

# When a Pastor Commits Criminal or Illegal Acts in the Name of “Religion”

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*By Daniela Ellerbeck, Legal Advisor to FOR SA*

The CRL Rights Commission’s report on the “*Commercialisation of Religion and Abuse of People’s Belief Systems*” identified certain abuses and malpractices that are taking place in the religious sector, and particularly in the Church.

This is the first in a series of articles that will look at the legal remedies that are available in South African law to address these abuses and malpractices. Since the vast majority of the abuses and malpractices identified by the CRL in their report and also reported on by the media, amount to acts that are already criminal or otherwise illegal in terms of existing law, we will start the series by looking at some of these instances.

## **A crime is a crime.**

Whether you are a pastor, a politician or a postman, everyone lives under the rule of law and the criminal justice system applies equally. A crime – even when committed under the cloak of “freedom of religion” – remains a crime. Churches and pastors have to operate under the rule of law, and if they contravene existing laws, they commit a crime.

It is also important to note that if one pastor commits a crime, it is possible that another pastor can be charged as a co-accused if that pastor for e.g. enabled the first pastor to commit the crimes (much like the person who drives the get-away car in a bank robbery, is also criminally charged as an accomplice), or if that pastor knew about the other pastor’s crime but said nothing or covered it up. Depending on the particular criminal or illegal act, it is also possible that the church itself can be criminally charged (e.g. for employing foreigners illegally, tax evasion etc).

## **Can I give someone permission to commit a crime against me?**

One of the common statements is that: “*It is not a crime if the victim is a willing participant*”. This is misleading because criminal law protects the public’s interests too, not just the interests of the “consenting” person. This means that the State has an interest in prosecuting all activities that are against the law, i.e. crimes.

By way of analogy, our law says that even if you specifically ask someone to kill you in the event of an assisted suicide, the person who kills you is still guilty of the crime of murder. The State (because it has a duty to protect the public interest) has an interest in bringing all criminals to justice for all crimes, even where your consent (e.g. to be killed) was to your own detriment.

In most cases, consent is not true consent because it is not given voluntarily. Rather, it is given as a result of coercion, for example where rogue pastors abuse their power and authority or commit fraud by misleading congregants about the results which will follow the act they are agreeing to. None of this is considered legally to amount to consent.

A dangerous superstitious practice does not become lawful simply because of consent.

[1] The general rule is that injuries (in e.g. initiation or religious ceremonies) may only be justified by consent where the injuries are small and/or inconsequential, and do not conflict with society's generally accepted concepts of morality, known as the *boni mores*.

An example of this would be male circumcision, a religious and cultural practice which is performed routinely in South Africa and (generally speaking) only inflicts small, inconsequential injuries that do not conflict with our society's *boni mores*. This can be contrasted with female circumcision – known as “female genital mutilation” or FGM – which is specifically prohibited by s12(3) of the Children's Act, 2005.

#### **Assault:**

By now everyone knows of the infamous “Prophet of Doom”, who sprayed his congregants with the pesticide Doom. Pastor Lethebo Rabalago was found guilty of four counts of assault with intent to do grievous bodily harm (“**assault GBH**”). (In addition, he was also found guilty of contravening the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947.) After due process of law, he was sentenced to an effective fine of R21 000,00.

Although his congregants had consented to let him spray them with Doom, this did not “immunise” him from being found guilty of having committed the crime of assault.

Other instances of assault (or potential assault) that have been documented in the media include the placing of heavy speakers on congregants' abdomens as they lie on the floor or locking people in deep freezers.

#### **Intimidation:**

Intimidation is a crime punishable with up to 10 years' imprisonment. The Intimidation Act, 1982 makes it a criminal offence to force someone to do (or not to do) something, by intimidating them with violence or threats of violence.[2] This does not change if the person who is doing the intimidating is the pastor.

#### **Drinking rat poison and other noxious substances:**

Pastor Light Monyeki allegedly told worshipers at the Grace Living Hope Ministries to drink water laced with the rat poison Rattex. Similarly, Prophet Bongani Maseko of Daveyton's Breath of Christ Ministries allegedly made his congregation drink engine cleaning fluid. When a pastor gives someone a poisonous substance to consume, he commits the crime of administering poison.

#### **Eating live snakes and other animals:**

Many will also remember the controversial "snake pastor", Penuel Mnguni, who fed live snakes to his congregants. The Animals Protection Act, 1962 makes animal cruelty a crime and imposes a prison sentence of up to 1 year.<sup>[3]</sup>

#### **When congregants go on a wild rampage:**

When a number of people commit serious violent acts that disturb the public's peace and security, they commit the crime of public violence. This year saw 23 congregants of the International Pentecostal Holiness Church in Limpopo arrested, after they went on a violent rampage where they assaulted each other and damaged vehicles. They were arrested for various offences, including the crime of public violence which carries a minimum prison sentence of 5 years.

#### **When stopping medicine causes death:**

When a pastor tells someone to stop taking their (e.g. anti-retroviral) medicine without advising the person to first verify with their doctor that they have been healed, and the person subsequently dies, the pastor was negligent because he owes a reasonable duty of care to his congregation because of his position of perceived authority. If this negligence subsequently causes their death, this is the crime of **culpable homicide**.

#### **Keeping children from school:**

Everyone will remember the "Seven Angels" tragedy in Ngcobo, Eastern Cape, where children were reportedly not allowed to attend school. This is a crime punishable by up to 6 months' imprisonment in terms of the South African Schools Act, 1996.<sup>[4]</sup> It is also worth mentioning that this case also involved sex trafficking, possession of illegal firearms, armed robbery and murder. This was evidently not anything that even vaguely resembles a church, but was in fact a criminal organisation.

#### **"But she said 'yes' to sex":**

Recently, numerous pastors have made headlines for allegedly committing sexual crimes such as rape or human trafficking. Amongst them are James Thubakgale, Angel Bazuuka and Timothy Omotoso of Jesus Dominion International Church. Irrespective of who commits a rape, it remains a crime. As explained above, unless someone voluntarily consents to something (in this case sexual intercourse) it is not true consent. In such cases, the issues of coercion and abuse of power are paramount. If someone "consents" to sex because they believe that if they don't, something bad will happen to them, it is not true consent. It is then a case of **rape**, which carries a minimum sentence of 10 years.

### **Sexual Assault:**

Unwanted sexual acts that fall short of penetration (which would be rape) are known as the crime of sexual assault. Instances of prosecution for sexual assault include the prosecution of pastor Timothy Omotoso for allegedly sexually assaulting Cheryl Zondi, one of his congregants.

### **Laws against Abuse:**

If a pastor (or certain other persons identified by s 110 of the Children's Act, 2005) on reasonable grounds believes that a child is being abused (e.g. that a member of his congregation is sexually assaulting a minor), and he/she fails to report this suspicion to the police, he/she is breaking the law and guilty of an offence.

The Domestic Violence Act, 1998 deals with domestic abuse, i.e. abuse that takes place where parties are in a "domestic relationship" with one another. In terms of the Act, a "domestic relationship" includes where people share(d) the same residence (e.g. where the pastor and one/more of his congregants stay under the same roof). The Act protects not only against physical abuse (which would be the crime of **assault**), but also includes amongst other things, emotional, verbal and psychological abuse, **intimidation** (which is already a crime as discussed above), harassment (i.e. a pattern of conduct that induces the fear of harm) and controlling behaviour that causes imminent harm to the safety, health or wellbeing of the person.

The Domestic Violence Act allows for the issuing of a protection order (a type of interdict) by the Court, and for a warrant of arrest (to be used by the police if the abuser breaks the protection order). The Act also gives the police the power to remove any weapons the abuser may have. Should an abuser decide to break the protection order, they can face up to five (5) years' imprisonment.

### **Laws against Commercial Crimes:**

Pastors have also been in the headlines for commercial crimes. A recent example is the arrest of Prophet Bushiri and his wife by the Hawks on charges of money laundering.

**Money laundering** is the crime of trying to make "dirty" money (i.e. money you obtained from illegal activities) appear "clean" (i.e. as if it was obtained legally). An example would be where the Mafia recorded the money they made from selling drugs (dirty money) in the books of a laundromat they owned, as if the money was the proceeds of dry cleaning (clean money).

Similarly, just being in the **possession of proceeds of unlawful activities** is a crime, as is **assisting someone to benefit from the proceeds of crime**.

All of these commercial crimes are punishable by up to 30 years in jail under the Prevention of Organised Crime Act, 1998.

Equally, the same legal principle that applies when a pastor fails to report the suspected abuse of a minor also applies when someone fails to report a commercial crime such as

theft, fraud and forgery to the Police.[5] Such failure to report is also an offence.

#### **Failure to pay taxes:**

The Tax Administration Act, 2011 deals with the penalties imposed for various forms of tax offences and understatements (e.g. misrepresentation made in your tax return).

Pastors, like every other person who earns enough to qualify as a tax payer, must pay income tax[6] (PAYE). Should a pastor misrepresent to SARS regarding his/her annual income, he/she becomes liable to pay not only the tax he/she rightfully owes, but also a penalty.[7] If he/she is guilty of intentional tax evasion, this penalty can be up to 200% of the difference between the correct amount of tax he/she should have paid, and the amount of tax the pastor would have paid had he/she not been caught.[8]

To be tax exempt, churches must be registered as public benefit organisations (PBOs) with SARS' tax exemption unit, otherwise they are taxed like normal companies.

#### **No, or the wrong, visa:**

A foreign pastor who leads a church i.e. works while being in the country on a visa that does not allow him/her to work (e.g. a visitor's visa only without an endorsement to work), contravenes the Immigration Act, 2002. This contravention can land him/her in jail for up to 7 years,[9] or be deported back to his/her country of origin.

#### **Conclusion:**

As can be seen from the above, South Africa has well-developed existing laws to deal with criminal or otherwise illegal acts committed in the name of "religion". In such instances, the State has a duty to intervene and would indeed be remiss in its duty if it does not.

Anyone (a congregant, an outsider, another church or religious organisation, even the CRL Rights Commission itself) who is aware that such acts are being committed, or who has reasonable grounds to believe that such acts are being committed, can lay a charge with the Police or relevant authorities. Once the Police are made aware that a crime has been committed (i.e. when someone make a report), they then have a duty to investigate the complaint. If the Police has reasonable grounds to believe that a crime was committed, the matter is handed over for prosecution by the State.

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[1] In *R v Sikunyana* 1961 (3) SA 549 (E) at para 82, X burned Y's head and body with live coals in order to exorcise an evil spirit. The Court held that "*a dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person*". And in *R v Phiri* 1963 R&N 395 (SR) where a witchdoctor inflicted "*serious and long-lasting injuries*" with a razor blade on a whole family in order to make them strong and rich and to heal a sick child, where the sick child was too young to consent, the Court was not prepared to recognise its parents' consent.

- [2] Section 1(a) of the Intimidation Act 72 of 1982 makes it a crime to intimidate someone by assault, injury or damage to property, or to threaten them with death, assault injury or damage to property.
- [3] Section 1(r) of the Act makes it a crime to unreasonably cause unnecessary suffering to any animal.
- [4] Section 3(6)(b).
- [5] Section 34 the Prevention of Corrupt Activities Act 12 of 2004.
- [6] Section 5(1)(c) of the Income Tax Act 58 of 1962.
- [7] Section 222 of the Tax Administration Act 28 of 2011.
- [8] Section 223 of the Tax Administration Act 28 of 2011.
- [9] Section 49(16)(a) of the Immigration Act 13 of 2002.



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# When a Pastor Makes Fantastical and False Claims Or Promises

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*By Daniela Ellerbeck, Legal Advisor to FOR SA*

This is the second article in our series that looks at the legal remedies available in South African law to address the abuses and malpractices identified by the CRL Rights Commission (CRL) in their report on the *“Commercialisation” of Religion and Abuse of People’s Belief Systems*. In our [first article](#), we looked at some of the existing laws where a pastor commits a criminal or otherwise illegal act.

In this article, we will look at the legal remedies available where a pastor, often in exchange for money, makes certain fantastical and false claims or promises to his/her congregants. However, this must always be balanced by the freedom of religion rights enjoyed by both the pastor and the congregation to exercise and practice their faith and to believe, even if such belief is “bizarre, illogical or irrational”. As such – and even though this article uses “blessed Vaseline” as an example – it is not intended to draw the conclusion that the selling of “faith products” is necessarily illegal or unlawful. Many churches and denominations sell such products, ranging from rosaries to anointing oil to “holy water”. Rather, it depends on the related claims and promises that are made relating to the properties of such products.

## **When there’s difficulty in differentiating between your pastor and your local magician:**

Extravagant claims by “holy” men is not just a South African phenomenon: A Ghanaian pastor has recently claimed he has performed [more miracles than Jesus](#), while Zimbabwean pastors have made headlines for [blessing condoms](#), [talking to God on a cell phone](#), and even for [selling tickets to Heaven](#).

In South Africa, pastors have made front pages for making all kinds of fantastic claims and promises if you pay money to make use of their (religious) services or products.

Some churches even sell various “good luck” or “faith” products that have been prayed over and blessed by the pastor, such as “holy” water, oil or Vaseline (page 31 of the CRL’s Report).

Prayers and blessings are sold with people being asked to pay large amounts of money before a prayer or blessing will be said over them (page 31 of the CRL’s Report), or [to](#)

watch the pastor perform a miracle. At R5000 a ticket, women who would like to get married are encouraged to attend a conference where the pastor will anoint their ring finger and Mr Right will appear in just 3 months!

Recent media headlines featured exposés on fake resurrections and churches where people were hired to participate in faking miracles, such as a healing, after the pastor prayed for them.

Pastors are persons in an office of trust who are Biblically mandated to be above reproach (1 Timothy 3:2-3). It is therefore disgraceful that any pastor would abuse the trust that they've been given to exploit the poor and vulnerable for selfish gain. The question is: can anything be done to stop these pastors from making such (potentially false) claims and promises?

In this regard, it is important to note that when a pastor or church communicates in a way that (a) brings a good or service they are offering (e.g. "good luck" Vaseline, or a guaranteed husband if they anoint your ring finger) to people's attention and (b) encourages their congregants or the public to make use of it, the pastor or church is in fact, *advertising*.

This might come as a surprise to some, but such claims are subject to the Code of Good Advertising Practice, the Consumer Protection Act, 2008 and the common law. Whether you are a pastor, a politician or a postman, we are all equal before the law.<sup>[1]</sup> Everyone lives under the rule of law and the law applies equally to all. This includes the advertising and consumer protection laws.

### **The Code of Good Advertising Practice:**

The Code deals with anything that appears in the media that aims to promote the consumption or use of goods or services, or the support of a cause. It therefore applies to non-commercial organisations (i.e. churches) and individuals (i.e. pastors) promoting their religious services or products too.

The Code requires that all advertising should be legal, honest, decent and truthful, with a sense of responsibility towards the people exposed thereto. Hence, no advertisement may be offensive to the public or abuse the trust, gullibility, lack of knowledge and/or experience, of the person exposed to it.

It requires that if a pastor makes a claim on television, a billboard or a flyer that the Vaseline he has prayed over will bring you good luck, he needs to have documentary evidence to back up that claim. It specifically requires that when it comes to superstition or beliefs, an advert should not imply that a product can affect the user's circumstances, unless the claim can be substantiated.

The Code is administered by the Advertising Regulatory Board (ARB) which deals with complaints of an alleged breach of the Code. Anyone (including therefore a congregant, another religious organisation, a member of the public or even the CRL itself) can lay a complaint. In the vast majority of instances where advertising is found to contravene the Code, the ARB will require that the advertisement either be withdrawn or that it be



corrected. Although the ARB does not have jurisdiction over people and/or entities that are not voluntary members of it, **broadcasters (television and radio stations) are bound by its decision** and will in all likelihood stop the broadcasting of advertisements that contravene the Code.

### **The Consumer Protection Act:**

The Consumer Protection Act, 2008 goes further than the Code of Good Advertising Practice and defines advertising as **any communication** by which a person or organisation (including therefore a pastor, or a church) seeks to bring goods or services to people's attention and promotes the use thereof.[2]

Many of the above instances – selling tickets to Heaven, and promising marriage, wealth or healing in return for money – are acts of advertising that are (potentially) in breach of the Act.

The Act says that no one must advertise any good or service in a way that is in any way deceptive, misleading or fraudulent regarding the advantages of using the good and/or service, or its nature and properties.[3]

This means that if a pastor sells his congregants Vaseline and tells them it will bring them good luck because he has blessed it, the pastor is breaking the law because he is misleading his congregants to believe that using this particular Vaseline has certain advantages and possesses different properties to those typically claimed by Vaseline.

The Act also prohibits what it calls "*unconscionable conduct*".[4] This includes the use of undue influence (e.g. the use of fake miracles during a church service) by a supplier (i.e. a pastor) on a consumer (i.e. a congregant) when marketing their goods and/or services (i.e. his miracle working powers).

The Act also prohibits false, misleading or deceptive representations.[5] Stated in another way: a pastor may not (either through his words or conduct) express or imply a false, misleading or deceptive representation concerning a material fact of his product or service that he is marketing. This means that if the pastor exaggerates the benefits of using his Vaseline, which he has prayed for and is trying to sell to his congregants or the public in general, he is breaking the law. The same applies if the pastor can see that someone misunderstands the benefits of using the "blessed" Vaseline, thinking it will cause them to have good luck, and he fails to correct them.

If found guilty of a breach of the Consumer Protection Act, the pastor can face civil remedies such as being ordered by a court to pay someone back their money,[6] and the **National Consumer Commission** can even refer the matter to the National Prosecuting Authority (NPA).[7]

To lodge a complaint with the National Consumer Commission, visit their website and complete the following **form** and send it in to the Commission. The National Consumer Commission, after assessing the complaint, may refer it to the provincial consumer protection authorities in the province where the complaint emanates from, for a speedy resolution.

## Fraud:

Lastly, there is a case to be made out that, even if the pastor does not charge someone money (i.e. he is not selling his products or services to someone, so neither the Code of Good Advertising Practice nor the Consumer Protection Act applies), but he intentionally causes you to believe something which he knows to be false, he should be prosecuted for the common law crime of **Fraud**. In the case of **Alph Lakau**, he has been charged with / is under investigation for fraud for allegedly falsely claiming that he raised a person from the dead.

Fraud is when a person unlawfully and intentionally makes a misrepresentation which causes someone else prejudice. In other words, a pastor intentionally lies to someone (either expressly or impliedly by either his words or conduct) and causes that person to mistakenly believe something which is false, causing them harm. The mere telling of a lie is therefore not fraud, but it is committed when a lie causes the person some form of harm.

By way of example, let us consider a “fake resurrection”, where a person attends a church on a Sunday and the pastor intentionally pretends to successfully raise someone from the dead. Clearly, the pastor is lying and causing his congregants to mistakenly believe that he has resurrected someone, but what harm has he caused them?

When it comes to harm, the Supreme Court of Appeal (SCA) in Bloemfontein has said that: *“To constitute prejudice, actual or potential, the false statement must be such as to involve some **risk of harm**, which **need not be financial** or proprietary, but **must not be too remote or fanciful**, to some person, **not necessarily the person to whom it is addressed.**” (R v Heyne, 1956).* In other words, the harm the pastor’s lie causes does not need to be financial – and it does not even need to be that the harm is caused to the congregants themselves.

In the same SCA case, the Court said: *“**That a charge of fraud may be supported by an allegation of prejudice to the State is clear... The State, on the other hand, has interests peculiar to itself. It is unnecessary in the present case to hold that prejudice to the State’s interest in upholding the law will always be sufficient... State as society’s guardian has a special interest... False representations, calculated to weaken that control by deceiving the police, are also calculated to harm the State really and not only theoretically. The requirement of prejudice is thus satisfied by the risk of harm to the State and it is unnecessary to consider the cases of the other persons and bodies who, it is alleged, might be prejudiced.**”*

In **S v Minnaar**, the Durban High Court has also said that harm can be against the State itself: *“A **misrepresentation** which resulted in the subversion or **potential subversion of a policy deliberately formulated by the State... was, by virtue of that fact alone, prejudicial or potentially prejudicial to the State** or to that public body....The State (and any other public body) had the **right to formulate and execute such policies as it saw fit in the public’s best interests** and any misrepresentation which caused it to depart from those policies was prejudicial because it hampered it in the exercise of that right”.*

The argument to be made therefore, is that the State has explicitly formulated the most pre-eminent public policy of all in the form of the Constitution. It therefore has a special interest peculiar to itself that its citizens are able to exercise their fundamental rights found in the Constitution without being subjected to misrepresentations. (The applicable rights in this context are found in sections 15 and 31 of the Constitution. Section 15 guarantees the right to freedom of religion, belief and opinion. Section 31 guarantees the right of religious communities to practise their religion.) As such, the State suffers prejudice (as society's guardian) when these rights are abused by a pastor who intentionally misrepresents miracles etc. to their congregants. It is therefore very possible that the National Prosecuting Authority (NPA) will be successful in prosecuting such a pastor for the crime of fraud.

### **Conclusion:**

In view of the above, it is clear that the South African legal system is well developed and that suitable remedies exist that offer a wide range of solutions to the problem of false advertising and fraudulent promises by some pastors. False advertising does not become true because it is the pastor who does so, or because it happens in the name of "freedom of religion". The law is the law, and anyone (a congregant, another religious organisation, a member of the public or even the CRL itself) who becomes aware of such conduct, has the right to lay a complaint against such a pastor or church with the relevant authority.

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[1] Section 9(1) of the Constitution of the Republic of South Africa, 1996.

[2] Section 1 of the Consumer Protection Act.

[3] Section 29 of the Consumer Protection Act.

[4] Section 40 of the Consumer Protection Act.

[5] Section 41 of the Consumer Protection Act.

[6] Section 52 of the Consumer Protection Act.

[7] Section 73 of the Consumer Protection Act.



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# When a Pastor Does Strange (but not Harmful or Unlawful) Things

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This is the third article in our series on the legal remedies available in South African law to address the abuses and malpractices identified by the CRL Rights Commission (CRL) in their report on the *"Commercialisation" of Religion and Abuse of People's Belief Systems* (the Report). This article focuses on the strange things that are neither harmful or unlawful, but which have made media headlines repeatedly, such as pastors who make their congregants **eat grass** and **flowers**.

Significantly, neither of the above practices are harmful (unless the flowers are poisonous), nor are they illegal. However, they are certainly unusual and do not conform to any traditional practice or expression of evangelical Christianity. (While such incidents are perpetrated by fringe elements of the Christian faith, it is worthwhile remembering that any solution will be applied to all faiths and all expressions of those faiths, equally!).

## **Religious freedom includes the "bizarre, illogical or irrational"**

It is therefore worthwhile pausing for a moment to consider a very important question: *"Should the State intervene and shut down pastors or churches who deviate from 'acceptable' religious practices?"*. Many pastors would say "yes" because they are understandably offended by someone who – in the name of their faith and religion – does something which brings the entire Christian faith into disrepute and public ridicule.

However, it is important to understand that although this may be true, the Constitutional Court (in the case of *Prince v President of the Law Society of the Cape of Good Hope*) has already ruled that people are entitled to believe something even if that belief is "bizarre, illogical or irrational", and are further allowed to give expression to such beliefs by being allowed to practise them. As such, they are protected by section 15(1) of the South African Constitution which declares that *"everyone has the right to freedom of conscience, religion, thought, belief and opinion"*

This decision reinforced and settled a very important legal principle, which is that freedom of religion is doctrinally and theologically neutral. You are therefore entitled to believe whatever you want to believe (or to believe nothing at all) as long as what you

do to express that belief, remains lawful. So while there may be some beliefs or practices that others do not like, understand, agree with or find deeply offensive – as long as these beliefs and practices are not unlawful, potentially dangerous and / or harmful, people have the right to believe such things and to put their beliefs into practice. A case in point would be a pastor who claims that since Jesus could turn water into wine, he has been given the power to turn flower petals into chocolate. Having put our theological lens aside (because this is clearly not a traditional practice of the Christian faith), we need to ask whether what he is proposing is illegal or harmful. The answer would almost certainly be “no” because even some exclusive restaurants decorate the dishes they serve with flower petals. So while it may be offensive to the widely accepted understanding of the Christian faith, it would be protected under the Constitution.

However, let us suppose that the CRL succeeds in having legislation passed empowering them to grant licenses to every religious practitioner, church and organisation. They would have the power to appoint a group of senior Christian leaders to a top tier structure called the “Peer Review Committee”, who in turn would evaluate all aspects of the practice of the Christian faith to ensure that these are “acceptable”. It is highly likely in the “flower petals to chocolate” case, this Committee would rule that such a practice is unacceptable and a likely remedy would be that unless the pastor/s concerned stopped this practice, their license/s would be removed and (potentially) their church/es shut down.

Many might applaud this decision, but the principle behind it and the precedent set by it would then have to be applied to all other similar situations. For example, if claiming that petals turn to chocolate carries this level of sanction, what about churches who believe that when you take a wafer and a sip of wine at communion it turns into the actual body and blood of the resurrected Christ? Logic, fairness (and possibly at that point, the law), would dictate that this should also be banned and shut down. It is therefore vital to consider what has been called “the law of unintended consequences” when dealing with the critically important issue of freedom of religion or there is a grave danger of people’s rights being trampled underfoot. Once the State (in particular) has been given the power to align and back with the full force of law any particular group of religious belief or expression, history has shown that the results are always disastrous for religious freedom.

### **Indecent behaviour**

However, when things start to move into areas where they border on the indecent – such as the instance of the Ghanaian pastor **wrapping his leg around a woman** while praying for her, or of a Pretoria pastor **telling his congregation to strip**, or of **people crawling on the floor after their pastor** – one has to wonder what can be done.

The first place to start is to recognise that we cannot protect people from their choices: we cannot tell people who to marry, which political parties to vote for, or not to drink or gamble. The same goes for what people choose to believe and practice – as long as it does not break the law, it is permissible.



Nevertheless, there is a point where the law can (and should) intervene because the State has a responsibility to uphold the rule of law, even if an individual has apparently willingly chosen to subject themselves to having an illegal act perpetrated against them. An extreme example – which makes the point – is that no matter how depressed I may be and no matter how much I may want my life to end, if I give someone permission to shoot me to put me out of my misery and they proceed to do so, they would be unable to use this permission to defend a subsequent charge of murder. This example also demonstrates that it is not necessary to have a “victim” making the complaint since in the case of a murder, the victim is clearly incapable of doing so. It is the State that has this duty to enforce the law. (The legal consequences of when a pastor commits a crime in the name of religion are fully canvassed in our [first article](#) in this series.)

When it comes to indecent behaviour that sparks the public’s moral outrage, the common law crime of *public indecency* may offer a solution. The crime of public indecency will need to be re-interpreted, but it is possible that behaviour which offends society’s good morals will fit within this crime. The possibility, therefore, exists that even someone who merely saw the behaviour can lay a charge with the SAPS or a complaint with the South African Human Rights Commission (SAHRC).

To commit the crime of public indecency, you have to *intentionally do something in public* (this does not require that conduct needs to take place in a public place, as long as it is perceived by members of the public) *that outrages the public’s sense of decency*. In other words, the perpetrator must know his conduct is public and that it outrages the public’s sense of decency.

Historically, public indecency has been understood as a crime for indecent exposure and/or having sex in public, and as such, it will need to be reinterpreted. Whether courts would be prepared to re-interpret the crime’s elements to fit the aforementioned examples of a pastor [wrapping his leg around a woman](#) or [telling his congregation to strip](#) or (as reported in Kenya) where a pastor [publicly touched a woman’s breasts](#) etc. is another question. It can therefore be argued that where conduct infringes the participants’ dignity to such an extreme level that the public is outraged at the infringement and transgression of decency, they can demand that it should be criminally prosecuted and if, after due process the perpetrator is found guilty, he/she should be punished under the law.

## Conclusion

*Freedom of Religion South Africa (FOR SA)* has consistently argued that there is a highly developed and wide-ranging rule of law which governs all who live in South Africa. These laws (and the legal system and process which enforces them) therefore have the capacity to deal with any issue where any form of the illegal or harmful act is being perpetrated. It is worthwhile repeating that you cannot hide an illegal act behind “freedom of religion”. A crime is a crime and must be dealt with as such, whether it is committed by a pastor, a postman or a politician. The problem in many cases is that these laws are not being adequately enforced – but where they are (as in the case if the



so-called “Prophet of Doom” who was convicted on five counts of assault and sentenced to three years in jail or an R30 000 fine for spraying congregants in the face with dangerous insecticide) they prove effective and they resolve the problems.

When it comes to practices that we may find strange, but that are not of the extremely indecent type discussed above, and which are not harmful or unlawful, it is important to remember that religious freedom means that people should be allowed to practise their beliefs, no matter how *“bizarre, illogical or irrational”*. No doubt early Christians who practised communion (where the wine represents Jesus’ blood and the bread his body) were seen as very strange. Giving the State the power to limit the religious freedom of such people because their religious practice is not deemed *“acceptable”*, will only serve to limit your own right to religious freedom when the cultural tides turn to such a point that your own religious practice is seen as being *“unacceptable”*.



Daniela is a duly qualified Attorney of the High Court of South Africa. She obtained a BCom LLB degree from Rhodes University. Daniela first worked for Médecins sans Frontières before completing her articles of clerkship at G van Zyl Attorneys, where she stayed on after being admitted as an attorney and practised, specialising in litigation. Daniela has loved Jesus since she was young and is a member of a local church in Cape Town where she is actively involved.

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Freedom of Religion South Africa (FOR SA) is dedicated to protecting and preserving the freedoms and rights that the South African Constitution has granted to the faith community. You can help FOR SA protect our freedom by:

- **Making a financial contribution to FOR SA** at <http://forsa.org.za/donate/> As a non-profit organisation, we are entirely dependent upon God’s grace for finances. Your generosity will help make a significant difference as we work to fulfil our mission to keep the Gospel free by advocating for religious freedom. We appreciate every gift, big or small!
- Signing up (at no cost) to FOR SA at <http://forsa.org.za/contact-us/join-us/> and [subscribing to our Newsletter](#).
- Praying for us as we defend this precious freedom before government and courts of law.
- Following us, and sharing our posts, on Facebook at “Freedom of Religion SA”.
- Informing us, should you become aware of any case in which religious freedom is threatened.

# When a church lacks good governance

by FOR SA | Jun 6, 2019 | Blog, Spotlight | 0 comments

*By Daniela Ellerbeck, Legal Advisor to FOR SA*

This is the fourth and final article in our series on the legal remedies available in South African law to address the abuses and malpractices identified by the CRL Rights Commission (CRL) in their report on the *“Commercialisation” of Religion and Abuse of People’s Belief Systems* (the Report). This article focuses on the issues identified by the CRL that relate to a lack of good governance (i.e. a lack of proper corporate governance and/or financial management) in churches. (In this regard, see pages 31 to 33 of the CRL’s Report).

Corporate governance is the system of rules, practices, policies and procedures by which a church (or religious organisation) is directed and controlled. The aim is to increase the organisation’s accountability in an attempt to avoid big (ethical, legal, financial, etc.) problems or risks. It also ensures the long-term success of the organisation. Good corporate governance is required not only by law, but it is essentially a Biblical principle: we are commanded to conduct ourselves in a manner that is worthy of the Gospel (Phil. 1:27), this includes having respect for the authorities, obeying the laws of the land, being ethical, transparent and accountable, and also being good stewards of the resources (both people and financial/material) which have been entrusted to us.

## **Issues incorrectly or illegitimately identified by the CRL:**

Not every “lack of good governance” issue that the CRL identified in their Report, was a true legal non-compliance issue.

For example, in terms of the CRL Report, some churches operate without a registration and/or licensing certificate, or are not registered with the Department of Social Development (the DSD) as either non-profit organisations (NPOs) or public benefit organisations (PBOs), and fail to report to the DSD annually.

In South Africa however, churches do not need to be registered or obtain a licence, in order to operate. As FOR SA set out in our previous series entitled, *Getting Your House in Order*, there are various legal entities in which a church can decide to structure itself, namely a **voluntary association (VA)**, a **living trust** or a non-profit company (NPC). While a VA does require a Constitution, formal registration of the VA with a government

authority is not required in order for the VA to be recognised. A living trust must, however, be registered with the Master of the Court, and a NPC with the Companies and Intellectual Property Commission (CIPC).

All of these legal entities can (but are *not obliged* to) register as a non-profit organisation (NPO) with the DSD in terms of the Non-Profit Organisation Act, 1997. Thus, being an NPO is a *voluntary choice* a church can make. Only if the church is registered as an NPO with the DSD, does it become legally obliged to report to the DSD annually.

Furthermore, all of these legal entities can (but, again, are not legally obligated to) register as a public benefit organisation (PBO) with SARS in terms of the Income Tax Act, 1962. (*Importantly, **tax exemption** for churches and religious organisations is not automatic – it has to be applied for through SARS' tax exemption unit. To be tax exempt, churches must be registered as PBOs with SARS' tax exemption unit, otherwise, they are taxed like normal companies.*)

### **Issues correctly or legitimately identified by CRL:**

The CRL did, however, also identify legitimate good governance problems in some churches, such as *a lack of a code of conduct, lack of oversight structures, lack of splitting of fiduciary duties, lack of bank accounts or properties being registered in the church leader's name (as opposed to the church's name).*

As a result, the CRL proposed that legislation should be passed to empower them (the CRL) as a State institution to grant licences to every religious practitioner, church and organisation (page 39 of the CRL's Report). They also proposed that the Commission be given the power to appoint a group of senior Christian leaders to a top tier structure called the "*Peer Review Committee*", who would evaluate all aspects of the practice of the Christian faith to ensure that these are "acceptable" (pages 42 and 47 of the CRL's Report).

In many instances, where a pastor acts both as the pastor and treasurer of a church (i.e. *a lack of splitting fiduciary duties*), it is not because of some bad faith on his and/or the church's part, but because of ignorance of a better way to do things. As a result, it is highly unlikely that a licensing scheme and/or top tier structure such as the proposed Peer Review Committee will solve this problem. If anything, it will likely result in the closing and shutting down of churches, as opposed to empowering and assisting them. The same can be said for the rest of the good governance problems identified by the CRL: *a lack of a code of conduct, lack of oversight structures, and the lack of bank accounts and proper property registration.* In many instances, all of these are the result of ignorance and not ill will. It is true that there is often an inadequate level of knowledge in all these (often quite technical) areas in smaller / more informal religious communities.

FOR SA believes that these problems can be best solved through an education campaign. This could be driven by the CRL, which will not only empower churches with skills and knowledge but also adequately solve all the good governance problems legitimately identified by the CRL.

## **Viable Alternative Solutions:**

Instead of a top-down, heavy, compulsory structure being forced on pastors and churches with the threat of being declared “illegal” (i.e. having their licences revoked and being shut down) should they not comply, there are a number of viable alternatives to solve the problem of lack of good governance.

### **Alternative solution #1:**

#### **The CRL Commission should become a “one-stop-shop”.**

These afore-mentioned situations where churches need support provide the CRL with a prime opportunity to assist pastors to be legally compliant, to have good governance structures in place as well as to educate the religious community on why checks and balances are necessary and how to use them effectively.

The CRL Commission was created to promote respect for religious communities’ rights. (Section 185 of the Constitution.) It is thus a State institution funded by our taxpayer money to serve South Africa’s religious communities. The Commission is therefore ideally placed to educate pastors on what legal entities are available for churches, to provide them with sample documents to establish such entities (such as a Constitution in the case of a voluntary association) and to educate religious communities about good governance principles and how to employ them in the religious sphere. The compliance and governance issues identified by the CRL’s Report provide them with a golden opportunity to practically assist religious communities by educating them on how to put better rules, practices, policies and procedures in place to control their churches. As churches become aware of the different legal entities available, how to register properties and open bank accounts in the church entities’ name etc., this will also solve the problems of churches *lacking bank accounts or proper property registration*.

Fraternal networks also help to ensure greater local accountability and provide for a wonderful opportunity for education on issues of compliance and other relevant qualifications. The CRL should support the establishment of ministers’ “networks & fraternal networks” and encourage pastors to join them. This will solve the problem of *lack of oversight structures*. Furthermore, by visiting fraternal networks as part of the aforementioned education campaign, the CRL can reach a vast number of pastors and religious organisations across South Africa. It is, therefore, a completely logical, reasonable and viable alternative that serves to strengthen religious communities’ right to religious freedom, which will otherwise effectively be limited by the CRL’s currently proposed recommendations.

### **Alternative solution #2:**

#### **The CRL should support the development of a “Code of Conduct” by and for the religious community.**

The CRL also identified the problem of *a lack of a code of conduct* in some churches. This problem is easy to address in the above education campaign, where the CRL can

educate religious communities and fraternals about existing solutions:

The South African Council for Religious Rights and Freedoms (SACRRF) has already been mandated by the religious communities (in a meeting of 70+ senior religious leaders) to draft and circulate a Code of Conduct for the religious community by the religious community. This Code will reflect the responsibilities corresponding to the rights set out in the Charter for Religious Rights and Freedoms, already adopted by 22 million people from across the religious and faith community of South Africa.

This Code, once finalised, will provide an agreed benchmark and a standard for the ethics and conduct of the religious community.

If the CRL educates pastors, fraternals and religious communities about the Code's existence, the benefits of signing it and/or using it as your church's own Code of Conduct, and encourages churches to do so, this will provide those churches who are lacking a code with a highly effective solution drafted by experts for the religious community.

### **Conclusion:**

All of the (legitimate) good governance issues identified by the CRL will, not only be adequately solved by an education campaign, but best solved by it.

As demonstrated, the CRL is ideally placed to drive such an education campaign, and such a campaign is both practical and easily achievable utilising the existing networks and structures such as pastors fraternals.

In this way, the CRL will be taking a leading role in empowering the religious communities it has been created to serve, and assist in bringing about good corporate governance principles and practices in churches and religious communities for the protection and benefit of all.



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