

THE REPORT ON THE REGULATION OF RELIGION IN SOUTH AFRICA AN ANGLICAN RESPONSE

1. INTRODUCTION: Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRLC)

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) has published a report of their investigation on the commercialization of religion in South Africa. To some extent the Report may be misnamed because the enquiry actually concentrated on the practices of Christian churches in South Africa. The Commission claims to have found 'evidence' of the 'commercialisation' of religion and 'non-compliance' with the law of the Republic of South Africa.

The Report also contains a draft Bill on the regulation of Religion in South Africa in a bid to address the excesses by groups or individuals who do so in the name of religion. The Commission recommends to Parliament that legislation be adopted providing for 'peer review' mechanisms, registration of religious practitioners and traditional healers, institutions as well as clearance and registration of religious practitioners and workers. It also seeks to have established accredited umbrella organisations. It proposes that every religious organization and every pastor be registered to practice.

There are three attacks against this Report that are being outlined here.

- Firstly, that this activity and its purpose is ultra vires the powers and responsibilities of the Commission as prescribed both by the Constitution of the Republic of South Africa and by the legislation establishing the Commission.
- Secondly, that the Report of CRL and the recommendations contained therein are unconstitutional and fly in the face of the rights guaranteed in the Bill of Rights.
- Thirdly, that the entire investigative process and the Report undermine the fundamental beliefs of the broader church.

This advisory submission will then set out possible responses by the Anglican Church of Southern Africa.

- 2 The Commission and its Powers:
 - 2.1 The CRLC is one of the state institutions established by the Constitution of the Republic of South Africa Act 200 of 1993 to support constitutional democracy (Chapter 9 of the Constitution). Chapter 9 institutions are considered to be “the cornerstones of democracy”.
 - 2.2 181 (2) states that these institutions are “independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice”.
 - 2.3 The primary objects of this Commission is, among others, “to promote respect for the rights of... religious communities” (s185(1)(a)). It also has the powers necessary to achieve its objectives including the power to “monitor, investigate, research, educate... on issues affecting religious communities” (s. 185(2)).
 - 2.4 In terms of Sec. 185(1)(c), the Commission has the object “to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa”. The true meaning and extent of this clause becomes the subject of discussion and debate in the light of recommendations emanating from the Commission.
 - 2.5 It is important to note that this Commission must be distinguished from two other commissions (the Public Protector and the Human Rights Commission) that actually enjoy enforcement mechanisms. This Commission is not designed to enforce any of its powers except powers to summons to an enquiry, and to report to parliament and that all state organs are enjoined by the Constitution to assist and protect the institution and that they may not be interfered with in the execution of their functions.
 - 2.6 The Public Protector, on the other hand, has the additional power “to take appropriate remedial action” (s.182(1)(c)), while the Human Rights Commission “to take steps to secure appropriate redress where human rights have been violated” (s.184(2)(b)).
 - 2.7 The tenor of the CRLC, has been to create an environment where the said communities can flourish in their belonging to any cultural, religious or linguistic community, “to enjoy their culture, practice their religion and use their language” (s.31(1)(b) of the Bill of Rights).

- 2.8 It is to be noted that in establishing the enquiry, the Commission expressed concern about the “commercialisation” of religion. The Chairperson of the Commission in her statements before, during and after the Report was published constantly expressed her concern that these activities were undermining the teachings of religion. In other words, the Commission does not appear to have based its interventions on its Constitutional mandate (s.186 of the Constitution read with the ss. 4 & 5 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002).
- 2.9 S5(k), however, comes closest to authorizing the Commission to undertake the work it has done and tentatively, to make the recommendations to Parliament. It says that the Commission has power to “bring any necessary matter to the attention of the appropriate authority or organ of state and, where appropriate, make recommendations to such authority or organ of state in dealing with such a matter.”
- 2.10 There are two riders to this power that must be borne in mind, however. It is that such recommendations must be consistent with the Constitution and with its primary mandate to promote and foster respect, peace, friendship, tolerance, promote the rights of such communities, and to recommend the establishment and recognition of community councils (s.4). Unlike the other Commissions, this Commission makes recommendations to organs of state, and does not enforce compliance directly to citizens. The Commission, it must also be borne in mind has power to bring any matter that affects the rights of the communities suggested to the attention of the appropriate state functionaries.
- 2.11 To underline the limitations on the Commission to enforce any of its powers directly, the Commission is enjoined to cooperate with other Chapter 9 institutions to seek assistance, and (s. 6(3) of the Act) “may report any matter that falls within its functions and powers to the South African Human Rights Commission to investigate”. To the best of our knowledge the Commission has not sought the assistance of the SAHRC in this matter.
- 2.12 It is doubtful that even assuming that evidence of “commercialisation” of religion were found, the case that the Commission should make is that such “commercialisation” actually is a violation of the rights of religious communities, and if law has been contravened, the Commission has powers to request the appropriate law enforcement agencies to investigate and for the law to take its

course. It is our submission that the Commission has acted ultra vires in undertaking the enquiry on the basis that it has done, and in making the recommendations for the “regulation” of religious practices.

- 2.13 The Commission’s function is covered in Sec 185(1)(c) of the Constitution wherein the Commission can “recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa”. It is argued that this power granted the Commission is the power to recommend the establishment of “councils” in accordance with national legislation and not the power to regulate by legislation religious and linguistic bodies. Currently, such legislation does not exist and the Commission is not empowered to initiate such legislation. Furthermore, a number of religious groupings, be they Christian, Jewish and or Islamic, already have voluntary councils and or structures that regulate the practice of their religions such as the South African Council of Churches, The Jewish Board of Deputies and the Muslim Judicial Council. Therefore, the recommendation contained in the Report of the Commission is ultra vires and flies in the face of the Constitution and the legislation establishing it.

3 Violation of Human Rights

- 3.1 The Constitution mandates the Commission to “promote respect for the rights of ... religious communities.” The rights that each person under the Bill of Rights of the South African Constitution is endowed with certain rights, however, precede that right. In other words, the rights are not just collective but also personal and individual.
- 3.2 These rights include the rights to freedom of religion, belief and opinion (s.15) and freedom of expression (s.16). The right to freedom of religion includes the right to freedom of conscience and thought.
- 3.3 The rights, however, are limited. The rights of religious communities are limited by the rights not to be exercised in a manner that “is inconsistent” with any provision of the Bill of Rights. Section 36 of the Bill of Rights makes provision for limitations on the rights in the Bill of Rights.
- 3.4 There are two difficulties with the manner in which the Commission has proceeded in this matter. Firstly, it has failed to indicate precisely who and what provisions of the Bill of Rights have been violated. Secondly, it applies a blanket approach in its proposals in a manner that is unconstitutional, unfair and unjust.

- 3.5 There is an extensive body of jurisprudence on this matter that could argue the violations referred to above.
 - 3.6 The Commission is itself guilty of a violation of human rights.
 - 3.7 The parliamentary office of the South African Catholic Bishops' Conference summarises their objections to the draft report and proposed legislation by affirming that freedom to form, maintain and govern religious organisations (including churches) autonomously, according to the dictates of one's conscience, belief and opinion, without the prescription or interference of the state, is a right guaranteed by the Constitution. Likewise the church is not beyond the long reach of the law. But that must be done and tested in terms of the available prescripts of the Rule of Law.
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4. The Anglican Church of Southern Africa Canon Law
- 4.1 The Anglican Church is episcopally led and synodically governed. By this it is meant that the Anglican Church, is led by a bishop, who is elected from amongst its clergy, by an Elective Assembly. This process is governed by democratic principles that are enshrined in the Canons of the Anglican Church of Southern Africa. The process ensures a secret ballot and is open to all qualifying members of the church and its institutions. The church as a whole is by itself governed and managed through a set of laws, rules and regulations referred to collectively as Canons. These Canons are adopted and amended by a periodic Provincial Synod of members of the church. The Canons are legislation for the church of a special type and are subordinate to the Constitution and the Laws of the Republic of South Africa. Individual members have the freedom of association and may choose to be part of the church and bound by these Canons. Prof. Barney Pitso in his Paper entitled "Theology and Canon Law in the Anglican Church of Southern Africa", states that the Canon Law's "purpose and objective is to will the purpose of God and to realize the good news of the kingdom of God on earth in the redeeming life and work of our Lord Jesus Christ. Given this, therefore, canon law has Christ as the cornerstone and is an instrument of the church to realize the purposes of Christ's mission. The foundation stone of Canon Law therefore is Christ, and the custodian thereof is the Church". In short, the Commission cannot and is not empowered or entitled to encroach on this sacrosanct sphere of freedom of religion and conscience. At most, the Commission can only recommend to churches that do not have rules to adopt such rules so that they may be consistent with the

Constitution within the framework of their own theology.

- 4.2 The Anglican Church in Act XVIII of the Constitution and Canons of the Anglican Church in Southern Africa “accepts the thesis that while theology provides it with a vision and definition of its purposes and Christian values, these are implemented in the form of canon law, which provides the norms of action for their implementation. Thus canon law has a theological basis, and theology works through canon law. In so doing it also accepts the need for the Church to exercise its leadership to ensure that its legal apparatus and procedures match its vision and purposes, and at the same time meet its current needs and aspirations in relation to its members’ rights, responsibilities and freedoms.”

5. Theological Objections

- 5.1. The Anglican Church of Southern Africa appeared before the Commission and made a presentation about the Church’s history, theology, practice and governance.

- 5.2 Fundamental to the theological understanding of the Anglican Church is both the Incarnational sacramental life, and the Word of God in proclamation and witness. The Anglican Church is synodically governed and episcopally led. This Anglican Way, has been articulated as a Church

- Formed by Scripture
- Shaped through Worship
- Ordered for Communion
- Directed by God’s Mission.

- 5.3 The Anglican Communion states the relationship between the church and secular authority in these terms:

As Anglicans we are called to participate in God’s mission in the world, by embracing respectful evangelism, loving service and prophetic witness. Our calling is that we work in God’s world in mission and evangelism, and we help to realize the kingdom of God on earth “as we work for God’s peace, justice and reconciling love. Our relationship with secular authority is one of respectful and responsible citizenship, assertive evangelism especially to promote social transformation and a fair and just world.

- 5.4 It is important that it be stated as a cardinal principle of our faith, that where secular authority is imposing choices on us, we would rather obey the dictates of conscience, guided by the authority of Scripture. Instructed to preach or proclaim the word and teachings about Jesus Christ, in the book, Luke---Acts of the Apostles (4:19), Peter testified to the Council of Elders and Rulers in Jerusalem in the primitive church that:
Whether it is right in God’s sight to listen to you rather than to God, you must judge; for we cannot keep from speaking about what we have seen and heard.
- 5.5 Throughout history Christians were challenged about the Christ of faith. What Paul said in Romans 13 is of a similar kind because it started by asserting that, “there is no authority except from God (Romans 13:1). The sovereignty of God is unchangeable and unchallengeable. As the church we abide by the prophetic calling that gives insight into the purposes of God who wills good for God’s people. “Justice and peace”, says the psalmist, “are met together; righteousness and peace have kissed each other” (Psalm 85:10). It is therefore a divine imperative that as a church we seek nothing but the truth, we uphold virtue and pledge solidarity with the poor. Nothing less is required of us. Structures and systems that are unjust, or oppressive will not prevail over the Christian conscience. Our church demonstrated that comprehensively during the apartheid era. The church’s humility, obedience and good citizenship should never be taken for granted.
- 5.6 It is for that reason that as per Justice Sachs, the Constitutional Court in Christian Education (2000) cautioned that there can be no private sphere out of the reach of the tenets of the Constitution, privatized and shielded from the full power for good of the Constitution. At the same time Sachs J warned that “the State should, wherever 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.” The words of Poonan, JA in the de Lange matter bear a grain of truth: “...this matter was not for the courts, and that the sensitivity of the issues – church doctrine and governance related to marriage, a sacrosanct institution – were best left to the church to determine internally”.
- 5.7 It seems odd therefore that the Commission has ignored the warnings of the Courts ranging from Strydom (2009) all the way to de Lange (2016) and ventures into the domain domestic to the church in its doctrines that it seeks to regulate. The SCA in the de Lange case referred to this as “doctrinal entanglement’. This does

not mean that the state does not have a role in addressing any forms of wrongdoing or illegality that takes place within the activity of the church. It has done so in the case of Prince (2000), although with some hesitation. It can do so even in the matters that were the subject of enquiry by the Commission. The question has to be asked, “does the Commission manage or do enough to avoid “doctrinal entanglement?”

6 The Approach of the Church

- 6.1 The church has so far respectfully and in humility interacted with the Commission just as it should have. This response by the church Likewise must be couched in a respectful tone, not least because the Commission is a constitutional state body.
- 6.2 The church, however, must register its strong objections to the evident manipulation of religion suggested by the Report of the Commission. Certainly the church must raise its voice against the mala fides inherent in the manner in which the process has moved from the commercialisation of religion onto regulation of religion.
- 6.3 The church should advise the Commission that its objection is also based on the principle that the Commission itself has acted ultra vires, bordering on illegality and irrationality.
- 6.4 The Commission does not have any investigative powers or powers of enforcement. It is for that reason that s.7(1)(b) makes provision for the SAHRC to “maintain close liaison with institutions, bodies or authorities similar to the Commission...”
- 6.5 In any event, the church that is aggrieved on account of the violation of the individual rights to freedom of religion, conscience, belief and opinion, and the associational rights enshrined in s.31 of the Constitution has recourse to report to the Human Rights Commission.
- 6.6 On the matters that gave rise to the Commission undertaking the enquiry, the Anglican Church is very clear. It distances itself and views with abhorrence any of the acts reported to be religious practices in some pseudo---churches and sects. We believe that there is sufficient law, both in terms of criminal laws, the enforcement of municipal bye---laws, as well as violations of human rights in matters like rights to human dignity, to life, to freedom and security of the person and bodily integrity.
- 6.7 That can be done without casting a catch---all net that entangles the innocent in the net of acts for which our church is never likely to be found wanting.

- 6.8 We take seriously the high esteem, dignity, reputation and deep history of our church to be associated in this manner in the mischievous actions of people whose claim to practicing religion is at best dubious. We wish to be dissociated from religions of this kind.
- 6.9 In any event, should Parliament proceed to gazette an intention to legislate as proposed by this Report, we shall participate in any public consultations, even while reserving our right to take our objections to the highest court in the land.
- 6.10 If legislation along the lines suggested by the Commission is proceeded with, the church will petition the President not to sign the legislation as passed by Parliament.
- 6.11 A Constitutional Court objection would be a matter of penultimate resort.
- 6.12 The last resort must be defiance of an unjust law.

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