



Assessing the Human Rights Implication of Calls for Regulation of Faith-based Organisations in Africa

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Abstract

The critical role that religion plays in society is indisputable. However, along with the practice of religion has come controversial religious practices which have become a common feature in many societies across the globe, including those in Africa. Having religious leaders spray their followers with insecticide, lure them to eat grass and snakes, and have them drink petrol; are just the tip of the iceberg in as far as controversial religious practices are concerned. Not surprisingly, some states have adopted measures to respond to these practices, with others seriously considering drastic steps. In Rwanda, for example, over 8000 churches have thus far been shut down, with the government of Rwanda already in the process of enacting legislation to regulate the operation of faith-based organisations. In Botswana, the Enlightened Christian Gathering, operating under the leadership of renowned Prophet Shepherd Bushiri, was shut down in 2018, only for the decision to be appealed before the High Court of Botswana. South Africa's Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission) has not backed down on its proposals to have religious structures regulated. Amidst all these proposals, an issue that remains far from resolved is whether the said proposals would pass international human-rights law muster. This article resolves this issue in the negative. It effectively demonstrates that the current practice of the National Prosecuting Authority in South Africa is testament to the fact that existing legislation and structures can effectively deal with controversies pertaining to religious practices.

Keywords: controversial religious practices; human rights; religion; regulation; Africa

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1 INTRODUCTION

Religion remains a major component of the daily lives of most people across the African continent, and for many, it constitutes their very being. The benefits of religious structures, including their increasing role in stepping into the breach to address the gaps resulting from states' incompetence, is indisputable. In recent times, however, controversy has marred multiple religious structures, leaving many perturbed about their role in society. In March 2019, South Africa's media went abuzz with news of one, Pastor Alph Lukau, allegedly raising a man from the dead. It later turned out that the "resurrection" was a sham and in fact staged.¹ As it were, Pastor Lukau allegedly staged the act to exhibit his supernatural powers, with the intention to drum up more followers. This would not be the first incident of its kind in the context of South Africa. In 2010, Prophet Rabalago made news when the media published pictures of him spraying congregants with an insecticide commonly referred to as "Doom".² According to the said prophet, the Doom had healing power and was capable of casting out demons from those possessed by evil powers. Prophet Shepherd Bushiri, the religious head of the renowned Enlightened Christian Gathering, has reportedly hosted spiritual dinners at a price as high as R 25000 for those interested in sitting close to him during the said dinners.³ This, to some commentators, is extortion.⁴ Prophet Mnguni and Prophet Monyeki are both on record for allegedly feeding their followers snakes, and rat poison, respectively.⁵ Overall, from spraying congregants with Doom, to having them eat grass, cockroaches, mice, and drink petrol, it is clear that South Africa has had its fair share of controversial religious practices.

In Rwanda, the growing number of churches and mosques has raised the eyebrows of those in political leadership. Over and above religious buildings allegedly not complying with laws and construction procedures, the increase in the number of churches and mosques has been a cause for concern for the state of Rwanda. Paul Kagame, the president of Rwanda, exclaims in response to this increase as follows: "700 churches in Kigali?" He laments further: "Are these boreholes that give people water? I don't think we have so many boreholes. Do we have as many factories? This is a mess!"⁶ Not coincidentally, thus far, up to 8000 churches and 100 mosques have been shut down in Rwanda. The arguments advanced for such closure being, amongst others, that most of their buildings of worship are not up to architectural standards.⁷ Botswana has not lagged behind in taking drastic measures to respond to the controversial religious doctrines. In 2018, the Enlightened Christian Church of Prophet Bushiri was shut down on account of a number of controversial practices including its advancement of the gospel of "miracle money".⁸ This doctrine allegedly promised acquisition of money without followers having to work for it. In Uganda, suggestions to have faith-based organisations regulated are a major part of the state's agenda.⁹ These moves are not unique to Uganda, Botswana, Rwanda and South Africa. Controversial religious practices are abound across the African continent and beyond, with the above examples being far from exhaustive.

Deeply disconcerted by these incidents, states are deciding to take the bull of religion by its head, with some states going so far as to specifically regulate the functioning of religious activities and organisations. As apparent in Rwanda and Botswana, the state has responded by having some churches and mosques shut down. In Rwanda, legislation for the strict regulation of

1 SABCNews Online "Pastor Raising Man from the Dead a Hoax – Funeral Parlour", 26 February 2019, <http://www.sabcnews.com/sabcnews/pastor-raising-man-from-the-dead-a-hoax-funeral-service/> (accessed 6-5-2019).

2 BBC News "South Africa's 'Doom Pastor' Found Guilty of Assault", 9 February 2018, <https://www.bbc.com/news/world-africa-43002701> (accessed 6-5-2019).

3 Madibogo "'25k to Dine with Major 1' - Bushiri Slammed for Charging Congregants" <https://www.sowetanlive.co.za/news/south-africa/2017-12-15-25k-to-dine-with-major-1-bushiri-slammed-for-charging-congregants/> (accessed 6-5-2019).

4 *Ibid.*

5 eNCA "Prophet Feeds Snakes to Congregation" <https://www.enca.com/south-africa/prophet-feeds-congregation-snakes> (accessed 6-5-2019).

6 News24 "Rwanda Closes Thousands of Churches in Bid for more Control", 4 April 2018, <https://www.news24.com/Africa/News/rwanda-closes-thousands-of-churches-in-bid-for-more-control-20180404> (accessed 6-5-2019).

7 Woods "Why has Rwanda Closed 8,000 Christian Churches?" <https://www.christiantoday.com/article/why-has-rwanda-closed-8000-christian-churches/130243.htm> (accessed 6-5-2019).

8 BBC News "Botswana Shuts 'Miracle' Pastor Shepherd Bushiri's Church", 10 January 2018, <https://www.bbc.com/news/world-africa-42634112> (accessed 6-5-2019).

9 *Ibid.*

religious institutions is underway.¹⁰ In South Africa, calls for regulation of religious organisations continue to be tabled by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission).¹¹ Uganda has been considering a bill on the same issue.¹² These moves have caused mixed reactions from sections of people in society. In Rwanda, some followers consider the drastic steps taken by the state as harassment and an unreasonable limitation to their freedom of worship.¹³ Others in Rwanda, however, view the move by the state as noble.¹⁴ For this latter category, the state is merely looking out for its citizens and protecting them from exploitation by manipulative religious leaders. This latter standpoint would, however, stand to be questioned when viewed through the opinion of McKaiser who raises the issue whether the state has a duty to protect one from subjecting oneself to harm. He poses the question: “should you respect people’s autonomy even if they choose to put themselves in harm’s way such as giving away their life’s savings, drinking paraffin or allowing themselves to be sprayed by Doom?”¹⁵ Cyril Ramaphosa, the president of South Africa, has also weighed in on this debate. He takes the view that regulation of religion would be problematic.¹⁶ He, however, maintains that “bogus pastors” must be dealt with. One would, however, question – dealt with in what way? Considered together, as one can garner from this brief exposition, addressing these controversies remains an uphill task. Yet, states, on their part, seem prepared to take drastic steps including the closure of churches and strict regulation. But should one take a step back, would these measures be up to speed with international human-rights standards?

The purpose of this article, therefore, is to assess the implication of the steps taken (and those being considered) by the states in question, for prevailing international human-rights standards. The discussion will demonstrate that there are fundamental flaws in the proposals and steps taken by these states when viewed through the lens of international human-rights law – a lens through which states are bound to view these issues by virtue of their ratification of the various international human-rights treaties on religious rights. In conducting this analysis, the article will be divided into five sections. Following the present introduction, the second section breaks down some of the measures and proposals made by selected states in Africa. The third section maps out the parameters of the right to religion under international human rights law. It also draws on jurisprudence from regional human-rights systems, including the European human-rights systems which has dealt comprehensively with this right. In mapping out the contours of this right, the section also seeks to demonstrate the incompatibility of some measures and proposed measures with international human-rights standards. The fourth section draws on the current practice of South Africa’s National Prosecuting Authority, in particular, the charges being preferred regarding the controversial pastors in South Africa. The analysis in this section demonstrates that existing legislation constitutes a tool for dealing with the criminal aspects pertaining to the so-called “bogus pastors”. This, in the author’s view, constitutes a viable option as opposed to strict regulation, which, as will be demonstrated, has the effect of transgressing international human-rights standards in every sense of the word. The fifth section draws a conclusion, taking stock of the salient points made in the entire discussion.

10 Woods “Why has Rwanda Closed 8,000 Christian Churches?”.

11 Parliamentary Monitoring Group on Cooperative Governance and Traditional Affairs “CRL Rights Commission Report: Commercialisation of Religion & Abuse of People’s Belief Systems: Hearings Day 1” <https://pmg.org.za/page/CRL%20Rights?via=homepage-feature-card> (accessed 6-5-2019).

12 Watchman Ministries “Legal Brief on Uganda’s Proposed National Policy on Religious and Faith Based Organisations” <http://web.monitor.co.ug/Supplement/2018/12/Legal22122018.pdf> (accessed 6-5-2019).

13 Ssuuna “Rwanda Restricts Fasting as 8,000 Churches Closed: New Law Requires Pastors to Obtain Theology Degrees and Forbids Urging Lengthy Fasts”, 7 August 2018, <https://www.christianitytoday.com/news/2018/august/rwanda-churches-closed-fasting-restricted-rgb-religion-law.html> (accessed 6-5-2019).

14 *Ibid.*

15 McKaiser “Should the State Step in if People let Bogus Pastors Harm Them, asks Eusebius”, 1 March 2019, <http://www.702.co.za/articles/339672/should-the-state-step-in-if-people-let-bogus-pastors-harm-them-asks-eusebius> (accessed 6-5-2019).

16 SABC News “Ramaphosa Condemns what he Calls ‘Bogus Religious’ Leaders”, 28 February 2019, <http://www.sabcnews.com/sabcnews/ramaphosa-condemns-what-he-calls-bogus-religious-leaders/> (accessed 6-5-2019).

2 RECENT ACTIONS/PROPOSED ACTIONS ON RELIGIOUS PRACTICES: INSIGHTS FROM RWANDA, SOUTH AFRICA, UGANDA AND BOTSWANA

In recent times, states, including African ones, are responding varyingly to the structure and nature that religion, belief and conscience is taking in their respective states. Examples cannot be exhausted but a few shall suffice to place these responses into perspective. In Uganda, for example, a policy/ law has been under consideration. This policy is geared towards regulation of faith-based organisations.¹⁷ The government of Uganda is set to implement the said policy, by amongst others, requiring preachers to have theological training prior to establishing religious organisations. The reasoning behind this policy can be gleaned from the statements of Uganda's Minister of Ethics and Integrity, Father Lokodo, who contends that a number of religious leaders are leading their followers astray.¹⁸ Father Lokodo submits that some of the doctrine being preached is causing followers to take bizarre decisions including dropping out of school, disregarding science and hospitals, and selling property to enrich religious leaders.¹⁹ The minister considers the policy warranted on account of the multiple loopholes in the law that religious leaders are taking advantage of.²⁰ Whether these arguments warrant the strict regulation of religious rights is another issue altogether and will be briefly dealt with in the next section when these measures will be assessed against international human-rights standards.

On 27 July 2018, the parliament of Rwanda passed a law geared towards regulation of faith-based organisations.²¹ The law is yet to be assented to by President Paul Kagame. This legislation follows a decision by the Rwandan government to shut down about 8000 churches and 100 mosques for failure to adhere to certain structural standards.²² Multiple aspects are canvassed under the proposed law. Notable is the requirement for all religious leaders as well as their legal representatives to possess a bachelor's degree in theology from an accredited institution of higher education. Law makers have also considered barring religious leaders from urging congregants to fast for extended periods such as the forty-day fast akin to the Biblical fast undergone by Jesus.²³ This, they contend is not only harmful to life, but also, undermines fundamental human rights including the right to health. Of course, the argument has been advanced that the legislation seeks to ensure that religious organisations adhere to legal standards including those pertaining to the architecture of places of worship. In this regard, Shyaka, the head of the Rwanda Governance Board, submits that the law does not seek to target churches and religious groupings.²⁴ Various commentaries would, however, suggest that there is more to the said legislation. If anything, it does appear that Rwanda is out to interfere with the right to freedom of religion, thought and conscience. The Rwanda Governing Board, for instance, has noted that regulation, amongst others, seeks to address "troubling behaviour of unscrupulous individuals masquerading as religious leaders."²⁵ This Board has also taken issue with religious leaders, contending that they are forcing congregants to fast "to a point of death from starvation."²⁶ When interviewed by one of the local tabloids, Shyaka is on record for stating as follows: "We discovered that the number of churches were bigger than the number of villages in the country."²⁷ With these statements, it remains far from clear whether the real motive for the legislation is adherence to standards or discomfort with the proliferation of religious groups and their beliefs/ practices.

17 Watchman Ministries.

18 Gateway News "Uganda's New Policy Requires all Pastors to Obtain Theological Training", 5 December 2018, <https://gatewaynews.co.za/ugandas-new-policy-requires-all-pastors-to-obtain-theological-training/> (accessed 6-5-2019).

19 *Ibid.*

20 *Ibid.*

21 World Watch Monitor "Rwanda: Over 8,000 Churches Close After Gov't Passes Law Regulating Religious Groups", 28 July 2019, <https://www.christianpost.com/news/rwanda-over-8000-churches-close-after-government-passes-law-regulating-faith-based-groups.html> (accessed 6-5-2019).

22 Woods "Why has Rwanda Closed 8,000 Christian Churches?".

23 Ssuuna.

24 News24 "Rwanda Closes Thousands of Churches in Bid for more Control".

25 Ssuuna.

26 *Ibid.*

27 *Ibid.*

The move to close churches would not be unique to Rwanda. In 2018, Botswana, disconcerted by the religious practices and procedures of the Enlightened Christian Gathering, under the leadership of Prophet Shepherd Bushiri, took a decision to close down the said church.²⁸ The church was shut down for allegedly failing to adhere to the laws of Botswana. This allegedly pertained to the failure of the church to furnish the government with audited financial records.²⁹ Although on paper, the reasons for the closure of the said church were grounded in its failure to adhere to the law, commentaries surrounding such closure alluded to the fact that the doctrine advanced by Prophet Shepherd Bushiri was equally at play. The church, allegedly advanced the message of "miracle money", a gospel which allegedly promised believers money miraculously without having to work for it.³⁰ The church allegedly continued to advance this message despite warnings from the government to put an end to such doctrine. The drastic actions taken pertaining to Bushiri's entry into Botswana would be bizarre and equally put to question whether the real issue was actually regulation of religious organisations or doctrines. Notably, Bushiri was required to apply for a visa to enter Botswana despite him being Malawian and as such, exempt from applying for a visitors' visa by virtue of being a citizen of a state which is a member of the South African Developing Cooperation (SADC).³¹ Even assuming that Bushiri ran a church that was not adhering to the laws of Botswana, Bushiri as an individual is different from the church. Ideally, the ban ought to have been directed at the church as opposed to an individual.

In South Africa, reports of controversial religious practices ranging from spraying Doom, eating of snakes and grass, to allegedly resurrecting the dead, have left the CRL Commission with no option but to swing into action. The CRL Commission is a constitutionally established organ in terms of article 181 of the Constitution of South Africa. It is one of the chapter nine institutions. In terms of the South African Constitution, its objectives are:

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) 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.³²

It is based on the above mandate that this Commission has increasingly been involved and even entangled in controversies surrounding religious practices in South Africa. With increasing reports on controversial religious practices, the CRL Commission launched an investigative study on the commercialisation of religion in South Africa. In launching this study, the Chairperson of the Commission has underscored that the investigation seeks to address 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.³³

In the Commission's view, religion appears to have become a commodity for a few individuals to enrich themselves.³⁴ This, in the Commission's opinion, has been at the expense of the vulnerable in South Africa. Multiple concerns have been raised by the Commission including the subjection of congregants to religious practices and rituals that not only undermine human rights, but also, are unethical.³⁵ The Commission has also been critical of religious practices such as the use of TV slots to advertise religious organisations, religious products

28 BBC News "Botswana Shuts 'Miracle' Pastor Shepherd Bushiri's Church", 10 January 2018, <https://www.bbc.com/news/world-africa-42634112> (accessed 6-5-2019).

29 *Ibid.*

30 *Ibid.*

31 Generally, members of the SADC are not under obligation to apply for visitors' visas because of the cooperation that exists between the SADC countries. Some of the states forming the SADC are South Africa, Zimbabwe, Botswana and Malawi.

32 Section 185 of the Constitution of the Republic of South Africa, 1996.

33 CRL Rights Commission Report: Commercialization of Religion & Abuse of People's Belief Systems, 2017 www.crlcommission.org.za/.../Report%20On%20Commecialization%20of%20Religio (accessed 6-5-2019) (CRL Rights Report).

34 *Ibid.*

35 *Ibid.*

and advancement of the faith of religious groups.³⁶ It has also taken issue with the nature of doctrine advanced by religious groups, reporting that the doctrine, thoughts and beliefs advanced by fundamentalists persuaded followers to take bizarre decisions including refusal to send their children to school, not to open bank accounts and to give finances unrealistically to religious leaders and organisations.³⁷

The investigative study was followed by a report, with the CRL Commission calling for stricter regulation of faith-based organisations. It recommended, amongst others, as follows:

- 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.
- The Religion should have a significant number of followers that believe in and that adhere to the tenets of the faith.
- Religious peer review committees must represent the whole religious community and not just a portion of the religion.
- A General Religious Practitioner, being a person that imparts knowledge of the tenets of the faith to a gathering of worshipers, shall be required to obtain a license to operate.³⁸

The Commission continues to show cause for these recommendations to be adopted and effectively implemented. For example, following the allegations against Pastor Omotoso regarding his alleged sexual abuse of females in his church, the CRL Commission has bemoaned the laxity of South Africa's framework on religious organisations.³⁹ Members of the CRL Commission have consequently attributed acts such as those alleged against Omotoso to absence of strict regulation of religious organisations. The argument has been that were there to be strict regulation of religious organisations, religious leaders would not have taken advantage of congregants. The argument of the CRL Commission however remains questionable as it is hard to see how regulation would, of itself, address criminality in churches. It is against this backdrop that it is argued later in this article that recourse to already existing laws could constitute the most effective remedy to the criminality in churches. Similar arguments were advanced following the Ngcobo police massacre.⁴⁰ This incident occurred in the Eastern Cape in March 2018. Members of the Mancoba Seven Angels Ministry allegedly stormed a police station at Ngcobo and killed five police officers and a retired soldier. Although it is unclear whether the killings were inspired by the religious belief of this religious organisation, all the suspects were undoubtedly affiliated to the religious organisation.⁴¹ Commenting on these killings, the CRL Commission contended that the said deaths could have been avoided had religious organisations been strictly regulated.⁴² Whether the Commission's claims hold weight is an issue beyond the scope of this discussion. What is indisputable though, is that criminality is sometimes inspired by religious practices and beliefs. The CRL Commission, therefore, insists that regulation is warranted and is equally convinced that implementing the recommendations made in no way undermines the right to freedom of conscience, religion, thought, belief and opinion as guaranteed under both South Africa's Constitution and international law.⁴³

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 Simelane "Religious Rights Body Calls for Stricter Religious Regulation, Again", 28 February 2019, *The Daily Maverick*, <https://www.dailymaverick.co.za/article/2019-02-28-religious-rights-body-calls-for-stricter-religious-regulation-again/> (accessed 6-5-2019).

40 Pitt "CRL Rights Commission to go to ConCourt after Ngcobo Massacre", 26 February 2018, *Mail & Guardian*, <https://mg.co.za/article/2018-02-26-crl-rights-commission-to-go-to-concourt-after-ngcobo-massacre> (accessed 6-5-2019).

41 *Ibid.*

42 *Ibid.*

43 CRL Rights Report.

The comments made by members of this Commission, however, seem to leave open the question whether the recommendations made cut to the core of religious doctrine, belief, thought, conscience and opinion. The Commission, for instance, is concerned that some religious organisations are “cult-like”, many of them advancing “controversial” beliefs and practices.⁴⁴ For instance, the Chairperson of the Commission, Mrs Mkhwanazi-Xaluva, observes that most “reasonable religious leaders” would agree with the CRL’s aims.⁴⁵ Who a reasonable religious leader is, constitutes a question hard to answer. The Commission goes as far as to compare religious organisations and their practices to trades and professions such as the medical, nursing and legal professions as regulated by the medical research council, the nursing council and the law society, respectively. Mkhwanazi-Xaluva is of the view that if these other professions are regulated, so should religious organisations. Mkhwanazi-Xaluva also appears to be questioning the actual belief system of individuals.⁴⁶ This could be gleaned from her words: “we are against the promotion of fantasies.”⁴⁷ Similar sentiments are advanced by the Deputy Chairperson of the CRL Commission, Professor David Luka Mosoma, who is of the view that “South Africans believe too much in miracles.”⁴⁸ Of course, the recommendations made by the Commission were rejected by the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) particularly as it pertained to their constitutionality.⁴⁹ The issue of regulation is, however, far from being laid to rest as the COGTA made a number of recommendations in the place of those proposed by the CRL Commission. The COGTA recommendations, amongst others, vouch for self-regulation by religious groups.⁵⁰ The possibility of adopting a code of ethics to define acceptable religious practices was also considered by the COGTA.⁵¹ Generally, the issue of regulation of religion in South Africa remains in balance so much so that even with the COGTA’s rejection of the Commission’s recommendations, the CRL Commission refuses to back down on its calls for regulation. Considered together, calls for intervention into the affairs of religious organisations, their beliefs and practices is becoming a common feature in recent times. The question to be answered, however, is – are the interventions already in place, and those proposed, in accord with international human rights law? The next section engages with this issue.

3 MEASURING THE PARAMETERS OF THE RIGHT TO RELIGION UNDER INTERNATIONAL HUMAN RIGHTS LAW AGAINST CALLS FOR REGULATION OF FAITH-BASED ORGANISATIONS

International human rights law is a branch of international law, with states becoming bound by its standards by, amongst others, ratification of international human-rights treaties. The ratification of international treaties creates a binding obligation on states regarding the treaties that have been ratified.⁵² Upon such ratification, states are mandated to enforce the provisions of the treaty in question, in good faith.⁵³ Moreover, having done so, states cannot invoke the provisions of national law as a basis for failing to give effect to the provisions of a ratified treaty.⁵⁴ The right to freedom of religion, thought and conscience is entrenched in very strong terms under multiple international human-rights instruments. The Universal Declaration of Human Rights, though not legally binding, recognises this right as follows: “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

44 *Ibid.*

45 *Ibid.*

46 Simelane.

47 *Ibid.*

48 *Ibid.*

49 Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs, “Committee Report on CRL Rights Commission Report on Regulation of Religion and Abuse of People’s Beliefs”, 30 January 2018, <https://pmg.org.za/page/CRL%20Rights%20Commission%20Report?via=homepage-feature-card> (accessed 6-5-2018).

50 Parliament of the Republic of South Africa “Portfolio Committee on COGTA Meets with CRL Commission to Discuss Seven Angel Ministries”, 20 March 2018, <https://www.parliament.gov.za/press-releases/portfolio-committee-cogta-meets-crlcommission-discuss-seven-angel-ministries> (accessed 6-5-2019).

51 *Ibid.*

52 Article 26 of the Vienna Convention on the Law of Treaties 1969.

53 *Ibid.*

54 Article 27 Vienna Convention on the Law of Treaties 1969.

private, to manifest his religion or belief in teaching, practice, worship and observance.”⁵⁵ This right has been guaranteed in similar terms in other international and regional treaties including the International Covenant on Civil and Political Rights,⁵⁶ the African Charter on Human and Peoples’ Rights⁵⁷ and the European Convention of Human Rights.⁵⁸ There is no treaty in place specifically dealing with religion, belief or thought. There are, however, some declarations, notable being the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.⁵⁹ The hallmark of this declaration is the promotion of tolerance and prevention of discrimination on the basis of religion, thought or belief. The Declaration on The Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁶⁰ though equally non-binding, also constitutes a strong framework for the protection of individuals’ or groups’ religious rights.

The abovementioned international human-rights instruments may not be exhausted in a brief article such as this. Moreover, the phraseology of provisions contained in the above instruments is somewhat similar in many respects in terms of substance and content. As such, it would not be misleading to only make reference to one of the treaties. For this purpose, reference is made to the International Covenant on Civil and Political Rights (ICCPR), an international treaty that has a reasonable amount of ratification including by South Africa, Botswana, Uganda and Rwanda. The starting point therefore is that by virtue of South Africa’s, Uganda’s, Botswana’s and Rwanda’s ratification of the ICCPR, there is a corresponding obligation on them to enforce the provisions of the ICCPR on the right to conscience, religion and thought in good faith. This right is guaranteed under Article 18 of the ICCPR as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The Human Rights Committee has given meaningful content to Article 18 of the ICCPR in terms of General Comment 22 on the right to freedom of thought, conscience and religion.⁶¹ For emphasis purposes, the Human Rights Committee is the authoritative interpretative organ of the ICCPR and this task is executed through, amongst others, General Comments. The legal status of General Comments has been widely discussed in the literature and will therefore not be discussed in this article.⁶² Critical to note for purposes of this discussion, however, is the fact that General Comments are highly persuasive and carry profound weight in so far as the meaning of provisions of international treaties is concerned.⁶³ The entire General Comment on this right cannot be dissected as this would not only be impracticable but unnecessary. Thus, selected aspects of General Comment 22 are discussed, in particular, a few of those that speak

55 Article 18 Universal Declaration of Human Rights 1948.

56 Article 18 International Covenant on Civil and Political Rights 1966.

57 Article 8 African Charter on Human and Peoples’ Rights 1987.

58 Article 9 European Convention of Human Rights 1953.

59 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.

60 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.

61 UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, <https://www.refworld.org/docid/453883fb22.html> (accessed 7-5-2019) (General Comment 22).

62 Otto “Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?” 2002 *Canadian Journal of Women and the Law* 1 1–33; Keller and Grover “General Comments of the Human Rights Committee and their Legitimacy” in Keller and Ulfstein (ed) *United Nations Human Rights Treaty Bodies: Law and Legitimacy* (2012) 116–198 127.

63 Gerber and O’Byrne “General Comment 16 on State Obligations Regarding the Impact of the Business Sectors on Children’s Rights: What is its Standing, Meaning and Effect?” 2013 *Melbourne Journal of International Law* 1 1–36.

to the issues that this article seeks to resolve.

Apparent in General Comment 22 is the two-legged nature of the Article 18 right. Notably, this right encompasses the right to freedom of thought, conscience and religion on the one hand, and the right to manifest such conscience, thought and religion on the other.⁶⁴ The first leg is discussed first. In terms of General Comment 22, the right to freedom of thought, conscience and religion also includes the freedom to hold a belief or beliefs.⁶⁵ This belief can be held individually or collectively with others.⁶⁶ At the heart of the first leg is the fact that it "cannot be derogated from, even in time of public emergency."⁶⁷ The implication of this, therefore, is that however "bizarre" a thought, belief, or conscience may be in the eyes of "reasonable" members of society, the freedom to hold such thought, conscience or religion cannot be the subject of interference by the state. In essence, this right is absolute and as such, a freedom beyond the realm of state intervention, even in instances of public emergency. In terms of General Comment 22, Article 18 of the ICCPR "does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference."⁶⁸ In terms of this first leg, an individual equally enjoys the freedom to either retain their current religion, thought or conscience or to denounce it. It could be assumed that the right guaranteed under Article 18 only applies to theistic beliefs. With the scope of this right as envisaged by Article 18 and the Human Rights Committee, action by states including the tendency to label certain belief systems "fantasies" would appear to question the belief systems and religions of individuals, an arena that the Committee considers beyond the realm of state interference, however bizarre such belief system may be. Some congregants, as already alluded to, have been ridiculed for "believing too much in miracles." Again, such constitutes a belief system and however unusual it may be, the state is bound to respect, protect and guarantee such belief system from all forms of interference. Freedom of Religion South Africa (FOR SA), so aptly describes such guarantee, despite the "bizarreness" that surrounds certain belief systems, as follows:

The right to believe whatever one wants to believe, belongs equally to the pastor who believes that God can heal the sick, and to the 'pastor' who believes that a flower can turn to chocolate in a person's mouth. From a legal point of view, both should be free to believe, preach and teach, and practise that belief – without questioning, or interference by the State.⁶⁹

The tendency to reduce the Article 18 right to theistic beliefs to the exclusion of all others has also been common cause. But contrary to this tendency, General Comment 22 makes it explicit that Article 18 affords protection to theistic and non-theistic beliefs as well as the right not to have any belief or thought.⁷⁰ Discrimination on the ground that a thought, belief or religion is not theistic is not in accord with international human-rights standards. Pertinent also is the Human Rights Committee's cognisance of the inclination towards discrimination against newly established religions, beliefs or opinions or those that some members of society are generally not familiar with. On this issue, the Human Rights Committee passes sound caution, observing that "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."⁷¹ Narrowing the discussion down to responses by states, recent developments in South Africa would appear to lead to the conclusion that hardly any regard is being given to pagan, agnostic or atheistic belief systems. The South African Pagan Rights Alliance (SAPRA), for instance has been very critical of the proposals of the CRL Commission, with its leaders contending that hardly have they been consulted regarding the proposed recommendations despite the consequence that such recommendations would have on their belief systems as pagans.⁷²

⁶⁴ General Comment 22, para 1.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ General Comment 22, para 3.

⁶⁹ Freedom of Religion South Africa (FOR SA), "Why We Cannot Regulate Religion (Part 1)", 2 December 2015, <https://forsa.org.za/why-we-cannot-regulate-religion-part-1/> (accessed 7-5-2019).

⁷⁰ General Comment 22, para 2.

⁷¹ *Ibid.*

⁷² South African Pagan Rights Alliance "SAPRA Lodges Complaint against CRL Rights Commission with

The second leg of the right guaranteed under Article 18 is the notion of manifestation. In line with Article 18 of the ICCPR, the Human Rights Committee makes a distinction between the right to freedom of thought, conscience and religion on the one hand, and the right to manifest belief or religion on the other.⁷³ Religion or belief can be manifested in private or in public. One can also choose to manifest a belief individually or collectively with others. The Human Rights Committee gives a non-exhaustive list of conduct that could fall within the ambit of manifestation of religion or belief, including observance of holidays, wearing attire unique to a belief or religion, recourse to particular languages, ceremonial acts and rituals, construction of places of worship, use of symbols, objects and ritual formulae, teaching of beliefs or religion, appointing or choosing religious leaders, freedom to set up religious schools and to distribute and disseminate religious texts for a belief system.⁷⁴ Unlike the first leg of the Article 18 right, which, under no circumstance can be subjected to any form of limitation, the second leg on the manifestation of religion or belief can be subject to limitation. In terms of Article 18(3) of the ICCPR, such limitations have to be “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Despite Article 18(3)’s cognisance of limitation of the right to manifest religion or belief, the Human Rights Committee notes cautiously that this provision must be interpreted as strictly as possible to avoid rendering the right guaranteed under Article 18 illusory.⁷⁵ Moreover, for such limitation to be invoked, it has to have been prescribed by law.⁷⁶

Amidst such clear elaboration above, one garners that the concerns of some states are problematic as they unduly restrict the right to freedom to manifest religion. For example, the CRL Commission has taken issue with the dissemination of religious beliefs and materials through media and television broadcast.⁷⁷ Such dissemination is, however, recognised under international human rights law, of course, holding other factors such as adherence to media laws constant. In addition, the Human Rights Committee recognises the appointment of religious leaders as a form of manifestation of religion.⁷⁸ This then brings us to the requirement of religious leaders and their legal representatives possessing degrees in theology, as proposed in Rwanda and Uganda. This proposal could pose challenges. For example, some Christian religious groups subscribe to the view that entry into religious leadership and ministry is based on a calling.⁷⁹ Such, they quote, was the case for many biblical figures including Jesus, John the Baptist and the disciples of Jesus.⁸⁰ Degrees in theology, they would contend, could be desirable but making it mandatory would appear to delve into religious doctrine on what qualifies one to be a religious leader. Thus, in elevating academic qualifications to a mandatory requirement, the state appears to be seriously overstepping its boundaries and as such interfering with the religious freedom and the autonomy of the Church to administer its own dealings. Moreover, the Human Rights Committee, as well as Article 18 of the ICCPR make it clear that the restriction has to be based on a law of general application. Currently, although churches are being closed down in Rwanda, the closure is based on a law that has not been assented to by the president, thus, making the entire process problematic and illegal.

Case law abounds from both the Human Rights Committee and regional human-rights bodies on the nature and scope of the right to religion, thought and conscience. The European Court of Human Rights has underscored the critical role of this right in a democracy, also going as far as emphasising its application to non-religious beliefs. In *Kokkinakis v Greece*, this Court held that

freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries,

COGTA”, 25 February 2019, <https://www.paganrightsalliance.org/sapra-lodges-complaint-against-crl-rights-commission-with-cogta/> (accessed 7-5-2019).

73 General Comment 22, para 3.

74 General Comment 22, para 4.

75 General Comment 22, para 8.

76 *Ibid.*

77 CRL Rights Report.

78 General Comment 22, para 4.

79 Freedom of Religion South Africa (Part 1).

80 *Ibid.*

depends on it.⁸¹

The decision of the Court in this case not only underscores the critical role that religion plays, but also the pluralist nature of society in terms of belief systems. It will be recalled in the preceding section that a major concern in Rwanda was the increase in the number of churches, to a point of surpassing the number of its villages. That there are multiple belief systems too many for the state to contain, of itself is not supposed to be a concern for the state. If anything, it underscores the vibrancy of belief systems which, as the foregoing decision notes, is at the heart of a democratic society. Thus, comments such as these are not only judgemental, but also, fail to heed to a need to advance diversity and co-existence as expected in a free and democratic society.

As already alluded to, while the right to religion, belief and conscience remains absolute, manifestation is subject to limitation, with this limitation narrowly defined to avoid arbitrariness. The African Commission on Human and Peoples' Rights (ACHPR) has engaged with this notion in *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire, Communications*.⁸² In highlighting the preciseness of Article 8 of the ACHPR which guarantees the right to religion, thought and conscience, the Commission held that "the harassment of the Jehovah's Witnesses and religious leaders, including assassinations, destruction of religious structures and death threats" amounted to a violation of Article 8 of the ACHPR. The Commission reasoned that the government of Zaire "presented no evidence that the practice of their religion in any way [threatened] law and order."⁸³ From the foregoing decision, one can garner that the fact that this right can be subject to limitation does not mean that anything goes. If anything, the state has to adduce proper evidence to prove that the tenets enshrined in Article 8 are fully met, without which a violation can effectively be established. A common practice across all the examples given in the above section is to seek to regulate religion based on speculation. One can draw from the examples from the states above that calls for the regulation of the right to religion and belief are often anchored in arguments unrelated to the transgression of the law *per se*. In fact, some of the claims remain speculative. Concerns that congregants are being subjected to cultic and dangerous doctrine are often cited by those at the helm of proposed laws and regulations, yet, in some of these claims, there is hardly any evidence to show a nexus between the remedy proposed by the state and the challenges identified. One, for example, wonders how regulation of faith-based organisations would curb sexual abuse perpetrated by religious leaders knowing full well that this is an individual criminal act, already regulated by law. Viewed through the lens of the Human Rights Committee's standpoint to the effect that limitations on the right to manifest religion should be interpreted as restrictively as possible, the actions and proposals across most of the above named states would seemingly not hold weight.

The individual and communal nature of this right has equally been elaborated upon by case law. In *Kokkinakis v Greece*, for example, the European Court of Human Rights held that, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbor, for example through 'teaching', failing which, moreover, 'freedom to change (one's) religion or belief', enshrined in Article 9 [of the European Convention of Human Rights], would be likely to remain a dead letter.⁸⁴

The private, public, communal and expressive layer to the right to religion brings sharply into focus other guaranteed rights such as the right to freedom of expression and association and the right to freedom from discrimination on the basis of, amongst others, religion or belief. Thus, any limitation on the right to manifestation of religion or belief, if unjustified, would effectively undermine other internationally guaranteed rights. This position has been buttressed in case law including the case of *Metropolitan Church of Bessarabia v Moldova*,

81 European Court of Human Rights Case of *Kokkinakis v Greece*, judgment of 25 May 1993, Series A, No. 260-A, 17, para 31.

82 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire, Communications* 25/89, 47/90, 56/91, 100/93 (Zaire case).

83 Zaire case, para 45.

84 *Ibid.*

where the European Court of Human Rights ruled that

since religious communities traditionally exist in the form of organised structures, Article 9 [of the European Convention of Human Rights] must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion, which includes the right to manifest one's religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention.⁸⁵

This precedent brings into perspective the strict requirement, such as that proposed by Rwanda, to have all religious meetings conducted in structures adhering to certain architectural standards. While this would be a realistic demand and in fact reasonable limitation, it seems to miss the point that some religious organisations in fact do not make use of buildings. The doctrine of some religious groupings, for example, may demand of them to worship under trees. To insist on religious organisations acquiring buildings as places for worship prior to them obtaining a licence, as proposed by Rwanda, poses challenges to doctrine regarding preferred places of worship and also risks undermining other related rights including the right to freedom of expression and association. FOR SA so appositely captured the problematic nature of these demands, underscoring that "anyone is free to start a new church (whether in a building, a tent or under a tree) and invite others to be a part of such voluntary association of persons for religious purposes. This right to establish religious associations, assemble and secure premises for these purposes, is fundamental to the right to freedom of religion."⁸⁶

Case law has also mapped out the parameters of the notion of "manifestation of religion." A distinction needs to be made between conduct that is central to a belief or religion and that which is not. Notably, the right to manifest religion or belief cannot be stretched too far, as to encompass, for example, the dissemination of information encouraging females to not subject themselves to abortions. This right has to be balanced with other rights including reproductive health rights and in some cases limited. In this regard, the European Court of Human Rights, has in *Pretty v the United Kingdom*, held that not all practices motivated by belief or religion amount to religious practices for purposes of protection.⁸⁷ The Court drew inspiration from the European Commission of Human Rights decision in the case of *Arrowsmith v The United Kingdom* in which

the Court [did] not doubt the firmness of the applicant's views concerning assisted suicide but would observe that not all opinions or convictions constitute beliefs in the sense protected by Article 9 (1) of the Convention. Her claims do not involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance as described in the second sentence of the first paragraph.⁸⁸

The ACHPR has also weighed in, clearly drawing a line between the absoluteness of the right to belief, religion and conscience on the one hand, and the extent to which that right can be manifested. In *Garreth Prince v South Africa*, for example, a case regarding the use of cannabis and the Rastafarian religion, the Commission ruled, *inter alia*, that the right to manifest belief or religion "does not in itself include a general right of the individual to act in accordance with his or her belief. While the right to hold religious belief should be absolute, the right to act on those beliefs should not be. As such the right to practice one's religion must yield to the interests of society in some circumstances."⁸⁹ Indeed, not any form of manifestation stands to be protected under Article 18. Such, for example could be the case regarding the tendency by some religious leaders to urge their followers to eat snakes and to spray followers with insecticide. The issue that would fall to be resolved, however, would be whether such manifestation ought to be protected by regulation of religion. Could these controversial practices be dealt with by already existing legislation? This issue is dealt with comprehensively in the next section.

⁸⁵ *Metropolitan Church of Bessarabia v Moldova*, App. No. 45701/99, European Court of Human Rights, 13 December 2001, para 31.

⁸⁶ Freedom of Religion South Africa (Part 1).

⁸⁷ *Pretty v United Kingdom*, App. No. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, para 82.

⁸⁸ *Arrowsmith v the United Kingdom* App. No. 7050/75, 8 European Commission of Human Rights 1977, 123, 127.

⁸⁹ *Garreth Anver Prince v South Africa*, Communication 255/2002.

The issue of regulation of religion by way of registration and peer assessment has also been the subject of the European Court of Human Rights Jurisprudence. On the issue of registration, the European Court of Human Rights has ruled that registration, *per se*, does not constitute an unjustifiable limitation to the right to religion/belief or to manifest such religion/belief. Such limitation, however, constitutes a violation of this right if calls for registration and the registration process itself is arbitrary. Moreover, once such processes become a requirement, refusal to register an organisation needs to be justified. In *Regionsgemeinschaft der Zeugen Jehovas v Austria*, for example, the European Court of Human Rights found a violation of Article 9. In the Court's view, although the applicants could still exercise their right to exercise their religion, the fact that the authorities had failed to grant the applicants legal personality constituted a violation of Article 9 of the European Convention of Human Rights.⁹⁰ Of course, states can rely on arguments of public order and national security to refuse to grant religious groups registration. However, the European Court has made it clear that that refusal on these grounds does not have to be merely speculative and vague. Concrete evidence has to be adduced to this effect.

Considered together, restrictions on manifestation of religion or belief by laws of general application such as those requiring registration, do not *per se*, undermine the Article 18 right. Violations, however, arise when there is sufficient evidence to prove that the requirements for such restrictions such as public safety, order, health, or morals or the fundamental rights and freedoms of others, have not been met. Moreover, regulations taking the form of registration have to ensure state neutrality. On the issue of neutrality, the European Court of Human Rights has observed that Article 9 of the European Convention of Human Rights bars the state from questioning "the legitimacy of religious beliefs or the ways in which those beliefs are expressed."⁹¹ It followed, according to the Court, that the tendency to make the legitimacy of a particular belief or religion dependent on the will of another religious/doctrinal/ecclesiastical authority undermines states' duty of neutrality in so far as the right under Article 9 is concerned.⁹² In light of this decision, proposals for umbrella bodies and peer-review mechanisms come sharply into focus. The CRL Commission, for example, envisages that this could take the form of "a board or whoever who understands the religion itself, or how it should be working."⁹³ The Board would accordingly assess whether "this [particular belief, teaching or practice] is normal for us, and this is unusual."⁹⁴ Similar proposals are apparent in Rwanda's framework.⁹⁵ The challenge with these proposals, however, is that with a peer-review mechanism or umbrella system, certain religious groups will now be given power to decide what qualifies as a religious organisation or belief for purposes of registration. This could result into unintended limitations on religious rights. Based on this proposal, the bizarreness of certain belief systems, especially the non-traditional ones, could most likely render them unsuitable for recognition. This would in effect be discriminatory to minority and non-traditional religions, an issue that the Human Rights Committee sounds a strong warning against. Another recommendation of the CRL Commission is that "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."⁹⁶ Again, this is quite problematic as it could totally exclude recent religious doctrines, belief or thoughts, contrary to the Human Rights Committee's emphasis on the applicability of Article 18 to non-traditional religions. This seems unworkable and from an international human-rights law perspective, untenable.

Overall, case law cannot be exhausted. The bottom line, however, is that the right to religion and belief is absolute. Even though the right to manifest such belief or conscience can be restricted, the threshold for such restriction is extremely high as evidence (not speculation) has to be adduced to show that such restriction is a threat to public safety, order, health, or morals or the fundamental rights and freedoms of others. Of course, and undoubtedly so,

90 *Regionsgemeinschaft der Zeugen v Austria*, App. No. 40825/98, European Court of Human Rights, 31 July 2008, paras 66–69.

91 *Metropolitan Church of Bessarabia*, paras 101–142.

92 *Ibid.*

93 CRL Rights Report.

94 *Ibid.*

95 National Catholic Reporter "After Shuttering 700 Churches, Rwanda Proposes Stricter Clergy Guidelines" 12 July 2018, <https://www.ncronline.org/news/world/after-shuttering-700-churches-rwanda-proposes-stricter-clergy-guidelines> (accessed 7-5-2019).

96 CRL Rights Report.

heavy reliance has been made to jurisprudence of the European Court of Human Rights, the obvious question being the applicability of this jurisprudence to African states. Indeed, the jurisprudence arises from the Interpretation of the European Convention of Human Rights, a convention that none of the African states is party to. It is worth noting, however, that the phraseology of this right under the European Convention of Human Rights is very much similar to that under African regional human rights instruments such as the ACHPR and even the bill of rights of the constitutions of African states. The European Court's interpretation would, therefore be persuasive, even though not binding. Critical to note also is the fact that the practice of drawing inspiration from other international human rights systems has been endorsed by the ACHPR, a human rights treaty that South Africa, Uganda Rwanda and Botswana are party to. In terms of this Charter, recourse to other international human rights instruments and jurisprudence to give meaning to provisions of the ACHPR is endorsed.⁹⁷

It bears mentioning that the constitutions of most, if not all states in Africa, including South Africa, Uganda, Rwanda and Botswana entrench the right to religion, conscience and belief in very clear terms.⁹⁸ A perusal through the phraseology of this right under these constitutions would reveal that the content and substance of this rights is similar to its entrenchment under international law. For example, in terms of section 15 of the South African Constitution, this right is guaranteed as follows:

Freedom of religion, belief and opinion

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

The above provision can be read together with other constitutional provisions including sections 9 and 31 of the Constitution. In terms of article 31(1) "persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society." Section 9 of the Constitution prohibits any form of discrimination on the basis of, *inter alia*, religion, belief and conscience.

The courts in South Africa have also given meaning to this right in a number of cases. Notable is the case of *R v Big Drug Mart Ltd*, where Dickson CJC ruled that "the essence of the concept of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."⁹⁹ The critical role that religion and belief plays in the lives of individuals in a democracy was also expounded upon in *Christian Education South Africa v Minister of Education*, with Sachs J, observing that there can be no doubt that the right to freedom of religion, belief, and opinion in an open and democratic society contemplated by the Constitution is important ... For many believers their relationship with God or creation is central to all their activities ... Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.¹⁰⁰

Of course, as already noted, the right to hold a belief, religion and conscience is absolute under international human-rights law, however bizarre. A similar point of view has been underscored in the South African case of *Prince v President of the Law Society of the Cape of Good Hope*, where Dickson CJC observed that "Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational... The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular

97 See Arts 60 and 61 of the African Charter of Human and Peoples' Rights, 1987.

98 See section 11 Constitution of the Republic of Botswana 1996; art 37 of the Constitution of the Republic of Rwanda 2003; art 29 of the Constitution of the Republic of Uganda 1995.

99 *R v Big Drug Mart Ltd* 1985 1 SCR 295, para 92.

100 *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC), para 36.

practice is central to a religion ..."¹⁰¹ In light of the foregoing case, one is forced to pose and to question – wouldn't calls for regulation of religion including acts such as fasting, interfere with individuals' belief systems knowing full well that the notion of fasting is at the heart of several religious doctrines. Thus, to question its authenticity, going so far as to propose regulations and laws prohibiting extended periods of fasting does nothing more than question peoples' freedom of religion, belief and conscience.

Moreover, proposals have been made to regulate religion in terms of section 22 of the Constitution of South Africa, which provides that "every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." As Dickson CJC stated in the celebrated case of *Big M Drug Mart*, religion is a matter of faith and belief, with many holding it sacred. From a Christian religious point of view, some churches consider the notion of religion as a matter of faith. On the other hand, the professions that the CRL Commission compares religion to such as the medical, nursing and legal profession, apply standards and rules that are objectively established and as Henrico puts it, "readily capable of assessment in terms of whether a member or professional association is compliant."¹⁰² He contends, rightly so that "the same cannot be applied to religious institutions on account of the fact that the essence of what they believe (or worship) is not conducive to any stringent definition of what is logical, reasonable or rational. The freedom is spiritual in nature."¹⁰³ Not surprisingly, the FOR SA has not minced its words in critiquing the proposals by the CRL Commission, contending that despite the indisputable fact that scrupulous religious leaders loom large, "the scope of the investigation is overbroad and touches on matters of religious doctrine which are protected from State interference."¹⁰⁴ Overall, some of these proposals go to the heart of peoples' belief systems, making it increasingly clear that the right to freedom of religion would be undermined by these proposals.

4 THE NATIONAL PROSECUTING AUTHORITY MEASURES IN SOUTH AFRICA THUS FAR AS EVIDENCE OF THE VIABILITY OF RECOURSE TO EXISTING LEGISLATION AND FRAMEWORKS

Up to this point, the discussion has laboured to demonstrate that the proposals and steps taken, and those being considered by some states could be at odds with international human rights norms as well as the constitutions of these respective states. Indisputable, however, is the fact that the religious practices of some faith-based organisations have involved the transgression of the laws of these respective states including their criminal laws. Thus, if as consistently contended, some of the regulations considered or being considered by these states are problematic, how then are they to deal with transgressions of the law by the said controversial practices? This section engages with this question, with particular emphasis on the role of the National Prosecuting Authority (NPA) under South African law.

The NPA is a constitutionally established organ of state in South Africa. A similar framework is evident in Rwanda, Uganda and Botswana. In terms of section 179(2) of the South African Constitution, "[t]he prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings." Since as already alluded to, some of the alleged controversial religious practices have an element of criminality, these effectively fall within the mandate of the NPA. Notable are spraying of Doom on congregants, money laundering and sexual abuse. All these acts are, in one way or the other, already explicitly criminalised under South Africa's laws including the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Similar legislative frameworks are available in Botswana, Rwanda and Uganda.¹⁰⁵ All these states equally have legislation on a wide range of issues including broadcasting, media and architectural standards. It follows logically that in the event of transgression of the law, there is already a legislative framework in place to respond to such controversies. These laws would stand to be

101 *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC), para 97.

102 Henrico "Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom?" (2019) 22 PELJ 1 15.

103 *Ibid.*

104 Freedom of Religion South Africa (Part 1).

105 See e.g. Penal Code Act of Uganda Chapter 120; Penal Code Act of Rwanda 1977; Penal Code Act of Botswana 2 of 1964.

invoked since every action or omission in these states is subject to the constitution.

One of the American Supreme Court of Appeal cases so appositely captures the issue of applicability of general laws to faith-based organisations and religious practices. In *Employment Division v Smith*, this Court ruled, *inter alia*, that “the right to free exercise [of religion] does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”¹⁰⁶ By analogy, religious leaders in South Africa, Botswana, Rwanda and Uganda and their followers are not relieved of the obligation to comply with the criminal laws applicable to their land. The decision, of course, does not afford protection to the state in instances where the laws enacted are intentionally directed at a certain religious group, or, are religiously motivated, as it does appear to be the case regarding the proposed legislation and regulations in South Africa, Rwanda and Uganda.

Thus far, the approach of the NPA regarding the alleged criminality surrounding the alleged controversial religious practices is testament to the viability of recourse to existing criminal law legislation to address these controversies. It could, therefore, be said, that with the NPA’s current practice, a balance can be struck between addressing the concerns of the CRL Commission on the one hand and guaranteeing of international human-rights norms, on the other. Regarding the “Doom pastor” (Lethebo Rabalago), for example, existing legislation formed the basis for criminal proceedings against him for spraying his congregants with Doom. He was found guilty of contravening the Agricultural Stock Remedies Act, and assault with intent to cause grievous bodily harm.¹⁰⁷ Presently, Omotoso, a pastor who allegedly sexually abused some of his female congregants faces charges in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹⁰⁸ These and several other cases demonstrate that religious leaders and their congregants cannot hide behind the cloak of religion to transgress the laws of the land. In these instances, the law must be enforced. In light of the potential of organs such as the NPA, the CRL Commission has the option of referring cases which have elements of criminality to the NPA for further action.

5 CONCLUSION

Overall, this article set out to assess the implication of proposals by states to regulate faith-based organisations for international human-rights norms. The analysis has drawn on selected human-rights instruments and case law, and in so doing, demonstrated that such regulation not only risks undermining international human-rights standards and the very constitutions of these states, but also, is a demonstration of the aloofness of these proposals to the existing legislation and frameworks that can effectively address the so-called controversial religious practices. Insisting on regulation, when in fact, there is evidence that existing legislation and structures can be relied on to address the concerns of adherents of regulation of faith-based organisations would seem to suggest that the actual motive behind these laws and policies is not regulation but rather, a move to stifle the right to freedom of belief, religion, opinion and conscience. This, however, as already alluded to, would be at odds with human rights in every sense of the term. In conclusion, therefore, it is about time states stopped hiding behind the cloak of regulation. If the issue really is adherence to standards and ensuring that religious practices operate within the confines of the laws of a given state, then existing legislation can deliver on that.

¹⁰⁶ *Employment Division v Smith* 494 U.S. 872, 879 (1990).

¹⁰⁷ See the Stock and Agricultural Remedies Act 36 of 1947, which deals with pest control operators and the Criminal Procedure Act 51 of 1977 which is the general Penal legislation in South Africa. On the outcome of this case, see BBC News “South Africa’s ‘Doom Pastor’ Found Guilty of Assault”, 9 February 2018, <https://www.bbc.com/news/world-africa-43002701> (accessed 6-5-2019).

¹⁰⁸ News24 “Rape-accused Pastor Timothy Omotoso Back in Court”, 4 February 2019, <https://www.news24.com/SouthAfrica/News/rape-accused-pastor-timothy-omotoso-back-in-court-20190204> (accessed 7-5-2019).