Safeguarding Freedom of Religion or Belief: Assessing the Recommendations of the CRL Rights Commission in the Light of International Human Rights Standards

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Abstract

Following widespread media coverage of spectacular cases of abuse within religious communities, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities initiated steps towards regulating the so-called 'religious sector'. Their proposals need to be critically assessed not only with regard to their constitutional mandate, but also in light of international legal authorities on freedom of religion or belief and human rights standards. It is argued, that the proposals would impose an inappropriate limitation on freedom of religion or belief. On that basis, alternative recommendations are suggested.

Keywords: church and state, regulation of religion, registration, abuse of religion, limitations of rights.

[1] C. Sauer is the main author of this paper. He has taken part in some major aspects of the named events himself and has been able to peruse minutes and recordings of the others where existent. Much of the legal argument has been taken from a joint written submission with Georgia du Plessis to the COGTA Portfolio Committee in response to the CRL reports. Angela Kirschstein has provided valuable research assistance, and helped fill gaps that remained in the oral presentation of the substance of the paper. Any mistakes however remain the responsibility of the main author.

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Introduction

In their 'Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems', the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (hereinafter CRL) proposed a strong regulation of religious communities based on a 'Peer-Review-Mechanism' of accreditations and licensing. With mandatory registration they hope to be able to exercise control to cut the roots of abuse in the name of religion and thus 'helping [religious] Organisations to get their house in order' (CRL 2016a:29).

But the CRL's actions and communications have been highly problematic: There are conflicting messages, there is a lot of confusion about terminology and procedure, and there is limited transparency surrounding the CRL. Therefore, some distinctions are needed – between the actual problems of abuse and gullibility versus the problems that the CRL creates by their own actions; between the CRL narratives and framing versus documented and established facts; between their communications versus their actions and in what attitude they are performing their work; between the interest of religious communities versus the interests of the CRL; between paternalism versus protection, promotion and empowerment.

For better orientation, a timeline of the events will be presented. It will be made clear that the CRL's procedure lacks transparency and respect for religious communities.

Then, a closer look will be taken at international standards regarding human rights and freedom of religion or belief (hereinafter: FoRB), because a balanced perspective is needed: Being contextually relevant and not isolationist, but learning from others outside South Africa. There are international authorities that defined those benchmarks which also inspired the South African constitution. In light of those standards, the relation between human dignity, human rights and FoRB as well as the limitations of that right and the role of the state will be discussed. Finally, recommendations will be given, how to implement a holistic empowerment approach for a better future for religious communities, and how to deal with actual issues legally.

Regulation as Response to Unusual Practices? A Tug of War between Opposing Positions

To give some context to the current debate around the regulation of religion in

South Africa, a closer look at past events regarding the handling of abusive outgrowths within religious communities on the part of governing entities is needed.

In early 2015[2], the chairperson of the South African Council of Churches (SACC), Bishop Ziphozihle Siwa, submitted a complaint to the SA Human Rights Commission, after several cases of abuse became public. As he stated in a working group at the Religious Summit on 13 February 2019, he had tried to engage offending religious figures without success. Without him knowing, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities stepped in and started issuing subpoenas to all sorts of churches based on complaints that he allegedly lodged. 85 church leaders were subpoenad to so-called hearings under threat of imprisonment in case of non-compliance (cf. CRL 2016a:8,47-50; FOR SA & SACRRF 2017:3-7). This was perceived as undermining the required respectful relationship between the CRL and the religious communities in the further course (cf. REACH SA 2017:3).

Those hearings took place between October 2015 and March 2016 (cf. CRL 2016a:8). In August 2016 the CRL issued a Gauteng Pilot Study that evaluated 'the commercialisation of religion in the Republic of South Africa' (CRL 2016b:1), based on opinion polls among 905 religious leaders, heads of households, congregants, and traditional healing practitioners, which Unisa had been commissioned to conduct between March and May the same year (cf. CRL 2016b:7). Coupled with the presentation of some results were specific recommendations suggesting a stronger regulation of religious groups. Critics attribute this outcome to an agenda-driven method and study design (cf. SACRRF 2017:5f).

After releasing a preliminary report on 25 October 2016 and conducting a 'Consultation on the state of the nation's psyche' in March 2017, the final report on 'Commercialization and Abuse of People's Belief Systems' was published on 11 July 2017, proposing a CRL-controlled, so-called peer-review-mechanism based on compulsory registration of religious organizations and religious practitioners (cf. CRL 2017:34-48). Every religious practitioner would belong to a predefined religious institution or worship centre, and those institutions or centres would be grouped in 'Umbrella Organisations' (CRL

[2] A request to the HRC for a copy of this complaint to verify its date and content remained unanswered to the date of publication of this article.

2017:42) that are subordinate to peer-review-committees. They would decide on the accreditation and sanctions, in close cooperation with the peer-review council built up by representatives of the committees. But on top of the structure would stand the CRL as the 'final arbiter' (CRL 2017:48) to implement final decisions. Therefore, a new legislation on religion would be needed, as well as an amendment of the CRL Act to increase the powers of the CRL (cf. CRL 2017:48). A sizable amount of preceding substantial submissions from churches and other religious communities were mostly ignored or remained unanswered.

Two weeks before the publication of the report, on 27 June 2017, the CRL gave a briefing to the parliamentary 'Portfolio Committee on Cooperative Governance and Traditional Affairs' (hereinafter COGTA), which has the oversight over CRL. There, the CRL claimed to have the support of the majority of churches (cf. COGTA 2017:3), but a number of representatives of named entities refuted this on the spot and later sent a petition to the ANC on 18 September.

The COGTA Portfolio Committee then reacted in an uncommon manner by organizing its own hearing of the religious leaders to establish the facts, and called for submissions. They received numerous requests to speak. The COGTA Hearing took place on 17 and 18 October the same year, allowing about 40 speakers to take a stand (cf. Parliament of the Republic of South Africa 2018:8f). The CRL regarded this intervention as a disruption of their planned agenda and wanted to activate public opinion and the media to achieve the results they envisioned, as the CRL chair Mrs. Thoko Mkhwanazi-Xaluva pointed out in a meeting with Freedom of Religion South Africa (FOR SA) and the South African Council of Religious Rights and Freedoms (SACRRF) (cf. FOR SA 2018b).

The subsequent COGTA report, issued in February 2018, did not endorse the peer-review-mechanism, but instead favoured self-regulation of religious communities. In that regard, a National Consultative Conference should convene as a platform to discuss challenges and to develop a charter for self-regulation and a legally recognized code of conduct. The report also recommended to strengthen the Independent Communications Authority of South Africa to penalise misleading media claims and legislation like the NPO Act or Income Tax Act to ensure registration of religious institutions (cf. Parliament of the Republic of South Africa 2018:7).

The following month, the CRL chairlady communicated the intention

to go to Constitutional Court for them to prove the legally binding character of the CRL reports (cf. FOR SA 2018a) – a view that conflicts with the CRL Act (cf. Government of South Africa 2002: Part 2,5(1)(i)).

In September 2018, things took an interesting turn, when the CRL announced at a press conference to 'hand over' the further process to Ray McCauley, senior pastor of Rhema Bible Church (cf. FOR SA 2018c). Additionally, CRL presented their own Code of Conduct for Religious Leaders as a draft resolution to be approved by a subsequent religious summit and the National Consultative Conference (NCC). From the outside, what seems as an act of empowering religious communities for self-regulation, has a background story that points into a different direction.

Firstly, the relevance and authority of those unilaterally appointed by CRL needs to be regarded as questionable. McCauley is considered by many in the religious communities as having a dubious history of uncritical cooperation with the deposed and corrupt state president Jacob Zuma[3].

[3] McCauley helped Zuma in his election campaign by having him speak at Rhema Bible Church, one of the largest Churches in South Africa (cf. Howden 2010). Zuma had formed an alternative body of faith leaders ('National Interfaith (Leaders) Council South Africa' (NICSA or NILC)) in 2009, which had the effect of side-lining the South African Council of Churches and other established religious networks, which were far more critical of the president.

Zuma had promised McCauley the position of chairman of NICSA, however Bishop Qundu was elected as the first chairman (cf. IOL 2009; SAnews 2012; Ellerbeck 2019) and NICSA is defunct in the meantime. – A list of specific questions sent to the leadership of Rhema Bible Church on 16 April 2019 about their own perspective on the background of the Religious Summit was left unanswered, and when the author insisted on a written response instead of the phone conversation offered more than 2 months later, the addressed referred to the CRL instead:

> The CRL are custodians of the mandate and they are in a better position to answer whatever questions you have in this regard.

However, any earlier attempts since 14 June 2019 to get a substantial response from CRL have been equally fruitless so far, as no form to make a formal PAIA application has been provided to date.

Secondly, by promoting their own 'Code of Best Practice for Religious Organizations', the CRL ignored and was seemingly seeking to marginalize the already existing draft 'Code of Conduct for Religions in South Africa', that had been extensively mandated in a consensus process and mirrors the South African Charter of Religious Rights and Freedoms (cf. SACRRF 2018).

One month later, in October 2018, the parliamentary 'Portfolio Committee on Women in the Presidency' published a press statement, demanding strong regulation of churches, including strict registration and closing of churches (cf. PC on Women in the Presidency 2018). Immediately prior to that, the Committee had met with the CRL, discussing gender-based violence in religious contexts (cf. FOR SA 2018c), after the rape trial of Nigerian pastor Timothy Omotoso received large media coverage. The CRL chairlady supported the main witness Cheryl Zondi in initiating the 'Cheryl Zondi Foundation' for rape victims who have been abused in religious contexts, in which Mrs. Thoko Mkhwanazi-Xaluva serves as the deputy chairperson (cf. Ngqakamba 2018). In this light, the question emerges whether the Women in the Presidency-press statement was actually arranged by the CRL to further underline their agenda.

On 13 November 2018, the CRL announced at a Press Conference that a national conference of religious leaders would be held at Rhema Bible Church in order to ratify the CRL Code of Conduct and to give a final statement. But unfortunately, until the day before that meeting, no agenda or any other documents were circulated, which amplified the impression of a lack of transparency. All those who had given critical statements at the COGTA hearing, were excluded from the organizational process and no invitations were given to them (cf. FOR SA 2018d) until they requested such.

When the day came on 13 February 2019, approximately 750 religious and church leaders gathered for this 'Religious Summit' (notwithstanding other terminologies; cf. National Religious Consultative Forum 2019).

In her opening speech, the CRL chairperson pressured the participants, saying:

> We need to warn you … if this thing doesn't work, our goal is to protect and to promote the rights of religious communities …. So, if this train doesn't leave the station, we've got a meeting on the 25th and the 26th of February which is our National Consultative Conference which is attended by the ordinary community …. They will tell us what

> to do …. I always say: People, if you don't take this as the religious leaders, government will take it on for you. And you don't want that to happen. When governments take over what should be your responsibility, governments really take over. Look at what has happened in other countries (Mkhwanazi-Xaluva 2019).

This was like lighting a fuse: The audience interrupted the agenda of the day due to frustration about the preceding process, the heavy-handed manner of the CRL, the harsh rhetoric, non-transparency and the need for further clarifycations. They asked: What is the authority of the organizing group? Is this the conference that the COGTA report recommended? Why are processes and agendas not inclusive and community-based? In the end, the CRL representatives were requested to leave the summit to ensure an independent and self-determined procedure (cf. National Religious Consultative Forum 2019).

The participants then split into various pre-arranged discussion groups, including an additional one to map out the way forward. The final motions and agreements contained an emphasis on the importance of self-funding of the consultative process to maintain independence – which is a reaction to the fact that the Cheryl Zondi Foundation (partly) funded the Rhema Summit (Ellerbeck 2019); the building of a more inclusive Interim Steering Committee including a legal expert; and a bottom-up consultative process by religious communities from a local and provincial to a national level, culminating in an interreligious national consultative conference in October 2019 (cf. National Religious Consultative Forum 2019).

An 'Addendum to the Commercialization of Religion Report' (CRL 2019) dated 24 February 2019 later appeared on the website of the CRL 'in order to clear any misunderstandings that may have emerged around the report within society at large'. In it, the top position of the hierarchical peer review structure now remains blank for any other impartial entity beside the CRL to take, and the term 'self' is emphasised in the otherwise unchanged proposal of a 'self-regulatory framework' of 'the religious sector'.

A few days later, on 25/26 February 2019, the CRL held their legally prescribed National Consultative Conference (NCC) to which the chairlady had referred to before the Religious Summit. The NCC has to decide upon the resolutions that need to be implemented in the subsequent term of the CRL. About 500 people were in attendance. Most of the seats were taken up by

community council leaders, provincial and other representatives, with only 30 religious leaders allowed – even though the major topic was about religious communities with far reaching resolutions to be voted upon (cf. FOR SA 2019:1f). The majority of the audience was neither informed about the processes that had taken place to that point, nor were they informed about the motions of the Religious Summit held at Rhema Church. There was an agenda item for a report about the Religious Summit, but the CRL seemingly had failed to issue an official invitation to the task team to present their resolutions. Among the delegates were participants of the Religious Summit who wanted to present on their behalf, but this was not allowed. The chairlady ruled that,

> … as the CRL Rights Commission, we cannot give a report of something we were not a part of. We can't say this is a true reflection of what happened there when we're asked to leave …. That would be illegal of us to talk about something we don't know …. The Rhema meeting can't come back. It's dead and gone (FOR SA 2019:5).

However, the task team of the Religious Summit had sent a four-page report, including motions, to the CRL immediately after the summit, as pastors Giet Khosa and Ezekiel Mathole confirmed in a telephone conversation with FOR SA (Ellerbeck 2019). The CRL decided to refuse to acknowledge the outcome of the Religious Summit, that opposed their intentions to enforce top-down regulation of religious communities.

Finally, without the NCC participants having any background information and with no discussion time granted, they had to formulate recommendations on the matter of regulation of religion. Some of the submissions were chosen to be presented, and out of this, a four-item resolution was issued, demanding a peer review mechanism and control of religious practitioners, enforcement of the CRL proposals, control of religious media and televised church services, the repealing of the Traditional Health Practitioners Act and the creation of a federation of traditional health practitioners (FOR SA 2019:7f).

This outcome differs greatly from the Religious Summit motions. But the CRL still sees itself as mandated to push the process forward towards a top-down interference into the exercise of religious freedom, that they perceive as a potential danger to other human rights.

CRL Actions		Civil Society
Subpoenas and Hearings	**10/2015-03/2016**	
Gauteng Pilot Study	**08/2016**	
Preliminary Report	**10/2016**	Critical analysis and submissions by religious representatives
CRL Consultation: State of the Nations' Psyche	**03/2017**	
	06/2017	Parliament: COGTA CRL Briefing, objections by attendant church representatives
Final Report	**07/2017**	
	10/2017	COGTA Hearing of religious leaders
	02/2018	COGTA Report rejects CRL proposals
CRL intention to go to Constitutional Court	**03/2018**	SA CRRF et.al. begin to draft a Code of Conduct for Religious Institutions
'Handover' to Ray McCauley, including a Code of Conduct	**09/2018**	
Women in the Presidency Statement demanding strict regulation of religion	**10/2018**	
CRL Press Conference at Rhema announcing a summit	**11/2018**	
CRL threatens religious leaders at Religious Summit at Rhema Days later: CRL NCC ignores summit resolutions	**02/2019**	Religious Summit: Attendees ask CRL to leave and develop own resolutions

On 28 February 2018 the 5-year mandate of the past CRL Commissioners ended. New Commissioners only came into office on 1 July 2018, due to a delay in the nomination/ selection process and the general elections. The past chairlady is no longer a Commissioner, but the past Vice-Chairperson has now become the chair. By the close of manuscript the current CRL had not yet made any statement pertaining to the matter of 'regulation of religious communities'.

International Standards

In private conversation with the author after his presentation on relevant international human rights standards at the COGTA hearing of religious leaders, several CRL Commissioners voiced: 'You have a very different understanding of religious freedom'. In the public debate they argued that their task was protecting the dignity and defending the religious freedom of vulnerable, poor, gullible, mainly female religious adherents who were helpless against exploitative and abusive religious practitioners. This in their mind justified the limitations and burdens the proposed remedies would entail for religious communities at large, including all the bona-fide and non-offensive ones. They strongly criticized any appeal to religious freedom as an alleged defence of malpractice that would occur in the name of religious freedom.

Playing off human dignity against FoRB results from a deep misunderstanding of the interwovenness of human rights and the material nature of FoRB. Therefore, it may help to consider the international standards and authorities regarding human rights and FoRB, that are of normative importance.

As South Africa is bound by these standards and because the Universal Declaration of Human Rights by now is part of common law, human dignity and human rights must be interpreted not only within the South African constitutional framework, but also within the international human rights framework. The South African constitution must be read in the light of those international standards to ensure adequate interpretations when it comes to specific implementation.

From this broader international human rights perspective, concerns can be raised regarding the CRL Report and subsequent actions.

Authorities on Freedom of Religion or Belief

Universal Declaration of Human Rights

In recognition of the dignity that all human beings inherit in their 'potential of responsible agency' (Bielefeldt, Ghanea & Wiener 2016:13), and the lessons learnt from the history of diversity and pluralism, the United Nations General Assembly adopted the Universal Declaration of Human Rights (hereinafter UDHR) on 10 December 1948. It is widely seen as a milestone in human history because of its universal and global moral claim; and is accepted as an ideal that provides orientation, but has no legal binding character in its own right (cf. Steiner & Alston 2000:151). This way it is recognized that universal rights belong to all human beings prior to any administrative aspects. Only in combination with the International Covenant on Cultural and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which have binding character for those who ratified, they constitute the International Bill of Human Rights as the very basis for International Law and an important influence on several national constitutions (cf. OHCHR 1996). However, in the meantime the UDHR has become an element of Common Law, which is universally applicable.

The holistic conceptualization provides an understanding of human rights as a web of 'universal, indivisible and interrelated and interdependent' items (VDPA 1993:I,5), which 'means that taking away one human right would not only leave us with a specific gap; it would seriously affect and damage the entire system of human rights' (Bielefeld 2016:29). Regarding FoRB, Article 18 clearly provides 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 teaching, practice, worship and observance.

It needs to be stressed that the wording aims to incorporate 'theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief' (UN Human Rights Committee 1993:2) as was pointed out later by the Human Rights Committee.

It is easy to see that – for example – Article 19 and 20, which protect

the freedom of opinion, expression, information, press, assembly and association, are inherently connected to Article 18. In basically recognizing human beings individually and collectively in their existential and 'identity-shaping convictions and conviction-based practices' (Bielefeldt, Ghanea & Wiener 2016:38), FoRB as expressed in Article 18 is described as the 'gateway' (Bielefeldt 2017:348) to other rights and freedoms.

International Covenant on Cultural and Political Rights (ICCPR)

Unlike the UDHR, the ICCPR does constitute a multilateral treaty of which the implementation is prescribed and monitored by the Human Rights Committee, as is specifically laid down in part IV of the covenant. In terms of FoRB, Article 18 of the ICCPR is divided in four subsections. Section 1 repeats Article 18 of the UDHR, section 2 prohibits coercion, section 4 ensures the parental right to pass on religious or moral education of their own conviction to their children. Section 3 deserves special attention with a view to the CRL's proposals, as it defines the conditions of possible limitations as follows:

> freedom to manifest one's religion or belief 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 (ICCPR 1966:Art. 18,3).

It needs to be highlighted, that the 'forum internum'– the inner existential conviction of a person – cannot be subject to limitation (cf. Bielefeldt 2017:342). Due to the concise character of the covenant, section 3 especially needs further interpretation and exact definitions to prevent abuse.

General Comment 22

In 1993 the Human Rights Committee issued General Comment 22 to further elucidate the rights and freedoms of the ICCPR, with a view to the dissolution of the Soviet-Block. The comments and recommendations were adopted by the Human Rights Treaty Bodies and thus add to the foundations of International Law. Whenever legislators operate within the sensitive field of human rights, they are legally bound to consider this General Comment.

General Comment 22 provides a more detailed interpretation of article

18 of the ICCPR. In 11 subsections, different aspects of FoRB are taken up, for example the broad construction of the terms 'religion' and 'belief', the distinction between 'forum internum' and 'forum externum', the broad range of acts protected under the terms 'worship', 'observance', 'practice' and 'teaching', the guarantee to objective education on religion and beliefs in public schools, the prohibition of discriminatory manners in different contexts such as state religion, state ideologies, conscientious objection etc. The longest subsection examines the narrow confines of the possibility of limitations, that touches upon the most sensitive area of FoRB. This will be discussed in more detail later.

European Court of Human Rights Case Law

When dealing with human rights legislation, the previous and present interpretation practice needs to be taken into consideration as well. Currently, the European Court of Human Rights provides the most extensive case law based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which is,

> almost identical to the parallel provisions in the International Covenant on Civil and Political Rights. As such, they constitute highly persuasive authority on the meaning of the latter provisions, which are now binding on most countries on earth (Durham 2010:9).

The Court's general take on FoRB is to protect the far-reaching scope and the fundamental character, as could be seen in the case of Kokkinakis v. Greece:

> [It *is*] one of the foundations of a 'democratic society' within the meaning of the Convention …. A fair balance of personal rights made it necessary to accept that others' thought should be subject to a minimum of influence, otherwise the result would be a 'strange society of silent animals that [would] think but … not express themselves, that [would] talk but … not communicate, and that [would] exist but … not coexist (ECHR 1993).

Regarding the CRL's proposals, the key decisions on registration issues, com-

ing mostly from countries of the former Soviet bloc transitioning into a democratic system, as well as Greece (having a State-Church) and Turkey, provide a firm foundation of major principles (cf. Durham 2010:7). Thus, mandatory registration laws and laws that prohibit religious activity without registration are not permissible (cf. Masaev v. Moldova App no 6303/05), the registration process should neither pose a major obstacle (cf. Church of Scientology Moscow v. Russia App no 18147/02), nor include arbitrary discretion of the authorities (cf. Manoussakis v. Greece App no 18748/91; 97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia App no 71156/01), high membership requirements (cf. Kimlya v. Russia App nos 76836/01 and 32782/03), licensing of certain beliefs (cf. 97 Members of the Gldani Congregation of Jehovah's Witnesses v. Georgia App no 71156/01; Metropolitan Church of Bessarabia v. Moldova App no 45701/99), discriminatory manners, manipulation (cf. Church of Scientology Moscow v. Russia App no 18147/02) or obligation for religious communities to 'structure themselves in ways that are not consistent with their own beliefs'(OSCE 2004:17).

OSCE

The Organisation for Security and Co-operation in Europe (OSCE) is the largest regional organisation with 57 countries as its members that cover the northern hemisphere. Its main purpose is conflict prevention, crisis management and rebuilding of democratic institutions through instruments like a highly functional monitoring system, independent information databases, as well as advisory and negotiation activity. In issuing several policy documents, the OSCE has set standards for the behaviour of states and governments. Although they are not legally binding, they ensure the assessment of concrete policies of member states (cf. Gareis 2015).

One of these documents are the 'Guidelines for Review of Legislation Pertaining to Religion or Belief', adopted by the Venice Commission in 2004, which is inter alia based on the ICCPR, the ICESCR, the UDHR, UN Human Rights Committee General Comment 22, the ECHR and the decisions of the European Court of Human Rights (cf. OSCE 2004:6). These Guidelines add to the foundations of interpretation practice and address a broad range of issues that 'typically arise in legislation' (OSCE 2004:3). Concerning registration processes, most of the principles outlined mirror the key decisions of the European Court of Human Rights as stated above.

In view of the umbrella-structure proposed by CRL it is worth highlighting the note that,

> consistent with principles of autonomy, the State should not decide that any particular religious group should be subordinate to another religious group or that religions should be structured on a hierarchical pattern (OSCE 2004:17).

In general, when dealing with crimes in the name of religion, the OSCE guidelines counsel caution before implementing new legislation:

> If a religious group is involved in a fraud or assault, for example, it is not necessarily best to respond by enacting new laws on religion. Thus, it is appropriate to consider whether the general laws on fraud or assault may be sufficient to address the problem without enacting a new statute to cover offences when committed in conjunction with religious activity (OSCE 2004:8).

Reports of UN Special Rapporteurs on Freedom of Religion or Belief

As a 'central element of the United Nations human rights machinery' (OHCHR 2019), the UN Special Rapporteurs are independent experts that monitor, investigate, assess and report global human rights compliance. In order to ensure independence from narratives construed by national authorities that might collide with international standards, it is most important for legislators to take into account the outside perspective of these UN representatives.

The reports of UN Special Rapporteur on freedom of religion or belief 2010-2016, Prof. Dr. Heiner Bielefeldt, systematize patterns, root causes and motives of infringements. He observes that 'the scope of the right to FoRB is often underestimated' (Bielefeldt 2017:339) as he examines the profound character and inclusive conceptualization of that right.

Concerning the problem of inappropriate political control mechanisms, he notes in his report of August 2016 that,

> relevant test questions are whether religious communities can run their own affairs outside of tightly monitored official channels, whether

> community members can meet spontaneously and in self-chosen religious centres, whether religious leaders can deliver sermons or address the community without previously being submitted to censorship […] The dividing line runs between those communities cooperating with State agencies by remaining within predefined and closely monitored channels, on the one hand, and those wishing to keep their community life free from excessive Government control and infiltration, on the other (Bielefeld 2017:348).

International Law Commentary on Freedom of Religion or Belief

The most extensive reference source on FoRB would be the recently published International Law Commentary by Heiner Bielefeldt, Nazila Ghanea and Michael Wiener (2016). It comprehensively considers all relevant provisions for protection of freedom of religion and belief as well as their interpretations by various Treaty Bodies and Special Rapporteurs. It is currently seen as the authoritative reference work. Certain chapters specifically deal with registration issues (1.3.8) and with limitations (5.2).

Foundational Issues

Having presented the relevant international norms and authorities to consult on the matter of FoRB, the foundations are laid to engage materially some foundational issues. The proposed regulation of South African religious organisations by a peer-reviewing umbrella structure touches upon a number of sensitive issues regarding FoRB. It may be subsumed under the topic of 'registration', regarding which experts warn:

> while 'registration' may *prima facie* appear to be a merely technical theme of less political significance, the issue is actually a source of major human rights problems in the area of freedom of religion or belief (Bielefeldt, Ghanea & Wiener 2016:223).

Thus, overly strict registration laws can amount to serious and far-reaching limitations of this human right. Those who do not wish to be registered according to their beliefs but are forced to join a certain structure might lose their distinct identity, while communities which applied for legal status but

were denied can in the long term be seriously impeded in organizing their community life. Consequently, 'virtually the whole catalogue of manifestations of religion or belief' (Bielefeldt, Ghanea & Wiener 2016:227) would be negatively affected.

The concerns around the CRL proposals can be grouped in three broad topics. *Firstly* the interrelations between human dignity, human rights in general, and the specific right to FoRB; *secondly*, the narrow confinements of permissible limitations of FoRB; and *thirdly*, the role of the state in general towards religious communities.

Human Dignity, Human Rights and Freedom of Religion or Belief

The UN Special Rapporteur noted that,

> Respect for freedom of religions or belief – or lack of such respect – typically manifests itself in the ways in which Governments deal with grounds for limitations. Unfortunately, the Special Rapporteur has frequently noticed loose and overly broad invocations of grounds for limitations, which often seem to be undertaken without due empirical and normative diligence (Bielefeldt 2017:342f).

Exactly this is the case with the CRL's claim of general 'abuse of human rights' (CRL 2016a:28) taking place in the name of religious freedom, neither understanding the holistic conceptualization of human rights (cf. VDPA 1993:I,5) nor the human rights approach. As stated above, the concept of FoRB is a gateway to other human rights and freedoms in general that protects 'a broad range of free activities in the area of thought, conscience, religion or belief' (Bielefeldt, Ghanea & Wiener 2016:38). By no means is it generally opposed to other rights and freedoms. They are all based on the axiomatic basic assumption that dignity inheres in all human beings, as they all have the 'potential of responsible agency for which they – and indeed all of them – deserve respect' (Bielefeldt, Ghanea & Wiener 2016:13). This respect for human dignity is unconditional and independent from concrete behaviour (cf. Bielefeldt, Ghanea & Wiener 2016:17). As such, human beings are automatically, equally and universally right-holders to all rights and freedoms, prior to any administrative recognition (cf. Bielefeldt 2017:353). The human

rights approach therefore aims to empower the human being individually and collectively in every aspect and hence doing justice to the existing and emerging diversity.

Applied to FoRB, it means that,

> it cannot be confined to particular lists of religious or belief-related 'options' predefined by States, within which people are supposed to remain. Instead, the starting point must be the self-definition of all human beings in the vast area of religions and beliefs, which includes identity-shaping existential convictions as well as various practices connected to such convictions (Bielefeldt 2017:340).

FoRB understood within the realm of the human rights approach recognizes the historical and empirical experience that there is no other common denominator between different religions, beliefs and convictions than the sole human being, who is the one professing and practicing his or her religion or belief, as an individual and/or in community with others. It also means, as the Special Rapporteur clearly reminded, that the focus of the right to religious freedom should be the believer (the human being) and not the beliefs (cf. Bielefeldt 2017:340). Therefore, the attempt of the CRL to define such a common denominator within an artificial and static umbrella-structure of predetermined religions ignores not only the basic insights of the mothers and fathers of the UDHR learned from the history of pluralism, but also the 'fluid and flexible nature of religion and belief as such' (Du Plessis 2019:154), which cannot be packaged into strict institutional patterns. It seeks to place religious organizations within boundaries that do not exist and tries to find consensus that does not exist nor is necessarily profitable.

Nevertheless, it is true that conflicts between different rights do occur in concrete cases: 'The practice of human rights, to a large degree, is a practice of managing conflicts' (Bielefeldt, Ghanea & Wiener 2016:29). Handling those cases means to carefully examine the scope, nature and aim of the concerned rights and finding specific, proportionate, reasonable, transparent, non-discriminative means reflecting the spirit of dignity, equality and empowerment that permeates all human rights. 'It is important not to turn concrete conflicts between (seemingly or actually) colliding human rights interests into abstract antagonisms on the normative level itself' (Bielefeldt, Ghanea & Wiener 2016:29). Therefore, instead of trying to deal with 'commer-

cialization of people's belief systems' as allegedly systematic abuse of human rights in general by limiting FoRB through overly strict registration laws, it would be more in line with the international authoritative interpre-tations of human rights to restrain from profound interventions into the system but to prosecute concrete criminal actions with adequate existing laws. Durham illustrates this with parallels from common practice in the enforcement of environmental protection among corporates:

> The point is, corporate registration laws are not used as a primary means of regulation of bad practices. […] Negative activities are more narrowly targeted, and non-offending organizations are free to proceed in ways that benefit society. Only in extreme circumstances is corporate dissolution the appropriate or necessary remedy. By analogy, religious communities should be allowed to organize as legal entities, and only actual negative conduct should be subject to administrative or criminal sanctions (Durham 2010:9).

Yet another foundational issue should be discussed when assessing the CRL proposals in the light of human dignity, human rights and FoRB. As we have seen, human dignity inheres in all human beings and thus establishes the principle of equality. Consequently, all manifestations of religions, beliefs or convictions held by human beings enjoy *equal protection and treatment*. No one has to justify the existence or exercise of his or her religious beliefs. It is argued that the type of regulation envisioned by the CRL disregards this principle of equality in two ways: *Firstly*, it *discriminates* against non-traditional minority groups that do not meet the licensing criteria (initially) set out by the CRL, such as a sufficient number of followers, a religious text, a founding document and a set of rules and practices that are not condemned as 'harmful' (cf. CRL 2016a:33). It needs to be remembered that,

> religious minorities are especially vulnerable to being characterized as engaging in behaviour that is either excessive or that diminishes agency and the ability of an individual to consent [and is therefore] in need of limits and control (Beaman 2008:12).

Secondly, it *favours* non-religious belief systems as they will not be subjected to the same strict organization and will be less restricted than reli-

gious belief systems. This stands clearly in stark contrast with section 2 of the General Comment 22, which declares the following:

> Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, includeing the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community (UN Human Rights Committee 1993:2).

Moreover, the proposed regulation ultimately violates section 9 and 15 of the South African constitution that ensures *equal* protection without predeter-mining which set of beliefs, values and convictions fall under the scope of FoRB.

The Narrow Confinements of Permissible Limitations of Freedom of Religion or Belief

It has become clear that the registration, licensing and structuring proposed by the CRL does in fact impose a limitation of FoRB. While it is true in general that limitations of that freedom can be appropriate when implemented 'in compliance with the binding criteria set out in the international rights law' (Bielefeldt, Ghanea & Wiener 2016:22), the question remains whether this restriction or limitation of an international human right is warranted and whether the isolated instances of the abuse of religion amount to a threat to 'public safety, order, health, or morals or the fundamental rights and freedoms of others' as stated in Article 18 (3) of the ICCPR.

The need to respect the autonomy of religious communities precludes the State from prohibiting internal (voluntary) religious practices that seem to be irrational, unreasonable or harmful from the outside – this will be doctrinal entanglement. Therefore, a common pattern among the more authoritarian governments is to refer to the broad and unspecified limitations of 'security', 'order' or 'morality' in order to discriminate against minorities and tighten control over independent religious communities (Bielefeldt 2017:342).

In fact, 'the question of where to draw limits and how to prevent the frequent abuse of limitation clauses is one of the most sensitive issues in human rights law' (Bielefeldt, Ghanea & Wiener 2016:21).

With paragraph 8 of General Comment No. 22, the Human Rights Committee insists 'that paragraph 3 of Article 18 is to be strictly interpreted' (UN Human Rights Committee 1993:8). For limitations to be justifiable, they must meet *all* of the criteria set out in Article 18 (3) of the ICCPR and other relevant norms of international human rights law (cf. ibid.). Furthermore, 'limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated' (ibid). Hence, they should be no more restrictive than it is required, and moreover 'the least restrictive among all the adequate measures that could be applied' (Bielefeldt 2017:342). The 'Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights' (AAICJ 1984) further add: 'The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned' but 'in favour of the rights at issue' (AAICJ 1984:I,A,2f).

The limitation must be prescribed by law to ensure transparency and needs to be 'subject to the possibility of challenge to and remedy against its abusive application' (AAICJ 1984:I,A,8).

It has to serve a legitimate aim: the protection of 'public safety, order, health, or morals or the fundamental rights and freedoms of others' (ICCPR 1966: Art. 18,3). Those terms are exactly defined in the 'Siracusa Principles' to prevent any arbitrary use. Special Rapporteur Bielefeldt draws attention to the fact that 'respect for the inalienability of human rights thus requires a high degree of empirical diligence and normative caution whenever limits are deemed necessary […]' (Bielefeldt, Ghanea & Wiener 2016:22) because 'the onus of proof falls on those who argue on behalf of limitations, not on those who defend or practice a right to freedom' (Bielefeldt, Ghanea & Wiener 2016:21).

The CRL has not proven that the incidences of harmful practices and fraud in the name of religion are of such systematic character that they threaten the basic functions and values of society. The CRL has not proven that the establishment of new, limiting legislation for religious communities is inevitably the only means to deal with such incidences rather than enforcing existing criminal laws. Finally, the CRL has not proven how the proposed registration, licensing and structuring will specifically and concretely prevent

cases of abuse within religious communities, as registration laws are not suited to prosecute criminal behaviour, as Durham points out:

> association law is not viewed as the primary control mechanism. Rather, instead of trying to address potential problems before they occur through association law, actual problems are dealt with as they arise by criminal, tax or other administrative remedies. […] Experience in other countries suggests that in general it is not registration authorities that identify such conduct, but police, neighbours, disgruntled insiders, and perhaps most frequently the media. In short, if the issue is controlling problems, a more productive way to proceed is to relax registration rules and rely on other social monitoring mechanisms to deal with the actual problems (Durham 2010:5,10).

The Role of the State

Throughout history, the relationship between state and manifestations of some religions (in a narrow sense) has always been tense because inherently, they pursue the same aim in their very own realm: To order the human life in community with a set of binding rules derived from a higher source (which – with regard to the state – can be a political ideology or just the common will of citizens). In the face of emerging diversity and pluralism, both had to rethink and negotiate their respective domain, which lead to a broadened degree of self-restraint. Hence, the most effective quality for the state to ensure FoRB would be a 'respectful non-identification' (Bielefeldt, Ghanea & Wiener 2016:35) as political secularity. A neutrality with general benevolence towards religion or beliefs would not invade internal doctrinal affairs, would not judge irrational practices, would not force to adopt alien structures and would not determine whether a system of values can be recognized as a 'religion'. It rather deals exclusively with the secular aspects of organizations and associations, acknowledging and facilitating the social benefits that derive from religious and belief-related communities.

> As such, political secularity has no value for its own sake, but, it has the status of a 'second order' principle whose normative persuasiveness originates from higher (i.e. first order) principles, namely, freedom of re-

> ligion or belief in conjunction with the requirement of non-discriminatory implementation (Ibid.).

This mirrors the basic insight of the 'Böckenförde theorem', which claims that 'the freedom-oriented secularized state lives by prerequisites which it cannot guarantee itself' (Böckenförde 1976:60). Such a state requires a certain self-regulating moral substance of the individuals which is inter alia brought forth or provided by various religious or belief systems manifested in communities. If the state would enact disproportionately restrictive laws to structure and control them, it would not only loose the social benefits, but ultimately loose its character as a democratic, liberal, benevolent-secular state. Durham lists those positive influences that eventually consolidate the state in its existence:

> Religious organizations play a powerful role in inculcating altruism and other personal characteristics that enhance social stability, productivity, and other forms of social capital such as increased volunteerism, social commitment, integrity, and general creativity. This impact is felt not only within religious organizations, but in other social settings as well. While religion can have negative as well as positive effects, it is socially wasteful to regulate religion in ways that unnecessarily curtail its positive effects (Durham 2010:9).

Therefore, it is the state's duty to act in a threefold way: It needs to respect, to protect and to promote or fulfil freedom of religion or belief (cf. Bielefeldt, Ghanea & Wiener 2016:33f). 'Respect' means to be aware and acknowledge its status as an inalienable right of such profound impact that it needs to be handled with care and not to underestimate its scope. The state should 'protect' that freedom from violations by non-state actors and should implement legislation and policies for that purpose. 'Promote' and 'fulfil' entails the provision of 'an appropriate infrastructure that allows persons living under their jurisdiction actually to make use of their human rights' (Bielefeldt, Ghanea & Wiener 2016:34). That includes a functioning and accessible judiciary as well as 'a broad range of promotional activities, such as education about religions and belief diversity as part of the school curriculum, and the building of societal resilience against religious intolerance' (Bielefeldt 2017:345).

This is the background for the mandate of the CRL as enshrined in the 'Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act'. The CRL was established as a representative of the interests of religious communities before the state, quasi as the best friend and protector of religious communities. The CRL is 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 (Government of South Africa 2002:Part 2,4(b)).

Actually, it should 'conduct programmes to promote respect for and further the protection of the rights of cultural, religious and linguistic communities' (Government of South Africa 2002:Part 2,5(b)). It has to educate, lobby, report, promote awareness and monitor government or legislators in order to protect. Thus, the CRL was never intended to act as a hostile adversary, or a legislator, or an executive, nor as a judiciary towards religious communities.

Recommendations

The South African Constitution is widely regarded as one of the most progressive in the world and mirrors international human rights standards. This precious asset would be severely undermined if official institutions and commissions began to adopt authoritarian patterns of behaviour, ignoring the initial spirit and history of those human rights standards.

Dealing with harmful practices and abuse in the name of religion, that are deeply interlaced with issues of poverty, rural traditions, lacking infrastructure, poor quality of education, theological confusion etc., requires a holistic long-term process of educating and empowering communities on several levels rather than installing restrictive top-down control mechanisms. The general approach should be one of facilitating dialogue in order to be effective, as the joint general recommendation/ general comment on harmful practices by the UN Committee on Elimination of Discrimination against Women and the UN Committee on the Rights of the Child have pointed out:

> vertical coordination requires organization between actors at the local, regional and national levels and with traditional and religious

> authorities …. Capacity-building should aim to engage influential leaders, such as traditional and religious leaders; … partnerships [with them could] help to build bridges between constituencies … [States should] initiate public discussions to prevent and promote the elimination of harmful practices, by engaging all relevant stakeholders in the preparation and implementation of the measures, including local leaders, practitioners, grassroots organizations and religious communities (CEDAW & CRC 2014:34,70,77 and 81(F)).

That requires a respectful and *broad-based* cooperation and general trust between the CRL and the religious and belief-related communities. Unfortunately, this has been damaged by the CRL's harsh way of communicating with a hostile attitude, rash media statements, sloppy research and the propagation of misleading half-truths, as well as by hidden agendas and non-transparent actions. Hence, the first and foremost recommendation would be for the CRL to earn new trust by developing an attitude of respect and benevolence towards the communities that they are mandated to represent, as well as properly considering the international standards on freedom of religion and belief (cf. Sauer 2019).

To be more concrete, the following could be done:

– The CRL should acknowledge and further support the adoption process of the 'Code of Conduct for Religions in South Africa' that has already been developed by the CRRF (2018) based on a broad consensus process. Only by a grass roots approach such as this can it be ensured that the values set out in such an ethics code will be backed by the majority of the respective communities[4]. As 'Freedom of Religion South Africa (FOR SA)' has pointed out:

> Although subscription to this Code would be voluntary, it would define the benchmarks and certify individuals or organisations as being in compliance, which would be an endorsement of their adherence to these standards (FOR SA 2017).

[4] The 'Anti-Regulation Group' has already adopted this code by integrating it into 'The Alberton Declaration' on 21 March 2019, by adding a few additional framing phrases.

– The CRL is permitted to maintain a database of religious organizations, as defined in the CRL Act para 5(j). They are also allowed to register 'religious practitioners' (e.g. leaders and office bearers) there, but it must never be a precondition to worship.

– The CRL should implement educational initiatives in cooperation with schools and communities on root causes and prevention of abusive practices, on orientation within religious diversity, and specifically on legal obligations for religious leaders and organizations. FOR SA observed, that,

> Many of the issues identified in the CRL's Report derive from a lack of compliance fuelled by ignorance. The reality is that some religious practitioners simply do not know or understand the various aspects of the existing legal framework they need to comply with (FOR SA 2017).

Thus, the CRL needs to encourage respective organizations towards accountable behaviour. Furthermore, the CRL could inform on how to file a lawsuit in case of an abusive incident and also raise awareness among the police and other state organs. This way they could further provide the basis for the enforcement of existing laws.

– Following up on this, the CRL should focus on those 'tools in the state's legal arsenal such as criminal laws and administrative sanctions' (Durham 2010:10) and use them to address these issues when they occur. With this in mind, they could install a ''rapid response' unit to alert the relevant authorities whenever it receives a complaint' (FOR SA 2017). In that line, they should remind parliament to act in every way that they can to safeguard an efficient judiciary that is not overstrained.

However, the general attitude of the CRL and the civil society must be shaped by a balanced view of religious and belief-related communities, particularly acknowledging that the overwhelming majority of these communities contribute greatly and profoundly to the South African society at large, even filling in the gaps where other institutions fail. Cases of abuse are an exception and not the rule.

Conclusion

In conclusion, it must be reiterated, that despite all criticism offered, the CRL Rights Commission is a unique and helpful instrument to promote and protect the rights of cultural, religious and linguistic communities. However, it must be uncaptured from controlling agendas. A holistic human rights approach aims to empower individuals and communities to enable them to develop self-regulating mechanisms. This happens in a bottom up movement from local and regional levels to the national level. Therefore, an atmosphere of freedom and respect within a democratic and non-discriminative, benevolent secular state is necessary.

(1) Freedom of thought, conscience, religion or belief is a fundamental and protected human right. It inheres in all human beings prior to any administrative act. Its public manifestation may only be limited under very narrowly defined circumstances and the state bears the burden of proof.

(2) The instances of so called 'commercialisation' of religion or 'abuse of people's belief systems' are isolated. They do not warrant the creation of umbrella organisations to regulate religion. They can be dealt with by existing laws that need to be enforced, but registration or association laws are unsuited for prosecution of abuses.

(3) The regulations proposed by the CRL report would definitively place a severe and unjustified restriction on free worship and religious practice.

(4) In addition, they would negatively discriminate religious groups compared to non-religious and other societal groups. They would also discriminate minority and less organized religious groups compared to majority and better organized religious groups. They would in effect substantially favour some religious or non-religious beliefs.

(5) The CRL has not proven that the isolated cases of 'commercialization' of religion or 'abuse of people's belief systems' constitute a general threat to public safety, order, health, or morals or the fundamental rights and freedoms of others. Therefore, the proposed limitations of manifestation of religion are unjustified. In addition, the measures proposed are not pro-

portionate, they are too restrictive, and there are less restrictive means available to engage the problem.

(6) Furthermore, the confining by the state of the exercise of religion or belief to a predetermined list of options acceptable to the state is an illegitimate restriction of freedom of religion or belief in itself.

(7) Even if all that were not the case, the proposed measures would still not be practical and feasible as they are based on the flawed assumption that there would be a common denominator between religious organisations that would allow grouping them in umbrella organisations. This ignores the fluid and flexible nature of religion and belief as such.

(8) In summary, the proposed regulations severely restrict the enjoyment of freedom of thought, conscience, religion or belief and violate fundamental human rights. They are unjustified, unwarranted, illegitimate, discriminatory in many respects, disproportionate, unnecessary, based on flawed assumptions, unpractical and unfeasible.

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