the case of *MEC for Education v Pillay*,²⁸ highlighted that:

“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. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries...”²⁹

Many acts may be performed as part of religion and for people who are not part of that religion; these acts may be interpreted as illogical.³⁰ Those who may not subscribe to

²⁶ 2006 1 SA 524; 2006 3 BCLR 355 (CC)

²⁷ As above paragraph 93.

²⁸ *MEC for Education: KwaZulu-Natal & Others v Pillay & Others* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) Paragraph 47 and 53.

²⁹ As above paragraph 47 and 53.

³⁰ As above.

these religious beliefs may further claim that it is an obsession on ‘things that do not exist’.³¹ Despite this, many scholars and case laws explained the importance of religion.³² In the case of *Prince v President of the Law Society of the Cape of Good Hope*,³³ Dickson observed that 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.³⁴

The foregoing court case of *Prince*³⁵ furthered the important point giving religion a ‘sufficient’ freedom that: Human beings may freely believe in what they cannot prove’ and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, this does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.’³⁶ Moreover, Van Der Walt in his words regarding the above observation noted that the wish to condemn and the desire to understand do not combine easily, and if we ignore the effect of language on understanding we will no doubt tend to condemn only what we do not understand.³⁷ The latter statement encourages people to respect other people’s belief or religion, not to condemn it because it might not make sense to others or strike the non-believer as illogical.³⁸

In *Louis Laurens Boths Gaum*³⁹ the Constitutional Court held that the right and accordingly, constitutional protection extends to beliefs that are “bizarre, illogical or irrational”.⁴⁰ In this regard, the constitutions of religious associations bust themselves with moral questions unlike many other types of associations, such as sports clubs, trade unions and charitable organizations. Religious associations in many instances

³¹ As above.

³² As above.

³³ As above.

³⁴ As above.

³⁵ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

³⁶ As above.

³⁷ AJ Van der Walt ‘Modernity, normality, and meaning: the struggle between progress and stability and the politics of interpretation’ Stellenbosch (2000).

³⁸ As above.

³⁹ *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg N.O* (40819/17) (PRETORIA) at paragraph 22.

⁴⁰ See also *Prince Case* n35 above.

take things such as divorce, adultery, the use of demeaning or blasphemous language, the consumption of alcohol, daily dietary laws, pornographic material, etc. seriously.⁴¹ Professor Lain Benson gave insights that these rules do not and are not intended to 'make sense' to those outside of the particular traditions that uphold them and it is their very peculiarity to outsiders that ought to and does make us chary about trying to judge such beliefs from outside.⁴²

Maviya said what may seem abusive and humiliating in the present may be considered beneficial from a transcendent, spiritual and eschatological perspective; for instance, some may impoverish themselves by giving all their material possessions to the church in the hope for a better reward on heaven⁴³ The *Lawrence* case⁴⁴ stated: what comes through as an innocuous part of daily living to one person who happens to inhabit a particular intellectual and spiritual universe might be communicated as oppressive and exclusionary to another who lives in a different realm of belief. That may be so trifling in the eyes of members of the majority or dominant section of the population as to be invisible may assume quite large proportions and be eminently real, hurtful and oppressive to those upon whom it impacts. This will especially be the case when what is apparently harmless is experienced by members of the affected group asymptomatic of a wide and pervasive pattern of marginalization and disadvantage.⁴⁵

Religion often carries an element which makes it illogical and foolish to others who do not believe or follow that religion.⁴⁶ According to Agbbiji and Swart,⁴⁷ religion creates

⁴¹ *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg N.O* (40819/17) (PRETORIA) at paragraph 22

⁴² De Freitas "Doctrinal Sanction and the Protection of the Rights of Religious Associations: *Ecclesia De Lange v Electronic Law Journal* PELJ 2016(19) – 1-22 at 14.

⁴³ C Banda 'Redefining Religion? A Critical Christian reflection on CRL Rights Commission's proposal to regulate religion in South Africa' May 2019

https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa. (Accessed 28 October 2019)

⁴⁴ *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC)

⁴⁵ As above at paragraph 163.

⁴⁶ As above.

⁴⁷ Agbbiji, O.M. & Swart, I., 2015, 'Religion and social transformation in Africa: A critical and appreciative perspective', *Scriptura* 114(1), 1–20. <https://doi.org/10.7833/114-0-1115> see also C Banda, May 2019, 'Redefining Religion in South Africa?: A Critical Christian reflection on CRL Rights commission' https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa (accessed 26 November 2019)

hope and optimism in spite of failed governments and economic institutions in Africa.⁴⁸ The benefits of the religious structures, including their increasing roles in stepping into the breach to address the gaps resulting from states' incompetence, are indisputable.⁴⁹ They further said that religion points people to the reality and power of God, calling them to trust God to transform their impossibilities.⁵⁰ Religion is a powerful tool for the poor and powerless.⁵¹ The high levels of poverty, corruption, crime and violence, high costs of living and medical care and poor service mean that many poor people turn to religion as a strategy of survival and existence.⁵²

IDLO has observed that beliefs and religions are dynamic and dynamism should therefore be harnessed.⁵³ Beliefs and religions are dynamic, ever-changing organisms in a constant state of flux and evolution based on new teachings, new leaders and new social and political climates. Even the most traditional of religions have reformed, and continue to do so at varying paces.⁵⁴ If lawmakers and policymakers assume that religious beliefs, practices or traditions are static or permanent, the result can be fundamental misrepresentations of religion, to the detriment of peace, security and non-discrimination. Freedom of religion or belief should be viewed as a shield that protects individuals and minority groups, not a sword that harms or coerces such group.

2.3 THE SOUTH AFRICAN NORMATIVE FRAMEWORK ON THE RIGHT TO RELIGION

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 of South Africa is important.⁵⁵ The right to believe or not to believe, and to act or not to act according to one's beliefs or non-beliefs, is a key ingredient of any person's dignity.⁵⁶ Sachs J said "the

⁴⁸ E C Lubaale "Assessing the Human Rights Implication of Calls for Regulation of Faith-Based Organizations" (2019)33 *Speculum Juris* 11-25

⁴⁹ N47 above.

⁵⁰ As above.

⁵¹ As above.

⁵² See paragraph 97 of *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC) 2002 2 SA 794 (CC).

⁵³ N2 above.

⁵⁴ As above.

⁵⁵ *Christian education SA v Minister of Education* 2000 (10) BCLR 1051 (CC) at paragraph 36.

⁵⁶ As above.

constitutional right to practice one's religion... is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society."⁵⁷ Ngcobo J highlights that religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality. To understand the normative framework on the right to religion at the national level, it is important to first of all have an understanding of the provision of the right to religion under South Africa's Constitution.⁵⁸

2.3.1 RELIGIOUS RIGHTS UNDER SECTION 15 OF THE CONSTITUTION

Section 15 states that:

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

The scope of section 15(1) is twofold. Firstly it guarantees the freedom to practice one's religion without interference from the state and secondly, to demand 'religious equality' within various religious communities. The right to freedom of religion is available to individuals and groups or communities and therefore has an individual and a collective dimension.⁵⁹ Religious freedom is therefore a right that operates both as a liberty right and as an equality right. Freedom of religion as liberty right entails freedom of choice or a safe to operate from governmental interferences, and freedom of religion as an equality right entails freedom from governmental practices which either favor one religion over another and/or religion in general over non-religion.⁶⁰

Section 15(1) of the Constitution sets the all-embracing right. Section 15(2) of the Constitution focuses on all of external manifestation of freedom of religion, conscience

⁵⁷ *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) at paragraph 25

⁵⁸ *Pillay case* at paragraph 78.

⁵⁹ see sec 31 of the current SA Constitution of 1996.

⁶⁰ Freedman 2000 Stell LR 100.

and belief at state (and state-aided) institutions.⁶¹ The above provision was explained in *S v Lawrence; S v Negal; S v Solberg*.⁶² The case dealt with section 14 of the Interim Constitution 1993 and which is now section 15 in the current Constitution of 1996. The highlights of section 14 of Interim Constitution apply similarly in section 15 of the current Constitution (1996). The court said that the provisions of section 14 themselves are intrusive as to the manner in which the right should be developed in South African law. Section 14(1) (herein embodied in section 15(1) in the 1996 Constitution) then protects the right to freedom of religion and conscience. Section 14(2) (currently embodied in section 15(2) in 1996 Constitution) then provides that religious observances may be conducted at State or State-aided institutions provided that they are conducted on an equitable basis and attendance at them is free and voluntary.⁶³

The court further highlighted that the provisions of religious rights makes it clear that religious observances at public institutions will not give rise to constitutional complaint if the observances meet three requirements: the observances must be established under rules made by an appropriate authority; they must be equitable; and attendance at them must be voluntary. It seems appropriate to imply from this provision and from the absence of an express clause to the contrary that a strict separation between religious institutions and the State is not required by the Constitution of South Africa.⁶⁴ The stipulation of voluntariness is not the only precondition established by section 15(2) in the 1996 Constitution of South Africa.⁶⁵ The subsection requires that, even where attendance is voluntary, the observance of such practices must still be equitable. The court highlighted that in its view, this additional requirement of fairness or equity reflects an important component of the conception of freedom of religion contained in South African Constitution. The South African society possesses a rich and diverse range of religions. Although the State is permitted to allow religious observances, it is not permitted to act inequitably.⁶⁶

⁶¹ *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at paragraph 63.

⁶² 1997 (4) SA 1176 (CC).

⁶³ As above At paragraph 117.

⁶⁴ N61 above at paragraph 118.

⁶⁵ As above.

⁶⁶ n61 above at paragraph 121.

2.3.2 THE RELIGIOUS RIGHTS UNDER SECTION 31 OF THE CONSTITUTION

Section 31 provides for:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - (a) To enjoy their culture, practice their religion and use their; and
 - (b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.⁶⁷

Courts have highlighted that freedom of religion have the following components: the right (a) to have a belief; (b) to express that belief publicly; and (c) to manifest that belief by worship and practice, teaching and dissemination.⁶⁸ For obvious reasons, the first component is not readily amenable to legal regulation. The second and third components, however, which are protected in conjunction with culture under section 31(1), are easier to assess and control. Although all the rights in the Constitution are subject to a general limitation clause, Section 31(2) provides explicitly that: the rights in subsection (1) may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights. It is worth noting, then, that the South African Courts have tended to refrain from the limitation clause when analyzing rights under section 15, since it involves the imponderable task of weighing faith against reason, not to mention distinguishing the religious from the secular.⁶⁹

From another perspective, the difference between section 15 and 31 can be couched in terms of absolute rights versus relative rights, where section 15 represents the absolute right to religious freedom that has become one of the hallmarks of the Western human rights culture.⁷⁰ The relative right provided for in section 31, on the other hand, represents a physical practice that is characteristic of a particular group.⁷¹ In other words, where absolute rights protect the concept of belief in general, relative rights are

⁶⁷ Section 31 of the RSA Constitution of 1996.

⁶⁸ N61 above.

⁶⁹ As above.

⁷⁰ Butterwox 'Religious rights in South Africa' (2015)

⁷¹ As above.

associated with manifestation of that belief in behavior.⁷² Nevertheless, when it comes to religious freedom, there can be no definite hierarchy between absolute and relative rights, because some religions emphasize practice and other belief. Protection must surely exist for both aspects though the practice may be subject to limitation or regulations.⁷³

2.3.3 THE CONSTITUTIONAL PROVISION AND ITS CONTENT

The *Pillay case* highlights that Religious (and cultural) practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.⁷⁴ Since the religious provision comes from the Constitution⁷⁵, its enforcement is derived from section 2 which states that the Constitution is the supreme law of the country of South Africa and any law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.⁷⁶ Furthermore, section 7(2) provides that the state must respect, protect, promote and fulfill the rights in the Bill of Rights (where religious rights are provided).⁷⁷

The South African Constitution instructs the state to respect, protect, promote and fulfill the rights in the Bill of rights including the provisions proclaiming “freedom of conscience, religion, thought, belief and opinion”.⁷⁸ Van De Vryer and Christian Green also note that according to the testimony of Prof Lourens du Plesis, political authorities have applied their duty to respect, protect and fulfill in a spirit of a ‘politics difference’ that goes “beyond the confines of mere tolerance and even magnanimous recognition and acceptance of the other”.⁷⁹

Section 7(2) of the Constitution is the key enforcement provision of the Bill of rights. This means that the state has the duty of upholding the Bill of Rights. Firstly, it must respect the Bill of Rights. That is, the state must not violate or limit the exercise of rights

⁷² As above.

⁷³ As above.

⁷⁴ *Pillay 2008 2 BCLR 99 (CC)* paragraph 78.

⁷⁵ The Constitution of the Republic of South Africa Act 108 of 1996.

⁷⁶ Section 2 of the Constitution as above.

⁷⁷ Section 7 of the Constitution of South Africa of 1996.

⁷⁸ As above.

⁷⁹ JD Van De Vryer & MC Green ‘Law, religion and human rights’ (2008) African Human Rights Journal

listed in the Bill of Rights. Secondly, the State must protect the Bill of Rights. This means that the State needs to take positive steps to prevent any violation of the rights listed in the Bill of Rights including religious liberties. The provision implies that the state cannot just stand by and ignore the infringement of religious liberties by religious establishments. The state reserves the right to prevent, protect and redress the violation of human rights by religious institutions, through judicial and non-judicial institutions, mechanisms and procedures, including interfaith dialogue. Lastly, the State needs to promote and fulfill the rights in the Bill of Rights. This clearly requires the State to take some measures that would heighten people's awareness of their rights and how to defend them. The State also bears the responsibility to inform people and its institutions, particularly religious ones, about their rights and corresponding civic duties in upholding and respecting the Bill of Rights. The State should emphasize the importance of norms, values and ethical principles that seek to promote and prevent the violation of human rights.

Coupled with section 7(2) is section 8(1) which provides that the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state." The Constitutional Court has held that this provision in certain circumstances imposes a positive obligation on the State "to provide appropriate protection to everyone through laws and structures designed to afford such protection," in addition, implicit in section 7(2) is that any steps taken to fulfill this duty must be reasonable and effective.⁸⁰ Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of state including the judiciary.⁸¹

2.3.4 THE COURT'S APPROACH AND INTERPRETATION OF THE RELIGIOUS RIGHTS UNDER SOUTH AFRICAN LAW

In *Christian Education South Africa v Minister of Education*,⁸² Sachs J had this to say:

"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. The right to believe or not to believe, and to act or not to act according to his or her beliefs or

⁸⁰ *Women's Legal Trust v President of the Republic of South Africa and Others, Faro v Birnham NO and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109; [2018] 4 ALL SA 551 (WCC); 2018 (6) SA 598 (WCC) (31 August 2018) at Para 54

⁸¹ *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC)

⁸² 2000 (4) SA 757; 2000 10 BCLR 1051 (CC)

non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience...."⁸³

The freedom of an individual to choose his or her belief or religion, including to not have any particular religion or belief at all, is central to the catalogue of fundamental rights to which every individual is entitled, and which therefore requires concrete protection through international legal instruments as well as through policy, law and implementation at the regional and domestic levels.⁸⁴ The free exercise of the right to freedom of religion or belief encompasses not just the freedom to hold personal thoughts and convictions, but also the ability to manifest them individually or with others, publicly or in private.⁸⁵ ICCPR urges states that the religious and freedoms must be enshrined in national legislation in such manner that everyone shall be able to avail him or herself of such rights and freedoms in practice, and in full respect for other human rights.⁸⁶

The court in the case of *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* has highlighted that:

"Human dignity has little value without freedom; for without freedom, personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are in separately linked. To deny people their freedom is to deny them their dignity."

In *Prince*⁸⁷ the court had on two occasions considered the contents of the right to freedom of religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right of freedom of religion is the absence of coercion or restraint.⁸⁸ Thus freedom of religion may be impaired by

⁸³ As above at paragraph 36.

⁸⁴ IDLO n2 above.

⁸⁵ As above.

⁸⁶ Article 7 declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief res.36/55 (25 November 1981)

⁸⁷ *Prince* 2002 2 SA 794 (CC) at paragraph 38.

⁸⁸ *R v Big M* at paragraph 353.

measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.⁸⁹ Sachs in *Christian Education*,⁹⁰ states that freedom of religion encompasses both the right to hold a belief and to practice that belief. It has both an individual and collective dimension and “is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial”.⁹¹ It also includes “the right to be different”,⁹² especially if these beliefs are regarded by the majority as “unusual, bizarre or even threatening”.⁹³

Van der Schyff analyzes the right freedom of religion that it is composed of five distinct aspects.⁹⁴ These are the freedom of religious autonomy, choice, observance, teaching and the right to propagate a religion.⁹⁵ Religious autonomy includes the right to state non-identification which prohibits the state from aligning itself with a particular religion and for people to regulate their own affairs which means that the bearers of the right may establish, constitute and maintain their own religious bodies and organizations. They are also allowed to regulate their own doctrine⁹⁶ and set guidelines for the admission of numbers to their religious organizations.⁹⁷ Secondly, the freedom of religious choice protects the right of an individual to adhere to a particular religion,⁹⁸ as well as the right to religious non-adherence and religious observance.⁹⁹ This component protects the act motivated by and associated with religion like the right to worship and observe religious rites.¹⁰⁰ Fourth is the freedom of religious training and upbringing.¹⁰¹ This encapsulates the training and teaching of individuals by religious organizations such as churches. Lastly, religious freedom also protects the freedom to propagate a

⁸⁹ *S v Lawrence* 1997 (4) SA 1176 (CC) at paragraph 92.

⁹⁰ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

⁹¹ As above at paragraph 19.

⁹² As above at paragraph 24.

⁹³ As above at paragraph 25.

⁹⁴ G Van der Schyff “Freedom of religious autonomy as an element of the right to freedom of religion” (2003) 3 *Tydskrifvir die Suid-Afrikaanse Reg* 512 521

⁹⁵ As above.

⁹⁶ South African charter for religion 2002.

⁹⁷ G Van der Schyff n94 above.

⁹⁸ Van der Schyff at paragraph 118.

⁹⁹ Van der Schyff n96 at paragraph 132.

¹⁰⁰ Van der Schyff n96 at paragraph 132.

¹⁰¹ Van der Schyff n96 at paragraph 147.

religion or denomination with the aim to convert people to that religion.¹⁰² The propagation of religion is considered an important part of many religions and is aimed at attracting people to a particular faith in the hope that they will convert to that religion. Consequently, bearers of the right to religious freedom are entitled to spread information about their religion and express and display their religious convictions publically. The right to religious freedom thus allows religious non-adherents to promote their secular views of the world and criticize the nature and content of religions.¹⁰³

Killian who drew views from Mosoma said that in African religious pluralistic context, religious liberty means that coercion and interference in the way one exercises one's religion is completely forbidden.¹⁰⁴ The idea of whole or the wholeness of life is like glue that holds religion and life together.¹⁰⁵ Religion is not simply a department or compartment of life, rather, it is life.¹⁰⁶ On the basis of the proceeding understanding, any reason to deny or reduce someone's religious liberty is equivalent to dehumanization.¹⁰⁷ Human dignity and religious liberty go hand in hand.¹⁰⁸ Therefore, the denial of one implies the denial of the other.¹⁰⁹ The inextricable connection between human dignity and religious freedom, particularly the emphasis on the right of the person to determine the religion of his or her choice, is closer to African thought.¹¹⁰

Freedom of religion "is one of the foundations of a democratic society."¹¹¹ Chaskalson P, who delivered the majority judgment, referred with approval to the definition of freedom of religion in the case of *Big M Drug Mart*,¹¹² that: the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and

¹⁰² Van der Schyff n96 at paraph138.

¹⁰³ As above

¹⁰⁴ Killian J 'Religious freedom in South Africa' September 1993

http://uir.unisa.ac.za/bitstream/handle/10500/19549/Kilian_J_0869818333_Section1.pdf;sequence=1
(accessed 20 November 2019)

¹⁰⁵ As above.

¹⁰⁶ As above.

¹⁰⁷ n75 above.

¹⁰⁸ As above.

¹⁰⁹ As above.

¹¹⁰ As above.

¹¹¹ As above at paragraph 418.

¹¹² *R v Big M Drug Mart* (1985) 13 CRR 64 97.

the right to manifest religious belief by worship and practice or by teaching and dissemination.¹¹³ Coertzen further added that Freedom of religion means that religions have the freedom to determine their own organizational and doctrinal structures and they do this in terms of their faith identity¹¹⁴

According to Wood; religious freedom means a universal axiomatic commitment to human integrity.¹¹⁵ For religious liberty to be actualized, three elements are crucially important which are: firstly, that the rights of a person should be respected, secondly, that persons should not be inhibited by political or other forces from committing themselves fully to a religion of their choice, and lastly, that citizens should be protected from discrimination of any kind on the basis of religious affiliation.¹¹⁶

Sachs J explained the relationship between freedom of religion and the right to equality as follows:

It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them would not be unfair to anyone else who do not hold those views, As the court said in *Prinsloo v Van der Linde & Another*, the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue, would in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.¹¹⁷

The court in *Prince* case highlighted that given our dictatorial past in which those in power sought incessantly to command the behavior, beliefs and taste of all in society, it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order. Some problems might by their very nature

¹¹³ As above.

¹¹⁴ P Coertzen, 2017, 'Freedom of religion: To have and to protect religious rights and freedoms', paper, Stellenbosch University.

¹¹⁵ C Banda, May 2019, 'Redefining Religion in South Africa?: A Critical Christian reflection on CRL Rights commission https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa (accessed 26 November 2019)

¹¹⁶ Wood Jr, E J (1992) 'Voices for religious liberty. *Journal of Church and State*' 34 (2), 221 – 228

¹¹⁷ *Prince* 2002 2 SA 794 (CC) at paragraph 42.

contain intractable elements. Thus, no amount of formal constitutional analysis can in itself resolve the problem of balancing matters of faith against matters of public interest. Yet faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individual who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.¹¹⁸

The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is “unusual, bizarre or even threatening”.¹¹⁹ In *MEC For Education, Kwazulu-Natal, and Others v Pillay*,¹²⁰ Justice Langa stated that religious and cultural practices should not only be permitted, but rather affirmed, promoted and celebrated.¹²¹ *Laerskool case* noted that at the level of principle then, the overarching constitutional theme is that our society is diverse, that that diversity is to be celebrated not tolerated, and that specific rights are conferred and dealt with in pursuance of that principle.¹²²

2.4 THE SOUTH AFRICAN CHARTER ON RELIGION

One of the official documents that spells out the rights and liberties of religious establishments in South Africa is the Charter of Religious Rights. The religious rights and obligations endorsed by the Charter include the right to believe or not to believe,¹²³ the right of religion to the freedom of expression,¹²⁴ the right of religion to freedom of association,¹²⁵ the obligation of the state with regards to the protection of Religious Rights,¹²⁶ the right to observe and to exercise one’s religion,¹²⁷ the right to maintain

¹¹⁸ As above at paragraph 170.

¹¹⁹ As above at paragraph 172.

¹²⁰ (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC)

¹²¹ As above.

¹²² *Organisasie vir Godsdiensse-aOndering en Demokrasie v Laerskool and Others* 2017 (6) SA 129 (GJ) (27 June 2017) at paragraph 89 and 90

¹²³ Article 1 -2.4 of the SACRRF.

¹²⁴ Article 1 -2.2 of the SACRRF.

¹²⁵ Article 1 – 2.2 of the SACRRF.

¹²⁶ Article 3 – 3.2 and 9.3 of the SACRRF.

¹²⁷ Article 4 – 2.5 of the SACRRF.

particular matrimonial, family and personal legal traditions;¹²⁸ the right of religion to freedom of expression;¹²⁹ the right of religion to freedom of propagation;¹³⁰ the right to religious dignity;¹³¹ the right to education consistent with one's religious convictions,¹³² the right to institutional freedom,¹³³ the rights and obligations of religion with regards to the laws of the land;¹³⁴ the right of religion to solicit, receive, manage and spend voluntary financial and other forms of support and contributions¹³⁵ and the rights of religion to conduct upliftment and charity work in the community and to establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.¹³⁶

The South African Charter of Religious Rights and Freedoms (SACRRF) is a religious-legal document that defines the freedoms, rights, responsibilities and relationship between the "State" of South Africa and her citizens concerning religious belief. Section 234 of the Constitution makes allowance for charters of rights to be drawn up by civil organizations, which may then be enacted by parliament.¹³⁷ The SACRRF is the first charter developed in South Africa. The Charter of Religious Rights evidently seeks to promote the free exercise of faith. This means that people should be given the freedom to believe what they want to believe and should not be forced into believing what they do not want to believe.

2.5 LIMITATION OF RIGHTS OF RELIGION IN SOUTH AFRICA

Section 7(3) states that the rights in the Bill of Rights where religious rights are provided, are subject to the limitations contained or referred to in section 36 (limitation clause) or elsewhere in the Bill.¹³⁸ One of the objectives of this study was the extension of the religious practices, to which extent do the religious rights may be practiced? Can

¹²⁸ Article 5 of the SACRRF.

¹²⁹ Article 6 – 6.3 of the SACRRF.

¹³⁰ Article 6.2 of the SACRRF.

¹³¹ Article 6.3 of the SACRRF.

¹³² Article 7 and 8 of the SACRRF.

¹³³ Article 9 of the SACRRF.

¹³⁴ Article 9.4 and 10 of the SACRRF.

¹³⁵ Article 11 of the SACRRF.

¹³⁶ Article 12 of the of SACRRF.

¹³⁷ See section 234 of the RSA Constitution of 1996

¹³⁸ Section 7(3) of the South African Constitution of 1996.

one just do what he claims to be his belief? To what extent may such be limited? Many claims are made out from the context of “freedom of religion”.¹³⁹ South Africa has been encountering several controversial acts which raised many question under the context of ‘freedom of religion’.¹⁴⁰

Ngcobo in the case of *Prince v President of the Law Society of the Cape of Good Hope*¹⁴¹ highlighted that human beings may freely believe in what they cannot prove’ and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.’¹⁴² However, Van Der Valt, in interpreting the latter, highlighted that 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.¹⁴³

Moreover, *Prince Case* noted that it is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform the law. The balancing exercise requires a degree of reasonable accommodation from all concerned. Religious communities are expected, like everyone, to make suitable adaptations to laws that are found to be constitutional that impact on the practice for their religion. Religion is accommodated within the framework of the values established by the state and their interpretation thereof. This immediately creates a scenario where religion has to adapt itself in order to “fit” those values. This is not always a just position and therefore it is argued that it is the state who should, as far as possible reasonably accommodate religion and not religion that should, as far as possible accommodate the state. Freedom of religion does not mean that each person can determine himself which

¹³⁹ B Simelani ‘Religious rights body calls for stricter religious regulation, again’ 28 February 2019 <https://www.dailymaverick.co.za/article/2019-02-28-religious-rights-body-calls-for-stricter-religious-regulation-again/> (accessed 23 June 2019).

¹⁴⁰ N89 above.

¹⁴¹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

¹⁴² As above,

¹⁴³ Van De Vryer JD & MC Green ‘Law, religion and human rights’ (2008) African Human Rights Journal

laws he/she will obey or which curriculum she/he will attend.¹⁴⁴ *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg* endorsed the view that communities should exercise their religious freedom with due regard to their legal, ethical and community responsibilities.¹⁴⁵

Section 15(3) (b) clearly states that recognition in terms of section 15(3) (a) must be consistent with the provisions of the 1996 Constitution. Read with section 31(2), which provides that the right of a religious group to practice their religion or a cultural group to enjoy their culture must be consistent with the provisions of the Bill of Rights, the latter implies that freedom of religion is subject to the law of general applicability. Section 9 of the Constitution also stipulates that “no one is above the law”. This means that no one is permitted to violate the law especially on the basis of religion.

Freedman gave an important view that no state can, for example, permit practices such as enforced polygamy, ritual murders, or public disturbances simply because they are mandated by religious beliefs.¹⁴⁶ The state must be able to limit those practices, whether religious or not, which endanger the life and health of others or which limit the rights of others or which create public disturbances or undermine public morals.¹⁴⁷ Moreover, regarding freedom of religion and criminal law or the laws of the land, the case of *Prince*¹⁴⁸ got its reference from the American case of *Employment Division, Department of Human Resources of Oregon v Smith*.¹⁴⁹ The *Smith* case highlighted that the right to the free exercise of religion does not relieve an individual of the obligation to

¹⁴⁴ Du Plessis G A 'Religious freedom, reasonable accommodation and the protection of the conscience of learners in South African public schools' URF Vol 7:1/2 2014 (p97 – 112) see also prince case

¹⁴⁵ *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg N.O* (40819/17) (PRETORIA) at para 25

¹⁴⁶ Rautenbach C et al 'Culture and (religion) in Constitutional Adjudication' 2003

https://www.researchgate.net/publication/26634942_Culture_and_Religion_in_Constitutional_Adjudication (accessed 19 December 2019)

¹⁴⁷ K Rajagopal 'Polygamy is not a religious practice, government tells Supreme Court' 11 April 2017 <https://www.thehindu.com/news/national/polygamy-is-not-a-religious-practice-government-tells-sc/article17915070.ece> (accessed 10 July 2019).

¹⁴⁸ *Prince* 2002 2 SA 794 (CC) at paragraph 121.

¹⁴⁹ *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 at 917 (1990) at As above paragraph 119.

comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes or prescribes conducts that his or her religion prescribes (or proscribes).¹⁵⁰

Religious freedom may be limited in terms of “law” which includes legislation, common law and customary law.¹⁵¹ The limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” This provides the standard against which infringements of religious liberty are measured in order to determine whether the limitation is constitutional.¹⁵² The standard requires that a proportional balance be achieved between the limitation and the purpose of the limitation. In order to do so, the factors listed in section 36(1)(a) to (e) must be considered.¹⁵³ These factors are not separate tests, but simply underscore the general substantive limitations test.¹⁵⁴ The weighing up of competing rights and interests is done on a case-by-case basis and the proportionality analysis is influenced by the unique circumstances of every scenario. Courts have accepted factors, provided by section 36, to be considered in limiting religion which are as follows:

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose¹⁵⁵

The Constitutional Court’s jurisprudence on religious freedom usually includes a limitation analysis,¹⁵⁶ once a restriction of freedom of religion in section 15(1) has been established.¹⁵⁷ The nature of the interaction between section 15(2) and section 36 has however never been addressed in case law. The internal requirements of voluntariness and equity in section 15(2) can act as internal modifiers. Internal modifiers establish the

¹⁵⁰ n149 at paragraph 879.

¹⁵¹ Van de Schyff N99 at paragraph 168.

¹⁵² Van de Schyff N99 at paragraph 168.

¹⁵³ *S v Makwanyane* 1995 (3) SA 391 (CC) paragraph 149.

¹⁵⁴ As above.

¹⁵⁵ *Freedom of Religion v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34

¹⁵⁶ section 36 of the SA Constitution of 1996.

¹⁵⁷ De Waal ‘Bill of Rights Handbook 341;

content of the right,¹⁵⁸ which means that religious observances that are performed equitably and where attendance is free and voluntary, will comply with the right to religious freedom in section 15(1) and the fact that it should be consistent with provision of the Bill of Rights.

The general provision that rights may only be limited by a law of general application is qualified. It narrows and refines the general requirement in section 36 and sets a higher standard for the exercise of religious observances. Furthermore, the requirements of “free and voluntary” and “equity” refine the general substantive test in section 36. It sheds lights on the content of the reasonableness standard¹⁵⁹ and identifies what is considered a reasonable exercise of the right to religious observances. The restrictions also identify the purpose of the limitation of the right to religious observances. It is clear that they are aimed at achieving a measure of equity amongst religions and protecting individuals or groups from religious coercion. The fact that the purpose of the limitation is expressly mentioned amplifies the importance of the limitation of the right to conduct religious observances.¹⁶⁰ When considering related to section 36 have already been addressed and even refined within the particular context of religious observances.¹⁶¹

The court in trying to balance the restrictions and freedom gave impetus In *Christian Education*,¹⁶² that the underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, whenever reasonably possible, seek to avoid putting believers to

¹⁵⁸ Woolman & Botha “Limitations” in Woolman et al CLOSA 34-31

¹⁵⁹ Van der Schyff “The right to freedom of religion in South Africa” at 189.

¹⁶⁰ As above.

¹⁶¹ Van Schaik thesis n99 at page 75.

¹⁶² *Christian Education South Africa v Minister of Education* 2000 4 SA 757; 2000 10 BCLR 1051 (CC) at paragraph 35.

extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

For religion/belief to be protected it must be serious, concern important aspects of human life or behavior, be sincerely held, and be worthy of respect in a democratic society.¹⁶³ Public authority cannot interfere with one's right to hold his/her beliefs, but there are some situations in which public authorities can interfere with one's right to manifest or show one's thoughts, belief and religion. This is only allowed where the authority can show that its action is lawful, necessary and proportionate in order to protect public safety, public order, health or morals and the rights and freedoms of other people. Action is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned.

2.6 THE RIGHT TO RELIGION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The South African Constitution is reputed to be one of the most international law-friendly constitutions in the world.¹⁶⁴ It provides, for example, that the interpretation of the Bill of Rights must take into consideration international law;¹⁶⁵ that when interpreting any legislation, any reasonable interpretation consistent with international law must be preferred over any other interpretation that is inconsistent with international law,¹⁶⁶ and that customary international law is law in the Republic except where it is in conflict with the Constitution or an Act of Parliament.¹⁶⁷

The court in *Women's Legal Trust v President of the Republic of South Africa and Others*,¹⁶⁸ said it clearly that:

¹⁶³ As above. See also *African Commission on Human and People's Rights v Kenya Application* 006/2012, judgement, 26 May 2017 paragraph 168.

¹⁶⁴ D Tladi 'Interpretation and International law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 310-338

¹⁶⁵ section 39(1)(b) of the Constitution

¹⁶⁶ section 233 of the Constitution

¹⁶⁷ section 232 of the Constitution

¹⁶⁸ *Women's Legal Trust v President of the Republic of South Africa and Others, Faro v Birgham NO and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109; [2018] 4 ALL SA 551 (WCC); 2018 (6) SA 598 (WCC) (31 August 2018)

“It is possible to determine the content of the obligation s7 (2) imposes on the State without taking international law into account. But s39 (1) (b) makes it constitutionally obligatory that we should. This is not to use interpretive injunction of that provision, as the main judgment suggests, to manufacture or creature constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic’s external obligations under international law, and their domestic legal impact”.¹⁶⁹

2.6.1 THE STATUS OF INTENATIONAL LAW IN SOUTH AFRICA

International law is a combination of treaties and customs that regulate the conduct of states among themselves. International law has three main sources: customary international law, treaties and conventions and soft law (guidelines and non-binding judgments). South Africa has ratified a number of international treaties which create a binding obligation upon such ratification.¹⁷⁰ The implication of this is that South Africa is under obligations to fulfill treaties it ratified (including the provisions that have a bearing on the right to religion) and to do so in good faith.¹⁷¹

While section 233 gives weight to international law, the court will take into account whether the relevant international law is binding on South Africa. Further, where international law is in direct conflict with the Bill of Rights, the courts will not uphold it domestically. This is the position because in terms of section 2 of the Constitution, the Constitution of South Africa is supreme and any law inconsistent with it, including international law, is invalid.

In *S v Makwanyane*,¹⁷² former Chief Justice Chaskalson of the Constitutional Court described the role of international law as follows:

“Public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill

¹⁶⁹ As above at paragraph 163. See also *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC)

¹⁷⁰ ISESCR was signed in 1994 and not ratified, ICCPR was signed in 1994 and ratified in 1998, CRC was signed in 1993 and ratified in 1995, CEDAW was signed in 1993 and ratified in 1995, African Charter of Human Rights was signed in 1996 and ratified in 1996 and lastly Declaration on the Elimination of All forms of racial discrimination was signed in 1994 and ratified in 1998

¹⁷¹ As above.

¹⁷² 1995 (3) SA 391 (CC)

of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals delaying with compatible instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the inter-American Court of Human Rights, the European Court of Human Rights, and, appropriate cases, reports of specialized agencies such as the [Special Rapporteur], may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]”¹⁷³

The above is further buttressed by the *Grootboom case*,¹⁷⁴ where Justice Yacoob of the Constitutional Court said:

“The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”¹⁷⁵

2.6.2 RIGHT TO RELIGION UNDER INTERNATIONAL TREATIES

The right to freedom of religion, thought and conscience is entrenched in very strong terms under multiple international human rights instruments. Among others, the rights of individuals concerning religion/belief were provided and protected by the treaties. Article 18 of the International Covenant on Civil and Political Rights of 1966 (ICCPR)¹⁷⁶ states that everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. Subsection two further state that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁷⁷ Article 18(4) further protects its provision stating that the

¹⁷³ As above at paragraph 35.

¹⁷⁴ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)

¹⁷⁵ As above at paragraph 26.

¹⁷⁶ International Covenant on Civil and Political Rights adopted United Nation General assembly (1966) Resolution 2200A (XXI) on 16 December 1966, Came into force from 23 March 1976 in accordance with Article 49 of the covenant, RES/2200A ratified in 10 December 1998 in South Africa.

¹⁷⁷ Subsection 3.

States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Regarding provision of religious rights, Donald and Howard highlighted that there is a twofold to the freedoms guaranteed by Article 18 of ICCPR, Article 9 of ECHR, Article 18 of the Universal Declaration of Human Rights and other related International Conventions and Covenants: internal and external.¹⁷⁸ Concerning the “internal” aspect, freedom is absolute – regarding deeply held ideas and convictions that are forged in a person’s individual conscience and cannot therefore be the subject of restrictions on the part of the State authorizes.¹⁷⁹ However, with regard to the “external” aspect the freedom in question is merely relative, which is logical in so far as – seeing that it is freedom to manifest one’s beliefs – public order may be affected or even threatened.¹⁸⁰ While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares.¹⁸¹ Article 9 of the European Convention and Article 18 of the ICCPR¹⁸² lists a number of forms which manifestation of one’s religion or belief may take namely worship, teaching, practice and observance.¹⁸³

2.6.3 THE RIGHT TO RELIGION BASED ON THE AUTHORITATIVE GUIDANCE FROM GENERAL COMMENTS

In interpreting and expanding the provision provided by the ICCPR,¹⁸⁴ The Human Rights Council, in its General Comment 22 highlights that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad

¹⁷⁸ Donald A, Dr and Howard E, Dr ‘The right to freedom of religion or belief and its intersection with other rights’ school of law, January 2015 Middlesex University, A research paper for ILGA-Europe.

¹⁷⁹ As above.

¹⁸⁰ As above.

¹⁸¹ European Court of Human Rights, ‘Overview of the Court’s case-law on freedom of religion’ 19 January 2011 (updated 31 October 2013)

https://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf (accessed 01 March 2020)

¹⁸² European Convention on Human Rights (1950) Council of Europe, effective on 3 September 1953

¹⁸³ Article 9 as above. Also Article 18 of the ICCPR

¹⁸⁴ Article 18 of ICCPR

range of acts.¹⁸⁵ The General Comment further states that the concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well various practices integral to such acts, including the building of places of worship, the use of ritual formulae, and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language, customarily spoken by a group. In addition, the General Comment states that the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.¹⁸⁶

2.6.4 OTHER INTERPRETATION AND APPLICATION OF THE RIGHT TO RELIGION UNDER INTERNATIONAL LAW

For some time, in trying to avoid interference and disrespect religion, several principles were developed. Among others, they include the ‘principle of respect for the right of others to believe’.¹⁸⁷ According to Donald and Leonard, this principle is a key factor when assessing the necessity of any interference with the manifestation of a religion or belief; it establishes the duty of the state to create a ‘level playing field’ between different groups, including both those with religious or non-religious beliefs and those with no religion or belief, with one side being free to present their point of view, and the other to reject it.¹⁸⁸ The principle of respect is thus sensitive to imbalances of power and seeks to ensure that those who ‘enjoy “superiority” over others, educationally, socially, politically or in any other fashion, are not unduly advantaged in an exchange of

¹⁸⁵ General comment 22 paragraph 4.

¹⁸⁶ General Comment No. 22 on ‘the right to freedom of thought, conscience and religion’ (Article 18), Human Rights Committee, 30 July 1993.

¹⁸⁷ Donald A and Howard E, The right to freedom of religion or belief and its intersection with other rights, January 2015, Middlesex University, a research paper for ILGA-Europe

¹⁸⁸ Evans M (2009) Manual on the wearing of religious symbols in public areas (Strasbourg: Council of Europe/Martinus Nijhoff) 83 – 84.

ideas'.¹⁸⁹ This principle is more about respecting the believer than a belief itself.¹⁹⁰ Believers and non-believers are entitled to the respect of those who hold to other forms of belief – even though, of course, there may be profound disagreement regarding the content of those views since respect for the believer does not necessarily entail respect for what is believed.¹⁹¹

Again, the principle of fostering (and reasonable accommodation) and tolerance has also been developed.¹⁹² According to Howard, this principle requires religious adherents to accept 'a fairly high degree of challenge' to their belief systems in the pursuit of this goal since the principle is viewed as a goal in its own right because it is a means of preserving democracy.¹⁹³ It was emphasized that Believers must "accept the legitimacy of there being a divergence of views on matters of fundamental significance to them within the broader society of which they form a part", and the same principle applies to non-believers who are faced with the manifestation of forms of religion or belief which they might find unwelcome or unpalatable.¹⁹⁴ In such situations, the role of the authorities is "not to remove the cause of tension by eliminating pluralism, but through its actions seek to ensure toleration" as stated in the case of *Serif*.¹⁹⁵

The IDLO advised that diversity should be promoted over uniformity.¹⁹⁶ Variations in religious expression are an extension of human diversity that States are called upon to preserve as fundamental human right.¹⁹⁷ Freedom of religion or belief is eroded when laws are misused to form uniformity comes in the form of religion or non-religion.¹⁹⁸ Just because some States choose not to base (or legitimize) their governance system on religious tradition or with reference to spiritual or religious authority, does not mean that these secular societies are exempt from the legal responsibility to protect their

¹⁸⁹ As above.

¹⁹⁰ As above.

¹⁹¹ N48 above.

¹⁹² N47 above.

¹⁹³ N48 above.

¹⁹⁴ N196 above.

¹⁹⁵ *Serif v Greece No.38178/97*, 14 December 1999 paragraph 53.

¹⁹⁶ The IDLO report n1 above.

¹⁹⁷ As above.

¹⁹⁸ As above.

residents' right to adopt or practice a religion of their choice.¹⁹⁹ Failing to protect freedom of religion will result in government-endorsed hostility toward religion.²⁰⁰ Wholesale rejection of religion in public life results in the secular State relinquishing the legal obligation to preserve and protect freedom of religion or belief as a fundamental human right.²⁰¹

Lastly, in the case of *Otto-Preminger-Institute v Austria*,²⁰² the EC held that those who choose to exercise the freedom to manifest their religion cannot reasonably to be exempt from all criticism.²⁰³ They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."²⁰⁴ Howard highlighted that there is no right not to be offended.²⁰⁵ This was held for the purposes of those who wouldn't want their religion or belief being undermined. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one's religion but does not bestow a right for believers to have their religion itself protected from all adverse comment.²⁰⁶ The question as to whether criticism, derogatory statement, insults or ridicule of one religion may actually negatively affect an individual's right to freedom of religion or belief can only be determined objectively and, in particular, by examining whether the different aspects of the manifestation of one's right to freedom of religion are accordingly negatively affected.²⁰⁷

2.6.5 LIMITATIONS OF THE RELIGIOUS RIGHTS BY THE INTERNATIONAL LAW

IDLO has stated that every government has a legal responsibility to promote and protect the human rights of those within its jurisdiction. However, difficulties sometimes arise where religious communities feel that the State is using human rights to interfere in their

¹⁹⁹ As above.

²⁰⁰ As above.

²⁰¹ As above.

²⁰² *Otto-Preminger-Institute v Austria* No. 13470/87, 20 September 1994 paragraph 47.

²⁰³ As above.

²⁰⁴ As above.

²⁰⁵ Donald A and Howard E, The right to freedom of religion or belief and its intersection with other rights, January 2015, Middlesex University, a research paper for ILGA-Europe

²⁰⁶ Special Rapporteur report of 2002 at paragraph 37.

²⁰⁷ As above.

long-practiced traditions and rites, some of which are said to be justified in the name of religion. In the name of religious freedom, laws have been used to deny freedom to others.²⁰⁸ Though freedom of religion forbids government from regulating belief; it does allow government to punish activity judged to be criminal, regardless of an activity's basis in religious belief. The approach of freedom of religion is not purely biblical.²⁰⁹

Parker crafted restrictions from Silvio Ferrari who contended that in the last ten to twenty years, there has been a new breed of religiously motivated terrorists, “willing to kill in the name of God.”²¹⁰ This reality has led on the need of finding a balance between the values of freedom of religion and security, to determine how to reconcile religious freedom and national security in a way that makes it possible to simultaneously enjoy them both.²¹¹ Parker contended that many governments around the world have adopted measures that are ostensibly “necessary” to ensure national security and public order, and life, health, morals, rights and freedoms of other citizens are protected from extremist religions or religious ideas.²¹² Furthermore, Parker assesses restrictions of religion with necessity. He derived his interpretation of the word “necessary” from Charles Kiss that necessary indicating that restrictions on rights “are permissible only when they are essential, i.e. inevitable.”²¹³

Donald and Howard highlighted that Restrictions on the right to manifest one's religion or belief must not be arbitrary or irrational.²¹⁴ They must be clear, publicly accessible, neo-retrospective, and people must able to understand the circumstances in which they might be imposed and foresee the consequences of their actions with a degree of accuracy.²¹⁵ According to the judgment of EC in *Svyato-Mykhaylivska Parafiya case*,²¹⁶

²⁰⁸ IDLO n1 above

²⁰⁹ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2929 (1) SACR 113 (CC) (18 September 2019) at paragraph 34.

²¹⁰ As above.

²¹¹ Silvio Ferrari, *Individual Freedom and National Security in Europe After September 11*, 3004 *BYU L Rev.* 357 358.

²¹² N104 above.

²¹³ Alexander C K “permissible Limitations on rights, in the INT Bill of Rights: the Covenant on Civil and Political Rights” (Louis Henkin ed, 1981) At 308

²¹⁴ Donald A and Howard E, *The right to freedom of religion or belief and its intersection with other rights*, January 2015, Middlesex University, a research paper for ILGA-Europe

²¹⁵ As above

Under Article 9(2) of the Convention,²¹⁷ any interference with the exercise of the right to freedom of religion must be “necessary in a democratic society”.²¹⁸ That means that it must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”.²¹⁹

The case of *Pantelidou v. Greece*²²⁰ leads as one of the examples determining the fair and justifiable limitations. This case concerned the applicant’s not being able to have access to a church that had been opened in a public green space by the congregation of the “True Orthodox Christians” in breach of the urban planning code. The site was earmarked for the construction of the Athens Mosque under that code. The applicant alleged a violation of her right to freedom of religion. In the judgment, the court declared the application inadmissible as being manifestly ill-founded. It pointed out in particular that the public interest of rational urban development could not be superseded by the liturgical needs of a religious community which had arbitrarily encroached on the public sphere in order to establish and operate a place of worship in breach of the relevant urban development plan. Therefore, having regard to the margin of appreciation enjoyed by States in the area of regional and urban planning and development, the court held that the impugned measure had been justified in principle and been proportionate to the aim pursued (preventing public disorder and protecting the rights and freedoms of others).

Furthermore, concerning expression of religion, since teaching is mentioned by the ECHR, the UDHR and the ICCPR as one of the manifestations of religion or belief; many religions count teaching of the faith as one of the principal duties of believers. It is thus highlighted that this does not mean however, that a religious individual can express their religion or belief in any or all circumstances; for an example, healthcare providers may be constrained both by the law and professional guidelines from expressing religious or moral beliefs in ways that may distress patients or exploit their

²¹⁶ *Svyato-Mykhaylivska Parafiya v Ukraine* No 77703/01 (07 November 2007) ECHR.

²¹⁷ Article 9 of UDHR.

²¹⁸ N 163 above ECtHR at paragraph 36.

²¹⁹ As above.

²²⁰ *Pantelidou v. Greece* No 36267/19 (10 October 2019) ECHR.

vulnerability.²²¹ Human Rights Committee general comment 22 Paragraph 7 states in accordance with article 20,²²² that no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its general comment 11,²²³ States parties are under the obligation to enact laws to prohibit such acts.²²⁴ The ECtHR has also added that “as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance...”.²²⁵ In defining hatred or hate speech, any expression that is “abusive, insulting, intimidating or harassing and/or which incites to violence, hatred or discrimination against groups identified by a specific set of characteristics”.²²⁶

2.7 CONCLUSION

Many people may perceive religion as a simple thing. Some may perceive it as a form of church but however religion is far way more than that. It may extend out of a building called church or synagogue to families, graveyards, mountains etc. their religious symbols can be found almost anywhere. Religion plays a large and important part in public life, through schools, hospitals and poverty relief programs. The law also permits the religious communities to practice their religions even it makes no sense to other people as long as it is within the boundaries of law of the country. The approach of freedom of religion is not purely biblical or ecclesiastical or doctrinal. It does not come from the religious doctrines but the law of general application. Internal rights of religion (belief) are absolute and cannot be limited. Though religious rights (external one) are constitutional, they are thus not absolute. They are subject to law of general application and can be limited.

²²¹ Donald A ‘Religion or belief, equality and human rights in England and Wales 154 - 157

²²² Article 20(2) ICCPR obliges states to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

²²³ Paragraph 19

²²⁴ General Comment No. 22 on ‘The right to freedom of thought, conscience and religion (Article. 18)’, Human Rights Committee, 30 July 1993.

²²⁵ *Erbakan v Turkey*, No. 59405/00, 6 July 2006 at paragraph 56.

²²⁶ Article 19

The nature and extension of human rights had been critically analyzed in this chapter, the following chapter will be analyzing and evaluating whether the proposed measures by the CRL Commission are in line with the provisions by the human rights standards from international law and national or not. In other words, whether the proposed measures by the Commission will be permissible and in according with the law (as entirely discussed in this chapter) or not.

CHAPTER THREE: THE ASSESSMENT OF THE MANDATE OF THE COMMISSION FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF CULTURAL, RELIGIOUS AND LINGUASTIC COMMUNITIES COMMISSION AND THE MECHANISMS IT HAS CONSIDERED TO REGULATE RELIGIOUS ORGANISATIONS

3.1 INTRODUCTION

This chapter engages with the CRL's involvement in the issue of religious rights in South Africa. This Commission has highlighted that the Constitution of South Africa leaves a scope for all kinds of beliefs and opinions, even views which some may regard as extreme are allowed and should not be regulated.¹ The Commission added that: When views lead to the abuse of human rights or (violation of) to the law, there is a cause concern. This has led to some people in the sector doing whatever they like with no accountability to anyone. The Commission further said that no one can order people to undertake questionable religious practices like feeding them grass, snakes, rats, drinking petrol, locking them in a deep freezer, driving over people etc.²

The public played a major role in exerting pressure on the government to have religious groups regulated.³ Such pressure led to the proposal of regulations of religious groups.⁴ That came as a result of several controversial incidents from religious community.⁵ The CRL Commission in its report, highlighted that "No religion should be accredited if it had practices deemed to a harmful effect on the physical or mental well-being of its followers or if deemed explosive of those practicing it."⁶ This is where The Commission started to

¹ B Simelani 'Religious rights body calls for stricter religious regulation, again' 28 February 2019 <https://www.dailymaverick.co.za/article/2019-02-28-religious-rights-body-calls-for-stricter-religious-regulation-again/> (accessed 23 June 2019)

² As above

³ L Ann 2019 'Ramaphosa to take on so-called pastors who cheat South Africans' 28 February 2019 <https://sadcnews.org/2019/02/28/ramaphosa-to-take-on-so-called-pastors-who-cheat-south-africans/> (accessed 24 July 2019).

⁴ As above.

⁵ C Maxon 'Fake pastors and their followers: This is why the 'God business' is thriving in SA' 07 March 2019 <https://city-press.news24.com/Voices/fake-pastors-and-their-followers-this-is-why-the-god-business-is-thriving-in-sa-20190307> (accessed 10 June 2019)

⁶ C Banda 'Redefining Religion? A Critical Christian reflection on CRL Rights Commission's proposal to regulate religion in South Africa' May 2019 https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa. (Accessed 28 October 2019)

propose the regulation in response of the controversial acts from religious communities. Since this study is more about the CRL Commission's call for regulation of religious bodies. This chapter will focus on the mechanism proposed by the CRL commission, more importantly the evaluation whether such proposed mechanism would be in alignment with normative human rights framework under International law and South African law (mainly the Constitution) standards. It would be of importance to examine the mandate of the CRL Commission and to assess the practicality and human rights implications of the proposals suggested by the Commission. Its mandate stretches to regulation of religious groups.

3.2 THE MECHANISMS PROPOSED BY THE CRL COMMISSION

The CRL Rights Commission, in its report, contended that it respects the right to religious freedom in its entire dimension as protected in section 15 and section 31 of the current South African Constitution.⁷ It further contended that it supports the duties of the state to create a positive and safe environment for the exercise of religious freedom and to act impartially and without unfair discrimination against anyone on the grounds of faith, religion, or religious affiliation.⁸ Furthermore, the CRL Commission highlighted that it respects the rights and status of religious organizations as institutions of civil society and acknowledges that much of what needs to be done, can only be achieved through cooperation between the state, the CRL Commission, and religious sectors or institutions.⁹ The CRL Commission however observed that while it promotes and protects the religious freedom, it carries a responsibility to guard any act which undermines and abuse of the religious freed, hence the need of investigative study.¹⁰ This is where The Commission started to propose the regulation in response to the controversial acts from religious communities.

The recommendations (mechanisms to be adopted) by the CRL Rights commission include peer review, umbrella organizations, registration, licensing and de-licensing,

⁷ 1996 SA Constitution.

⁸ *S v Lawrence 1997 4 SA 1176 (CC)*

⁹ CRL Commission 2017 report.

¹⁰ As above.

accreditation, and punitive measures.¹¹ The CRL Rights Commission is of the view that all these recommendations will not warrant a new legislation but to request the amendment of the CRL Act 19 of 2002 to accommodate the proposed needs.¹² The proposed amendment to the CRL Act will ensure that religious freedom is guaranteed in the country and that the religious sector is given space and capacity to resolve its challenges and make all relevant recommendations to the Commission.¹³ The various proposals of the CRL Commission on how to regulate religious groups are discussed below.

3.2.1. ACCREDITED UMBRELLA ORGANISATIONS

In establishment of accredited umbrella organizations, such will have the power and authority to monitor among others including to investigate and to discipline its members.¹⁴ It is reported that churches will be free to decide on which umbrella organization or body they want to be part of belong to, by law, everyone will belong somewhere.¹⁵ Since the Commission contended the establishment of Umbrella Organizations, it also pointed out the roles and functions of the registered umbrella organizations that they will, among other things:

- (a) Capacitate their members in the various relevant legislation policies and regulations that impact on the religious sector.
- (b) Represent their members on forums where issues affecting the religious sector are discussed.
- (c) Set minimum standards of good governance, ethics and acceptance religious practices as per their religious doctrine.
- (d) Where necessary, be the spiritual leaders of the members to ensure that they remain on a good spiritual path.
- (e) Where necessary, discipline members who have veered off the path to bring them back on track.

¹¹ As above.

¹² As above.

¹³ N1 above.

¹⁴ N9 above.

¹⁵ Simelane n1 above.

- (f) Where necessary, recommend to the Peer-Review Committee and eventually the CRL Rights commission that a member is removed from the Register of religious leaders as per the codes and standards of their religious beliefs and practices.

3.2.2. PEER REVIEW COMMITTEE

In Peer-Review Committee (within umbrella organization), it will take form of a “board or whatever who understands the religion itself”, and will decide whether “this [particular belief, teaching or practices] is normal for us and this is unusual or not”.¹⁶ The umbrella organization will elect a member to represent them in their relevant Peer-Review Committee. The Peer-Review Committee will each cover a particular religion, for example, one for Christians, one for African religion; one for Muslims, Jews, Hindus, Rastafaris etc. these Committees will ensure that there are religious self-regulation and accountability.¹⁷ The Commission will mandate and empower the Peer-Review Committee with the following roles and functions, among others things:

- (a) To advise the CRL Rights Commission on matters affecting their particular religion.
- (b) Each Peer-Review Committee will be the final mediator of disputes within their own religion.
- (c) Religious leaders who want to appeal against the decisions taken by their umbrella organizations can refer their matters to the Peer-Review Committee
- (d) Complaints received by the CRL Rights Commission from ordinary members of various religions, who are dissatisfied with the decision taken by the relevant umbrella organizations, will be referred to the relevant Peer-Review Committee for advice.
- (e) The Peer-Review Committee of each religion will deal with complaints from ordinary members of society about organizations from their religion.
- (f) Each religion’s Peer-Review Committee will refer matters and advise the CRL Rights Commission on the resolutions they have taken regarding complaints.

¹⁶ N9 above.

¹⁷ As above.

- (g) The Peer-Review Committee shall be an advisory body to the CRL Rights Commission. The final decision powers shall lie with the CRL Rights Commission.¹⁸

3.2.3. THE PEER REVIEW COUNCIL

Consist of peers/representatives of each religion (one representative per religion). It will be a multi-faith body; In Powers and responsibilities of the Council, the Council may:

- (a) Decide if a (new) religion should be recognized and issued with an operating license or not.
- (b) The council may refuse to issue a license if the institution's "doctrine is deemed potentially harmful, physically and mentally to those who practice it, or is such doctrine is not found in the tenets of the religion and which bring the religion into disrepute."¹⁹
- (c) Act as an appeal board to mediate in any matter concerning the registration of religion, or any disputes that may arise through the different religious committees that cannot be resolved by the specific religious peer review committee.²⁰
- (d) act as a mediator between the different religions, with the CRL Commission being the final appeal (before the matter goes to court) on any inter-and intra-religious matters¹⁴⁹ and;
- (e) Act as a mediator in matters between the State and the religious sector.²¹

3.2.4. LICENSING AND REGISTRATION

The CRL Commission highlighted that the registration mechanism for religious leaders would be similar to that of other professional bodies such as that of Lawyers, Nurses, Doctors and Engineers.²² The Commission highlights "We believe this registration mechanism will also help to professionalize the religious sector further, without compromising the internal requirements of various institutions for recognizing those of religious leader".²³ According to the recommendations, each worship Centre would

¹⁸ As above.

¹⁹ CRL Rights Commission Commercialization (n9 above) p34 at paragraph q8.2

²⁰ CRL Rights Commission Commercialization (n9 above) p34 at paragraph 18.3(ii)

²¹ CRL Rights Commission Commercialization (n9 above) p35 at paragraph 18.4(iv)

²² As above.

²³ As above.

freely form their umbrella organizations and these umbrella organizations must be registered and known to peer-review committees.²⁴

It was highly noted that every religious practitioner must be registered and fall under umbrella organizations.²⁵ Every registered religious leader should have a location where he or she conducts religious ceremonies and this could be churches, homes, mosques, temple, mountains, open fields and tents.²⁶ These committees will each cover a particular religion, for example, one for Christians and one for Muslims.²⁷ These committees will ensure there is religious self-regulation and accountability.²⁸ The peer-review committee will be the final mediator of disputes within their own religion.²⁹ The CRL Commission's chairperson Thoko Mkhwanazi-Xaluva in support of the above recommendations said "the Constitution also stated that everyone had the right to choose a trade, including being a religious leader, and that the practice of a trade or occupation may be regulated by law".

3.2.5 THE POWER AND ROLE OF THE COMMISSION IN THE PROPOSED MECHANISMS

The CRL Rights Commission suggested that it will have the ultimate authority to decide upon matters of doctrine and who is (and is not) recognized as a "Religious Practitioner".³⁰ It will also have the power to charge license, which will likely raise close to a billion Rand annually and which will finance this elaborate structure.³¹ The CRL Commission contended that it will remain the final arbiters in all matters as recommended by the Peer-Review Committee and the Peer-Review Council.³² The final decision will be taken and implemented by the CRL Rights Commission so that these are implemented through the commission's offices, and the legal obligations remain

²⁴ As above.

²⁵ As above.

²⁶ As above.

²⁷ As above.

²⁸ N9 above.

²⁹ As above.

³⁰ FOR SA 'CRL Rights Commission's Final Report to Parliament in June' 15 June 2017 <https://forsa.org.za/crl-rights-commissions-final-report-to-parliament-in-june/> (accessed 25 February 2020)

³¹ As above.

³² As above

within the Constitution.³³ The power to charge license lies on the Commission. The question that falls to be answered, however, pertains to whether, in light of its constitutional mandate, the CRL is rightly placed to roll out regulations of this kind, let alone to play a lead role in the regulation of religious practices. To resolve this issue, it is important to understand the constitutional mandate of the CRL Commission.

3.3 THE CONSTITUTIONAL MANDATE OF THE CRL COMMISSION

The CRL commission is a state institution established in terms of chapter nine of the Constitution to support democracy.³⁴ It is an independent institution and subject only to the Constitution.³⁵ Its activities and functions are to be impartial, and powers must be exercised and performed without fear, favor or prejudice.³⁶ It is a juristic statutory body regulated by the Commission for the Promotion and Protection of the Rights of the Rights of Cultural, Religious and Linguistic Communities Act (CRL Commission Act),³⁷ from which it essentially derives its statutory wherewithal to fulfill its constitutional functions.³⁸ Although the Chapter nines are state institutions, they operate outside government and partisan politics, and they are free from interference by other organs of state. The Constitution asserts their independence in authoritative terms, using language that is in keeping with that used to declare the independence of the judiciary.³⁹

Although the CRL Rights Commission draws its powers and existence from the Constitution and the CRL Act, its operation is guided by existing local, provincial, national (policies and legislation) and international instruments. It also has a critical role to play in influencing polity and legislation ensuring that their sacredness and responsiveness to the diverse CRL communities are met.⁴⁰ Thus the CRL Rights Commission must ensure the alignment of policies and legislation to the pillars of

³³ As above.

³⁴ Section 181(1)(c)The Constitution for the Republic of South Africa Act 108 of 1996.

³⁵ Sec 3 of the CRL Act 2002

³⁶ As above.

³⁷ Commission for the Promotion and Protection of the Rights of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

³⁸ As above.

³⁹ Sec 3 of the CRL Act 2002.

⁴⁰ As above

democracy – the Bill of Rights pertaining to freedom of belief, opinion and association and strengthen the transformation of the South African society.

3.3.1 OBJECTIVES OF THE CRL COMMISSION

In terms of Section 4 of the CRL Act;⁴¹ the objects of the Commission are –

- (a) To promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
- (b) To promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association;
- (c) To foster mutual respect among cultural, religious and linguistic communities;
- (d) To promote the right of communities to develop their historically diminished heritage; and
- (e) To recommend the establishment or recognition of community councils in accordance with section 36 or 37.

3.4 THE HUMAN RIGHTS IMPLICATIONS OF THE MECHANISMS PROPOSED BY THE CRL RIGHTS COMMISSION

Trying to balance religious liberty and the state’s duty to legislate for the common good has been highlighted as a big challenge by several scholars. Pienaar and Rautenburg noted it as follows:

“..... It would not be easy to strike a balance between religious liberty and the state’s duty to legislate for the common good. This is exactly the difficulty the South African legislature is going to face. On the one hand, vociferous members of religious and traditional communities are going to demand full and unchanged recognition of their religion or tradition, which includes the legal rules of such a religion, and on the other hand, the state has the duty to ensure constitutional protection of the rights of the adherents to those religious or traditions. The drafting of legislation that recognizes religious and traditional legal systems other than the systems already in operation in South Africa will not be an easy task. If all the discriminatory elements are not removed by means of legislation that recognition will not be in compliance with section 15(3)(b). On the other hand, if all the discriminatory elements are removed by means of legislation the recognition might not be acceptable to the visible proponents of the

⁴¹ Sec 4 Of the CRL Act 2002

relevant religious and traditional communities and will result in the legislation becoming more paper law. However, these difficulties should not prevent the legislature and courts from abolishing unfair discrimination (based on sex and gender) and unacceptable coercion of individuals within religious and traditional legal systems.”⁴²

With all the controversies and crimes taking places under the context of freedom of religion, there is thus no doubt that something should be made to prevent such. A video clip from BBC also showed how destructive other churches are to the communities.⁴³ On the video, among other allegations, a pastor in Soshanguve accused of raping boys from his congregation.⁴⁴ In the same video, another woman was allegedly being raped and impregnated by a religious leader and she said that whenever she tried to tell him about the pregnancy, he threatened to kill her.⁴⁵ She adds “I don’t pray [anymore], I don’t know what to say to God after what happened to me.”⁴⁶ However BBC also highlighted that Freedom of religion is greatly practiced in South African religion making it difficult to legislate against controversial churches.⁴⁷ The Commission believes to have suitable measures to address the controversies and thus one pastor asked questions concerning mechanism of the Commission, “What tools do they have to tell good preacher from a bad preacher... who decided and what the criteria was?” - Therefore the following part is about the evaluation of the mechanisms of the Commission against the provision of religious liberties – whether such measures are the answers or not, to all the controversial religious practices.

3.4.1. BACKGROUND OF ARGUMENTS

Richard and Hammar highlighted that it is one thing for a statute to apply to a local dry cleaner or fast food restaurant, but it is quite different to apply the same law to a church, since churches are protected by the Articles guaranty of religious freedom as well as

⁴² Prof C Rautenbach et al ‘Culture (and Religion) in Constitutional Adjudication’

⁴³ BBC fake pastors and false prophets rocking churches in South Africa (2018)
<https://www.youtube.com/watch?v=QHnKowVRFyU> (29 March 2020)

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ As above.

similar provisions in state constitutions.⁴⁸ They further highlighted the impetus that many churches oppose these kinds of governmental assertion of authority as unreasonable intrusions into the life of the church.⁴⁹ Many Christians expressed serious concern that the recommendations, if implemented, would erode freedom of religion and cede the church to state control.⁵⁰ To some Christian objectors the idea of regulating religion signals the imminent end of religious freedom, “the arrival of the anti-Christ and religious persecution in South Africa.”⁵¹

Mdongo highlighted that the report by the CRL Commission to regulate religion amounts to state control of religion. There should always be, in any democracy, a distinction between religion and state.⁵² Michael Swain contended “...We have said from the beginning that the commission is the wrong organ to speak on this issue, because they are a state institution. It is up to [religious leader] to keep our house in order.”⁵³ As the proposals of the Commission will affect institutional freedom of every church and every pastor, in South Africa, “we need every church and every pastor to stand with us for freedom (from State interference)”. Regulation will radically affect and alter the religious landscape of our country.⁵⁴ There are many challenges raised and thus, they will be highlighted in each of the included mechanisms proposed by the Commission.

3.4.2. PEER REVIEW COMMITTEE AND UMBRELLA ORGANIZATIONS

Freedom Of Religion South Africa (FOR SA) noted that From practical point of view, it is difficult to see how a central regulating body could truly be representative of all the different doctrinal streams within the Christian faith, i.e. cover the entire spectrum from those who hold to a very literal interpretation of the Scriptures, to those who subscribe

⁴⁸ Richard R and Hammar J D ‘Pastor, Church & Law’ <https://www.churchlawandtax.com/library/pastor-church-law/chapter-9-government-regulation-of-churches/> (accessed 17 March 2020)

⁴⁹ As above.

⁵⁰ Ramphele L ‘CRL to amend Act to clamp down on controversial religious leaders’ 11 July 2017 <http://www.capetalk.co.za/articles/263916/crl-to-amend-act-to-clamp-down-on-controversial-religious-leaders> (accessed 25 February 2020)

⁵¹ As above.

⁵² As above.

⁵³ As above.

⁵⁴ As above.

to a very liberal view of the scriptures.⁵⁵ There would always be the risk that one group over time would take control of the regulating body (say for e.g. liberals, especially in the light of how secular humanism and liberal theology are sweeping Western nations including South Africa) and rule that (for e.g. conservative) beliefs and practices that do not align with their own, be outlawed.⁵⁶ The concern was raised that “When Church regulates Church, who decides what is acceptable and what not? If there are so many denominations (not including independent churches), how could one central regulatory body reflect all of these?” Most of these groups are so divided because of doctrinal matters that differ enough and are therefore important enough to that group that they could not stay in the denomination they left.⁵⁷ Historically, many new groups would have faced persecution for breaking away, yet their beliefs were so strong that they all felt that they could not remain. Thus it would be impossible for one body to represent all, while maintaining religious freedom.⁵⁸

The establishment of accredited umbrella organizations and peer review as the recommendations by the commission are of good concern, however, the issue of governing the belief in large affects and condemns the uniqueness of beliefs and religion.⁵⁹ It limits how one should have a belief and practice his belief because other belief may not be ‘usual and normal’ to other religious institutions though it may carry no harm. It should however be noted that a same religion may have God whom is worshipped but in different manner. For an example, some wear church uniform whereas other don’t, some condemns attending funeral and go to church without taking a break whereas to some it don’t do anything. The point is that religious institutions may have the same religion/belief (God) but different ways to practice such belief and different doctrines. The religious clause promotes unique belief though it may be seem “illogical” to others.⁶⁰ The court in *Hassan v Bulgaria* noted that religious communities traditionally exist in organized structures and find meaning in the religious ceremonies

⁵⁵ FOR SA ‘Why we can’t regulate religion (part 1)’ 2 December 2015 <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (10 March 2020)

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ See n6 above.

⁶⁰ See *Prince v Cape Law society CC 2002 2 SA 794 (CC)*

and the religious ministers conducting those ceremonies: participation in the life of community is thus a manifestation of one's religion.⁶¹ It further noted that "...but for very exceptional cases, the right to freedom of religion... excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate"⁶²

Moreover on the uniqueness of religion, it was highlighted in many cases and by many scholars. If religion becomes under single umbrella, many ways of worship will be eliminated and remain with few or one way of worship and it will not be determined by one's convictions but the peer review committee.⁶³ As Coertzen said, freedom of religion means that religions have the freedom to determine their own organizational and doctrinal structures and they do this in terms of their faith identity.⁶⁴ People have freedom to determine their own organizational and doctrinal structure not structures determined by certain people approved by any, body of the state. What will happen if things that are "not normal" to others are considered center of certain religion? If such may be eliminated then it means those who would want such will no longer worship in their own doctrinal way. Chaskalson P said that freedom of religion is to entertain such religious beliefs as persons chooses.⁶⁵ It should be noted that it is what person chooses not what has been approved. FOR SA further contended that Regulation even self-regulation is not permissible.⁶⁶ Because religious freedom guarantees people the right to make up their own minds as to what they believe (including how they interpret the Scriptures) and also how they practice their beliefs.⁶⁷ The state cannot regulate this,

⁶¹ *Hasan and Chaush v Bulgaria No. 30985/96 (26 October 2000) ECHR.*

⁶² As above at paragraph 1358.

⁶³ Banda n6 above.

⁶⁴ Coertzen, P., 2017, 'Freedom of religion: To have and to protect religious rights and freedoms', paper, Stellenbosch University.

⁶⁵ Chaskalson P, who delivered the majority judgment, referred with approval to the definition of freedom of religion in the case of *Big M Drug Mart*,⁶⁵ that: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

⁶⁶ FOR SA 'Why we can't regulate religion (part 1)' 2 December 2015 <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (10 March 2020)

⁶⁷ As above.

and neither can it be regulated by a state-recognized religious group (such as a Council of Elders) who would have the force of the State behind it.⁶⁸

Pothier said The CRL Rights Commission's recommendation for a 'vast structure of control and oversight' of religion reflects an understanding of religion that is inattentive to the quest for religious freedom by many ordinary South African Christians.⁶⁹ The quest for religious freedom in South Africa is illustrated in the origins of the AIC. Masondo says that the African Indigenous churches exemplify the African struggle for self-identification and self-realization.⁷⁰ In colonial times this quest for self-identification and self-realization included freedom from white control, freedom from white missionary paternalism and the quest to worship God in accordance to one's perceived encounter with God.⁷¹ The initial AIC leaders broke away from established churches to express their freedom. Indeed, while some of their beliefs may be deemed unorthodox and controversial, these cannot be addressed by forcing them into hierarchical authority as proposed by the CRL Rights Commission. However, various theological departments in some South African universities run programs targeting AICs to equip them with biblical literacy skills to empower them to exercise their religious freedom informatively.⁷² Moreover, as contended by FOR SA, It is therefore inevitable that CRL Rights Commission will ultimately take decisions regarding the acceptability of doctrinal belief and expression, and this fundamentally opposed to the nature of the Constitutional right to Freedom of Religion.⁷³

3.4.3. LICENSING AND 'DE-LICENSING'

The recommendations of the CRL Rights Commission contended that every religious body (churches) and the religious leader/practitioner/pastor should have to be registered and licensed so that he operate and practice. He will also be required to have basic knowledge of running bank account, running meeting, governance, structures

⁶⁸ As above.

⁶⁹ See n6 above.

⁷⁰ As above .

⁷¹ As above.

⁷² As above.

⁷³ FOR SA 'PRESS RELEASE: Concerns and Obligations to CRL Recommendation to license Religion in South Africa' 11 July 2017 <https://forsa.org.za/press-release-concerns-and-objections-to-crl-recommendation-to-license-religion-in-south-africa/> (accessed 25 February 2020)

etc.⁷⁴ taking the above statement with the case of *Monoussakis v Greece*,⁷⁵ the European Court (EC) found a violation of Article 9⁷⁶ when a Jehovah's witness were prosecuted for "establishing and operating a place of worship without first obtaining the authorization as required by [its] law". The government in the dispute argued that "the authorization measures which included criminalizing the use of a non-authorized place of worship, served to protect public order and the rights of others".⁷⁷ The EC held that Article 9 had been violated because the law had been used to "impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain no-orthodox movements and to restrict the activities of faith outside the orthodox church, such carries a direct effect on freedom of religion that [they] cannot be regarded as proportionate to the legitimate aim pursued, nor, accordingly, as necessary in a democratic society"⁷⁸

Furthermore, In *Metropolitan Church of Bessarabia v Moldova*,⁷⁹ the EC found that the government's refusal to officially recognize the Church of Bessarabia was an interference with freedom of religion.⁸⁰ The refusal to recognize the applicant church was not a legitimate means to fulfill this aim because the government was not acting neutrally and impartially, its concerns about national security and territorial integrity were "purely hypothetical" and the significant consequences for the religious freedom were not proportionate to the legitimate aim pursued.⁸¹ With the aid of the two above case laws, the EC highly noted that for one to practice, he shouldn't get the "approval" first in order to practice his religion. The EC even rejected the government which alleged that the permission to practice was for security purposes.⁸²

The chairperson Thoko Mkhwanazi-Xaluva of the CRL Rights Commission contended that the proposal to regulate the religious institutions and practitioners as professionals

⁷⁴ N Badenhost 'CRL Commission Moves Quickly to Regulate Religion in South Africa' 13 Oct 2016 <https://forsa.org.za/crl-commission-moves-quickly-to-regulate-religion-in-south-africa/> (accessed 28 October 2019)

⁷⁵ No.18748/91 [1996] ECHR 41 (26 September 1996)

⁷⁶ As above.

⁷⁷ As above at paragraph 405.

⁷⁸ As above at paragraph 409.

⁷⁹ App No 45701/99, 35 Eur rep 306 332 (2002)

⁸⁰ As above.

⁸¹ As above at paragraph 334.

⁸² As above.

is in line with the Constitution and the Bill of Rights.⁸³ She further said “Professionalizing the religious sector cannot be deemed to be unconstitutional.⁸⁴ She further claimed that Section 22 of the Bill of rights stipulates that every citizen has the right to choose their trade, occupation or profession freely and the right to choose a trade, includes being a religious leader, and that the practice of a trade or occupation may be regulated by law.⁸⁵ Firstly from the above claim, religion and profession are not realized under the same clause or provision in the South African Constitution⁸⁶ and in the International law (though in African Charter was). If religion and profession were the same things, they would be provided under the same clause. Profession needs certain skills and qualification whereas religion does not. The nature of religious is sensitive.⁸⁷ On that sense, religion does not qualify as a trade. Religious practitioners are not the same as lawyers or doctors.⁸⁸ In the case of lawyers and doctors, objective criteria exists against which legal or medical opinions or practices can be measured, but there are no such objective criteria for religious beliefs and practices which are constitutionally protected – even if they are bizarre, illogical or irrational. In a country that has a constitutionally protected right to religious freedom, it is not possible for the State to lay down objective criteria against which religious convictions and beliefs will be measured.

Moreover, FOR SA contended that Pastors are not like lawyers, doctors or social workers.⁸⁹ As Henrico said, 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.⁹⁰ While it is obvious that, in the case of lawyers, doctors and social workers, a certain level of knowledge and expertise is required in order to qualify and practice such, this is not necessarily true of pastors who (as many would believe, according to their interpretation of the

⁸³ CRL Rights Report n9 above.

⁸⁴ As above.

⁸⁵ Constitution of SA 1996 Constitution

⁸⁶ Religion is realized under section 15 and trade under sec 22 of SA Constitution 1996

⁸⁷ *Perry v Latvia* 548 U.S 399 (2006)

⁸⁸ FOR SA ‘Why we can’t regulate religion (part 1)’ 2 December 2015 <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (10 March 2020)

⁸⁹ As above.

⁹⁰ See n25 above.

scripture) are qualified by godly character and the call of God only.⁹¹ If the State (or a Council of Elders recognized by the State) were to insist on a theology degree from a university (many of who teach very liberal theology) or similar qualification in order for a person to be formally recognized as a “pastor”, the State would be elevating itself above the Word of God and require what God Himself does not. Placing such restrictions on leadership, would be a serious overstepping on the part of the State and a gross interference with religious freedom and the autonomy of the Church to govern own affairs.

For general presumptions, In order for a license to be granted, must one be deemed “fit”? This is a requirement in many aspects including in careers even for license to drive a vehicle but when it comes to religion, the story might be different. The first question here is “fit” for who? Religious matters are believed to divert from God (even Gods) not human beings. People are believed to be “called to preach”, so the question is who called them? The religious people believe it is God not man kind or the commission. The thing of qualifying people to religion will leave some without having aspect they belong to. It was highlighted that Religion gives hope to many who thus “failed” in many parts of life including academically and professionally.⁹² Since churches and pastors “will be required to have basic knowledge of running bank account, running meeting, governance, structures etc.”, it does mean that without such knowledge one cannot practice his belief or religion. Now, that leads to serious concern whether religion does qualify as trade/profession or not.

Human Rights Committee noted that the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as freedom to choose their religious leaders, priests and teachers.⁹³ *Perry v. Latvia*⁹⁴ noted Religious communities existed universally in the form of organized structures and abided by rules which were often seen by followers as being of divine origin. Accordingly, religious ceremonies had sacred value for believers if they were conducted

⁹¹ As above.

⁹² See Banda n6 above.

⁹³ General Comment No. 22 on ‘The right to freedom of thought, conscience and religion’ (Article 18), Human Rights Committee, 30 July 1993 paragraph 4.

⁹⁴ 548 U.S 399 (2006)

by ministers empowered for that purpose in compliance with such rules. In other words, this finding of the court highlighted that there are ministers empowered to conduct sacred activities therefore sacred activities are not for everyone but those approved by sacred belief than through qualifications. The court in *Hassan v Bulgaria*⁹⁵ gave an impetus concerning to choose their leadership, it found that In the applicants' case, observing that the acts of the Bulgarian authorities had operated, in law and in practice, to deprive the excluded leadership of any possibility of continuing to represent at least part of the community, the court found that there had been an interference with the internal organization of the Muslim religious community and the applicants' freedom of religion. The appointment of religious leaders are issue of doctrines of a religious institution.⁹⁶

Mkhwanazi-Xaluva highlighted point of departure. She said "point of departure is that, as a pastor, you must be licensed; we must register you, so that when your elders say you are no longer fit to be one of us, then we can say we are revoking your license, you can't preach here anymore, go find another job somewhere." Banda raises questions: "Will a pastor who genuinely believes that he has been called by God to preach the gospel stop preaching just because the CRL Rights Commission has taken his license to preach? Will aspiring preachers who are evicted of their calling patiently wait for the licensing "bureautic procedures" to finish before they can fulfill their calling? The commission's ambitions are not informed by the many examples in the Bible where prophets and disciples disobeyed the orders of the authorities to not prophesy and preach and continued with their ministerial works even when it meant being killed." Therefore, to take away or tamper with the freedom of religion of ordinary people and place it in hierarchical bodies is to rob the poor of their only power to transcend their circumstances.

Another question is regarding a statement made that "...you can't preach here anymore, go find another job somewhere."⁹⁷ From a religious perspective, is preaching a career?

⁹⁵ *Hassan v Bulgaria* No 29750/09 [2011] ECHR 1340 (19 September 2011)

⁹⁶ See article 9 of SACRFF.

⁹⁷ FOR SA 'CRL Rights Commission's Final Report to Parliament in June' 15 June 2017

<https://forsa.org.za/crl-rights-commissions-final-report-to-parliament-in-june/> (accessed 25 February 2020)

If one has to undergo training then anyone including those who are not “called” can do it, then religion will no longer operate the same in sacred manner, it will be systemized not by its own pattern (doctrines) but by the pattern of the CRL Rights Commission’s recommendations.⁹⁸ Swain said although religion was a “profession”, it cannot be compared to careers like law, medicine and financial services. In these instances, there are laws, regulations, processes and procedures against which conduct can be evaluated and licenses awarded or withdrawn, whereas the area of faith is by definition fluid and varied.⁹⁹

3.4.4. REGISTRATION AND ACCREDITATION

Concerning accreditation, the Commission’s subpoenas require pastors to give evidence regarding “the institution where they studied and where they received accreditation”, and proof of the “person/s or the authority that ordained them”. FOR SA stated that its concern is that this aspect of the investigation is touching on doctrinal issues¹⁰⁰ And moreover in *Hassan v Bulgaria*¹⁰¹ the court highlighted that the state is not allowed to determine the doctrinal organizations of religious communities.

FOR SA contended that even Jesus Himself would have been disqualified for lack of “accreditation”.¹⁰² FOR SA contends that it explained: some churches (particularly those who view church as “an institution”) will only appoint persons who hold a degree in theology or are similarly qualified, to positions of leadership in the church; other churches believe that the only qualifications for leadership are those set by scripture. It is not theological training that qualifies one for the appointment as a pastor (or deacon) in the church, but godly character and a sense of the call of God to ministry, as such, the issue is squarely doctrinal.¹⁰³ Degrees in theology with banking and management knowledge could be desirable but making it mandatory would appear to delve into religious doctrine on what qualifies one to be a religious leader. Thus, in elevating academic qualifications to a mandatory requirement, the state appears to be seriously

⁹⁸ As above.

⁹⁹ E Mabuza ‘Every religious leader must be registered: CRL Rights report’ 11 July 2017

¹⁰⁰ FOR SA ‘Why we can’t regulate religion (part 1)’ 2 December 2015 <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (10 March 2020)

¹⁰¹ *Hassan v Bulgaria* No 29750/09 [2011] ECHR 1340 (19 September 2011)

¹⁰² As above.

¹⁰³ As above.

overstepping its boundaries and as such interfering with the religious freedom and the autonomy of the Church to administer its own dealings.¹⁰⁴

Restrictions on manifestation of religion or belief by laws of general application such as those requiring registration, do not *per se*, undermine the article 18 right.¹⁰⁵ Violations, however, arise when there is sufficient evidence to prove that the requirements for such restrictions such as public safety, order, health, or morals or the fundamental rights and freedoms of others, have not been met.¹⁰⁶ Moreover, regulations taking the form of registration have to ensure state neutrality. On the issue of neutrality, the European Court has observed that Article 9 of the Convention bars the state from questioning “the legitimacy of religious beliefs or the ways in which those beliefs are expressed”.¹⁰⁷

The CRL Rights commission highlighted that its recommendations also acknowledge that by registration it can know how many religious affiliations in the country and where can be found, especially when they want to discuss matters concerning them.¹⁰⁸ It further highlighted that it finds nothing invasive, unconstitutional and unworkable regarding that.¹⁰⁹ Commission on Human Rights resolution 2005/40¹¹⁰ (paragraphs 4(c) and 4(e)) and Human Rights Council resolution 6/37 (paragraph 12(e) and 12(h)) also Urges States, to review, whenever relevant, existing registration practices in order to ensure the right of all persons to manifest their religion or belief, alone or in community with others and in public or in private; and also urges States to ensure that, in accordance with appropriate national legislation and in conformity with international human rights law, the freedom for all persons and members of groups to establish and maintain religious charitable or humanitarian institutions is fully respected and protected.

¹⁰⁴ EC Lubaale “Assessing the Human Rights Implication of Calls for Regulation of Faith-Based Organisations” (2019)33 *Speculum Juris* 11-25.

¹⁰⁵ As above

¹⁰⁶ As above.

¹⁰⁷ *Metropolitan Church of Bessarabia v Moldova App No 45701/99, 35 Eur rep 306 332 (2002)*

¹⁰⁸ N9 above.

¹⁰⁹ As above

¹¹⁰ Commission on Human Rights Resolution on Elimination of all forms of intolerance and of discrimination based on religion or belief, Resolution 2005/40 of 19 April 2005.

However, the recommendation by the Commission is that, a church cannot operate unless recognized by the Commission itself. For the unregistered, it shouldn't be an issue or make them illegitimate.¹¹¹ The Special Rapporteur reiterated that international human rights law recognizes freedom of religion or belief regardless of registration status.¹¹² Those who cannot or do not want to register should therefore still be able to manifest their religion or belief both individually and collectively, in private or public.¹¹³ The religious liberties exclude seeking and obtaining permission of existence and also permission of exercising religious rights. Such have been noted in the case of *Metropolitan Church of Bessarabia and Others v. Moldova*.¹¹⁴

The Special Rapporteur did not ban registrations; she however permitted States to register religious organizations. The only prescribed points of registration to take into consideration are that:

- Registration should not be compulsory, i.e., it should not be a precondition for practicing one's religion, but only for the acquisition of a legal personality and related benefits;
- in the latter case, registration procedures should be easy and quick and not depend on extensive formal requirements in terms of the number of members or the time a particular religious group has existed
- Registration should not depend on reviews of the substantive content of the belief, the structure, the clergy, etc.
- No religious group should be empowered to decide about the registration of another religious group. It is imperative that no religious group be empowered to decide about the registration of another religious group.
- While it would be appropriate to require registration for the acquisition of a legal personality and similar benefits, the Special Rapporteur emphasized that registrations conditions should not depend on the review of the substantive content of the belief, the structure of the faith group and methods of appointment of the clergy.

¹¹¹ As above.

¹¹² Special Rapporteur report of 2005 at paragraph 26.

¹¹³ As above.

¹¹⁴ No 45701/99 (13 December 2001)

- High minimum membership requirements should not be allowed with respect to obtaining legal personality;
- It is appropriate to require lengthy existence in the State before registration is permitted
- Other excessively burdensome constraints or time delays prior to obtaining legal personality should be questioned;
- Provisions that grant excessive governmental discretion in giving approvals should not be allowed; official discretion in limiting religious freedom, whether as a result of vague provisions or otherwise, should be carefully limited;
- Intervention in internal religious affairs by engaging in substantive review of ecclesiastical structures, imposing bureaucratic review or restraints with respect to religious appointments, and the like, should not be allowed.
- Provisions that operate retroactively or that fail to protect vested interests (for example, by requiring re-registration of religious entities under new criteria) should be questioned.
- Adequate transition rules should be provided when new rules are introduced;
- Consistent with principles of autonomy, the State should not decide that any particular religious group should be subordinate to another religious group or that religious should be structured on hierarchical pattern (a registered religious entity should not have veto power over the registration of any other religious entity.)
- Additionally, provisions which are vague and which grant excessive governmental discretion in giving registration approvals should not be allowed.¹¹⁵

Lubaale on the issue of registration noted that the European Court of Human Rights has ruled that registration, per se, does not constitute an unjustifiable limitation to the right to religion/belief or to manifest such religion/belief.¹¹⁶ Such limitation, however, constitutes a violation of this right if a call for registration and the registration process itself is arbitrary. Moreover, once such processes become a requirement, refusal to register an

¹¹⁵ Special Rapporteur religious guidelines page 17 (n112 above)

¹¹⁶ N104 above.

organization needs to be justified.¹¹⁷ States can rely on arguments of public order and national security to refuse to grant religious groups registration.¹¹⁸

3.4.5. WORSHIP CENTERS

Many Religious organizations had several confusions and questions concerning the issue of worship centers as provided in the mechanisms by the Commission. They contended that, firstly, “worship center” is not defined in the report and should probably be defined. If, for example, people meet in a tent, a home, a hotel or hut to worship or pray – would that be considered a “worship center” for which a license has to be obtained? Is a cinema a “worship center” if a religious film is shown in it; does a sport stadium become a “worship center” if a mass prayer rally is held there; is a cemetery a “worship center” when a religious funeral is held there, or the beach when a local municipality gives permission for a wedding or sunrise service to be held there? Secondly, they further highlighted that one cannot expect from Peer Review Committees or umbrella organizations (who will effectively be made up of religious leaders) to have intimate knowledge of local government regulations and by-laws, or the necessary legal knowledge relating to constitutions and other governance matters which will be required in order for them to approve and issue licenses to “worship centers”.

The Religious organizations further contended that a number of other terms are also undefined, including “religious leaders in charge of, or working in such center, permanently or temporarily”. What does “in charge of”, “working in”, “permanently” or “temporarily” mean? Who does and does it not include? Does it for example mean that those in charge of or involved with children’s, youth or worship ministry (even if they are volunteers) must also be registered in order to fulfill these functions? Moreover, Full Gospel and other religious organizations said that the requirement that proof has to be submitted that are “enough congregants to maintain the worship center on donation basis, or proof that there is a source of income that can maintain it”, is vague. How many is “enough congregants”, and how specifically would it be determined whether the religious institution has enough finances at its disposal to maintain “the worship center”?

¹¹⁷ As above.

¹¹⁸ *Regionsgemeinschaft der Zeugen Jehovas and others v Austria*, Application No.40825/98 ECtHR 31 July 2008 paragraph 66-69.

Will the CRL Commission have to employ financial experts to assess the commercial viability of religions? Would the institution be required to put up bank statements, a bank guarantee, a surety – and how long a period would this “proof” need to cover?

3.4.6 OTHER GENERAL INSIGHTS

Lubaale noted that With the scope of this right as envisaged by article 18 and the human Rights Committee, action by states including the tendency to label certain belief systems “fantasies” would appear to question the belief systems and religions of individuals, an arena that the Committee considers beyond the realm of state interference, however bizarre such belief system maybe.¹¹⁹ Some congregants as already allude to; have been ridiculed for “believing too much in miracles.” The state is bound to respect, protect and guarantee such belief system from all forms of interference.¹²⁰

The CRL Commission contended that, through its recommendations, it wants to promote and protect religious freedoms further by ensuring that religious institutions run their own affairs without any interference from the state.¹²¹ It further highlighted that nowhere in its recommendations does the CRL RIGHTS Commission said that the state must interfere in the religious affairs of any affairs of any religion but instead, the recommendations encouraged self-regulation rather than state-regulations.¹²² The CRL Rights Commission claimed that it wants every religion to thrive in South Africa. It suggested that it is not suggesting or intending to interfere in any matters of dogma.¹²³ Banda concerned that there is no difference between self-regulation and state regulation because the CRL Commission Rights Commission will have the final authority and be the licensing authority of all pastors as well as the registering authority of the worship centers. Banda concludes that religious communities must resist the commission’s efforts to regulate religion because its secular humanistic understanding of religion attempts to redefine religion in ways that are unhelpful to religious communities must graciously challenge the CRL Rights Commission to protect the

¹¹⁹ Lubaale N104 above.

¹²⁰ See sec 7 and 8 of the 1996 Constitution of South Africa.

¹²¹ CRL Commission Report n9 above.

¹²² As above page 27.

¹²³ As above.

freedom of religion by working with practitioners from religious impostors who should be reported to the police and the face the wrath of justice.¹²⁴

Banda is of the view that The CRL Rights Commission's recommendations for the regulation of religion reflect a secular humanistic view of religion by only promoting the constitution and secular views as the basis for churches to reform their way of doing things.¹²⁵ The secularist perspective that undermines the spiritual nature of religion also lacks awareness of the dynamic nature of religion.¹²⁶ The CRL Commission's understanding of religion in South Africa, especially Christianity, is not sufficiently informed by the positive developments within the churches. The Commission's report expresses a negatively unbalanced view of churches, which hinders a meaningful engagement with the churches.¹²⁷

Maviya however, finds that the Commission's recommendations do not really address the root of the problem, lying in 'unregulated, personality driven Christian and traditional practices'.¹²⁸ That is, while the commission's recommendations address issues such as sexual violations and financial misconduct, they do not address the psychological and spiritual power on which religious leaders thrive.¹²⁹ Consequently, Maviya sees a need a need to protect 'the core values of dignity, equality and freedom' because it is not enough to just uphold the constitution as proposed by the CRL Rights Commission. The view of religion presented by Maviya, just like that held by the CRL Rights Commission, is a purely humanistic and legal one, where undesirable elements can simply be discussed and discarded upon their condemnation.¹³⁰ However, in reality many religious people view themselves as not just adherents of easily negotiable and easily discarded laws and practices but as under obligations to obey at all cost the transcendent ultimate being.¹³¹ Therefore, what may seem abusive and humiliating in the present may be considered beneficial from a transcendent, spiritual and eschatological perspective; for

¹²⁴ N6 above

¹²⁵ As above.

¹²⁶ As above.

¹²⁷ As above.

¹²⁸ As above.

¹²⁹ As above.

¹³⁰ As above.

¹³¹ As above.

instance, some may impoverish themselves by giving all their material possessions to the church in the hope for a better reward in heaven.¹³²

The commission's professionalization of Christian ministry along the models used in secular professions, insist on professional training and academic qualification. While this may be helpful in enhancing efficiency and order in churches, Banda said it overlooks the common understanding of Christian ministry as a spiritual vocation, driven by the call of God and empowered by the Holy Spirit.¹³³ While professional qualifications are needed and useful, the CRL Rights Commission's insistence for one to register as a minister of religion overlooks the suspension of many Christians towards the academy. As an example, Zimbabwe's Prophet Walter Magaya says critical theology has mislead pastors and churches and vows that he will not advise anyone to go to a Bible or theological school, because "wrong theories of God's kingdom are being reinforced in the minds of many people through those colleges".¹³⁴ Many churches emphasize spiritual capacity because they believe ministry is fundamentally a divine calling that comes with miraculous spiritual capacitation for ministry. Other churches find no value in theological training because they believe a person is called and equipped miraculously for ministry. Banda fully believe that churches should critically rethink their one-sided emphasis on spirituality and value critical theological training.

IDLO advised that the law should not attempt to regulate religious practices, belief or disbelief.¹³⁵ IDLO contended that the law should not be used to regulate and promote rights and peaceful coexistence among all people, intervening in religious matters only when religion is being used to justify harm to others. This means avoiding the placement of religious rights in opposition to other human rights – i.e. the realization that freedom of religion or belief is not a zero sum game where one person's win is another's loss. Sachs also stated that section 36 analysis should not set up a no-win situation.¹³⁶ Interestingly, he also warns against "requirements of contemporary society exerting a

¹³² As above

¹³³ As above

¹³⁴ As above.

¹³⁵ International Development Law Organization 'Freedom of Religion or Belief and the Law: current dilemmas and lessons learned' (2016)

¹³⁶ *S v L:awrencwe (4) SA 1176 (CC)* at paragraph 155.

hydraulic insistence on conformity to majoritarian standards”.¹³⁷ Legislation should not aggravate the feeling of marginalization experienced by such groups outside the mainstream.¹³⁸ One cannot imagine in South Africa today any authority passing or sustaining laws which suppressed central beliefs and practices of religions.¹³⁹ IDLO further highlighted that the same is true for States that have adopted a theocratic framework for governing their societies. Even though a particular religion may have been legally established to help govern the State, this does not mean that the rights of religious minorities or non-religious residents are any less important than those of the religious majority. Theocracies have proven capable of protecting and promoting religious freedom as a fundamental human right. Nearly every theocracy has provisions for protecting religious minorities. State-forced religious beliefs and practices are a violation of the human right to choose or not to choose to practice religion.¹⁴⁰

Cyril Ramaphosa, the president of South Africa, has also weighed in on this debate. He takes the view that regulation of religion would be problematic.¹⁴¹ Banda noted that regulating religions has the potential to force religions to operate underground if for some reason their registration is not approved.¹⁴² The refusal by colonial authorities to recognize African traditional religious ceremonies did not make Africans abandon their religious practices. They in fact conducted them at night under the cover of darkness¹⁴³ IDLO further added that Just and equitable rule of law frameworks, based on strong human rights principles, are an essential requirement for societies to safeguard freedom of religion or belief, and to balance this right fairly with other rights and interests. These legal frameworks can also help to reduce the potency of extremist organizations that seek to draw public support and legitimacy from politicized religious strife and violence may well ensue, and the law itself can easily become an instrument of oppression. As

¹³⁷ *Prince case* 2002 2 SA 794 (CC) at paragraph 156.

¹³⁸ As above 157.

¹³⁹ As above.

¹⁴⁰ IDLO N135 above

¹⁴¹ SABC News “Ramaphosa condemns what he calls ‘bogus religious’ leaders” 28 February 2019 <https://www.sabcnews.com/sabcnews/ramaphosa-condemns-what-he-calls-bogus-religious-leaders/> (accessed 11 June 2019)

¹⁴² N6 above.

¹⁴³ As above.

distinct from rule by law, the rule of law embraces and operationalizes human rights through non-discriminatory laws and policies.¹⁴⁴

It must also be noted that the 2017 CRL Rights Commission's final report was a watered-down version of the preliminary report issued in 2016, which contained drastic proposals. For example, section 18.1 of the proposal proposed the drafting of new parliamentary act to set some criteria for a religion to qualify as a religion; one of the proposals that no religion be accredited if it had practices deemed to have a harmful effect on the physical or mental well-being of its followers or if deemed exploitive of those practicing it. This recommendation, which is left out in the 2017 final report, would have seriously shaken the South African religious landscape. The recommendations are however still overbroad and touches on matter of religious doctrine which are protected from State Interference. Some proposals go to the heart of people's belief systems, making it increasingly clear that the right to freedom of religion would be undermined by these proposals. They still seem unworkable and from international human rights law perspective, untenable.

3.5 CONCLUSION: THE CONSTITUTIONALITY OF THE MECHANISMS OF THE CRL RIGHTS COMMISSION

The recommendations made by the Commission were rejected by the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) particularly as it pertained to their constitutionality.¹⁴⁵ FOR SA and SACRRF made the conclusion that several components of the right to freedom of religion will be limited by the proposed legislation. This is probably an unintentional, but nonetheless unconstitutional, consequence of the proposals in the Report.¹⁴⁶ Pothier argues that while to some extent the purposes that the commission seeks to achieve by its proposals are admirable, 'it surely cannot be claimed that they (purposes) are so important as to warrant the wholesale violation rights that would be involved'.¹⁴⁷ Thus

¹⁴⁴ N135 above.

¹⁴⁵ Parliamentary Monitoring Group on Cooperative Governance and Traditional Affairs "CRL Rights Commission Report: Commercialization of Religion & Abuse of People's Belief Systems: hearing Day 1" <https://pmg.web.monitor.co.uug/Supplement/2018/12/Legal22122018.pdf> (accessed 11 June 2019)

¹⁴⁶ N6 above.

¹⁴⁷ As above

the proposals of the commission are rejected based on the premise of their constitutionality such as follows:

(1) *DEFEATING FREEDOM*

The prime objective of the CRL Rights Commission for regulation, as FOR SA highlighted, comes from, among other claims, its statement “we want to understand why people believe or practice the things they do. There needs to be a reason, it needs to be rational. It can’t just be because God or the Holy Spirit said so. God doesn’t speak like that.”¹⁴⁸ However, this contradicts the core freedom of belief since freedom of belief is unquestionable that cannot be proved from scientific point of view, and symbols and particularly, symbolic actions. Moreover, “Human beings may freely believe in what they cannot prove’ and that although ‘their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion’ and they ‘should not be put to the proof of their beliefs or faith.”¹⁴⁹ Such was further allowed by the ECtHR that belief applies ‘not only to “information or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.’¹⁵⁰ Therefore, religious bodies doesn’t have to stipulates its reasons for The Commission to understand, freedom of belief excludes any obligations for religious bodies to make the Commission to understand its operation unless it carries element of illegality or crime.¹⁵¹ The duty of the Commission here is to then foster tolerance and respect. Article 2(5) of SACRRF stipulates that no person may be subjected to any form of force or indoctrination that may destroy, change or compromise their religion, beliefs or worldview.

Concerning the statement whether the religion is normal or right or wrong, This statement seems to indicate that what the CRL Commission is proposing comes down

¹⁴⁸ CRL Report n9 above.

¹⁴⁹ *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC)

¹⁵⁰ HRC General Comment no 34, Article 19: Freedom of opinion and expression paragraph 11 “the right to freedom of expression ‘embraces even expression that may be regarded as deeply offensive”. See also *Handyside v UK* No. 5493/72, 7 December 1976 paragraph 49.

¹⁵¹ SACRFF article 1.

to regulating doctrine. The religious organizations submits that whether or not it is statutory regulation by the State or by peers, would be inconsistent with the right to freedom of religion, and the contends of the SA Charter of Religious Rights and Freedoms.¹⁵² In *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*: The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin color has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather a purely formal sense of enjoying a common citizenship depends on recognizing and accepting people with all their differences, as they are. The Constitution thus acknowledges the validity of human beings (generic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.¹⁵³ Now the question is, what will happen if for an example, religion falls under Christianity but look different from known/prescribed Christianity? *Prince case* ensured people that the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledged the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.¹⁵⁴ The IDLO also highlighted that dynamics should be harnessed and diversity be promoted instead of being prevented.¹⁵⁵

Kroeze highlights that the view of what constitutes a religion and what is protected as religious freedom is an affirmation of traditional views and ideas.¹⁵⁶ But that reliance on tradition is itself a political choice to affirm or deny, confirm or reject, include or exclude

¹⁵² As above.

¹⁵³ [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at paragraph 60.

¹⁵⁴ 2002 2 SA 794 (CC) At paragraph 2.

¹⁵⁵ The IDLO report n135 above.

¹⁵⁶ IJ Kroeze 'God's Kingdom in the Law's Republic: Religious Freedom in South African Constitutional Jurisprudence' PER/PELJ 2003(6)2

something.¹⁵⁷ However, for socially and economically powerless groups participation in public dialogue might be a problem. So if the proposal of the CRL Rights Commission may be implemented it would erode freedom of religion and cede the church to state control, it then means it also have bad impact to the powerless and the poor because they will no longer engage in religious practices because one couldn't pay license fee, then cannot operate.

Major religious groups seldom approach the court for exemptions, simply because they have enough political clout to have their needs met on the legislative level.¹⁵⁸ It turns out then that power is a prerequisite for participation in the republican dialogue and that raises the old problem of the repression of minority views in classical republicanism.¹⁵⁹ In every one of the cases, the exemption sought was denied because of some overarching state purpose. This does not mean that any or all of the decisions are necessarily wrong, but merely that they illustrate something about the approach of the court. It is an approach of deference to external authority, an acceptance of the state as arbiter of what “the life” should be. In the words of Suvllivan, it does not show much faith in faith.¹⁶⁰ Where republicanism seeks to include those traditionally excluded (the “other”), the court’s reliance on traditional ideas of what constitutes religious freedom silences those voices.¹⁶¹

(2) INTOLERANCE

The mechanisms of the Commission amount intolerance. *Prince case* highlighted that Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs and practices considered alien and threatening.¹⁶² At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct.¹⁶³ It was highlighted that one cannot imagine in South Africa today any legislative authority passing or sustaining which suppressed central beliefs and practices of Christianity, Islam, Hinduism and

¹⁵⁷ As above.

¹⁵⁸ As above.

¹⁵⁹ As above.

¹⁶⁰ Sullivan 1992 U Chicago LR 204-205-223

¹⁶¹ Kroeze n156 above.

¹⁶² 2002 2 SA 794 (CC) at paragraph 145.

¹⁶³ As above.

Judaism. There are well-organized religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections. They are not driven to seek constitutional protection from the courts. A threat to the freedom of one would be seen as a threat to the freedom of all.¹⁶⁴ It was held accordingly that Variations in religious expression are an extension of human diversity that States are called upon to preserve as fundamental human right.¹⁶⁵ Freedom of religion or belief is eroded when laws are misused to form uniformity comes in the form of religion or non-religion.¹⁶⁶

The case of *Prince* further adds that “Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognizes this diversity. This is apparent in the recognition of languages [section 6 of the Constitution], the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin [section 9(3) of the Constitution], and the recognition of freedom of religion and worship [section 15 and 31 of the Constitution]. The protection of diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings. Freedom is an indispensable ingredient of human dignity.”¹⁶⁷

(3) FREEDOM OF ASSOCIATION

Dual character of religious freedom entails the right to observe and participate in the religion of choice, as well as the right to be free from any direct or indirect compulsion in the making of this choice.¹⁶⁸ In accordance with the principle of free choice, a person cannot be obliged to take part against their will in the activities of religious community when they do not belong to that community.¹⁶⁹ Moreover on choice, Article One of the South African Charter of Religious Rights and Freedoms states that Every person has the right to believe according to their own religious or philosophical beliefs or conviction (hereinafter convictions) and to choose which faith, worldview, religion or religious institution to subscribe to, affiliate with or belong to. However, the mechanisms by the

¹⁶⁴ As above.

¹⁶⁵ As above.

¹⁶⁶ As above.

¹⁶⁷ *S v Lawrence* 1997 4 SA 1176 (CC) at paragraph 49.

¹⁶⁸ Van Schaik thesis n66 page 128

¹⁶⁹ See *Dimitras and Others v. Greece* No 42837/06 3 June 2010.

Commission did not grant people to decide, they enforce them to be part. They do not encourage “voluntariness” but obliging people to belong religions to belong to peer review committee, to first obtain license and be registered in order to operate, the religious leader and religion must first qualify in order to practice, religious institutions no longer have freedom vested by the SA charter, constitution and international law as they are replaced peer review council to decide on matters concerning their own affairs.

The mechanisms highlighted that the peer-review committee will be the final mediator of disputes within their own religion.¹⁷⁰ However, FORSA contended that the notion of a multi-faith Peer Review Council sitting as a “judge” over the beliefs and practices of a particular religion, with the power to decide whether or not it should be recognized as a religion in the first place, seems to be inconsistent with the constitutional right to freedom of religion, and freedom of association.¹⁷¹ SACRRF and FORSA highlighted that the requirement that every religious institution and/or practitioner be compelled, by law, to belong to an umbrella organization, is also inconsistent with the right to freedom of association¹⁷² which guarantees an individual, a group of individuals or an organization the right to choose their associates.¹⁷³ The right to associates includes the right not to associate.¹⁷⁴ Article 1 of the 1981 declaration states that “this right shall include freedom to have a religion or whatever belief of one’s choice” and that “no one shall be subject to coercion which would impair his freedom to his freedom to have a religion or belief of his choice”.

The right to manifest one’s beliefs by way of religious observances and other actions will be affected,¹⁷⁵ specifically the right to associate with others,¹⁷⁶ to form and join religious associations and institutions,¹⁷⁷ to organize religious meetings and other collective activities, and to establish and maintain places of religious practice.¹⁷⁸ Legislation compelling registration and licensing of religious communities and religious

¹⁷⁰ CRL Commission report n9 above..

¹⁷¹ FORSA and SACRRF Report 2017 paragraph 92.

¹⁷² See section 18 of the Constitution, 1996.

¹⁷³ *Taylor v Kurtstag* 2005 (1) SA 363 (W) at paragraph 37.

¹⁷⁴ Currie & De Waal, *The Bill of Rights Handbook* (6th edition), Juta, pp400 – 401

¹⁷⁵ FORSA and SACRRF report 2017 paragraph 125.

¹⁷⁶ See section 18 of the SA 1996 Constitution.

¹⁷⁷ See sec 31 of the SA 1996 Constitution.

¹⁷⁸ Article 4 and 4(2) of the South African Religious Rights Charter.

practitioners limits all these rights.¹⁷⁹ Individual believers or followers will not be free to manifest and observe their beliefs in these ways as they deem fit, as they will be allowed only to do it in and through recognized and licensed instructions and practitioners. The licensing of places of worship (“worship centers”) also limits this right.¹⁸⁰ One will probably not be allowed to worship at a place of one’s choice, but only at a licensed worship center. This may even affect informal gathering in homes or in open spaces.

(4) EXCLUSION OF RELIGIONS

Furthermore, According to this study, it seems like the mechanisms by the CRL Rights Commission are specifically for known and majority religions that needs for an example religious leaders, building, membership, etc. Bennet highlighted that when a society does not differentiate belief from knowledge; it has no need of a professional class to analyses and interprets a specialist subject.¹⁸¹ Rather, religion (like law) lies within the reach of everyone.¹⁸² Admittedly, the conduct or rituals might require particular skills, and might also entail privileged access to supernatural powers. Indeed, the practice of many African religions involves diviners, spirit mediums, herbalists (who understand not only the physical but also the mystical powers of plants) and witchdoctors (who specialize in the detection of malevolent forces).¹⁸³ Notwithstanding these expert groups, however, there was no authoritative body specifically qualified to pronounce on matters of faith and orthodoxy.¹⁸⁴

The African religion and belief believe that all the living and the dead are thus believed to be linked together in an enduring relationship. Some of the spirits, however, exert a special influence, and they continue to communicate regularly with the living. The power to intercede with them vests principally in the family head, who combines ritual and temporal powers in one office, and provides a channel of communication with the ancestors through notionally unbroken ties of blood. In order to maintain this

¹⁷⁹ See FORSA and SACRRF report paragraph 125.

¹⁸⁰ CRL rights Commission report p36 at paragraph 18.6

¹⁸¹ T Bennet A Shorter ‘African Christian theology’ in JR Hinnells A handbook of living religions (1991) 431

¹⁸² As above.

¹⁸³ As above.

¹⁸⁴ As above.

relationship, the livings are obliged to perform certain rituals. Although the major rituals coincide with the principal rites of passage – birth, initiation, marriage and death – intervention by the ancestors is also invoked when the family wants to give thanks for an escape from death or ill-fortune. All these are celebrated by the ritual killing of cattle or goats. The family then gathers, sometimes with neighbors, to share a feast or a fresh brew of beer. Ritual is the key to understanding veneration of the ancestors. Communication demands the performance of certain rites according to predetermined customs.¹⁸⁵ Now concerning the above, is a family that performs such practices a worship center? Is it required to be accredited, registered and licensed? Is it supposed to pay for license? Should such family join umbrella organization? Is such family required registration in order to practice? Is it required to have ‘text’ or ‘background’? Can a family head conduct a ritual without a license? Will a head qualify for license? Can a herbalist operate without a license? It seems like they do not curb the older religions such as ancestral (African) religions even newer religions.

(5) *THE PRINCIPLE OF ‘SEPARATION’.*

The “State” is not defined in the Constitution but was held by the Constitutional Court to include all those actors who derive their authority from the Constitution, including Parliament, government at national, provincial and local levels, state institutions supporting constitutional democracy created by Chapter 9 of the Constitution, ‘state departments and administrations’ as well as bodies created by statute.¹⁸⁶ FORSA contended several times that no one including the state has the right ‘to decide which religions qualify as a religion or sit as a judge over the doctrines of religious institutions, and decide whether they can operate or no. The religious communities in South Africa have a right and freedom to believe, teach, preach and live out our religious convictions and beliefs, without the control and interference of the State.’¹⁸⁷

¹⁸⁵ As above.

¹⁸⁶ *Women’s Legal Trust v President of the Republic of South Africa and Others, Faro v Birgham NO and Others, Esau v Esau and Others* (22481/2014, 4466/2013, 13877/2015) [2018] ZAWCHC 109; [2018] 4 ALL SA 551 (WCC); 2018 (6) SA 598 (WCC) (31 August 2018) Para 53

¹⁸⁷ C Collison ‘Sate is trying to control religion and it doesn’t listen to us’ 30 August 2017 <https://mq.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019).

CHAPTER FOUR: ASSESSING THE ADEQUACY OF EXISTING LEGAL AND POLICY FRAMEWORK TO ADDRESS CONTROVERSIAL RELIGIOUS PRACTICES AND HOW OTHER COUNTRIES TACKLED CONTROVERSIAL RELIGIOUS PRACTICES

4.1 INTRODUCTION

According to Savage, it is not wrong to preach but the fact that many use God's name to commit crime is very disturbing.¹ These realities basically led the Commission to consider regulation of religion and religious practices. Michael Swain, the director of Freedom of Religion South Africa, in his response regarding the proposed measures to be adopted by the CRL Commission in his words states "we live in a society that has the rule of law. We are all subject to those laws. Those laws are there for our protection. The problem is that these laws are not being enforced..."² He further stated that "For an example, when you see somebody is being assaulted, you should call the SAPS [South African Police Service]. When someone has a prayer meeting for 20 people and the next day they bank R1.5-million, that is potentially money-laundering – and you can't hide that behind freedom of religion."³

In line of the above, this therefore chapter analyses the existing legal framework that can be relied on to address the illegality that surrounds some of the controversial religious practices. This is important because having found that the regulations do not measure up to national human rights law and international human rights law, then the recommendation would be for the state to implement already existing laws rather than regulations advocated for by the CRL Commission. This chapter also evaluates how are some of the religious groups are currently practicing their religious rights which are alleged to be illegal and what aspects make these practices illegal or falls out of the

¹ J Savage 'The Flood Of False Prophets And Pastors In Africa' 18 April 2018
<https://www.modernghana.com/news/848376/the-flood-of-false-prophets-and-pastors-in-africa.html>
(accessed on 04 June 2019)

² C Collison 'Sate is trying to control religion and it doesn't listen to us' 30 August 2017
<https://mg.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019).

³ As above.

concept 'freedom of religion. Lastly, it will briefly look on how other countries resolve controversial practices which will be a lesson for South Africa.

4.2 ENFORCEMENT OF LAWS

Indisputable, however, is the fact that the religious practices of some faith-based organizations have involved the transgression of the laws of these respective states including their criminal laws. Thus, if as constitutently contended, some of the regulations considered or being considered by these states is problematic, how then are they to deal with transgressions of the law by the said controversial practices?⁴ FORSA believes that instead of regulating and in the process burdening churches with even more laws they have to comply with, unscrupulous pastors who swindle money or place people's health in danger (for e.g. telling them to drink petrol), should be caught using the existing (tax, immigration, criminal, etc.) laws.⁵

4.2.1 FREEDOM OF RELIGION AND RULE OF LAW

Not all practices motivated by belief or religion amount to religious practices for purposes of protection.⁶ The right to manifest belief or religion “does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious belief should be absolute, the right to act on those beliefs is not. The approach of freedom of religion is not purely biblical.⁷ Free exercise of religion “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conducts that his or her religion prescribes (or proscribes).”⁸ Practice of religion, as distinct from belief, is not absolute. It could be subordinated to a general governmental interest in the regulation of conduct, but only if the government were able to justify that “by compelling the sate

⁴ EC Lubaale “Assessing the Human Rights Implication of Calls for Regulation of Faith-Based Organisations” (2019)33 *Speculum Juris* 11-25

⁵ FOR SA report in responding the Commission 2017 report for Commercialization

⁶ *Pretty v the United Kingdom* no.2346/02, Council of Europe: European Court of Human Rights, 29 April 2002 paragraph 82.

⁷ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2929 (1) SACR 113 (CC) (18 September 2019) Para 34

⁸ *Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872 qt 917 (1990)] at paragraph 879.

interest and by means narrowly tailored to achieve that interest”.⁹ One of the minorities, O’Connor J, held that notwithstanding this, the state’s overriding interest in preventing the physical harm caused by drug use constituted sufficient justification for interference with religious freedom.¹⁰

Prince case notes that it is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform the law. The balancing exercise requires a degree of reasonable accommodation from all concerned. It further stated that “Religious communities are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice for their religion.” Religion is accommodated within the framework of the values established by the state and their interpretation thereof. This immediately creates a scenario where religion has to adapt itself in order to “fit” those values. This is not always just position and therefore it is argued that it is the state who should, as far as possible reasonably accommodate religion and not religion that should, as far as possible accommodate the state. Freedom of religion does not mean that each person can determine himself which laws he/she will obey or which curriculum she/he will attend.¹¹ *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg* endorsed that communities should exercise their religious freedom with due regard to their legal, ethical and community responsibilities.¹²

Section 15(3)(b) clearly states that recognition in terms of section 15(3)(a) must be consistent with the provisions of the 1996 Constitution. Read with section 31(2), which provides that the right of a religious group to practice their religion or a cultural group to enjoy their culture must be consistent with the provisions of the Bill of Rights. The latter applies that freedom of religion is not above the law of general applicability but the “law” is above freedom of religion. Section 9 also stipulates that “no one is above the law”, this means that no one is permitted to violate the law particularly on basis of religion.

⁹ As above.

¹⁰ As above.

¹¹ G A Du Plessis ‘Religious freedom, reasonable accommodation and the protection of the conscience of learners in South African public schools’ URF Vol 7:1/2 2014 (p97 – 112) see also prince case

¹² *Louis Laurens Boths Gaum v Nelis Janse Van Rensburg N.O* (40819/17) (PRETORIA) at para 25

The court in trying to balance the restrictions and freedom of religion gave impetus In *Christian Education*,¹³ that the underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, whenever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

In investigations of the Commission, the Commission highlighted that some pastors believe that they are untouchable and they owe nothing but God.¹⁴ The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials, and judges. Aristotle wrote that it is more proper that law should govern than any one of the citizens.¹⁵ In this sense, it stands in contrast to tyranny or oligarchy where the rules are held above the law. The rule of law stands in contrast against the idea that certain people are above the law, such as by divine right. Whether one is a pastor, a politician or a postman, everyone lives under the rule of law and the criminal justice system applies equally.¹⁶ A crime – even when committed under the cloak of “freedom of religion” – remains a crime.¹⁷ Churches and pastors have to operate under the rule of law, and if they contravene existing laws, they commit a crime.¹⁸

Rembe and Mokhethi questioned why religious establishments that mistreat and undermine the rights of people should be given a leeway to misrepresent the

¹³ As above at paragraph 35.

¹⁴ See CRL Rights Commission report 2017.

¹⁵ N2 above

¹⁶ Ellerbeck D 'When a Pastor Commits Criminal or Illegal Acts in the Name of "Religion"' 29 April 2019 <https://forsa.org.za/when-a-pastor-commits-criminal-or-illegal-acts-in-the-name-of-religion/> (accessed 29 October 2020)

¹⁷ FOR SA n5 above

¹⁸ As above.

constitutional rights and values that seek to protect and preserve the dignity of people who are helpless and maltreated? Such religious establishments cannot be allowed to continue to ill-treat people under the guise of religious liberties.¹⁹ The State has to bring some form of control or monitor the exercise of such religious liberties the adage that in a secular society the throne and altar should be separate has no relevance here.²⁰ Perhaps it is time for religious institutions to start allowing state officials to evaluate their human rights related practices and to give public reports concerning such assessments. This however, does not imply that religious institutions should be controlled by the State, or that state officials should detect what happens in churches – but that religious institutions should be held accountable when infringe the constitutional rights of people.²¹

There has been concerned argument of McKaiser who raises the issue whether the state has a duty to protect person from subjecting themselves to harm.²² He poses the question whether should one respect people's autonomy even if they choose to put themselves in harm's way such as giving away their life's savings, drinking paraffin or allowing themselves to be sprayed by Doom?²³ One commentator has responded to this question by observing that It doesn't make sense that we celebrate Christianity but also allow people to be played by "these fake pastors".²⁴ Kevin, who was another commentator, observed that it is within the states own interest to protect people from self-harm. Mokhethi and Rembe highlighted that Section 7(2) of the Constitution is the key enforcement of the Bill of rights/ this means that there has the duty of upholding the Bill of Rights/ firstly, it must respect the Bill of Rights.²⁵ That is, the state must not violate or limit the exercise of rights listed in the Bill of Rights. Secondly, the State must protect the Bill of Rights.²⁶ This means that the State needs to take positive steps to prevent

¹⁹ As above.

²⁰ As above.

²¹ J Mokhoathi and N S Rembe, 2017, 'Religious liberties and the Constitution of South Africa: A Call for religious accountability', <https://doi.org/10.7833/116-1-1145> accessed (09 January 2020)

²² E McKaiser 'Should the state step in if people let bogus pastors harm them, asks Eusebius' 01 March 2019 <http://www.702.co.za/articles/339672/should-the-state-step-in-if-people-let-bogus-pastors-harm-them-askseusebius> (accessed 04 July 2019).

²³ As above.

²⁴ As above.

²⁵ Mokhoathi and Rembe n21 above.

²⁶ As above

any violation of the rights listed in the Bill of Rights including religious liberties. The provision implies that the state cannot just stand by and ignore the infringement of religious liberties by religious establishments. This answer the question that the state reserves the right to prevent, protect and redress the violation of human rights by religious institutions, through judicial and non-judicial institutions, mechanisms and procedures, including interfaith dialogue.²⁷

Doom, petrol, grass - Even though these acts are claimed to be of faith, they demoralize and undermine the rights of congregants.²⁸ This is an exploitation which demeans the dignity of the congregants.²⁹ These pastors seem to be taking advantage of the health condition and biological needs of their congregants. Since they are aware that people who are desperate for healing often go to any lengths to obtain their recovery, these acclaimed pastors (or prophets) use that as an advantage to exploit and undermine the constitutional rights of congregants. Rembe and Mokhethi advised that Religious liberties should be monitored and constitutional rights enforced wherever needed.³⁰ If not, religious liberties establishments will keep on infringing the constitution and the rights of helpless people. All human beings have the right to be protected by law, which is also enshrined in section 9(1) - which gave people right to equal protection of the law.³¹ They have the right to be respected, whether blinded by their faith or desperation stemming from their need for healing. And if their rights are being violated, it is the duty of the State to protect them against such violation.³²

4.2.2 LEGISLATIONS IN PLACE

The commission also identified problems of non-compliance with the existing laws. FOR SA and other religious organizations highlighted that the answer to these problems is then, in the first instance, the effective enforcement of the existing laws and regulations. Where appropriate, the CRL Rights Commission may refer the matter to the Financial

²⁷ As above.

²⁸ See n21 above

²⁹ See section 10 of the SA Constitution of 1996.

³⁰ Rembe n21 above

³¹ Section 9 of the SA Constitution of 1996.

³² See section 7 and 8 of the SA Constitution of 1996.

Intelligence Centre (FIC), SARS or the Police, who will then be tasked with criminal investigation and prosecution on grounds contravening the following Legislations:

- The Advertisement Standards Authority legislation for Illegal and unethical advertising of religious and traditional healing services. The Advertising Regulatory Board of South Africa requires that advertisers must hold the evidence for their advertising claims. Advertisements must be truthful and may not mislead consumers. Advertisers are not allowed to misuse and misrepresent research results. They are not allowed to make science claims for a product if it does not have such a basis.³³
- The Schools Act 1996 for Forbidding children to attend school on basis of religious belief. Keeping children from school, where children are not allowed to attend school even in basis of religion is a punishable crime punishable by up to 6 months imprisonment in terms of the South African Schools Act of 1996.³⁴ No child should be prevented from accessing his or her right to education in the new democratic South Africa. This is in line with the provisions of section 29 of the Bill of Rights in the Constitution which unequivocally states that “everyone has the right to a basic education including adult basic education.”³⁵ In terms of the South African Schools Act, every parent has the responsibility to ensure that his or her child attends a school and no-one should prevent them from attending classes. The Act states that “any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months”.³⁶
- The Companies Act 2008 and The Non-Profit Organizations Act of 1997 for Operation of religious institutions as a business as the Commission highlighted that there is lack of clear separation between religious activity and business activity;

³³ R De Lange ‘Misleading Advertising’ 13 September 2020
<http://www.google.com/amp/s/theconversation.com/amp/false-advertising-145067> (accessed 27 April 2020)

³⁴ See section 3(6)(b) of South African Schools Act of 1996.

³⁵ Act 108 of 1996.

³⁶ As above.

- The Immigration Act 2002 for Misuse of the visa application systems and misuse the South African Visa Application processes. A foreign pastor who leads a church i.e. works while being in the country on a visa that does not allow him/her to work (e.g. a visitor's visa only without an endorsement to work), contravenes the Immigration Act, 2002.³⁷ This contravention can land him/her in jail for up to 7 years, or be deported back to his or her country of origin as per section 49(16)(a) of the Immigration Act 13 of 2002. The Banks Act 1990 for Flouting of banking rules and lack of fiduciary committees, such as finance, internal audit and financial management.
- The Income Tax Act 1962 and The SA Reserve Bank Act 1989 for commercialization of religion. The Tax Administration Act 2011 deals with the penalties imposed for various forms of tax offences and understatements misrepresentations made in tax return. Pastors, like every other person who earns enough to qualify as a tax payer, must pay income tax (PAYE) according to Section 5(1) (c) of the Income Tax Act 58 of 1962.
- The Animals Protection Act 1962 for usage of dangerous animals such as snakes, without necessary license and for non-compliance with the Act. In instance where a pastor fed congregants with live snakes, this is not only about danger and crime to humanity but also the Animal Act does not permit such usage of animals. Section 1(r) of the Animal Protection Act makes it a crime to unreasonably cause unnecessary suffering to any animal. The Animals Protection Act, 1962 makes animal cruelty a crime and imposes a prison sentence of up to 1 year. Furthermore, if one is keeping wild animal in captivity, he must have a permit. No one may keep any wild animal in captivity without a permit more importantly animals that can be classified as dangerous. The permit will be in accordance of the province, for an example in Western Cape will be in accordance with the Western Cape Nature Conservation Laws Amendment Act 3 of 2000. National Environmental Management Biodiversity Act 10 of 2004 deals with wildlife issues, which means that such usage of animals is regulated.

³⁷ See *Bushiri v Minister of home Affairs and Others* (43470/2020) [2020] ZAGPPHC 585 (21 October 2020)

- Intimidation Act for coercion. Intimidation is a crime punishable by law with up to 10 years' imprisonment.³⁸ The Intimidation Act, 1982 makes it criminal offence to force someone to do (or not to do) something, by intimidating them with violence or threats of violence. This does not change if the person doing it is a pastor or a person with certain religious authority or someone who is doing it on basis of religion. The Con Court prohibits chastening a child even under religious guise of "spare a rod, spoil a child".
- The Deeds Registries Act 1937 - relating to registration of immovable property as The Commission found that there are improper registrations of Deeds;
- The Prevention and Combating of Corrupt Activities Act 2004, The prevention of Organized Crime Act 1998 (POCA) and The Financial Intelligence Centre Act 2001(FICA) for money laundering, tax evasion, terrorism financing activities), this obligate congregants who don't report such. Section 34 of the Prevention of Corrupt Activities Act 12 of 2004 holds accountable someone who fails to report a commercial crime such as theft, fraud and forgery to the Police.
- The criminal law, including common law offences for offences such as fraud, assaults etc. In instances where congregants are swallowing rat poison, petrol, and other noxious substances, such is a crime of administering poison under common law. Such instances occurred when Pastor Light Monyeki allegedly told worshipers at the Grace Living Hope Ministries to drink water laced rat poison Rattex. Similarly, Prophet Bongani Maseko of Daveyton's Breath of Christ Ministries made his congregation drink engine cleaning fluid.³⁹
- Criminal law (Sexual Offences and related Matters) Amendment 32 of 2007 for sexual offences. The sexual intercourse that lacks clear consent is criminalized. Unless some voluntarily consents to sexually intercourse, it is not true consent. In instances where pastor does it, the issue of coercion and abuse of power is paramount. If someone consents to sex because they believe that if they don't,

³⁸ Ellerbeck D 'When a Pastor Commits Criminal or Illegal Acts in the Name of "Religion"' 29 April 2019 <https://forsa.org.za/when-a-pastor-commits-criminal-or-illegal-acts-in-the-name-of-religion/> (accessed 29 October 2020)

³⁹ As above.

something bad will happen to them, it is not true consent. It is then a case of rape, which carries a minimum sentence of 10 years.⁴⁰

Religious institutions in South Africa must comply with a variety of other laws, including (in addition to the above) labor laws, health and safety laws; protection of personal Information Act 2013 (POPIA); the Promotion of Access to Information Act of 2000 (PAJA) etc. compliance with all of the laws and regulations that apply to religious institutions in South Africa is already a significant cost burden.⁴¹ The CRL's Proposal to legally compel religious institutions and practitioners to register and obtain a license before they will be allowed to practice will undoubtedly involve the payment of fees for the obtaining of (renewal) of that license, which will place an additional financial strain on religious institutions. These religious institutions are non-profit organizations and almost entirely reliant on the goodwill of their members to give voluntary donations on a regular basis from which operation costs are paid. Such additional operational costs may well make it impossible for religious institutions and practitioners, particularly in the poorer areas, to (continue to) operate. If current laws are indeed not sufficient, it would be prudent from government resources and capacity point of view, to consider improving and strengthening these existing laws rather than to create new ones.⁴²

Furthermore, SACRFF reiterated that the NPO Act does not oblige religious institutions to register as non-profit organizations with Department of Social Development (DSD) the fact that "some churches" are therefore not registered with DSD, does not make them non-compliant with the law, as the Report seems to suggest.⁴³ However, those who have chosen to register with DSD have a legal obligation in terms of the NPO Act to report annually to the Department.⁴⁴ The Act also provides for the legal mechanisms and penalties in the event of non-compliance. As a result, the answer to this problem is effective enforcement. Although religious institutions generally register with SARS as

⁴⁰ As above.

⁴¹ FOR SA report FOR SA 'PRESS RELEASE: Concerns and Obligations to CRL Recommendation to license Religion in South Africa' 11 July 2017 <https://forsa.org.za/press-release-concerns-and-objections-to-crl-recommendation-to-license-religion-in-south-africa/> (accessed 25 February 2020)

⁴² As above.

⁴³ As above report at paragraph 14.2(i)

⁴⁴ CRL Rights Commission Commercialization report 2017 p25 at paragraph 14.2(iii)

public benefit organizations (PBOs), the Income Tax Act 1962 does not oblige them to do so. This is not necessarily an issue of non-compliance with the law. However, it is correct that all persons/organizations have a legal obligation in terms of the Income Tax Act to disclose their annual income to SARS.⁴⁵ The Act also provides for the legal mechanisms and penalties in the event of non-compliance. Again, effective enforcement of the existing law holds the answer.

An organization can also (but is not legally obliged to) register as a public benefit organization (PBO) with SARS in terms of the Income Tax Act of 1962. The reason why many organizations do this is for the purpose of enjoying tax benefits.⁴⁶ However, in this regard it is important to note that the Income Tax Act allows a certain threshold profit at all. Where no tax is paid, or a PBO operates as a business making profit over and above the allowance threshold, SARS has the power and responsibility to take action; and it is important to note that registration as PBO is completely separate from registration as a NPO. It is also no longer a requirement that an organization register under the NPO Act in order to qualify for PBO approval. However, if an organization commits an offence under the NPO Act, SARS may withdraw the organization's PBO approval.

Furthermore the NPO Act has rather onerous requirements for registration⁴⁷ and indeed, the ability to keep on operating as a NPO.⁴⁸ The same holds true for NPCs registration under the Companies Act, and living trusts registering under the Trust Property Control Act. Should all religious institutions be compelled, by law, to register in terms of the NPO Act (or other applicable legislation), it would make it very difficult, if not impossible, for smaller (or poorer) religious institutions who do not have the capacity, resource and/or financial means to comply with the statutory requirements, to register as such in the first place, and/or to keep on operating as religious institutions.

4.3.3 CASE LAWS ON RELIANCE TO ADDRESS CONCERNS BY THE CRL COMMISSION

⁴⁵ CRL Rights Commission Commercialization report p25 at paragraph 14.2(iv)

⁴⁶ Under s30 and/or 18A of the Income Tax Act of 1962.

⁴⁷ see sec 12 of the Income Tax Act of 1962.

⁴⁸ see s17 – 18 of the Income Tax Act of 1962.

FOR SA rejected the recommendations of the Commission on previous chapter stating that rather than creating new laws that will place additional burdens on the already strained capacity of the government, the Police and the courts, resources should first and foremost be directed at enforcing existing laws more effectively.⁴⁹ It is clear that there already numerous laws in place that regulate and govern religious institutions and practitioners. Where they fail to comply with the existing laws, the solution is more effective implementation and enforcement of those very laws.

Some religious organization are alleged to front as faith-based organizations, but there were some allegations made about money laundering, syndicates and other illegal ways of raising funds and siphoning money out of the country.⁵⁰ SARS, SAPS, Department of Social Development and National Treasury should ensure that these allegations are investigated.⁵¹ Pothier insightfully bases his rejection of the commission's recommendation on the moral wrongness of the actions of the Pentecostal and Charismatic pastors.⁵² He states: locking people in deep freezes or driving over them are surely matters that need to be reported to the police, rather than being discussed under the guise of freedom of religion".⁵³ In other words, the commission has not distinguished criminality and freedom of religion. He added that Overall, it would have been preferable for the Commission to have brought a few test cases before the courts, rather than devoting its efforts to inverting a vast structure of control and oversight which – if it should come into being – will fail entirely to distinguish between genuine churches and those that merely masquerade as such.⁵⁴

In terms of section 179(2) of the South African Constitution, The Prosecuting Authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.⁵⁵ Since as already

⁴⁹ FOR SA report n41 above.

⁵⁰ CRL Rights Commission report p31 at paragraph 16.2

⁵¹ FOR SA 'PRESS RELEASE: Concerns and Obligations to CRL Recommendation to license Religion in South Africa' 11 July 2017 <https://forsa.org.za/press-release-concerns-and-objections-to-crl-recommendation-to-license-religion-in-south-africa/> (accessed 25 February 2020)

⁵² C Albertyn "Equality" in Cheadle MH, Davis DM & Haysom HRL (eds) South African Constitutional Law: The Bill of Rights (2005) 4-41

⁵³ As above.

⁵⁴ As above.

⁵⁵ The Constitution of SA of 1996.

allude to, some of the alleged controversial religions practices have an element of criminality, these effectively fall within the mandate of the NPA. Notable are spraying of doom to congregants, money laundering and sexual abuse. All these acts are, in one way or the other, already explicitly criminalized under South Africa's laws including the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Criminal Procedure Act 51 of 1977.⁵⁶ All these states equally have legislation on a wide range of issues including broadcasting, media and architectural standards. It follows logically that in the event of breaking the law, there is already a legislative framework in place to respond to such controversies.⁵⁷ These laws would stand to be invoked since every action or omission in these states is subject to the constitution.⁵⁸

Presently, Omotoso, a pastor who alleged sexually abused some of his female congregants face charges in terms of the Criminal Law (Sexually Offences ad Related Matters) Amendment and the Criminal Procedure Act⁵⁹. It is alleged that Omotoso despite his position as a known pastor and together with his co-accused - Lusanda Sulani and Zukisa Sitho – are facing 97 charges including rape, human trafficking and racketeering for allegedly targeting and recruiting young girls for sexual exploitation.⁶⁰ It is alleged that the girls were moved from their homes to two mission houses in Kwazulu-Natal, where they were allegedly made to engage in sexual acts with Omotoso. The pastor has been in jail since 20 April 2017 while Sulani and Sitho are out on bail. Omotoso made application seeking the Port Elizabeth court to dismiss sex-related charges against him and other accused on which the application was dismissed.⁶¹ These and several other cases show that religious leaders and their congregants cannot hide behind the cloak of religion to transgress the laws of the land. In these instances, the law must be enforced. It has also been seen in Bushri's case

⁵⁶ See Lubaale n4.

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ Act 32 of 2007.

⁶⁰ Citizen Reporter 'Timothy Omotoso rape trial: court to rule on dismissal application' 18 August 2021 <https://www.citizen.co.za/news/south-africa/courts/2593738/timothy-omotoso-rape-trial-court-to-rule-on-dismissal-application-18-august-2021/#:~:text=Omotoso%20and%20his%20co-accused%20%E2%80%93%20Lusanda%20Sulani%20and,targeting%20and%20recruiting%20young%20girls%20for%20sexual%20exploitation>. (Accessed 21 August 2021)

⁶¹ *Omotoso and Others v S* (CC 15/2018) [2018] ZACPEHC 81 (30 October 2018)

where the police's elite crime-fighting unit, the HAWKS investigated Bushiri for alleged money laundering after a tip that he was sending money from South Africa to his country of birth, Malawi.⁶² The case for money laundering and fraud and contravention of the Prevention of the Organized Crime Act⁶³ had been opened against ECG leader Sheperd Bushiri and his wife, Mary.⁶⁴ The approach of the NPA regarding the alleged criminality surrounding the alleged controversial religious practices is testament to the viability of recourse to existing criminal law legislation to address these controversies. It could, therefore, be said, that with the NPA's current practice, a balance can be struck between addressing the concerns of the CRL Commission on the one hand and guaranteeing of international human rights norms on the other.⁶⁵ In light of the potential of organs such as the NPA, the CRL Commission has the option of referring cases which have elements of criminality to the NPA for further action.

4.3.4 THE 'DOOM' CASE⁶⁶

On or about Monday 21 November 2016, a pastor herein first Respondent was alleged uses Tiger brand's Doom insecticide to spray his congregants in order to heal members of his church assembly. Doom is an insecticide held and registered by Tiger Consumer brand as its trade mark. It is generally freely sold to the consumers in open markets, shops, supermarkets and even larger hypermarkets and stores, for use in households. It is a multi-insects killer also registered as a as pesticide in terms of Act 30 of 1947 to poison and kill insects.

The nub of defense was that the pray of Doom on the congregants during healing ministrations was a divine instruction from God by the spirit and when it occurred and that the Respondent have freedom of religion, belief and opinion, and further that; there exists no legal framework currently in our law that prohibits such religious practices.

⁶² Phaladi B and Malatji N 'Hawks probe Bushiri as R15 a month leaves SA' 01 April 2018 <https://www.sowetanlive.co.za/sundayworld/news/2018-04-01-hawks-probe-bushiri-as-r15m-a-month-leaves-sa/> (accessed 17 Feb 2010)

⁶³ Act 121 of 1998

⁶⁴ Jordaan N "Prophet' Bushiri to stand trial next year on fraud and money laundering charges' 29 November 2019 <https://www.sowetanlive.co.za/news/south-africa/2019-11-29-prophet-bushiri-to-stand-trial-next-year-on-fraud-and-money-laundering-charges/> (accessed 17 Feb 2020)

⁶⁵ As above.

⁶⁶ *Member of the Executive council responsible for the department of Health, Limpopo V Rabalago and Another* (5727/2016) [2017] ZALNPPHC 51 (20 March 2017)

(The fact that according to them no statutory framework is at the moment in place in South African law that impedes their religious practices complaint of.)⁶⁷ it was further submitted on behalf of the Respondent during that, apart from the fact that Doom was indeed applied or employed on specific congregants during the “faith healing ministration” religious beliefs and faith healing, are reasons for spraying Doom to “pray for people as per “instruction from God by the spirit”. This spiritual intervention with healing powers from Doom or spray or other medium, descends as and when the Spirit of God instructs the pontiff in his church assembly, crusades and other terbanacles of worship to heal ailing members.⁶⁸

With the preceding issues considered, the questions calling for determination are three-pronged, namely: (a) whether or not, the Respondent’s alleged freedom of religion, belief, thought and opinion is unlimited, if not absolute, whether such right or freedom of religion and/healing or ministration should be curtailed as against other freedoms or rights in the Bill of Rights; (b) whether or not the Appellant and/or the general member of the public will suffer any potential or actual harm if the Respondent’s healing ministrations alleged were allowed to continue as in the manner complaint of, and that; (c) Whether or not would it be in the best interest of the administration of justice, the democratic values enshrined in the Bill of Rights, the Constitution and rule of law, that this court confirms an injunction against the religious practices performed by the Respondent.⁶⁹

Phathudi J in giving judgement noted that “If I were to err, would rather err on the side of conservatism and carve a wide chasm limiting the scope and type of freedom of religion and belief entertained by the First Respondent and his church assembly, and the section 15(1) and 31(1) rights.”⁷⁰ The judgement further stated that Section 15(1) states that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Section 15(2) provides further that religious observances may be conducted at State or State-aided institutions, provided that – (a) those observances follow rules

⁶⁷ At paragraph 25.

⁶⁸ At paragraph 22.

⁶⁹ At paragraph 26.

⁷⁰ As above.

made by appropriate public authorities. in *casu* one is confronted with the question whether the Respondents in exercising their “religious observances” in their religion and beliefs, do so within the confines of Section 15 (2)(a) of the Constitution.⁷¹ Section 31 provides for rights of religious communities but the matter does not end there. Section 31(2) thereof clearly stipulates that the right in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.⁷² Apart from the restriction espoused in subsection 1 of section 31, there we have a limitation clause in section 36 of the Constitution that curtails or limits the rights in the Bill of Rights in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

It was reported that Counsel for the Respondents “was at pains” to call for national legislation regulating such unconventional religious methods as practiced by the Respondents.⁷³ He contended that currently South Africa has no legislation that prohibits the freedom of worship and religion. However counsel for the Respondents lost sight of the principle that the right to freedom is not absolute. Its scope may be limited by other rights or by law of general in pursuit of a genuine state’s purpose and for good governance. Legislation and a permit system regulated by law would, in my view, be too cumbersome to monitor and supervise. It will certainly put law enforcement agencies and the state in a strait jacket.

Finally, judge turn to the three cardinal issues he was called to address in this matter:⁷⁴

(a) Given the foregoing considerations and bearing in mind the authority of Constitutional court in *Prince’s case*, above, it follows that the Respondent’s rights of freedom of religion, belief and opinion is no doubt, subject to the limitation clause. I do not visualize a situation where religious leaders of various denominations in our country would be permitted to perform unorthodox dangerous and risky religious practices under the cloak of the freedom of religion envisaged in the Bill of Rights. An attempt to

⁷¹ At paragraph 19.

⁷² At paragraph 21.

⁷³ At paragraph 37.

⁷⁴ At paragraph 38.

regulate their religious faith and believe in order to allow them exemption to apply and administer toxic substances or feed their members with all sorts of live reptiles like snakes, rats, mice, etc. would be absurd if not untenable.⁷⁵ (b) for the reasons given in (a) above, it would also not be in the best interests of members of the Second Respondents in particular and the fabric of society in general, to allow such unconventional and harmful methods of religious practices without State intervention. It is not the Applicant's case to deny the First Respondent, the freedom of his religion. It is the harmful and unorthodox methods practiced by the First Respondent that offends the public interest and the protection accorded to it by the Constitution, the rule of law of general application.⁷⁶ (c) In addition, the freedom of worship whether actuated by spirituality or not, has to be exercised reasonably within the confines of the law and the Constitutional framework. Any conduct that offends the Constitution which is the apex legal instrument to protect and defend human right as enshrined in it, is liable to be met with a stern injunction.⁷⁷

Lethebo Rabalago has been found guilty on five charges of assault with intent to do grievous bodily harm and contravening the Agricultural Stock Remedies Act⁷⁸ (which deals with pest control operations) for spraying congregants with the Doom insecticide.⁷⁹ Magistrate Frans Mahodi held that the state has proved its case beyond reasonable doubt. The court already mentioned that some of the victims had detrimental side effects, the illness, like coughing for more than seven months.⁸⁰ The "Doom pastor" was further barred from using spray that he may not spray any congregant or visitor to his church with the insecticide 'Doom' or use any form of harmful substance or administer orally any harmful liquid or give instructions that such an act must be

⁷⁵ At paragraph 38.1

⁷⁶ At paragraph 38.2

⁷⁷ At paragraph 38.3

⁷⁸ Act 36 of 1947.

⁷⁹ Mamokgere S (SABC NEWS ONLINE) 'Doom pastor found guilty on five charges' 9 February 2018 <http://www.sabcnews.com/sabcnews/doom-pastor-found-guilty-five-charges> (accessed 17 Feb 2020)

⁸⁰ As above.

performed.⁸¹ Prophet Lethaba Rabalego was therefore sentenced to thirty thousand fine or three years' imprisonment.⁸²

4.3 THE APPROACH OF OTHER COUNTRIES: LESSONS FOR SOUTH AFRICA

It is undeniable that it is a challenge to tackle the controversial religious practices, however there are ways in which other countries used in order to address such practices which are now an issue in South Africa.

In Brazil, An evangelical pastor claimed to have been endowed with heavenly milk that came out of his genitals when he received oral sex from his congregants. The evangelical pastor had convinced his followers to drink his semen, which he claimed was 'Holy Milk' in order to be healed of their sickness. The State intervened and the pastor was arrested for criminal charges.⁸³ Rwanda is out to interfere with the right to freedom of religion, thought and conscience with regulation amongst other things. The Rwanda Governing Board has noted that regulation seeks to address "troubling behavior of unscrupulous individuals masquerading as religious leaders."⁸⁴ This Board has also taken issue with religious leaders, contending that they are forcing congregants to fast "to a point of death from starvation."⁸⁵ Moreover, On 27 July 2018, the parliament of Rwanda passed a law geared towards regulation of faith-based organizations. Although this law is yet to be sanctioned by the president, this legislation follows a decision by the Rwandan government to shut down about 8000 churches and 100 mosques for failure to adhere to certain structural standards.⁸⁶ In 2018, Botswana, disconcerted by the religious practices and procedures of the Enlightened Christian Gathering (ECG) under the leadership of Sheperd Bushiri, took a decision to close down the said church. The church was shut down for allegedly failing to adhere to the

⁸¹ Polokwane Obsever 'Judge extends rulling on 'Doom' pastor' 20 March 2017 <http://www.observer.co.za/judge-extends-ruling-on-doom-pastor/> (accessed 14 February 2020)

⁸² The Citizen "Doom prophet sentenced" o2 March 2018 <https://citizen.co.za/news/news-cns/1842103/doom-prophet-sentenced/> (accessed 17 February 2020)

⁸³ See Rembe and Mokhethi n21 above.

⁸⁴ BBC News "Botswana shuts ;miracle' pastor Sheperd Bushiri's church", 10 January 2018 <https://www.bbc.com/news/world-africa-42634112> (accessed 10 December 2020)

⁸⁵ As above.

⁸⁶ As above

laws of Botswana. This allegedly pertained to the failure of the church to furnish the government with audited financial records.⁸⁷

In Zimbabwe, the country has struggled with some sections of the African Independent Churches (AICs), who deny their children education and immunization, teach against hospital medicine and also practice child marriage and forced marriage. The government, with the assistance of various organizations, has confronted these churches to challenge them on harmful cultural practices such as polygamy, child marriage and denying women and children rights and access to medication.⁸⁸ Some members of these churches have been jailed for abusing their children and wives.⁸⁹ The various government engagements and dialogues with these groups have yielded fruit, although very marginal. The fact that some members of these churches now campaign within their churches against the harmful and oppressive religious beliefs that violate the rights and dignity of children and women shows that the engagement by the government and civil society is bearing fruit, no matter how small. Rather than regulate these AICs, which may lead them to go into defense mode or operate underground, they have been engaged and challenged to abandon their dangerous and oppressive religious beliefs and practices. The problems raised by the CRL Rights Commission are not unique or new, they can be addressed through existing laws/legislation.

4.4 CONCLUSION

Religious institutions in South Africa must comply with a variety of laws in the country. The CRL Commission cannot rely on observations like ‘wrong or right’ religious acts. Where the religious act carries criminal element then such is undoubtedly a crime which must be tried and convicted. The commission can also play a role in teaching and advising which might prevent many problems it highlighted above. The State needs to promote and fulfill the rights in the Bill of Rights. This clearly requires the State to take some measures that would heighten people’s awareness of their rights and how to

⁸⁷ World Watch Monitor “Rwanda: Over Churches Close After Gov’t Passes Law Regulating Religious Groups” 29 July 2019 <https://www.christianpost.com/news/rwanda-over-8000-churches-close-after-government-passes-law-regulating-faith-based-groups.html> (Accessed 01 December 2020)

⁸⁸ E McKaiser ‘Should the state step in if people let bogus pastors harm them, asks Eusebius’ 01 March 2019 <http://www.702.co.za/articles/339672/should-the-state-step-in-if-people-let-bogus-pastors-harm-them-askseusebius> (accessed 04 July 2019).

⁸⁹ As above.

defend them. The State bears the responsibility to inform people and its institutions, particularly religious bodies, about their rights and corresponding civic duties in upholding and respecting the Bill of Rights. The State should emphasize the importance of norms, values and ethical principles that seek to promote and prevent the violation of human rights.⁹⁰

⁹⁰ As above.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The aim of this study was to assess whether the proposed interventions by the CRL Commission would be in accord with national and international human rights standards. Human rights constitute a normative framework against which these proposals are assessed. The research also aimed to assess whether there are any existing laws in place that can be relied on to address the criminal illegal nature of some religious practices and also assessed how other countries addressed these issues.¹

5.2 CONCLUSION

Those who accept the commission's recommendations base it on the Constitution's protection of human rights and human dignity, which they find are grossly violated by the churches. According to the findings of the Commission, churches violate the Constitutional rights of congregants and break the laws of the country.² Churches are not exercising their religious freedom with due regard to their legal, ethical and community responsibilities.³ In many ways, the CRL Rights Commission is concerned about balancing religious freedom and adhering to the Constitution and various laws of the republic. That is, religious communities must not exercise their religious freedom in a way that negates legal, ethical and community responsibilities.

Those who reject the regulation of religion appealed to the Constitution's provision on freedom of religion, while others say instead of drafting laws that will burden all religious societies the commission should identify the elements of criminality and hand them to the police.⁴ It can thus be argued that there are already laws in place to deal with the criminal elements masquerading as expressions of freedom of religion, and there is no

¹ Chapter one of this study.

² CRL Rights Commission commercialization report 2017:34

³ CRL commercialization report 2017:34

⁴ B Simelani 'Religious rights body calls for stricter religious regulation, again' 28 February 2019 <https://www.dailymaverick.co.za/article/2019-02-28-religious-rights-body-calls-for-stricter-religious-regulation-again/> (accessed 23 June 2019)

need to make new laws.⁵ Instead of drafting laws that will burden all religions societies the commission should identify the elements of criminality and hand them to the police.⁶

The recommendations of the commissions could protect people as claimed but with the existing laws in place. Those recommendations amount to State control. No one including the state, has the right 'to decide which religions qualify as a religion or sit as a judge over the doctrines of religious institutions, and decide whether they can operate or not.'⁷ Government cannot regulate spiritual matters.⁸ The religious communities in South Africa have a right and freedom to believe, teach, preach and live out religious convictions and beliefs, without the control and interference of the State.⁹ The commission's proposal to regulate religion is infringing on the freedom of worship and conscience. The Constitution guarantees and protects freedom of religion in South Africa, therefore adopting the proposals of the CRL Rights Commission will be unconstitutional, wrong, a serious offense against freedom of religion and a clear attempt of the state to control religious and churches in South Africa.¹⁰

The CRL Commission cannot rely on observations of 'wrong or right' to religious acts. Where the religious act carries criminal element then such is undoubtful a crime which must be tried and convicted. A serious challenge of the report is that it does not detail the extent of the identified problems among the churches. There is no indication of statistical data of how many of the sampled churches were evading paying tax and how many foreign pastors had misused the visa system. Furthermore, the commission describes as a misuse of the visa application when a pastor applies for a change of visa, and yet the immigrant laws of South Africa do allow for foreigners with justifiable

⁵ C Banda 'Redefining Religion? A Critical Christian reflection on CRL Rights Commission's proposal to regulate religion in South Africa' May 2019
https://www.researchgate.net/publication/333460118_Redefining_religion_A_critical_Christian_reflection_on_CRL_Rights_Commission's_proposal_to_regulate_religion_in_South_Africa (Accessed 28 October 2019)

⁶ J Mokhoathi and N S Rembe, 2017, 'Religious liberties and the Constitution of South Africa: A Call for religious accountability', <https://doi.org/10.7833/116-1-1145> accessed (09 January 2020)

⁷ C Collison 'Sate is trying to control religion and it doesn't listen to us' 30 August 2017
<https://mg.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us/> (accessed 14 October 2019).

⁸ As above.

⁹ As above

¹⁰ P Coertzen 'Constitution, charters and religions in South Africa' (2014) African Human Rights Journal.

cause to apply for a change of conditions on their visas.¹¹ The report (by the CRL Commission to regulate religion) amounts to state control of religion. There should always be, in any democracy, a distinction between religion and state.¹² There already numerous laws in place that regulate and govern religious institutions and practitioners. Where religious communities fail to comply with the existing laws, the solution is more effective implementation and enforcement of those very laws.

The issues that the commission identified were abuses, which were criminal acts in nature; one cannot hide behind freedom of religion and then commit a criminal act. The law must be enforced.¹³ Rape, money laundering, fraud, Locking people in deep freezes or driving over are surely matters that need to be reported to the police, rather than being discussed under the guise of freedom of religion. It would have been preferable for the Commission to have brought a few test cases before the courts, rather devoting its efforts to inventing a vast structure of control and oversight which, if it should come into being, will fail entirely to distinguish between genuine churches and those that merely masquerade as such.¹⁴ Religious institutions in South Africa must comply with a variety of laws in the country.

The conclusion is that that the proposed mechanisms are unnecessary, as the problem identified in the Report can be addressed through the enforcement of existing legislation. Even if religion is to be regulated as proposed, there is no guarantee that the problems identified in the Report will no longer occur. There is no legal ground for regulation of, or interference with, doctrinal matters – unless those beliefs and practices are clearly harmful or unlawful, in which case existing laws need to be implemented and enforced.

5.3 RECOMMENDATIONS

It is necessary that people, churches and religions must take responsibility to protect their freedom of religion. If they don't do that the state and its organs will take over and

¹¹ FOR SA 'CRL Rights Commission's Final Report to Parliament in June' 15 June 2017 <https://forsa.org.za/crl-rights-commissions-final-report-to-parliament-in-june/> (accessed 25 February 2020)

¹² N1 above

¹³ Freedom of Religion South Africa (FOR SA), "Why We Cannot Regulate Religion (Part 1)" 2 December 2015, <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (accessed 7 May 2019).

¹⁴ N5 above.

define the boundaries of religion.¹⁵ The whole problem aroused from churches which are failing to live up lawful and ethical standards, therefore it is recommended for churches and their leaders to take responsibilities and to be ethical and respect the law always. Moreover, if the CRL Rights Commission performs its duty to bring any relevant matter (such as a violation of the criminal or civil law) to the attention of the authority or organ of state of and making recommendations in respect of such a matter, it would highly solve the problem which landed the Commission into proposing its recommendations.¹⁶ The CRL Rights Commission can (and should) refer complaints of abuses to the relevant authorities, so that relevant laws can be enforced.¹⁷ FOR SA and many other church denominations have argued that there are existing laws already in place to deal with every “abuse” that the CRL Rights Commission identified and these simply need to be enforced.¹⁸ Therefore, it is recommended for the laws that are in place to be enforced.

The selection of contested issues featured in this study not only highlights challenges that the country face in relation to the right to freedom of religion or belief, but also signals where rule of law approaches can contribute to upholding this right. In meeting the multifaceted challenges related to bringing freedom of religion or belief to life, the IDLO made the recommendations to the states of which South Africa can adopt as well.¹⁹ The South African Government through its organs of state more importantly the CRL Rights Commission should:

1. Refrain from unjustly interfering with the right to practice religion or belief.
2. Protect the right of an individual to change their religion or belief.
3. Tolerate and protect religious practices that do not accord with the dominant or State religion.

¹⁵ Coertzen at n10 above.

¹⁶ See s 5(1)(k) of the CRL Commission Act 19 of 2002

¹⁷ FOR SA ‘PRESS RELEASE: Concerns and Obligations to CRL Recommendation to license Religion in South Africa’ 11 July 2017 <https://forsa.org.za/press-release-concerns-and-objections-to-crl-recommendation-to-license-religion-in-south-africa/> (accessed 25 February 2020)

¹⁸ As above.

¹⁹ International Development Law Organization ‘Freedom of Religion or Belief and the Law: current dilemmas and lessons learned’ (2016) - “IDLO is an intergovernmental organization devoted to empowering people and enabling governments to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.”

4. Set appropriate limits on religious practices that interfere with the rights of others.
5. Maintain open, transparent and regular consultative of religious institutions and non-governmental organizations who are knowledgeable about the right to freedom of religion or belief, and involve them in the reform of law, policy and regulations affecting the enjoyment of the right to freedom of religion or belief.
6. Work at the international level, including through the United Nations and regional organizations (more importantly by using their guidelines), to promote intergovernmental dialogue on the right to freedom of religion or belief.
7. Work with religious leaders to support positive messages in religious beliefs and practices that promote peace and seek to reduce and resolve conflict.
8. Work in partnership with national human rights bodies, civil society organizations, trade unions and businesses to identify challenges and help strengthen universal enjoyment of the right to freedom of religion or belief.
9. Explore new and innovative ways to turn back the rising tide of restrictions and hostilities.
10. Avoid adopting laws and policies that prevent or hinder the freedom of religious individuals and institutions to adapt, change and evolve their beliefs and practices
11. Avoid adopting laws and policies that determine religious belief or disbelief.
12. Ensure that religiously motivated actions are not exempted from civil and criminal law designed to prevent harm.
13. Identify, monitor, document and use all appropriate educational, administrative and penal measures to end harmful traditional or religious practices.
14. Prosecute criminal violations of the right to freedom of religion or belief fairly and effectively, and codify recognition that crimes perpetrated with an intention to harm an individual or group on the basis of their religion or belief – where discriminatory motive forms an aggravating factor of the offense – should attract harsher punishment. This should be complemented with comprehensive efforts at rehabilitation, as appropriate, for both offender and victim.
15. Systematically reviews and reform all school curricula to ensure they do not promote the superiority of one religion or belief over another, or promote

intolerance against one or other religious traditions or beliefs. Reviews and reform school textbooks to promote inclusiveness of all religious groups and respect for all diversity, pluralism and the right to freedom of religion or belief.

16. Develop and apply primary and secondary school curricula that inculcate respect for the right to freedom of religion or belief, drawing on good practices from other countries and existing regional and international toolkits, as available.
17. Encourage and support universities to hold regular workshops and seminars that promote respectful, meaningful intellectual dialogue and informed discussion on topical issues relating to the right to freedom of religion or belief, including doctrine, practice and conflict.
18. Feature programs in State broadcasts that promote respect for all religions, faiths and beliefs, and promote respect for diversity of religion or belief.
19. Encourage independent media institutions to feature accurate news stories that proactively combat intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief.

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