



Regulating Religion

1. Introduction

In August 2015 the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) began an investigation into the 'commercialisation of religion'. In the words of the Commission's chairperson, Ms Thoko Mkhwanazi-Xalavu,

"We are launching an investigative study on the commercialisation of religion and the abuse of people's belief systems in terms of when these institutions are being run, how are they being run, where is their funding going into, who collects how much and what do they do with the money, where does the money eventually go to, what are the governing principles that are there."¹

The investigation was in response to a number of media reports concerning suspicious or untoward practices being undertaken by various pastors and 'churches'. These included allegations of congregants being made to eat grass or to drink petrol; stories of people being cajoled into handing over large sums of money in order to be 'cured' of a disease; the encouragement of personality cults; and the depositing of church funds in the personal bank accounts of leaders.

The investigation ended in March 2016 and a report was subsequently issued.² This report calls for far-reaching regulation of religious organisations and religious 'practitioners', and proposes that legislation be introduced to this end. This briefing paper will consider the role of the CRL Commission, the necessity or otherwise of the investigation, the main recommendations of the report, and whether or not the regulatory

proposals offend against the rights to freedom of religion and freedom of assembly.

2. The CRL Commission

The CRL Commission is one of the six State Institutions Supporting Constitutional Democracy provided for in Chapter 9 of the Constitution. Of all these 'Chapter 9 institutions' it is perhaps the least known or understood; its impact over the last 20 years has not been on anything like the scale of other Chapter 9 institutions such as the Public Protector, the Auditor-General or the Electoral Commission.

Nevertheless, the CRL Commission has a potentially important role to play in a society characterised by a wide diversity of languages, cultural traditions, historical heritages and – to an extent – religious beliefs. It was probably due to their sensitivity to the risk that such diversity might lead to division and enmity that the drafters of the Constitution saw the need for a body that would "promote respect for the rights of cultural, religious and linguistic communities" and "promote and develop peace, friendship, humanity, tolerance and national unity" among such communities.³

Among the matters that the CRL Commission has dealt with recently are public holidays, albinism and the problems experienced by the albino community, *ukuhlolwa kwezintombi* (virginity testing of young women), and conflict resolution. The latest Annual Report available on the Commission's website appears to be for 2013. The Commission consists of a Chairperson and a Deputy-Chairperson (currently Prof David Luka Mosoma, a former Vice-Chancellor of the

University of South Africa) and ten Commissioners who represent a rough cross-section of South Africa's ethnic and linguistic communities.

3. The Investigation

In the introduction to its report the Commission states that

“the recent controversial news reports and articles in the media about pastors instructing their congregants to eat grass and snakes, to allegedly drink petrol or to part with considerable sums of money in order to be guaranteed a miracle or blessing has [*sic*] left a large portion of society questioning whether religion has become a commercial institution or commodity to enrich a few. Some communities have also started asking whether the government should leave the developments as they are or should something be done about the perceived commercialisation of religion.”

There is no indication of who or what comprises the “large portion of society” that is supposedly questioning what religion has become; neither are we told which communities exactly are “asking whether the government” should do something about the problem. This is not to suggest that there are no problems in the religious sphere. There are undoubtedly a number of charlatans and con-artists abroad ready to take people's money in return for spurious ‘cures’ and ‘healings’. And it seems clear that there are numerous prosperity cults active around the country, preaching a message of personal material advance as a sign of God's favour; a message intimately connected, it goes without saying, to the special material advance of the cult leader.

The report details one such encounter, when a ‘religious leader’ arrived to appear before the Commission:

“Two heavily armed guards got out of this particular religious leader's luxury car for a security check. As the crowd screamed more, another black Mercedes-Benz with tinted windows stopped opposite the S65. Unarmed guards carried out similar procedures. People in black T-shirts bearing the words “I am who God says I am” were

shown shouting “my father, my father” to their leader.”

The problem, though, is that nothing in the report indicates how widespread this problem of quasi-religion is. Of course a news item about congregants being made to drink petrol will excite comment; and the appearance of a ‘pastor’ in the kind of luxury car usually reserved for drug-barons and senior politicians will rightly raise eyebrows. But against this it might be argued that every week millions of South Africans routinely attend religious services and play their part in their churches’/mosques’/temples’ activities without being in any way exploited or duped.

Many of the specific issues listed in section 14 of the report are clear violations of existing laws and regulations, and could be easily addressed: some churches have failed to register as non-profit organisations; others do not disclose their income to SARS; some pastors misuse the visa system, entering the country under false pretences; money is taken out of the country without Reserve Bank permission. Well-understood provisions exist to deal with all these problems. Indeed, in the ‘Recommendations’ section, the Commission acknowledges that SARS, the Department of Home Affairs and various other state agencies ought to tackle these matters; but the question of why this is not happening is left open.

There is also the surprising statement that

“No one could call to order people undertaking questionable religious practices like feeding people grass, snakes, rats, drinking petrol, locking people in the deep freezer, driving over people, etc.”

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. 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 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.

4. The Recommendations

As mentioned, the report recommends that more effective steps be taken by the relevant authorities to tackle tax evasion, failure to register appropriately, and various other financial and immigration irregularities. The Commission offers its assistance to religious organisations that wish to regularise their positions in these areas.

However, despite noting that there are authorities with existing jurisdiction to deal with the problems it has identified, the Commission goes on to conclude that there is a need for the religious sector to be regulated. Initially, it appears that it is encouraging self-regulation, but it soon becomes clear that something far more intrusive is being contemplated.

The Commission proposes the establishment of a Peer Review Council “which will consist of peers from each Religion that will give permission to operate to individual religious leaders.” It seems that this Council will consist of one representative of each religion, though what constitutes a ‘religion’, and how the representatives will be chosen, are not clear. Below the Council there will be a series of Peer Review Committees, one for each religion, the main task of which appears to be dispute resolution. Each such Committee will put in place an Umbrella Organisation which

“will be given powers to recommend the licensing of institutions and individual practitioners. They will also apply to the Peer Review Council for the withdrawal of licenses of institutions and religious practitioners.”

It appears that these Umbrella Organisations will play a broad policing role. People will be able to lay complaints with them about religious organisations or individual religious practitioners; and they will have disciplinary powers over such organisations and practitioners. There will also be an appeal procedure upwards to the Peer Review Committees and the Peer Review Council for those who are not satisfied with the Umbrella Organisation’s handling of a complaint.

It goes without saying that the notions both of a statutory body with the power to grant and withdraw licenses for religious institutions and practitioners, and of religious practice being subjected to licensing at all, are unprecedented in this country.

5. Proposed Legislation

In order for its recommendations to be implemented, the Commission envisages the enactment of legislation, and section 18 of the report offers a draft of what such legislation might contain. It begins by setting requirements that will

“identify the requirements for a religion to qualify as a religion:

i. The Religion must have a Religious Text that has a defined origin or an origin proved so ancient that no one alive can remember the true origin.

ii. The founding documents of each religion should be significantly different.

iii. The Religion should have a significant number of followers that believe in and that adhere to the tenants [*sic*] of the faith.

iv. The Religion should have a set of rules and practices that order the lives of followers in a specific and particular way that benefit the followers. No practice should be allowed if deemed to have a harmful effect on the physical or mental well-being of its followers or if deemed exploitive of those that practice it.

v. The rules and practices of religion should not exploit society in general for the benefit of the religion and at the expense of the religious freedoms of others.”

The draft gives no indication of why these requirements were chosen: for example, why a text is required; why the “founding documents” (whatever these may be) should be “significantly different”; what constitutes a “significant number of followers”; who will “deem” a religious practice to be harmful or exploitive.

The draft goes on to provide that

“For a religion to be recognized, they [*sic*] would need to adhere to the prescripts of the proposed Act.

That the Peer Review Council shall only issue such an operating license once the religious institutions comply with the requirements as stipulated in the proposed Act.

That no license may be withheld on the grounds of doctrine unless such doctrine is deemed potentially harmful, physically and mentally to those who practice it or if such doctrine is not found in the tenants [*sic*] of the religion and which bring the religion into disrepute.”

It is difficult to make sense of some of these provisions, and it is not clear what the Commission understands by ‘doctrine’, or what the difference is between the doctrines and the tenets of a religion.

The proposed Act will also require the licensing of ‘worship centres’ and of ‘General Religious Practitioners’. No worship centre will be licensed unless the person in charge is also licensed as a practitioner, and unless it can prove that it has sufficient congregants, or other sources of income, to maintain itself.

6. Constitutionality

In any enquiry into the constitutionality of a law that seeks to limit a right there are two steps. Firstly, it must be established whether or not a right is being limited. Secondly, if this is established, it must be decided whether the limitation is justified. In this second part of the enquiry various factors come into play: the nature of the right concerned; the importance of the purposes of the limitation; the nature and extent of the limitation; and whether other, less restrictive means exist to achieve the purposes of the law concerned.⁴

The rights to freedom of religion and freedom of association are set out in sections 15 and 18 of the Constitution. They are not expanded upon or enumerated, since their meaning is well-established and clear. They are both considered to be ‘fundamental rights’ (although this is not a distinction that the Constitution itself makes).

There is no doubt that many, if not most, of the Commission’s recommendations, and most of the proposed legislative enactments listed above, would amount to limitations of freedom of religion and association; some of these limitations would be extremely severe. The purposes which the Commission seeks to achieve may be laudable in some respects, but it surely cannot be claimed that they are so important as to warrant the wholesale

violation of rights that would be involved. As noted, the issue of religion being commercialized, while real, has not been shown to be particularly widespread, or to constitute the kind of major social problem that might justify the effective suspension of two fundamental constitutional rights.

But it is the question of whether other, less restrictive means exist to address the problem that will ultimately sink the proposed measures. As noted above, and as largely conceded by the Commission, there are already various laws, statutory and common, and numerous State institutions, from SAPS to SARS, that can deal effectively with the kind of corruption, crookery and exploitation that the Commission is worried about. It is simply not necessary to bring new legislation into being, and it is certainly not necessary to do so in a manner that eviscerates freedom of religion and freedom of association.

It seems extremely doubtful whether the Commission’s proposed legislation will see the light of day. It is expected that the SA Law Reform Commission would first consider the need for such a law, and it is to be hoped that once the proposals are subjected to proper legal scrutiny, they will be rejected. Even if the SALRC recommends legislation along these lines, it would be up to government to table it, and it is questionable whether there is any appetite for that in the governing party.

There is already a strong groundswell of resistance to these proposals by representative bodies of many churches and faiths, and these will no doubt mount a challenge to any such legislation during parliamentary hearings. In any event, in the very unlikely event that proposals of this kind should actually find their way into law, the courts are sure to strike down any unconstitutional aspects.

7. Conclusion

Overall, while the report mentions a few disturbing examples of fraud and exploitation in the name of religion, it fails to establish that our society is suffering from a particularly serious problem in this regard. The isolated examples it mentions do not seem to justify the exceptionally intrusive and directive nature of the remedies the report proposes. The report also neglects to explain why a cumbersome, impractical, and

intrusive system of councils, committees and 'umbrella organisations' is needed when plenty of ordinary legal mechanisms already exist to tackle the issues it is worried about.

The Commission originally gave a deadline for public comment on the report by 18th November 2016. This has now been extended to 28th

February 2017. The Necessary details of where to submit comment can be found on the commission's website:

<http://www.crlcommission.org.za/>

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¹ See <http://www.crlcommission.org.za/>

² The report can be found at

<http://www.crlcommission.org.za/docs/Preliminary%20Report%20of%20the%20hearings%20on%20Commercialization%20of%20Religion%20and%20abuse%20of%20people's%20belief%20systems.pdf>

³ Constitution of the Republic of South Africa, 1996, section 185(1) (a)-(b).

⁴ Constitution of the Republic of South Africa, 1996, section 36(1).

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