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ABSTRACTS

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THE CONSTITUTIONALITY OF THE REGULATION OF RELIGION IN SOUTH AFRICA — UNTOWARD RESTRICTIONS OF THE RIGHT TO RELIGIOUS FREEDOM?

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In August 2015, the constitutionally empowered South African Commission for the Promotion and Protection for the Rights of Cultural, Religious and Linguistic Communities launched an investigative study into what it called the 'commercialisation of religion' (the notion that certain religious institutions abuse 'people's belief systems' for financial gain). This was in response to a number of media reports concerning untoward practices by various religious organisations. In the final report relating to the Commission's investigation, a number of recommendations were made, proposing more stringent and formalised regulation of religious institutions within South Africa. The Commission's recommendations received substantial opposition from most religious organisations in South Africa, mostly relating to the fear that these recommendations will result in an unjustifiable limitation of the right to religious freedom. This article provides a brief analysis of the Commission's powers and mandate in order to determine whether the Commission was acting within the scope of its powers. A discussion of the reports and recommendations of the Commission follows, and the proposed organisational structures (and their consequences) are discussed and tested against the South African constitutional framework and jurisprudence pertaining to the right to religious freedom. In conclusion, the legal validity of the Commission's recommendations is investigated in light of the Constitution and international commentary.

I INTRODUCTION

Religion can be powerful, potentially claiming the entire being of a person, motivating his or her entire life-course in a particular direction.[1] The Constitutional Court stated in *Christian Education South Africa v Minister of Education* that religion is 'a part of a way of life, of a people's temper and culture'.[2] As a consequence, religious (and non-religious) beliefs have the potential to create a powerful appeal to the conscience of a person and, when the person is placed in community with other like-minded individuals,

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[1] It is acknowledged that not all religious beliefs have this effect on their adherents. What is implied is that there are many religious beliefs which can *potentially have this effect* on their adherents. The effect will ultimately depend on how the individual has internalised the religious belief and the extent to which the person chooses or allows the religion to direct his or her life-course.

[2] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 33.

religion creates a strong and forceful common goal.[3] It is for this reason that some countries view religion as something threatening that should be regulated strictly. In some cases, there is, arguably, discriminatory regulation — for example, in China.[4] In other countries, there are regulatory criteria, but they do not necessarily discriminate.[5] Finally, there are countries which see the powerful appeal of religion as a positive attribute, inspiring greatness and creativity. In these countries, religion is mostly seen as something that should be regulated in a limited sense for the basic purpose of maintaining

[3] For example, faith groups have provided substantial assistance pertaining to disaster recovery after natural disasters in the United States of America: Paul Singer 'Faith groups provide the bulk of disaster recovery, in coordination with FEMA' *USA Today* 13 September 2017, available at *https://eu.usatoday.com/story/news/politics/2017/09/10/hurricane-irma-faith-groups-provide-bulk-disaster-recovery-coordination-fema/651007001/*, accessed on 10 September 2018. Such common goals may also be negative, for example, the use of religious motivations to commit terrorist activities.

[4] The most recent changes to the regulation of religion in China occurred in February 2018. According to the new regulations, only officially recognised religious institutions may operate in the country. The new regulations also impose new oversight on online discussions of religious matters, religious gatherings, and the financing of religious groups (as well as donations to such groups). Although religious freedom is protected in theory, strict control is exercised over religious activities. Restrictions on unregistered religious groups have also been tightened: Christian Shepherd 'China tightens regulation of religion to "block extremism"' *Reuters* 7 September 2017, available at *https://www.reuters.com/article/us-china-religion/china-tightens-regulation-of-religion-to-block-extremism-idUSKCN1BI1IH*, accessed on 10 September 2018. Also see Daniel L Overmeyer 'Religion in China today: Introduction' (2003) 174 *China Quarterly* 307 at 307–16. These regulations come dangerously close to the regulation practices frowned upon by United Nations Special Rapporteur Heiner Bielefeldt. For example, the censorship of religious material and the prevention of voluntary contributions by way of regulation procedures are not seen as an acceptable form of regulating religion: Heiner Bielefeldt, Nazila Ghanea & Michael Wiener *Freedom of Religion or Belief: An International Law Commentary* (2016) 228–9.

[5] An example is Belgium, although the Belgian system is not without controversy and its critics. Franken argues that the actual regulation criteria in Belgium are not transparent and objective. With regard to the 'recognition' of a religion in Belgium, one of the requirements is an indication of 'several tens of thousands' of members of the religion. What this criterion means is not clear: Leni Franken 'State support for religion in Belgium: A critical evaluation' (2017) 59 *Journal of Church and State* 59–80. This is contrary to international-law principles stating that legislation should not make 'obtaining legal personality contingent on a religious or belief community having an excessive minimum number of members. States should ensure that they take into account the needs of smaller religious and belief communities, and should be aware of the fact that provisions requiring a high minimum number of members make the operational activities of newly established religious communities unnecessarily difficult': OSCE Office for Democratic Institutions and Human Rights 'Guidelines on the legal personality of religious or belief communities' available at *https://www.osce.org/odihr/139046?download=true*, accessed on 14 November 2018 para 27 ('the OSCE Guidelines'). Furthermore, one of the criteria for the recognition of a religious institution in Belgium is 'social relevance' (maatschappelijke relevantie). A religious institution has to prove that it is socially relevant in order to be recognised. However, the meaning and content of 'social relevance' is not clearly defined: Eredienstendecreet of 7 May 2004, amended 6 July 2012 ('Erediensten decreet').

public law and order (but not to the extent that it interferes with religious doctrine).[6] One such country is South Africa.

On the continuum between stringent and limited regulation, there are two forms of regulation. First, there is the registration and regulation of *religions as such* (for example, Christianity and Islam). Secondly, there is the registration and regulation of *religious institutions* (eg specific mosques or churches).[7] In both instances the regulation ranges from minor regulation (regarding, for example, tax money) to full 'recognition'[8] and regulation (and sometimes supervision) of religions[9] and religious institutions in a country.[10] It is the second type of regulation (the regulation of religious institutions) that

[6] This does not mean that if a country has registration criteria, this is necessarily undemocratic or that the country views religion as a negative attribute of society. What is important is that registration criteria for religious institutions and religions are not abused by governments and do not infringe on the right to religious freedom. Good 'registration' or regulation practices can be found in the OSCE Guidelines op cit note 5.

[7] A distinction must be made between the registration of a religion and the regulation of the religion's religious institutions. In Belgium, for example, specific religions (such as Judaism, Islam and Christianity) are officially 'registered' and receive official status. These registered religions have several religious institutions that should also apply for registration. This registration occurs once the institution has met all the registration criteria. Such registration and regulation by the state usually leads to some financial benefit for the religion and religious institution. Thus, there is a distinction between the registration of a religion and a religious institution (in Belgium: see Eredienstendecreet op cit note 5). The focus of this article is on the registration and regulation of religious institutions, such as mosques, churches and synagogues.

[8] Some countries use the term 'recognition'. However, I prefer the words 'registration' and 'regulation', as the word 'recognition' has elicited controversy: 'It is ... advisable not to use the term "recognition" in the context of registration procedures. Registration procedures should be based on the clear understanding that they should serve the better realization of human rights, whose exercise, including in community with others, remains prior to, and ultimately independent of, any administrative approval': Bielefeldt et al op cit note 4 at 231. 'The term "recognition" when used to describe registration procedures may furthermore obscure the insight that the entire system of human rights is based on the "recognition of inherent dignity of all human beings" ': ibid at 222. According to Bielefeldt et al, the word 'recognition' creates the impression that the exercising of religious freedom by religious adherents is subject to the particular religion being 'recognised'. The notion of 'not recognised' creates the perception that a religion is being dismissed or disregarded or that the human dignity inherent in the right to religious freedom is dependent upon the 'recognition' of a specific religion. See the next footnote below for an explanation of the difference between the concepts 'registration' and 'regulation' for purposes of this article.

[9] In this article a distinction is made between the 'regulation' and 'registration' of religion. 'Registering' a religion in a country is one form of 'regulating' religion. Hence, the 'regulation' of a religion or religious institution is a broader concept than the mere 'registration' of a religion or religious institution. 'Regulation' also includes, among other things, the 'supervision' of religions already registered.

[10] A good example of a country where religions and religious institutions are officially 'recognised' is Belgium (erkenningscriteria). Such regulation does not imply that the doctrines of the religious community are regulated, but rather refers to their technical functioning and recognition for tax purposes and the receipt of government

is the major focus of this article. More specifically, the recent attempts to introduce this form of regulation in the South African system, and the constitutionality thereof, are discussed in detail.

Although several models of religious regulation already existed in South Africa, the country recently made international headlines with attempts to reform the regulation of religion in the country. In August 2015, the South African Commission for the Promotion and Protection for the Rights of Cultural, Religious and Linguistic Communities (hereinafter 'the CRL Commission', or 'the Commission') launched an investigative study into what it calls the 'commercialisation of religion'. By using the phrase 'commercialisation of religion' the Commission refers to the notion that certain religious institutions abuse 'people's belief systems' because of the way these institutions are being run financially.[11]

The investigation was launched in response to a number of media reports concerning untoward practices by various religious organisations (mostly labelling themselves as Christian denominations). These untoward practices included: congregants being made to eat grass to 'be closer to God' before being stamped on;[12] the drinking of gasoline;[13] and congregants being sprayed with insecticide, accompanied by the claim that this could heal people with cancer and HIV.[14] These are only three incidents among several in the last five years.

The Commission's investigation ended in March 2016 and a report was issued. The *Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems* (hereinafter the 'final report') generally promotes stricter and more formalised regulation of religious institutions in South Africa (beyond the rather relaxed forms of regulation that already exist). The

funding: Eredienstendecreet op cit note 5. However, Belgium remains at the end of the continuum where more stringent forms of regulation are present.

[11] *Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems* available at *http://www.crlcommission.org.za/docs/Report%20On%20Commecialization%20of%20Religion%20and%20Abuse%20of%20People's%20Believe%20Systems%20final.pdf*, accessed on 12 July 2018.

[12] Jill Reilly 'Lawn again Christians: South African preacher makes congregation eat grass to "be closer to God"' *Mail Online* 10 January 2014, available at *http://www.dailymail.co.uk/news/article–2537053/Lawn-Christians-South-African-preacher-makes-congregation-eat-GRASS-closer-God.html*, accessed on 12 July 2018.

[13] 'South Africa's "Prophet of Doom" condemned' *BBC News* 21 November 2016, available at *http://www.bbc.com/news/world-africa–38051923*, accessed on 12 July 2018.

[14] 'South African streets contain numerous signs and advertisements with promises of miracles of healing and prosperity. Promises are made while soliciting donations. According to the CRL Commission, there has also been an increase in religious organisations or leaders from outside South Africa operating in the country: CRL Rights Commission *Preliminary Report of the Hearings on Commercialisation of Religion and Abuse of People's Belief Systems* available at *http://www.crlcommission.org.za/docs/Preliminary%20Report%20of%20the%20hearings%20on%20Commercialization%20of%20Religion%20and%20abuse%20of%20people's%20belief%20systems.pdf*, accessed on 12 July 2018.

response from religious communities to the envisioned regulation was considerable, and mostly negative.[15] In its consideration of the CRL Commission's final report, the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs ('COGTA')[16] sided with the religious communities. COGTA stated that there were already laws in place that addressed many of the issues highlighted in the final report, but that these laws were not being properly enforced. COGTA also suggested that it would be better to establish a bottom-up approach, and that a 'code of conduct' that emanated from the religious institutions should be drafted.[17] In other words, COGTA recommended that religious institutions themselves should propose a solution to the alleged 'abuse of people's belief systems', rather than there being an imposed solution that emanates from an external source (such as the Commission). Even after these suggestions by COGTA, the CRL Commission remained set on following through with its proposed report, and considered applying to the Constitutional Court for a declaratory order on its powers and mandate.[18] Eventually, the Portfolio Committee on Women in the Presidency, in support of the CRL Commission, made a public call towards the regulation of religion by stating that there

> 'is a lack of proper regulation to control churches that are operating outside of the law. Municipality [sic] by-laws should be enforced. Legislation should be put in place to allow for the accountability, transparency, registration and regulation of churches and religious leaders.'[19]

[15] Most of these responses were recorded at the workshop of the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs ('COGTA') on 27 June 2017, which was held to discuss the report: *Report of the PC on COGTA on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) on the Commercialisation of Religion and Abuse of Peoples Beliefs*, 14 February 2018, available at *https://pmg.org.za/tabled-committee-report/3260/*, accessed on 12 July 2018.

[16] In South Africa, the two houses of Parliament (the National Assembly and the National Council of Provinces) conduct some of their work in Parliamentary Committees. The functions of the parliamentary committees (of which COGTA is one) include the consideration and amendment of Bills, initiation of Bills, consideration of special petitions, and examination of areas of public life or matters of public interest: Parliament of the Republic of South Africa 'How parliament is structured' available at *https://www.parliament.gov.za/how-parliament-is-structured*.

[17] Report of the PC on COGTA op cit note 15.

[18] Michael Swain 'CRL still set on (state) regulation of religion' *FORSA* 6 April 2018, available at *https://forsa.org.za/crl-still-set-on-state-regulation-of-religion/*, accessed on 11 July 2018. Also see Christina Pitt 'CRL Rights Commission to go to ConCourt after Ngcobo massacre' *News24*, 26 February 2018, available at *https://www.news24.com/SouthAfrica/News/crl-rights-commission-to-go-to-concourt-after-ngcobo-massacre-20180226*, accessed on 12 July 2018.

[19] Parliamentary Monitoring Group 'Abuse of women and children by religious leaders/sector: CRL Commission briefing' available at *https://pmg.org.za/committee-meeting/27380/*, accessed on 15 November 2018 (hereinafter Report by Women in the Presidency). The Portfolio Committee on Women in the Presidency also stated that there is a 'Big Man' syndrome in churches, and women are at the bottom of the church ranks: Report by Women in the Presidency.

Although the CRL Commission's attempt at the regulation or licensing of religion has received substantial opposition,[20] aspects relating to the constitutionality of the regulation of religious institutions in South Africa require detailed discussion. The main aim of this article is to discuss the potential effect of the Commission's final report and proposals on religious freedom in South Africa. These proposals are tested against the Constitution of the Republic of South Africa, 1996 ('the Constitution') and evaluated in an international context.

A brief analysis of the CRL Commission and its constitutional powers and mandate is presented first. This analysis is used to determine whether the Commission has been acting within the scope of its powers and whether its recommendations go beyond its constitutional mandate. Thereafter, a discussion of the preliminary[21] and final reports and recommendations of the Commission follow. The proposed organisational structures (and their consequences) are discussed and then tested against the South African constitutional framework and jurisprudence pertaining to the right to religious freedom.

The current South African framework regarding the registration or regulation of religious institutions is investigated. I show that there is very limited regulation due to the evolution of a relationship of 'mutual benefit' (and not control) between the state and religion (although some domestic laws, limiting the actions of religious institutions, do exist). Due to the nature of this relationship, it is argued that solutions which have the objective of preventing abuse by religious institutions and emanate from religious communities themselves (a bottom-up approach), are more in line with the jurisprudence on religious freedom that has developed in South Africa.

In conclusion, I investigate the constitutionality of the recommendations of the CRL Commission in light of the Constitution and international commentary. Some of the recommendations of the Commission directly touch on issues concerning doctrinal entanglement, the 'reasonable person' test, and the limitation of rights. I argue, first, that the proposed measures of the Commission amount to an unjustifiable limitation of the right to religious freedom (s 36 of the Constitution). I then argue that the Commission based its recommendations on a flawed assumption that religious denominations have common characteristics which allow them to be grouped into categories. The potential doctrinal entanglement of the Commission's recommendations is discussed, as well as the fact that measures which can address most of the highlighted issues (without the danger of doctrinal entanglement) are in fact already in place. I argue that the Commission's emphasis on the regulation of religious institutions, while maintaining silence about non-religious belief institutions, is discriminatory. Finally, I express the view that the Commission's use of the 'reasonable person' test in

[20] Although there is some support for the Commission's recommendations by the Parliamentary Committee on Women in the Presidency, the recommendations encountered substantial opposition from the Parliamentary Portfolio Committee (COGTA) and religious institutions in South Africa.

[21] Preliminary report op cit note 14.

establishing whether or not a religious belief is 'reasonable' is contrary to the interpretation of the right to religious freedom in South Africa.

II THE CRL COMMISSION OF SOUTH AFRICA

Chapter 9 of the Constitution constitutionally mandates and empowers the CRL Commission.[22] The Commission is independent from the government and subject only to the Constitution and the law. State institutions supporting democracy, of which the CRL Commission is one, 'must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.[23]

Section 185 of the Constitution states that the functions of the CRL Commission are to:

(i) *promote* respect for the rights of cultural, religious and linguistic communities;
(ii) *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;
(iii) *recommend* the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for communities in South Africa; and
(iv) *monitor, investigate, research, educate, lobby, advise and report* on issues concerning the rights of cultural, religious and linguistic communities.

Sections 4 and 5 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act ('the CRL Act')[24] repeat these notions. In terms of s 5 of the CRL Act, the Commission *may* also

(i) *facilitate* the resolution of friction between and in cultural, religious and linguistic communities;
(ii) *receive and deal with requests* related to the rights of cultural, religious and linguistic communities; and
(iii) *make recommendations* to the appropriate organ of state regarding legislation that impacts the rights of cultural, religious and linguistic communities.

The Commission may further establish and maintain databases of cultural, religious and linguistic community organisations and institutions.

Clearly, according to the Constitution and the CRL Act, the Commission is not the first and final arbiter of religious issues in South Africa. It has to promote the right to religious freedom and can recommend the establish-

[22] Section 181(1)*(b)* of the Constitution.

[23] Section 181(2) of the Constitution. No person or organ of state may interfere with the functioning of these institutions: s 181(4). The Commission is accountable to the National Assembly and must report on its activities to the National Assembly once a year: s 181(5).

[24] Act 19 of 2002.

ment of councils in South Africa. It may facilitate the resolution of friction and may make appropriate recommendations to religious communities. The language used suggests the nature of an advisory body that may make recommendations and set up committees, but cannot force religious institutions to subject themselves to regulation and registration criteria. The Commission may *monitor* the rights of cultural, religious and linguistic communities (and probably use established legal processes in case of the violation of rights), but this does not necessarily mean that, to be able to carry out its monitoring function, the Commission may enforce a system whereby religious institutions should be registered or grouped under various councils. This point is important since the CRL Commission, in its final report (discussed below), aims to amend the CRL Act in such a way that the Commission becomes the final decision-making power on issues regarding religious freedom.[25] The response from religious communities has mainly been that this amendment would be unconstitutional and would provide the Commission with powers that fall beyond the scope of the CRL Act.[26]

III THE CRL COMMISSION'S PRELIMINARY INVESTIGATION, REPORT AND RECOMMENDATIONS

As the Commission may conduct an investigation to monitor, investigate and research an issue concerning the rights of cultural, religious and linguistic communities,[27] it may also summon a person (by written notice) to give evidence before it. This is exactly what the Commission did when it launched the investigative study into what it called the 'commercialisation of religion' and the 'abuse of people's belief systems', ending in its final report.[28]

[25] Final report op cit note 11 at 47–8.

[26] FORSA open letter to the CRL Rights Commission on its final report on the 'Commercialisation of Religion and Abuse of People's Belief Systems' 16 May 2017, available at *https://forsa.org.za/open-letter-to-the-crl-rights-commission-on-its-final-report-on-the-commercialisation-of-religion-and-abuse-of-peoples-belief-systems/*, accessed on 12 July 2018.

[27] Section 7 of the CRL Act.

[28] A section 7 committee was established in line with the CRL Act. Religious organisations and their leaders were informed in advance of their appearance in the summons and were also instructed to prepare presentations, which addressed the following questions: 'i. Your religious institution's history; ii. Training of your religious leaders; iii. Your religious institution's governance structures and fundraising strategies; iv. Soliciting of payments (funerals, weddings, prayers, etc.); v. Utilization of your religious institution's money; vi. Transfer of money outside South Africa; vii. Employment of foreign pastors; viii. Your understanding of commercialisation and abuse of people's belief systems': Preliminary report op cit note 14. African religion and traditional healer representatives had to cover the following areas, among others: 'The history of African religion; Apparent differences with other organisations; Food and dietary regulations; Some suggestions, which can add value to the study': Final report op cit note 11 at 15. During the hearings the Commission faced several challenges, such as attendance by an entourage of members; undermining and misunderstanding of the statutory object of the CRL Commission; refusal to take the prescribed oath; refusal to submit required documents such as financial statements and

The preliminary[29] and final reports claim that recent controversial media reports (such as the eating of grass and other controversial occurrences) have left a large portion of society questioning whether religion has become a commercial institution or commodity to enrich a few — hence the concern about the 'commercialisation of religion'. However, neither the preliminary nor the final report defines 'commercialisation' for this purpose.[30] In both reports the Commission claims that it is functioning only under the Constitution, being a reliable voice for people while contributing to the programme of transformation to which the Constitution commits religious institutions.[31] Furthermore, it is clear from the investigation and the reports that the focus is mainly on religious organisations as opposed to non-religious organisations. However, the Commission does not define in the reports what it means by a 'religious organisation'.[32]

bank accounts; and threatening behaviour. However, the majority of religious organisations responded in a co-operative manner: see the final and preliminary reports.

[29] Preliminary report op cit note 14.

[30] Although 'commercialisation' is not defined by the CRL Commission, it is assumed to mean the 'profit-making activities' of religious institutions. Concern about the 'profit-making activities' of religious institutions, or institutions with large profit-making aims claiming to be religious (such as Scientology), is not novel. The European Court of Human Rights has found this to be a tricky issue and has also not provided a clear answer: *Guide on Article 9 of the European Convention on Human Rights*, updated on 31 May 2018, available at *https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf*, accessed on 20 November 2018.

[31] It is not contested that the investigation was constitutional. A random sampling method was used to bring religious leaders and organisations before the CRL Commission. 85 religious leaders from various rural and urban religious institutions were summoned: see the preliminary and final reports.

[32] Defining religion seems almost impossible itself: J Platvoet & A Molendijk *The Pragmatics of Defining Religion: Contexts, Concepts and Contests* (1999); Robert Cummings Neville *Defining Religion: Essays in Philosophy of Religion* (2018). Defining what a 'religious organisation' or 'religious institution' means is not easy either. Because there are benefits and duties attached to being defined as a 'religious institution', especially with respect to regulation criteria, it is important to understand what is meant by the notion 'religious organisation' or 'religious institution'. Religious organisations are 'organizations that are organized largely around religious doctrine and are formed with the primary purpose of manifesting religious belief, following religious doctrine or otherwise helping to make the option of a religious way of life possible. This can include a spectrum of organizations from those that engage mainly in religious worship, such as churches and congregations, to organizations that have religious and some non-religious purposes such as adoption, health, and counselling services provided by churches or religious charities': Jane Calderwood Norton *Freedom of Religious Organizations* (2016) 9. However, 'from the theological perspective of religious adherents it may be difficult to draw these boundaries': ibid. Religious organisations, in this sense, are mainly concerned with organised religion — 'religions that have an organized structure through which the religion is practised': ibid. What was not clear from the investigation of the CRL Commission was whether the Commission only referred to such organised forms of religion or whether less 'institutional-like' religions are also included in their investigations and eventual recommendations.

During the investigation, the following substantive problems were identified (among others) in some South African religious institutions: organisational and administrative deficiencies; exploitation of the poor and the vulnerable; subjecting members to practices and rituals that evoke questions of human rights and ethics; and the use of personal bank accounts as the institutions' accounts.[33] The reports also found a lack of compliance with existing laws such as non-registration with the Department of Social Development as non-profit organisations ('NPOs') or the South African Revenue Service as public benefit organisations and misuse of the visa application system by foreign religious leaders.[34] The CRL Commission and the Portfolio Committee on Women in the Presidency focused especially and extensively on the Commission's findings regarding the 'exploitation of the poor and vulnerable' (especially women and children) by religious institutions.[35]

According to the Commission, the summary of the findings in the preliminary report indicated that there was prima facie evidence of the commercialisation of religion (even though a very small sample of the religious community was used).[36] The Commission made several recommendations in the preliminary and final reports in order to combat the 'commercialisation of religion'. These recommendations imply some form of 'licensing', 'registration' or 'regulation'. All religious practitioners must be registered, as the Commission wants to maintain a database of cultural, religious and linguistic community organisations and practitioners.[37] Furthermore, all religious institutions or 'worship centres' must also be registered.[38]

One of the most fundamental consequences of the recommendations is the creation of a 'dispute resolution mechanism' functioning externally to a specific religious institution (eg church or mosque) but which will adjudicate on internal disputes and issues of the institution. What makes this structure questionable is that, contrary to the existing adjudications of courts on non-doctrinal and procedural internal aspects of religious institutions (discussed below),[39] the scope of the issues to be adjudicated by the proposed mechanism is not clearly defined.

The 'dispute resolution mechanism' boils down to the following recommendation: there will be a peer-review council consisting of peers from each religion which will give permission to operate to individual religious leaders.[40]

[33] Preliminary report op cit note 14 para 12.

[34] Ibid para 14.

[35] Report by Women in the Presidency op cit note 19.

[36] Approximately 85 religious leaders were interviewed: final report op cit note 11 at 13.

[37] Ibid at 43.

[38] Ibid at 44.

[39] See part V(c) below on instances where South African courts decided internal (but not doctrinal) issues of religious organisations.

[40] According to Bielefeldt et al op cit note 4 at 228, registration should not seek to compel the community or part of it to place itself, against its will, under a single leadership.

To this extent, religious leaders will be registered by the peer-review council. There will then be a committee for each religion (e g a Christian peer-review committee) whose chairperson will be a member of the peer-review council. Each committee will have a dispute resolution mechanism, which it will establish itself. Each religion will have an accredited umbrella organisation with powers to *recommend the licensing of institutions and individual practitioners*. It is not clear which criteria should be used for the licensing of a religious institution or an individual practitioner. The umbrella organisations will also have a supervisory function in that they will be allowed to 'set minimum standards of good governance' and 'discipline members who have veered off the path to bring them back on track'.[41] The umbrella organisation can also recommend to the peer-review committee and the commission that a member be removed from the register of religious leaders.[42] Communities and individuals will be able to lodge complaints with the umbrella organisations about religious institutions and individual practitioners. The disciplinary procedures will be conducted by the umbrella organisations.[43] There is, therefore, as highest authority a peer-review council. Under it are the peer-review committees with umbrella organisations under them for each brand of religious institution. In the final instance, the ultimate decision-making power will lie with the CRL Commission.[44]

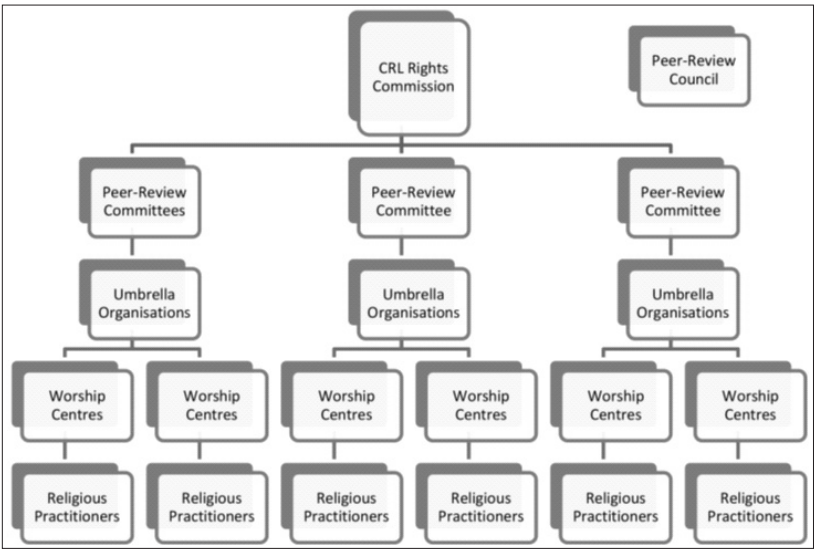

Figure 1: The structure that the CRL Commission proposes for the regulation of religious institutions.[45]

[41] Final report op cit note 11 at 46.
[42] Ibid.
[43] Preliminary report op cit note 14 para 17.
[44] Final report op cit note 11 at 47.
[45] Ibid at 42.

The content and make-up of these structures, and the scope of powers of the umbrella organisations and peer-review committees are not described in detail. Broad references (as discussed above) are made to their main functions, but no clarification is given as to their powers and their internal operations.

Additionally, the preliminary report advocated for the accreditation of a religion as such, for example, Christianity or Islam (and not only its various religious institutions), but this was not explicitly repeated in the final report. According to the preliminary report, the CRL Act must be amended to set requirements for a religion to qualify as a religion as such and to be accredited. For example, there must be a religious text, founding documents of each religion, and there should be a significant number of followers, a set of rules, and practices that order the lives of followers in a specific and particular way that benefits the followers.[46] Although not repeated in the final report, the preliminary report stated that an accredited umbrella organisation should have the power to *recommend the licensing of institutions and individual practitioners*. This implies some form of regulation *or grouping* of the religion itself (and not only its institutions) in order to group 'worship centres' into a specific religion's umbrella organisation.

The structure proposed by the CRL Commission is unprecedented in the South African context, and sits uncomfortably with existing South African jurisprudence pertaining to religious freedom.

IV THE SOUTH AFRICAN FRAMEWORK REGARDING RELIGIOUS FREEDOM AND ITS REGULATION

Section 15 of the Constitution provides for wide protection of all religions, beliefs, opinions and conscience.[47] Section 31(1)*(a)* states that persons belonging to a cultural, religious or linguistic community may not be denied the right to enjoy their culture, practise their religion, and use their language. Section 31(1)*(b)* also states that persons may not be denied the right to form, join and maintain religious associations. Sections 15 and 31 both provide for the collective aspect of religious freedom and the right to self-determination of religious groups. It is not only the individual, but also the collective religious group that has a right to religious freedom.[48] The CRL Commission's recommendations are directed towards the regulation of religious

[46] Preliminary report op cit note 14 para 18(1). Bielefeldt et al op cit note 4 at 228 mention that '[r]egistration should not depend on criteria such as ownership of a building used for the worship or reviews of the substantive content of the belief, the structure of the community, the number, citizenship, methods of appointment, and education of clergy, etc'.

[47] Section 15 of the Constitution states: '(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

[48] Warren Freedman 'The right to religious liberty, the right to religious equality, and section 15(1) of the South African Constitution' (2000) 11 *Stellenbosch LR* 107 at 99–114. However, the right to self-determination of religious groups and their right to religious freedom are not unlimited. Section 31(2) of the Constitution states that

institutions and therefore mainly refer to collective aspects of the right to religious freedom.[49]

Furthermore, the relationship between religion and state in South Africa is not one of *strict* separation (although there is some separation) and does not include an establishment clause. There is a clear presence of interaction between religion and state.[50] Courts in South Africa have stated that

> '[r]eligious organisations also constitute important sectors of national life and have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs, fully entitled to have their say with regard to the way law is made and applied.'[51]

The South African 'model' is therefore one that seeks and encourages the democratic development of the right to religious freedom. It is a relationship of mutual benefit and not of control by one of the other.

In this constitutional framework of mutual benefit (without control), there is already a limited amount of legislative regulation for religious institutions. The Non-Profit Organisations Act[52] provides for the registration of religious organisations (and traditional healing institutions) as NPOs. Registration in terms of the Non-Profit Organisations Act is voluntary. If registered, every NPO must adhere to the standards of generally accepted accounting practices.[53] The preferential tax treatment of NPOs is not automatic. Religious organisations must first meet the requirements set out in the Income Tax Act[54] and must apply for this exemption. An NPO will only enjoy preferential tax treatment once it has applied for and has been granted approval as a public benefit organisation. All religious organisations

the 'rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.

[49] The collective dimension of the right to religious freedom is also protected in international law and regional legal systems. For example, art 9 of the European Convention on Human Rights expressly refers to the exercise of religious freedom 'in community with others': Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, available at *https://www.echr.coe.int/Documents/Convention_ENG.pdf*, accessed on 25 November 2018. Article 18 of the International Covenant on Civil and Political Rights uses a similar phrase: International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, available at *https://treaties.un.org/doc/publication/unts/volume%20999/volume–999-i–14668-english.pdf*, accessed on 25 November 2018.

[50] *S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (CC) para 101. The South African model differs from the United States position: 'Congress shall make no law respecting an establishment of religion ...'. See ibid. Also see David Bilchitz & Alistair Williams 'Religion and the public sphere: Towards a model that positively recognises diversity' (2012) 28 *SAJHR* 146.

[51] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 90.

[52] Act 71 of 1997.

[53] Section 17 of the Non-Profit Organisations Act.

[54] Act 58 of 1962.

are also subject to the Fund Raising Act[55] for fund raising activities. For traditional healers,[56] further regulation occurs by way of the Traditional Health Practitioners Act.[57] It provides for the registration of traditional health practitioners in South Africa and for protecting the interests of those who use their services. It is mandatory to register in accordance with this Act in order to practise as a traditional health practitioner.[58]

Furthermore, several self-regulating organisations exist — such as the South African Council of Churches ('SACC')[59] and the National Interfaith Council of South Africa ('NICSA').[60] Recently, another form of self-regulation was proposed as a reaction against (and towards providing an alternative to) the proposals by the CRL Commission. As mentioned above, upon rejecting the CRL Commission's recommendations, COGTA recommended that the religious community be granted the opportunity to propose a bottom-up or grassroots approach, as requested by the religious community during meetings before Parliament. Hence, the South African Council for the Protection and Promotion of Religious Rights and Freedoms ('the Council') drafted a Code of Conduct for Religion in South Africa (hereinafter 'the Code'). This Code promotes the right to religious freedom and the self-regulation of religious institutions and religions in line with the Constitution. Under the Code, religious institutions undertake to act in the best interests of society (subject to the law of the land), transparently (especially regarding finances), and to take action against reprehensible conduct by religious institutions, while at the same time being 'mindful of the respective jurisdictions of religion and the state'.[61]

[55] Act 107 of 1978.

[56] In South Africa, traditional healers ('Isangomas') are also diviners who determine the cause of illness by using ancestral spirits. Disease is a supernatural phenomenon governed by a hierarchy of vital powers: Rajendra Kale 'South Africa's health. Traditional healers in South Africa: A parallel health care system' (1995) 310 *British Medical Journal* 1182. The practice of traditional healing in South Africa contains a clear element of faith and the use of faith towards healing practices. This element of faith is also clear from the definition of the concept 'traditional health practice'. A 'traditional health practice' includes the 'performance of a function, activity, process or service based on a traditional philosophy': s 1 of the Traditional Health Practitioners Act 22 of 2007. 'Traditional philosophy' means 'indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs': s 1 of the Traditional Health Practitioners Act. For this reason, it is also a subject for discussion when it comes to the 'licensing of religion' since the proposals of the Commission will also affect traditional African faiths and their general and healing practices.

[57] Act 22 of 2007.

[58] Section 21 of the Traditional Health Practitioners Act. It should be noted that only the 'healers' or 'practitioners' must register in accordance with this Act; it is not the traditional faith or traditional faith institution that must register.

[59] South African Council of Churches available at *http://sacc.org.za/*.

[60] National Interfaith Council of South Africa available at *https://www.nicsa.org.za/*, accessed on 12 July 2018.

[61] SA Council for the Protection and Promotion of Religious Rights and Freedoms 'Code of Conduct for Religion in South Africa' available at *http://forsa.org.za/*

It is clear that there are already new initiatives, some legislation, and minimum forms of regulation regarding religious institutions and practitioners. Currently, no 'recognition' of a religious group or registration of religious institutions is required. The CRL Commission's introduction of the registration of a religion or the regulation of a religious institution therefore has no legal precedent in South Africa. Rather, the South African relationship between religion and state provides for the active promotion of religious freedom in South Africa. More control of religion and religious institutions is not in line with this existing relationship of mutual benefit. It is this sentiment, and the issue whether the recommendations of the Commission are constitutional that need further discussion.

V AN UNTOWARD LIMITATION OF THE RIGHT TO RELIGIOUS FREEDOM?

The violations and abuse of human rights by religious institutions are indeed saddening. However, I agree with Coertzen & Malherbe that even in light of a number of isolated instances of such possible abuse or 'commercialisation of religion', strict regulation of religion will cause a shift in the relationship between religion and state in South Africa (possibly violating the right to religious freedom and self-determination under ss 15 and 31 of the Constitution).[62]

Although there are countries, especially in Europe (such as Belgium and Austria)[63] which follow a model of registration — not without criticism, it must be said[64] — there is no precedent for it in South Africa. Even in countries where such registration is required, there are international commentaries indicating when registration will violate the right to religious freedom.[65]

There are several reasons why the proposals of the CRL Commission potentially violate the rights in ss 15 and 31 of the Constitution. Neither s 15 nor s 31 provides for absolute rights. Both the right to religious freedom and the right to self-determination of a religious group can be limited. Section 31 clearly states that the right of a religious community can be limited if it exercises the right in a manner that is inconsistent with any provision of the Bill of Rights. Both ss 15 and 31 can be limited in terms of s 36 of the

wp-content/uploads/2018/04/CRRF-Proposed-Code-of-Conduct-for-Religions-In-South-Africa.pdf.

[62] Pieter Coertzen & Rassie Malherbe 'Response by the Council for the Protection and Promotion of Religious Rights and Freedoms to the CRL Rights Commission Report on the Commercialisation of Religion and Abuse of People's Belief System' (June 2017). Press statement, on file with author.

[63] Many European systems have multi-tier systems necessitated by strong patterns of co-operation and by funding that supports major religious denominations: Cole Durham 'Legal status of religious organizations: A comparative overview' (2010) 8 *Review of Faith and International Affairs* 9.

[64] See note 5.

[65] Bielefeldt et al op cit note 4.

Constitution (the limitation clause). There are clear possibilities for the limitation of a religious group's rights if the group violates the rights of the 'poor and vulnerable' (or anyone else) in society (as indicated by the CRL Commission). The CRL Commission argues that it falls within the scope of its powers (or at least that it wishes to amend the CRL Act in order to broaden its powers) to create procedures for the regulation of religion. Such regulation would, in the Commission's view, not be a limitation of the right to religious freedom.

There are several arguments that show that such regulation will, in truth, constitute an unjustifiable limitation of the right to religious freedom. Below, it will be shown that (i) the rights of religious groups are limited by the Commission's proposals; and (ii) that such limitation is unjustifiable.

(a) A justifiable limitation?

Clearly, some of the actions of religious institutions in South Africa have violated and infringed the human rights of other citizens. Yet, this does not warrant the all-encompassing regulation criteria proposed by the Commission.

Limiting human rights in terms of the Constitution involves a two-stage approach. The first stage involves a 'determination of the scope of the right and a delimitation of the boundaries of constitutionally protected activity'.[66] This is an interpretation stage only.[67] It therefore has to be asked whether the CRL Commission's proposals fall within the scope of the right to religious freedom contained in ss 15 and 31 of the Constitution. Section 15 itself does not mention any limitation with regard to religious freedom (except requirements regarding religious observances and other limitations that are irrelevant to this article). Section 31, in contrast, expressly states that the right of a religious community can be limited if it is exercised in a manner that contravenes the rights of others. This has led to some regulations limiting the rights of religious institutions by way of legislation and case law (where those practices infringe upon the rights of others).[68] In *Christian Education*, the Constitutional Court also stated that religious freedom has to be regarded with appropriate seriousness but that the underlying question is how far a democracy 'can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not'. A society can cohere only if all its participants accept that certain basic norms and standards are binding. Hence, there is no automatic right to belief-based exemption from the laws of the land. At the same time, the state should,

[66] Kevin Iles 'A fresh look at limitations: Unpacking section 36' (2007) 23 *SAJHR* 72.

[67] Ibid.

[68] See for example *Christian Education* supra note 2. An example where there is some form of legislative regulation of religion is the Meat Safety Act 40 of 2000 which permits the ritual slaughter of animals for religious reasons. However, the slaughter is regulated (and hence limited) by regulations issued by the Minister: see s 22.

'wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law'.[69] Religious organisations clearly cannot function without adhering to the laws of the land (as many failed to do, according to the CRL reports). Thus, some regulation and limitations will inevitably be imposed to prevent religious organisations from doing whatever they want. (An example is the prohibition on administering corporal punishment at schools for religious reasons.[70]) Courts mostly regard these forms of limitation as justifiable.

Although ss 15 and 31 state that the individual and collective rights to religious freedom can be limited, South African courts have mostly described religion and the right to religious freedom in a positive manner, providing a clear interpretation of what the scope of the right to religious freedom entails. South African courts have described religion, religious freedom and religious organisations in the following ways: 'They are part of the fabric of public life and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.'[71] Furthermore,

> '[r]eligious organisations ... constitute important sectors of national life and have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs, fully entitled to have their say with regard to the way law is made and applied.'[72]

This was confirmed by Langa CJ in the case of *MEC for Education, KwaZulu-Natal & others v Pillay*,[73] where he stated that religious and cultural practices should not only be permitted, but rather affirmed, promoted and celebrated.[74] Sachs J further mentioned that religion is not always a matter of private conscience or communal sectarian practice, as many religious persons see it as part of their duty to be part of society as a whole. Religious organisations play major roles in media and schools, and demand ethical behaviour from their members, 'promote music, art and theatre ... and conduct a great variety of social activities'.[75] Religion is therefore seen as an active element of society which should be celebrated and given space to play a role in the formation of the societal sphere.[76]

[69] *Christian Education* ibid para 35.
[70] Ibid.
[71] Ibid para 33.
[72] *Fourie* supra note 51 para 90.
[73] 2008 (1) SA 474 (CC).
[74] Ibid para 65.
[75] *Christian Education* supra note 2 para 33. These words and sentiments were repeated in the case of *Fourie* supra note 51 para 90.
[76] Regarding the content of the right to freedom of religion, the court stated that it, at least, entails: '(a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the "absence of coercion or restraint." Thus, "freedom of religion may be impaired by measures that

Therefore, it does not seem that South African courts view religion and its institutions as something that should be regulated heavily, although religious believers and religious organisations remain subject to the laws of the land which, to some extent, limit and impose minor regulation on religious organisations. Besides religious organisations being bound by the law in general, South African courts have interfered with religious institutions when they have acted in a manner that was unjust or not in line with their own procedures,[77] but the courts have refrained from becoming involved in doctrinal issues, regulation or the management of religious institutions.[78] I shall argue below that the proposals by the CRL Commission, should they be enacted or widen the scope of the CRL Act, could lead to possible doctrinal entanglement, thereby unjustifiably limiting the right to religious freedom.[79] Furthermore, when one considers the reactions of religious institutions to these proposals, it is clear that they do not view such regulation as an affirmation of diversity, but rather as a limitation of their freedom.[80]

There is no jurisprudence to indicate that the extensive form of regulation proposed by the Commission is in line with the right to religious freedom in ss 15 and 31. The scope of the right to religious freedom in South Africa does not indicate that it allows for the extensive regulation of religion in the manner explained by the Commission, although minor regulation and limitations do exist. Hence, the proposals of the CRL Commission will restrict 'an activity which falls within the protected scope of the right'.[81]

The CRL Commission's recommendations contain a clear limitation and stricter regulation of the right to religious freedom, and it has to be established whether such limitation is justifiable under s 36(1) in an open and democratic society based on human dignity, equality and freedom.[82] This is the second stage of the limitation enquiry.

Section 36 of the Constitution states:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
> *(a)* the nature of the right;

force people to act or refrain from acting in a manner contrary to their religious beliefs" ': *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 38; *Christian Education* supra note 2; *S v Lawrence* supra note 50.

[77] See for example *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 *ILJ* 868 (EqC) and *De Lange v Presidding Bishop of the Methodist Church of Southern Africa* 2016 (2) SA 1 (CC).

[78] Rassie Malherbe 'Die impak van die Grondwet op godsdiens — 'n voorlopige waarneming' (2008) 49 *Nederduits Gereformeerde Teologiese Tydskrif* 269.

[79] See part V(c) below.

[80] Carl Collison 'State is trying to control religion and doesn't listen to us' *Mail & Guardian* 30 August 2017, available at *https://mg.co.za/article/2017-08-30-state-is-trying-to-control-religion-and-doesnt-listen-to-us*, accessed on 12 July 2018.

[81] Iles op cit note 66 at 71.

[82] Ibid.

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

A 'law of general application' includes common law and statutory law that are clear, accessible, precise and generally applicable.[83] In the case of *President of the Republic of South Africa v Hugo*[84] it was accepted that an empowering legislative provision was a minimum requirement to qualify as a law of general application. The CRL Act adheres to all these requirements, as it is clear, accessible, precise, generally applicable and an empowering law (for the CRL Commission). Although the CRL Act qualifies as a 'law of general application', I submit that the Commission's interpretation of the scope of its powers provided by the Act is too wide. As indicated above,[85] the CRL Act allows the Commission to *facilitate* the resolution of friction between and within cultural, religious and linguistic communities; *receive and deal with requests* related to the rights of cultural, religious and linguistic communities; and *make recommendations* to the appropriate organ of state regarding legislation that impacts the rights of cultural, religious and linguistic communities. The Commission may also establish and maintain databases of cultural, religious and linguistic community organisations and institutions.

Although the Commission may facilitate the resolution of friction and deal with requests, there is no compulsory element in this description of powers. The Commission cannot force religious institutions to submit themselves to 'dispute resolution mechanisms', and requests should come from the religious communities themselves, and not be imposed upon religious communities by an external structure. There is a clear element of compulsion in the recommendations where the Commission states that it 'proposes an organisational structure under which every religious organisation *should* fall and which they *should* adopt'.[86] Furthermore, the Commission may maintain databases of religious institutions, but not necessarily for purposes of regulation or to 'professionalise the religious sector'.[87] Hence, although the CRL Act is empowering legislation, the CRL Commission's interpretation of the scope of its powers is broader than the CRL Act allows. Only if the recommendations of the Commission were to be officially enacted and the scope of its powers widened by law would the recommendations become 'law of general application'.

Section 36 further states that a limitation should enhance the values of an open and democratic society based on human dignity, equality and freedom.

[83] Ibid at 76.
[84] 1997 (4) SA 1 (CC) paras 96–104.
[85] See part II above.
[86] Final report op cit note 11 at 39 (emphasis supplied).
[87] Ibid.

It is not clear how the recommendations will further democracy and freedom. One possible result may be that religious organisations will be subject to more state control and a number of limited cases of abuse will be prevented, but it is not clear how this will be sufficient to further democracy and freedom for society in general. Will the prevention of isolated instances of human-rights violations (by way of the recommended limitations) outweigh the limitations imposed on the equality and freedoms of religious institutions? This is where certain factors are taken into account in order to balance the competing rights and establish whether the limitation is justifiable or not.

The first factor to be taken into account is the 'nature of the right'. This is a measure of the ability of a right to be limited. Some rights appear by their nature to be capable of limitation in very particular ways only. For example, the right not to be subjected to slavery is almost impossible to limit.[88] However, the right to religious freedom has a negative and positive aspect. The negative aspect states that the state may not interfere in any person's practice of their personal religion, while the positive aspect means that every person has a right not to have one religion preferred over another. The limitation enquiry may have different outcomes depending on which part of the right is being focused on.[89] The right to religious freedom also has a forum internum part (which cannot be limited) and a forum externum part (which can be limited, subject to narrowly defined circumstances).[90] The limitation of the right will therefore depend on the context.[91] The right to religious freedom is also permeable in that it overlaps with equality, freedom and human dignity.[92] The effect of limiting this right therefore touches upon all three values underlying the Constitution.

The second factor is the 'importance of the purpose of the limitation'. Thus, the limitation must advance an important state interest.[93] In this case, it can be argued that the state interest is the protection of its citizens from abuse and protection of public safety and public order.

The third factor, the nature and extent of the limitation, is far-reaching. The recommendations will limit not only a few isolated religious organisations or persons, but rather affect the entire religious body of South Africa. What is important is the effect of the limitation on the right itself.[94] It is argued that the right to religious freedom, as understood in South Africa up to now, will be completely compromised and the impact will be so great that it will change the established relationship of co-operation between religion and state. This impact is discussed in detail below.[95]

[88] Ibid at 80.
[89] Ibid.
[90] This is clearly seen in art 18 of the International Covenant on Civil and Political Rights op cit note 49.
[91] Iles op cit note 66 at 81.
[92] Ibid.
[93] Ibid at 82.
[94] Ibid at 83.
[95] See part V(b) to (f).

The fourth factor asks whether there is a rational connection between the limitation and the purpose it hopes to achieve.[96] The CRL Commission hopes to protect those who are vulnerable and easily subjected to abuse by religious organisations. The Commission also hopes to ensure that religious organisations abide by the laws of the country. However, it is not clear how the registration procedures proposed by the Commission will realize these purposes. One would imagine that a better or more organised application of existing laws, or the implementation of specific (and less general) regulation (such as amendments to advertising legislation for those religious organisations who advertise in a fraudulent manner) could achieve the purposes envisioned by the Commission. This would also have a lesser impact on the collective right to religious freedom of religious institutions as a whole. The nature and the extent of the proposed 'licensing' far exceeds the purpose for which it is implemented.

This leads us to the final factor — 'less restrictive means to achieve the same purpose'. As stated above (and argued below),[97] there are less restrictive means to protect the most vulnerable people in society from abuse by religious institutions. The potential burdens placed on religious institutions outweigh the purpose of bringing a number of individuals to justice.[98] The Commission is of the opinion that the actions of certain religious institutions lead to human rights violations. This may be true, but there are existing, less restrictive means (in constitutional law, criminal law and civil law) for dealing with such violations (which I shall discuss below) than the full regulation of religion and religious institutions. The right to religious freedom overlaps with human dignity, equality and freedom and the proposed regulations by the Commission will have a broad effect on all three founding values of the Constitution.[99]

Flagging a number of isolated instances as sufficient cause to restrict religious freedom in general (in a way that affects the entire country and not only isolated individuals) is also not supported in international law. International law does provide for some limitations of the right to religious freedom that should be taken into account in South African law.[100] Article 18 of the Universal Declaration of Human Rights ('UDHR')[101] provides that 'everyone has the right to freedom of thought, conscience and religion'. This right includes the freedom to change one's religion and to manifest a religion or

[96] Iles op cit note 66 at 83.

[97] See part V(d).

[98] With this criterion it is the effect of the limitation on the right itself and not the individual that is important: Iles op cit note 66 at 83.

[99] How this occurs is discussed in more detail in parts V(b) to (f).

[100] International law forms an intrinsic part of South African constitutional law and interpretation by way of s 39 of the Constitution, which states: 'When interpreting the Bill of Rights, a court, tribunal or forum — ... (b) *must* consider international law' (emphasis supplied).

[101] Adopted by the United Nations General Assembly at its 3rd session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.

belief in teaching, practice, worship and observance. This can be done as individuals and in community with others. This right is repeated in art 18 of the International Covenant on Civil and Political Rights ('ICCPR').[102] Furthermore, para 3 of art 18 states that this freedom may only be limited if prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. In general, the Commission argues that the recent occurrences in South Africa can be framed as human rights violations. As the former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, has said, governments frequently refer to the broad and unspecified limitation of 'order' or 'morality'[103] in order to discriminate and tighten control over independent religious communities.[104] It is easy to group a number of isolated instances under broadly framed restrictions in order to increase control over religion and this becomes a way of imposing arbitrary restrictions.[105] The bar for the violation of public peace and order is very high. The burden for justifying any limitation on freedom of religion lies with the state.[106] According to General Comment 22, the Human Rights Committee insists that 'paragraph 3 of article 18 is to be strictly interpreted'.[107] Limitations must be established by law and not be applied in a manner that would vitiate the right to religious freedom.[108] To prevent a state from abusing limitation criteria, such restrictions on human rights always require specific arguments.[109] A limitation of the forum externum part of religious freedom can only be permitted if *all* the criteria set out in art 18(3) of the ICCPR are met.[110] Limitations must be legally prescribed and they must be necessary to pursue a legitimate aim — the protection of 'public safety, order, health or morals or the fundamentals rights and freedoms of others'. Restrictions must also be proportional, meaning that they must be limited to a minimum degree of interference and must be conducive to promoting the legitimate purpose they are supposed to serve.[111] The proposals of the CRL Commission seem to group isolated instances under broad restrictions such as the violation of 'human rights'. Furthermore, the creation of an entire

[102] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

[103] The notion of using 'morals' to restrict the right to religious freedom must not be based on principles deriving exclusively from a single tradition: United Nations 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, available at *http://www.refworld.org/docid/453883fb22.html* para 8.

[104] United Nations General Assembly *Elimination of all Forms of Religious Intolerance*, A/71/269 para 16.

[105] Bielefeldt et al op cit note 4 at 21.

[106] Ibid at 231.

[107] CCPR General Comment No 22 op cit note 103 para 8.

[108] Ibid.

[109] Bielefeldt et al op cit note 4 at 21.

[110] Ibid at 22.

[111] Ibid.

structure of peer-review committees and umbrella organisations (as dispute resolution mechanisms) to prevent such isolated instances is not a minimum degree of interference and is also disproportionate.

It can nevertheless be argued (as the Commission does) that regulating religious institutions will not necessarily mean that the right to religious freedom is limited. For the first time, in Resolution 2005/40, the Commission on Human Rights expressed serious concern 'at the misuse of registration procedures as a means to limit the right to freedom of religion or belief of members of certain religious communities'.[112] Therefore, it is not regulation that is condemned, but rather its misuse. Although regulation criteria as such are not necessarily a violation of the right to religious freedom, there are a number of reasons why the proposals of the CRL Commission can be regarded as misuse of regulation criteria. According to the European Court of Human Rights,[113] vague descriptions of the scope of powers of bodies which make 'arbitrary or discriminatory decisions by officials possible are impermissible'.[114] As stated above,[115] the Commission wishes to broaden the scope of its powers and has only vaguely described the powers of the different bodies forming part of the proposed 'dispute resolution mechanism'. Potential misuse (whether intentionally or by way of negligence) can also emanate from several obstacles and consequences when religious institutions have to register themselves — leading to the misuse or negligent use of regulation criteria, eventually infringing the right to religious freedom. Special Rapporteur Bielefeldt made a number of recommendations regarding the regulation of religion and the circumstances under which such regulation would be abusive. According to Bielefeldt, regulation should not be made compulsory. It should not review the substantive content of the belief or the structure of the community, and it should not interfere with voluntary financial contributions by individuals or institutions.[116]

> 'While registration can have beneficial effects for those communities wishing to obtain such a status, it is highly problematic if the Government renders registration compulsory by turning it into a sine qua non of any communitarian enjoyment of freedom of religion or belief.'[117]

> 'It cannot be reiterated enough that freedom of religion or belief, qua its nature as a universal human right, inheres in all human beings prior to any process of administrative approval. Thus, it must be possible for individuals and groups of individuals to also practise their religion or belief independently from any official status, if they prefer not to obtain any such status or if their application for registration has been unsuccessful.'[118]

[112] Ibid at 226.
[113] *Jehovas & others v Austria* ECtHR, App No 40825/98, July 31 2008 para 71.
[114] Also see Durham op cit note 63 at 8.
[115] See part III above.
[116] Bielefeldt et al op cit note 4 at 228–30.
[117] Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief*, Heiner Bielefeldt, A/HRC/28/66/Add.1.
[118] United Nations General Assembly op cit note 104 para 49.

The fact that regulation criteria should not be made compulsory was confirmed by the European Court of Human Rights in *Masaev v Moldova*.[119]

Based on these criteria, there are several potential violations of religious freedom in the proposals of the CRL Commission. The Commission states that it will be the final arbiter on issues arising within religious institutions, limiting the independence and freedom of religious institutions to deal with their internal matters by way of their own rules and regulations. This will especially be unjustifiable if the Commission interferes with the substantive issues and structures of religious institutions. The grouping of religious institutions into different umbrella organisations already makes assumptions about the structures of religious institutions. The CRL Commission also fails to circumscribe the nature, functions and powers of the peer-review committees and umbrella organisations. It becomes impossible to determine whether the powers that these bodies will have can potentially infringe upon the right to religious freedom — they are too vague. This points towards the potential misuse of regulation criteria, resulting in possible doctrinal entanglement by the Commission. United Nations commentary also states that registration cannot be made compulsory. Hence, religious institutions cannot be expected to register themselves under umbrella organisations. A refusal to register should also not place a religious institution at a disadvantage, either financially or in the exercise of its religious freedom. Therefore, to the extent that registration or licensing is compulsory and the Commission has a final say on undefined issues, there is misuse of the regulation procedure and a potential unjustifiable limitation of s 15. Clear (and less limiting) means to deal with unlawful behaviour by religious institutions already exist.

The Commission's proposal should not pass muster under s 36 of the Constitution, as this form of heavy regulation is unknown in South African jurisprudence. The internal limitations of religious freedom in international law require a very high bar — one, as Bielefeldt argues, that states use too readily to justify regulation criteria. Likewise, the Commission has simply grouped together a number of isolated incidents of abuse under the broad notion of 'human rights violations' and has argued that those abuses sufficiently justify regulation of religion in a heavy-handed manner.

(b) The flawed assumption of a common denominator

South African courts have emphasised the importance of religious diversity and of protecting and celebrating this diversity. The Commission's proposed measures are based on the assumption that there is a common denominator between religious organisations that would allow grouping them together under umbrella organisations. This ignores the fluid and flexible nature of religion and belief as such.

The focus of the right to religious freedom should be the believer (the human being) and not the belief. The main reason for this is that beliefs and

[119] ECtHR, App No 6303/05, May 12 2009 para 26.

religions are often irreconcilably different in their messages, normative requirements, and interpretations of what matters. Consequently, there is no common denominator upon which to base 'regulation' of belief structures under umbrella organisations.

> '[T]he only common denominator identifiable within such vast diversity seems to be the human being, who is the one professing and practising his or her religion or belief, as an individual and/or in community with others. Accordingly, human rights can only do justice to the existing and emerging diversity by empowering human beings, who indeed are the right-holders of freedom of religion or belief.'[120]

The organisation of religions or beliefs into groups or communities of groups seeks to place religious organisations within boundaries that do not exist, and tries to find consensus that does not exist and which is not necessarily profitable. The right to religious freedom 'cannot be confined to particular lists of religious or belief-related "options" predefined by states, within which people are supposed to remain'.[121] According to Carter, religion has no sphere and has no natural bounds. It is not amenable to being 'pent up'.[122] According to Bielefeldt, the regulation of religion, the packaging of religious beliefs and the artificial structuring of religion as proposed by the CRL report (static umbrella organisations and peer-review committees) will potentially recognise religions and beliefs with certain institutional characteristics and exclude the fluid and flexible nature of religion and belief. Furthermore, in keeping with the principle of autonomy is the fact that states should not require religious groups to structure themselves in ways that are not consistent with their own beliefs about their structure (hierarchical, congregational, connectional, representational, etc).[123] Lastly, if registration criteria are only accommodative to some, and not all, religions, the activities of many other religious groups will be restricted, as different religious groups have different organisational needs.[124]

How will these religious institutions be grouped? Will there be an umbrella organisation for Protestant churches? If so, how can an umbrella organisation for Protestant churches have a unified structure while being representative of several denominations? How can one umbrella organisation with a single structure accommodate and include the variations and differences of a diverse pool of Protestant churches? Will the internal procedures of, for example, the Apostolic Faith Mission churches ('AFM') in South Africa be compatible with the required regulations and mechanisms of the

[120] United Nations General Assembly op cit note 104 para 11.

[121] Ibid.

[122] Stephen L Carter *God's Name in Vain: The Wrongs and Rights of Religion in Politics* (2000) 72.

[123] OSCE 'Guidelines for review of legislation pertaining to religion or belief' adopted by the Venice Commission at its 59th Plenary Session (18–19 June 2004) available at *https://www.osce.org/odihr/13993?download=true*, accessed on 13 July 2018, s II(F)(1). Also see Durham op cit note 63 at 8.

[124] Durham ibid at 10.

peer-review committee? Even if it is, will it simultaneously be accommodative towards the internal procedures of other religious organisations, such as the Dutch Reformed Church? If the Dutch Reformed Church followed its own internal procedure to appoint or dismiss a minister, is the umbrella organisation or peer-review committee in a position to override these procedures (especially where the institutional leader abused his or her position) and can the procedures of the umbrella organisation be representative of, for example, all Protestant churches?

The potential for doctrinal entanglement and interference with the structures and unique characteristics of religious institutions cannot be avoided when religious institutions are grouped into umbrella organisations based on the flawed assumption that these institutions have a common denominator (other than the human being).

(c) Doctrinal entanglement

The CRL Commission stated that the umbrella organisations will have final decision-making powers, as will the peer-review committee which, in turn, will be under the control of the CRL Commission. The umbrella organisations would be able to set standards of good governance and implement disciplinary procedures for religious ministers and others. Members could also be added and removed from the organisations at the recommendation of the umbrella organisations. It is not clear what these disciplinary procedures entail and in which instances they could be used. It is also not clear what 'standards of good governance' would entail, and whether they will be compatible with the internal doctrines of multiple and diverse religious institutions.

This could potentially lead to interference with the internal workings and doctrines of religious institutions by the external Commission. Although the Commission argues that it does not intend to involve itself with the doctrines of religious institutions, the decision on when a religious belief is for mere financial gain, is a 'reasonable' belief, and meets the 'standards of good governance' (some of the reasons for the proposed licensing) already presents potential entanglement.

A religious institution, as a legal person, can also be a bearer of the right to religious freedom. This provides religious institutions with the autonomy to implement their own doctrines and beliefs. It also allows religious institutions to make decisions and policies about other internal matters, such as their organisational structures and procedures, appointment of clergy and membership requirements. It is generally accepted in South Africa that the law and courts do not involve themselves in the doctrinal issues of religious institutions. The appointment of clergy and membership requirements are usually closely entangled with doctrinal issues and the courts and the law are hesitant to interfere with these issues.[125] For example, in the case of *De Lange*

[125] Malherbe op cit note 78 at 269.

v Presiding Bishop of the Methodist Church of Southern Africa[126] the Supreme Court of Appeal asserted that protecting the autonomy of religious associations was considered a central aspect of protecting religious rights. The court further stated that this type of dispute (the sexual orientation of the spiritual leader) was the kind in which a secular court should not become entangled, because the issue goes to sensitive matters of doctrine.[127]

However, religious institutions are not absolutely free from external interference — especially not in cases of human-rights violations such as the ones investigated by the Commission. The right to religious freedom of religious institutions can be limited. Courts have also interfered where the internal procedures of a religious institution (agreed upon by parties to a contract) were not followed (not leading to doctrinal entanglement). As a legal person, a religious institution must comply with the law when entering into a contract and buying property, for example.[128] According to Van Coller, a court will interpret the relevant church order to ensure that the church complies with its own rules, and will not interfere unless strictly necessary.[129] For example, in the case of *Ngewu v The Anglican Church of Southern Africa*[130] the court confirmed that 'a Court will only interfere in unconcluded proceedings if a grave injustice will occur and it is necessary to intervene to attain justice'.[131] In the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*[132] the court stated that it could not interfere with the selection and appointment of spiritual leaders in a church. However, concerning the application of contracts of employment of non-spiritual leaders, the court may interfere.[133]

Although South African courts have interfered with 'non-doctrinal' issues of religious institutions, this does not mean that the registration of religious institutions will be confined to the 'non-doctrinal' and will not infringe upon the doctrinal aspects of religious institutions (especially if the powers of umbrella organisations and peer-review committees are not clearly defined). When it comes to the registration of religious institutions, it becomes fundamentally important to define whether and when such registration (or the expulsion of an institution or religious practitioner) can take place. It is also important to indicate that registration and expulsion will merely be connected to issues that are not doctrinal or part of the internal organisation (structure or procedures) of the religious institution. From the final report it is not clear when licensing of institutions and individual practitioners can be recommended, or what 'minimum standards of good governance' and

[126] Supra note 77 para 77.
[127] Ibid.
[128] Malherbe op cit note 78 at 269.
[129] Helena van Coller 'The Church, the Bishop, and the missing money' 2017 *Oxford Journal of Law and Religion* 610.
[130] [2016] ZAKZPHC 88.
[131] Ibid at 39.
[132] *Strydom* supra note 77 para 77.
[133] Ibid paras 16–18.

'members who veered off the path to bring them back' mean.[134] It is also not clear when a member can be removed from the register of religious leaders and according to which criteria a recommendation of removal will be made. The procedures and grounds for disciplinary procedures are not made clear. Such 'standards of good governance' and 'disciplinary procedures' can easily become entangled with the doctrinal issues of a religious institution if not defined clearly. And even if defined clearly, caution should be exercised not to cross the boundary between that which is doctrinal and that which is temporal.

(d) Measures already in place

It has been argued that extra licensing or regulation is not necessary in cases of violation of human rights by religious institutions, since there are already measures in place to deal with such instances in South Africa. And even if registration procedures exist, such registration procedures should be used to facilitate rather than control religious activity: 'other tools in the state's legal arsenal such as criminal laws and administrative sanctions are used to address these problems when they emerge'.[135] Durham indicates that it is also not registration laws that are particularly effective in terms of identifying problematic behaviour (such as the abuse of religion for financial gain). Usually it is police, neighbours, disgruntled insiders and the media (as seen in the recent cases in South Africa) that uncover such abuses.[136]

As Van Coller argues, religious institutions are already subject to various administrative and financial laws with which they have to comply, for example, the Non-Profit Organisations Act, the Companies Act[137] and the Income Tax Act.[138] Other legislation includes financial regulation through the banks, employment legislation and many more. Van Coller suggests that instead of creating more regulations with which religious institutions have to comply, the abuse of religion which falls within the ambit of legal violations should be prosecuted using existing tax, immigration, criminal and other laws.[139]

However, it might be argued that these existing measures cannot be utilised effectively because of the notion of doctrinal entanglement. In other words if, for example, a preacher told a congregation member to pay him or her a sum of money to perform a miracle healing, it would be difficult for the congregation member to accuse the preacher of fraud since the congregant agreed to the transaction and the action of the preacher was based on a belief. It could also not be argued that the belief of the preacher was irrelevant,

[134] See part III above where these recommendations by the Commission are discussed. Also see, final report op cit note 11 at 46.
[135] Durham op cit note 63 at 10.
[136] Ibid.
[137] Act 71 of 2008.
[138] Act 58 of 1962.
[139] Van Coller op cit note 129 at 610–18.

mistaken or ridiculous. There is a reluctance to regulate even the most 'harmful' religious beliefs, as deciding on the faith of others strikes at the heart of religious freedom.[140] It could also be argued that non-mainstream religious institutions are never held to the same standards as non-religious institutions.[141] For example, fraud in non-religious institutions is easily acted upon. However, when it comes to religious institutions, fraud in the name of a religious action or belief is seldom acted upon due to fear of doctrinal entanglement. As De Vos states, it is unthinkable that any religious institution inducing believers to give it money by promising them a better life on earth or an eternal life in 'heaven' would be criminally prosecuted in South Africa. This is so partly because the truthfulness of these beliefs cannot be proven.[142] But it is because of the nature of religious freedom, and because it strikes at the heart of the dignity of a human person, that voluntary religious and non-religious beliefs and actions cannot be criminally sanctioned in the usual way.

Hence, the question arises whether the ordinary criminal and fraud sanctions would be sufficient to prosecute those who abuse religion for their own gain, especially in view of the fact that the sanctions cannot be applied to religious institutions in the usual way because doctrinal entanglement should be avoided. To the extent that the application of the law does not interfere with the doctrine, procedure and organisation of a religious institution, existing laws can be used to govern religious institutions and their actions. Although these laws may not be as effective concerning issues where doctrine is concerned (eg in identifying fraudulent beliefs and practices of religious practitioners), the structure proposed by the CRL Commission, if it wishes to remain lawful and in line with South African law and practice, may also not make decisions concerning religious doctrine. Hence, it would not be acceptable for the Commission (or the umbrella organisation, or the peer-review committee) to decide when the beliefs of a religious practitioner or religious institution are fraudulent or criminal. Therefore, even if existing laws will not always be able to identify 'fraudulent' beliefs due to the principle of doctrinal entanglement, the Commission would not be allowed or be able to have a greater scope of jurisdiction in such cases, or to make such determinations (as this would be contrary to existing jurisprudence regarding religious freedom and doctrinal entanglement in South Africa).

How then, can such fraudulent actions of religious institutions be countered? Should government go as far as attempting to counter them at all, when they are based on the voluntary actions and choices of believers? In current South African jurisprudence, the courts cannot determine when a

[140] Pierre de Vos 'Rights and wrongs of regulating religion' *Daily Maverick* 26 August 2015, available at *https://www.dailymaverick.co.za/opinionista/2015-08-26-rights-and-wrongs-of-regulating-religion/#.WecQX4hx3IV*.

[141] Ibid.

[142] Ibid.

religion or belief is 'reasonable' or fraudulent.[143] This does not mean that there are no restrictions on the right to religious freedom. As stated above,[144] there are instances where the courts have interfered with employment contracts and procedural matters not involving doctrinal issues of religious institutions. As Van Coller indicates, even in instances concerning doctrinal issues no further regulation is needed where religious institutions have proper processes in place and follow proper procedures in relation to the governance and financial affairs of the church.[145] For example, in the case of *Ngewu v The Anglican Church of Southern Africa*[146] (involving alleged financial mismanagement by a bishop), after unsuccessful attempts to resolve the issues through pastoral means, the Synod of Bishops appointed a task team in accordance with its canons to conduct a forensic audit. The church also appointed a fraud investigation team. Eventually the Metropolitan of the church informed the applicant that it had decided to proceed with a trial against him in terms of canon 38. Hence, the Anglican Church of Southern Africa was organised in such a manner that it had internal procedures in place to identify and deal with the fraudulent behaviour of its members and religious leaders.

As discussed above, there are also existing limitations of the right to religious freedom in international law. Therefore, if the conduct of a person (whether a religious leader or not) needs to be limited in order to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, and the strict limitation requirements of art 18 of the ICCPR are met, the right to religious freedom can be limited and fraudulent behaviour countered (although the proposals of the Commission are argued above to be too extensive and not in line with the limitations set by art 18 of the ICCPR). Additionally, the justifiable limitation of the right to religious freedom is possible in terms of s 36 of the Constitution (although it must be remembered that I have argued above that the proposals of the Commission are an unjustifiable limitation).[147]

(e) A distinction between the religious and the non-religious

Section 15 of the Constitution provides for the equal and broad protection of all religious and non-religious beliefs. The equal and broad protection of all religions and beliefs (religious and non-religious) is also provided for in international law (UDHR and ICCPR).[148]

[143] *Prince* supra note 76 para 42.
[144] See part V(c).
[145] Van Coller op cit note 129 at 610–18.
[146] Supra note 130.
[147] For a more detailed discussion on this aspect see part V(a).
[148] Articles 2 and 18 of the Universal Declaration of Human Rights include 'all possible attitudes of the individual to the world, toward society, and toward whatever determines his fate and destiny in the world, be it a divinity, a superior being, reason and rationalism, or chance': Bahiyyih Tahzib *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (1996) 73. General Comment 22 op cit note 103 para 2 clearly states that art 18 of the ICCPR protects theistic, non-theistic and

The investigation and both reports of the CRL Commission mainly focus on religious organisations as opposed to non-religious organisations, without ever providing a description of the concept 'religious institution' or 'religious organisation'. This in itself is an oversight by the Commission, in that it does not define its subject of application. If the CRL Commission only expects to register or license religious institutions, what about the licensing and regulation of institutions of non-religious beliefs? Why should belief structures or institutions of a religious nature be subject to licensing and registration requirements, but belief structures or institutions of a non-religious nature (such as humanistic societies) not be subject to such registration?[149] Here it is important to mention that s 15 of the Constitution and international law support the notion that 'a set of deeply held opinions — or convictions — can form a comprehensive view of the good life comparable to any and all conventional religious faiths'.[150] Section 15 also includes views derived from political, sociological or philosophical convictions or ideologies.[151] Here, the argument is that all ideologies or opinions are based on some or another belief structure, whether religious or not. These beliefs and their institutions are equally protected under s 15. However, the proposals of the Commission apply only to religious belief structures or institutions and not to those of a non-religious nature. There is no attempt by the Commission to justify this distinction. Such justification is important since non-religious beliefs, such as communism, can also be used in an abusive manner that violates human rights or be used for, in the words of the Commission, 'commercialisation'. If a mosque is to be grouped under specific organisations and be registered with the Commission, why should the 'humanist society' and its leaders not be registered in some way? It could be countered that the scope of the Commission's powers is limited to religious organisations only. This may be true, but does not detract from the fact that unequal treatment exists because only religious institutions need to be registered (and not non-religious institutions) while the freedom of religion and belief of both types of institutions is protected equally by s 15 of the Constitution.

Furthermore, minority religions and less 'institution-like' religions that are not sufficiently organised will find it more challenging to organise themselves for purposes of such registration and under umbrella organisations. When

atheistic beliefs as well as the right not to profess any religion or belief. Therefore, the terms 'belief' and 'religion' are to be understood broadly.

[149] It should also be noted that, in the African context, there is not always a great distinction between what is 'sacred' and what is 'secular': C W du Toit 'Religious freedom and human rights in South Africa after 1996: Responses and challenges' 2006 *BYU LR* 685.

[150] Paul Farlam 'Freedom of religion, belief and opinion' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) 41-14.

[151] Bernard Bekink 'The intrinsic uneasy triangle between constitutionalism, secularism and the right to freedom of religion — A South African perspective' 2008 *TSAR* 481 at 487–8.

regulatory criteria are used, many states do not adequately reflect the full scope of the right to religious freedom because they often restrict its application to predefined types of religions while excluding non-traditional beliefs and practices.[152]

In summary, the envisaged problems with the CRL Commission's report include the possibility that traditional or established religions might be able to organise themselves under umbrella organisations (although even this might prove to be challenging), while more fluid and smaller religions or beliefs would not necessarily have the capacity to do so. Several religious groups and their denominations are not necessarily 'organised' (whatever that may mean).

There will also be a distinction between religious beliefs and non-religious belief structures. If the registration of religion applies only to religious institutions and will be easier for more 'institution-like' religious organisations, will this be in line with s 9 of the Constitution?[153]

(f) The 'reasonable person' test

In the final report, and during the hearings, the CRL Commission stated that the test for freedom of religion is the 'reasonable person' test.[154] In the context of the CRL Commission's investigative finding that some religious institutions have caused harm and have infringed upon the rights of the 'poor and vulnerable', the 'reasonable person test' refers to the fact that unemployment, poverty and inequality render people desperate and willing to believe anything (or anything that a 'reasonable person' would not).[155] However, in the case of *Prince v President of the Law Society of the Cape of Good Hope*[156] the court stated that a person is free to believe something even if it is illogical or bizarre.[157]

> 'The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion.'[158]

Sachs has also written that the wounds of the religious community have been caused by writings that the public realm was confined to the world of rationality and public reason, 'that all forward-looking people could under-

[152] United Nations General Assembly op cit note 104.

[153] Section 9(3) of the Constitution states that the 'state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender ... religion, conscience, belief, culture'.

[154] Final report op cit note 11 at 50.

[155] Report of Women in the Presidency op cit note 19.

[156] *Prince* supra note 76 para 42.

[157] Open letter op cit note 26.

[158] *Prince* supra note 76 para 42.

stand'.[159] Hence, South African jurisprudence does not support the notion that religious freedom is only granted where the religion is seen as 'reasonable'.[160]

Although I do not support the 'reasonable person test' in relation to the determination of the application of the right to religious freedom, it is still a reality that there are religious institutions in South Africa that exploit the poor and vulnerable members of society. For this reason, I argue that the South African government should prosecute these perpetrators via existing legal means,[161] rather than regulating religious institutions and making decisions about which beliefs are 'reasonable' and which ones are not. Giving courts the power to decide when a religious belief or action is 'reasonable', is a potential entanglement with the doctrine of a religion and a violation of the right to religious freedom.

VI CONCLUSION

The regulation or registration criteria for religious institutions are not necessarily an unjustifiable limitation of the right to religious freedom. However, it is the use of such criteria in a manner that is unduly restrictive and limiting towards the right to religious freedom that is problematic.

Although the regulation and registration of religious institutions are used in several countries, for example Belgium (although this is not uncontroversial),[162] this does not mean that it is an appropriate model in the South African context, as it is unprecedented in South Africa. It underestimates the fluid and diverse nature of South Africa's religious societies as well as the relationship of mutual benefit between religion and state.

It is also argued that, even if the proposals of the Commission were to be accepted, they would amount to an unjustified limitation of the right to religious freedom — especially in the manner they are presented currently. The reasons are:

(a) The proposals of the Commission are contrary to international commentary that registration should not be made compulsory.
(b) The scope of the powers of the proposed committees and umbrella organisations is not clearly described.
(c) The circumstances under which licenses and registration may be withdrawn are not defined.

[159] Albie Sachs *The Strange Alchemy of Life and Law* (2009) 240.

[160] A similar approach has been adopted in Europe where the OSCE states that the European Court of Human Rights is 'ill-equipped' to 'delve into discussion about the nature and importance of individual beliefs, because what one person holds sacred may be absurd or anathema to another and no legal or logical argument can be invoked to challenge a believer's assertion that a particular belief or practice is an important element of his religious duty': *Guide on Article 9* op cit note 30.

[161] See part V(d) above for a discussion of the measures already in place to deal with such perpetrators.

[162] Franken op cit note 5. See further note 5 in general.

(d) The proposals of the Commission, should they widen the scope of the CRL Act or be enacted, are not justifiable limitations of the right to religious freedom under s 36 of the Constitution. There are existing and less restrictive means to deal with human rights violations by religious institutions.
(e) Countries use broad categories such as 'human rights violations' (as an art 18 ICCPR limitation) too easily to impose registration procedures upon religious institutions, which limits the right to religious freedom.
(f) Such registration procedures assume that diverse religious groups in South Africa share some common denominators.
(g) Such registration procedures do not take into account that various minority religions are unstructured and insufficiently organised.
(h) The registration of religious institutions, but not non-religious belief institutions, may potentially amount to discrimination under ss 9 and 15 of the Constitution.
(i) The Commission claims for itself the power to determine when a religion or belief is 'reasonable', which is a clear form of doctrinal entanglement.

According to Durham, unduly restrictive laws governing the structuring of religious organisations result in significant loss of the social benefits of religions. Although the impact of religion can be positive and negative, 'it is socially wasteful to regulate religion in ways that unnecessarily curtail its positive effects'. The broad trend is to assure religious communities at least as much legal flexibility as secular NPOs are allowed.[163] I have argued in this article that the structures proposed by the Commission will, in an attempt to curb the negative effects of religion (in the way that any ideology could have negative effects), unnecessarily curtail the positive effects of religion and the positive contributions of religious institutions in society (such as inculcating altruism, the enhancement of social stability, productivity, increased volunteerism, social commitment, integrity and general creativity).[164]

[163] Durham op cit note 63 at 9.
[164] Ibid.

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