CHURCH LAW AS A *IUS SUI GENERIS* IN SOUTH AFRICA: A REFORMED PERSPECTIVE

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Church law as a *ius sui generis* in South Africa: A Reformed perspective

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A thesis submitted to the Faculty of Theology (Department of Ecclesiology)
at the University of the Free State
in accordance with the requirements of the degree of

PHILOSOPHIAE DOCTOR

Promoter: Prof PJ Strauss

January 2014

DANKBETUIGINGS

Spesiale dank by die afhandeling van hierdie projek gaan ongetwyfeld aan

- Sheryl en Jenna vir al die liefde, aanmoediging en geduld
- Prof Piet Strauss vir die motivering en bekwame leiding
- Erna Kinsey vir die sorgvuldige taalversorging
- Die personeel van die biblioteke van UNISA, die Universiteit van Pretoria, die Universiteit van die Vrystaat, die Noordwes-Universiteit sowel as die kerkargief van die NHK
- Die Hervormde gemeente Sionspoort vir die volgehoue ondersteuning
- Die Een wat self alles voorsien wat Hy vra

DECLARATION

I declare that the thesis hereby handed in for the qualification Doctor of Philosophy (PhD) at the University of the Free State, is my own independent work and that I have not previously submitted the same work for a qualification in another faculty or at another university.

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JH van Staden

ABBREVIATIONS

BCEA	--	Basic Conditions of Employment Act
CCMA	--	Commission for Conciliation, Mediation and Arbitration
CE	--	Church of England
CPD	--	Cape Provincial Division
CPSA	--	Church of the Province of South Africa
ECHR	--	European Court of Human Rights
EComHR	--	European Commission of Human Rights
EDL	--	Eastern Districts' Local Division
EEA	--	Employment Equity Act
FBO	--	Faith-based Organisation
GKSA	--	Gereformeerde Kerke in Suid-Afrika
ICCPR	--	International Covenant on Civil and Political Rights
LRA	--	Labour Relations Act
MCSA	--	Methodist Church of Southern Africa
NGK	--	Nederduitse Gereformeerde Kerk
NHK	--	Nederduitsch Hervormde Kerk
NHGK	--	Nederduitsch Hervormde of Gereformeerde Kerk
NIV	--	New International Version
NPD	--	Natal Provincial Division
NPO	--	Non-profit Organisation
OPD	--	Orange Free State Provincial Division
PAJA	--	Promotion of Administrative Justice Act
PBO	--	Public Benefit Organisation
PKN	--	Protestantse Kerk in Nederland
SAFA	--	South African Football Association
SARFU	--	South African Rugby Football Union
SCA	--	Supreme Court of Appeal
TPD	--	Transvaal Provincial Division
UCB	--	United Cricket Board of South Africa
UDHR	--	Universal Declaration of Human Rights
UK	--	United Kingdom
UN	--	United Nations
USA	--	United States of America
VGK	--	Verenigende Gereformeerde Kerk in Suider-Afrika
VOC	--	Dutch East India Company
WLD	--	Witwatersrand Local Division
ZAR	--	Zuid-Afrikaansche Republiek

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CHAPTER 1

INTRODUCTION

1.1 Orientation

Before 1994 South Africa was, for all intents and purposes, a Christian state and the alliance between church and state often blurred the distinction between church law and civil law. The church enjoyed a privileged position and found itself politically protected. This favourable status was then severely challenged in the wake of the democratic elections on 27 April 1994. On 4 February 1997 the current Constitution of the Republic of South Africa (Act 108 of 1996) came into force. Chapter 2 (the Bill of Rights) of the Constitution guarantees fundamental rights that are paramount to the scope of this study. These include section 9 (Equality), section 15 (Freedom of religion, belief and opinion), section 18 (Freedom of association) and section 31 (Cultural, religious and linguistic communities).

In the light of the Constitution and experience of the first two decades of the current dispensation, the relationship between religious institutions (including churches) and the state needs to be carefully reconsidered. Issues that should be raised are the extent to which churches are compelled to comply with the authority of the law of the state, and the circumstances under which they are allowed to arrange their own internal affairs. The challenge to the church remains to redefine itself and its role and position in society, in terms of the constitutional rights and freedoms conferred upon it by the Bill of Rights. The need to explore the extent to which these freedoms influence the position of church law in South Africa emanates from this.

Roelf Meyer (2001:6), a former South African Member of Parliament and a leading figure in the constitutional process, recalls the monumental task the constitutional writers had in negotiating a new constitution at a time when

"(r)eligious and business leaders joined hands with political leaders to create a vision of hope for South Africa at a very critical time of the process, when violence still dictated the agenda".

According to Meyer (2001:6ff.) a very significant paradigm shift occurred halfway through the negotiation process. Essentially, this change involved a shift away from the focus on group rights to a focus on individual rights. After a brief breakdown in the process by mid-1992, a constitutional state, in which the Constitution, as opposed to parliament, would be supreme, was ultimately established. A Bill of Rights to protect individual rights came into being and the Constitutional Court was established to adjudicate the Constitution. An exact reading of the text confirms that the wording of section 15(1) indeed suggests that individualistic rights were first and foremost in the minds of the drafters. The jurisprudence of the South African Constitutional Court intimates that the judicial understanding of what the protection of the right entails is "indeed as lean, minimalist and especially individualistic as the wording of section 15(1)" (Du Plessis 2001:14).

This study, however, will focus on religious rights from a group rather than an individual perspective. Religious freedom, by its very nature, according to Du Plessis (1996:460), includes what is necessary for a person to be involved in a religious community of their choice. The right to religious freedom will therefore include a right to its associative or institutional element. Du Plessis (2001:14) poses the critical question: "Does the South African Constitution provide adequate protection for the rights of religious adherents actualising their religious freedom *as groups and as communities*?". Du Plessis concludes that there is generous scope within the constitutional context for the optimal protection of religious rights as group rights, and that there are several indications in the Constitution that facilitate a group-friendly understanding of the right to religious freedom, with no weaker form of religious freedom than that afforded to individuals.

The courts are increasingly willing to consider religious rights as the most important fundamental rights. Judgments in leading cases seem to support this

notion,[1] confirming the need to explore the extent to which these freedoms influence the position of church law in South Africa. In this light, Landman's (2006:178) caveat should be considered:

> Daar rus ook 'n groot plig op godsdiens-instellinge om hulle interne regsdokumente – bv. die statute van 'n godsdiens-instelling – in die lig van die Menseregte-akte te verwoord en om in detail te handel oor die *nie*-toepasbaarheid van sekere artikels van die Grondwet op so 'n organisasie.

Churches are, however, not always able to provide theologically sound answers to church-polity issues that may occur. This can lead to a situation where church issues have to be solved using legal methods "wat analoog is aan ander vorme van die reg en wat vreemd is aan die regering van die kerk" (Coertzen 1991:4). This could prove to be very unsatisfactory and not in the interests of sound church governance.

Many scholars propose that South Africa is a religion-neutral state (as opposed to a sacral or secular state),[2] providing for free exercise of religion without preferring any particular faith or denomination. The so-called "establishment clause" of the Constitution of the United States of America (USA)[3] is often cited as analogous authority for this view.[4] Chaskalson P., in *S v Lawrence; S v Negal; S v Solberg* (1997), points out that it is clear from USA court decisions dealing with the First Amendment of the USA Constitution that the "establishment clause" and the "free exercise clause" have different concerns, although they may overlap in some instances.[5] The judge warns that, in

[1] Cf. *S v Lawrence; S v Negal; S v Solberg* (1997), *Christian Education South Africa v Minister of Education* (2000), *Prince v The President of the Law Society of the Cape of Good Hope* (2002), and *MEC for Education: KwaZulu Natal v Pillay* (2008).
[2] E.g. Du Plessis (1996:461; 2001:19), Van der Vyver (2004:50), and Smit (2005:44). Cf. 5.3.2 (*infra*) and 5.3.3 (*infra*).
[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Constitution of the USA, First Amendment).
[4] Chaskalson, P., in *S v Lawrence; S v Negal; S v Solberg*, concedes this notion but warns that "[o]ur Constitution deals with issues of religion differently to the US Constitution" (at 100).
[5] At 99.

developing the South African jurisprudence under section 15 of the Constitution,[6] we should be careful not to blur this distinction.

Another possible analogy may be found in the total separation between church and state in the Netherlands. Van Bijsterveld (2001:152) shows how this separation should be qualified. The status of the church is entrenched in the Dutch Civil Code (*Burgerlijk Wetboek*). Churches are legal entities *sui generis* to be governed by their own statutes "in so far as these do not conflict with the law". This differs from the position with other legal entities, such as associations and foundations, as no specific regulations for the church as a legal entity have been enacted. The provision in the Dutch Civil Code section on general principles of legal entities does not apply to churches (see 4.4.16.1, *infra*). Analogous application of the regulations is only allowed in so far as this is not in conflict with church statutes or the nature of internal relations. The court may thus only annul a church decision if it conflicts with "good faith". Smith is convinced that it is

> unlikely that religious communities will be required to order their affairs in accordance with the Bill of Rights in the same way required of the state and other social actors. For religious freedom to be meaningful, the Constitution must permit religious groups to organize themselves around their own doctrines even if these doctrines appear peculiar, chauvinist or biased to others.[7]

Karl Barth (1958:713-720) describes church law altogether as a *ius sui generis,*[8] (albeit a *ius humanum* and not a *ius divinum*), "a law which in its basis and formation is different *toto coelo* from that of the state and all other human

[6] Section 15 of the Constitution corresponds with section 14 of the Interim Constitution (Act 200 of 1993) under which the case was decided.
[7] Quoted by Coertzen (2001:42).
[8] This description is sometimes also applied to other branches of law when there is a unique or peculiar position in relation to civil law. Dupont and Verbruggen (2005:1084) use the phrase when referring to the law of juvenile deliquency: "Daarmee werd de eigenheid (*ius sui generis*) van het jeugdbeschermingsrecht en de grenzen van de daarmee samenhangende bevoegdheden ter discussie gesteld".

societies".[9] Church law as *ius in sacra* must therefore be distinguished sharply from the law of church and state, expressed by Barth as *ius circa sacra*.[10]

The church, however, cannot exclude itself from the *ius circa sacra* because it cannot detach itself from the world it exists in.[11] The individual members of the church recognise the authority and jurisdiction of the state and adapt themselves loyally to the *ius circa sacra*.[12] At the same time, the *ius circa sacra* may never, without responsible theological reflection by the church, become the *ius in sacra*.[13] The state will never adopt the church's understanding of itself, nor does it have to. The law pertaining to church and state can never be, and should not attempt to be, the law of the church, nor can it be accepted or recognised as such.[14] It is paramount that churches refrain from viewing themselves in the same way the state often does. The challenge to the church remains to define itself and its role and position in society in terms of the constitutional rights and freedoms conferred upon it by the Bill of Rights.

For centuries, churches in the Reformed tradition have relied on article 36 of the Belgic Confession[15] (composed in 1561 by Guido de Brès), which deals with civil government, to elucidate the relation between the church and state authority. This article reads as follows:

> We believe that because of the depravity of the human race our God has ordained kings, princes, and civil officers. He wants the world to be governed by laws and policies so that human lawlessness may be restrained and that everything may be conducted in good order among human beings. For that purpose he has placed the sword in the hands of the government, to punish evil people and protect the good. And being called in this manner to contribute to the advancement of a society that is pleasing to God, the civil rulers have the task, subject to God's law, of removing every obstacle to the preaching of the gospel and to every

[9] Barth (1958:714) also describes church law as a living and growing law which continually calls for reformation and is therefore "unlike any other law, a *ius sui generis*".
[10] *Id.*:687.
[11] Coertzen (1991:159).
[12] Cf. Barth (1958:688).
[13] Bronkhorst (1992:45).
[14] Cf. Barth (1958:688).
[15] The Belgic Confession is the oldest of the doctrinal standards of the Reformed tradition, combining with the Heidelberg Catechism and the Canons of Dort to form the Three Forms of Unity.

> aspect of divine worship. They should do this while completely refraining from every tendency toward exercising absolute authority, and while functioning in the sphere entrusted to them, with the means belonging to them. And the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere; to the end that God may be honoured and served by everyone, as he requires in his Word. Moreover everyone, regardless of status, condition, or rank, must be subject to the government and pay taxes, and hold its representatives in honour and respect, and obey them in all things that are not in conflict with God's Word, praying for them that the Lord may be willing to lead them in all their ways and that we may live a peaceful and quiet life in all piety and decency. And on this matter we denounce the Anabaptists, other anarchists, and in general all those who want to reject the authorities and civil officers and to subvert justice by introducing common ownership of goods and corrupting the moral order that God has established among human beings.

Article 36 discusses civil authority in the light of Romans 13:1: "Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God".[16]

Many theologians are of the opinion that article 36 gives expression to a theocratic form of government that guarantees the self-rule of the church.[17] According to this view, God's absolute sovereignty creates the backdrop for church and state relationships, whether the state explicitly recognises this or not. In the light of the Confession, Coetzee (2006:150) maintains that there is mostly consensus amongst Calvinistic-reformed theologians regarding the state's duty to advance the kingdom of God.

It is uncertain though how, in a constitutional state with guaranteed rights to freedom of religion and modern democratic separation between state and

[16] The Bible (Translation: New International Version [NIV], 1984).
[17] Van Wyk (2005:35). See also Coertzen (2008:349).

church, this is to be achieved. Fourie (2006:170-171) indeed argues that article 36 is incompatible with modern forms of church-state relations and that it should be read as an interesting, but historically dated, document rather than attempting "hermeneutic gymnastics" to deduce a meaningful modern application from it.

The article's perspective of a "sacral society" where there is no separation of church and state seems to create a problem for modern-day practice of church law and governance. It even seems to prevent the very condition it sets out to achieve, rather than to promote the self-rule of the church.

When interpreting and attempting to apply the article one must take into account that it was written as an apology at a time when the Roman Catholic authorities continually reproached the Reformers for being revolutionaries with no respect for the king. In pleading for mercy from King Philip of Spain and assuring him that the Reformers are loyal subjects who honour those in authority, De Brès, borrowing from Calvin, uses two principles: The Word of God and the *ius naturale*[18] (an idea also subscribed to by Luther).[19] The only thing the Reformers desired was freedom to serve God according to their understanding of the Bible. It seems feasible, if not desirable, in any study of the position of church law *vis-à-vis* state authority and civil jurisprudence to take note of the role and implications of article 36 in church governance in a constitutional state.

1.2 Title of the thesis

The title of the study is: Church law as a *ius sui generis* in South Africa: A Reformed perspective. The scope is demarcated to focus mainly on the three traditional Afrikaans Churches of Reformed descent: (1) Nederduitse Gereformeerde Kerk (Dutch Reformed Church) (NGK); (2) Gereformeerde Kerke in Suid-Afrika (Reformed Churches in South Africa) (GKSA); and (3) Nederduitsch Hervormde Kerk van Afrika (Netherdutch Reformed Church of Africa) (NHK).

[18] See Dreyer (2005:888-889). Cf. Coetzee (2006:148).
[19] Raath (2007:170) notes how Luther embraced St. Paul's idea of natural law as a law "written in (men's) hearts". See also *Id.* (footnote 3).

1.3 Value of the study

As a primarily theological study the focus remains on church law rather than on civil law in its objectives and approach. The work will attempt to contribute to the vast body of theological knowledge by providing a relevant framework for understanding the current position of church law in South Africa. It may also add to future considerations in the development of church law within the constitutional state.

1.4 Supposition of the study

The pertinent issue is the status of church law and the autonomy of churches to promulgate and enforce their own rules, standards and regulations. The supposition is that church law is a *ius sui generis* and should be treated as such, notably since the Constitution provides the framework with definitive freedom of religion being afforded to individuals and religious organisations, respectively. Consequently, the effect and influence of the Constitution (and particularly the Bill of Rights) on the law, as perceived and practised within the church in South Africa, will be analysed. The basic premise is that the Constitution affords the church more freedom to regulate its own affairs than currently being utilised, but that the church-state relationship is still somewhat vexing and that, in terms of the Constitution and notably the Bill of Rights as contained in chapter 2 and the supposed separation of church and state, wider authority should be afforded to the church to take control of its own affairs.

The scope which the Constitution of South Africa affords churches to function and to arrange their own internal affairs according to their tenets and confession of faith, has apparently not been fully realised. Future development in church law and the jurisprudence of the South African courts and legal system should take this into account and churches need to find ways to utilise the appropriate entrenched constitutional rights to limit state interference in church matters.

1.5 Aim and purpose of the study

The position of churches and the status of church law in South Africa have evolved in the years since the first reported court cases. The main objectives of

the study include an investigation into the development of church law and South African jurisprudence involving churches before 1994, and the evolving status and position of church law in South Africa post-1994, exploring the impact of the Constitution on the practice of church law in South Africa. Logically following from this is an analysis and exploration of the relationship between state and religion, or, more specifically, religious institutions. The scope will be narrowed further to a focus on churches of the Christian faith, notably those of Reformed origin.

The study will aim to add to the knowledge of (and discourse related to) the development of the way church law should be dealt with by the judiciary in the future. The right to the regulation of own affairs pertaining to doctrine, office bearers, free exercise, property, training, and the like is considered. Certain application fields relevant to the church, including but not limited to, labour law, legal status of churches, equality, church office, property, membership, authority of church assemblies and ecclesiastical tribunals, discipline, and freedom of association form the main focus of the study.

Questions that will be raised include: How should the church relate to the state and its various institutions? What role should the church play (if any) to reform government and to attempt to influence the law-making process? What role does the state assume in the separation of church-state debate? What role should churches play within the context of the broader (diverse) society they find themselves in, and in contributing to the common good of society? When should the courts be allowed to interfere with the internal governance of churches? What exactly constitutes churches' own internal affairs and what role does doctrine play in this determination? To what extent would the South African Constitution permit the state to support religious institutions and their activities? The aim in this study is to investigate these and other questions, to come to a better understanding of the challenges facing church law, and to explore ways for churches to achieve greater independence from civil law, taking into account the extent to which the Constitution would contribute to ensuring such potential self-rule. The ultimate purpose of the study is to arrive at a proper understanding and appraisal of church law as a *ius sui generis* in South Africa.

1.6 Research design and methodology

The study will strive to integrate theological and legal resources to provide a theoretical understanding of the central theme and the research will be done through an examination of available and relevant literature. This basis should provide a method of understanding the current position and status of church law in South Africa. From there the study will proceed to a concern for future relationships between church law and the legal system and the possibilities these hold for the church. The approach will include historical and comparative international perspectives.

The methodological approach will rely heavily upon existing material, such as theses and dissertations in the field, published articles, court judgments and other authoritative judicial decisions pertaining to church governance, church law and church-related disputes. These sources will be investigated and integrated by logical analysis of publications and opinions in church law and current constitutional provisions pertaining to churches and church law, as well as other legislation and statutory regulations.

1.7 Structure of the study

The primary focus of the study is the analysis of church law as an inimitable discipline and area of interest within the fields of theology and law in South Africa – a *ius sui generis*. A proposed structure of the study comprises historical and international perspectives, followed by certain focus areas, the emphasis being on church law as a unique field of study. The study is divided into eight chapters. The aims and components of each chapter can be highlighted as follows:

Chapter 1: This chapter contains a general introduction to the theme. The aim, methodology, and structure of the study are outlined in this chapter.

Chapter 2: History shaped the present into what it is today and it also paves the way forward. Although history is complex, it is necessary to give an overview of the pivotal moments in world history. The major events in church history, to a greater or lesser degree, influenced and shaped South African church

governance and church law into what it is today. This chapter will provide an overview of these events.

Chapter 3: Major events in the history of the church in South Africa, notably the history of the relationship between the church and the state and the relationship between the church and the judiciary, have shaped church governance and church law in South Africa. This chapter will investigate these events since the *ius patronatus* of the early Cape. A brief overview will be offered of the major events in South African church history which contributed to the development of church law as a *ius sui generis* in South Africa. The historical development of church law since 1652 will be described. Leading court cases concerning church affairs and church law since 1828 will be analysed to indicate how the development of the jurisprudence of South African law contributed to the distinctive position held by church law.

Chapter 4: In this chapter the position of churches and church law worldwide, with special focus on North America, Oceania and Europe, will be discussed. An overview will be provided of the way church-state relationships in selected countries influence the self-understanding, self-expression, and legal status of churches, and the effect these factors ultimately have on church autonomy and church law in the respective jurisdictions. The church-state relationships in these countries will be considered and evaluated within the context of South African church law and constitutionality in developing an understanding of the possibilities for church law in this country.

Chapter 5: The relationship between the church and the constitutional state in South Africa and the implications for the future of church law and sound church governance form the focus of chapter 5. The unique position of church law in terms of the church's self-understanding and the possibilities of church autonomy within the framework of entrenched religious rights will be discussed. An overview of the Constitution of South Africa and its application will be given, with emphasis on religious rights in constitutional adjudication. The application of the limitation clause within the context of religious rights will be scrutinised in terms of recent court cases. A general introduction to the proposed South African Charter of Religious Rights and Freedoms will be offered.

Chapter 6: The legal status of churches (and the Churches under scrutiny in particular) in South Africa, and the consequence of this status in terms of sections 8 (subsections 2 and 4), 15, 18 and 31 of the Constitution will be the focus of chapter 6. Possible options will be reviewed critically, including a voluntary association based on contract, a *societas,* a *universitas*, a non-incorporated body, a combination of Roman Dutch and English legal subjects, a legal subject based on the internal corporate law, a legal entity *sui generis* as in the Netherlands, or a voluntary association *sui generis* with no comparable legal precedent. The self-understanding of the church will be considered in the light of its true calling and its distinctive role within society.

Chapter 7: In the penultimate chapter the judicial position of church law in relation to current civil law will be examined. This includes an investigation into the jurisdiction of civil courts in doctrinal matters as well as the authority and autonomy of church assemblies in terms of constitutional values and provisos. The accountability of church tribunals when giving effect to associational rights will be discussed. The way the right to just administrative action[20] applies to decisions of church assemblies and disciplinary tribunals will also be argued, with emphasis on church discipline against the backdrop of statements such as the following: "The right to admit members and clergy would also imply the right to discipline such people in order to enforce conformity and encourage conduct in harmony with religious precepts and teaching".[21] The impact of church law as a *ius sui generis*, *inter alia*, on labour relations within the church and the position of the church as an employer will be explicated and reported. Provisions in the Constitution, the Basic Conditions of Employment Act,[22] the Employment Equity Act,[23] and the Labour Relations Act,[24] as well as relevant court cases that have implications for the church as an employer, will be discussed. The relation between doctrine and church law will be discussed and the hermeneutics of church law within the context of the aims of the study will also be considered.

[20] Section 33 of the Constitution.
[21] Van der Schyff (2001:101-102).
[22] Act 75 of 1997.
[23] Act 55 of 1998.
[24] Act 66 of 1995.

Chapter 8: In the final chapter the conclusions of the study will be discussed, the contribution to the knowledge base evaluated, and the possible implications for further research considered.

1.8 Résumé

The first chapter provided a general introduction to the theme. The aim and methodology of the study were outlined and an overview of the structure of the study was given. The following chapter will provide a general historical overview of major events that have shaped church law in South Africa.

CHAPTER 2

GENERAL HISTORICAL PERSPECTIVE

2.1 Introduction

History shaped the present into what it is today and it paves the way forward. Although history is complex, it is necessary to give an overview of the pivotal moments in world and South African history (see chapter 3) pertaining to religious freedom, the church-state debate, and the way history influenced the development of church law as a *ius sui generis* in South Africa.

As a result of historical events, South African civil jurisprudence has survived within a common-law environment, which is why South African law is called a "mixed legal system".[1] The three major components of South African law are the Western component (Roman Dutch law and English law), an indigenous component (indigenous African law), and a universal component (human-rights law).[2] The South African Constitution distinguishes between common law, customary law, and legislation.[3] Confirming the ever-developing nature of the law and fundamental rights, section 39(2) states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

The history of the Western component starts with the foundation of Rome in 753 BC, and the earliest history of English law can be found in the 11th century AD. The origin of the universal component of our law may be traced back to the rise of the natural-law theory as developed by both Greek and Roman thinkers as

[1] Hawthorne (2006:71). Other mixed legal systems include those of Scotland, Quebec, Louisiana, Sri Lanka, Botswana, Lesotho, Swaziland, Namibia and Zimbabwe (*Id.*, footnote 3).
[2] Van Niekerk and Wildenboer (2009:5).
[3] Section 39(3).

well as the thoughts of the early church fathers.[4] All three components of South African law were significantly influenced by canon law and Protestantism, as the legal system developed further through court decisions, customary law, and legislation. Moreover, the legal development also shaped the way the church viewed itself and its relationship with the state as well the role of church law and church governance within society.

The following general summary brings several historical fields into focus, to provide a framework for understanding the legal position today. It does not pretend by any means to be an exhaustive treatise on the subject – it is rather cursory at best. The objective is to set the background for an understanding of issues referred to later in the study.

2.2 Biblical background

The New Testament notion of law and justice was built on the Greek legal philosophy, which was an intuitive politico-moral concept rather than an authoritative body of received legal precepts in the narrower sense of the term.[5] Plato's ideal of a state and a legal system governed by scientific principles was carried forward by Aristotle in his own treatise on the state, called *Politics,* and further developed by the Romans, who considered themselves to be the true inheritors of the post-Socratic tradition of rational thinking.[6] Although the philosophy of law may be said to originate with the Greeks, law, in the modern sense of the term, starts with the Romans.

The New Testament, written during the classical period of Roman law (27 BC - 84 AD),[7] holds that the state and the church are God-ordained authorities (with complementary roles) and both accountable to God. The seeds of this view can be found in the Old Testament's portrayal of the roles of priests and prophets, which came to be distinguished (after the initial fusion of the political and

[4] Van Niekerk and Wildenboer (2009:7).
[5] Chroust (1946:301ff.).
[6] Van Niekerk and Wildenboer (2009:45).
[7] Cf. *Id.*:46. The periods in the development of Roman law preceding the classical period are: early Roman law (753 BC - 250 BC) when the *ius civile* was the only recognised legal system; and pre-classical period of Roman law (250 BC - 27 BC) when the *ius honorarium* was established and applied alongside the *ius civile.*

religious roles of ancient Israel) from the roles of kings and monarchs, even though they were all bound by God's authority.

To the question of the Pharisees, whether it is right to pay taxes to Caesar or not, Jesus answers: "Give to Caesar what is Caesar's, and to God what is God's".[8] This view is also found in Paul's Romans 13 and Ephesians 5 and 6, as well as in 1 Peter: "Submit yourselves for the Lord's sake to every authority instituted among men: whether to the king, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right".[9]

Members of the newly established church were encouraged to comply with their secular tasks and duties wherever they were placed by the divinely ordained universal order of things. The first apostolic fathers reiterated these exhortations, insisting that peace and order, which are part of the divine resolve, can only be kept through the strict observance of the established civil laws and the maintenance of the set social and political structure.[10] Christians were called upon to be model citizens, living in harmony with the authorities.

It is clear, however, that when a governing body went beyond its legitimate authority and usurped powers belonging to God alone, the call to Christians to obey no longer applied. By the time the Book of Revelation was written Christians were prompted to resist by suffering. The foundation for the ensuing centuries of tension and uneasy co-existence was laid.

2.3 The early church

2.3.1 Roman intolerance

The rise and fall of the Roman Empire, spanning approximately twelve hundred years, dominate the early days of the Christian church as well as the development of both law and social order. The influence of the Roman legal heritage is still evident today. Four periods of Roman civilisation can be

[8] Matthew 22:21 (NIV).
[9] 1 Peter 2:13-14 (NIV).
[10] Chroust (1946:309).

distinguished: Monarchy (753-509 BC), Republic (509-27 BC), Principate (27 BC - 284 AD), and Dominate (284 AD).[11]

The last century of the Republic saw several civil wars and the emergence of military dictatorships. The final republican war began with the murder of Julius Caesar in 44 BC and the succession of his adoptive son, Octavius, who ruled as emperor under the name of Augustus. With his new constitutional model, the so-called Principate, Augustus appeared to have saved the Republic but, in reality, managed to concentrate the real power in his person. The first two centuries of the Principate, however, were characterised by peace, prosperity, and stability under the *Pax Romana.*[12]

During the early period of the Principate – the time when Christ was born and the church was established – Christianity was seen as part of the Jewish religion, and the Roman Empire was fairly tolerant of different religions.[13] In addition to Christianity, the new cults and religions (which developed and existed peacefully alongside the traditional Roman religion) included worshippers of Isis, Mithras, and the *Magna Mather.*[14] Gradually, however, the tide turned against new religions and Christians came to be persecuted throughout the Empire, until the religion was completely suppressed and eventually banned. According to Van der Schyff (2001:8) this persecution was the result of the Christian refusal to worship pagan gods, an act required of all in the Roman Empire. Pont (1978:4ff.) and Tellegen-Couperus (1993:122) point out that it is more likely the position of the emperor as an emperor-god having to be worshipped,[15] that led to the final collision between the Christians and the Empire.[16]

[11] Thomas *et al.* (2000:15-44).
[12] See Thomas *et al.* (2000:20). Chroust (1946:303-304) describes the Roman legal order as a "universal *Pax Romana*", the symbol and assurance of stable peace and order through a clearly defined and properly delimited legal polity. For over a millennium after the political fall of the Roman Empire, men yearned for the *Pax Romana*, and looked upon it as the indispensable secular prerequisite for the propagation and flourishing of the Christian church.
[13] Pont (1978:18ff.).
[14] Tellegen-Couperus (1993:121).
[15] The emperor-cult was very popular because it was easier for the ordinary person to identify with the emperor than with an absent pagan god (cf. Pont 1978:4).
[16] It is, however, likely that the decree to worship pagan gods played a role in the second and third century persecutions.

In 64 AD fire broke out in Rome rumoured to have been started by Emperor Nero himself.[17] Accusing the Christians of having started the fire, Nero intensified the conflict and Kuiper (1964:8) speculates that it is likely that in the ensuing persecution the apostles Paul and Peter suffered martyrdom in Rome. Ignatius, Polycarp and Justin succumbed to the same fate in the next one hundred years in different parts of the Empire.[18] The pressure after this was eased somewhat with the exception of brief persecutions under Emperor Marcus Aurelius (161-180), Septimus Severus (200-211), Decius (249-251), Valerian (257-258) and Diocletian in 303.[19] During Diocletian's reign the Empire was divided into the Western Empire, with Rome as its capital, and the Eastern Empire, with Constantinople as the capital.[20]

Diocletian also introduced a division of four regions (prefectures), each under the authority of an emperor. Each of the emperors had a *praetorian* prefect to support him in military, juridical, and financial matters. In addition, Diocletian subdivided the four prefectures into dioceses, each of which was governed by a *vicarus*, and the dioceses were subdivided into provinces, each of which was governed by a *praeses*.[21]

2.3.2 First signs of religious freedom

Christianity withstood the persecution and eventually (gradually) managed to become the dominant religion in Rome.[22] Reasons why this happened include the closely knit organisation of the church, the development of in-depth theological literature, and the ethical norms that the Christians observed.[23] The way to formal religious freedom was initially paved by an edict of Diocletian's successor, Emperor Galerius, who, on his deathbed, issued an edict of tolerance in 311 that granted Christians permission[24] to hold assemblies again:

[17] Pont (1978:18); Kuiper (1964:8).
[18] *Id.*:9.
[19] *Id.*:11ff.; Pont (1978:18ff.).
[20] Thomas *et al.* (2000:21).
[21] Tellegen-Couperus (1993:119-120).
[22] Van der Schyff (2001:9).
[23] Tellegen-Couperus (1993:122).
[24] Not to be confused with freedom – this was still limited.

> Among other arrangements which we are always accustomed to make for the prosperity and welfare of the republic, we had desired formerly to bring all things into harmony with the ancient laws and public order of the Romans, and to provide that even the Christians who had left the religion of their fathers should come back to reason; since, indeed, the Christians themselves, for some reason, had followed such a caprice and had fallen into such a folly that they would not obey the institutes of antiquity, which perchance their own ancestors had first established; but at their own will and pleasure, they would thus make laws unto themselves which they should observe and would collect various peoples in diverse places in congregations. Finally when our law had been promulgated to the effect that they should conform to the institutes of antiquity, many were subdued by the fear of danger, many even suffered death. And yet since most of them persevered in their determination, and we saw that they neither paid the reverence and awe due to the gods nor worshipped the God of the Christians, in view of our most mild clemency and the constant habit by which we are accustomed to grant indulgence to all, we thought that we ought to grant our most prompt indulgence also to these, so that they may again be Christians and may hold their conventicles,[25] provided they do nothing contrary to good order. But we shall tell the magistrates in another letter what they ought to do. Wherefore, for this our indulgence, they ought to pray to their God for our safety, for that of the republic, and for their own, that the republic may continue uninjured on every side, and that they may be able to live securely in their homes. This edict is published at Nicomedia on the day before the Kalends of May, in our eighth consulship and the second of Maximinus.[26]

Although the decree of Galerius granted Christians hardly more than limited tolerance, it paved the way for the earliest milestone in the protection of churches' legal positions and full religious tolerance in the form of the promulgation of the *Edict of Milan* in 313 by Constantine, the first Christian emperor of Rome:

[25] A conventicle is a secret and unlawful religious meeting, typically of non-conformists (*Oxford Dictionary of English*).
[26] Translated by the University of Pennsylvania, Department of History, from the original Latin text found in Lactantius, *De Mort*.

When I, Constantine Augustus, as well as I, Licinius Augustus, fortunately met near Mediolanurn (Milan), and were considering everything that pertained to the public welfare and security, we thought, among other things which we saw would be for the good of many, those regulations pertaining to the reverence of the Divinity ought certainly to be made first, so that we might grant to the Christians and others full authority to observe that religion which each preferred; whence any Divinity whatsoever in the seat of the heavens may be propitious and kindly disposed to us and all who are placed under our rule. And thus by this wholesome counsel and most upright provision we thought to arrange that no one whatsoever should be denied the opportunity to give his heart to the observance of the Christian religion, of that religion which he should think best for himself, so that the Supreme Deity, to whose worship we freely yield our hearts) may show in all things His usual favor and benevolence. Therefore, your Worship should know that it has pleased us to remove all conditions whatsoever, which were in the rescripts[27] formerly given to you officially, concerning the Christians and now any one of these who wishes to observe Christian religion may do so freely and openly, without molestation. We thought it fit to commend these things most fully to your care that you may know that we have given to those Christians free and unrestricted opportunity of religious worship. When you see that this has been granted to them by us, your Worship will know that we have also conceded to other religions the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases; this regulation is made we that we may not seem to detract from any dignity or any religion. Moreover, in the case of the Christians especially we esteemed it best to order that if it happens anyone heretofore has bought from our treasury from anyone whatsoever, those places where they were previously accustomed to assemble, concerning which a certain decree had been made and a letter sent to you officially, the same shall be restored to the Christians without payment or any claim of recompense and without any kind of fraud or deception, Those,

[27] A rescript, in which the emperor or his chancery solved a juridical problem submitted by a citizen or an official, was an important source of law in 313. In 315 Constantine decided that rescripts that deviated from prevailing law were invalid, and from the end of the fourth century they started to lose general validity until they finally ceased to be a source of new law (Tellegen-Couperus 1993:125).

> moreover, who have obtained the same by gift, are likewise to return them at once to the Christians. Besides, both those who have purchased and those who have secured them by gift, are to appeal to the vicar if they seek any recompense from our bounty, that they may be cared for through our clemency. All this property ought to be delivered at once to the community of the Christians through your intercession, and without delay. And since these Christians are known to have possessed not only those places in which they were accustomed to assemble, but also other property, namely the churches, belonging to them as a corporation and not as individuals, all these things which we have included under the above law, you will order to be restored, without any hesitation or controversy at all, to these Christians, that is to say to the corporations and their conventicles: providing, of course, that the above arrangements be followed so that those who return the same without payment, as we have said, may hope for an indemnity from our bounty. In all these circumstances you ought to tender your most efficacious intervention to the community of the Christians, that our command may be carried into effect as quickly as possible, whereby, moreover, through our clemency, public order may be secured. Let this be done so that, as we have said above, Divine favor towards us, which, under the most important circumstances we have already experienced, may, for all time, preserve and prosper our successes together with the good of the state. Moreover, in order that the statement of this decree of our good will may come to the notice of all, this rescript, published by your decree, shall be announced everywhere and brought to the knowledge of all, so that the decree of this, our benevolence, cannot be concealed.[28]

The "free opportunity to worship" afforded to Christians as well as to "other religions" was a critical moment in the history of religious rights. Moreover, the order to promptly restore all property to Christians, including churches "belonging to them as a corporation and not as individuals", indicates the recognition of religious group rights that would have a long lasting effect on the legal position of churches and which is still resonating in church law today. It also catapulted Christianity from an underground religion into everyday Roman life.

[28] Translated by the University of Pennsylvania (*op. cit.*).

Religious freedom soon led to a close relationship between church and state and rapidly developed into Christianity becoming the state religion. The church came to be organised in more or less the same way as the state and the increased number of bishops developed a hierarchy of their own which was parallel to the administrative hierarchy in the state.[29]

Freedom turned into favouritism and by 321 Constantine had changed the law of succession, allowing individuals to bequeath property to churches, and assigned in every city of the Empire an allowance of corn to the poor, on behalf of charities. He furthermore confirmed the right of clergy to be tried in their own courts[30] and by their peers when accused of a crime (a privilege unparalleled in the history of church law), and elevated the arbitration of bishops to the force of positive law while judges were instructed to execute the episcopal decrees. Clergy were exempted from service to the state, personal taxes and municipal duties. He ordained a Sunday law, setting the day apart for religious observances throughout the Empire. He abolished crucifixion as a punishment and prohibited gladiatorial games. He discouraged slavery, infanticide, and easy divorces.[31]

In addition to his legal reforms, Constantine was also interested in theological affairs. He convened and presided over the celebrated Council of Nicaea in 325, which was to settle the creed of the church, notably the doctrine of the Trinity.[32] The meeting was also an attempt to prevent various doctrinal movements, such as the Arians and the Donatists, causing schisms in the church.[33] The primary reason, however, for convening the Council seems to have been that Constantine saw Christianity and maintaining the unity of the church as a potential binding element within the Roman Empire. He regarded it as his task to watch over the newly found harmony between church and state, which was

[29] Tellegen-Couperus (1993:122-123).
[30] In later years this right became an obligation. In the fifth century a council of Aquileia condemned the bishop Palladius for demanding a civil trial, and a council of Mileve decreed that clerics who strive to bring their lawsuits or disputes before civil judges should be deprived of their clerical dignity and removed from their offices. Seven centuries later Pope Innocent III reprimanded the Archbishop of Pisa for maintaining that a cleric could renounce his right of exemption and appear before a civil court (Ojetti 1908).
[31] Cf. Tellegen-Couperus (1993:131). See Lord (2003:39ff.) for a more detailed account of Constantine's reforms.
[32] Lord (2003:39ff.).
[33] Tellegen-Couperus (1993:123).

especially beneficial to the state.[34] Berkhof and De Jong (1967:56) note that: "De staatskerk wordt een centraal georganiseerd rechtinstituut". Therefore it is clear that a united church was paramount for peace in the Empire and the dominant position of the emperor.

Gitari (1982:411) lists three basic forms of church-state relationships in early Christianity, namely, the Constantinian form, the Augustinian approach, and the Anabaptist model.[35] The Constantinian form sees the state and the church as separate only in principle, but joined to make one commonwealth. Coertzen (2008:348ff.), in drawing the conclusion that the Constantinian model, to a certain extent, determined the place and role of religion in South Africa between 1652 and 1994, explains that, according to this model, the political authorities are dominant over church authorities. This means that the authorities assist, influence, and sometimes even fully control and use the church, and the state may use its coercive power to advance the "true religion". For Coertzen (2012:87) South Africa before 1994 showed the "typical Constantine situation of the state protecting churches but at the same time also controlling them".

The religious liberty and tolerance of the Constantinian period suffered a setback when Emperor Julian tried to revive heathenism,[36] and even more so when the Edict of Milan was supplanted by an edict by Emperor Theodosius, which compelled all members of the Empire to adhere to the Trinitarian faith as confessed by the bishops of Rome and Alexandria.[37] This situation was an unfortunate turn of events, as Berkhof and De Jong (1967:57) aptly point out:

> De toestand van tachtig jaar tevoren precies omgekeerd! Maar tot grote schade van het geestelijk gezag der kerk, dat door zulke wetten niet gesteund maar geschonden wordt. Het geloof is geen staatszaak. Een kerk, die meer wil zijn dan begunstigde kerk, wil in werkelijkheid minder.

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[34] *Id.*
[35] Strictly speaking, Gitari's third model is not an early-church model. The Anabaptist model arose much later (during the sixteenth century) under the radical reformers who disliked what they saw as the compromises the Reformation had made with civil powers. The Anabaptists believed that the church had nothing to do with the state and should withdraw completely from the world (cf. 2.5.4.3, *infra*).
[36] Kuiper (1964:27ff.).
[37] Berkhof and De Jong (1967:57).

Many Christians called for a return to the previous recognition of freedom of conscience, but their calls were unfortunately in vain as the late Roman Empire instituted capital punishment for heresy.[38] The church became less tolerant of dissent as it grew into a more powerful position. Van der Schyff (2001:10) indicates how the emergence of the Catholic Church as a strong entity brought it into conflict with the reigning secular forces, contributing to the development of the separation of state and religious institutions, an essential constituent for recognition of true freedom of religion.

In practice, however, the intensifying of the control of the church over the government forces continued with the rise of the episcopal office as one of the controlling agencies of society for more than a thousand years.[39] Ambrose (340-397), governor of a large part of northern Italy, was elected in 374 as Archbishop of Milan, which showed how the episcopal office transcended the office of governor of a province in influence and power, and the mammoth strides the church had made as a power in the world.[40]

Tellegen-Couperus (1993:129-130) illustrates how the *episcopalis audientia* became very popular by the end of the fourth century. This happened when Christians took their private-law disputes to a bishop, in accordance with Paul's letter to the Corinthians.[41] This legal procedure differed from normal jurisdiction, not only with regard to the court involved, but also in another aspect: it was not possible to appeal against a sentence passed by the *episcopalis audientia.*

2.3.3 Augustine's City of God

Through his gifted rhetoric Ambrose became instrumental in the conversion of Augustine of Hippo (354-430) who subsequently developed into one of the most influential Christian thinkers and episcopal leaders of all time.[42] The demolition of Rome by the Visigoths in 410 left a deep scar on the collective soul of Romans, who saw the tragedy as punishment for the abolition of pagan worship. Against this background Augustine set out to write his monumental work, *De Civitate Dei*

[38] Van der Schyff (2001:10).
[39] Lord (2003:63ff.).
[40] Cf. *Id.*, Kuiper (1964:33), and Berkhof and De Jong (1967:71).
[41] 1 Corinthians 6:1-8.
[42] Lord (2003:72ff.).

(The City of God), to console Christians. He said that, while the earthly empire was annihilated, the City of God would ultimately triumph.[43]

The idea of the two opposed cities forms the central theme of Augustine's view regarding church and state relations. He writes extensively about "the rise, progress, and appointed end of the two cities, one of which is God's, the other this world's".[44] The two cities are radically antithetic, as shown by the analogy of the contrast between Jerusalem (the eschatological *civitas Dei*, the eternal kingdom of God, "a commonwealth and community founded and governed by God")[45] and Babylon (the apocalyptical *civitas diaboli*, denoting earthly kingdoms that rise and fall).[46] Throughout the time members of these two cities were in opposition, the two kingdoms were at war, and man can be a citizen of only one or the other. On this earth the former sojourns as an alien, persecuted by the latter. The citizens of the City of God, however, participate fully in the works of this world as the two cities are interwoven in *saeculum*.[47]

According to Augustine's theory, church and state need to be sharply distinguished in this world. The empire and the church should not place any coercion on each other, but remain parallel to the last day.[48] The Augustinian approach, the second of Gitari's models (*supra*) of early church-state relationships, provided the background for Luther's doctrine of "two kingdoms", which holds that the state is competent in matters of administration and justice, and the church in matters of faith (cf. 2.5.3, *infra*). According to Gitari's explanation of this model, these two functions should be kept separate, with neither church nor state interfering in the other's province. The two kingdoms should work together in harmony. If traces of the Constantine model is to be found in South Africa's church-state relationship before 1994 (Coertzen, *supra*), it seems reasonable to say that the Augustinian model provides an analogy of the period post 1994.

[43] Augustine (427), translated by M. Dods, published in 1886.
[44] *Id.*:617ff.
[45] *Id.*:15 (footnote 28).
[46] Cf. *Id.*:531. Augustine calls Rome Babylon in *De Civitate Dei.*
[47] *Id.*:555.
[48] *Id.*

The result of Augustine's arguments, when he held that for the state to be just and moral it must follow Christian standards, seems to have deviated from his pure intention of total church-state separation as found in *De Civitate Dei*. Because, according to this view, justice is the essence of the state and the essence of justice is the *amor Dei*, the church has superiority over the state – not in civil matters as such, but it may invoke the power of the state (to suppress heresy, for example). This acceptance of Roman law and the legal force of the state was seemingly a result of the threat that Donatism held for the unity of the church.[49] The seeds of the medieval church-state controversy can be found herein.

2.3.4 The Theodosian Code

As the incursions of Germanic tribes damaged political stability the need for a systematic collection of imperial legislation increased.[50] The Theodosian Code (*Codex Theodosianus*) was an official collection of imperial statutes beginning with those of Constantine. First published on 15 February 428 in the Eastern Empire, the *Codex* was subsequently accepted by the Western Roman Emperor Valentinian III for his area, and it came into force for the whole Empire on 1 January 439.[51] Pollock (2010:18) contends that it was no "code" in the modern sense of the term, but merely a fairly methodical collection of statutes, containing many things the barbarians were better off not having read, such as the bloody laws against heretics.

The *Codex Theodosianus* was superseded in the East by Justinian's legislation (*infra*) but it continued to be used in the West. It was divided into sixteen books, these again being subdivided into titles, in which individually preserved constitutions were arranged chronologically. The *Codex* became the only authoritative source of constitutions of this period and replaced the *Constitutiones Sirmondi,* which consisted of sixteen constitutions almost all concerning ecclesiastical matters.[52]

[49] Berkhof and De Jong (1967:76ff.); Weijland (1988:82ff.).
[50] Thomas *et al.* (2000:37).
[51] Kunkel (1966:147).
[52] Jolowicz (1967:483-484).

In his doctoral thesis completed in 2006,[53] Philip Tilden analysed laws and letters of the later Roman Empire, essentially following the structure of the *Codex Theodosianus* itself, covering an individual emperor's laws in each chapter. Tilden's thesis attempts to seek some explanation for the laws issued, especially those that appear to be most intolerant. He achieved this through examination of political or other factors that may have been motivating factors behind the issuance of each law. As such, Tilden's thesis takes the form of an historical and social commentary of the laws issued. The argument throughout the thesis is that Christian emperors and their administration were not necessarily as intolerant (toward non-Christians) as appears to have been the case, and he suggests thereby that there is little evidence that the Christian state was intolerant. This can, however, be considered a minority report.

2.4 The Middle Ages

2.4.1 Introduction

The Roman Empire came to an end when the Vandals and other Germanic tribes plundered Rome in 455 and finally conquered Rome in 476. This brought early church history to an end. The Middle Ages commenced and were to continue for almost a thousand years until the fall of Constantinople in 1453.[54]

2.4.2 Early Middle Ages (476-1140)

2.4.2.1 Introduction

The Roman subjects of the Germanic kings continued living according to Roman law. The barbarian conquerors made provision for their Roman subjects by drawing up various codes (collectively called the *Leges Romanae Barbarorum*), including the *Edictum Theodorici*, the *Lex Romana Visigothorum,* and the *Lex Romana Burgundionum*.[55] In doing so they drew extensively, *inter alia*, from the *Codex Theodosianus.*[56] Thomas *et al.* (2000:38ff.) postulate that, even though the quality of these Germanic codes was rather poor in respect of Roman law

[53] *Religious Intolerance in the Later Roman Empire: the evidence of the Theodosian Code*.
[54] Kuiper (1964:51).
[55] Jolowicz (1967:485-487).
[56] Cf. 2.3.4 (*supra*).

content, they remained an important factor in legal history, keeping the "Rome idea"[57] alive and preparing the ground for the reception of the Justinianic codification.

2.4.2.2 The *Corpus Iuris Civilis*

Justinian became the emperor of the Eastern Roman Empire in 527. His ideal was to reunite the Roman Empire and to restore it to its former glory. He found the law disorganised, having a mixture of different types of regulations and opinions, with a lot of outdated legislation to boot. Justinian wanted to create a single source of law that contained all the applicable law, while eliminating inconsistencies, and to present it in a systematised manner. He appointed a special committee of ten members, chaired by Tribonian, to complete the task. As a consequence, the *Corpus Iuris Civilis*[58] came about, a work that provides us today with a version of Roman law as it was at the end of its development.[59]

The *Corpus Iuris Civilis* was distributed, in Latin, in four parts: the *Digesta*, the *Institutiones*, the *Codex,* and the *Novellae* (added later).[60] Justinian's concern for efficiency and good government was not limited to the civil administration, but extended to the church.[61] The *Corpus* deeply influenced the canon law of the ensuing Middle Ages (and indeed every era thereafter) through the maxim *ecclesia vivit lege romana* (the church lives by Roman law).[62]

Various provisions in the *Corpus* serve to secure the status of orthodox Christianity as the state religion of the (Eastern) Empire, uniting church and state, and making anyone not connected to the church a non-citizen. Imperial control of the church thus became legal. The very first law in the *Codex* required everyone under the jurisdiction of the Empire to subscribe to the Christian faith.[63] The sanctity of marriage, the position of slaves and women, and social status

[57] One of the ways in which the Germanic peoples tried to imitate the Roman way of life was by applying Roman law, thereby showing their admiration for Roman culture and well ordered government. Rome thus became important as an "idea" and the "Rome idea" contributed to the survival of Roman law after 476 (Van Niekerk and Wildenboer 2009:68).
[58] A name given to this codification, only in 1583, by the jurist Dionysius Godofredus, as a counterpart of the *Corpus Iuris Canonici* (Kunkel 1966:157, footnote 2).
[59] Thomas *et al.* (2000:38); Van Niekerk and Wildenboer (2009:63).
[60] Evans (1996:205).
[61] *Id.*:207.
[62] Fortescue (1910).
[63] Cf. Evans (1996) and Thomas *et al.* (2000:38ff.).

were among the important issues of the day that formed part of the *Corpus*. From the *Novellae*, Justinian is quoted by Evans (1996:209): "In the service of God there is no male or female, nor freeman, nor slave".

The *Digesta* is the richest and most massive part of the *Corpus* and it has been the principal source of our knowledge of the classical period of Roman law. It offers a cross-section of the entire development of Roman jurisprudence from the last century before Christ to the end of the classical period and a renewed study of the *Digesta,* over the course of many centuries, has repeatedly led to a fresh blooming of juristic thought.[64]

The *Digesta*, however, seems to have been too difficult for teaching purposes and Justinian initiated a new introductory textbook for law-students. The new work, published under the name *Institutiones* (entrusted to Tribonian and two law professors) came into force[65] along with the *Digesta* on 30 December 533.[66]

The introductory sentence of the *Prooemium* (Preamble) of the *Institutiones* – "In the name of Our Lord Jesus Christ"[67] – sets the tone for the treatment of the church and acknowledgement of the influence of religious doctrine on prevailing law, notably the laws of slavery, obligations, marriage, and succession. This influence is evident in examples of legislation directly favouring the church. Under the heading: "Of Quasi-contractual Obligations" (Book III), the *Institutiones* deals with cases where money (including by means of a legacy or a trust bequest) is paid over in error. This cannot be reclaimed, "provided the legatee or beneficiary is a church, or other holy place honoured for its devotion to religion and piety".[68] Under "Of Actions" (Book IV) the *Institutiones* regulates situations where persons who are under an obligation as heirs to pay over legacies or trust bequests to churches (or other venerable places), but neglect to do so until sued by the legatee, are held liable to an amount twice the value of the original claim.[69]

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[64] Kunkel (1966:157-158).
[65] For a student text-book to be given statutory force was as extraordinary then as it is now. It does, however, show that its influence is not to be dismissed.
[66] Tellegen-Couperus (1993:144).
[67] Translated by Moyle (1913).
[68] Moyle's translation (1913:154-155).
[69] *Id.*:178.

2.4.2.3 The initial development of canon law[70]

Whilst, in the Eastern Empire, the legislation of Justinian remained in force until the fall of Constantinople in 1453, in the former Western Empire, Roman law continued to exist via the *Leges Romanae Barbarorum*.[71] In this second period[72] of the history of Roman law, law-making was influenced not only by Roman law but also by the developing canon law and Germanic law.[73]

During the first centuries of the early Middle Ages, canon law had not yet reached a stage of development where it could be seen as a separate legal system. It was basic Roman law supplemented by the legislation of the Frankish kings, the resolutions of church meetings, and papal decrees and instructions.[74] The best known collection of church laws is that of the monk Dionysius, which was compiled early in the sixth century – named *Collectio Dionysiana*.[75] Other notable codifications of canon law during this period include the *Collectio Hispana* (validated as binding for Spanish canonical law at the fourth council of Toledo in 633), the *Decretales pseudo-Isidorianae*[76] (a name dating from the seventeenth century because of the number of forged *decretales,* including forged parts of the *Lex Romana Visigothorum*),[77] the *Collectio Anselmo dedicata*[78] (dedicated to Anselm, archbishop of Milan, 881-897), and the *Decretorum Libri XX*[79] of Burchard (Bishop of Worms *ca.* 1000-1025).[80]

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[70] Some scholars (cf. Boudinhon 1910) draw a distinction between canon law (mainly derived from the *Corpus Iuris Canonici* [*infra*] including the regulations borrowed from Roman law) and ecclesiastical law (which refers to all laws made by the ecclesiastical authorities, some much later than the *Corpus Iuris Canonici*). However, for the sake of this study the terms are used interchangeably as synonyms. This is to be distinguished from the term "church law", which refers to the later development of the discipline in the Protestant tradition.
[71] Tellegen-Couperus (1993:148).
[72] Cf. *Id.* The legislation of Justinian marks the end of the first period of Roman law and the beginning of the second period.
[73] *Id.*
[74] Van Niekerk and Wildenboer (2009:73).
[75] *Id.*
[76] This collection included the rule *spoliatus episcopus ante omnia debet restitui* (no accusation can be brought against a bishop as long as he is despoiled of his see) (Van Zyl 1983:171-172, footnote 176).
[77] See 2.4.2.1 (*supra*).
[78] This systematic collection contained numerous references to Roman law, including references from the *Institutiones* and *Codex* of Justinian (Van Zyl 1983:172).
[79] This became the standard textbook on canon law in the majority of ecclesiastical schools in Germany, France and Italy (*Id.*:172).
[80] *Id.*:168-172.

It is clear that Roman law, and particularly that of Justinian, exercised a great influence upon canon law.[81] Reciprocally, the influence of canon law as it developed appears to have tempered the rigidity of Roman law. This influence can be seen in various fields of modern South African law[82] such as family law, procedural law and law of contract. For example, the rule of *pacta sunt servanda* (a person can be held accountable for any agreement), which will be encountered later in this study (see 7.2.3.2.1, *infra*), came about when canon law relaxed the formal Roman law rule *ex nudo pacto non oritur actio* (a mere agreement does not give rise to an action).[83]

Canon law also improved other enactments of Roman law. The right of provisional possession (*institutum possessorium*), for instance, was amplified and highly developed by canon law, which gave additional legal protection in the case of actual possession obtained by injunction (*interdictum*) of the magistrate. The possessory interdict, granted by Roman law for immovable objects only, was extended by canon law to movable objects and even to abstract rights (*iura incorporalia*).[84]

Slowly and by obscure processes a great mass of ecclesiastical law had been forming during the early Middle Ages.[85] As canon law was adapted and modernised, it developed into a separate legal system.[86] This in turn led to the establishment of separate law courts. These courts had supra-national jurisdiction over matters ranging from marriage, adultery and incest to wills, commercial contracts, heresy, perjury, and all matters relating to church property or personnel. The ultimate sanction was excommunication.[87] All matters spiritual fell within the exclusive jurisdiction of the ecclesiastical courts and all matters civil remained under civil jurisdiction. There were cases in which natural and spiritual elements were so conjoined that they took on another nature juridically and gave rise to different rights. These included, for example, a case where a

[81] Cf. Ojetti (1908).
[82] Canon law became part of Roman-Dutch law (and thus part of South African law) via the Germanic legal systems (cf. Van Zyl 1983:160ff.).
[83] Cf. Van Niekerk and Wildenboer (2009:73).
[84] Ojetti (1908).
[85] The legal notion of this period was: The law, both in the church and the state, is not “made”, but “handed down” and “discovered” (Schatz 1997:130).
[86] Cf. Pollock (2010:23).
[87] Thomas *et al.* (2000:51-52).

contract entered into by lay persons was confirmed by oath. The twofold juridical element brought the matter within the ecclesiastical as well as the civil domain.[88] These conjunctions appear to explain why ecclesiastical magistrates were often vested with civil power, which they exercised as civil magistrates.[89]

2.4.2.4 Church and state during the early Middle Ages

At the end of the fifth century, Pope Gelasius I (492-496) distinguished two forces that ruled the world, the priestly authority and the kingly power.[90] He asserted the exclusion of bodies of religious thought and practice from the grasp of secular rulers.[91] The first pope to assume broad political powers was Gregory the Great (590-604). Through Gregory's continued efforts, at governing and administration, the church eventually became the directing power of European politics.[92]

With the conversion to Christianity of the Frankish king, Clovis, in 496, the Franks entered into an alliance with the church.[93] The crowning of Pepin in 751, by Pope Zacharias, reinforced the coalition and established the impression that popes held ecclesiastical office and civil power concurrently – a power they would hold until the nineteenth century.[94]

Pepin's son, Charlemagne, continued the church-state partnership when he insisted on being crowned as emperor by Pope Leo III on Christmas day, 800.[95] He attempted to revive the old Roman Empire through the establishment of the so-called "Holy Roman Empire". In reality this meant only that Charlemagne referred to the Frankish Empire as the "Holy Roman Empire" – while it was not a "Roman Empire" at all, it did play an important role in the survival of Roman law in the West, after the fall of the Western Roman Empire in 476.[96] Van der Schyff (2001:11, footnote 41) suggests that, while Charlemagne had taken it upon

[88] Ojetti (1908).
[89] Cf. *Id.*
[90] Ladner (1947:405).
[91] Van der Schyff (2001:11).
[92] Kuiper (1964:57-58).
[93] Pont (1978:75).
[94] Kuiper (1964:70-71).
[95] See Shahan and Macpherson (1908), Pont (1978:76), and Van Zyl (1983:161).
[96] Van Niekerk and Wildenboer (2009:68).

himself to advance the cause of religion, he did so to the detriment of the separation of church and state.

Charlemagne's accomplishments with regard to religion, politics, agriculture, trade and industry, culture, art, and education are well documented.[97] It is his deep interest in ecclesiastical law, however, that is of particular significance to the objectives of this chapter. His civil legislative work consisted principally of organising and codifying the principles of Frankish law handed down from antiquity. As basis and norm for his legislation, he utilised the ecclesiastical canons. He habitually submitted his projects of law to the bishops and gave civil authority to the decrees of synods.[98] More than once he made laws at the suggestion of popes or bishops. He readily interfered in the church's domain when he actively recognised and protected ecclesiastical immunities, and strictly enforced tithes for the support of the clergy and the dignity of public worship.[99]

The parliament in the early ninth century was essentially bicameral (civil and ecclesiastical), with bishops in a spiritual constituency sitting side by side with counts in the secular national parliament. These assemblies were so closely intertwined that, according to Shahan and Macpherson (1908), in the reading of a "council" under Charlemagne, it is not always possible to ascertain whether the particular proceedings were those of a parliament or a synod.

After the death of Charlemagne in 814, the Frankish Empire started disintegrating under the threats of the Norsemen, Saracens, and Hungarians. In 843 it divided into three parts, roughly what we know today as France, Germany, and Italy.[100] The church could not rely on the state for its much-needed unity and stability any longer. The church therefore started to move away from political dependence to papal (judicial) control. Pope Nicholas I (858-867) increased the strength of the papacy by proclaiming that the coronation of kings was a power given to the church directly from God. Political and ecclesiastical powers thereby rested in the pope.[101]

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[97] Cf. Kuiper (1964:71-74) and Pont (1978:75-77).
[98] Shahan and Macpherson (1908).
[99] *Id.*
[100] Berkhof and De Jong (1967:92).
[101] *Id.*

The church became *regnum* or *imperium* governed by the pope. In achieving this primacy of the church, Nicholas I used the *Decretales pseudo-Isidorianae* (see 2.4.2.3, *supra*). These decretals created a belief that total supremacy, ecclesial and secular, emanated from the pope, who ruled over bishops and kings alike. The fact that the Isidorian decretals were largely based on forgeries was only proved during the Renaissance.[102]

2.4.2.5 The Gregorian reform

After Nicholas I, at around 900, the church, state, and culture reached a low point. There was effectively no leadership and the unity and authority of the church came under severe threat. It was only when Gregory VII (Hildebrand) (1073-83) became pope that the hegemony of the papacy was restored. He was more relentless than any of his predecessors, including Nicholas I (*supra*), in his drive to absorb all power into the ecclesiastical hierarchy, with the pope at the apex, thrusting the church towards secular as well as spiritual authority. Government thus came to be seen as an ecclesiastical institution.[103] Augustine's *De Civitate Dei* (2.3.3, *supra*), propagating the ideal of the establishment of the kingdom of God on earth, appears to have been Hildebrand's greatest inspiration.[104]

Hildebrand was renowned for his extraordinary faculty for administration, which later characterised his government of the church. Under his capable direction, the property of the church, which was diverted into the hands of Roman nobility and Normans, was largely recovered.[105] The focus of his reforms then shifted to the clergy. In 1074 he enacted, *inter alia*, the following decrees: that clerics who had obtained a sacred office by payment should cease to minister in the church; that no one should be permitted to buy or sell ecclesiastical rights; that all who were guilty of incontinence should cease to exercise their sacred ministry; and

[102] Pont (1978:79-80); Kleynhans (1982:8-9); Schatz (1997:123-124).
[103] Berkhof and De Jong (1967:93); Avis (2001:41).
[104] Kuiper (1964:108).
[105] Oestereich (1909).

that people should reject the ministry of clerics who failed to obey these injunctions.[106]

Hildebrand's efforts to eradicate lay investiture were met with considerable resistance. King Henry IV of Germany disregarded these attempts and invested a new bishop of Milan. The ensuing investiture controversy saw Hildebrand excommunicating Henry IV. The power of the papacy ensured that Henry IV lost the support of his followers, prompting him to acquiesce, whereupon Hildebrand lifted the excommunication.[107]

The investiture conflict continued fiercely after Hildebrand's death in 1083. Eventually, at the Concordat of Worms, an agreement was reached between the pope (Calixtus II) and the emperor (Henry V), which stipulated that the pope was to choose and invest bishops in church office, while emperors were to invest them with secular authority. This state of affairs was not satisfactory, but it constituted a compromise between state and church that set the scene for greater influence of the church on political matters in years to come.[108]

Ladner (1947:416-418) attributes a large share of the elaboration of a new concept of the state (complicated by the revival of a study of Roman law) in the twelfth and thirteenth centuries to the development of the relation between church and state during and after Hildebrand's time in office.

2.4.3 Late Middle Ages (1140-1500)

2.4.3.1 The *Decretum Gratiani*

The great divide in the history of medieval canon law came in 1140 with the publication of Gratian's *Concordia Discordantium Canonum* (in course of time the work became commonly known as the *Decretum Gratiani*).[109] According to Bakker (1992:21), the commencement of Scholasticism and the revival of a study of Roman law created the ideal conditions for a scientific consideration of

[106] *Id.* See also Pont (1978:81) who refers to Hildebrand's stance against priests who were married illegally. They were forced to dismiss their wives in order to devote themselves once again to the demands of their commitment to Christ and the church.
[107] Cf. Oestereich (1909) and Berkhof and De Jong (1967:93).
[108] Kuiper (1964:113-115); Berkhof and De Jong (1967:95-97).
[109] Kuttner (1949:495).

the existing canon law. Gratian (a Benedictine monk from Bologna), in compiling the *Decretum*, collected and systematised passages from sources of canon law including the Bible, patristic literature, papal decretals, canons of church councils, and texts from the *Corpus Iuris Civilis* (cf. 2.2.4.2, *supra*).[110] The *Decretum* furthermore demarcated the boundary between ecclesiastical and civil courts, contributed to rational procedure in episcopal and papal courts, and effectively pre-empted the fields of family and inheritance law.[111]

Gratian placed the various sources of law in a hierarchical order. He placed natural law between divine law and human law. Divine law, as the will of God reflected in the Bible, was supreme. Natural law also reflected God's will, but it could be found in human reason and conscience as well as in revelation. Gratian concluded that neither human law (*leges*) of secular rulers nor the church could contravene natural law (*ius naturale*).[112]

As a methodical treatise, the *Decretum* became a fundamental text of a new science in institutions of learning, as well as the foundation for juristic reasoning through which an independent, and highly technical, scientific discipline developed into what is known today as Church Law.[113] The work consists of three parts. The first, dealing with the sources of canon law and ecclesiastical persons and offices, is divided into 101 *distinctiones*, which are subdivided into *canones*. The second part consists of 36 *causae* (cases awaiting judgment including cases pertaining to ecclesiastical jurisdiction, procedure, property, and matrimony), subdivided into *quaestiones* (the questions raised by the case) and *canones* (canons and decretals) bearing on the question. The third part, which is entitled *De Consecratione*, gives, in five *distinctiones*, the law bearing on church ritual and the sacraments.[114]

[110] Thomas *et al.* (2000:52). Van Zyl (1983:173) mentions that parts of the *Decretales pseudo-Isidorianae* (*supra*) were also included in the *Decretum Gratiani*.
[111] Clark (1987:676).
[112] *Id.*:677.
[113] Cf. Kuttner (1949:495), Kleynhans (1982:9), and Bakker (1992:21).
[114] Van Zyl (1983:173); Bakker (1992:21-22).

2.4.3.2 The increasing demand for canon lawyers

According to Clark (1987:768) the medieval church after Gratian assumed increasingly the character of a legal corporation. Canon law became clearly differentiated from theology. The cry "freedom of the church" (*libertas ecclesiae*) involved a battle to emancipate the clergy from their former subservience to secular government, which was now considered a betrayal of the church's divine mission. Educated canonists were "the generals in this war".[115] Canon law became an all-pervading social and cultural power which led the clergy to "run to the law schools in search of the canon-lawyer's promising career".[116]

In the second half of the twelfth century, Bologna became the principal European centre for the revival of Roman law and this gave impetus to a systematic review of canon law. The university, as seat for both laws, served to varying degrees, and in different ways, the interests of church and state.[117] The tension between church and state then extended to the academic realm.

On the secular side, a proliferating class of Bologna-trained lawyers promoting rationalism and secularisation attempted to reduce the role of the church in government. Justinian's codification (2.4.2.2, *supra*) formed the basis of a systematic and interpretative study of Roman law by the so called glossators at Bologna.[118] This provided the stimulus for a juridical renaissance of Roman law that still reverberates in South Africa today.

On the religious side, many of the medieval popes after the time of Gratian were canonists rather than theologians. Pope Alexander III (1159-1181) brought the papal chancery into close contact with Bolognese canon law.[119] From this basis the papacy as an institution reached its zenith of power during the pontificate of Innocent III.[120]

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[115] Mitteis, quoted by Clark (1987:678).
[116] Kuttner (1949:494).
[117] Clark (1987:678-679).
[118] Van Niekerk and Wildenboer (2009:82-83). The glossators wrote explanatory grammatical and exegetical notes in the margin of the text and also between the lines. These notes were called *glossa* (see Van Zyl [1983:83ff.] for a broad description of the glossators' work and influence).
[119] Clark (1987:678-679).
[120] Pont (1978:85).

Pope Innocent III (1198-1216), in addition to studying theology in Paris, studied jurisprudence at Bologna and became a learned theologian and one of the greatest jurists of his time.[121] He availed himself of every opportunity to implement his grand concept of the papacy. Innocent III began his time in office when a power vacuum existed within the Roman Empire after the death of Henry VI in 1197.[122] In the decretal *Venerabilem* he expounds his beliefs that the pope has an obligation to intervene in certain secular matters. He asserted his position when he emphasised that, even though princes may elect a king, a decision on whether a king thus elected is worthy of the imperial dignity or not belonged to the pope alone, whose office it was to anoint, consecrate, and crown him.[123]

2.4.3.3 The reception of canon law

The Bolognese scientific exploration of canon law appears to have been the driving force behind a newfound need for a codification of canon law. In 1230 Pope Gregory IX ordered an update of decretals and canons, from the time of Gratian onwards, under the initial title *Corpus Iuris Canonici*.[124]

The *Decretum Gratiani* (2.4.3.1, *supra*) formed the first part of the *Corpus*. In addition to the *Decretum Gratiani*, the *Corpus Iuris Canonici* consisted of the *Liber Extra*, the *Liber Sextus*, the *Liber Septimus*, the *Extravagantes Johannis XXII,* and the *Extravagantes communes*.[125] The decretal *Venerabilem* was also embodied in the *Corpus Iuris Canonici.*[126]

The *Corpus Iuris Canonici* was then studied by canonists in the same way the *Corpus Iuris Civilis* was studied by secular legal scholars, and it was held in (at least) the same regard.[127] Through this dynamic body of academic legal knowledge, both Roman law and canon law eventually formed part of the *ius commune* (the European common law).

[121] Ott (1910).
[122] *Id.*
[123] *Id.*
[124] Thomas *et al.* (2000:52). The initial title *Corpus Iuris Canonici* became official when all updated decretals were issued together in 1582. See also Kleynhans (1982:11). The *Corpus Iuris Canonici* remained in force in the Roman Catholic Church until the twentieth century when it was replaced by the *Codex Iuris Canonici* (Bakker 1992:28).
[125] Van Zyl (1983:178).
[126] Ott (1910).
[127] Cf. Van Zyl (1983:183).

Some of the canonists were trained as glossators[128] and they initiated the process of reception of canon law into civil law.[129] It was the *ultramontani* ("those from north of the Alps"),[130] however, and, even more so the commentators,[131] who achieved an integration between Roman law, Germanic law, canon law, and town law (statutory law of European towns and cities as well as customary regional law).[132]

The commentators confirmed that canon law and Roman law were two separate legal systems that had to be applied in different spheres. There were three exceptions to this rule, though. Canon law could be applied instead of Roman law in cases of purely spiritual matters, in matters concerning the church, and in those cases where the application of Roman law would amount to sin.[133]

In conjunction with canonists, commentators developed new doctrines to deal with the conflict of legal principles between these different systems. They worked out new principles for criminal law, law of criminal procedure, law of matrimonial property, law of land utilisation, and commercial law, to adapt them to contemporary conditions.[134]

Van Zyl (1983:184) notes the influence that canon law had on the law of civil procedure. The strict formalities of the law of evidence had been replaced by rules that were aimed at an effective and fair trial. It was private law, however, that benefited most from the influence of canon law (*Id.*), including all the aspects of matrimonial law, such as betrothal, separation (*seperatio a mensa et thoro* – literally "separated from bed and table"), and divorce. This also applies to the law of succession and the law of contract (cf. 2.4.2.3, *supra*). The concepts of fairness (*aequitas*) and good faith (*bona fides*), and the serious manner in which perjury came to be regarded, entered secular law through canon law.[135]

[128] Cf. footnote 118 (*supra*).
[129] Van Niekerk and Wildenboer (2009:87).
[130] *Id.*
[131] Also called postglossators or *Konsiliatoren* (Clark 1987:689).
[132] Thomas *et al.* (2000:53); Van Niekerk and Wildenboer (2009:89).
[133] Van Niekerk and Wildenboer (2009:96).
[134] Clark (1987:690).
[135] Van Zyl (1983:183-184). See also Kuttner (1947:493ff.).

By the commentator's efforts a more practical legal system was created and received throughout Europe. This would eventually become the *ius commune*.[136] The *ius commune* was the sixteenth-century legal system of the Netherlands (namely Roman-Dutch law), which was later introduced into South African law.

2.4.3.4 Natural law

As a result of the revival of Roman law in the late middle ages, the concept of natural law (*ius naturale*) (see 2.4.3.1, *supra*) emerged strongly and would play a major role in the development of fundamental human rights of later centuries, as it is also embodied in South African constitutional law, thereby influencing the practice of church law today.

According to Van Zyl (1983:187ff.), the idea of natural law originated during Greek antiquity with Aristotle's view of a "universal law". In Roman legal development this was later described as *ratio summa insita in natura* (the highest reason that is found in nature). *Ratio naturalis* became the foundation of the *ius gentium* (the common law of all nations), which is closely associated with the *ius naturalis*, which in turn is related to *ius divinum*.[137]

Thomas Aquinas (1225-1274) developed the idea of natural law as God-given, binding and valid for all times, places, and circumstances. Chroust (1946:314-19) explains that Aquinas, in his *Summa Theologica*, subscribes to three basic ideas in regard to law and justice: 1) the *lex aeterna* (the divinely ordained, absolute, immutable and eternal government of the whole universe); 2) the *lex naturalis*; and 3) the notion that justice is "fundamentally but the set and constant purpose to give to every one his own".[138] While the *lex aeterna* is imprinted in the human soul, man's participation therein is called *lex naturalis.* By virtue of this partaking we are constantly aware of the basic principles of right and justice within ourselves, hence the *lex naturalis* becomes declaratory of the *lex*

[136] *Id.*
[137] Van Zyl (1983:187).
[138] Chroust (1946:316).

aeterna.[139] The "true social good", for Aquinas, is always the proper purpose of law.[140]

Berkhof and De Jong (1967:124-125) show how Aquinas' ideas led him to a stern belief of papal supremacy. According to this notion, the state can only fulfill its duty if it is guided by a supernatural institute, namely the church, with the pope as its head.

It would appear that Aquinas' emphasis on divine reason and the *lex aeterna* seemed too idealistic to humanists and pre-empted the revival of a consideration of human reason during the ensuing Renaissance (see 2.5, *infra*).

2.4.3.5 The influence of Roman law on canon law

Whereas the influence of canon law on Roman law, and therefore modern law in South Africa, is well documented, the two systems had a reciprocal influence on each other. Even though canon law initially evolved from Roman law (2.4.2.3, *supra*), canon law (and, ultimately, church law) later resisted the persuasion of Roman law to a significant extent, mainly because of the increasing power of the papacy.

According to Baldwin (1959:42), canon law has never been completely immune from the influences of Roman law. For the explication of church law as a *ius sui generis* it is essential to take cognisance of this influence. From the twelfth century Bologna was the creative centre of both legal systems and the relationship between Romanist and canonist studies "resulted in the significant influence of Roman law on Canon Law and *vice versa*".[141] The influence of Roman law on canon law is particularly evident in fields such as canonical marriage law,[142] property law,[143] and the law of guardianship.[144]

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[139] *Id.*:317.
[140] *Id.*
[141] Baldwin (1959:42). Even when the attention of the canonists was mainly absorbed in the study of Gratian's Decretum, the Decretists showed evidence of the influence of Roman law (*Id.*).
[142] Harvey (1972:25ff.). Under the influence of Roman law, the concept of marriage was established, *inter alia*, purely by consent of the respective parties (*nudus consensus facit nuptias* became the ruling principle in the canon law).
[143] Baldwin (1959:1-92). By means of decretals the popes injected the legal device of *laesio enormis* into the system of canon law. By 1250 the penetration of the Roman law of sale into canon law became particularly evident. Note, for instance, the general acceptance by the

2.5 The Renaissance and the Reformation

2.5.1 The Humanist view

The power of the pope had reached its pinnacle at the onset of the Renaissance,[145] as Europe was beginning to emerge from the medieval period. The new culture expanded from Italy to the rest of Europe, spurred on by the invention of the printing press. The religious form of the Renaissance was neo-platonic, influenced by the emergence of a new appreciation of art, science, literature, law, architecture, trade, and economics. The number of clergy that identified with the new movement proved to be a sign of the rapid secularisation of the church.[146] The immanent dwindling of the church as a significant political, as well as social, factor caused a renewed abuse of power.[147] This state of affairs pre-empted the reformation of the church that seemed inevitable.

The new intellectual movement that was gradually developing placed man at the centre of things, and is thus often called Humanism. The Humanists rejected the medieval uncritical belief in authority and introduced critical thought, which had enormous consequences in all structures of society.[148] A paradigm shift in legal science took place, initially in France, but it would later be adopted all over Europe, including the Netherlands.[149] This would develop into the Roman-Dutch legal system that was introduced to South Africa in the seventeenth century.

The legal humanists were divided regarding the relationship between canon law and civil law. Hugo Donellus (an eminent scholar and professor of law at the universities of Heidelberg and Leiden), for instance, was a fierce supporter of a definite separation, arguably under the influence of John Calvin (*infra*), whereas

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canonists of the Roman law principles of freedom of bargaining, as well as the way canonists appear to be willing to use the device of *restitution in integrum* for remedying injury done to churches. Also noteworthy is the way Pope Innocent IV enlisted the two possibilities of *actio ex contractu* and *officium iudicis.*

[144] Helmholz (1978:223ff.). See for example the way church courts in England from 1300 to 1600 exercised guardianship jurisdiction through the application of Roman law.

[145] It is generally accepted that the Renaissance started *ca.* 1450.

[146] Berkhof and De Jong (1967:120); Pont (1978:108ff.).

[147] Kuiper (1964:147-150); Van Zyl (1983:162).

[148] Cf. Thomas *et al.* (2000:55-56).

[149] *Id.*

Franciscus Duarenus (a French jurist and professor of law at the University of Bourges) was in favour of the study of Canon Law.[150]

One of the most prominent figures of Humanism, Desiderius Erasmus (*ca.* 1466-1536), tried to reconcile Plato's philosophy and Christ's teaching in his attempt at a "Biblical humanism". He was increasingly sceptical of papal leadership and the abuse of the medieval church power. His emphasis on individualism, however, as well as his loyalty to the Catholic Church and a less radical approach than his contemporary, Martin Luther, kept him from ever joining the Reformation, despite his sympathy with some of Zwingli's thoughts.[151]

2.5.2 Huldrych Zwingli

During the first decades of the sixteenth century the proper relationship between the church and the civil magistracy became a much debated issue. With the advent of the Reformation, the question of who should control discipline in the Christian community, the church or the magistracy, was at the centre of the controversy. At stake was the matter of who exercised decisive social control. The Swiss cleric, Huldrych Zwingli (1484-1531), entered the fray as a fierce advocate for magisterial discipline.[152] Zwingli was one of the first Roman Catholic priests to accept some of the basic tenets of Erasmus and Humanism. In 1520 he rejected the Catholic Church completely.[153]

Zwingli's greatest legacy, in terms of this study, is his desire to see the church and the state in a peaceful partnership where both are reliant on the other. Zwingli, while agreeing with Luther on most doctrinal matters,[154] argued against Luther's notion of *Regnum Christi non est externum* (the reign of Christ is not external).[155] Luther denied that the magistrate could involve himself, as a magistrate, in matters of religion. Zwingli, true to his motto of *Regnum Christi etiam externum* (the reign of Christ is also external), declared that "een

[150] Van Niekerk and Wildenboer (2009:105-106).
[151] Kuiper (1964:147-151); Berkhof and De Jong (1967:120-121); Pont (1978:110-111); Heine (2008:57).
[152] Baker (1985:4ff.).
[153] Pont (1978:132-134).
[154] It is generally accepted that the doctrine of the holy communion was the only real theological difference between Luther and Zwingli.
[155] (Baker 1985:5, footnote 4). According to Luther, the distinct territories of the two different kingdoms, the secular and the sacred, should remain separate (2.5.3, *infra*).

christenmens is niets anders dan een getrouwe en een goede burger en een christelijke stad is niets anders dan de christelijke kerk".[156]

This view of Christian society led Zwingli to leave all disciplinary authority, including the imposition of excommunication, in the hands of the magistracy. He defended the supremacy of the magistracy over all of society's affairs, including religion. For Zwingli public authority was the proper custodian of right religion and good morals. Government is the church made visible in the world. The city rulers controlled all discipline within the community and had the power to supervise clergy. From its authority there could be no appeal.[157]

Zwingli opposed any separate ecclesiastical jurisdiction and, partly due to his influence, in May 1525 a civil court (the *Ehegericht*) was created in Zürich to supervise marriages. According to Baker (1985:3; 1988:135) the *Ehegericht* was a magisterial rather than an ecclesiastical court, assuring magisterial control over Christian discipline. Van 't Spijker (1992a:93), on the other hand, speciously describes the *Ehegericht* as "een kerkelijk tribunaal voor huwelijkzaken", which arguably is indicative of the way the distinctions between the civil and ecclesiastical entities were blurred in Zwingli's ideal of a single corporate entity. The other two major Swiss cities, Bern and Basel, soon followed suit and the Reformation became official in these cities. In both cases there was total integration of church and state, with the magistrates controlling Christian discipline.[158]

After the death of Zwingli, the Zürich Council appointed Heinrich Bullinger (1504-1575) as his successor. Bullinger authored a new church ordinance, but continued along the same principles laid down by Zwingli, investing all disciplinary power in the hands of the magistracy. The concept of a church court separate from the (civil) magisterial court was first advocated in Switzerland by Oecolampadius and Jud.[159] Their insistence on the essential independence of

[156] Quoted by Van 't Spijker (1992a:90).
[157] Baker (1985:6; 1988:135).
[158] *Id.*:135ff.
[159] *Id.* The fundamental differences between Bullinger and Oecolampadius became especially evident in a dialogue about the true meaning of Matthew 18:15-17. Reacting to Bullinger's contention that Christ used a synecdoche and meant public punishment in prescribing treatment of the derider as "a publican and a heathen", Oecolampadius exclaimed that "where he discovered this strange idea, I do not know" (Baker 1985:15-17).

the church from civil rule in matters of discipline and polity (also found in the thoughts of Bucer and Calvin) digressed significantly from Zwingli and Bullinger, who resembled the development in Germany's Reformation under Martin Luther.

2.5.3 Martin Luther

When Martin Luther (1483-1546), an Augustinian monk, protested against the alleged heresy of the Catholic Church by nailing his 95 theses to the church door at Wittenberg on 31 October 1517, he not only changed the history of the church, but also that of church law. The supremacy of the papacy, the authenticity of centuries' of papal decretals, and the validity of the body of the existing canon law came under his close scrutiny.[160]

The doctrine of the two kingdoms introduced into theology by Luther was a monumental step in the development of the modern concept of the separation of church and state, although Luther never succeeded in his efforts to realise it in practice. In an exposition, *On Secular Authority* (originally published in 1523),[161] Luther describes the power struggle between sacred authority (pertaining to man's soul, which is eternal and subject only to God) and secular authority (described as the "sword", the symbol, emblem, and substance of worldly rule). Luther divides the world into two kingdoms: God's kingdom (constituted by true Christian believers) and the kingdom of the world (consisting of the remainder of humanity).[162] The members of God's kingdom are governed by Biblical laws and the Spirit, with no need for the secular "sword" as harmonious living comes naturally. The need for civil law arises because the rest of society does not adhere to the same principles as believers, and the latter should therefore be protected. In this sense God uses secular law and the civil government to keep believers safe and the world orderly and peaceful. Christians should therefore obey the orders of secular powers and assist in upholding the secular order,

[160] Cf. Kuiper (1964:157-186).
[161] Translated by H. Höpfl (1991), from the original *Von Weltlicher Oberkeit*.
[162] Luther, in formulating the two kingdoms concept, echoes Augustine's *City of God* (see 2.3.3, *supra*).

except when the latter legislates on matters of faith, which would be considered to be *ultra vires*.[163]

Luther (1523/1991:22-34) subsequently deals with the question of how far the secular government may reach without intruding into the domain of God's kingdom. He explains how too much and too little freedom of action may both be harmful. Christians should conform to the civil rule, but the latter should never overstep its parameters by legislating on matters pertaining to faith and religion:

> Secular government has laws that extend no further than the body, goods and outward, earthly matters. But where the soul is concerned, God neither can nor will allow anyone but himself to rule. And so, where secular authority takes it upon itself to legislate for the soul, it trespasses on (what belongs to) God's government, and merely seduces and ruins souls.[164]

The central position that the Bible takes, or should take, in guiding the lives of the citizens of both kingdoms, shines through Luther's entire treatise. He criticises the pope and bishops for not ruling according to the Word of God, thereby stooping to the same levels as the secular rulers.[165] He emphasises that the Bible shows us exactly what God wants, and if God has not commanded something Himself, "we can be sure that it is not pleasing to him, for he will have our faith grounded solely in his divine Word".[166] He uses the text in Matthew 16:18, "On this rock I will build my church", which is the *locus classicus* for the endorsement of papal authority (assigning to Peter, the "rock", the position of the first pope) of the Roman Catholic Church, to show that the Bible is in fact the infallible "rock", the only real guiding authority.[167] This firm stance was preceded by a pivotal moment in the history of church law when Luther burnt the *Corpus*

[163] An example of an *ultra vires* act is if a secular ruler commands one to adhere to the papacy or tries to persuade one to a specific belief. The answer to these acts, according to Luther (1523/1991:29), should be: "Command me what lies within the limits of your authority, and I will obey. But if you command me to believe, or to surrender my books, I will not obey … (I)f you do not resist him and let him take away your faith or your books, then you will truly have denied God". It is thus clear that a secular leader should be disobeyed for *ultra vires* acts, but still respected as rulers for all other purposes.
[164] *Id.*:23.
[165] *Id.*:27.
[166] *Id.*:23.
[167] Cf. Höpfl's interpretation of Luther's understanding of "rock" in this text (which is incidentally incorrectly referenced as being Matthew 18), as meaning "faith" (*Id.*:23, footnote 23).

Iuris Canonici (see 2.4.3.3, *supra*), in a public act of defiance, on 10 December 1520 in Wittenberg.[168]

Luther also deals with the question of whether heresy should be restrained by secular rule. He affirms unequivocally that "(t)he use of force can never prevent heresy".[169] The task has been assigned to the church to accomplish this restraint, fighting spiritually with God's Word (as heresy is considered a spiritual thing by Luther), and not to the rulers (fighting with the sword). This reiterates the distinct territories of the two different kingdoms. Both must be allowed to continue their work.

Luther's doctrine of the two kingdoms did not, however, prevent him from appealing to the government to interfere in the affairs of the church. The secular governance of the Lutheran *Landeskirchen* (state church) included a territorial rule (*Landesherrliches Kirchenregiment)* according to the tenet *cujus regio, ejus religio* (whose region, his religion).[170] Ganes (1970:128-129) speculates that Luther's idea of a *Freiwilligkeitskirche* (voluntary association of believers)[171] contributed to the ascendancy of the territorial church in Germany. Pont (1981:5) is of the opinion that the view of the church as a voluntary association contributed to the idea that all problems arising within the church can be resolved by appealing to civil law (cf. 6.6, *infra*). Kleynhans (1982:11) shows how the relationship between the church and the territorial rulers was so intertwined that church law lost its autonomy and became a subdivision of the civil law, much as canon law initially was a part of Roman law. Coertzen (1991:214) is indeed convinced that, because civil authority and jurists had power over church governance, they often relied on Roman Catholic canon law in their administration. According to Koffeman (2009:67) the *ius circa sacra* rested completely in the state, while only the *ius in sacra* remained in the hands of the

[168] Bakker (1992:23).
[169] Luther (1523/1991:30).
[170] Kleynhans (1982:10-11); Avis (2001:44); Koffeman (2009:67). Two other systems of church governance that developed in Germany during the sixteenth century were the episcopal and the collegial (Coertzen 1991:214ff.). The latter would play a major role in early South African church history (see chapter 3, *infra*).
[171] Luther's distinction between the visible and the invisible church (*infra*) has been indicted for the fact that the law of association of the seventeenth century considered the church to be a voluntary association (Spoelstra 1989:3).

church. It seems though that the church was constantly under pressure from the civil authority.

The development of Luther's thoughts on church governance appears to have coincided with his changing view on the *ius divinum.* Divine law for the early Luther had a bearing only on what he calls the "invisible church" (the congregation of all the elect who receive salvation in Christ).[172] According to Dulles (1977:685) Luther, in his later works, recognised that there was divine law also in the "visible church" (all those who apparently accept by faith the preaching and who take part in the sacraments). This interpretation of Luther is not shared by Spoelstra (1989:3), who considers the governing of Luther's "visible church" as being "van 'n ander orde as God se regering van die onsigbare kerk van gelowiges", or by Coertzen (1991:8) who insists that "(d)ie reg in die sigbare kerk is … uit-en-uit 'n menslike reg". Berkhof and De Jong's (1967:179) summary of Luther's argument seems to be most fitting: "God regeert de christenheid door het ambt van het Woord en de wereld door het ambt van de overheid".

It is widely accepted that Martin Luther initiated the reformation theory of the church and should therefore be held in high regard for his mammoth role in the development of a Reformed theology. His influence on church law in South Africa, however, seems to be nominal when compared to that of Calvin.

2.5.4 John Calvin

2.5.4.1 Calvin on church and state

Whereas Luther focused primarily on the Reformed doctrine, John Calvin (1509-1964) was the first Reformer to realise the importance of a church order in addition to the dogma.[173] Calvin (*Institutes* IV:315-316 [3.1]) insisted that God alone should "rule and reign in the Church, that he should preside and be conspicuous in it, and that its government should be exercised and administered solely by his word".[174] To this end God uses "the ministry of people, by making

[172] Van 't Spijker (1992a:86-87). See Gane (1970:121-124) for an exposition of Luther's distinction between the visible and the invisible church.
[173] Pont (1981:3); Coertzen (1991:221).
[174] Translated by H. Beveridge.

them, as it were, his substitutes, not by transferring his right and honour to them, but only doing his own work by their lips, just as an artificer uses a tool for any purpose."[175]

When Dreyer (2005:888) describes Calvin's ideas on society as a "theocracy",[176] he postulates that we find the basis of modern day "rule of law" in a *rechtstaat,* where the government is bound by the laws promulgated by parliament, in Calvin's thoughts. If this is meant to indicate that, in Geneva's "theocracy", it was the church that controlled all aspects of life, including all legal aspects of society, it is probably going one step too far.

To understand the role of Calvin in the development of church governance it is important to consider the political and religious backdrop of Calvin's time. Calvin found the "ferocity and tyranny"[177] of the papacy to be unacceptable, he considered the pope to be "corrupt",[178] and even "Antichrist",[179] while he was convinced that in the Roman Catholic Church there prevailed "a perverted government, compounded of lies, a government which partly extinguishes, partly suppresses, the pure light".[180] It is therefore fair to accept that Calvin based his approach to the church-state relationship of his era on his observation of the adverse effect of the reigning papal supremacy on church governance.

Calvin's position in the church-state debate is summed up in the opening section of his treatise "Of Civil Government" in his *Institutes*:[181]

> But he who knows to distinguish between the body and the soul, between the present fleeting life and that which is future and eternal, will have no difficulty in understanding that the spiritual kingdom of Christ and civil government are things very widely separated.

[175] Calvin (*Institutes* IV:316 [3.1]).
[176] McNeill (1965:34-35) warns against the possible ambiguity of the term "theocracy" if used to describe Calvin's habitual reference to the divine basis of government. The term should not be taken in its popular sense of hierocracy, government by priests, but rather in its basic meaning, government by God. According to Kik (1963:82-83) historical facts, recorded in the official registers of Geneva, reveal that Calvin did not set up a theocracy in which he and the clergy dominated the Government of Geneva. See also 5.2.4 (*infra*).
[177] Calvin (*Institutes* IV:380-381 [7.20]).
[178] *Id.*:382 (7.22).
[179] *Id.*:384 (7.25).
[180] *Id.*:305 (2.2).
[181] *Id.*:651 (20.1).

Yet, his distinction does not go so far as to "justify us in supposing that the whole scheme of civil government is matter of pollution, with which Christian men have nothing to do".[182] Indeed, the kingdom of Christ and the civil government "are not adverse to each other".[183] The former begins the heavenly kingdom in us, while to the latter it is assigned

> to foster and maintain the external worship of God, to defend sound doctrine and the condition of the Church, to adapt our conduct to human society, to form our manners to civil justice, to conciliate us to each other, to cherish common peace and tranquillity.[184]

Van Ruler reportedly compared Calvin's view as "twee kapiteins op het ééne schip van het volksleven".[185] Calvin (*Institutes* IV:652-653 [20.3]) calls upon government to fight idolatry, blasphemy and other offences to religion, while maintaining a public form of religion. He discusses the parts of civil government separately, dividing it into the magistrate (the president and guardian of the laws), the laws (according to which the magistrate governs), and the people, who are governed by the laws and should obey the magistrate.[186] The magistrates are commissioned by God, "invested with divine authority, and, in fact, represent the person of God, as whose substitutes they in a manner act".[187] All power is ordained by God, the rulers are the ministers of God, and submission to the government is the duty of every citizen, in the vein of Romans 13:1-3.[188]

From the above it becomes clear that Calvin considered it the state's duty to uphold the faith and the church. The church and the civil government (which is of divine origin) join and interact intimately in their search for the public good and in service of the people's needs (cf. 6.13.3, *infra*), while both are placed under the obedience to God. This diverges significantly from Luther's approach where a conceptual church-state separation ends up as a territorial state-church.

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[182] *Id.*:652 (20.2).
[183] *Id.*
[184] *Id.*
[185] Quoted by Van Wyk (2005:134).
[186] *Institutes* IV:653 (20.3).
[187] *Id.*:653 (20.4).
[188] *Id.*:654 (20.4).

2.5.4.2 Calvin and Bucer

Calvin spent May 1538 to September 1541 in Strasbourg at the invitation of Martin Bucer.[189] Bucer endorsed the principles of Oecolampadius (2.5.2, *supra*) in his appeal for an independent church, free from civil authority.[190] Bucer's influence later became evident in Calvin's drive towards a total separation of sacred and secular powers.

De Kroon (1988:160ff.) shows how the terms "internal" and "external" (*internum* and *externum*) play a dominant role in Bucer's thoughts. The term *internum* means the area that lies beyond the reach of all human authority (the area within, the area of faith and decisions of conscience), while in contrast the *externum* is the area of the community that was the domain of secular authority, the area of law and order. For Bucer the responsibility for pure religion was included in the *externum*, thus under the sovereignty of civil authority. Government, he repeatedly asserted, must respect decisions of conscience, which belonged to the *internum*, as their authority was limited to the *externa*.[191]

Bucer's system of church governance, called "Presbyterian" by Van 't Spijker (1992a:96) for its emphasis on the role of the elders, was most likely what interested Calvin. It was, however, probably Bucer's appeal on the Word of God, in explicating his system of church law, that left the deepest impression on Calvin, as explained by Van 't Spijker (1992a:97): "Kerkrecht bezit van zichself geen goddelijk gezag. Het is niet vanzelfsprekend *ius divinum*, maar het heeft slechts gezag voorzover het overeenkomt met Gods Woord".

2.5.4.3 The Anabaptists

A significant part of Calvin's treatment of the church-state issue was aimed at a refutation of the Anabaptists. This was despite their being aligned with the religion of the Reformers in its resistance against the Catholic Church. However, the Anabaptists fervently denied that civil rulers could rightly exercise any

[189] Kuiper (1964:194-195).
[190] Van 't Spijker (1992a:94).
[191] Bucer, being a theologian in service of the government, appears to have diverged from his own convictions and allowed the government to encroach upon the *internum* (cf. De Kroon 1988:165).

authority over Christians and rejected any bond between church and secular rule, including easy membership of the church through the state.[192] The Anabaptist views called for a decisive separation of the church from the state, demanding complete freedom from any interference, coercion, or influence by the government in matters of belief. These notions were probably Calvin's ideal, but circumstances had him accept a less radical stance.

One of Calvin's main concerns seems to have been the way the Anabaptists sought religious liberty. They complained that they could not have fellowship and unity with those who threatened with civil rule (the "external sword"), while Calvin argued that the imperfection of the church was no reason for separation from it.[193] Schaff (1932:29) asserts that the main interest in Anabaptism lay in the protest they made against the political order of the time, rather than in the religious principles they adopted, even though the latter seems to have always been a moot point.

Although Zürich[194] is described as the "cradle of the Anabaptist movement",[195] Strasbourg, renowned for its tolerance, became a refuge and organising centre for these radical reformers. This new movement, opposing infant baptism, bearing of weapons, and the office of the magistracy, rapidly increased in numbers between 1527 and 1529.[196] A confrontation between Bucer and the Anabaptists appeared inevitable. He attempted to curb their influence, but the city council posed a problem. The council jealously guarded its prerogatives as supreme authority for church affairs. On Bucer's insistence, however, the magistrates established a college of church wardens (*Kirchspielpfleger*) for the supervision of church life. This programme was met with little enthusiasm by the council.[197]

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[192] Cf. Kuiper (1964:205) and Baker (1985:13-14).
[193] Schaff (1932:30); Klaassen (1977:421ff.).
[194] The Anabaptists in Zürich, led by Conrad Grebel, had once been associated with Zwingli's programme of reformation (Kuiper 1964:204-205). In 1525 Zwingli charged them with separatism and schism (Klaassen 1977:541). The final break seemingly came as a result of Zwingli's habit of deferring to the city council in final decisions. This was perpetuated when, in February 1529, the Protestant Reformation became the state church in Switzerland by civil decree (Schaff 1932:35-36).
[195] Schaff (1932:35). See Klaassen (1977:421ff.) for a detailed view on the Anabaptists in Zürich.
[196] Kreider (1955:103ff.).
[197] *Id.*

The turning point in Bucer's struggle with the Anabaptists came in December 1531, when the council decreed the banishment of the leader of the Anabaptist community, Pilgrim Marpeck.[198] Marpeck accused the clergy of preaching under the protection of the magistrates and not freely under the cross of Christ. He asserted that one can only be ruled by either the Word or the civil authority. He affirmed categorically the necessity of the separation of church and state, and seemingly denied that government had any functional value for the true Christian. Marpeck finally left Strasbourg in February 1532, starting the decline of the Anabaptist movement.[199]

Heinrich Bullinger, in a lengthy treatise, led some damaging evidence against the Anabaptists, concluding that they were hostile to the government and against obedience to it.[200] These and similar reports steered the Strasbourg council towards stiffening its legal policy in 1535 by issuing a mandate prohibiting the providing of food, housing, or refuge to Anabaptists. The council declared obligatory the baptism of all infants within six weeks of birth. In March 1538 a new mandate with even stricter provisions was issued.[201] At the core of the ensuing tension was the magistracy's fear that the Anabaptists' refusal to conform to the commands of the government would produce an epidemic of civil disobedience and contempt for governmental authority. The movement was eventually contained by systematic, continuous coercion and a vigorous, disciplined (state) church.[202]

It would appear that Calvin's attack on the Anabaptists' views on the separation of church and state emanated primarily from theological rather than political differences. Complete freedom to worship and the notion that the state has no right to interfere in matters of faith and church governance are certainly not ideals that true Calvinists would scoff at.

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[198] *Id.*
[199] *Id.*:107-108.
[200] Schaff (1932:31). Cf. Klaassen (1977:421ff.).
[201] Kreider (1955:110ff.).
[202] Cf. *Id.*

2.5.4.4 Calvin's Geneva

For centuries the bishop had been the nominal head of Geneva. The Council of Two Hundred was instituted in Geneva in the fourteenth century and was chosen by the citizens of Geneva to share power with the bishop in ruling over the city. In the sixteenth century the Council formally adopted the Reformed faith and expelled the bishop. In this abrupt reversal of authority the city now ruled the church through the Council, and the Council, assuming both civil and ecclesiastical authority, had no intention of yielding this dual control.[203]

The political transition from a Roman Catholic community to a Protestant society under the rule of a council (with no experience in dealing with ecclesiastical affairs) happened before Calvin first arrived in Geneva in August 1536. In the ensuing anarchy, Calvin achieved the almost impossible by establishing a certain level of independence for the church. This was, however, short-lived because in a battle over jurisdiction in spiritual matters (notably the power of excommunication) the Council banished Calvin from Geneva.[204]

The Council of Geneva, however, struggled to maintain order in the city and invited Calvin back in 1540, who, reluctant but driven by a sense of duty, returned to Geneva in September 1541. Upon his return the *Ordonnances Ecclésiastiques* (Ecclesiastical Ordinances), drafted by Calvin and an assigned committee, were published and were to become a constitution of the Church in Geneva.[205] They were republished in 1561 with minor changes.[206] The basic principles[207] of this new Church Law of Geneva have passed into church orders of Reformed and Presbyterian churches throughout the world, also in South

[203] Kik (1963:72-75).
[204] *Id.*:76-79.
[205] Whether this document fully embodied Calvin's views is questioned by Spoelstra (1989:16; 19), but Pont (1981:21) is convinced that it was basically created by Calvin and that it lay "volkome in lyn met sy denke".
[206] Pont (1981:3).
[207] These principles include the defining of four regular orders of officials appointed by Christ as pastors, teachers, elders, and deacons (all considered to be equal), the sacraments, and church discipline. See Pont (1981:22-47) for the full text of the 1561 *Ordonnances Ecclésiastiques*.

Africa, and became known as the presbyterial-synodal system of church government.[208] Calvin later wrote to a friend about this document:

> In the first place, we had to see about getting the ecclesiastical laws written. Six of the Council were appointed to assist us in drawing them up. We finished the work in twenty days, and although it is not perfect it is tolerable, considering the state of the times. It was accepted by the popular vote. Then a court was appointed to exercise a censorship of morals and to watch over the order of the Church, for I was anxious, as was right, that the spiritual power should be distinguished from the temporal jurisdiction.[209]

Calvin's theoretical separation of the two entities, church and state, while providing for their mutual interaction, appears to be contradictory. According to McNeill (1965:41-42), however, Calvin realised that any real alienation between church and state would have spelled disaster. The *Ordonnances Ecclésiastiques* were ratified by the magistrates. The clergy were sworn to maintain these ordinances, as approved by the city rulers. The elders were already members of the magistracy and were elected by the Council of Two Hundred. The election of deacons and of workers in the hospital for the aged, sick, and poor followed the same plan. Matrimonial cases in law were declared to be a matter for the magistrates, who might, at their discretion, call in clergy for advice. The Council, co-operative to a certain extent, was unwilling to relinquish its control over church affairs. It would have been unwise if the church had denied them any involvement. Pont (1981:22) explains how the situation in Geneva was unique and the role that Calvin afforded the secular rulers in the church is seldom found in other orders of Reformed churches. It was, however, only in cases where governments were totally adverse to the church (the position in France, for instance) that the Calvinistic church succeeded in keeping the state completely outside the affairs of the church.

Calvin insisted that the sacraments and preaching remained the exclusive domain of the clergy. In addition, he took a firm stand against the alienation of

[208] Cf. Van Wyk (1981:57ff.), Coertzen (1981:243) and Van 't Spijker (1992a:97). This system is not practised by the GKSA (Spoelstra 1989:17).
[209] Calvin, quoted by Kik (1963:79-80).

church property on the grounds that "what has once been devoted to Christ and the church is not the property of the civil magistrate".[210] It therefore seems that Calvin remained adamant that church and state should stay separate – in as far as the state had no jurisdiction over the church's own distinct affairs and concerns. However, he paradoxically accepted the interaction of church and state where the governing of society was at issue. His influence on the social, educational, and economic life of Geneva bears witness to this.

Calvin's fiercest battle with the Council came with his setting up of a consistory, a body formed of five pastors and twelve elders.[211] This brought the issue of jurisdiction to the forefront again, and, for Calvin (*Institutes* IV:438 [11.1]), "the whole jurisdiction of the Church relates to discipline". Calvin explains that

> no city or village can exist without a magistrate and government, so the Church of God … needs a kind of spiritual government. This is altogether distinct from civil government, and is so far from impeding or impairing it, that it rather does much to aid and promote it. Therefore, this power of jurisdiction is, in one word, nothing but the order provided for by the preservation of spiritual polity. To this end, there were established in the Church from the first, tribunals which might take cognisance of morals, animadvert on vices, and exercise the office of the keys.[212]

Calvin, while insisting on the dissimilarity of ecclesiastical and civil power, maintained that there should be a close co-operation between the two authorities where the morals of citizens were concerned. Calvin (*Id.*:442 [11.3]) explains this with an example of a person who gets intoxicated and inevitably faces imprisonment in a well-ordered city. The law will be satisfied by the magistrates and the external tribunal. This would, however, not necessarily lead to repentance, rendering them unfit for communion. The church would have to interfere in such cases (even though the church had no power to punish wrongdoing), enforcing the church's right to deny them the sacrament thus combining their efforts with the secular rule. Here Calvin seems to emphasise

[210] Calvin, quoted by McNeill (1965:42).
[211] Kik (1963:80).
[212] Calvin (*Institutes* IV:438-439 [11.1]).

the third *nota* of the traditional *notae ecclesiae*[213] and Koffeman (2009:270) shows how this could be construed to be a correction of Luther's view. Van 't Spijker (1992a:100) also notes the close relation between dogma and discipline in Calvin's understanding of the order of the church: "*Docere* en *discere* zijn correlate begrippen in de gedachtenwereld van Calvijn, evenals *doctrina* en *disciplina*" (see also 7.7.2, *infra*).

It was not until 1555 that the Council accepted Calvin's claim that the consistory had the right to excommunicate, paving the way for a strict moral code to be imposed and strengthening the legal position of the church.[214] While in Zwingli's Zürich the state ran the church, in Geneva it was the church that eventually ran the state.

Calvin's striving for the independence of the church in arranging its own affairs[215] may be considered one of his greatest legacies. Although civil authority will always have a *ius circa sacra*,[216] Pont (1981:5) argues, from a Calvinistic point of view, that the church has always denied that "die owerheid seggenskap in die kerk het of dat enige ander reg binne die kerk kan geld as net die kerk se eie reg wat 'n *ius sui generis* of wel 'n eiesoortige reg is".[217]

The importance of Calvin's influence on the position of church law in South Africa, and thus on the premise of this study, cannot be overestimated. The words of John Adams seem fitting: "Let not Geneva be forgotten or despised. Religious liberty owes it most respect". [218]

2.5.5 John Knox

The church in Geneva proved to be a model for churches of the Reformation in France, the Netherlands, and Scotland.[219] At the beginning of the Reformation era the Roman Catholic Church in Scotland exerted absolute control over the church and a substantial amount of control over the affairs of the state. The

[213] The marks of the church namely Word, sacrament, and discipline (article 29 of the Belgic Confession) (see 6.12.2, *infra*).
[214] Kik (1963:81-82).
[215] See Van 't Spijker (1992a:101).
[216] Cf. Koffeman (2.5.2, *supra*). See also 5.2.1 (*infra*).
[217] Cf. 1.1 (*supra*).
[218] Quoted by Kik (1963:84).
[219] Kuiper (1964:219).

bishops, corrupted by power and wealth, set a bad example of dissipation setting the scene for a much needed reform.[220]

In Scotland the move to Calvinism was prompted by the martyr George Wishart and continued by his protégé, John Knox (1505-1572). In 1560 the Scottish parliament decreed Protestantism to be the new state-religion. The pope's authority was hereby abolished, and although the church was still considered supreme in spiritual matters, the state controlled all civil affairs.[221] The church order (the *Book of Discipline*), adopted by the Scottish parliament in 1561, secured a presbyterial-synodal organisation that formally kept ecclesiastical discipline within the jurisdiction of the church.[222] With this they aimed at "reproving and correcting these faults which the civil sword doth either neglect or may not punish".[223]

With the reign of Queen Mary which started in August 1561, the course of the church was threatened. Mary, a staunch Roman Catholic, was convinced that subjects were bound to follow the sovereign in religious matters and refused to ratify the church order that the parliament had adopted. Although Knox could not be influenced, some leading Protestant laymen declined to take their seats in the general assembly of the Church that met in December 1561 because she had not authorised it.[224] To this Knox replied: "Take from us the liberty of assemblies, and take from us the gospel".[225] The general assembly decided the issue by meeting without the consent of the Queen or the parliament. Following this precedent the Church conducted all its affairs independently of the state.[226]

In 1564 Knox, reiterating his interest in the sovereignty of God, declared that "as the Queen is a slave of Satan, God's vengeance hangs over her realm".[227] His views on church and state are summed up in his statement that his "travail is

[220] Kik (1963:88).
[221] Kuiper (1964:217-218); Pont (1978:172). Knox disapproved of preachers taking employment in civil government: "Let none that be appointed to labour in Christ's vineyard, be entangled in civil employment" (quoted by Gray 1939:144).
[222] Pont (1978:172).
[223] Quoted by Kik (1963:92).
[224] *Id.*:92ff.
[225] Quoted by *Id.*:92.
[226] *Id.*
[227] Quoted by Gray (1939:141).

that both princes and subjects obey God".[228] Queen Mary's reign ended in 1567, and she never succeeded in suppressing the influence of the Reformation. By 1570 the position of the Scottish Presbyterian Church was solid and Scotland was a Reformed state in the mould of Geneva.[229]

2.5.6 The church in England

The Act in Restraint of Appeals, passed by the English Parliament in February 1533, was drafted by Thomas Cromwell on behalf of King Henry VIII (1509-1547) and seems to have been the originating force for the English Reformation.[230] This Act forbade appeals to the pope on religious and other matters, effectively removing the pope from all civil and religious authority.[231] This measure made following papal rule in church, religion, or other matters illegal. It prepared the way for the enactment of the Act of Supremacy a year later, decreeing the king to be the supreme head of the Church of England (*Anglicana Ecclesia*). The Acts enabled King Henry to divorce Queen Catherine of Aragon so that he could marry Anne Boleyn.[232]

The ensuing Royal Supremacy as a doctrine was based on three interlocking and fundamental principles. First, the sovereign stood in a pastoral relationship to the whole English nation as a shepherd to his flock. Second, the king was overlord and sovereign of the clergy who were also considered to be his subjects. Third, as monarch, he owed no obedience to Rome.[233]

Henry, however, never completely severed ties with the Catholic Church. Historians are therefore not in agreement regarding Henry's role in originating the reform of the English church.[234] Pont (1978:171) suggests that the archbishop, Thomas Cranmer, first started with an internal reformation of the Catholic Church in England, while Elton (in Ban 1972:186) refers to Thomas

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[228] *Id.*:143.
[229] Kuiper (1964:219); Berkhof and De Jong (1967:190); Pont (1978:172).
[230] The first informal beginnings of anti-papalism in England can be found in 1530 when Henry realised (and reiterated it often between 1530 and 1533) that "local causes should be settled locally by the clergy of the province, (and) that the Christian community had been set by God under the rule of emperors" (Scarisbrick, quoted by Ban 1972:192).
[231] Ban (1972:186ff.).
[232] *Id.*; Kuiper (1964:223).
[233] Scarisbrick in Ban (1972:189).
[234] Ban (1972:186).

Cromwell as "the architect of English reform". Buckler (1941:312ff.) notes the risk of linking the English Reformation with the Lutheran movement. This is probably the reason why Kuiper (1964:222) calls the English Reformation one of "peculiarities", noting that there was no single, outstanding leader.

Although Henry kept most of the Catholic elements in liturgy and form in the Church of England, he took a firm stance against canon law, even prohibiting its study. Instead he encouraged the study of Civil Law hoping that students would realise that canon law was "a mass of bad Latin and brutal ignorance, the product of dark ages, in which the sacerdotal lust for power had filched from kings and princes of the earth their God-given rights".[235]

Henry's ecclesiastical laws have not permanently superseded canon law. After the death of Henry in 1547, portions of canon law sporadically came back into force.[236] In 1881, in *Mackonochie v Lord Penzance*, the court confirmed that canon law was part of the general common law of England "in that wider sense which embraces all the ancient and approved customs of England which form law".[237] This is still the position today, and ecclesiastical courts (rooted in canon law) have jurisdiction in matters relating to, *inter alia*, property, matrimony, and discipline.[238]

2.5.7 Religious conflict in France

Since the end of the fifteenth century the French government has had total authority over the church. King Francis I and his successor, Henry II, thus had a political interest in a strong Catholic Church, leading to several sporadic confrontations between Catholics and Protestants (Huguenots).[239] In 1559 the Huguenots, at a synod in Paris, accepted a Calvinistic creed (*Confessio Gallicana*) and a church order (the *Discipline Ecclésiastique*), following the Genevan order, but extended to include rules for the association of separate congregations in one national denomination:

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[235] Quoted by Buckler (1941:319).
[236] *Id.*:319ff.
[237] Quoted by Buckler (*Id.*:321).
[238] Cf. *Id.*:320ff.
[239] Kuiper (1964:213); Pont (1978:169).

> (G)een gemeente mag over de andere heerschappij voeren; de gemeenschaplijke en de onafgedane zaken moeten in provinciale en nationale synoden worden beslist; de synoden zijn vertegenwoordigingen der gemeenten, samengesteld uit predikanten en ouderlingen.[240]

According to Pont (1981:48-54) the *Discipline ecclésiastique* was the first attempt of the Reformers to form a national church. Separate congregations would stay independent but not autonomous as far as communal matters (decided by the synod) were concerned. These principles influenced the Church Order of Emden of the church in the Netherlands, as well as the order of the church of the southern Netherlands, at the Synod of Antwerp in 1564.

As a result of the influence gained by the Huguenots, civil war broke out in 1562 which culminated in the St. Bartholomew's Day massacre in 1572. It was clear that the Catholic authorities never trusted Protestants to be loyal subjects of the (Catholic) state. Outbreaks of war were divided by formal peace treaties granting the French Protestants various levels of religious tolerance and freedom, brought on mainly by military resistance.[241]

In 1598 the Edict of Nantes (signed by Henry IV) provided civil equality and (almost complete) freedom of worship to the Huguenots. With this freedom the Huguenots grew to become a major political force in France: "onder een roomse overheid vormden de gereformeerden een soort staat in de staat".[242] These guarantees, however, were revoked in 1685 leading to an increase in the number of fleeing Huguenots, many of them finding a home in South Africa.[243]

2.5.8 Reformation in the Netherlands

2.5.8.1 The early years

The Reformation in the Netherlands did not have a central figure or single leading event as its focus, as was the case in its neighbouring countries.[244] It

[240] Berkhof and De Jong (1967:187).
[241] *Id.*; Kuiper (1964:213).
[242] Berkhof and De Jong (1967:188).
[243] *Id.*; Van der Schyff (2001:15).
[244] Except in England where also no single, outstanding leader in the Reformation can be identified (cf. 2.5.6*, supra*).

developed steadily among those who became dissatisfied with the conditions in the Roman Catholic Church under the rule of King Philip II of Spain.[245] Ultimately there were two creeds that became pivotal in early Dutch Protestantism. The adoption of the Belgic Confession, authored by Guido de Brès (1523-1567), by a synod at Antwerp (held by the church in the southern Netherlands) in 1564, and the translation of the Heidelberg Catechism into Dutch by Peter Datheen in that same year, were the result of the culmination of years of continuing reform that gradually shaped the church. De Brès was hanged in 1567 for disobedience to the court at Brussels and, especially, for the distribution of holy communion in Reformed congregations.

The Belgic Confession was written to assure the king that the Protestants were not a group of radical rebels. Article 36[246] of the Confession addresses the relationship between members of society and the civil government. In terms of the article civil authority is ordained by God and tasked to restrain lawlessness and promote good order, and society's duty is to be subject to the government in the light of Romans 13. Defiance of civil authority was only warranted when one was compelled to act contrary to Biblical demands. Articles 30 to 32 deal with church government. The independence of church government, propagated in these articles, was contrary to the views of the authorities who could, for instance, determine who might serve as a priest in a town.[247]

The Synod of Antwerp also adopted a church order based on the *Discipline ecclésiastique* of 1559 of the French church and decisions of the synods at Poitiers (1560), Orléans (1562), and Lyon (1563). This order put a high value on the independence of the local church, even more so than the *Discipline ecclésiastique*, omitting all references to synods and higher assemblies.[248]

[245] At first the Reformation in the Netherlands was Lutheran and Anabaptist in character, slowly turning to the views of the Swiss cantons which were under the influence of Calvin and Beza. There were also proponents of the views of Bullinger, which were sympathetic to some form of Erastianism, where the magistrates could have a voice in church affairs, notably with respect to the appointment of clergy. This civil interference in church affairs was opposed by the Genevan elements (cf. Bangs 1961:158-159; see also 2.6.3.1, *infra*).
[246] See 1.1 (*supra*) for text of article 36 of the Belgic Confession.
[247] See 5.2.4 (*infra*) for a discussion of the Belgic Confession.
[248] Deddens (1992:110).

2.5.8.2 The Convent of Wezel

After the Synod of Antwerp, the Belgic Confession was presented to King Philip II at the Convent of Wezel (1568)[249] in the hope of securing toleration. According to Pont (1981:3) the foundation of the Reformed church order in South Africa can be traced back to the Convent of Wezel. Here work started on a church order for the northern Netherlands, modelled on the *Ordonnances Ecclésiastiques* of Geneva (which served as blueprint for the presbyterial-synodal ecclesiastical polity) and the church order of the Reformed exile churches in London. Datheen, Marnix, and Moded emerged as the major role-players during the Convent.[250]

In eight chapters the Convent recorded its ideas on matters including the offices, the sacraments, and discipline. What was agreed upon was, however, not a church order but principles to be considered in the design of any subsequent orders.[251] These principles were: Scripture; the example of the apostles; and the church tradition.[252]

2.5.8.3 The Synod of Emden

As a result of the threat of religious persecution, the first true synod of the Reformed Church of the Netherlands was held on German soil, in the town of Emden in 1571.[253] After the Belgic Confession and the Heidelberg Catechism were formally accepted by the delegates, the matter of a church order was on the agenda. The Synod (chaired by Gaspar van der Heyden, with Johannes Polyander acting as secretary) adopted an anti-hierarchical article first in order to avoid the dangers of the Roman Catholic hierarchical system.[254] The Synod, expanding on the foundation that had been laid by the *Discipline ecclésiastique*, maintained that each individual congregation (although united in doctrine) had the right to regulate its own matters:

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[249] The Convent was not a synod as it was not made up of delegates from churches, but rather by a group of concerned Reformed members from the Netherlands. Wezel, in Germany, was chosen for its reputation for religious freedom (Pont 1981:70).
[250] Deddens (1992:111).
[251] *Id.*
[252] Pont (1981:5).
[253] Bangs (1961:159).
[254] Pont (1981:92-103).

> Geen kerk zal over een andere kerk, geen dienaar des Woords, geen ouderling, noch diaken, zal de een over de ander heerschappij voeren, maar een iegelijk zal zich voor alle suspiciën, en aanlokking om te heerschappen wachten.[255]

The Synod followed the *Discipline ecclésiastique* in determining the majority of other articles, including matters of discipline and the offices. On the matter of assemblies it diverged from the *Discipline ecclésiastique*, emphasising the role of the church council.[256] The Order concludes with article 53 which reiterates the authority of synodal decisions, and every congregation and classis is called upon to accept these decisions, not because they are taken by a higher body but because they are considered to be made with common accord:

> Deze artikelen de wettelijke en behoorlijke orde der kerken betreffende, zijn also met gemeen akkoord gesteld, dat ze (zo het de nuttigheid der kerken vereist) veranderd, vermeerderd en verminderd mogen en behoren te worden. Nochtans zal het geen bijzondere kerk vrij staan, zulks te doen. Moet alle kerken zullen arbeiden deze te onderhouden, totdat in een synoale vergadering anders besloten wordt.[257]

The Church Order is thus not absolute, and was indeed to be developed by subsequent synods. The true value of Emden was that a Calvinistic church order was formed where the independence of the church from political control, under the authority only of Scripture, was claimed. Unfortunately this ideal was not bound to withstand political influences after the demise of Spanish and Catholic rule in the Netherlands.[258]

2.5.8.4 After Emden

Religious persecution decreased significantly after the Netherlands gained political independence from Spain in 1572. Thereafter, benefiting from the newly found religious liberty, the church held synods on Dutch soil. There were two synods in Dort, in 1574 and 1578, a synod in Middelburg in 1581, followed by one in 's-Gravenhage (The Hague) in 1586. These synods significantly

[255] *Id.*:103. For the complete text of the Church Order of Emden, see *Id.*:103-110.
[256] Deddens (1992:112).
[257] Pont (1981:110).
[258] *Id.*:110-112.

developed the work started at Emden, but the essentials of the Church Order of Emden were kept intact.[259]

The northern Netherlands had increasing success against the rule of the Catholic Spanish Habsburgs after they had joined forces under the Union of Utrecht on 20 January 1579. In 1581 they declared independence from Spain. The Treaty of Utrecht included a reference to freedom of religion, and the newly formed independent Republic of the Netherlands became a safe haven for many Protestants. Article 13 of the Treaty specified that each province possessed legislative power over religious matters, provided that everyone shall have freedom of religion and that no-one may be persecuted or investigated because of religion.[260]

The churches regarded themselves as sovereign in the management of church matters. They elected their own office-bearers and exercised discipline (in doctrine and conduct) over their members and the clergy. The church orders of the succeeding synods, however, made increasing concessions to the civil authority, and the growing control by the states-general became especially relevant by the beginning of the seventeenth century.[261]

2.6 After the Reformation

2.6.1 The Counter Reformation

In answer to the growth and increased influence of the church of the Reformation, the Roman Catholic Church attempted to reform itself, a movement often called the Counter Reformation.[262] Pope Paul III convened the Council of Trente which sat in three different sessions from 1545 to 1563 to address internal challenges such as corruption, selling of church offices, and other financial abuse, to redefine church doctrine and to impose conformity in religious observance. It rejected all compromises with the Reformers, reiterating the

[259] Deddens (1992:113-117).
[260] De Beaufort and Van Schie (2008:64).
[261] Van der Gugten (1988:381ff.).
[262] Kuiper (1964:234).

traditional Catholic tenets.[263] The Council managed to facilitate certain reforms in church governance, mainly relating to the position of bishops and the growing divide between clerics and laity. In conclusion, however, the Council submitted all decisions to the pope for ratification. This confirmed the traditional Catholic view of the papacy as infallible and absolutely authoritative.[264]

2.6.2 Religious Rationalism and the Age of Enlightenment

2.6.2.1 Introduction

By the middle of the seventeenth century the world found itself on the threshold of the modern era. The Peace of Westphalia in 1648 ended religious strife in Europe. The Thirty Years War had come to an end and matters of faith ceased to be an important issue between governments. The pope's influence was reduced to a point where he could no longer effectively participate in political affairs. As religious sanctions lost authority, the law of nations correspondingly increased in prestige, establishing modern diplomacy and the system of sovereign states still known today.[265]

The Enlightenment came about as a logical consequence of Humanism, spurred on by the consciousness of reason (*cogito, ergo sum*) of René Descartes (1596-1650). Rationalism became the basis of science and the growing thought was that through science a better society could be created. A new scientific legal system was developed, building on the ideas of natural law of Thomas Aquinas (2.4.3.4, *supra*).[266]

The Dutch jurist, Hugo de Groot (1583-1645), in his work *De iure belli ac pacis*, laid the foundation of a modern natural law which could exist even if God should not exist. He saw human reasoning as the source of natural law and severed the link between divine law (*ius divinum*) and natural law (*ius naturale*).[267] Natural law for De Groot contains all of society's directives as dictated by human reason. To be part of a community, a person has to enter into a social contract with

[263] The Council upheld their traditional views on, *inter alia*, salvation through faith and works, transubstantiation and the sacraments (Pont 1978:158-160).
[264] Berkhof and De Jong (1967:182); Bossy (1970:51ff.); Pont (1978:158-160).
[265] Cragg (1960:9ff.); Van der Schyff (2001:19).
[266] Van Zyl (1983:190ff.); Thomas *et al.* (2000:56-58).
[267] *Id.*

fellow members of the community, abiding by the laid down principles for example *pacta sunt servanda* and rules regarding delictual liability.[268]

The Germans Samuel Pufendorf (1632-1694), Christian Thomasius (1655-1728), and Christian Wolff (1679-1754) expanded on these thoughts. Pufendorf developed a systematic social ethic that had to function independently from the church. For him natural law was based on members of a community's desire to be social beings. Thomasius, under the influence of Pufendorf, reduced the role of the church and the *ius divinum* to the realm of the inner conscience, proposing a total separation of law and morality. It would seem that Wolff, initially under the same influences as Thomasius, went one step further, arguing that human reason is autonomous, rejecting the *ius divinum* completely.[269] These thoughts laid the foundation for the ultimate recognition of inalienable human rights.[270] These and other legal and philosophical developments resulted in an increasing tolerance and stability, affecting the authority of the church. The relations of church and state were settled in a way generally unfavourable to the church.[271]

The independence of the church was threatened more than ever. Governments interfered in its affairs, expropriated its wealth, and altered the structure of administration. In Roman Catholic countries the ties with Rome were considerably relaxed. The movement in favour of national churches made headway, with the church becoming nothing more than a department of state in some autocracies.[272]

2.6.2.2 John Locke's concept of neutrality

The English philosopher John Locke (1632-1704) emphasised the sovereignty of the people rather than that of the state, bringing the concept of separation of church and state into a wider field. Like De Groot (*supra*), Locke proposed that a social contract exists between members of a community (primarily concerned with the needs of civil society) in terms of which they trust the state completely

[268] Van Zyl (1983:192).
[269] Cf. Van Zyl (1983:197ff.).
[270] Van Zyl (1983:190ff.); Thomas *et al.* (2000:56-58).
[271] Cragg (1960:11-12).
[272] *Id.*

with meeting their security and comfort.[273] Locke held that God is the ultimate source of authority and regarded Christian morality as a supremely wise and rational code of conduct. Reason therefore teaches us to understand the law which governs nature and unfolds the pattern of belief that can be derived from it.[274]

In *A Letter Concerning Toleration*,[275] Locke argued that the government lacked authority in the realm of individual conscience, as this was something rational people could not cede to the government to control. This "liberty of conscience (that) is every man's natural right"[276] must therefore remain protected from any government authority. For Locke a total separation between church (a "free and voluntary society" where people join for "worship which is truly acceptable to God")[277] and state (with civil supremacy over religion) seemed to be the only way to ensure a peaceful co-existence:

> I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.[278]

Locke furthermore maintains that it is not the (neutral) state's function to lead people to salvation:

> the whole jurisdiction of the magistrate reaches only to … civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls … the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion

[273] Van Zyl (1983:195).
[274] Cragg (1960:13).
[275] First published in 1689, translated by W. Popple in 1796.
[276] Locke (1689/1796:57).
[277] *Id.*:14-15.
[278] *Id.*:10.

> consists in the inward persuasion of the mind, without which nothing can be acceptable to God.[279]

McCabe (1997:235ff.) is of the (rightful) opinion that, contrary to popular interpretation, Locke's conception of neutrality leaves open the possibility that the state may reasonably take a stand on matters of faith and religion, if they violate the doctrine of strict separation. It appears that where government becomes an agent to secularism it may jeopardise the foundation of equality and human rights. Locke thus does not propose an inviolable church state distinction. McCabe (*supra*) calls Locke's stance one of justificatory neutrality as opposed to strict separation, justifying Locke's support for the establishment of a national Church of England.[280] According to the view of justificatory neutrality, Locke would argue in favour of the state's affirming some broad religious beliefs, not for their intrinsic truthfulness, but purely because of civil interests. It is strange, though, that McCabe (1997:251) notes that Locke was worried that people who deny the existence of God pose "a serious threat to the civil interests the commonwealth is designed to protect".

Kessler (1985:493) proposes that, although it may appear that Locke designed his principle of separation to protect religious freedom, his concern for safeguarding the secular realm was greater than his concern for the sacred. Although each church has the right to worship freely, only those forms of worship that are legal and do not endanger civil interest can be allowed. The teachings of Christ and the laws of God have no binding force if they conflict with civic virtues and the legitimate ends of civil government.[281] It would therefore seem that Locke paradoxically attempted to protect religious freedom by weakening ecclesiastical power. It is nevertheless reasonable to argue that the system of positive neutrality, as elucidated in 4.4.16.3 (*infra*), 5.3.3 (*infra*), and 6.13 (*infra*), is rooted in Locke's views.

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[279] *Id.*:11-12.
[280] To make sense of Locke's support for a national church it is essential to understand his firm hope and belief, instilled by years of bloody conflict in seventeenth century England, that a national church could serve a stabilising function in the prevailing political strife and religious pluralism. The state's alignment with a national church could be justified in terms of its mandate to preserve the civil order. Locke hoped that a national church could become an institution of cultural cohesion, holding the community together in bonds of fellowship (cf. McCabe 1997:247-251).
[281] Kessler (1985:496).

2.6.3 Church and state in the Netherlands of the seventeenth century

2.6.3.1 The Arminian controversy

By the end of the sixteenth century the Reformed Church in the Netherlands had, through a series of church orders, conceded authority to the government to interfere with ecclesiastical matters. The state had the right to appoint clergy and to approve decisions of church meetings. The state sent commissions to church assemblies and authorised the convening of synods.[282] This measure of control of the state over the affairs of the church was carried over into the seventeenth century and gradually the state became more eager to interfere in church affairs.[283] The Reformed Church held a privileged position and was supplied with ecclesiastical funds from the government (out of confiscated Catholic holdings).[284]

The consequences of the blurred distinction between the church and the state became evident in the battle between the followers of James Arminius (1560-1609) (Arminians or Remonstrants) and the followers of Franciscus Gomarus (1563-1641) (Gomarists or Counter-Remonstrants) over the matter of predestination.[285] The nature of the debate was mainly theological but, because of the close connection of the church and the state, and Arminius' insistence that Romans 13 meant that civil government had the highest authority in church and religious matters, the secular authority soon became involved in this conflict.[286] Van 't Spijker (1992b:104-105) notes the great number of Remonstrants who supported Erastianism. Several state-church orders (staatskerkorden) were inspired by Erastian support of government influence in ecclesiastical matters (see also footnote 245, *supra*).

In 1610 the followers of Arminius, led by Johannes Uitenbogaard after the death of Arminius, met in Gouda and prepared a remonstrance containing five articles,

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[282] Vorster (1956:23ff.).
[283] *Id.*
[284] Van der Gugten (1988:381).
[285] Arminius was a Reformed theologian who taught that people had a choice to accept or reject Christ. Gomarus on the other hand believed that only those predestined by the sovereign will of God will come to faith (Berkhof and De Jong 1967:202-205).
[286] Van der Gugten (1988:382).

summed up by Berkhof and De Jong (1967:204) as “de bijbel staat boven de belijdenis, de overheid boven de kerk, het geloof boven de genade”.

Johannes van Oldenbarnevelt, the *landadvocaat* of Holland, and the jurist Hugo de Groot (see 2.6.2.1, *supra*) supported the Remonstrants. They favoured a republican confederacy of states rather than a federal state headed by a monarchy. They were opposed by Prince Maurice of Nassau (military leader of the Republic), who sided with the Counter-Remonstrants.[287] Maurice called on the provincial states to convene a national synod to deal with the stalemate situation. The provinces, however, under the leadership of Van Oldenbarnevelt invoked article 13 of the Treaty of Utrecht (see 2.5.8.4, *supra*), insisting that the matter be dealt with at provincial level. They issued “De Scherpe Resolutie” stating, *inter alia*, that no national synod would be convened, that local magistrates received authority to engage special militia and appeals against actions of the magistrates were not allowed. This resolution was regarded as a threat to law and order and the potential beginning of a civil war. This prompted Maurice and the states-general to summarily convene a national synod, in violation of the treaty.[288]

2.6.3.2 The Synod of Dort

On November 13, 1618 the National Synod of Dort was convened by the states-general, who underwrote all the costs. The main item on the agenda was the Arminian controversy. The Remonstrants denied the Synod’s authority to rule over them. The moderator, Johannes Bogerman, replied that the Synod had been legally convened by the states-general. As the Remonstrants held that the government had the highest authority, also in church matters, they were expected, according to their own tenets, to submit to the Synod’s authority. They refused to submit to the jurisdiction of the Synod and their doctrine was dismissed as heresy, while the majority of Remonstrant ministers were deposed from their office.[289]

[287] De Beaufort and Van Schie (2008:65-66).
[288] Van der Gugten (1988:380ff.).
[289] *Id.*; Berkhof and De Jong (1967:204-206).

After the Synod dealt with the controversy, the Canons of Dort were accepted as the third of the doctrinal standards of the Reformed Church. The Synod further reviewed the existing church order and adopted a version that is known as the Church Order of Dort. According to article 28 of the Order it is the duty of the civil authority to promote the ministry in every conceivable way. In return everyone in office is duty-bound to promote obedience, love, and respect for the government in the church:

> Ghelyck het Ampt der Christelijcke Overheden is, den H. Kerckendienst in alle manieren te bevorderen, den selven met haer exempel den onderdanen te recommanderen, ende den Predicanten, Ouderlingen ende Diaconen in alle voorvallende noot de handt te bieden, ende by hare goede ordeninge te beschermen; Alzoo zijn alle Predicanten, Ouderlinghen ende Diakonen schuldigh de gantsche Ghemeente vlijtelijck ende oprechtelick in te scherpen de ghehoorsaemheyt, liefde ende eerbiedinghe die sy den Magistraten schuldigh zijn: ende sullen alle Kerckelijcke persoonen met haer goet exempel in desen de Ghemeente voor gaen, ende door behoorlijck respect ende correspondentie, de gunst der Overheden tot de Kercken soecken te verwecken ende te behouden: ten eynde een yeder het zijne in des Heeren vreese, aen weder zijden doende, alle achterdencken ende wantrouwen moghe werden voorghecomen, ende goede eendracht tot der Kercken welstandt onderhouden.[290]

Despite these strong concessions in favour of the civil authorities, the Order of Dort was never accepted by the government. This was despite various efforts by a synodal commission to gain recognition for the Order. The main reason for the rejection seems to have been that the state feared that the Order may limit its authority. The Order, however, was accepted by the provinces of Utrecht, Gelderland, and Overijssel, but never by the Republic. Nevertheless, it had an enormous influence on the development of the presbyterial-synodal system throughout the world, including South Africa.[291]

[290] Published in Van Biesterveld and Kuyper (1905). The full text of the Church Order of Dort is also published in Pont (1981:176-186).
[291] *Id.*:168-171; Berkhof and De Jong (1967:206).

Spoelstra (1983:3) regards Luther's distinction between the visible and the invisible church to be the reason that the law of association of the seventeenth century considered the church to be a voluntary association for the religious needs of its members (cf. chapter 6, *infra*). This ultimately contributed to the discarding of the Church Order of Dort in 1816 when the state replaced it with a collegialistic set of ecclesiastical regulations. This had a significant impact on church governance in South Africa, and will be dealt with in the next chapter.

2.7 Concluding remarks

From the very early ages the relationship between the church and the state has been fraught with problems and challenges. Any swift overview of major events would reveal the integration of politics and religion in the Roman Empire. This is also evident from the close relation between Roman law and canon law. The development of formal separation between church and state gradually moved forward, but not in any linear fashion. During the mammoth power-struggle between church and state, which saw the power balance ultimately shifting from state dominance to church dominance, no true separation appeared possible and the union of church and state was assumed unquestioned. It was only with the onset of the Renaissance, when the power of the pope reached an ultimate highpoint and renewed attempts to abuse this power ensued, that the medieval uncritical belief in authority was challenged and the wisdom of the union of church and state was seriously questioned.

After the Renaissance, the Reformation continued the steady process of separation between church and state – albeit cautiously as could be seen in the adoption of the Belgic Confession and the blurred distinction between church and state in the Netherlands of the seventeenth century. The influence of the Anabaptists who strongly rejected the idea of the union of church and state, notwithstanding fierce opposition from the Reformers, should not be overlooked. The idea of the separation of religion and state was, however, only fully embraced during the eighteenth-century Enlightenment. Yet, it was the impact of the principles of the Church Order of Dort which would have the most significant influence on South African church law. The South African church-state relationship would not escape the principle of reciprocal duties which ultimately

led to interdependence between church and state, revealed by article 28 of the Order of Dort (see 2.6.3.2, *supra*), as will be seen in the following chapter.

2.8 Résumé

The major events in church history, to a greater or lesser degree, influenced and shaped South African church governance and church law into what it is today. This chapter provided an overview of these events. The next chapter will offer an overview of the South African history pertaining to the development of church law as a *ius sui generis*.

CHAPTER 3

SOUTH AFRICAN HISTORICAL PERSPECTIVE

3.1 Introduction

Development of church law in South Africa has not escaped the historical influences that have shaped general legal practice. South African common law originated from Roman-Dutch law, but it was augmented and transformed, to a large extent, by English law and further amplified through case law. South African common law was exposed, during its earliest formative period, to the same Christian influences that helped to shape Roman law in Western Europe, from the time of the emperor Constantine. After the settlement in the Cape these influences were reinforced by legislation.[1]

This chapter provides a brief overview of the major events in South African church history and jurisprudence, which have contributed to church law as a *ius sui generis* in South Africa.

3.2 The settlement at the Cape (1652-1795)

3.2.1 Introduction

The roots of church law and church-state relations in South Africa are to be found with the arrival of Jan van Riebeeck at the Cape, on 6 and 7 April 1652 and the months following, when he was assigned to establish a supply station for ships en route to the east, on behalf of the Dutch East India Company (VOC). The settlement in the Cape appears to have coincided with the apex of legal science in the Netherlands, during an era when the Netherlands was experiencing an exceptional blossoming in its economy and trade. The

[1] Du Plessis (1996:443-444).

administration in the Cape commenced practising Roman-Dutch law as its common law.[2]

The accompanying establishment of the Reformed Church in the Cape, under the patronage of the VOC, deviated significantly from Dutch Reformed polity regarding church government and the authority of Christ, where the state has a duty to protect the church and rule in a Christ-like fashion, and not receive patronage of ecclesiastical affairs.[3] This situation has been compared to the aberration of standard Vatican policy by *patronato regio*[4] in colonial Latin America.[5] Although the patronage law of the Council of Policy can scarcely be described as an "aberration", there is evidence that the patronage law (*ius patronatus*) of the VOC was strictly enforced in the Cape's early years.[6]

For the first 143 years of the country's history the church functioned more or less as a state department,[7] although describing the Reformed Church as a state church between 1652 and 1804 has also been challenged.[8] The fact that the VOC forbade the practice of Roman Catholicism, even though there were Catholics residing at the Cape,[9] seems to gainsay any attempt to deny that the Reformed Church was the established state church.

Raath (2002:999ff.) is of the opinion that it was not the influence of Calvin, as he claims is generally accepted, that shaped the relationship between church and magistracy at the Cape:

> It was the Zurich Reformed tradition (Zwingli and Bullinger) and not the tradition of Geneva (Calvin and Beza) which influenced the theological and political convictions in the Cape settlement the most. Also the relationship between church and magistracy was the direct result of theological convictions shaped by Bullinger's covenant theology. Authors arguing from the presumption of the so-called Calvinistic foundations of the early Dutch settlement at the Cape fail to give an acceptable

[2] Van Zyl (183:420ff.).
[3] Nieder-Heitmann (2003:180).
[4] The historical bond between the state and the Roman Catholic Church (cf. Floria 2002:341).
[5] Nieder-Heitmann (2003:180).
[6] Cf. Kleynhans (1974:14).
[7] Van der Watt in *Id.*
[8] Coertzen (2008:346).
[9] De Gruchy (1979:1).

> explanation of the relationship between ecclesiastical and political authorities at the Cape in the period 1652-1708.[10]

Raath (2002:1019) concludes that Bullinger's view of a church that exists in its believers proves the existence of the church at the Cape, even though no sophisticated church organisation existed initially. According to this view, there was no separation between ecclesiastical and political authorities, as found in Calvin's theology.

It is debatable that it is indeed widely accepted in scholarly circles that Calvinism shaped early church history in the Cape. De Gruchy (1979:9ff.) notes that the theology and practice of the NGK have been affected by a great deal more than the authentic teaching of John Calvin, including the neo-Calvinism of Abraham Kuyper[11] – the influence of which became apparent through Kuyper's idea of separate spheres of sovereignty.[12] Van der Vyver (2004:35) shows that the doctrine of sphere sovereignty, despite its distinct Calvinistic bias, was historically developed in Lutheran sociological and political thought. Modern Calvinistic writers, such as Groen van Prinsterer and Dooyeweerd, have expanded the idea. Defining the church as a community of faith with its own characteristics, Groen van Prinsterer referred to "the independence of the state over against the church in consequence of its direct submission to God".[13] Church law in South Africa evolved in the midst of these and other influences, but historic inquiry shows that it has attained its own distinct character.

3.2.2 Early jurisprudence

When the Treaty of Utrecht was signed on 23 January 1579 the states-general became the highest legal authority in the united provinces[14] of the Netherlands. The states-general appointed the VOC to manage the administration of the

[10] Raath (2002:1019).
[11] The influence of Kuyper, however, seems to be particularly prominent in the history of the Gereformeerde Kerk, as suggested by Vorster and Van Wyk (2000:113-114). Cf. Smit (1984) and Spoelstra (1989).
[12] De Gruchy (1979:10).
[13] Van der Vyver (2004:39). See also 5.2.6 (*infra*).
[14] The seven provinces, Holland, Zeeland, Friesland, Utrecht, Gelderland, Groningen, and Overijssel had each sent a representative to the states-general to deal with communal issues such as international affairs (including policy regarding the Cape of Good Hope) and defence (Van Zyl 1983:424).

Cape, and the latter did so through an executive management of seventeen members (*Heeren Seventien*). The commands of the Council of Seventeen formed the highest authority in the Cape, although it was still subject to the approval of VOC and the states-general. The governor as head, assisted by senior officers, formed a managing council (Council of Policy).[15] The Council of Policy's proceedings, which included reports and decisions taken, were called the Resolutions, of which the first was on 30 December 1651, a prayer of Van Riebeeck asking, *inter alia*, that "de Justitie gehanthaefft (worden)", and the "ware gereformeerde Christelijcke Leere mettertijt mochte voortgeplant ende verbreijt worden".[16] The first resolution taken in South Africa (albeit on the ship the Dromedaris) was on 8 April 1652, when Van Riebeeck reported on the safe journey and instituted a labour schedule.[17]

This Council in 1685 divided into two separate bodies, namely, the (new) Council of Policy and the Council of Justice.[18] The separation of functions led to a more sophisticated legal system, which had been somewhat elementary up till then.[19] In 1688 an independent prosecutor was appointed[20] and Mr. Jacob van Heurn was admitted to practise as an advocate and notary in all the courts at Cape Town and in the Court of Landdrost and Heemraden at Stellenbosch.[21]

Because of the expansion of the Cape Colony, a local government needed to be instituted. The Board of the Landdrost and (members of) the Heemraden governed the country districts. The Board served as a court with jurisdiction on civil as well as criminal cases, it had municipal and related governing functions, and it could impose taxes. It even had certain military powers and played a role in the safekeeping and defence of the relevant districts. The members of the Board were recommended by the Council of Policy and nominated by the governor. The following posts were involved in local government: a *landdrost* was an official of the VOC, represented the authority (as in the Netherlands), and acted as chairman of the Board; a *drostdy* was the jurisdiction of a landdrost

[15] *Id.*:424ff.
[16] Cape Town Archives Repository, South Africa, reference code C:1-2.
[17] *Id.* C:7-10.
[18] Van Zyl (1983:424ff.).
[19] Raath (2000:100).
[20] *Id.*
[21] Botha (1924:255-256).

(in South Africa in particular this also referred to the seat of a *dros* [an official]); a *heemraad* was a free citizen appointed as a member of the newly formed college; and a *veldkornet* was an official in the local government who was subordinate to the landdrost.[22]

The states-general did not dictate the legal system to be applied in the Cape, but Roman-Dutch law or, more accurately, the *ius commune* of Europe, was the logical juristic choice.[23] The works of Dutch writers, like Hugo Grotius[24] and Johannes Voet, and Dutch court decisions were often consulted and cited in legal opinion as authority.[25] In addition, Raath (2000:101) considers the possibility that Justinian's *Corpus Iuris Civilis* (see 2.4.2.2, *supra*), a copy of which was available to the Council of Policy, played a role in judicial proceedings. He is also of the opinion that federal theology had a profound effect on the administration of justice. Raath (2000:102) found this to be evident in a communal acceptance that the entire society, bound by covenant, was compelled to obey God's law.

In 1791 the government approved instructions to regulate attorneys. These contained 18 articles and also defined some of their duties as, *inter alia*, if nominated by the court, an attorney had to act *pro deo* for the church council or the diaconate, and for needy persons. The bill of costs was to be taxed by the monthly commissioner of the court.[26]

3.2.3 The planting of the church

3.2.3.1 The sick comforters

Between 1652 and 1665, the spiritual care of the immigrants was undertaken (in addition to ordained ministers briefly visiting the Cape) by "kranckbesoeckers"

[22] Cf. Resolutions of the Council of Policy of Cape of Good Hope, Cape Town Archives Repository.
[23] Van Zyl (1983:440).
[24] According to Raath (2000:101) the influence of Grotius introduced a strong element of Arminianism into the jurisprudence of the Cape under the influence of theological developments in Holland during the latter half of the seventeenth century.
[25] Van Zyl (1983:442).
[26] Botha (1924:258).

(sick comforters), the first being Willem Barendtz Wylant,[27] succeeded by Pieter van der Stael, Ernestus Back, and Jan Joris Graa.[28] They read (but never preached) sermons during Sunday services, and instructed children in their religion. They were not allowed to offer communion, perform baptisms or conduct marriages. Jooste (1946:42-48) shows how this service was undertaken under the auspices of the church council of Batavia and the Classis of Amsterdam.

Spoelstra (1906:4) lists only one letter of Wylant to the Classis Amsterdam but publishes eight letters by Van der Stael to the Classis from March 1657 to May 1663 (*Id.*:6-25). In these letters Van der Stael reported *inter alia* on the service of visiting ministers with reference to communion, baptism of children, and confirmation of members. He also gave feedback about his register of membership, general administrative actions, appropriation of funds for the benefit of the poor,[29] and, finally, notice of his departure to Batavia in 1663.[30] Weddings were, as a general rule, conducted by the secretary of the Council.[31]

Van der Stael's successors, Back and Graa, had rather short and insignificant terms of service until 1665.[32] The Council of Policy (the colonial executive body chaired by the governor [see 3.2.2, *supra*]) organised and fully controlled the work of the sick comforters and Jooste (1946:48), with Vorster (1956:38) and Kleynhans (1974:13) concurring, therefore considers it impossible to describe a relationship between church and state during this period. Van der Stael's relationship with the Council of Policy, which renewed his contract in 1661 at his request,[33] maintained close contact with the Classis of Amsterdam, and

[27] Wylant arrived at the Cape on the same ship as Van Riebeeck, namely, the Dromedaris (Claasen 1969:74).
[28] *Id.*:72.
[29] "Hier neffens gaet een wisselbrieff ken, inhoudende de somme van dertich guldens acht stuyvers, ten behoeffte van den armen, gesproten uyt de collecten alhier" (First letter of Pieter van der Stael, to the Classis Amsterdam, 5 March 1657 [Spoelstra 1906:10]).
[30] Eighth letter of Pieter van der Stael, to the Classis Amsterdam, 14 May 1663 (Spoelstra 1906:25-26).
[31] Moorrees (1937:23).
[32] Cf. Claasen (1969:83-87).
[33] *Id.*:123.

honoured the Church Order of Dort,[34] appears to gainsay Jooste, Vorster, and Kleynhans.

Claasen (1969:139) credits the sick-comforters with the laying of the foundation of church life in South Africa. Claasen (1969:159) correctly argues further that, from a church law point of view, the church existed fully and officially from 1652, and the (often fragile) relationship between church and state in South Africa was therefore indeed initiated by the arrival of Van Riebeeck in 1652.

3.2.3.2 The first congregations

In 1657 the first steps toward a fully fledged colony were taken and the first minister to settle in the Cape was Rev. Johan van Arckel, who arrived on 18 August 1665, having been appointed by the VOC directors (the Council of Seventeen) in full employment in the service of the VOC.[35] An elder and a deacon were chosen soon after his arrival and 24 persons sat down at the first communion served by Van Arckel. From that day on membership of the church roughly doubled every 20 years until the second half of the eighteenth century.[36]

An ecclesiastical court was established shortly after the arrival of Van Arckel, the constitution of which, according to Theal (1897a:149), shows the intimate relationship that existed then between the church and the state. This Court consisted of a member of the Council of Policy (the political commissioner), Van Arckel, the deacons, who were selected by the Council of Policy from a double list of names furnished annually by the Court itself, and the elders, who were elected by the Court as representatives of the congregation but could not perform any official duties until the elections were confirmed by the temporal authorities.[37]

The Ecclesiastical Court had primary control, of not only all religious observances, but also of all educational activities during the whole period of the VOC's government of the Colony. Although it was in a sense merely an engine of the state, and always subordinate to the Council of Policy, in practice it was

[34] Cf. Van Staden (1973:60).
[35] Theal (1897a:149); Gerstner (1997:22).
[36] McCarter (1869:6).
[37] Theal (1897a:149).

guided by the decrees of the Synod of Dort and the precedents of the courts of the fatherland.[38]

In 1679 Simon van der Stel was sent to the Cape to become the governor. When a second congregation was formed at Stellenbosch in 1685, the state had encroached, for the first time, on the liberty of the church during the election of a consistory.[39] A regulation was made insisting that half the members of session had to be officials of the state, chosen by the government.[40] This meant that no church meeting could be held unless the state was represented.[41]

In 1688, after the revocation of the Edict of Nantes had ended the toleration of Protestantism in France, 126 French Huguenot refugees were sent to the Cape by the authorities in the Netherlands.[42] The Council of Policy sought to merge the Huguenots into predominantly Dutch congregations. These efforts were resisted by the French immigrant pastor, Rev. Pierre Simond, who disregarded the governor's authority and appealed directly to the Council of Seventeen. His appeal was granted and a separate French-speaking congregation was established in Drakenstein.[43]

When Simond departed in 1702 the French believers assimilated with the Dutch,[44] strengthening the settlement and the Church. The Church expanded along with the Colony having five congregations and six ministers by 1750. The congregations remained under the authority of the Classis of Amsterdam, the Church functioned as part of, and in service of, the government and the ministers were government officials with the rank of "onderkoopman".[45]

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[38] *Id.*

[39] *Id.*; McCarter (1869:7). Up to this time the state's involvement in church order had been confined to its role in the ecclesiastical court.

[40] Cf. Spoelstra (1907:262) who dates this resolution as December 1674. Several instances of the execution of this resolution before 1685 in the *Exctracten uit de Resolutie-Boeken* confirm that the earlier date is more accurate.

[41] McCarter (1869:7). This state of affairs lasted until 1842 when a government commissioner sat in the Cape Synod for the last time (*Id.*).

[42] Jooste (1946:54ff.).

[43] *Id.*

[44] McCarter (1869:8) insists that, rather than a voluntary assimilation with the Dutch, the government, in the despotic spirit then prevailing, compelled the French immigrants to abandon French to conform in language, as well as mode of worship, to the Dutch Reformed service.

[45] Engelbrecht (1936:2); Oliver (2008:100). There were three ranks: Opperkoopman, koopman and onderkoopman (Geldenhuys 1951:37, footnote 14).

3.2.3.3 The Church Order of the early Cape Church

The Ecclesiastical Court at Batavia overseeing the colonies was instructed on matters of faith and policy by the Classis of Amsterdam and many scholars assume that the Church Order of Dort was implemented in South Africa.[46] This view, however, is challenged by Pont (1991:141-143) who shows that the Classis of Amsterdam resided in the province of North Holland where the Order of Dort had never come into force. It seems, however, that the same Calvinistic presbyterial-synodal principles, established by the Synod of Emden in 1571, were followed in the Cape in the period 1652-1795.[47]

3.2.4 The Council of Policy and church administration

3.2.4.1 The initial encounters

Notwithstanding the presumed application of Dort's principles, in matters concerning church law the Church at the Cape always referred to the mother Church in the Netherlands for guidance and advice. Due to the strict application of the *ius patronatus* in both the Cape and the Netherlands, however, the Cape Church was not effectively protected against the abuse of governmental power.[48]

For the purpose of evaluating the relationship between church and state in the Cape, the Council of Policy, being the highest authority of the VOC in the Cape of Good Hope, acted as the civil authority. The Council, by means of its Resolutions (see 3.2.2, *supra*), ruled the establishment between 1652 and 1795 and discussed all the important issues concerning the Colony.[49]

Although Van Arckel formed a consistory soon after his arrival, the Classis of Amsterdam wished to retain full jurisdiction over the Cape. This distant classis, however, could only exercise its authority by letter and the sluggish communication with the colonial powers rendered the long distance administration of church affairs somewhat ineffective. This resulted in the colonial government acquiring more direct influence over the church than the

[46] Van Staden (1973:1-6); Oliver (2008:100).
[47] See also Engelbrecht (1936:9), Moorrees (1937:62), and Coertzen (2012:83).
[48] Geldenhuys (1951:38). Cf. McCarter (1869:6).
[49] Kleynhans (1974:13). Cf. the Resolutions of the Council of Policy of Cape of Good Hope, Cape Town Archives Repository.

civil government in the Netherlands had over the mother Church.[50] The Cape government continued to apply the *ius patronatus*, and the church remained subordinate to the Council of Policy. The Council of Policy, for instance, approved all candidates for church consistories and even attempted to move a minister to a frontier congregation without his approval.[51] This was in addition to the rule that no church meeting could be held unless the state was represented (see 3.2.3.2, *supra*).[52]

The Council of Policy's dominance became particularly evident when Rev. Le Boucq attempted to remove members, appointed by the latter Council, from the consistory in 1708 and he was deposed from office by the very same Council. He had subsequently to state his case to the governor general rather than the Classis of Amsterdam.[53]

From the extracts of the "Resolutie-Boeken" of the seven oldest congregations, and the letters that circulated among them,[54] a clear picture of the relationship between the church and the government emerges. In the *Klaagschrift van Maria Prignon* (submitted to the church council and considered on 29 April 1668) the widow of Rev. Petrus Wachtendorp, Maria Prignon, accused a provisional lieutenant, Abraham Schut,[55] of defaming her by alleging that she and her husband had never been legally married and that their children were thus born out of wedlock. In what appears to be the first official legal exchange between the government and the church, Schut appealed to the Council of Policy and the church council decided: "om kerkelick te doen, alles wat het recht der kercke vereyschen".[56]

The church council did not mention this case again, but from the Resolutions of the Council of Policy of Cape of Good Hope it appears that, on 3 August 1688, the Council, presided over by Jacob Borghorst (governor) and Aernout van

[50] Kleynhans (1974:12ff.); Gerstner (1997:20).
[51] *Id.*
[52] McCarter (1869:7); Geldenhuys (1951:38).
[53] Gerstner (1997:20).
[54] Published in Spoelstra (1907:255-541).
[55] In the *Oudste Resolutie-boek in het Kaapsch Kerkenraads-archief* Abraham Schut and Johan Reinierszen are listed (handwritten by Van Arckel) as the first elder and deacon of the Cape Church respectively (Spoelstra 1907:256).
[56] *Id.*:258-259.

Overbeke, deprived Schut of his seat in the Council of Policy "met interdictie om *alhier* in geen vergaderinge meer te verschijnen, edoch exercerende sijn militaire dienst als voor heen, tot 'er tijt dat de Ceijlonse vaderlantse schepen, alhier arriverende, hij daermede costij, komt te vertrecken".[57] By then he was not a member of the church council any more, having been replaced by Johannes Coon,[58] and it is therefore not entirely certain how the resolution would have affected his position as elder, although his demise seemed inevitable.

This would be the first of many occurrences showing the existing relationship between the church and the government. According to the *Resolutie-Boeken* an extraordinary meeting was held on 11 July 1787 to discuss a request from a number of Lutherans "om de Overheid te verzoeken, óók Lutherschen toe te laten in Regeerings-Collegies".[59] The resolutions regarding the position of slaves[60] and financial assistance to expand the church building at Stellenbosch[61] are but two more of many examples of the close relationship between church and state, as revealed by the church council's minutes.

3.2.4.2 Baptism

The sacrament of baptism became a contentious issue between the church and the Council of Policy.[62] The question debated was whether the children of unbelieving parents should be baptised or not. The members of the Council of Policy were divided in opinion, as were the citizens of the colony. As no agreement could be reached, the matter was referred to Batavia.[63] The Ecclesiastical Court of Batavia, in conjunction with the Classis of Amsterdam, issued guidelines, on 25 January 1664, declaring that children of slaves could be baptised, on condition that those responsible for their upbringing undertook to

[57] Cape Town Archives Repository, South Africa, Reference Code C.5:19-20. The italicised word was written between the lines, in the same handwriting as the remainder of the resolution (see footnote 1).
[58] From *Exctracten uit de Resolutie-Boeken* (Spoelstra 1907:258).
[59] Spoelstra (1907:328). The political-commissioner feared incongruity and discouraged this, whereby the Council decided to request him to discuss it with the government. The request was denied and a number of deputations were subsequently sent to the government.
[60] From *Exctracten uit de Resolutie-Boeken* (Spoelstra 1907:334).
[61] *Id*.:274.
[62] Raath (2002:1013ff.).
[63] Theal (1897a:150).

send them to the state-school to have them educated in the Christian religion and doctrine.[64]

Van Arckel embraced the views held by the Classis and baptised all the children that were brought to him, whether they were of believing or unbelieving parents. For a time all discord ceased in ecclesiastical matters, due to Van Arckel's gentle and pious nature. On 12 January 1666, less than six months after his arrival, Van Arckel died after a brief illness. The Political Council subsequently detained the chaplain of the next ship to visit the Cape, Rev. Johannes de Voocht, pending the appointment of a successor.[65]

On 21 March 1666 a visiting minister, Rev. Phillippus Baldeus, interrupted De Voocht during the baptism of a slave-child, protesting against the performance of the sacrament. De Voocht desisted from performing the baptism. For this Baldeus was heavily criticised by the governor, Zacharias Wagenaer, and members of the Political Council, in terms of the 1664 guidelines. On instruction of the Council, De Voocht baptised the slave-child and the children of all other slaves who requested the sacrament during the service the following Sunday.[66] This became a practice that continued for many years after the Baldeus incident, although not without subsequent (minor) disagreements and disruptions.[67]

3.2.4.3 Liturgy

All clerical matters such as the starting time of services and the institution of a vocal prayer (*bedezang*) before the sermon had to be submitted for approbation by the governor.[68] In the same way, the acceptance of a new versification of the Psalms was subjected to approval of the Political Council who even gave notice

[64] *Id.*; Hattingh (1982:27).
[65] Theal (1897a:151).
[66] According to Jooste (1946:69-70) it was Rev. Overney who baptised the child, but Theal (1897:149-153), in a thorough account of the incident, shows that it was indeed Rev. de Voocht. Jooste rightfully mentions that this was a pure church matter, but in the Council of Policy's decision the church council was not even mentioned. Likewise, in the minutes of the church council the case was also never mentioned (cf. *Exctracten uit de Resolutie-Boeken* [Spoelstra 1907]).
[67] Hattingh (1982:27).
[68] From *Exctracten uit de Resolutie-Boeken* (Spoelstra 1907:335).

"dat in deese kerkgemeente wat spoediger gesongen wierde, dan men voorheen door dies ingeslopen manier gewoon was te doen".[69]

3.2.4.4 Diaconate

The Council of Policy regulated the office of deacon, and thus, in effect, care of the poor and orphans. In 1657 the government set up a special fund for this purpose. Contributions to the fund consisted mainly of church collections and certain allocated fines. After 1665 the church had intensified its efforts of caring for the needy, but the state still kept a strong vigil over these efforts. This is evident from the fact that the Council of Policy appointed the deacons and also insisted on annual financial reports. In 1685 Commissioner Van Rheede instructed the church council to spend diaconal funds only with approval of the entire council.[70]

3.2.4.5 Discipline

The Cape Town church council, in a letter to the Classis of Amsterdam on 18 February 1762, lamented the fact that the church seemingly increasingly became executors of decisions of the government without their even being consulted. The church council pleaded "dat kerkelijke zaaken alleen kerkelijk behandelt worden".[71] This occurred following the case of Rev. Gerardus Croeser of Zwartland who, with his elders, were found by the Council of Justice to have unlawfully censured a young girl. The case was sent to the church council, not to establish whether the censure was lawful, but to execute the sentence imposed by the Council of Justice "om namelijk de gemelde jonge dogter van die censure te doen ontheffen, ende den predikant Ds Gerardus Croeser, benevens zijne ouderlingen, volgens kerkelijk gebruik daarover te corrigeeren".[72]

Vorster (1956:41-42) documented the case of Rev. J.W. Hertzogenrath, who was punished by the Council of Policy after he was found guilty of misconduct,

[69] *Id.*:311.
[70] Vorster (1956:41).
[71] Spoelstra (1906:297). In the letter the church council pleaded for the (re)institution of a combined church council.
[72] *Id.*

and the case of a young girl, Van der Westhuizen, whose excommunication was reversed by the church council of Swartland by order of the Council of Justice.

3.2.4.6 Daily life

The role of the Council of Policy in church council decisions pertaining to the everyday lives of members of the church became increasingly evident in the latter half of the 18th century. In 1787, for instance, the church council proposed regulations against profaning Sundays and requested the Council of Policy to institute a prohibition on any form of labour on Sundays.[73] In 1788 the church council rejected a request by a slave, Sluis van Suratte, to live on his own, as it would have been contrary to government policy.[74] It appears that the Council of Policy strategically utilised the church to exercise its power and authority in the community.

3.2.4.7 Administration

The first church council (consistory) was elected shortly after the arrival of Van Arckel. The VOC, in alliance with the Amsterdam Classis of the Reformed Church in the Netherlands, subsequently sent a continuous number of resident ministers to the Cape. These ministers were ordained and supervised by the Classis of Amsterdam. As an established church the Reformed Church exercised a virtual religious monopoly in the new colony.[75]

For more than a hundred years the VOC allowed no other Christian denomination at the Cape, despite many members of other church traditions arriving from Europe. Under the patronage of a company that was the epitome of Dutch maritime and commercial ascendancy, and tasked to govern the Church and uphold the pure Reformed faith, the Church in the Cape enjoyed more than only a privileged position. Under the VOC's authority company employees were seen to attend religious services and observed religious practices.[76] All attempts

[73] From *Exctracten uit de Resolutie-Boeken* (Spoelstra 1907:328-329).
[74] *Id.*:334. Certain rules pertaining to Christian slaves were relaxed in the nineteenth century. For instance, the law that slaves were not competent to give evidence in courts of justice, though observed during the Dutch period, was repealed in 1823 – in so far as Christian slaves were concerned (Botha 1933:6).
[75] Engelbrecht (1936:2); Gerstner (1997:16).
[76] Nieder-Heitmann (2003:180).

of the church to gain a degree of independence from the Classis of Amsterdam were quashed because this threatened the company's authority.[77]

This kind of political interference in the church's internal organisation militated against the Reformed understanding of church governance. Towards the end of the VOC's administration the Lutheran Church was allowed to minister in the Cape, and the first Lutheran Church was built in 1774, but the majority of Lutherans had already become Reformed to secure their employment. This resulted in virtually all Colonists and their descendants being members of the Reformed Church.[78]

3.2.4.8 Attempts at convening a general meeting

In an attempt to establish a church organisation, and at the request of the consistories, the Council of Policy gave the five existing parishes permission to hold a combined meeting. An annual general meeting (assembled mainly to settle parochial boundaries), called a classis after the example of the Church in the Netherlands, was first held on 30 August 1745 and was presided over by Ryk Tulbach in his capacity of political commissioner.[79]

The Church in the fatherland regarded this as an "unwarrantable assumption of authority",[80] and suggested that it should adopt the title of "combined church meeting" and after 1748 it was known by that name.[81] In its yearly sessions the matters discussed were trivial because it was powerless to deal with anything significant. Its opponents continually kept a close vigil with the intention of entrapping it. They found an opportunity when the meeting attempted to investigated Rev. Cloppenburg, who was said to lead a notoriously evil life, and sent its recommendations to the government. This was regarded by the Synod of South Holland as usurping authority to which it was not entitled. Instructions were subsequently given to the Cape government to prevent such irregularities,

[77] *Id.*
[78] *Id.* Cf. Oliver (2008:100).
[79] Theal (1897b:40). Cf. McCarter (1869:21) and Moorrees (1937:537) who both date the meeting at 1746.
[80] McCarter (1869:21).
[81] Theal (1897b:40).

and in March 1759 the Council of Policy issued orders that put an end to the sessions, a mere thirteen years after it first convened.[82]

Thereafter each consistory dealt with (minor) matters affecting itself only, the government had control in all matters not relating to doctrine, and the Classis of Amsterdam examined the qualifications of ministers before they were sent out by the directors, gave advice in questions of discipline, doctrine and procedure, and acted as a court of appeal in matters affecting adherence to the rules of the church.[83]

This example of the growing despotic rule of the VOC increased the degree of discontent among the people. Soon the grievances expanded to other areas including the Company's commercial monopoly and the legal system as, *inter alia*, only one matrimonial court existed in the Colony.[84]

During the Napoleonic Wars the VOC had lost its maritime monopoly and, in 1795, England took over the colonial authority at the Cape, seemingly to prevent the French from doing so. The French had occupied the Netherlands and the link between the Reformed Church and the Classis of Amsterdam was severed. A difficult period for the Church resulted.[85]

3.3 First English rule (1795-1803)

At first the Colony remained in English hands for only eight years. McCarter (1869:27ff.) describes these as eight years of external and internal trouble. This was probably true for the political and social structure of the Colony, but Moorrees (1937:430ff.) shows that the change had little influence on the Church. Article 7 of the Act of Capitulation, signed on 16 September 1795, stipulated: "De Colonisten zullen al haare Voorregten, welke zij thands genieten, blijven behouden, zo wel as der presente Godsdienst, zonder eenige verandering".[86]

[82] Theal (1897b:40-41).
[83] *Id*.
[84] McCarter (1869:24).
[85] Engelbrecht (1936:2); Nieder-Heitmann (2003:180).
[86] Quoted by Moorrees (1937:430).

During this period all correspondence with the Classis of Amsterdam virtually ceased[87] and the government effectively took over the organisation of the church. With the exception of some unauthorised acts,[88] the Act of Capitulation was seemingly respected by the new rulers and the colonists were supported in some ways such as the provision of ministers for every congregation.[89]

It became clear, however, that the government had no intention of denouncing its authority and granting the church any form of independence. On the contrary, the force of the *ius patronatus* was even more evident in the role of the government in church affairs. The insistence on electing half of the members of the church council and the presence of the political commissioner at every church meeting continued. The government also retained the right to appoint, move, and remove ministers at will. The British government furthermore insisted that members of church councils vow their allegiance to the king.[90]

3.4 Batavian rule (1803-1806)

3.4.1 Restoration

By a stipulation at the peace of Amiens the Colony was restored, in 1803, to the Batavian Republic, as the new organisation of the Netherlands was then called.[91] General J.W. Janssen was sent out as governor, and J.A. de Mist became commissioner general of the Cape. The church council of Cape Town had, soon after the restoration to Batavia, requested De Mist to grant the council freedom to elect deacons without interference and to reconvene the combined meeting (see 3.2.4.6, *supra*). De Mist, however, aimed for a total reorganisation of the church and drew up a body of regulations, both civil and ecclesiastical.[92]

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[87] Spoelstra (1907:247-252) transcribes three letters from the Classis of Amsterdam to the Cape Church during this period, dated 24 August 1802, 29 August 1803, and 24 October 1804 respectively. The last recorded letter from the church council to the Classis is dated 2 June 1795, although four letters dated in 1802 and 1803 are briefly mentioned in the *Acta der Classis Amsterdam* (published in Spoelstra [1906:586-587]).
[88] Cf. Moorrees (1937:432ff.). Kleynhans (1974:23) considers these incidents to be proof that the "Britse owerheid van die orde in kerklike aangeleenthede min gemaak het en dat die sakramente meermale dientengevolge ontheilig is".
[89] Moorrees (1937:434).
[90] *Id.*: 429-445; Kleynhans (1974:18-23).
[91] McCarter (1869:27). The VOC had been dissolved some years before.
[92] Geldenhuys (1951:39).

3.4.2 Church Ordinance of De Mist

Marginal religious tolerance was introduced by means of the Church Ordinance proclaimed by Commissioner General De Mist on 25 July 1804. De Mist found the church in a poor state, disrupted internally by discord and financial mismanagement.[93] This necessitated the *Provisioneele*[94] *Kerken-Ordre*[95] *voor de Bataafsche Volksplanting aan de Kaap de Goede Hoop* regulating "eene gelyke bescherming der Wetten"[96] for all church communities which stayed operational until 1843. No specific benefit would, according to the Ordinance, be associated with any religious creed, and any faith community could have promoted their tenets openly, providing that those of other communities were in no way intimidated thereby.[97]

The Nederduitse Gereformeerde Kerk (NGK) remained the *de facto* state church, but all religious denominations received equal protection under the law. The government was still in charge of church affairs but people could now choose or change their religion. The Church was subservient to the state who maintained the right to appoint its ministers and to approve church councils. The government even had the right to impose taxes payable on the Church.[98]

In the preamble of the Ordinance[99] it is stated:

> De Commissaris Generaal, doordrongen van de Waarheid, dat geene beschaafde Maatschappy zonder Godsdienst bestaan kan - en dat het de pligt is van een Gouvernement, op alle wyze te zorgen, dat de openbaare Godsdienstoeffeningen van zodanige Kerk-genoodshappen, die, ter bevordering van Deugd en goede Zeden, een Hoogst Wezen eerbiedigen, aangemoedigd en beschermd worden, is even zeer overtuigd, dat die bescherming moet steunen op vaste en rechtvaardige beginselen, en gewyzigd worden door regelmaatige Wetten en Ordres,

[93] Van der Vyver (1972:171).
[94] It was called *Provisioneel* as it still had to be endorsed by the Batavian government (Jooste 1946:90).
[95] Strictly speaking, De Mist's Ordinance was not a church order as such, but rather a way for all denominations in the Colony to organise their affairs in accordance with an official policy (cf. Engelbrecht 1936:9).
[96] Article 1 of the *Provisioneele Kerken-Ordre* (Pont 1991:179).
[97] Van der Vyver (1972:172).
[98] Oliver (2008:101).
[99] The complete text is found in Pont (1991:178-190).

> zonder welke ook de beste en nuttigste Instellingen op den duur onbestaanbaar zyn, en in het einde uitloopen op verwarringen, scheuringen en verdeeldheden tot verderf van den Staat. En het is uit bezef hier van, dat Hy, naar rype deliberatie, en na daar op te hebben ingenoomen de consideratien van Gouverneur en Raad van Politie, heeft goedgevonden, in afwagting, en onder voorbehoud van de Hooge goedkeuring en Sanctie van het Staats-Bewind, voor deeze Volkplanting te arresteeren gelyk Hy arresteert by dezen de hier navolgende Provisioneele *KERKENORDRE* voor de Bataafsche Volkplanting aan de Kaap de Goede Hoop.

The first part of the Ordinance (articles 1-18) laid down the general principles for all denominations, guaranteeing freedom of worship and equal protection by the law, ensuring that there would be no privileged (state) church (articles 1-3). This is, however, qualified in article 4 which provided that churches that had not existed at the time had to apply for permission from the governor to exercise their rights in terms of the Ordinance. The government, however, retained the right "om te kunnen beoirdeelen (sic) de uitwerkselen dier Leerstelsels op den Burgerstaat" (article 5), casting some doubt on the extent of the new freedom in practice. Each denomination was responsible for the remuneration of their ministers and the maintenance of their buildings (article 8).

The second section (articles 19-52) dealt briefly with the Lutheran Church and extensively with the "Hervormd Kerk-genoodschap, bij verreweg het talrykste, en ten platte Lande in deze Volkplanting het eenigste",[100] as the influential and privileged church in the Colony, and therefore in need of special protection and support by the government. It is clear, however, that this protection became the backdrop for a new *ius patronatus*, notwithstanding the fact that there was a supposed separation between church and state.[101]

The magistrate of the district received the right to appoint church council members where there had not been a congregation before (article 23) and the election of all other new members had still to be submitted to the governor for approval (article 24). The government would continue to appoint and remunerate

[100] Article 20 *Provisioneele Kerken-Ordre* (Pont 1991:182).
[101] De Mist saw the protection in terms of the *ius circa sacra* of the government, but that same protection gave the governor a *ius in sacra* (cf. Pont 1991:191).

ministers of the NGK, as well as provide for the widows of ministers (cf. articles 25-32). The administration of church funds was regulated by articles 37-45, providing primarily that "(h)et Oppertoezicht … over alle Kerkelyke Administratien blyft aan den Gouverneur in der tyd". Articles 46-51 dealt with the induction of a general church assembly, under the auspices of the governor.

From the above it becomes clear that the church had not in reality been separated from the state at all and that the state firmly held the reigns of the church – in the words of Keet in 1924: "Met de invoering van de kerkorde van de Mist werd de heerschappij van de staat groter … De regering deed letterlik alles".[102] Moorrees (1937:457) heavily criticises the fact that the church was not consulted in the process of adopting the Ordinance. This was completely contrary to the principles of the Reformed church law and rendered the church even more dependent on the state to the extent where separation between church and state was nothing more than "dat die Kerk met 'n goue ketting aan die Staat gebind word". Pont (1991:198-199) takes a more favourable approach towards the Ordinance and considers it a giant leap forward. The church, in his view, became a voluntary association with the newfound possibility and potential to develop into an independent organisation. He laments that the "grootste enkele merkwaardigheid was dat die kerk so traag op hierdie stimulans gereageer het".[103]

Jooste (1946:92) points out that this newfound independence brought an end to the ties with the Classis of Amsterdam and could be seen as the first steps towards a new church. He does, however, concede that the church was now totally subordinate to the state. As the only set of regulating rules for the church originated from the government, while the church had no choice in the matter, arguably nothing less could be expected.

3.4.3 Legal reform

The short period of Batavian rule saw the beginnings of many modernising legal reforms, not the least of which was the reconstitution of the Court of Justice around a core of salaried, legally trained judges enjoying considerable

[102] Quoted by Kleynhans (1974:36).
[103] Pont (1991:199).

independence and prestige. Yet, juridically speaking, very little has survived from that period; neither law reports, textbooks, opinions, nor decrees.[104]

3.5 English rule (1806)

3.5.1 Cession

In 1805 a new war between England and France broke out. Janssen commenced arrangements for the defence. On the evening of 4 January 1806, 63 vessels anchored at Table Bay from which English troops immediately disembarked. Janssen's forces, somewhat less in number than those of the enemy, were soon overpowered and the following day Cape Town surrendered. For the same reasons that the Dutch had desired the Cape, Britain now coveted it – for its excellent position en route to its Indian possessions.[105]

Henry Martyn, on board the fleet as chaplain in the service of the (English) East India Company, started ministering to the wounded and dying. He wrote: "I prayed that the capture of the Cape might be ordered to the advancement of Christ's kingdom; and that England … might not remain proud and ungodly at home, but may show herself great indeed, by sending forth the ministers of her Church to diffuse the gospel of peace".[106]

McCarter (1869:33) is of the opinion that stagnation had given place to progress with the new rule. The slave population had been made free and a vast stimulus had been given to moral advancement. In his view "(r)eligious intolerance has made way not only for the fullest toleration, but for the enlightened and generous encouragement to spread the gospel".[107]

At cession of the Cape to the English government, the eighth article of the Deed of Capitulation secured the religious privileges of population: "The burgers and inhabitants shall preserve all their rights and privileges, which they have enjoyed

[104] Sachs (1973:34).
[105] McCarter (1869:29ff.).
[106] Quoted by McCarter (1869:31).
[107] *Id.*:33.

hitherto, public worship, as at present in use, shall also be maintained without alteration".[108]

The English government accordingly continued to support the NGK congregations by providing the ministers' salaries. They also perpetuated the supremacy of civil authority by appointing ministers, sometimes against the will of the congregations.[109] Moreover, the governor possessed the right to suspend and even dismiss ministers, which confirms that the ministers of the NGK were nothing but government officials.[110]

A further indication that the relationship between state and church continued unaltered was the appointment of J.I. Rhenius of the Cape Town as "Political Commissioner for Church affairs in this settlement".[111] The Ordinance of De Mist was still firmly entrenched in the regulation of church affairs.

3.5.2 The Synod of 1824

The Ordinance of De Mist provided that an experiment was to be made whether it was viable and feasible to, every second year, hold a general church assembly consisting of two ministers and two elders from the principal congregation and one minister and one elder from the other congregations. In addition, two political commissioners nominated by the governor had to be present to represent the government at the meeting.[112] According to the Ordinance, all resolutions of the assembly were subject to the governor's approval and the political commissioners had the right to suspend any decision pending the consent of the Executive.[113]

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[108] *Id.*:34-35.
[109] *Id.*:35.
[110] Jooste (1946:121). Cf. the governor's suspension of Rev. Schutz of Swellendam and his subsequent reinstatement simply by a letter to the Cape Town Consistory headed "for your information and guidance" (Moorrees 1937:539).
[111] Jooste (1946:109). The appointment of Rhenius did not occur without controversy as the Cape Town Consistory considered it to be obsolete. In a letter by the secretary of the government it is submitted that the governor "felt himself called upon to continue the appointment of a political commissioner over Church Affairs, which situation had been judged necessary by the former government of this settlement, and it is indeed considered in some degree as part of the establishment of the Reformed Church in Europe, as tending to connect the Church more closely with the Government" (*Id.*:112).
[112] Article 46, *Provisioneele Kerken-Ordre* (Pont 1991:188).
[113] Article 48, *Id.*

More than twenty years had passed before a general assembly (synod) was held in November 1824.[114] Twelve congregations (Cradock and Beaufort were not represented) attended the meeting chaired by Rev. Berrangé, with Rev. Borcherds appointed as Scribe. Sir John Truter and P.J. Truter were in attendance as political commissioners and all decisions were duly submitted to the governor of the Colony for approval and publication, as regulated by De Mist's Ordinance.[115] Berrangé, in his opening address, lauded the "weldadig Gouvernement, waaronder wij leven, en door hetwelk ons nu dit voorregt wordt vergund".[116]

In his official report to the governor, Sir John Truter wrote that one of the chief objects of the synod was to frame a general regulation for the government of the church.[117] Truter emphasised that this should be done "met bijzondere inachtneming van den geest en bewaring van het gezag van de tegenwoordige Koloniale regeering".[118] It was clear that the government would not willingly give up their authority over ecclesiastical matters.

3.5.3 The Algemeen Reglement of 1824

Moorrees (1937:553), supported by the majority of church historians,[119] laments the fact that, in writing the *Algemeen Reglement voor het Bestuur der Nederduitsche Hervormde Kerk, in Zuid-Afrika* (forthwith referred to as the 1824-Ordinance) the synod moulded it to the example of the *Algemeen Reglement voor het Bestuur der Hervormde Kerk in het Koningrijk der Nederlanden* of 1816 and not to the Church Order of Dort. This ensured the *status quo* concerning the relationship between the church and the state, diverting from the pure Reformed principles as found in the Order of Dort. That the 1824 synod adopted the Ordinance without apparent duress shows, at least in part, that the arrangement was mutually beneficial.

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[114] The reasons for the delay before convening the synod are not clear. It may have been because of the new (English) government's fear of an independent church (cf. Moorrees 1937:538) or the Church itself stalling the process due to the restricting conditions in De Mist's Ordinance (cf. McCarter 1869:36).
[115] Moorrees (1937:548).
[116] *Id.*:549.
[117] Kleynhans (1974:51).
[118] Moorrees (1937:553).
[119] See Kleynhans (1974:51).

Article 9 of the 1824-Ordinance[120] stated that the General Assembly was the highest authority in church matters. This article, however, afforded very limited authority to the church as article 11 entrenched the government as body of appeal in cases where the General Assembly could not come to a decision. In addition, article 12 enacted that "De Algemeene Kerk Vergadering ontwerpt Kerkelyke Reglementen en verordeningen, en draagt dezelve voor aan het Gouvernement ten fine van Sanctie".[121]

This same involvement of the government was also evident in the fifth section that dealt with discipline. If the consistory found a minister or other member of the church council guilty of misconduct, notice of the (provisional) suspension had to be given to the general assembly, but also to "zyne Excellentie den Heer Gouverneur, met opgave van de gronden en motiven, op welke zoodanige suspensie is geschied, door welken de suspensie zal moeten worden goedgekeurd, voor en aleer dezelve effect zal mogen sorteeren".[122] Other articles also confirmed the tight grip that the government had on church management.[123] With this thorough entrenchment of the *ius patronatus*, the Calvinistic view of church and state, as well as the presbyterial-synodal form of church governance, was dealt a painful blow, notwithstanding the positive aspects of the Ordinance.

3.5.4 Turmoil between 1824 and 1843

The issue of the relationship between the church and the state in the Cape reached a climax in the years after the first synod until 1843, at least in part due to a disagreement regarding the status of the 1824-Ordinance, the Order of De Mist still being operative.[124] The turmoil coincided with certain changes in the

[120] The complete text of the 1824-Ordinance is found in Pont (1991:216-237).
[121] *Id.*:218.
[122] Article 110 (*Id.*:233).
[123] E.g. articles 19 and 136. According to (Pont 1991:242) the general assembly decided on 15 November 1824, in a decision that never formed part of the Ordinance, that "geene uitspraken of besluiten der Algemene Kerkvergadering of Ringsbesturen zullen van kracht zijn, dan na dat dezelve door Zijne Excellentie den Gouverneur zullen zijn goedgekeurd". Van Staden (1973:182-183) and Kleynhans (1974:54) include this decision in the 1824-Ordinance as article 138. Jooste (1946:150) agrees with Pont that the decision never formed part of the Ordinance, but holds that it was the printers of the Ordinance who omitted the "article" by mistake, much to the displeasure of one of the political commissioners, D.F. Berrangé, some years later.
[124] Jooste (1946:142); Geldenhuys (1951:44); Van Staden (1973:183).

administration of justice that had been introduced in the first decades of English rule.

3.5.4.1 The English influence on the administration of justice

The introduction of a Vice-Admiralty Court, the creation of circuit courts in 1811, the opening of the doors to the public in 1813, the replacement of Dutch by English as the official language of the courts, the introduction of British judges, the application of British court procedures and the gradual assimilation of the local Roman-Dutch law to that of England, all revealed an English bias.[125]

The arrival of 5000 British settlers in 1820 added to the pressures on the authorities to import an English system of administration of justice. Ordinance 33 of 1827 abolished the courts of Landdrost and Heemraden and created the offices of resident magistrates. With the expansion of the population of the Colony more courts of law became necessary, therefore districts were opened up and resident magistrates and civil commissioners appointed.[126]

3.5.4.2 The first supreme court

The First Charter of Justice of 1827 consolidated the reforms effected since 1806 and established a supreme court at the Cape, moulded to the English model, to replace the Council of Justice. Sir John Truter expressed high hopes for the new court in his closing address to the Council of Justice, referring to it as a "bulwark of civil liberty".[127] Although the Roman-Dutch common law was not formally replaced, the introduction of the new court paved the way for the introduction of English law.[128] It appears, though, that some judges always remained faithful to their Roman-Dutch roots.[129]

The proceedings of the new Supreme Court commenced on 1 January 1828, and the first case where church officials were, although only incidentally,

[125] Sachs (1973:38); Girvin (1992:291).
[126] *Resolutions of the Council of Policy of Cape of Good Hope*.
[127] Quoted by Girvin (1992:304).
[128] *Id.*:292-293.
[129] E.g. Menzies, J. (see *Id.*:306).

involved was reported on 10 March 1829.[130] In *Richter v Wagenaar* the court considered an action by a man against his wife for alleged adultery. The proof of adultery in this case depended entirely on proof that the child of the defendant was illegitimate.[131] The minister of the Roman Catholic Church was called as witness to produce a certificate of baptism which he had performed, and the sexton of the Lutheran Church testified to the circumstances surrounding the funeral of the child.

Other decisions, related to religion, in the early years of the Supreme Court include cases concerning property disputes in 1832[132] and 1836,[133] involving the Roman Catholic congregation of Cape Town, and a decision that the common-law rule where the spouse of an accused is not a compellable witness for the prosecution, should not only apply to Christian marriages but also to marriages in terms of Islamic law.[134]

It was, however, only in 1841, in an action by Rev. Shand of Tulbach against a churchwarden (De Waal), that the NGK became involved in a case before the court. The events that led to *Shand v De Waal* originated in 1834 when Rev. Shand, a Presbyterian minister from Scotland, refused to baptise a child.[135] The presbytery (ring) subsequently, in a drawn out squabble, twice suspended Rev. Shand, both times with the approval of the governor, Sir Benjamin D'Urban. Rev. H.A. Moorrees was subsequently appointed as the stand-in minister of Tulbach.

A special synodal meeting in October and November 1837 (*inter alia*) heard Shand's appeal against his suspension. After Shand had stated that he would serve the sacraments to "onbesproken of ongecensureerde Ledematen en dus overeenkomstig de reglementen der Synode in Zuid Afrika, en de gewoonte en instellingen alhier bestaande te handelen", the synod declared that he was

[130] This was revealed by personal review of the *Cases Decided in the Supreme Court, Cape of Good Hope*, *as reported by the late Hon. William Menziez, Esquire*, vol. 1, edited by Buchanan.
[131] The common-law presumption *pater est quem nuptiae demonstrant* complicated such proof significantly.
[132] *Orphan Chamber, N.O. Bohmer v The Rev Rushton and Wagner, as Pastors and Managers of the Roman Catholic Chapel.*
[133] *The Master, as the Executor of Bohmer v The Churchwardens of the Roman Catholic Chapel and Others.*
[134] *August v Rens* (1836).
[135] For a detailed account of the events leading up to the case of *Shand v De Waal* see Moorrees (1937:676-691), Jooste (1946:151-173), and Kleynhans (1974:57-63).

"weder een Leeraar der Hervormde Kerk".[136] To this the governor objected, claiming that the synod had deviated from the due order of its own proceedings and had no power to reinstate Shand in his former position. According to the governor they should have communicated their opinion in a resolution stating that there was no longer any bar to the removal of the suspension and then recommended his reinstatement accordingly. Even when the synod attempted to make amends by declaring that they had no intention of finalising the reinstatement before the governor's approval, the latter responded that "one construction only could have been put upon it, namely that the synod *had reinstated* Mr. Shand, informing the Government of that step".[137]

Shand protested against the interference of the governor insisting that the synod as the "highest Ecclesiastical authority of this land" determined that the earlier suspension had ceased to have effect and that "(t)he Governor has no power at all to suspend, or continue suspension from the office of the Ministry of Tulbach".[138] Jooste (1946:160) considers this reply of Shand to be a turning point in the state of submission of the Church to the governor.

In his dissent Shand relied on the presbyterial-synodal model of church governance. In this light, in a letter to the *Actuarius* of the synod, he lamented the fact that he found no precedent in church law for his (continued) suspension by the exercise of civil power:

> The Government of every Church establishment is or ought to be within itself, and if the Civil power is in any case permitted or warranted to interfere, it is only to maintain and enforce the decisions of the Ecclesiastical Courts. It is a principle laid down in the Established Churches of Scotland and Holland and acknowledged by the Civil Governments of these countries, that the suspension of a Minister of Christ from his Ministry in any congregation, or the continuation of that suspension is a matter concerning which no civil authority is competent to judge, and no Civil Jurisdiction is authorized to decide; and the very

[136] *Acta Synodi* (1837:162). "Twee en twintigste Sitting" of the "Buitengewone Synodale Vergadering" (11 November 1837).
[137] Kleynhans (1974:60).
[138] Quoted by Jooste (1946:160).

> proposal or attempt of interposing the Civil power in such a case would doubtless be resisted and treated as an illegal interference".[139]

To this the governor replied that, "although the Synod is the highest ecclesiastical Court in the land, its decisions are of no effect until sanctioned by the Representative of Her Majesty, who is the Head of the Colonial Church".[140] This led Jooste (1946:165) to the view that the Shand case was essentially a collision between the presbyterian and episcopalian models of church government, the governor acting as a *Summus Episcopus* in the latter. It seems that Shand had challenged the *ius patronatus* in a way no-one before him had had the nerve to do.

Ultimately the case was submitted to the committee of the General Assembly of the Church of Scotland for Colonial Churches for consideration. The committee, judging the case from the general principles applicable to Presbyterian churches, concluded, *inter alia*, that the suspension from office, being only a temporary measure, did not infer the power upon any court to transfer its emoluments to a third party; that the appointment of Rev. Moorrees during the suspension of Shand was irregular; and that the judgment of the synod removing the suspension, restored Shand to all his rights and privileges as minister of Tulbach, which indeed was duly done.[141] This validated Shand's challenge of the *ius patronatus*, and the Church Ordinance of De Mist (3.4.2, *supra*) to boot. It also signifies a victory for the presbyterial-synodal model of church governance.

In *Shand v De Waal* before the Supreme Court in 1841, Shand led an action against the churchwarden (De Waal) of the Tulbach congregation to have the latter give up possession of the parsonage. This was done in the light of Shand's reinstatement to his former rights and privileges as minister of Tulbach. In an ironic twist the secretary of the government wrote on 22 November 1839: "Aware that the use of the parsonage house has been denied to Mr. Shand, who is

[139] Quoted by Kleynhans (1974:61).
[140] Quoted by Jooste (1946:165).
[141] Jooste (1946:167).

lawfully the minister of Tulbagh, His Excellency the Governor has declined interfering in that question".[142]

The defence took objection to the plaintiff's right to sue on the grounds that, according to 37th article of De Mist, the administration of church property was vested in the consistory and that the consistory alone could sue.[143] The court held that there were insufficient grounds on which to maintain the objection and directed them to proceed with the evidence for the defence.

After counsel had been heard the court decided, *inter alia*, that the plaintiff was entitled to the possession of the parsonage. Chief Justice Wylde held that the plaintiff was not entitled to sue the defendant in his individual capacity and ought to have proceeded against the consistory. Menzies, J., with Kekewich, J., concurring, however, held that the plaintiff was entitled to bring the action against the defendant in the form in which it had been brought, and was entitled to judgment against the defendant.[144]

In *Long v Bishop of Cape Town* (1863) the Privy Council heard an appeal after the Synod of the Church of England had suspended the appellant when he was found guilty of having neglected and refusing to obey certain commands of the respondent, and for persisting in his refusal after having been solemnly warned and admonished. The appellant, considering the initial sentence illegal, continued with his parish duties whereupon he was cited to appear before the respondent for having refused to conform to the sentence. The bishop appointed a minister to the temporary charge of the parish and directed the churchwardens to prevent the appellant from officiating in the Church. The appellant then applied to the Supreme Court for an interdict restraining the respondent and his nominee from hindering him in the performance of his duties.[145]

The court made an order restraining both the appellant and the respondent until the rights of the parties were ascertained in an action brought by the appellant. The appellant accordingly instituted proceedings in the Supreme Court. Judgment in favour of the respondent was given on 15 February 1862. Hodges,

[142] At 477.
[143] At 478.
[144] At 480-482.
[145] At 163-175.

C.J., and Watermeyer, J., held that the respondent, by virtue of his episcopal authority, assented to by the appellant, had lawfully exercised their power according to the laws of the Church.[146]

The appeal was heard in February 1863. Lord Kingsdown, delivering the judgment, reiterated that the Church of England, in places where there was no church established by law (as in the Cape Colony), was in the same situation as any other religious body. This meant that the members "may adopt rules for enforcing discipline within their body which will be binding on those who expressly or by implication assent to them".[147] He was convinced that the appellant voluntarily submitted himself to the authority of the respondent to such an extent as to enable the respondent to legally deprive him of his benefice under certain circumstances. His judgment, however, then took an awkward turn when he accused the Synod of the Church of England of assuming powers that only the Legislature could possess, rendering these acts illegal. The appellant was clearly not bound to any illegal acts and he had thus unlawfully been removed from office as the order of suspension was not found to be justified by the conduct of the appellant.

Lord Kingsdown, even though his judgment rested on other grounds, heavily criticised the constitution of the tribunal for the appellant's initial trial: "(C)are should have been taken to secure, as far as possible, the impartiality and knowledge of a judicial tribunal. The Bishop was substantially the prosecutor and one whose feelings were deeply interested in the question".[148] The respondent breached a well-established principle of natural justice that states that no person can judge a case in which they have an interest.[149] Even though it was not

[146] At 175. Bell, J., in a minority judgment, held that the sentences were *ultra vires* and that the appellant had not bound himself by contract or otherwise to submit to the jurisdiction claimed by the respondent (*Id.*).
[147] At 176.
[148] At 180.
[149] Commonly expressed in Latin as *nemo iudex in sua causa*. The second established principle of natural justice is expressed as *audi alteram partem* (both sides [of a case] should be heard). See also 7.4.3 (*infra*).

involved, the principles laid down in this case would be authoritative in many subsequent cases involving the NGK.[150]

3.5.4.3 A growing desire for a new church ordinance

During the years 1824 to 1842 synodal meetings were held every fifth year. No resolutions could be passed without the approval of the political commissioners, nor could they be brought into force without the consent of the executive.[151] It became evident that this situation was becoming problematic to the governor, Sir George Napier, from the concluding paragraph of a letter from the colonial secretary, Colonel Bell, dated 17 January 1840:

> The Governor is most anxious to free the Church from the trammels of secular interference in all spiritual or purely ecclesiastical matters, and of substituting in all other matters, of which she cannot dispose by her sole authority, that of the highest civil tribunal, for the authority which he conceives to have been so undesirably continued in the Governor – the extinction of whose appellate jurisdiction in civil and criminal procedure ought, in his opinion, to have been followed up by the extinction of that anomalous relation in which he still appears to be placed by the ancient regulations of a Church whose principles repudiate all interference in matters concerning its own internal ecclesiastical concerns.[152]

This state of affairs was aggravated by an undesirable occurrence at the synod of 1842, where one of the political commissioners present availed himself of his official position and sought to use his political influence to prevent the proceedings from receiving official approval.[153] This was the kind of usurping of power that led to a growing contention that it was necessary for a "Church Ordinance" to be passed, recognising the church's right to frame and carry out its own regulations, without submitting everything to the government for its

[150] Cf. e.g. *Van Rooyen v Dutch Reformed Church, Utrecht* (1915), *De Waal and Others v Van der Horst and Others* (1918), *Bredell v Pienaar and Others* (1922), and *Du Plessis v Synod of the Dutch Reformed Church* (1930).
[151] McCarter (1869:36-37). Cf. footnote 123 (*supra*).
[152] Quoted by McCarter (1869:37-38).
[153] *Id.*:37.

sanction.[154] De Mist's Order "ceased to be suitable either to the Dutch Reformed Church or to the ecclesiastical condition of (the) Colony in general".[155]

3.5.5 Ordinance 7 of 1843

Ordinance 7, with a schedule annexed containing the church laws, was passed by the Legislative Council in 1843, and subsequently received the Queen's sanction.[156] According to the heads of argument by the defendants in *Loedolff and Smuts v Murray and Louw* (1862),[157] the object of the Ordinance was twofold, firstly to repeal De Mist's Church Ordinance and, secondly, to provide rules for the management of the NGK. Watermeyer, J., in his judgment added that what had been effected by the Ordinance was that, whereas previously the churches were bound by De Mist's regulations, they were now at liberty to make their own rules and regulations, provided no such regulations were repugnant to the provisions of the Ordinance. The Ordinance was "a private law for the government of the Church, and is binding as a mutual agreement between the parties".[158]

The Ordinance[159] contained ten articles: Article 1 repealed De Mist's Order in totality; article 2 declared that no religious community was entitled to claim from the government a contribution or allowance towards the support of the ministry, and all such grants were deemed to be merely voluntary and gratuitous and under absolute control of government; article 3 ratified the existing church laws (contained in the Schedule) and confirmed that the Church should be invested with the power of regulating its own internal affairs; article 4 entrenched the right of the synod to change church laws provided that any rule or regulation that was inconsistent with any of the provisions of the Ordinance would be null and void;

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[154] *Id.*:38-39.
[155] Section 1, Ordinance 7 of 1843.
[156] Moorrees (1937:662-664). The good intentions of the government were evident from the fact that the Ordinance was submitted under the heading "The Separation of Church and State Petition" (Kleynhans 1974:81).
[157] This action was brought to decide the right of Rev. Louw, from a congregation outside the Cape Colony, to sit as a member of the 1862 synod in Cape Town (in terms of the seventh clause of Ordinance 7). The moderator, Rev. Murray, was joined as co-defendant. The court decided that the words "Dutch Reformed Church in South Africa", when used in Ordinance 7, are equivalent to "Dutch Reformed Church in the Cape Colony. Rev. Louw was subsequently barred from taking part in the proceedings of the synod.
[158] At 89.
[159] See McCarter (1869:149-152) for the full text of Ordinance 7 of 1843.

article 5 enacted that, in congregations where the minister received a salary from the government, the governor reserved an unrestricted right of filling such a vacancy;[160] article 6 confirmed that the Church was to exercise its discipline and governance in terms of the presbyterial-synodal system, and its doctrine in terms of Confession of Dort and the Heidelberg Catechism,[161] and those who professed this governance and doctrine were (in the case of a dispute) by right entitled to the possession of all property or rights by law belonging to the Church; article 7 regulated the composition of the synod that consisted of all acting ministers and an elder (two elders in the case of Cape Town), nominated by each consistory; and article 10 enacted that church officials (acting on behalf of the congregation) were vested with legal subjectivity (to sue and be sued) in all civil and criminal proceedings relating to church property.

Article 8 and article 9 have even more notable significance for the aims of this study. The former enacted that the Church had no power over the person or property of its members, except as had been yielded by voluntary consent. All church laws had to be regarded in law as the rules and regulations of a "merely voluntary association". Members were bound to the said rules and regulations by virtue of the ordinary legal principles applicable to cases of express or implied contract. Article 8 thus described the juridical position of the Church in terms of the existing rationalistic paradigm[162] and denied that the Church was a legal subject *sui generis* (cf. chapter 6, *infra*).

Article 9 acknowledged the spiritual jurisdiction of the Church, protecting members against the civil judiciary as long as internal rules were followed and no malice could be shown:

> And be it enacted that no person or persons composing, complaining to, or giving testimony before any duly constituted judicatory of the said Church shall be liable to any action, suit, or proceeding at law, civil or criminal, at the instance of any member of said Church, for or on account

[160] In 1845 this right was reassigned to the Queen in terms of Ordinance 16 of 1845 (Moorrees 1937:666, footnote 3).
[161] The reason why the Belgic Confession (as the oldest of the Three Forms of Unity) was omitted is unresolved. The statement of doctrine was, however, amended by section 2, Act 9 of 1898 to include the Belgic Confession (see *Du Plessis v The Synod of the Dutch Reformed Church* [1930] at 416).
[162] Cf. Pont (1991:261-262).

> of any matter or thing, written or spoken by any such person or persons *bona fide*, and without malice, in reference to or upon the occasion of any scandal, offence, or other matter, real or alleged, which by the rules and regulations of the said Church for the time being should be reported to any such judicatory, and which any such judicatory is empowered to investigate; nor shall any action, suit, or proceeding at law be instituted for the purpose of preventing any such judicatory from pronouncing, in the case of any scandal or offence which shall be brought before it, and proved to its satisfaction, such spiritual censures as may in that behalf be appointed by the said Church, or for the purpose of claiming any damages or relief in regard to such censures, if the same shall have been pronounced.[163]

The influence of the Ordinance at once became evident when the governor, after the publication of the Ordinance, declared that it was no longer necessary to submit the names of new church council members to him for approval. Shortly before the publication he refused to approve the members of the first council of the newly formed congregation of Victoria-West since the congregation was founded without his consent.[164]

Article 9 came under judicial scrutiny in the Supreme Court in 1854 in *Weeber v Van der Spuy*. This was an application for the review of a judgment of the Magistrate's Court at Beaufort West in an action of slander against an elder of the NGK. The appellant pleaded that he was not amenable to a civil court according to article 9,[165] as he had uttered the supposed defamatory words[166] (without malice) at a meeting of the consistory in his capacity as elder of the Church at Beaufort West, rendering them privileged. He therefore claimed that he was protected by law and objected to the jurisdiction of the court. The magistrate overruled the objection but the Supreme Court reversed the magistrate's ruling.

[163] Article 9, Ordinance 7 of 1843.
[164] Moorrees (1937:669).
[165] The official court report in 2 Searle (at 41, paragraph 2) erroneously reads "Article 4".
[166] The minutes read: "Broeder Weeber berigt dat er een gerucht in omloop was dat een lidmaat der gemeente, Cornelis van der Spuy, beschuldigd werd door Frans Apollos, wegens een onbetamelyk gedrag met zyn vrouw" (*Weeber v Van der Spuy* [1854] [at 42]).

In his judgment Musgrave, J., in reference to Ordinance 7, expressed his view as follows:

> Those regulations … must necessarily be regarded by this Court as constituting, as it were, a *special charter* of the rights, liberties and powers of the Dutch Reformed Church of this Colony, which it is the bounden duty of the Judges most guardedly and scrupulously to maintain and uphold as inviolable so long as it shall continue to form a part of the law of the land. That law has declared that that church should be invested with the power of regulating its own internal affairs, and that the General Assembly or Synod of that church is the *natural and proper ecclesiastical authority* by which rules and regulations for its government in its own internal affairs may rightfully be made.[167]

According to the judgment, the only instances where the Supreme Court would interfere in church matters were where there was a transgression of the limits which had been assigned to their jurisdiction or where they were guilty of any palpable abuse of their legitimate powers.[168] A member of a consistory could claim protection under article 9 in all other instances.

The newfound freedom and power of the Church to arrange its own affairs soon started to appear in different, sometimes even corrupted, forms. At the sitting in 1857 a resolution was passed declaring that the synod highly disapproved of the mere confirmation of marriage by a civil officer, without a religious ceremony, and again censuring members of the congregation who were married in churches other than the NGK, or who married members of other churches. Another resolution had been passed declaring the power of the synod to hear cases of first instance, there being no necessity to proceed first in a lower court.[169]

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[167] *Id.*, at 52.
[168] *Id.*, at 52-53. This only applied to the NGK. Where other denominations were concerned, the Supreme Court acted as an ecclesiastical court.
[169] See *Loedolff and Smuts v Robertson and Others* (1863) (at 130). This action was brought to have acts and resolutions of the 1852, 1857 and 1862 synods declared null and void in terms of the ruling in *Loedolff and Smuts v Murray and Louw* (1862) (*supra*). The court refused to set aside the acts and resolutions of the synods, holding that they were not invalidated by the subsequent disqualification of such members.

Article 9 (*supra*), however, never completely excluded the Church's liability to have its proceedings brought into review before a civil court.[170] It is therefore not surprising that the proceedings at the synod of 1862 gave rise to a number of actions in the Supreme Court involving the NGK.

In *Kotzé v Murray* (1864) the court had to deal with the case of Rev. Kotzé of Darling, who, at the 1862 sitting of the synod, stated his opinion that, where the sixtieth question was concerned "the Catechism was in error".[171] The majority of the members called upon him to retract, which he refused to do. At a subsequent meeting of the synod, a resolution was passed suspending him from the ministry, depriving him of his salary from the Church and of the government grant. He brought an action to the Supreme Court to set aside the sentence on the following grounds: 1. The presbytery, and not the synod, was the competent body to try a minister;[172] 2. Even if the synod were competent to try the case, the proceedings in this case were not in accordance with their own rules and regulations or with substantial justice; 3. Even if the synod were competent to try the case and had not fallen into any irregularity, the sentence was illegal, as the words used by the plaintiff were warranted in terms of the relevant standards.[173]

The court set aside the sentence on the second ground, inasmuch as the plaintiff was never cited before the synod, no act of accusation was given and no trial took place. Under the third ground no final ruling was made but Bell, J., in his judgment, remarked that "the commentators on the Catechism never dreamt or intended to say that it laid down so infallible a doctrine as to compel human intellect blindly to adopt every word thereof by fallible men".[174]

Up until this time the Church was blissfully unaware of the effect that the court's interpretation Ordinance 7 would ultimately have on its organisation. In his

[170] Cf. McCarter (1869:40).
[171] At 43.
[172] Porter, for the plaintiff (at 43), pleaded that under Ordinance 7 the synod had to try ministers for offences, but in 1847 an alteration was made, and the synod passed to the presbytery its power to try ministers in the first instance.
[173] The defence (at 44-45) argued that the Church was a voluntary association with liberties confirmed by the existence of Ordinance 7 which forbade the court to consider the merits of the case. The defence relied on *Weeber v Van der Spuy* (1854) (*supra*) and *Long v Bishop of Cape Town* (1863) (*supra*) to show that it was only on the forms as agreed upon and not the doctrine that the court had liberty to enter.
[174] At 60.

judgment, Cloete, J., stated: "Whenever any rule or decree is issued by the Synod affecting the civil rights of any person, the validity of such rule or decree may be determined by the competent Civil Court".[175] In addition to the order regarding the initial sentence of the plaintiff, the elaborate comments concerning spiritual matters was a surprising turn of events for the Church. The judgment in *Kotzé v Murray* paved the way for more to come.

In 1864 Rev. T.F. Burgers of the NGK at Hanover brought an action against Rev. Murray, the moderator of the synod. The action was to set aside a sentence of suspension by the synod after complaints of unsound doctrine. Murray raised the objection that he was in no sense the representative of the synod. The court held that the action was wrongly brought against the moderator and that the proper body to be sued was the synodal commission.[176] The action was subsequently brought against the members of the synodal commission. The defendants filed an exception on the grounds that the court had no jurisdiction in respect of an act done under the spiritual authority of the Church to which the plaintiff had purportedly submitted himself. In his judgment Justice Bell reiterated that Ordinance 7 that laid down certain rules and regulations for the government of the Church had been accepted by the Church. This meant that a civil court had the right to interfere when it was alleged that those rules and regulations had not been adhered to. The voluntary submission of the plaintiff to said rules and regulations did not debar the court from interfering. The exception was disallowed and the court decided to try the case on its merits. The three judges unanimously found for the plaintiff, maintaining that the synodal commission assumed jurisdiction that belonged to the presbytery. The sentence of the synod was declared null and void.[177]

The synodal commission subsequently appealed to the Privy Council in London but the appeal was dismissed. Lord Westbury held that the Church had departed

[175] At 40. In addition to "civil rights" civil courts, according to Justice Cloete, may also address civil "liberties" as well as the "*status* in society". See the discussion of *De Waal and Others v Van der Horst and Others* (1918) to see how this would change in the next century (3.7.3.4, *infra*).
[176] *Burgers v Murray* (1864).
[177] *Burgers v Murray and Others* (1865).

from its laws and confirmed that the presbytery of Graaff-Reinet was the only competent court to try the case in the first instance.[178]

The presbytery of Graaff-Reinet, even after being served with a copy of the judgment of the Supreme Court, treated the congregation of Hanover as vacant by virtue of the suspension of Rev. Burgers by the synodal commission. The presbytery directed Rev. Kotzé to take charge of the parish as minister consulent. The members of the presbytery who had formed the majority vote (22 against two) were summoned to appear in the Supreme Court to show cause why it should not be found that they had illegally deprived Burgers of his office. The two members (Van Eeden and Visser) who formed the minority vote in the presbytery joined Burgers as applicants. In *Burgers and Others v Joubert and Others* (1866) the court granted an interdict to prevent Rev. Kotzé and the (new) consistory from interfering in the parish of Hanover.

In June 1866, after Rev. Burgers was wrongfully and unlawfully obstructed and prevented to sit, deliberate and vote as member of the presbytery of Graaff-Reinet, the case went to court for consideration once again. The Supreme Court in *Burgers v Du Plessis and Others* (1866) held that the action of the presbytery was invalid and that Rev. Burgers was entitled to admission as a member of the presbytery, and to all the privileges appertaining to him as a minister of the Church. Possibly the closing statement from the judgment is the clearest indication of the status of Ordinance 7 and the relationship between civil law and church law at this point in history:

> The strongest safeguard of the liberty so dear to the Church – the freedom from secular interference in spiritual matters, which it rightfully claims, but, I believe, in a wrong way – is a strict adherence to its own rules and regulations, at its own request embodied in the statute book, and by itself amended from time to time in accordance with the law.[179]

[178] McCarter (1869:70-72); Engelbrecht (1947:56).
[179] At 400.

3.5.6 Other cases before the Cape Supreme Court, 1866-1908

In 1866 the Cape Supreme Court heard property disputes involving the Mohammedan Church,[180] and the Moravian Missionary Association,[181] respectively. In 1880, the bishop of Cape Town brought an action against the government for the payment of an annual allowance, afforded to his predecessor, in terms of Schedule C of Ordinance 3 of 1852 that appropriated an amount for the maintenance of public worship. The action failed as Schedule C (see 3.5.5, *supra*) was repealed in 1875.[182]

In the case of *Merriman v Williams* (1880)[183] the plaintiff was the bishop of the Anglican Church in Grahamstown, who sued the dean of the same Church. The facts of the case, as set out in the judgment, could be summarised as follows: Dean Williams, as a member of the Church of England (CE), did not accept the independence of the Church of the Province of South Africa (CPSA). The articles of the constitution of the latter Church, agreed to by the Provincial Synod of 1870, contained a proviso to the effect that in the interpretation of its faith and doctrine it was not bound by the decisions of the tribunals of the former Church. In 1875 Williams, out of protest, did not attend the Provincial Synod of the CPSA and subsequently disputed the right of the bishop to preach and perform all other ecclesiastical functions, although these rights were entrenched in the 1878 statutes for the government of St. George's Cathedral.[184] In April 1879 the plaintiff was prevented from preaching by the defendant, and, after failing to appear at his hearing, Williams was tried and found guilty in his absence and sentenced to suspension. He refused to obey the sentence and was then excommunicated, which he also ignored.[185]

The bishop brought the suit to the Supreme Court with the prayer that the defendant be declared one of the clergy of the CPSA, and the sentences of the

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[180] *Jan and Others, Members of the Mohammedan Church of Jan van Bougies v Ismael and Others, Imaum, Gatieps, and Billals of the same Church* (1866).
[181] *Bechler v Van Riet* (1866).
[182] *Bishop of Cape Town v Colonial Secretary* (1880).
[183] The judgment in *Merriman v Williams* (1880) was referred to in *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (see 3.6.5.10, *infra*).
[184] These statutes were drawn up by the plaintiff and agreed to by all in the chapter, except the defendant (at 138).
[185] At 136-139.

ecclesiastical tribunal accordingly be enforced, and that the plaintiff in his episcopal capacity had the right to officiate in the Cathedral Church and to have free access to the land and premises. It further prayed for a perpetual restraining interdict against the defendant, who, in return, claimed that, as a priest of the CE (as by law established), and not of the CPSA, he owned the rights referred to and not the bishop. He maintained that, as the CPSA was independent of the CE and had no authority over him, the Diocesan court that tried him was moreover improperly constituted. He also disputed the validity of the transfer of the church building made in 1871.[186]

Counsel for the plaintiff rightfully argued that "(i)n England a Bishop occupies a special position in the eye of the law, but in this country he is an officer of a voluntary body".[187] De Villiers, C.J., in a detailed elaboration of the facts and merits of the case,[188] conceded that, although the CE was an established church in England, in the Colony it was a voluntary society, constituted and subsisting by mutual agreement. He subsequently referred to the judgment in *Long v Bishop of Cape Town* (both by the Supreme Court and the Privy Council) that was based upon the assumption that "the Church in this Colony … was an association of members of the Church of England governed by the laws of the Church of England".[189] The chief justice held, however, that the Church of St. George had been devoted to ecclesiastical purposes in connection with the CE and that the CPSA had severed its ties with the CE. The bishop thus had no jurisdiction over, or right to contractually bind, the dean in any way. Likewise, the tribunal before which he was cited had no jurisdiction over him. The Supreme Court therefore pronounced a decree absolving the defendant from the instance with costs against the plaintiff.

The judicial committee of the Privy Council denied the appeal by the bishop.[190] The Privy Council, however, did not enter into discussions whether or not the

[186] At 139.
[187] At 139. Cf. *Long v Bishop of Cape Town* (1863).
[188] At 143-180.
[189] At 157.
[190] *Merriman v Williams* (1880) (Appeal). Smith, J., in a separate judgment in the court *a quo* (at 183), while not referring to the main question, did note that the defendant precluded himself from denying the legality of the plaintiff's claim after having sanctioned it for many years. Cf. the legal doctrine of estoppel (see *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* [1893] [at 87-88]) – the defendant, by

CPSA is a branch of, or identical with, the Church of England. The legal connection between the two, strangely enough, was not denied, notwithstanding arguments to the contrary.

It is significant, notably for the aims of this study, that the court *a quo*, with the Privy Council concurring, was of the opinion that legislation, imperial or colonial, was necessary to regulate the relative rights of the CPSA and the CE in respect of their endowments under private deeds of trust. Reference was made to the Legislatures of Canada and Australia that had settled the rights of the respective Churches in those countries.[191]

The dispute between the CE and the CPSA was revisited in the case *In re Trinity Church Trust White and Others Ex parte* in 1886. The complete disconnection between the CE and the CPSA was reaffirmed by Chief Justice de Villiers. An application was brought to deprive a minister of the Trinity Church, a congregation of the CE, of a trusteeship after, many years earlier, he subscribed to the Canons of the CPSA. The order was denied *inter alia* because "an agreement may be implied from the acts and conduct of a person without any express contract".[192]

The first case regarding church censure came before the Cape Supreme Court in 1886.[193] The applicant was found guilty of adultery by a consistory of the NGK and she was deprived, in terms of this judgment, of the right to take communion. She subsequently sought relief from the Supreme Court. De Villiers, C.J., found that denying the applicant the use of the holy communion was a purely spiritual punishment, and, in terms of section 9 of Ordinance 7 of 1843 (see 3.5.5, *supra*) the court could take no cognisance of the matter. The application was refused accordingly.

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subscribing to the constitution of the CPSA, and taking prominent part in its organisation, had effectively debarred himself from objecting to it. The Privy Council nevertheless dismissed the appeal.

[191] In the words of Smith, J.: "I have a firm conviction that nothing short of an Act of Parliament can finally and satisfactorily settle the question of property" (Supreme Court ruling, at 184).

[192] At 187.

[193] *Van Graan v Hope Town Consistory of the Dutch Reformed Church* (1886). Cf. *Burgers v Murray* (1864) (3.5.5, *supra*) where the court interfered in the ecclesiastical dispute.

In 1897, however, the court had no reservations in ruling against an imaum of a Mohammedan congregation of the Paarl, who claimed that he was appointed for life. The court asserted that it was competent for a clearly ascertained majority of the *bona fide* members of the congregation to dispense with his services after due notice to him.[194]

In 1902 the court once again refused to interfere when application was made for an order authorising the amendment of an entry in the baptismal register of St. George's Cathedral, Cape Town.[195] Buchanan, J., in his judgment stressed that, as the baptismal register was not a public register (whereas the applicant pleaded the opposite), the court should not make an order to amend records kept by the Church.[196]

In 1908 the Cape Supreme Court heard its final case involving church matters before the unification of South Africa. *Rex v April* was an appeal from a decision of the resident magistrate of Woodstock. Ludwig April was found guilty of theft by means of false pretences after he appeared to have falsely given out that he was an ordained minister and duly authorised to solemnise marriages. On appeal the court held that he was accepted as minister in a small breakaway church[197] and therefore it was not decided whether he "had not the full right to marry people according to the Marriage Order in Council".[198] The court found no *mens rea* and the conviction was duly quashed. Acting Chief Justice Buchanan even stated that "I think it is time the Legislature took up this important matter and placed the marriage laws on a better footing than that upon which they are founded at present".[199]

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[194] *Du Toit and Others v Domingo* (1897). No reference was made to Ordinance 7 of 1843, which confirms the view that the Ordinance applied to the Dutch Reformed Church only (cf. *Weeber v Van der Spuy* [1854] [3.5.5, *supra*]).
[195] *Ex parte Tyler* (1902). The reason for the application was that the applicant might have been prejudiced by the entry under discussion in a case of succession of property.
[196] Cf. *Robyn v Blankenberg* (1917).
[197] April was not ordained as minister in the traditional way, but set apart by election and the solemn shake of hands ratifying his appointment as their pastor (at 395).
[198] Hopley, J. (at 395).
[199] At 394.

3.6 Expansion outside the Cape Colony

3.6.1 The Great Trek

Between 1836 and 1838 the Great Trek took place. The reasons for the Great Trek seem to have revolved mainly around the rejection of the British rule in the Cape.[200] The governor, Sir George Napier, attempted everything within his power to prevent the "razernij van Emigratie".[201] The Cape Synod of 1837 accused them of rebellion that seriously jeopardised their membership of the Cape Church, and refused requests to send a minister with them.[202]

The main challenge that faced the Trekkers initially was to appoint a minister. This was no easy task as the NGK refused to sanction the trek and, consequently, no qualified minister joined them. The Trekkers, nevertheless, from the outset planned to maintain well organised religious practice as they were convinced "dat de openbare Godsdienst de eerste grondslag moet zijn waarop een Christelijke Maatschappij moet gegrondvest worden".[203]

3.6.2 Founding a church

As the preamble of the Church Ordinance of De Mist referred to "deeze Volksplanting" (see 3.4.2, *supra*), the emigrants, once outside the borders of the Cape Colony, found themselves somewhat disconnected from an effective church organisation. On 8 February 1837 the first (temporary) church council was elected and on 23 April of that same year the missionary, Erasmus Smit, was ordained as the first minister, shortly after Piet Retief joined the Trek and was inaugurated as governor.[204] On 6 June 1837 the Trekkers approved a basic code of legislation set forth in nine articles. Article 1 constituted a *Maatschappij*, as the collective Voortrekker society was called. With the election of F. Retief and C. van der Merwe as elders and C. Liebenberg and R. Dreyer as deacons in

[200] Van Zyl (1983:459); Pont (1991:273).
[201] Quoted by Engelbrecht (1936:29) from the *Government Gazette* of 4 May 1838. In a letter to the emigrants on 21 May 1838, however, sir George Napier showed a tempered attitude when he noted their "getrouheid, goeie orde en gehoorsaamheid aan die wette" (Moorrees 1937:699-700).
[202] Storm (1989:34); Pont (1991:275-277).
[203] Storm (1989:39).
[204] Moorrees (1937:705-706). That Retief effectively appointed Smit should be understood against the backdrop of the existing *ius patronatus* where the governor had such a prerogative (Pont 1991:285).

December 1837, with Retief gaining a seat on the council as governor, the foundation for an independent church was laid. The service of sacraments and the conducting of marriages could now be legally kept.[205] The relationship between church and state in the new "maatschappij" was one of total interdependence and shared authority.

The view that a new independent church was founded during the Groot Trek, named the "Voortrekkerkerk" by Storm (1989:62, 63, 65 and 70, *inter alia*), is challenged by Geldenhuys (1982:113-117) who shows that the terms "Gereformeerd" and "Hervormd" were used interchangeably as synonyms, but that no doubt should exist that the Voortrekkers were still loyal members of the NGK. Strauss (2011:265ff.) also strongly argues that the Church of the emigrants during the Groot Trek was indeed the NGK. Both Geldenhuys and Strauss are convinced that it was only a resolution by the General Assembly in August 1853 at Rustenburg that resulted in the establishing of the NHK and the official severing of the ties with the NGK. A proper assessment of the comprehensive account by Dreyer (1929) (by way of official correspondence and other historical documents) of the involvement of the Cape Church with the Voortrekkers seems to refute any attempt to insist on the complete independence of the emigrant church before 1853.[206]

3.6.3 Natal

3.6.3.1 The Republic of Natalia

While the Potgieter group proceeded further north, Piet Retief proposed Natal as the final destination for his group. After Retief's death the governance of the Republic of Natalia was taken over by the 24 members of the "Raad van Representanten van het volk" who adopted a constitution named "Regulatien en Instructien, voor de Raad van Representanten van het volk, aan Port Natal en omliggende land".[207]

[205] Pont (1991:286-289).
[206] See, for instance, "Bybels, ens., vir die Voortrekkers" (Dreyer 1929:90) and "Dankbetuiginge aan die Kaapse Sinode" (*Id.*:145-146).
[207] Storm (1989:52-53).

As did Retief, this new "Volksraad" took an oath in terms of article 36 of the Belgic Confession (see 1.1 [*supra*] and 5.2.4, [*infra*]) that they would protect and advance the interests of the church. This they did, *inter alia*, through a request to the magistrate of Pietermaritzburg to attend church council meetings as political commissioner,[208] not unlike the position in the Cape Colony (see 3.5.2 and 3.5.4.3, *supra*). Storm (1989:58-59) shows how, in the way that the Volksraad forced Rev. Smit into early retirement and stripped him of certain privileges, and subsequently appointed Rev. Lindley, the *ius patronatus* of the Cape was seemingly still exercised in the new independent governance.[209]

The short-lived Republic of Natalia suffered annexation by the British in 1843 and Natal became an autonomous district of the Cape Colony. The church council of Pietermaritzburg adopted Ordinance 7 of 1843 (see 3.5.5, *supra*) as Church Law,[210] a decision that would become somewhat problematic in years to follow (see 3.6.3.2, *infra*).

3.6.3.2 The judiciary in Natal

Even before the British annexation of Natal, Roman Dutch law was applied in legal administration terms of the "Regulatien en Instructien" (*supra*). Ordinance 12 of 1845 confirmed this approach, as did article 21 of the Supreme Court Act, no. 39 of 1896.[211] In 1845 a district court was established, with appeals being heard by the Cape Supreme Court and then by the Privy Council. The District Court was replaced by a Supreme Court when Natal gained independence in 1857. This new court could hear appeals from lower courts but the right to appeal to the Privy Council remained.[212] Of particular relevance in terms of the aims of this study, the Court asserted its right to decide on ecclesiastical

[208] *Id.*:55-56.
[209] The service of Rev. Lindley in the five congregations of the Voortrekkers (Natal, Pietermaritzburg, Weenen, Winburg and Potchefstroom) is, however, highly praised (Storm 1989:64-65).
[210] Pont (1991:301-303). In May 1844, Natal was formally integrated into the Cape Colony. This meant that the British governor gained authority over all matters, civil and religious (Storm 1989:73).
[211] Van Zyl (1983:472) is of the opinion that, despite the official bias in favour of Roman Dutch law, the influence of English legal tradition and English procedure during the nineteenth century in Natal was much stronger than in the Cape. Cf. Spiller (1983:76ff.).
[212] Van Zyl (1983:471-472).

matters.[213] Although it therefore seems that Ordinance 7 of 1843 of the Cape was not fully in force in Natal, the ruling in *Bishop of Natal v Green* (*infra*) showed a marked reliance on the Ordinance in some ways.

John William Colenso (1831-1905), Bishop of the Anglican Church of Natal (1853-1883), was a recurrent figure in litigation in the early years in Natal, starting in 1856 (in the District Court) in *Colenso v Acutt*, in which he appeared on behalf of the bishop of Cape Town, in a dispute against the churchwarden of St. Paul's, Durban, and then in *Lloyd v Colenso* (1859) in which he was sued by the colonial chaplain for damages for libel and illegal suspension from office.[214]

Colenso also appeared in the new Supreme Court, *inter alia*, in *Bishop of Natal v Bishop of Cape Town* (1866),[215] *Bishop of Natal v Wills* (1867), and *Executor in the Estate of P. Erasmus Smit v Bishop of Natal* (1882). It was, however, his legal skirmishes with Dean Green that became notorious. In *Bishop of Natal v Green, Williams and Dickinson* (1866), Colenso applied for an order that he be allowed access to the baptismal register of St. Peter's, held by the respondents.[216] The application was granted but subsequently Green refused the court order and an order of contempt of court was granted against him. On 1 February 1868 the order was cancelled after the dean appeared before the court and entered an explanation.[217] The bishop and the dean would have more legal encounters in the subsequent years.

In *Bishop of Natal v Green* (1867) the court was requested to confirm the bishop's order depriving the dean of the right to officiate as a minister of the Church of England in Natal. In deciding on the power of Colenso to issue this order, Chief Justice Harding found that the Anglican Church in Natal was merely a voluntary association. He elucidated what this meant in concrete terms when he cited Ordinance 7 of 1843 that regulated the order of the NGK in Natal. This stated that the regulations of a voluntary association would affect persons connected with it only if they subscribed to those rules and acknowledged them as being binding on them. The court therefore refused to interfere which led to a

[213] This right was established in *Bishop of Natal v Wills* (1867) (Spiller 1983:76).
[214] Spiller (1983:76).
[215] *Id.*
[216] *Id.*:78.
[217] *In re: Rev Jas. Green, Dean* (1868).

further series of deprivations and suspensions of ministers by the bishop, eventually leading to the court interdicting the dean from officiating in any church or building set apart for the Church of England.[218] This ultimately resulted in the formation of the CPSA.[219]

In *Bishop of Natal v Wills* (1867)[220] Connor, J. (in a dissenting judgment), argued that the ministers of the Natal Anglican Church were bound to yield obedience to the bishop in conscience but not in law, and that the "rules of a voluntary association are not law, even to those who have voluntarily subjected themselves to them, because law governs irrespectively of there having ever been consent".[221] This view, however, would only hold up where Ordinance 7 of 1843 was strictly applied and the courts consistently refused to rule in ecclesiastical matters. This evidently was not the case in Natal.

In a labour case in 1887, in *Edwards v Bishop of Maritzburg*, the plaintiff claimed an amount, being the balance of one year's stipend, which he contended was due to him after having been wrongfully dismissed in breach of his contract. He was engaged by the defendant to take up the position of curate in January 1885 at the Cathedral Church at Pietermaritzburg under Dean Green who terminated the plaintiff's connection with the Cathedral after four months, in consequence of his "violent conduct and intemperate language".[222] The question before the court was whether he was entitled to a full year's stipend in terms of his contract.

The court had no qualms in dealing with the case as it would have with any other case "in an ordinary matter of business, wherein one person engages the services of another on conditions settled between them".[223] The fact that the defendant offered the plaintiff the sole charge of another parish in the Diocese

[218] *Bishop of Natal v Green, Robinson, Williams, Spence and Jenkyn* (1868).
[219] Cf. *Johnson and Another v Churchwardens of St. Paul's Church, Durban* (1890) (at 6-7) where Morcom, A.A.G., offers a brief history. This case dealt with ministers of the CPSA who applied for an order restraining the churchwardens of St. Paul's Church, Durban (CE), from interfering or preventing the applicants from having free access to a cemetery of which the trust deed was under dispute. See also *Merriman v Williams* (1880) (3.5.6, *supra*).
[220] The court considered an application by the bishop for an interdict restraining Rev. Wills from officiating as a minister in any Anglican Church in Natal, without the license of Colenso to do so. A provisional order to that effect was issued.
[221] At 65.
[222] At 46.
[223] Wragg, J., at 51. The court also stressed that in dealing with the case it had to apply the *lex loci* (which applied to the CPSA) and not the law of England (which applied to the CE) (cf. 3.5.6, *supra*).

answered the question whether the defendant could justify a breach of the contract by reason of the plaintiff's bad behaviour. The court found the defendant personally liable on the contract and awarded the sum claimed.

This case led to a peculiar action between the same parties in 1888.[224] The plaintiff was inhibited from the exercising of his duties in the Diocese of Maritzburg as he apparently had not made the necessary declarations of canonical obedience. He subsequently claimed that the defendant, in his initial contract (see *Edwards v Bishop of Maritzburg* [1887], *supra*), had bound himself to supply him with support for life. In his judgment Connor, C.J., averred that even if such a right existed in English ecclesiastical law, it would not be law in Natal. The contract between the parties contained no life-long obligation and the case was dismissed.

Before the unification of South Africa the Natal Supreme Court also ordered the appointment of a curator of the Diocesan properties of the Church of England to fill a vacancy (1894),[225] and heard a labour case in 1900.[226] The latter case was brought by the Rev. (Dr.) Alfred Ikin, whose appointment as Diocesan District Minister of the CE was cancelled by the defendants.[227] In his judgment Mason, A.C.J., remarked that it would "not be necessary for us to consider the many difficulties surrounding the ecclesiastical questions connected with the Church of England in Natal",[228] referring to the exact position of the church council or its standing committee. By the turn of the century there was thus no denial of the Natal Supreme Court's jurisdiction in purely ecclesiastical matters.

3.6.4 Orange Free State

3.6.4.1 Expansion beyond the Orange River

The first congregation north of the Orange River, south of the Vaal and west of the Drakensberg, was Winburg, founded by Rev. Lindley in 1842. In 1843

[224] *Edwards v Bishop of Maritzburg* (1888).
[225] *Church of England Properties, In re, Ex parte Rowse* (1894).
[226] *Ikin v Curators, Church of England* (1900).
[227] The court found the cancellation by the defendants to be valid.
[228] At 269.

Winburg established its own, although subordinate to the Natal Volksraad, legislative council, the *Adjunktraad* and appointed its own magistrate.[229]

Napier's successor as Cape governor, Sir Peregrine Maitland, in August 1845 proclaimed authority over the territory on behalf of the British. The *Adjunktraad* at Winburg claimed joint jurisdiction over the Trekkers living between the Orange and the Vaal with the Volksraad at Potchefstroom. The new governor of the Cape, Sir Harry Smith, on 3 February 1848 declared British sovereignty over the area. On 14 March 1849 Smith issued his Regulations for the future Government of the Sovereignty beyond the Orange River which stated that the Dutch Reformed Churches within the district would be under the control of the Cape Synod. Relations between the Cape and Winburg became increasingly strained. Many of the farmers deserted Winburg and moved across the Vaal River.[230]

3.6.4.2 The judiciary in the Orange Free State

In 1854 The Orange Free State was declared an independent republic in terms of a convention signed at Bloemfontein. According to its Constitution the highest legislative power rested in the Volksraad. An independent judiciary was introduced consisting of a relatively sophisticated court system,[231] embracing Roman-Dutch law as its foundation. In 1875 the Supreme Court, based in Bloemfontein, was instituted.[232]

In 1862 an action was brought in the Cape Supreme Court for the purpose of deciding the meaning of the words "Dutch Reformed Church in South Africa" as used in Ordinance 7 of 1843.[233] The plaintiffs had previously applied for an interdict restraining Rev. Louw, minister of Fauresmith, in the now independent Orange Free State from sitting as a member of the Cape Synod. In his judgment Watermeyer, J., declared that "it appears clear to me that the words 'South Africa' in the Ordinance meant the Colony and nothing else".[234] In another

[229] Van Staden (1973:247-250); Van Zyl (1983:466-467); Pont (1991:304-310).
[230] Van Staden (1973:247-250).
[231] Cf. Van Zyl (1983:467).
[232] *Id.*:466-467.
[233] *Loedolff and Smuts v Murray and Louw* (1862).
[234] At 94.

case[235] the following year it was confirmed by the Supreme Court that the churches in Natal, the Orange Free State and Transvaal fell outside the jurisdiction of the Cape Synod. One can safely assume that this ruling nullified Smith's Regulations (*supra*). The independence of the church outside the Colony was now firmly established.

The new Supreme Court of the Orange Free State heard its first major case involving the church in January 1879, in this instance the Gereformeerde Kerk at Bethulie.[236] This was also the first case involving the GKSA, having been founded on 12 May 1859, "hebbende als grondslag den Bijbel en de leer en tucht voorgeschreven bij de Synodale besluiten genomen te Dordrecht in de jaren 1618 en 1619", according to the court record.[237] In the action the plaintiffs argued that the ministers and other members of the congregation strayed from the rules that were established during the founding, *inter alia* by teaching a doctrine contrary to the Bible and the Canons of Dort. As they were no longer prepared to stay on as members, they claimed that the property of the congregation should be sold and the proceeds divided among themselves and the other members.

The counsel for the defence described the congregation of Bethulie as a "zedelijk ligchaam, corporatie of *Universitas*".[238] In the words of Voet this meant that the church is "eene zoodanige vereeniging die voort blijft te bestaan al zouden al de oorspronkelijke leden verwisseld zijn en andere in hunne plaats gekomen".[239]

The plaintiffs, on the other hand, insisted that a church should be considered a "maatschappij of *societas*"[240] because the authorisation of the state was needed to form a corporation, which was not applicable here as "eene kerkvereeniging

[235] *Loedolff and Smuts v Robertson and Others* (1863) (see footnote 169 [*supra*] for a summary of the facts of the case).
[236] *Venter, Joubert, De Wet en Andere v Den Kerkraad der Gereformeerde Kerk Bethulie* (1879).
[237] At 4.
[238] At 5.
[239] At 6. The court, in the judgment, translated from Voet (III. 2, 1).
[240] At 5.

door onderlinge overeenkomst daargesteld, niet in haren aard eene corporatie uitmaakt, maar als slechts eene maatschappij moet worden beschouwd".[241]

In its judgment, the court, after considering several relevant legal authorities, ruled that the Gereformeerde Kerk, Bethulie, was a corporation (*universitas*) and "als zulks kunnen de goederen dier corporatie niet aan de leden, door wien zij bijdragen zijn, terug worden gegeven".[242] This ruling would prove to be a landmark as far as the legal subjectivity of churches was concerned (cf. chapter 6, *infra*).

3.6.5 Transvaal

3.6.5.1 The Zuid-Afrikaansche Republiek

The first congregation north of the Vaal River was founded on 26 March 1842 in Potchefstroom, shortly after the Volksraad chose the first church council. The congregations of Lydenburg (1849), Rustenburg (1850) and Zoutpansberg (1852) followed.[243] Numerous fruitless efforts to acquire the services of a fulltime minister led to a degree of despondency amongst the members, the only consolation being the occasional visit by ministers from the Cape.[244] This was perpetuated by a strained relationship with the Cape Synod which was unwilling to recognise the independence of the Transvaal Church. To further complicate matters, the British government insisted that the Voortrekkers living in the district north of the Vaal were still British subjects who fell under the jurisdiction of the Cape courts. This notion was fiercely contested by the Voortrekkers.[245]

In 1852 two Commissioners representing the British government met with Voortrekker representatives under the leadership of Andries Pretorius at the Sand River (halfway between Bloemfontein and the Vaal River) to negotiate and ultimately sign an agreement with the Voortrekkers guaranteeing them the right

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[241] At 5.
[242] At 6.
[243] Pont (1991:324-326).
[244] Moorrees (1937:758-760) relates how, on one of these visits, Rev. Neethling was very impressed by the hospitality of the members and the great need for an organised ministry. Neethling also had to discipline three members of the Church who had remarried while their wives were still living in the Cape.
[245] *Id.*:775; Storm (1989:91-101).

to rule themselves.[246] The Sand River Convention formed the basis for the establishment of a republican state north of the Vaal River, called the "Zuid-Afrikaansche Republiek" (ZAR) from September 1853. Storm (1989:101-102) is of the opinion that this event reinforced the idea of an independent church.

3.6.5.2 The arrival of Rev. Van der Hoff

The 1852 Cape Synod decided to incorporate the congregations into the Cape Church.[247] The struggle to find a minister for the Church in the Transvaal forced them to seriously consider this option.[248] The Volksraad, when it received a notice of the intention of a Dutch minister to join the Church, decided to put off a decision in this matter.[249]

On 1 July 1852, in Amsterdam, Rev. Dirk van der Hoff (1814-1881) signed an agreement with the Volksraad to come to the Transvaal as minister. He arrived at the Cape on 5 November 1852. He was admitted to the Church, although he refused to take an oath of allegiance to British authorities[250] after it had come to his attention that the Cape Ordinance could not be in force in the independent Republic in the north. In April 1853 Van der Hoff, his wife and newborn daughter left for the Transvaal via Natal. They arrived in Potchefstroom on 27 May 1853.[251]

Van der Hoff initially advocated the affiliation of the Transvaal congregations with the Cape Church. He did, however, progressively identify himself more with the struggle for an independent church in the ZAR. At a meeting of the church councils of Potchefstroom, Rustenburg and Zoutpansberg on 8 August 1853 at

[246] The Sand River Convention was signed on 17 January 1852 (Pont 1991:334).
[247] *Id.*:345. Moorrees (1937:779) shows that it was indeed the Transvaal Church that requested an affiliation with the Cape Church and that the latter reacted accordingly.
[248] According to the *Kerkbode* the Cape Church clearly considered the affiliation of the Transvaal Church completed: "De Transvaalsche Gemeente is op haar verzoek … in de Kerk dezer Volkplanting ingelijfd, en staat derhalwe onder het beheer der Synode" (Moorrees 1937:769, footnote 15). See, however, also *Loedolff and Smuts v Murray and Louw* (1862).
[249] It seems that the proposed adoption of Ordinance 7 of 1843 was the main issue of contention for the Volksraad who wanted the Transvaal Church to make "goede kerklijke regulatien" themselves. The church council of Potchefstroom supported this stance (Storm 1989:118). Cf. Moorrees (1937:776).
[250] Although Engelbrecht's (1936:115-116) view that ministers of the Cape NGK were compelled to take an oath of allegiance to the British government was challenged by Moorrees (1937:810-811), it would be fair to accept that at least an element of duress with regard to the request existed.
[251] Engelbrecht (1936:73-80); Moorrees (1937:772-773).

Rustenburg,[252] in what could be described as the first synodal meeting of the ZAR Church, integration with the Cape Church was unanimously rejected. From the minutes of this General Church Assembly it appears that the lack of fulfilment of the promise to provide a minister for the emigrants and the unwillingness to submit to the church laws of the Cape were the main reasons for this decision.[253] The meeting furthermore decided to recognise the "Nederduitsch Gereformeerde Kerk voor de eenige wettige Kerk" in Transvaal and that no other denomination was to be allowed to establish a church in the Republic.[254]

All the resolutions of the meeting were ratified on 22 November 1853 at Potchefstroom by the Volksraad and a second General Assembly (where Lydenburg was also represented).[255] While facing many more arguments over church government, Van der Hoff's efforts turned out to become even more difficult when Lydenburg affiliated with the Cape Synod in 1854. In 1856 Lydenburg declared an independent republic.[256]

3.6.5.3 The Constitution of the ZAR

On 5 January 1857 the Constitution of the ZAR[257] was adopted, which tacitly secured the close relationship that existed between the church and the state. At the same congress a flag was introduced and M.W. Pretorius was appointed as State President.[258] The amended Constitution of 1858,[259] article 20, stated:

> Het volk wil zyne Nederduitsch Hervormde Godsdienstleer, zooals deze in de jaren 1618 en 1619, door de Synode te Dordrecht is vasgesteld, in

[252] There was no representative from Lydenburg (Moorrees 1937:776).
[253] *Id*. See also Van der Hoff's unofficial report on the general assembly of 8 August 1853 as transcribed by Engelbrecht (1952:166-169).
[254] Moorrees (1937:776). It appears, however, that, in 1853, the name "Nederduitsch Hervormde Kerk" was already in use and confirmed in the 1858 Constitution (Engelbrecht 1952:165; Van Staden 1973:339).
[255] Engelbrecht (1936:95); Moorrees (1937:776-777).
[256] Engelbrecht (1936:91-113); Moorrees (1937:801).
[257] Full text found in South African Archival Records, Transvaal (vol. 3:439-471).
[258] Engelbrecht (1936:127-128).
[259] Full text found in South African Archival Records, Transvaal (vol. 3:496-524).

> hare grondbeginselen blyven behouden, en de Nederduitsch-Hervormde Kerk zal de kerk van den Staat zyn.[260]

According to the Constitution, Potchefstroom became the "hoofdplaatz" (main centre) of the Republic and Pretoria the seat of government.[261] But soon it was proposed that Pretoria should serve in both capacities. One of the reasons was that the General Assembly of the Nederduitsch Hervormde Kerk (NHK) was held there because of its centrality with regard to the congregations of the Church. This was a significant development concerning the role of the Church in the state-church relationship.[262]

The NHK was now the only church funded by the state and, in terms of article 22, no member of another church could hold any office in an official capacity.[263] The NHK had sole clerical power and authority in the Republic, and enjoyed full protection by the government. This protection became markedly evident when, in 1860, the Volksraad even passed a law as "Maatregelen van voorzorg tegen bedrog en misleiding by de uitbreiding van het Evangelie onder de Heidenen"[264] which stipulated[265] (*inter alia*) that the government had to be approached for permission for a missionary to enter the Republic (article 1); that the government had to give permission to erect a missionary station (article 3); and that missionaries were compelled to conduct themselves according to the Constitution (article 5). In addition, article 2 provided that all missionaries had to agree fully with the Heidelberg Catechism in accordance with article 21 of the Constitution which read:

> Het verkiest in zyn midden geen Roomsche kerken toe te laten, en ook geene andere Protestantsche, dan de zoodanige, waarin dezelfde

[260] South African Archival Records, Transvaal (vol. 3:498). In addition to article 20, article 23 stated: "Het volk erkent geen ander kerkelyk gezag, dan dat, wat door de kerkenraden zyner Nederduitsch Hervormde gemeenten is of wordt goedgekeurd, aangenomen en vasgesteld, volgens Art. 20" (*Id.*).
[261] Article 17 (*Id.*).
[262] Theron and De Wit (2010:4-5).
[263] South African Archival Records, Transvaal (vol. 3:498): "Het zal geen andere vertegenwoordigers in den Volksraad aanstellen, dan degenen die lidmaten der Nederduitsch-Hervormde gemeenten zyn".
[264] Notule van die Volksraad van die Suid-Afrikaanse Republiek, part IV (1859-1863), published in South African Archival Records, Transvaal (vol. 4:76).
[265] Full text found in Bylaag 48 (1860) (*Id.*:387-388).

hoofdsom van christelyk geloof geleerd wordt, als is opgegeven in den Heidelbergschen Catechismus.[266]

3.6.5.4 The church order of the NHK

Although "Kerklijke Wetten" were published in the *Staats Courant* of 28 May 1858, they were never ratified by the Volksraad. Under the heading "Over de wederzijdsche betrekking tussen Kerk en Staat" it stated: "Geen Gouvernement of wereldlijk bestuur heeft enige mag in de kerk, maar wel om de kerk."[267] This meant that the government had a duty to protect the Church and remunerate the ministers, but had no authority to interfere with the internal affairs of the Church.[268]

The first official church order of the Church in the ZAR, mostly resembling the 1858 "Wetten", was the *Reglementen voor het Nederduitsch Hervormde Kerk in de Zuid-Afrikaansche Republiek* of 1862. The Volksraad promulgated the *Reglementen* into law on 24 October 1863.[269]

The new church order was modelled after the *Algemeen Reglement* of 1824[270] (see 3.5.3, *supra*) and, to a lesser degree,[271] the church laws contained in Ordinance 7 of 1843 (see 3.5.5, *supra*) and showed notable similarities in style and content to the laws that were applied in the Cape in 1862. It has been criticised for bearing the same collegialistic approach as the regulations that were in force in the Cape Church, thereby departing from the pure Calvinistic presbyterial-synodal principles of church governance as found in the Cape Church before 1795 (see 3.2.3.3, *supra*).[272]

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[266] South African Archival Records, Transvaal (vol. 3:498).
[267] Geldenhuys (1951:68).
[268] *Id.*
[269] Notule van die Volksraad van die Suid-Afrikaanse Republiek, part IV (1859-1863), published in the South African Archival Records, Transvaal (vol. 4:220). Full text of the *Reglementen* is found as Bylaag 89 (581-608).
[270] Cf. Botha (1963:25ff.).
[271] It has also been argued that Ordinance 7 had a bigger influence on the *Reglementen* than the *Algemeen Reglement* (cf. Pont 1963:36). The latter, however, had, at least as far as the relationship between the church and the state is concerned, arguably a more significant influence on the *Reglementen*. The state's authority over matters of the state church was firmly established.
[272] Geldenhuys (1951:69); Pont (1963:42-47).

The *Reglementen* consisted of four separate collections of laws. The first, the *Algemeen Reglement*, stipulated that the Church would be managed by the church assembly, the general assembly and the commission of the general assembly.[273] The second and third were the *Reglement der algemene kerkvergadering voor de Kerkeraden* (dealing with the appointment and duties of church council members) and the *Reglement voor Kerkelyk Opzicht en Tucht,* respectively, with the fourth being the *Reglement op de Algemene Weduwenbeurs*. The relationship of the Church with the state was entrenched in article 41 ("Zy staat in onmiddelyk verband met den Volksraad"), supported by article 39 (which stated that all changes to the *Reglementen* were to be submitted to the Volksraad) and article 36 (which stipulated that any proposed change to the date of the meeting of the general assembly had to be reported to the Executive Council).[274] Botha (1963:35) reiterates that

> … die ou Transvalers geen neutrale Staat of die skeiding van Kerk en Staat wou hê nie. Hulle het die gesag van die Staat rondom die Kerk erken en het steeds op die beginsel van Artikel 36 van die Nederlandse Geloofsbelydenis gestaan, waarvolgens die owerheid die Kerk moes steun en beskerm.

Geldenhuys (1951:70) summarises the early legal position of the NHK in the ZAR as follows: 1. The Church was an organisation within the state with certain defined freedoms; 2. The governance of the Church was exercised on the basis of "demokratiese Volksregering" (democratic rule of the people); 3. The laws of the Church were dependent on the state's sanction; remuneration of ministers was undertaken by the state, etc.; 4. The Church was state church, and, for the sake of this privilege, had to be subordinate to the authority of the state in all instances.

[273] It seems that there was no need for a presbytery during these early years.
[274] See also Pont (1963:37-38).

3.6.5.5 The Gereformeerde Kerk

A church schism in the ZAR took place on 11 February 1859 when a number of members, led by Rev. Dirk Postma, broke away to form the (Vrye) Gereformeerde Kerk (see 3.6.4, *supra*).[275] When Postma had first arrived in the ZAR, he and Rev. Van der Hoff seemingly had a good relationship. Differing points of view caused the secession.[276]

Several historians are of the opinion that the break was primarily due to the permissibility of singing of hymns in church services.[277] Du Plooy (2003:489; 2004:14-15) considers this view to be deceptive and one-sided, asserting that the perceived deformation of doctrine, liturgy and discipline, combined with resistance against the collegialistic regulations and the departure from the Church Order of Dort (see 3.6.5.4, *supra*), played a role, as well as the desire to break free from government interference in church matters.[278]

In April 1859 an extraordinary meeting of the general assembly, called by the government in an attempt to prevent a separation, was held in Potchefstroom. The meeting had to deal, *inter alia*, with the question of whether Rev. Postma's church satisfied the requirements set by article 20 of the Constitution of the ZAR (see 3.6.5.3, *supra*).[279] The meeting answered this question as follows: "Dat de kerk door Postma gesticht op sich zelve beschouwd zou voldoen aan de vereisten van Art. 20 der grondwet".[280]

The church order that Postma had submitted, however, did not follow the Order of Dort very closely,[281] and was even considered as "geheel in stryd … met die van Dordrecht".[282] In 1862, at the Synod at Reddersburg, the Order of Dort was

[275] Du Plessis (1925:30-41).
[276] Engelbrecht (1936:155-160). Van der Linde (1978:60) quotes Postma, who, during a visit by Van der Hoff, emphasised that the church is a completely spiritual body that "in geenen deele afhanklik moet zijn in zijn werking en ontwikkeling van een fiat van de overheid, hoewel zij anders den kerk mag ondersteunen".
[277] Engelbrecht (1936:145); Van Staden (1973:365); Pont (1978:268); Theron and De Wit (2010:4-5). This notion was reportedly perpetuated by Rev. Postma himself (Moorrees 1937:813).
[278] See also Du Plessis (1925:30-41), Van der Linde (1978:52-56), and Smit (2013:130-131).
[279] Geldenhuys (1951:72).
[280] Du Plessis (1925:44).
[281] Geldenhuys (1951:72).
[282] Rev. Beyer, quoted by Du Plessis (1925:47).

accepted in totality as the church order of the Gereformeerde Kerk.[283] Therefore there were then two separate churches in the ZAR that both satisfied the provisos of article 20.

3.6.5.6 The second schism

In 1860 Utrecht (with Lydenburg) became part of the ZAR, although not yet part of the NHK. When Rev. F.L. Cachet became the minister of Utrecht in 1865, he disputed the name "Hervormd" (see 3.6.5.3, *supra*) (he insisted that the name "Nederduitsch Gereformeerd" be retained) at a meeting with the commission of the general assembly of the NHK on 26 June 1865. He showed discontent with the NHK's position as state church and also requested more information regarding the absence of the church's creed in the church order (see 3.6.5.4, *supra*).[284]

All these matters were reviewed at the General Assembly in November 1865, but the latter issue educed the liveliest debate. The meeting decided "dat de belijdenis onzer Kerk duidelik staat uitgedrukt in Art. 7 der Nederlandsche Geloofsbelijdenis".[285] Moreover, article 20 of the ZAR Constitution (see 3.6.5.3, *supra*) stated that the Church would follow the doctrine established by the Synod of Dort. As a result of the opposition against his arguments, Cachet declared that there was no prospect of the NGK of Utrecht joining the NHK and he vowed to establish as many congregations of the NGK as possible.[286]

Despite considerable resistance against his efforts,[287] the first general assembly of the NGK in the ZAR, held in December 1866 at Utrecht, was attended by

[283] Geldenhuys (1951:72).
[284] Moorrees (1937:807); Van Staden (1973:370-371); Pont (1978:282-284).
[285] Notule van die Algemene Kerkvergadering van die NHK, kerkargief van die NHK (K1/1). Cf. Moorrees (1937:807). Article 7 of the Belgic Confession states that the "Holy Scripture contains the will of God completely and that everything one must believe to be saved is sufficiently taught in it … Therefore we reject with all our hearts everything that does not agree with this infallible rule".
[286] Notule van die Algemene Kerkvergadering van die NHK, kerkargief van die NHK (K1/1). See also Moorrees (1937:808) and Van Staden (1973:372).
[287] One of the ongoing disputes related to the salary of Rev. Cachet, which was resolved when the Volksraad on 14 September 1866 accepted the following resolution: "(D)at geene gemeente in deze Republiek, die zich afscheidt of niet is vereenigd met de Staats-kerk zooals vervat in art. 23 der Grondwet, eenige aanspraak kan maken voor salaris op het Gouvernement dezer Republiek" (Notule van die Volksraad van die Suid-Afrikaanse Republiek, deel VI [1866-1867], published in South African Archival Records, Transvaal [vol. 6:35-36]). Cachet accused the NHK that they did not observe the spirit of articles 20 and 22 of the Constitution and, in turn, the NHK

representatives of eight congregations.[288] After the delegates had signed a declaration of unity, the relationship with the other two major churches in the ZAR, and with the state, was determined and a Church Law was accepted,[289] also shaped to the Order of the Cape Church. It therefore showed similar collegialistic traits in regulating the "management" of the Church.[290]

3.6.5.7 Church unification

Sir Theophilus Shepstone annexed the ZAR on behalf of Britain in 1877. After subsequent failed diplomatic deputations to London in 1877 and 1878, a revolt to reclaim the Republic in 1880 led to the First Transvaal War of Independence. The British relinquished control over the ZAR after they were defeated at Majuba in February 1881.[291] The regained independence under President Paul Kruger merited a new sense of unity amongst the citizens of the ZAR.[292] A union between the NGK and the NHK seemed feasible, if not inevitable.

Both the general assemblies of the NHK and the NGK met in November 1881 to discuss the possible unification.[293] Commissions representing both churches met on 31 October 1882 and the following days. After talks about the doctrine, practical issues and the relationship with the Cape Church had taken place, a heated debate ensued, mainly about the name "Hervormd".[294]

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accused Cachet of not complying with article 23. In January 1869 the conflict continued with the case of Hartbeestfontein before the Magistrate and Heemrade in Potchefstroom (Engelbrecht 1936:235-243).

[288] Moorrees (1937:809).

[289] Van Staden (1973:373-375).

[290] *Id.*:375-388.

[291] Engelbrecht (1936:298ff.); Van Staden (1973:391).

[292] Pont (1978:294). Coetzee (2006:151) notes how President Kruger attempted to regulate the church-state relation in the light of article 36 of the Belgic Confession. This seems remarkable as Kruger was a member of the Gereformeerde Kerk, which fiercely opposed the close relationship between church and state (see 3.6.5.5, *supra*).

[293] The general assembly of the NHK of 1879 had already accepted a resolution that stated "de vereeniging tusschen de Nederduitsch Hervormde en Nederduitsch Gereformeerde Kerken wordt beschouwd als wenschelijk" and took note "dat de Nederduitsch Gereformeerde Kerk dit ook als wenschelijk beschouwt" (Notulen van de Algemene Kerkvergadering van die NHK [1879:15]). Cf. Kotzé, C.J., in *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (1893) (at 76) (see also 3.6.5.10, *infra*).

[294] Engelbrecht (1936:318-326); Van Staden (1973:392).

With the exception of the NHK "Konsulentsgemeente" Pretoria[295] (Witfontein) (see 3.6.5.8, *infra*), all the congregations of the NGK and the NHK merged on 7 December 1885 to form one united church in the ZAR under the compromised name "Nederduitsch Hervormde of Gereformeerde Kerk" (NHGK) and a church order for the new Church was accepted.[296]

With regard to the relationship of the church with the state, the Volksraad accepted the following resolution in May 1886:

> Was in vroegere jaren de band van den Staat tot de Nederduitsch Hervormde Kerk een andere, het is de wensch des Volks geweest hierin verandering te brengen en de Volksraad heeft dien wensch moeten eerbiedigen. Staat het derhalve nu niet langer in de magt van den Volksraad aan eene der kerken het voorregt te verleenen om te zijn de kerk van den Staat, onveranderd blijft echter de verplichting van den Staat om alle vroegere aangegane verbintenissen tegenover personen, zooals salarissen te handhaven.[297]

With this decision all formal ties between the former NHK and the ZAR government were severed and there was no longer a state church.

3.6.5.8 Resistance to the unification

It soon became evident that there were a substantial number of members of the NHK who opposed the unification. At a general meeting in April 1886, the Konsulentsgemeente decided "geen afstand te willen doen van de Nederduitsch Hervormde Kerk, en al die regten daaraan verbonden ... (en) te zijn en te blijven leden van de Nederduitsch-Hervormde Kerk in de Zuid-Afrikaansche Republiek, met al derzelver regten daaraan verbonden, zooals dezelve zijn vasgesteld bij artt. 20 en 24 der Grondwet en by de wetten en bepalingen der Ned. Herv.

[295] The Konsulentsgemeente was a second NHK congregation in Pretoria with a centre of assembly at Witfontein and, in 1886, also at Rhenosterpoort. It was founded as a separate congregation when it broke away from Pretoria because of irreconcilable differences between Rev. Begemann and several of the members of the Pretoria congregation (Engelbrecht 1936:273-275). The congregation was not represented at the unification meeting.
[296] Botha (1961:9); Van Staden (1973:391-395).
[297] Geldenhuys (1951:73).

Kerk".[298] At the same meeting the congregation was renamed "*De Nederduitsch-Hervormde Gemeente der Zuid-Afrikaansche Republiek, district Pretoria*".[299] This was meant to indicate their intention to preserve the NHK in the ZAR.

Disagreement and even severe conflict regarding the name-issue and doctrinal matters, as well as property disputes, subsequently ensued. At Zeerust the dispute over church property in 1890 had to be adjudicated by the Magistrate's Court. Acting magistrate, J.S.N. Hugo, on information by Rev. Van der Spuy of the NHGK, issued a warrant of arrest for trespassing against members of the NHK. The ZAR government interfered eventually and the NHK kept the building, while the NHGK kept the parsonage and built a new church with assistance from the government.[300]

Rev. M.J. Goddefroy accepted a call to the NHK in 1887, and served the combined congregations of Pretoria, Middelburg and Standerton. As the only minister of the Church, he also served the other nine existing congregations, including Zeerust, in a supportive role,[301] as consulent.[302] In 1890 his treatise, *De Kerkkwestie niet een Leer- maar een Levenskwestie*,[303] was published as a reply to the accusations of theological liberalism in letters in *De Volkstem* by one of the fiercest proponents of the unification, Rev. H.S. Bosman, and helped to abate the tension that resulted from the resistance to the unification.

3.6.5.9 The Procuration Commission

In the meantime a second movement opposing the unification started to take form. Four elders of the NHK, led by N.M.S. Prinsloo and A.D.W. Wolmarans, approached the Transvaal High Court for a rule *nisi*,[304] calling upon the NHGK to show cause why an order of the court should not be issued prohibiting it or any

[298] Notule van die Kerkraadsvergadering van die Konsulentsgemeente (NHK) (23 April 1886) (kerkargief van die NHK, Pretoria [G10 1/1/1]).
[299] *Id*.
[300] Engelbrecht (1936:369-375).
[301] Goddefroy (1890/1991:28).
[302] A consulent is a "visiting officiating minister" (*Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* [1893] [footnote at 79]).
[303] Translated into Afrikaans by Botha (1991) as *Die Kerkkwessie nie 'n leer-, maar 'n Lewenskwessie*.
[304] A rule *nisi* is an order from a court to show cause, the absence of which will render the rule absolute.

of its officials from mortgaging, alienating, or transferring any properties belonging to the NHK, pending an action to be instituted.[305]

This rule operated as a provisional restraining interdict. In their petition the plaintiffs stated, *inter alia*, that, as members of the NHK, they had an interest in the church properties of the NHK and they represented "many hundreds of members" of the NHK.[306] Furthermore, they contended that the general assembly of the NHGK refused to recognise the conditions and regulations of the union (notably regarding the fixing of the name to be either "Hervormde" or "Gereformeerde"), and that they were thus not entitled to transfer fixed property that was vested in respective "Kerkeraads".[307]

In his answering affidavit, Rev. Bosman (assistant secretary of the NHGK) asserted that the applicants had no right to the claim as they were all members of the NHGK, and that the NHK and NGK had both ceased to exist as separate bodies or legal persons.[308] To this C.J. Joubert replied that

> it is untrue that the 'Hervormde' Church does not exist any longer, as alleged by Mr. Bosman. On the contrary, congregations of that Church still remain who have never taken any share in the so-called amalgamation … and that the (NHK) still exists with its own general synod, of which deponent is the secretary and the Rev. Mr. Goddefroy is the chairman.[309]

The court, in delivering judgment on 5 August 1890 by Kotzé, C.J., and Esselen, J., set the rule *nisi* aside upon the ground that either "the Hervormde Kerkeraad agreed to the transfer", in which case an interdict against their "Kerkeraad" should be sought, or "did not agree" in which case there would be no ground for an interdict.[310]

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[305] *Prinsloo and Others v Nederduitsch Hervormde or Gereformeerde Church* (1889).
[306] At 220.
[307] At 221.
[308] At 222-223.
[309] At 224.
[310] At 225.

Despite the failed application, the right of a church council to refuse transfer was recognised. On these grounds a Procuration Commission[311] was introduced that acquired power of attorney from former members of the NHK to act on their behalf to protect their rights. N.M.S. Prinsloo and A.D.W. Wolmarans were appointed as chairman and secretary, respectively, of the Commission.[312]

3.6.5.10 The *Trichardsfontein* case

While the number of members represented by the Procuration Commission grew to more than a thousand, the NHK congregation of Standerton (Trichardsfontein) summoned the NHGK congregation of Standerton to reclaim the church building at Trichardsfontein and other church properties. The Transvaal High Court heard the case in 1892 and gave judgment on 5 June 1893.[313]

Lengthy arguments were advanced on the facts and evidence in the case. On behalf of the plaintiffs (the NHK was represented by Rev. Goddefroy, joined by four elders and four deacons), it was submitted that the plaintiff Church had not concurred with the union and had therefore never lost its independent existence. The plaintiff's counsel relied on the church's character as a *universitas.*[314] Furthermore, it was argued that the donation of the piece of land upon which the church buildings were erected (Trichardsfontein) was made in 1882, and that it was made expressly to the NHK. On 31 March 1889 transfer of the land took place in terms of the donation to the consistory[315] of the NHK, as trustee for that congregation. The fact that transfer took place after the unification was taken as proof that the donor had made the presentation, and still wished to make it, to the NHK and not to the NHGK. Kleyn, counsel for the plaintiffs, concluded that: "(t)he action of the *Kerkeraad* as trustee for the congregation could not bind the

[311] A proxy with power of attorney.
[312] Engelbrecht (1936:376-399); Pont (1978:308).
[313] *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (1893).
[314] See *Venter, Joubert, De Wet and Andere v Den Kerkeraad der Gereformeerde Kerk Bethulie* (1879) (3.6.4.2, *supra*) where it was confirmed that a church is a *universitas* (as opposed to a *societas*) that continued to exist as a legal person for as long as even only one member remained. See also chapter 6 (*infra*).
[315] The court considered the terms "kerkeraad", "church council" and "consistory" to be interchangeable synonyms.

congregation as regards the transfer of the church property to the union".[316] The case of *Merriman v Williams* (see 3.5.6, *supra*) was cited.

Counsel for the defendants denied that the principles of a *universitas* applied in this case, and furthermore contended that the general assembly, as the supreme controlling body of the NHK, approved of the union.[317]

The court, in its judgment, directed the defendants, "within one month, to put the plaintiffs into possession of the church building at Trichardsfontein, and also deliver up to them all the church books and other goods in the defendant's possession".[318]

Kotzé, C.J., gave detailed reasons for his judgment. Following the same basic line of reasoning as the court in *Venter, Joubert, De Wet and Andere v Den Kerkeraad der Gereformeerde Kerk Bethulie* (1879) (see 3.6.4.2, *supra*), referring to the nature of a *universitas*,[319] the chief justice reiterated that, if there were any members of the NHK congregation who did not concur with the union, they would be constituting the Hervormde congregation of Standerton, and therefore entitled to the ownership of the land at Trichardsfontein. The original two Churches' existence could therefore only be terminated by the consent or acquiescence of each individual member of the two separate bodies.[320]

It was held that the general assembly only had authority to bind the minority to that which came into the scope and object of the "corporation", but the act of dissolution by a resolution to unite it with another would be *ultra vires*. No member could be compelled to join the union, "however desirable and praiseworthy the union may happen to be".[321] The court accepted that there were members of the NHK Standerton who indeed had never consented to the

[316] At 73.
[317] *Id.*
[318] At 74.
[319] In his judgment Chief Justice Kotzé (at 82) quoted from Ulpian's Digest to explain the nature of the *universitas*: "*Sed si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, cum jus omnium in unum reciderit, et stet nomen universitatis*".
[320] At 82.
[321] At 82.

union and were always opposed to it. They were considered to have continued to constitute the NHK congregation of Standerton.[322]

Morice, J., even though he concurred with the judgment of the chief justice, was nevertheless relentless in his criticism levelled at the plaintiffs, stating that he believed "that by their conduct they have wrecked a useful movement".[323] In his judgment, though, he raised an interesting observation when he accepted that the right to dispose of church property rested with the congregation, and not with the general assembly. As the immovable property was registered in the name of the congregation, and not in that of the Church as a whole, an "obstinate minority of the congregation, however small it be, may defeat the best intentions of the congregation when it comes to a question of the disposal of church property".[324] The onus of proof rested on the defendants to prove that full consent was given for the amalgamation, and this proof was absent. Justice Morice came to the same conclusion as the chief justice, without referring to the *universitas* principle.

In 1895 the Supreme Court confirmed the ruling[325] when it held that it had not been shown that all the members of the NHK of Rustenburg had consented to join the union (or had been informed of all the particulars of the union), and were thus entitled to all the property of the NHK of Rustenburg. The court ruled that silence is not always equivalent to consent: "Only when it is one's duty to speak out is one bound by one's silence".[326]

The *Rustenburg* decision was cited in an Eastern Districts Court judgment in 1902, as legal precedent in an analogous case.[327] There the plaintiff had seceded from the African Methodist Episcopal Church and the court found that

[322] Regarding those members who at first concurred to the union and subsequently withdrew from it, it was decided that, in terms of the legal principle of *volenti non fit injuria*, no person is allowed to go behind his own act and seek to avoid the natural consequences thereof (cf. *Merriman v Williams* [1880]). If, however, they were to join the ranks of those who originally objected and remained independent, they were even within their rights to represent the NHK congregation of Standerton, which indeed happened (at 83).
[323] At 88.
[324] At 87. See also 7.5 (*infra*).
[325] *The Nederduitsche Hervormde Congregation of Rustenburg v The Nederduitsche Hervormde or Gereformeerde Congregation of Rustenburg* (1895).
[326] Quoted from the summary of the case, published in *The Digest of the Cape Law Journal* (vol. 1-17) (1901:88-89).
[327] *Dwane v Goza and Others* (1902).

he could not claim church property as against members of the old congregation who had declined to join his movement. In addition to the *Rustenburg* case, Justice Sheil also referred to the situation in America where a number of similar cases were presented before the courts and it had been held "that in disputes of this nature those members of the original congregation who adhere to the order of their church, although they may form a minority, are the true congregation, and are entitled to the church property".[328]

3.6.5.11 The judiciary in the ZAR

3.6.5.11.1 Before the war

According to the Constitution of the ZAR, the judiciary would comprise magistrates, "heemrade" and jurors (article 127). The Constitution did not state which legal system was to be applied, but three *Bijlages*, issued in September 1859, ordered that the "Hollandsche Wet" would prevail, meaning primarily Roman Dutch law.[329]

In 1877 President Burgers signed a constitutional amendment in terms of which the administration of justice would reside in a Supreme Court, consisting of three judges, a circuit court, and magistrate's courts. A young Grahamstown advocate, J.G. Kotzé, was appointed as chief justice.[330]

The first action heard by the Supreme Court in the Transvaal involving the Church appears to have been the case of *Jacobs NO v Celliers* in 1889. This was an argument on an exception taken to a summons issued by one Jacobs on behalf of the consistory of the Dutch Reformed Church at Pietersburg against one Celliers. The latter excepted that Jacobs had sued only as deacon, but did not possess a power of attorney from the consistory. Referring to, *inter alia*, the *Bethulie* case (see 3.6.4.2, *supra*), the court allowed the exception, with costs.

Shortly after the cases mentioned in 3.6.5.9 (*supra*) and 3.6.5.10 (*supra*), the efforts of the colonial secretary, Joseph Chamberlain, and the British high

[328] At 18. Cf. 7.5.2 (*infra*).
[329] Notule van die Volksraad van die Suid-Afrikanse Republiek, part IV (1859-1863), published in South African Archival Records, Transvaal (vol. 4:303ff.).
[330] Ellis (2010:48). See 3.6.5.10 (*supra*), for Chief Justice Kotzé's judgment in the *Trichardsfontein* case.

commissioner, Sir Alfred Milner, to remove President Kruger and his government, resulted in the Second Transvaal War (Anglo Boer War, 1899-1902). This caused considerable disruption of the church, as well as the judiciary.[331]

3.6.5.11.2 <u>After the war</u>

After the war the Transvaal became a Crown Colony and many Cape officials in the Law Department were sent to the Transvaal to establish a new judicial system there. The statutes they prepared were based largely on Cape models, and in turn these statutes became the basis for the organisation of courts and rules of evidence and procedure adopted by the whole of South Africa after unification.[332] Both the Transvaal Supreme Court (Pretoria) and the Witwatersrand High Court (Johannesburg) were established. According to Proclamation 14 of 1902, Roman Dutch law would still be in force, but it was inevitable that English influences would lead to a gradual assimilation of the English legal system.[333]

During the years between the war and the unification of South Africa, churches appeared to be reorganising and restoring their church buildings. After 1902 no established church in South Africa enjoyed preferential treatment.[334]

Few cases involving church law came before the bench. In 1905 the Ebenezer Congregational Church, which had been duly incorporated in the Transvaal under the Societies and Associations Incorporation Ordinance (56 of 1903), applied to have transfer of three stands in the mining district of Johannesburg passed and registered in the corporate name of the Church.[335] The Registrar of mining rights refused on the ground that two of the trustees were "coloured persons".[336] Innes, C.J., held that the Ordinance did not discriminate between

[331] Engelbrecht (1936:416); Zimmermann and Visser (1996:18).
[332] *Id.*; Sachs (1973:52).
[333] Zimmermann and Visser (1996:18); Van Zyl (1983:465).
[334] Du Plessis (1996:445).
[335] *Ebenezer Congregational Church v Registrar of Mining Rights* (1905).
[336] At 165. Section 133 of the Gold Law (15 of 1898) provided that "no coloured person may be license-holder, or in any way be connected with the working of the diggings, but shall be allowed only as a workman in the service of whites" (quoted by M. Nathan [for the respondent], at 166)

societies composed of white or coloured persons and that the applicant was therefore entitled to the transfer and registration of the properties.

In 1908 the Transvaal Supreme Court heard its final case involving church matters before the unification of South Africa. In *Cassim v Molife*[337] the appellant failed to prove that property (attached in execution) of the St. Samuel's Congregation (in Klipspruit, district of Krugersdorp) belonged to its umbrella organisation, the African Mission Society, which he alleged was a *universitas*. Innes, C.J., applied two tests, laid down by *Webb & Co., Ltd v Northern Rifles* (1908), to determine whether the Society was to be considered a *universitas*: the power to hold property apart from its members, and the right of perpetual succession (see also 6.7, *infra*). The court held that the Society was not a *universitas* and that the property belonged to the congregation.[338]

While using the example of monasteries as portions of the Roman Catholic Church (and agreeing that there are many other examples of the same kind), which are spoken of as being *universitates*, Mason, J., agreed that the appeal should be dismissed. He did, however, contend that although the Roman Catholic Church in his example did not own the monastery in the sense of private ownership, it did have certain rights. He unfortunately failed to elaborate on these rights (and to note how these would differ from the rights of a *universitas*), except to mention that ownership of churches themselves was not embraced.[339]

3.7 The Union of South Africa

3.7.1 Formation of the Union

The Union of South Africa came into being on 31 May 1910 with the unification of the four former separate colonies. The Union of South Africa was formed as a self-governing British Colony by virtue of the Union of South Africa Act (1909),

[337] An appeal from a decision by the assistant resident magistrate of Krugersdorp.
[338] The question whether the congregation was a *universitas* was not considered in this case, as Solomon, J., argued that "(i)f it formed a *universitas*, it follows that the building would *prima facie* be the property of the *universitas*. If it did not, then the building would be the property of the individual members who put it up" (at 754). The building would thus never become the property of the Mission Society.
[339] Mason, J., seems to have contradicted himself on this point for he had earlier noted that "(i)t seems to me quite possible for there to be a *universitas*, such as the African Mission Society, constituted by congregations, but not, so to speak, owning the congregations" (at 755).

governed under a form of constitutional monarchy with the British monarch represented by a governor-general. The British parliament enacted the Union of South Africa Act which, *inter alia*, resulted in judicial unity when the separate supreme courts of the four territories were fused into a single Supreme Court of South Africa, divided into provincial divisions, and further supported by the founding of the Appeal Court in Bloemfontein. Modelled after the unwritten Westminster Constitution it contained no bill of rights and expressly excluded the power of the courts to review the validity of any law passed by parliament. The central legal principle in the Union was the doctrine of parliamentary sovereignty, and by logical extension, judicial subordination to the will of the parliament.[340]

3.7.2 The position of the church and the state, 1910-1961

Major events after 1910 that influenced the church in South Africa included two world wars, the 1948 victory of the National Party and the 1960 Cottesloe deliberation. Although officially there was separation between church and state, close collaboration between the church and the state was evident in the political sphere. This was apparent from the efforts of the government to gain support from the (not unwilling) church for the enactment of certain legislation. Some of these acts were racially based, for example, the Mixed Marriages Act (1949), the Population Education Act (1950), and the Group Areas Act (1950). Other laws were made to protect Christianity.[341]

The revoking of Ordinance 7 of 1843 stands out though as an event of major importance in church law and the relationship between the church and the state. Despite the good intentions of the government at the time, Ordinance 7 never resulted in juridical freedom for the church in the Cape. Kleynhans (1974:80-96) shows how the Ordinance was rather a restricting factor in the relationship between the church and the state. On Monday, 21 October 1957, on the advice of the Permanent Legal Commission, the Cape Synod took the following decision:

[340] See the Union of South Africa Act (1909). See also Sachs (1973:130), Van Zyl (1983:476), Dugard (1990:442), and Zimmermann and Visser (1996:18).
[341] Kuperus (1996:846-847); Oliver (2008:102-103).

> Die Nederduitse Gereformeerde Kerk in Suid-Afrika verklaar en bevestig hiermee sy volgehoue historiese standpunt dat hierdie Kerk, as georganiseerde liggaam, steeds in eie kring 'n selfstandige bestaan gevoer het, hoewel noodwendig onderhewig aan wetteregtelike bepalings wat van owerheidsweë van tyd tot tyd op die Kerk van toepassing verklaar is. Aangesien die bestaan van die Kerk dan nie van sodanige wetteregtelike bepalings afhanklik is of daarop gevestig is nie, besluit die Sinode hiermee dat dit aan die Moderatuur opgedra word om in die reses, ooreenkomstig regsadvies, die aangewese owerheidsinstansies te beweeg om die tersake wetteregtelike bepalings, nl. Ordonnansie 7 van 1843 en latere wetgewing wat dit wysig, te herroep.[342]

On 3 March 1961 the House of Assembly finally revoked Ordinance 7 of 1843.[343]

Regular synodal meetings were held by the NHK, NGK, and GKSA and membership continued to rise. Many scholars view this period as one of privilege for the traditional Afrikaans Churches.[344] Since 1902, however, there had been no established church in South Africa enjoying preferential treatment. According to Du Plessis (1996:445) statutory provisions relating to the church and enacted since the unification made no attempt to favour any denomination, nor did they detract from the internal sovereignty or autonomy of churches. Du Plessis does not elaborate on the extent to which churches were autonomous and free to regulate their own affairs internally. This would be revealed by the way the judiciary viewed the church through official court reports.

3.7.3 An overview of relevant court cases between 1910 and 1961

3.7.3.1 The Cape

3.7.3.1.1 The first two decades

The first "church" case before the new Cape Provincial Division (CPD) of the Supreme Court of the Union of South Africa was an action for the appointment of

[342] Handelinge van die 33ste vergadering van die Hoogeerwaarde Sinode van die NGK, fourth session (1957:42).
[343] Kleynhans (1974:95-96).
[344] Cf. Oliver (2008:102).

trustees to the Pniel Mission Institute in 1911.[345] The court established a governing body for the mission and made further provision to ensure a perpetual succession in the trusts confided to that body.

In 1912, in *Ex parte Reeve*, application was made for an order authorising the management of the St. George's Cathedral to amend the register of baptisms kept therein (since the records in question were incomplete) and to issue a certificate of baptism to the applicant.[346] As in *Ex parte Tyler* (1902) (see 3.5.6, *supra*) the court refused to interfere, in the same way as in the case in *Robyn v Blankenberg* (1917).[347] In the latter case, although *Ex parte Tyler* (where it was held that a baptismal record was not a public record) was not cited in the judgment, Juta, J.P., noted that he was not aware of any legislative enactment compelling the issue (or even registration) of baptismal certificates.[348]

The NGK's first involvement in the CPD was an appeal from a decision in the Magistrate's Court at Lady Grey in 1916.[349] By a resolution of the consistory of the NGK (Lady Grey) on 16 December 1915 the finance committee was authorised to take legal proceedings in the name of the consistory. When action was taken in their own name, the defendant in the court *a quo* took exception which was dismissed. On appeal the CPD allowed the exception in view of the extract from the minutes of the consistory and on the grounds that there was no evidence that, by the rules of the Church, the finance committee was entitled to sue in its own name. Action had to be taken in the name of the consistory. This was decided notwithstanding section 6 of Act 23 of 1911[350] which provided that persons in the NGK who were vested with the administration of any funds were

[345] *De Wet and Another v Marais and Others* (1911).
[346] The applicant had to show a certificate of baptism before he could take up an appointment as Public Prosecutor at Nylstroom, Transvaal – an odd occurrence since there was no established church in the Union (cf. Du Plessis 1996:445). Maasdorp, J. (at 195), indeed doubted that the position to which the applicant was appointed could be made to depend upon the presentation of a baptismal certificate.
[347] An appeal from a decision in the Magistrate's Court at Paarl.
[348] At 283-284.
[349] *Oelsching v Finance Committee Dutch Reformed Church, Lady Grey* (1916).
[350] The section stated: "It shall be lawful for the person or persons in whom, by the laws, rules and regulations of any of the said uniting churches respectively for the time being the possession or administration of any buildings, lands, funds, monies, goods or effects belonging to any congregation or Presbytery or to the Synod or General Assembly shall respectively be vested, to sue and be sued in all actions and suits relating to any matter or thing by any such officer or officers respectively possessed or administered as if the same were his or their private property" (at 173).

entitled to sue. It is noteworthy that the CPD attached a greater weight to the resolution of the consistory than to the statutory provisions in this case.

Gardiner, J., in *Lakey v Paarl Congregational Union Church* (1917), in a similar fashion defined the court's position regarding spiritual privileges when he stated: "I can hardly conceive the Court ordering a pastor to administer to a person holy communion, or directing a minister to baptise a child".[351] This was after the plaintiff claimed that the minister, deacons and members of the financial committee of the Paarl Congregational Union Church had wrongfully removed his name from the roll of members of the Church. He insisted on an order stating that he was still a member of the Church and entitled to all privileges appertaining to such membership, or alternatively an order compelling defendants to repay him the amounts contributed by him to the funds of the Church.

The plaintiff stated further in his evidence that the deacons and financial committee represented the congregation and that their authority to do so was conferred upon them by the congregation. This was supported by a document headed "Principles of Church Order and Discipline",[352] ironically submitted by the defendants themselves. Having been led by the Church rules once again, the court held that the defendants in this matter were the proper persons to be sued.[353] The court nevertheless allowed the defendants' exception to the plaintiff's declaration on the grounds that it was "vague, embarrassing and bad in law" as well as "disclosing no cause of action".[354]

Ordinance 7 of 1843 (see 3.5.5, *supra*) was tested for the first time in the CPD in 1922. In *Bredell v Pienaar and Others* the applicant claimed, *inter alia*, an order setting aside proceedings of the church council of the NGK at Somerset West and the presbytery of Stellenbosch in connection with a charge of immorality made against the applicant. The church council on 4 October 1920 pronounced

[351] At 630.
[352] The document in question stated that to the pastors and the deacons "as the officers of the church, is committed respectively the administration of its spiritual and temporal concerns, subject, however, to the approbation of the church" (at 629).
[353] Cf. *Oelsching v Finance Committee Dutch Reformed Church, Lady Grey* (1916) (*supra*).
[354] At 629.

that it was “onmogelijk de heer J. Bredell schuldig of onschuldig te verklaren”.[355] This was an odd outcome as a verdict of not guilty would be the reasonable judgment in a disciplinary hearing where there is clearly no preponderance of probabilities either way.

Geldenhuys (an elder and the original complainant) appealed against this ruling to the presbytery who followed the advice from their Law Commission that “de heer J. Bredell schuldig verklaard zal worden aan de zonde van ontucht met Rachel Nimb en dus onderhewig aan censuur door den Kerkraad, Art. 351 and Art. 343”.[356]

The first respondent objected to the jurisdiction of the CPD by virtue of Ordinance 7 of 1843 and he contended that the application to the civil court was premature as he had not exhausted[357] all his remedies (i.e. his right of appeal to the synod). In his judgment Watermeyer, J., disagreed with both contentions on the ground that the NGK is a voluntary association and in terms of section 8 of Ordinance 7 its rules and regulations should be regarded as the rules and regulations of a voluntary association. Although those rules gave the church council, presbytery, and synod power to act as courts, such trials had to be conducted according to the rules of the Church, and if the rules were not observed the court would interfere.[358]

A further objection was raised, namely, that censure was only a spiritual punishment and did not involve the right of property, excluding the court’s jurisdiction. Justice Watermeyer also disagreed with this contention and showed how a person could suffer pecuniary loss as a result of the censure.[359]

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[355] An extract from the minutes of the meeting of the church council (Somerset West) on 4 October 1920 (quoted at 579).
[356] An extract from the minutes of the meeting of the ring (Stellenbosch) on 12 October 1921 (quoted at 580).
[357] Cf. the discussion of *De Waal and Others v Van der Horst and* Others (1918) (3.7.3.4, *infra*).
[358] At 581-582. Cf. 3.5.5 (*supra*) and the application of sections 8 and 9 in *Kotzé v Murray* (1864), *Burgers v Murray and Others* (1865), *Weeber v Van der Spuy* (1854), and *Long v Bishop of Cape Town* (1863).
[359] At 583.

He subsequently dealt with the conduct of the church council, the absence of a formal trial, and the absence of a definite judgment.[360] It was the absence of a formal charge (and failure to provide the applicant with particulars of the charge), however, that drew the fiercest criticism from the court, for it was not only a breach of church rules, but "also opposed to ordinary ideas of justice".[361]

The proceedings before the church council were therefore set aside and declared null and void, as were the proceedings before the presbytery, but the latter on other grounds. The court found it highly unusual that Geldenhuys, being a member of the church council, could appeal the outcome and that the appeal was decided against the applicant without his being given any opportunity of being heard. The whole of that procedure was ruled to be against the letter and spirit of the church regulations and against every principle of justice.[362]

Ten years later, in a another judgment, Justice Watermeyer reiterated that a person charged before a committee of enquiry of a church (duly set up by the church as a voluntary association by virtue of its rules) must be given a fair trial, including being informed of the charge and afforded a fair opportunity of preparing a defence.[363] This was when a minister of the African Methodist Episcopalian Church who had been found guilty of impregnating a young girl had approached the court for an order to set the proceedings of the committee aside.

During the trial it became clear that there was no evidence before the committee which would have been accepted in a court of law as proof against the applicant. Surprisingly Justice Watermeyer subsequently noted that the committee, not being a court of law, was not bound by the rules of evidence and even "entitled

[360] As there were no records of the proceedings of the church council before the court, no finding could be made regarding the serious allegations of the breach of the principles of natural justice (see footnote 149, *supra*). As it is trite that these principles form part of the rules of any voluntary association, thus also the rules of the church, their breach, if it had been proved, would have warranted interference by the court.
[361] At 585. Justice Watermeyer cited several cases where the courts have interfered in similar instances. He also lamented the fact that the respondent alleged that the absence of a definite charge did not prejudice the applicant, but failed to discharge the onus to prove it.
[362] At 586. The term "every principle of justice" referred to would probably include the "ordinary ideas of justice" as well as the principles of natural justice that were clearly breached in the appeal. See also 7.4.3 (*infra*).
[363] *Abrahamse v Phigeland and Others* (1932).

to pay attention to gossip".[364] The question he considered was not whether the committee was wrong in its conclusion, but whether there were any grounds upon which the court could interfere. He found none as the committee had not contravened the church rules, a "fair trial" took place, and it had not acted *mala fide*.

In 1924, an application, for an order allowing transfer of certain property of the Roman Catholic Church into the name of the bishop on behalf of the central prefecture of the Province of the Cape, was heard by the court.[365] Gardiner, J., refused the application after he noted that the system of government of the Roman Catholic Church vested all church property primarily in the pope, and that proof that he consented to registration of the said properties in the name of the applicant was absent.

In 1929 the court heard a dispute over a minister of the Presbyterian National Church of Africa who attempted to make an application on behalf of that Church. The court ruled that, in the absence of a resolution by the church council authorising the minister, he had no *locus standi* to make an application on behalf of the congregation he proposed to represent.[366]

3.7.3.1.2 Doctrine before the CPD

The first case involving doctrinal matters before the CPD[367] was heard when charges of heresy were made by the curatorium of the Theological Seminary at Stellenbosch against Professor J. du Plessis, a minister of the NGK and professor at the Seminary.[368] The commission of the presbytery of Stellenbosch

[364] At 199. Cf. *Lucas v Wilkinson and others* (1926) (at 19). See also *Odendaal v Kerkraad van die gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en andere* (1960), notably Justice Potgieter's quote from article 188 of the Kerkwet in force in the NGK (Orange Free State) in 1960: "Lede van kerkvergaderings is ampshalwe verplig om kennis te neem van verspreidende nadelige gerugte, ook wanneer daar geen bepaalde klag voor hulle gebring word nie" (at 170).

[365] *Ex parte Central Prefecture of Cape of Good Hope* (1924).

[366] *Presbyterian National Church of Africa v Vumazonke and Others* (1929). This ruling was despite the fact that it was stated, in supporting affidavits, that the church council joined in the application. Only eight of the twelve members, however, joined in support of the application. The court left the impression that, if the application was jointly and unanimously made, it would have been considered, even in the absence of an official resolution.

[367] See *Die Kerksaak tussen Prof. J. du Plessis en die Ned. Geref. Kerk in Suid-Afrika* (1932).

[368] Among other accusations, Prof. Du Plessis was accused of teaching (contrary to the "Leer van die Kerk, soos uiteengesit in die Formuliere van Enigheid") that the Bible was not inspired unerringly in its entirety and therefore had no absolute authority, that the first five books in the

(at a meeting in June 1928) and a meeting of the presbytery both dealt with the complaint in terms of the church order and found no grounds for an indictment against the plaintiff. On appeal (in October and November 1928), however, the synod decided that there were sufficient grounds for the drawing up of an indictment, and referred the matter to the presbytery to frame this and to hear the case. The presbytery heard the case and Du Plessis was acquitted on all the counts. The curatorium appealed against this verdict to the synod which (in March 1930) convicted the plaintiff on all counts, and, as he refused to submit to certain conditions, deprived him of his status as a minister and dismissed him from his post at the seminary.[369] Thereupon the plaintiff approached the CPD for relief.

Before the actual case was heard the proceedings of the church tribunals came under scrutiny in *Du Plessis v The Synod of the Dutch Reformed Church* (1930). The declaration before the court alleged a number of irregularities in the proceedings. One of these was that the curatorium acted *ultra vires* in appearing as complainants from the beginning.[370] The defendant's exception to this declaration on the grounds that the curatorium should have been joined as a party was disposed of as the curatorium was not a party to any contract with the plaintiff.[371]

The declaration went on to state that if the court should find that there were no irregularities, the plaintiff would say that the words imputed to him were not in conflict with church doctrine (as defined by statute)[372] and that the decision of the synod was consequently "unlawful, unfair and unjustified".[373] The defendant also made exception to this statement, attacking the court's jurisdiction in the matter. This exception was also dismissed. According to Gardiner, J., in an action based on an agreement between a voluntary association (such as a

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Bible did not originate with Moses *in toto*, and that he denied the divine nature of Christ. The issues were arranged in three basic categories: "Inspirasie, Hoër Kritiek en Kenosis" (see *Id.*:5-24) (also see Geldenhuys' [1982:3-11] personal reminiscences of the case and the period after the saga).

[369] Facts as set out by Gardiner, J., from the declaration (at 410-411).

[370] At 411.

[371] At 404-405 and 412ff. The curatorium does not suspend or dismiss professors and they cannot sue or be sued. "No person can be a defendant unless the plaintiff claims damages from him, or some relief or the enforcement of a right against him" (Halsbury, quoted at 413).

[372] Section 6, Ordinance 7 of 1843 as amended by section 2, Act 9 of 1898 (at 416).

[373] At 412.

church)[374] and one of its servants, the court has jurisdiction to interpret the agreement.

With reference to, *inter alia*, sections 8 and 9 of Ordinance 7, and articles 110,[375] 111,[376] 183,[377] 184[378] and 188[379] of the Rules and Regulations of 1843, Justice Gardiner, in dismissing an exception to the plea in bar,[380] conceded that the Legislature gave church courts the power to decide what constituted false doctrine and to come to a final ruling (against ministers who agreed to submit themselves to these tribunals). This did not, however, influence the court's jurisdiction to review the proceedings in any way[381] (including the question of whether a doctrinal issue was indeed at stake). The right of action which a minister has in respect of a punishment by such a tribunal arises out of a breach of contract, such as *mala fides*, irregularity and non-observance of procedure. A wrong decision on the merits of the case, honestly and regularly arrived at, however, did not constitute a breach.[382]

The contention that the synod was now the interpreter of its own agreement was addressed in an interesting way by the justice. He noted that the agreement was between the plaintiff and the Church. The synod is not the Church, but a body chosen by the Church – a position analogous to that of the Supreme Court, where the judges are appointed by the government, and yet they have to construe agreements made by the government on behalf of the state.[383]

When the actual case was finally heard, judgment was given in favour of Prof. Du Plessis on 15 January 1932 on the grounds of usurping of power by the synod. There seems to be disagreement amongst scholars with regard to whether the court indeed got entangled in doctrinal matters in the course of the

[374] As defined in a number of cases (*supra*).
[375] "Church government is administered by consistories, presbyteries, and the general church assembly" (at 818).
[376] The maintenance of the "reformed doctrine" is entrusted to church courts (*Id.*).
[377] The general assembly or the synodal commission shall have immediate management of charges against ministers (*Id.*).
[378] A charge shall be forwarded in writing to the accused (at 419).
[379] Complaints against the doctrine of a minister must contain distinct evidence of heresy (*Id.*).
[380] A plea in bar sets forth matters that deny the plaintiff's right to maintain his or her lawsuit. In this case the plea in bar set forth that the plaintiff as a member of the Church and as minister and professor, through silent agreement, was bound by the Laws and Regulations of the Church.
[381] Cf. *Long v Bishop of Cape Town* (1863) and *Weeber v van der Spuy* (1854).
[382] At 426.
[383] At 424.

final judgment. Fourie (1973:237) asserts that the court overstepped its boundaries regarding doctrinal adjudication in the same way the court in *Kotzé v Murray* (1864) (see 3.5.5, *supra*) had done. Fourie criticises the court for becoming entangled in the question whether the plaintiff's theological position represents a departure from the Church's official stance as set out in the Belgic Confession. Sadler (1979:42-45), on the other hand, in his consideration of the case, is convinced that the judgment was limited to purely juridical arguments only. According to Sadler (*Id.*:52, footnote 14) Justice Gardiner never attempted to assess any of the theories that pertained to doctrinal issues.

A thorough reading of the proceedings, published verbatim in *Die Kerksaak tussen Prof. J. du Plessis en die Ned. Geref. Kerk in Suid-Afrika* (1932), shows that the court indeed frequently enquired about doctrinal issues,[384] for instance Justice Gardiner's question during the testimony on behalf the plaintiff: "Maar die belydenisskrifte is miskien self nie duidelik nie. Kan deskundiges nie opgeroep word om punte uit te lê nie?";[385] his question during cross-examination, after many hours of theological debate, to the plaintiff: "Verstaan ek u reg, dat u van mening is dat die Belydenisskrifte in sekere opsigte verkeerd is?";[386] his view that "die vraag voor (die hof) is: "As ons die Formulêre (sic) van Enigheid ontleed, sluit die besluite van die Sinode van 1928 dan sekere dinge uit wat deur die Formulêre (sic) van Enigheid toegelaat word?";[387] and his statement in cross-examination to Prof. Du Toit: "Wat die hof moet uitmaak is of die leer dat die vyf boeke nie van Moses is nie, onder die belydenisskrifte toelaatbaar is",[388] to list but a few examples. When, in addressing the counsel for the defendant, Justice Gardiner notes that it is "nie ons taak om te besluit watter leer reg is nie, maar watter teorie juis is volgens die formuliere, om also te sien of prof. Du Plessis reg is",[389] it gives an indication of the court's ambivalent position that

[384] Adv. De Wet, counsel for the plaintiff, explained that, just as there exists a common law that is subject to statutes but nevertheless assists the courts to interpret statutory law, the church has its own common church law that assists in interpreting church orders and statutes where there are doubts or ambiguities (*Die Kerksaak tussen Prof. J. du Plessis en die Ned. Geref. Kerk in Suid-Afrika* [1932:21]).
[385] *Id.*:27.
[386] *Id.*:45.
[387] *Id.*:81.
[388] *Id.*:129.
[389] *Id.*:51.

probably gave rise to opposing views such as those held by Fourie and Sadler (*supra*).

There is, however, little doubt that, considering the way doctrinal enquiry and theological debate was allowed throughout the extensive arguments, the case revolved around far more than just procedural and related matters. This is indeed confirmed by the final judgment[390] (delivered on 15 January 1932) where, although it is stated that no attempt will be made to evaluate doctrinal matters,[391] the judge nevertheless stated, for instance, that "die Belydenisskrif nie so duidelik is dat 'n mens sonder om die argumente te hoor, kan sê dat net een teorie moontlik is nie"[392] and, after quoting passages from the Belgic Confession, noted: "Dit lyk vir my of hierdie artiekels (sic) ruimte laat vir bewerings soos dié van Eiser".[393] Similar doctrinal evaluations pervade throughout the judgment and refute any attempt to claim that the judgment only involved procedural issues.

3.7.3.1.3 More cases before the CPD

In two property disputes, in 1931 (*Darrol and Another v Tennant and Another*)[394] and 1936 (*Mills and Others v Registrar of Deeds and Others*), respectively, the CPD addressed the long-time disparity between the CE and the CPSA (cf. *Merriman v Williams* [1880]).

In 1938 an application for the removal of a restriction upon immovable property was brought before the CPD by the church council of the NGK at Plooysburg.[395] The deed, at the wish of the donor (long deceased), contained an express prohibition of alienation and application was made in terms of section 1 of Act 2 of 1916 for leave to sell the property free from the conditions. The applicant received no relief under the statute, but Davis, J., was satisfied that the Act was not intended to take away the inherent jurisdiction of the court with regard to church property. He referred to Voet, who was of the opinion that the court, in authorising the sale of church property, should act upon the same principles

[390] *Id.*:215-227.
[391] At 224.
[392] At 225.
[393] At 226.
[394] This application was heard again and finalised in *Darrol and Another v Tennant and Another* (1932).
[395] *Ex parte Kerkraad van die Nederduitse Gereformeerde Kerk van Plooysburg* (1938).

upon which it would have acted in authorising the sale of property of minors.[396] That included an examination of what "just cause" entailed,[397] which was left to the decision of the judge. On the merits of the case the application was granted.

In 1944 an application was brought for an order restraining the committee of the Congregational Church at Pniel from holding bioscope performances in aid of church funds.[398] The applicant contended that these performances contravened the constitution of the Church.[399] In his judgment Fagan, J., regarded the Church's constitution to be a "kontrak tussen die lede" and noted that the committee was not entitled to move outside its provisions.[400] He held, however, that the applicant did not prove that the committee's actions fell outside those provisions and he refused the application.[401] The justice did not address the issue of the jurisdiction of the court in a case like this, and it is assumed that he considered the court fully competent to hear the case, including interpretation of the constitution of the Church. Whether this would have been the case if the NGK was involved (in terms of Ordinance 7 of 1843) is debatable. The prerogative of interpretation of church statutes will be revisited in 7.7 (*infra*).

3.7.3.1.4 The Eastern Districts' Local Division

After the unification of South Africa the Eastern Districts' Local Division (EDL) in Grahamstown (sharing concurrent jurisdiction with the CPD over the eastern districts of the Cape Province [until 1957]) heard a number of cases involving church matters. The first case fitting into this category was *Ehmke v Grunewald* (1920)[402] where the plaintiff, a pastor of the Bethany Baptist Church at Kingwilliamstown, sued the defendant for defamation of character. This was the result of alleged malicious accusations of adultery and indecent assault against the plaintiff. The defendant claimed that the statements complained of were

[396] At 394.
[397] *Id.*
[398] *William v Boltman and Others* (1944).
[399] The constitution stated, *inter alia*, that the Church had to "uphold and extend Evangelical religion" and "promote Christian unity to secure religious equality and moral and social reform" (at 374).
[400] At 376.
[401] At 378.
[402] Reported in 1921.

published "without malice on a privileged occasion",[403] a defence that was denied by the plaintiff. Because of the highly defamatory nature of the statements the onus was on the defendant to show that the occasion was indeed privileged.[404]

Hutton, A.J.P., after a lengthy discussion of the background and merits of the case, found that publication of the statements complained of in this case was made, *inter alia*, "to protect communications made in the general interests of society",[405] thus rendering the occasion under discussion privileged. The *onus* therefore shifted back to the plaintiff to prove express malice. In the absence of such proof the action was dismissed.

Subsequent cases heard by the EDL include a property dispute involving the Ethiopian Church,[406] an order against a duly constituted Hindu temple for expelling a member,[407] and a criminal appeal against a conviction for the disturbance of a congregation lawfully assembled for religious worship.[408]

3.7.3.2 Orange Free State

The jurisdiction of the civil courts in purely spiritual matters was tested in 1919 in the Orange Free State Provincial Division (OPD) of the Supreme Court of the Union of South Africa. In *Nel and Others v Donges NO and Others* (1919) the plaintiffs, three members of the NGK at Hoopstad, claimed an order interdicting the ministers and church council of the same Church from administering the

[403] At 33. The "privileged occasion" (defined at 47) referred to the committee that was specifically appointed by the Conference of the Church to investigate the charges. Cf. *Weeber v Van der Spuy*.
[404] The principle of "strict liability" (liability without proof of fault [negligence or intention]) still applies in most (but not all) cases of defamation in South Africa (cf. *National Media Ltd. and Others v Bogoshi* [1998] where the Supreme Court of Appeal found that strict liability of members of the press was unconstitutional).
[405] At 49.
[406] *Ethiopian Church Trustees v Sonjica* (1925).
[407] *Chetty v Siva Subramanier Aulayam* (1930). The action failed for the relief was claimed against the congregation of the temple and not against the council who expelled him in terms of their constitutional powers.
[408] *Rex v Mashaba* (1944) (strictly speaking, falling outside the scope of this study).

sacrament to members of the Church who had participated in the Rebellion,[409] on the ground that such administration was opposed to church rules.[410]

The defendants pleaded that the position of the rebels in the Church was still *sub judice* and had been in abeyance until judgment by the synod. They further pleaded that the plaintiffs' grounds of complaint did not concern any civil or pecuniary right, but was solely a matter of internal discipline which should have been heard by the presbytery, with a right to appeal to the synod.[411]

Ward, J., rightfully disposed of the case (McGregor, J., concurring) on the grounds that what the defendants had done was a matter of spiritual import (see also 7.2.3.4, *infra*). Justice Ward referred to the Cape Supreme Court's refusal to interfere in *Van Graan v Hope Town Consistory* in 1886 (see the discussion of the judgment at 3.5.6, *supra*) where the facts were comparable to this case. Although the *Van Graan* case was not directly applicable as it was decided in terms of Ordinance 7 of 1843,[412] Justice Ward, significantly, held that there was no real or substantial difference between the position of the Church in the Cape and in the Orange Free State.[413]

The question of the specific rights that the court would protect in "church" cases[414] was explored by the OPD in *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* in 1952. The applicant, a deacon of the Bloemheuwel congregation of the NGK, had written a letter to the church council with the heading: "Voorstel i.s. Kerktoestande en 'n Gravamen – 12 November 1951". This document, containing "krasse beskuldiginge teen die Ned. Ger. Kerk, sy ampsdraers en sy leer",[415] led to a charge against the plaintiff and a temporary suspension from office, after which the applicant approached the court in an *ex parte* application resulting in a rule *nisi* following which the temporary suspension was withdrawn. The applicant was subsequently informed in writing

[409] The "Rebellion" referred to an armed rebellion against the government of the Union, between October 1914 and January 1915 (at 11).
[410] The rules of the Church provided that no person guilty, *inter alia*, of stirring up or taking part in rebellion against the secular government of the country, shall be entitled to partake in the sacraments (*Id.*).
[411] At 8.
[412] In 1918 still functional in the Cape but not in force in the Orange Free State.
[413] At 11-12.
[414] Cf. *Kotzé v Murray* (1864) and *De Waal and Others v Van der Horst and Others* (1918).
[415] At 92.

of a meeting of the respondent (the ringskommissie) to be held to institute preliminary inquiries regarding the matter, where after he applied for an interdict restraining the respondent from holding these inquiries.

In his judgment, Brink, J., dealt with the question of conditions that would be considered to be "prejudicial to a complainant", which, according to Dove Wilson, J.P., in *Van Rooyen v Dutch Reformed Church, Utrecht* (1915) (see 3.7.3.3, *infra*), would entitle the court to interfere in the proceedings of a voluntary association. In this case there was no pecuniary loss or any real possibility of such a loss. The civil right, according to Justice Brink, that warranted protection in this case, was that a suspension from his office as deacon would have precluded him from enjoying his rights as a member of the church council. According to the Rules and Regulations of the Church all control of funds and properties was vested in the church council and a suspension would have caused the plaintiff to be deprived of these rights of control.[416] This reasoning in the judgment seems to differ appreciably from the opinion of De Villiers, J.P., in the TPD in *De Waal and Others v Van der Horst and Others* (1918) (see discussion at 3.7.3.4, *infra*), and appears to be an imprudent effort to found jurisdiction.[417]

The court held, in accordance with comparable cases,[418] that the applicant did not have to exhaust the remedies provided by the Rules and Regulations before approaching the court. The court also held that, similar to *Bredell v Pienaar and Others*,[419] the notice in terms of which the meeting in question was to be held did not indicate with sufficient clarity the charge the applicant had to answer to.

In one of the final cases during this period the court dealt with a situation where the applicant, the minister of the NGK congregation of Bloemfontein-Wes, applied for an order to set aside his suspension from office by the presbytery,

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[416] At 101-102.
[417] Although this view seems closer to Justice Watermeyer's argument in *Bredell v Pienaar and Others* (3.7.3.1.1, *supra*), there did not appear to be any possible pecuniary loss to the applicant in the case under discussion.
[418] Cf. the discussion of *De Waal and Others v Van der Horst and* Others (1918) (at 3.7.3.4, *infra*).
[419] See Justice Watermeyer's opinion in *Bredell v Pienaar and Others* (1922) (at 3.7.3.1.1, *supra*) and Justice President Dove Wilson's opinion in *Van Rooyen v Dutch Reformed Church Utrecht* (1915) (at 3.7.3.3, *infra*).

declaring such decision to be of no force and effect. In *Odendaal v Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en andere* (1960) the applicant relied on article 210(2) of the Laws and Regulations for the Management of the Church,[420] in force in the Orange Free State NGK. The first respondent was the church council; the second respondent was the presbytery; the third respondent was the synodal commission. The charge (which was still under investigation) originated from damaging rumours regarding the plaintiff's presence at a reportedly disreputable location where he had allegedly been assaulted and robbed.[421]

A considerable portion of the judgment by Potgieter, J., is dedicated to the question whether the plaintiff had a right to approach the court before all internal remedies had been exhausted. His reasoning does not differ substantially from the arguments of De Villiers, J.P., in *De Waal and Others v Van der Horst and Others* (see discussion at 3.7.3.4, *infra*) and will not be elaborated upon.

Justice Potgieter subsequently dealt with the charge sheet which was defective in terms of article 210(2) (*supra*). According to the charges the applicant could not have known whether he was charged with improper conduct because it started the rumours (referred to above), or was he charged because those rumours were actually founded.[422] The justice found that the applicant was prejudiced (thus establishing the court's jurisdiction), either because the charge sheet did not disclose a cause of action, or, alternatively, that no real charge was revealed by the charge sheet:

> Indien 'n lid van die Ring van die gerugte kennis geneem het en aan applikant duidelik gemaak is dat die grondigheid, al dan nie, van die gerugte genoem in nader besonderhede ondersoek word sou hierdie Hof nie kon ingryp nie want hierdie Hof is hoegenaamd nie geroepe om te oordeel of applikant skuldig is aan daardie gedrag al dan nie. Hierdie Hof

[420] Article 210(2) reads: "So 'n aanklag moet as 'n behoorlike akte van beskuldiging opgestel word en moet 'n duidelike uiteensetting bevat van die aard, die plek en die datum van die oortreding" (quoted at 169). Justice Potgieter made it clear that "dit nie verwag (word) dat so 'n akte van beskuldiging met die noukeurigheid opgestel moet word wat verlang word in strafsake voor 'n geregshof nie", but had to contain at least the type and the date of the alleged transgression (*Id.*).
[421] At 161.
[422] At 174.

> kan en sal alleen ingryp, soos nou gedoen word, indien dit duidelik is dat daar 'n onreëlmatighied in die prosedure bestaan het en die beklaagde daardeur benadeel is. Of applikant skuldig is aan enige oortreding al dan nie was slegs vir die Ring om te besluit.[423]

The court set aside the suspension of the plaintiff as it was found that the charges drafted by the presbytery did not comply with article 210 of the Laws and Regulations and did not constitute any cause of action.[424]

3.7.3.3 Natal

The first "church" case before the new Natal Provincial Division (NPD) of the Supreme Court of the Union of South Africa was an action in 1912.[425] The plaintiff claimed, in terms of section 6 of Act 9, 1910, a pension for life against the trustees of the St. Mary's Native Church, Pietermaritzburg. The court held that the property in question was not affected by the said Act and dismissed the application.

An action against the church council of the NGK congregation at Utrecht came before the NPD in 1915[426] after a member of that congregation was summoned to appear before the council without details of the charge being given to him. He subsequently applied for an interdict restraining the council from proceeding with an enquiry against him until they had communicated to him the details and substance of the charge against him and disclosed the depositions or other complaints against him.[427] The applicant relied on article 234 of the Rules and Regulations of the Transvaal Church (in force in Natal at the time of the trial) that stated that "(i)f a person is summoned before a Church Council by reason of a complaint against him, written notice thereof shall be given him".[428]

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[423] *Id.* See also 7.4.3 (*infra*).
[424] Cf. *Lakey v Paarl Congregational Union Church* (1917), *De Waal and Others v Van der Horst and Others* (1918), *Bredell v Pienaar and Others* (1922), and *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* (1952).
[425] *Sibisi v Church Property Trustees* (1912).
[426] *Van Rooyen v Dutch Reformed Church Utrecht* (1915).
[427] At 323-324.
[428] At 335. This rule was considered to be "one of the most ordinary and elementary rules of the administration of justice by any tribunal" (Dove Wilson, J.P., at 331). Cf. article 184 of the Rules and Regulations of 1843 and the application thereof by the CPD in *Du Plessis v The Synod of the Dutch Reformed Church* (1930) (3.7.3.1.2, *supra*).

When he granted the interdict, Dove Wilson, J.P., expressed that he had no doubt that the court could interfere where it was shown (as in this case) that a voluntary association had arrived at a decision which was, or purposed to arrive at a decision which might be, prejudicial to a complainant by methods which were contrary to its own constitution and to the ordinary principles of justice.[429]

The NPD also heard an action regarding the validity of the dismissal of the imaum of an Islamic Mosque in 1925.[430] In 1926 application was made to the court to set aside the report and finding of the District Synod, Natal, of the Wesleyan Church and the appeal proceedings held before the annual conference of that Church.[431] The applicant had been convicted of certain acts of impropriety and suspended from office by the Minor Synod, confirmed, on appeal, by the District Synod and, on review, by the conference. The grounds upon which the application was based included, *inter alia*, that the charge was vague, evidence (such as hearsay) was wrongly admitted and the proceedings were contrary to the rules of the Church and the principles of natural justice.[432]

Dove Wilson, J.P., noted that none of the complaints upon which the applicant urged the court to interfere was ever advanced before the church disciplinary bodies.[433] The justice president reiterated the view he had expressed before in *Van Rooyen v Dutch Reformed Church Utrecht* (1915) regarding the circumstances in which the court would interfere in the exercise of disciplinary discretion by a voluntary association, adding that one may only invoke the aid of the court to set aside the earlier proceedings if one can show that they had caused patrimonial loss, or some deprivation of civil rights. He continued to lay

[429] At 330-331. See the discussion of *Bredell v Pienaar and Others* (1922) (3.7.3.1.1, *supra*) and *De Vos v Die Ringskommissie van die Ring van die N.G. Kerk, Bloemfontein, and Another* (1952) (3.7.3.2, *supra*).
[430] *Jooma and Others v Jhavary and Others* (1925).
[431] *Lucas v Wilkinson and Others* (1926).
[432] Cf. footnote 149 (*supra*). Cf. the discussion of *Bredell v Pienaar and Others* (1922) (3.7.3.1.1, *supra*).
[433] At 16. It never became clear why these arguments were not dealt with before, but one may safely assume that it was mainly because the conference only reviewed the case because the applicant did not make use of his right to appeal to that body.

down the limits of this interference: "No appeal lies to it on the facts of the case".[434]

The justice president dismissed the application, showing with painstaking detail that the applicant had not discharged any of the grounds for the application. In showing that the trial by the conference had been conducted in terms of the relevant constitution, he, *inter alia*, noted (as did Justice Watermeyer in *Bredell v Pienaar and Others* [1922] [see discussion at 3.7.3.1.1, *supra*]) that the disciplinary bodies were not bound by strict rules of evidence, hence the ruling against the objection regarding the admittance of hearsay evidence.[435] The court also found that members of advisory bodies (such as the synods in this case) were not excluded from sitting in the actual trial (by the conference) and therefore overruled the objection regarding the principles of natural justice.[436]

3.7.3.4 Transvaal

In the year after the unification of South Africa, both the Transvaal Provincial Division (TPD) and the Witwatersrand Local Division (WLD) of the Transvaal Supreme Court heard cases involving church matters.

The TPD, in *Deutsche Evangelische Kirche zu Pretoria v Hoepner* (1911), heard an application by one Max Hübner, on behalf of the Deutsche Evangelische Kirche zu Pretoria, for an order compelling the respondent (the former treasurer of the Church) to deliver a certain title deed belonging to the Church.[437] At dispute was Hübner's authority to initiate proceedings and the court had to interpret the statutes by which the abovementioned Church was governed. Under the statutes the control and management of the Church was vested in the congregation who were to conduct their business by means of a church council, which consisted of the pastor and "at least four and not exceeding seven

[434] *Id.* Cf. *Kotzé v Murray* (1864) in the Cape Supreme Court where Cloete, J., held that the court may interfere in the decision of a church tribunal whenever doubts were casted on the form of the proceedings or the merits of the case.
[435] At 19-20.
[436] At 21-22. See also 7.4.3 (*infra*).
[437] This was an appeal from a decision by Wessels, J., in chambers.

wardens".[438] The defendant insisted that the council ceased to exist in terms of the statutes when the number of wardens fell below four.

It seems that the competence of the court regarding the interpretation of church statutes was never in doubt (cf. 7.7.1, *infra*). Justice President de Villiers stated that "the decision of this case depends upon a proper construction of the Church Statutes before (the court)".[439] In his judgment he conceded that, as the number of members had been reduced to three, there was, strictly speaking, no church council any longer. He held, however, that the continuing members were entitled to co-opt members to fill vacancies, notwithstanding that membership had fallen below the prescribed number, noting that the present situation was "a legal subtlety which was never contemplated by the parties".[440] Curlewis, J., concurring with the judgment that the appeal should be allowed, added that where a document is fairly open to two constructions the argument of inconvenience should be adopted.[441]

In a labour dispute in the WLD a few months later the Bethel NGK, Vrededorp, applied for an order interdicting the respondent (the former minister of the applicant Church) from entering the church building or receiving funds from the Church and to deliver the keys of the church building to the petitioners.[442] This was as a result of the respondent's dismissal on the grounds of "incapacity or of gross negligence in matters vital to the welfare of the church and the congregation".[443] At dispute was the validity of the general meeting of the congregation that dismissed the respondent. Ward, J., held that the congregation had no power to pass a resolution dismissing the minister at a meeting called for another purpose (that of liquidating the debt of the parsonage) and the application was duly refused.[444]

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[438] At 228.
[439] At 226.
[440] At 227-228. The judgment is rather surprising as two of the three judges considered the provisions of the statutes to be compulsory rather than merely directory. Bristowe, J., however, while concurring with the judgment, considered it "a settled rule that, in the absence of anything to the contrary in the governing instrument, such bodies are competent to act, notwithstanding that their membership has fallen below the prescribed number" (at 229).
[441] At 235.
[442] *Bethel NGK Vrededorp Congregation v Dempers* (1911).
[443] At 84.
[444] At 85.

In what was strictly speaking not a "church" case, the WLD in 1913 held that stands donated to the GKSA, NGK, and NHK were, in terms of a resolution passed by the Executive Council of the ZAR in 1886, free of burdens such as license monies, even when alienated.[445]

The court's power to interpret the constitution and regulations of a church was first seriously considered in the TPD in 1918 in *De Waal and Others v Van der Horst and Others* (cf. 7.7.1, *infra*). The action arose out of the fact that the first defendant was elected as parliamentary representative for the electoral division of Wolmaransstad. It was alleged that he would not have been able to properly discharge his duties as the minister of the NHGK at Wolmaransstad, moreover the two positions occupied by him were incompatible with one another under the constitution of the Church. The prayer was for a declaration that resolutions taken by the congregation and the church council were illegal; for an order dismissing him as minister of the congregation; and for an order interdicting the church council from paying him a salary.

Six exceptions to this declaration were taken, all of which will not be dealt with here. The fifth exception, which alleged that the declaration disclosed no cause of action, was the most important. This required of De Villiers, J.P., to confirm that the NHGK was a voluntary association[446] and that courts of law had no power to determine disputes amongst members of such an association (least of all questions of disputed doctrine), except for the enforcement of some temporal or civil right (primarily of a patrimonial nature).[447] This meant that people were at liberty to form themselves into any association as long as the objects were not

[445] *Hull v Rand Township's Registrar* (1913).

[446] As there was no established church in the Transvaal anymore, by 1918 it was generally accepted that all religious organisations in South Africa were voluntary associations, similar to the situation that existed in the Cape in terms of Ordinance 7 of 1843 (cf. e.g. *Long v Bishop of Cape Town* [1863], *Kotzé v Murray* [1864], and *Merriman v Williams* [1880]). See also chapter 6 (*infra*).

[447] At 281-283. The court agreed with the Scottish case of *Forbes v Eden* where it was held that a civil court may impose the duty of enquiring into the regularity of proceedings on itself where a pecuniary benefit or the disposal and administration of property were at stake (at 282-283). It seems that the court would have been reluctant to found jurisdiction on any other perceived right, except if at least a secular concern was shown, such as the interpretation of a contract. Cf. *Nel and Others v Donges N.O. and Others* (1919) in the OPD the following year where *De Waal and Others v Van der Horst and Others* (1918) was cited and it was assumed that a "temporal or civil right" meant a patrimonial or pecuniary one. Cf. *Kotzé v Murray* (1864) (at 60) for the position in the Cape Supreme Court in 1864. See also *De Vos v Die Ringskommissie van die NG Kerk Bloemfontein* (1952).

against the law or good morals, and to frame any rules they chose for good government and discipline, including establishing tribunals to decide questions that might arise within the association.[448] As decided in *Long v Bishop of Cape Town* (1863) (see discussion in 3.5.4.2, *supra*) the decision of such a tribunal will be binding when it has acted within the scope of its authority.[449]

Justice President de Villiers declared that the court would therefore have had no power to interfere with the position of the first defendant as minister of the Wolmaransstad congregation, if the question stood by itself. The prayer, however, for an interdict against the second and third defendants from paying the first defendant a salary while he remained a Member of Parliament, engaged a patrimonial right and therefore the court would have jurisdiction to decide on the first defendant's position as minister. The plaintiffs, being members of the congregation, and as such having a patrimonial interest in the property of the congregation (and thus *locus standi*), had a right to insist that the property should be administered in accordance with the rules and regulations of the Church.

Having discharged the issues of jurisdiction and *locus standi*, the justice president proceeded, albeit cautiously, with an eloquent argument regarding the question of whether it was indeed against the rules and regulations of the Church to pay the first defendant his salary. In this respect he showed, with several relevant examples, how the American courts have held that the decision of a religious judicatory as to what is considered to be consistent with a particular doctrine was conclusive on civil courts. The English courts on the other hand held that, provided it has jurisdiction, the civil court was the proper tribunal to construe the laws and regulations of a church according to legal tenets and principles of interpretation. Following the Privy Council's (binding) ruling in *Williams v The Bishop of Salisbury*, it was concluded that the true construction of the rules and regulations of the Church lay with the court (cf. 7.7, *infra*). It was subsequently held that, according to the constitution and the regulations of the Church, the first defendant's position as minister was incompatible with that of a

[448] At 281.
[449] Being a judgment by the Privy Council, the TPD was bound by the decision in *Long v Bishop of Cape Town* (1863).

Member of Parliament, and that the church council had no power to grant him leave of absence for the purpose of attending parliamentary duties.[450]

To the question whether all internal remedies within the Church must be exhausted by a member before the civil courts will interfere, Justice President De Villiers was in accord (*obiter*) with the situation of the American courts, where the questions were answered in the affirmative. He conceded, however, that he could not find justification for this view in the rules of the Church or in previous binding court decisions and held that "if the plaintiffs have a right of action they have a right to bring it at once without having exhausted their remedies under the Church Laws".[451]

In 1928 the WLD heard a case where the Registrar of Mining Titles refused to pass transfer of property disposed of by a Church in the absence of a constitution.[452] After deliberation the court found that there was no bar on the jurisdiction of the court and issued a rule *nisi.*[453]

In *Van der Westhuizen and Another v Feenstra NO* (1939) in the WLD, the applicant (a minister of the NHGK who had received a call to the Brakpan-Wes congregation of that Church, supported by the church council of the congregation as second applicant) asked for a mandamus[454] to compel the respondent (the chairman of the presbytery of Boksburg)[455] to carry out his duties. The presbytery, after they had found complaints about the applicant's behaviour well founded, refused to take steps to allow the induction to take place and insisted that, in terms of the Rules and Regulations of the Church, the synod should first deal with the complaints. According to the applicants, the call was valid because it was approved by the synodal committee.[456]

The court held that, although in terms of the constitution of the Church a decision by the synodal committee may be set aside at the triennial meeting of the synod,

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[450] At 284-287.
[451] At 285. Cf. *Bredell v Pienaar and Others* (1922) (3.7.3.1.1, *supra*). See also 7.2.3 (*infra*).
[452] *Ex parte Maromite Catholic Church* (1928).
[453] See footnote 304 (*supra*). Cf. *De Wet and Another v Marais and Others* (1911).
[454] An order to compel.
[455] The court held that it was sufficient to cite the chairman alone, and that it was not necessary to cite the other members of the presbytery.
[456] At 314-315.

such a decision remains in force, and effect must be given to it, pending the final ruling of the synod. The presbytery had no right to appeal the decision of the synodal committee to the synod and was compelled to take steps to allow the induction of the first applicant to take place.[457]

3.8 The Republic of South Africa

On 31 May 1961 South Africa became a republic and adopted a new constitution which was followed by a reworked constitution in 1983. In both the 1961[458] and 1983[459] Constitutions, the judiciary was (still) premised on the British concept of parliamentary sovereignty (see 3.7.1, *supra*), restricting the Supreme Court's competence to pronounce on the validity of Acts of Parliament.[460] Matters relating to religion and church law were regulated either by enactments of the legislature or by common law.[461] In addition to rejecting the power of judicial review, both the 1961 and 1983 Constitutions (similar to their predecessor, the 1910 Constitution) failed to provide legal protection for human rights.[462]

The legal position of churches and status of church law, as well as a description of the major decisions of the South African courts after 1961, and the influence these rulings had on church law in South Africa and the relationship between the church and the state, will be discussed in the relevant subsequent chapters.

3.9 Concluding remarks

An historical enquiry into the relationship between the church and the state as revealed by the relationship between church law and civil law reveals a rather inconsistent approach by the South African courts where churches have found themselves in litigation. The establishing of principles for the judicial relationship between civil law and church law in legislative history did not follow a simple path. Church autonomy seems to have been a foreign concept during the early years of church-state relations in South Africa.

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[457] Cf. *Bredell v Pienaar and Others* (1922).
[458] Act 32 of 1961.
[459] Act 110 of 1983.
[460] Except where procedural requirements were at issue.
[461] Cf. Du Plessis (1996:443).
[462] Dugard (1990:442-443).

From 1652 to 1795 the Council of Policy clearly controlled all the affairs of the church, seemingly with the consent of the principles of the Church Order of Dort which applied at the time. The years after 1795 saw some dramatic political changes, but the position of the church remained more or less constant until the promulgation of Ordinance 7 of 1843. The new Ordinance in theory freed the church from government interference in its own matters, but in practice no real independence in church governance ensued. The government never truly loosened its grip on the church. Moreover, courts of law interfering with doctrinal issues became common-place, even though the intrusion was often hidden behind a façade of alleged protection of other identifiable civil rights. Even with the expansion to the north these principles prevailed and the interrelation between politics and religion became increasingly apparent in the twentieth century. The state protected churches but at the same time also controlled them.[463] This situation would continue until a new era for church-state relations dawned in 1994.

3.10 Résumé

The major events in the history of the church in South Africa, notably the history of the relationship between the church and the state and the relationship between the church and the judiciary, shaped church governance and church law into a *ius sui generis* in South Africa. This chapter provided an overview of these events since the *ius patronatus* of the early Cape. The next chapter will provide a global overview of church-state relationships, and the way this influenced church law in selected countries.

[463] Cf. Coertzen (2012:85ff.). See chapter 5-8 (*infra*).

CHAPTER 4

INTERNATIONAL PERSPECTIVE

4.1 Introduction

Section 39(b)(1) of the Constitution of South Africa[1] offers guidelines for the interpretation of the rights contained in sections 9-35 (the Bill of Rights):

> When interpreting the Bill of Rights, a court, tribunal or forum
> a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> b. must consider international law; and
> c. may consider foreign law.

When reading sections 15 and 31 (see 5.3.4 [*infra*] for the text), the provisions of international human rights and developments in, *inter alia*, Europe, the USA, and Oceania, provide invaluable indications for the evolution of a constitutional jurisprudence unique to South Africa, but with definite roots in international human rights law pertaining to church law under the provisions of the right to freedom of religion. The legal relationship between the church and the state, as an expression of the relationship between religion and law, takes on various shapes in countries that subscribe predominantly to the Protestant faith, with varying degrees of separation and cooperation between church and state. This chapter will briefly explore these systems (as well as certain significant Western systems in countries predominantly Catholic) to the extent relevant to the situation in South Africa.

4.2 General principles

Four major international documents, published in the twentieth century with the aim of promoting religious freedom, have a significant influence on the

[1] Act 108 of 1996.

relationship between churches and their respective states. The promulgation of the Universal Declaration of Human Rights (UDHR)[2] by the United Nations (UN) in 1948 initiated an appreciation for the right to religious freedom in a global context. Article 18 of the UDHR provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Other rights that may influence the relationships between governments and churches include the right to "a fair and public hearing by an independent and impartial tribunal",[3] and the right to "freedom of peaceful assembly and association".[4]

Although it has been suggested that one cannot refer to "universal" human rights,[5] the UDHR is considered to be the most important document on religious freedom published in the twentieth century.[6]

Whereas the UDHR imposed a "moral" obligation upon signatory nations, the principles in the International Covenant on Civil and Political Rights (ICCPR) of 1966 created a "legal" obligation and are mandatory for the states that have ratified it.[7] The ICCPR deals mainly with the same rights and freedoms as the Convention, but elaborates on many of them. Article 18, states, *inter alia*:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with

[2] Adopted by the UN's general assembly on 10 December 1948.
[3] Article 10.
[4] Article 20(1).
[5] Cf. Koffeman (2009:327).
[6] Cf. Davis (2002:224-225) who describes the near universal recognition of religious freedom in the UDHR (which he considers to be an outgrowth of the Enlightenment) as "undoubtedly a human milestone" that cannot be overstated. Davis compares the importance of the UDHR with the Edict of Milan in 313 as the beginning of the Constantinian union of state and church (cf. 2.3.2, *supra*) and the 1517 posting of Luther's 95 theses as the beginning of the Protestant Reformation (cf. 2.5.3, *supra*).
[7] *Id.*:225.

> others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The UN has issued two further declarations related to religious freedom. Although these two declarations are only binding on those countries that formally enact them, they do provide valuable additions to the UDHR and the ICCPR. The 1981 Resolution,[8] for instance, provides a broad list of religious rights. These include the right "(t)o teach a religion or belief in places suitable for these purposes; (t)o solicit and receive voluntary financial and other contributions from individuals and institutions; and (t)o train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief".[9] Davis (2002:228) is of the opinion that, although the Resolution does not have the path-breaking qualities of the UDHR or the enforceability of the ICCPR, it is unsurpassed in terms of the comprehensiveness of rights addressed.

Following the Declaration of 1981, in 1993 the general assembly passed another Resolution aimed specifically at religious freedom.[10] The 1993 Resolution asserts the freedoms established in the 1981 resolution and adds additional findings from UN councils such as the Commission on Human Rights. In the Resolution the general assembly reaffirms certain guidelines for religious tolerance and notes that it is "alarmed" at the high levels of intolerance that are continuously experienced.[11] The Resolution emphasises that "non-governmental organizations and religious bodies and groups at every level have an important

[8] Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief, adopted by the 36th session of the United Nations General Assembly on 25-11-1981.
[9] Article 6(e-g).
[10] Elimination of all forms of Religious Intolerance, adopted by the 48th session of the UN General Assembly on 20-12-1993.
[11] *Id.*:2.

role to play in the promotion of tolerance and the protection of freedom of religion or belief".[12]

4.3 North America

4.3.1 United States of America

4.3.1.1 The wall of separation

The First Amendment of the Constitution of the USA ensures that the state remains neutral whenever a matter of a religious nature is of concern: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof".[13] This "high wall of separation"[14] first entered into the USA's public forum and judicial conscience in 1947 in the Supreme Court case of *Everson v Board of Education of the Township of Ewing*. Justice Black wrote that the founding fathers "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group".[15]

According to Van Bijsterveld (2000:995) it is mainly in the representation of religion in the public sphere and the social and cultural area (mass media, education, and charitable institutions) that the doctrine of the "wall of separation" becomes evident. The constitutional freedom of religion, however, appears to have a significant influence on the right of churches to deal with questions concerning religious doctrine in terms of their own rules and statutes, thus protecting their own domain. Related matters bearing on polity, clerical office, church discipline and membership are also outside the power of government.[16]

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[12] *Id*.
[13] The First Amendment contains the "establishment clause" that serves as a structural restraint on the government (separating church and state), and the "free exercise clause" that safeguards individual religious rights (cf. Esbeck 2001:2). See Hammond (1998:20ff.) (who distinguishes between two approaches regarding separation between church and state namely: Seperationists and Accommodationists) for a thorough explanation of the implications of the First Amendment for society at large.
[14] Van Bijsterveld (2000:993).
[15] At 11.
[16] Esbeck (2001:16).

Churches may accordingly claim a certain level of immunity from intervention by civil courts when developing doctrine and resolving controversies internally. This freedom in terms of the First Amendment was thoroughly entrenched in *Presbyterian Church v Hull Church* (1969) where the Supreme Court of the USA was called upon to pass judgment concerning a case of religious doctrine and church law. In 1966 two congregations of the Presbyterian Church in Georgia in the USA seceded from the parent organisation claiming that the latter had departed from the original tenets of faith and practice.[17] They reconstituted themselves as an autonomous religious organisation. The ministers of the two churches (as well as the majority of elders) subsequently renounced the general church's jurisdiction and authority over them.

The dispute arose mainly over control of the properties used until then by the local churches. Under Georgia law, the right to the properties was made to turn on a civil court decision as to whether the parent church had departed from the tenets of faith and practice held at the time the local churches had affiliated with it, in accordance with the "departure-from-doctrine" element of the so-called "implied trust theory".[18] The question presented to the court was whether the restraints of the First Amendment permitted a civil court "to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine".[19]

A church commission's efforts to conciliation proved to be fruitless and the commission proceeded to take over the properties in question on behalf of the Church. The local churches made no effort to appeal the commission's action to higher church tribunals[20] but opted to file suits in the Superior Court of Chatham County, to prevent the Church from trespassing on the disputed property (title to

[17] The claimed departures from the original tenets by the general Church include the ordaining of women as ministers and elders, giving support to the removal of Bible reading and prayers in the public schools, disseminating publications denying the Holy Trinity, and causing all members to remain in the National Council of Churches of Christ and willingly accepting its leadership which advocated, *inter alia*, civil disobedience (footnote 1).
[18] Georgia law implied a trust of local church property for the benefit of the general church on the sole condition that the general church adhered to its tenets of faith and practice (at 4). The departure-from-doctrine element of this implied trust theory allowed civil courts to interpret church doctrines and to determine whether actions of a church constituted a substantial departure from the tenets of faith and practice of the church (at 8). See Kauper (1969:349-356) for a comprehensive explanation of this aspect of Georgia law at the time. See also 7.5.2 (*infra*).
[19] At 1.
[20] The Synod of Georgia and the General Assembly.

which was held by the local churches). The Church defended the action on the ground that civil courts were without power to determine whether a church had departed from its tenets of faith and practice. The jury returned a verdict in favour of the local churches finding that the Church had departed from their doctrine and had thus violated the "implied trust" (*supra*). The Supreme Court of Georgia affirmed the judgment.

On appeal the Supreme Court of the USA confirmed that the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. The judgment states that First Amendment values were plainly jeopardised when church property litigation required resolution of controversies over religious doctrine and practice and the court *a quo* was found to have "violated the command of the First Amendment".[21] The court ruled that a civil court may not apply a departure-from-doctrine standard, nor may it review a church decision by applying the standard. According to the judgment, any such action would amount to a serious departure from the Constitution and the judgment of the Supreme Court of Georgia was reversed.[22]

4.3.1.2 Legal status of churches

Churches in the USA appear to have a constitutional status wholly unlike other voluntary organisations and thus a unique institutional autonomy. According to Esbeck (2001:20-22) this distinguishable status coincides with the historic claims of churches that they are not mere legal personalities that ultimately derive their existence from the state. Churches often maintain that they pre-existed the state, are specially accounted for by the establishment clause, and should be allowed to operate unhindered by government in agreement with their understanding of their own divine origin and mission.

In the USA, no permission or registration is required for a religious organisation to form, meet, and worship. However, religious groups typically seek legal status

[21] At 8.
[22] From the judgment it is clear that church property disputes, which can be decided by the application of "neutral principles of law, developed for use in all property disputes" (at 8), as well as decisions of church tribunals that are compromised by possible "fraud, collusion, or arbitrariness" (at 6), fall outside the scope of the judgment.

through state laws of incorporation.[23] This is afforded in different forms, e.g. specific statutes for denominations,[24] trustee corporations,[25] a membership corporation,[26] a corporation sole,[27] and simple non-profit organisations.[28]

Durham Jr. (2010:5) is of the opinion that most states afford religious groups multiple options so that they can find the form most suited to their ecclesiastical polity. The general trend of legal development in the USA has been toward making it easy for religious communities to organise their affairs and to engage with the state in the civil domains of property ownership, employment, and the countless other settings in which religious groups need to interact with the secular legal order. In the light of the right to religious freedom, statutes are crafted in ways that minimise regulatory burden and avoid intrusion into the organisational affairs of churches.

Where no doctrinal issues are at stake, courts in the USA may continue to decide cases involving churches. Courts are, however, required to focus their attention on the locus of authority in the determination of disputes. In the case of independent and congregational churches, the issue of authority is determined by the usual rules applicable to voluntary associations, notably the internal statutes of the church and the rule of the majority. As far as hierarchical churches are concerned (in a legal sense this includes the presbyterial-synodal system) the authority for determination of issues is prescribed by the law of the general church body.[29]

With regard to the current state of church autonomy in the USA, Destro (2001:206-214) notes that it may be argued that it is both increasing and decreasing. Churches reportedly increasingly complain about the burden of

[23] Durham Jr. (2010:3).
[24] The states with such laws are Connecticut, Delaware, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Vermont, and Wisconsin (*Id.*:11 and footnote 11).
[25] *Id.*:4
[26] The membership corporation is analogous in many ways to the business corporation, except that usually no stock certificates are issued (*Id.*).
[27] The corporation sole is in effect a one-person corporation that incorporates a particular office and provides for property rights in perpetuity. Control of property follows the office, and not the office holder (*Id.*).
[28] Religious not-for-profit corporations account for 87% of legal forms of churches in the USA, according to a mid-1990s survey (*Id.*:10).
[29] Kauper (1969:370ff.).

regulation. On the other hand, at constitutional level, there is an increasing awareness that the integrity of churches is at risk when the government seeks to intrude on their constitutionally protected rights.

4.3.2 Canada

Part 1 of the Canadian Constitution[30] contains the Charter of Rights and Freedoms which is the constitutional guarantee of the civil rights and liberties of every citizen in Canada. Section 2(a) guarantees that everyone has the fundamental freedom of conscience and religion. According to Patrick (2006:27), section 2(a) is worded broadly enough to potentially include both a "free exercise" and an "anti-establishment" component analogous to the First Amendment of the USA Constitution (*supra*). The Charter thus, functionally, mandates the separation of church and state in Canada. The theory is based on a comparison of USA Supreme Court and Supreme Court of Canada judgments in comparable cases involving the separation of church and state. These two countries appear to resolve their issues similarly, including resolution of church property disputes.[31] The exceptional cases, where the two approaches were at variance, are beyond the scope of this study.

4.4 Europe

4.4.1 Introduction

The fundamental issues in the majority of European countries are decided at the constitutional level, supported by statutes which specify the relation between the church and the state. According to Garlicki (2000:484) it is generally accepted that churches are autonomous and it is assumed that the legislature may only regulate external matters. It is, however, impossible to generalise, as will be shown below. Van Bijsterveld (2000:990) shows how European systems are deeply rooted in historic traditions. Robert (2003:638) notes the complexity of church and state relationships in Europe – although a profound Christian

[30] The Constitution Act of 1982.
[31] Patrick (2006:36ff.). Although Canada has reached similar results under section 2(a) of the Charter as the USA has under its First Amendment, many issues have simply never arisen so far in Canadian courts (*Id.*).

influence is evident in nearly all European countries, no judicial system is comparable to another, hence the complexity. In Europe one finds a mixture of church-state systems. Systems of separation are found in the Netherlands, Ireland, and France. Systems using formulas, that combine basic separation and cooperation, include Germany, Belgium, Austria, Spain, Italy, and Portugal. According to Robert (2003:638ff.) the church-state connections seem weaker in Catholic Europe than in Protestant or Orthodox Europe. This presumption is also, however, frequently disproved.

Every country in Europe has its own system of church-state relationships.[32] Complete neutrality, in the sense that the church and the state are so separate that no connection whatsoever exists between them, does not exist.[33] All western European countries support the church or religion in some form. The western European constitutions, each in their own way, create a balance in the relationship between the church and the state, with an unchallenged institutional legal position as the basis for the presence of religion in society.[34] Consequently, each has its own guidelines for how the state supports churches financially and the church and the state meet in the creation and implementation of certain legal mechanisms ensuring participation in public services, chaplaincy services, the system of public holidays, building facilities, and ancient monument care.[35]

In Europe many countries have multi-tier systems,[36] necessitated in part by strong patterns of cooperation and funding supporting major religious denominations in varying degrees. This provides for a "base level" entity that can be used by any religious community, and provides "upper tier" status with more restricted entry conditions qualifying a group for various forms of state cooperation.[37] All European systems provide some avenue for religious communities to acquire legal status. At the "base level", religious groups typically organise as normal non-profit associations. As will be seen in the discussion

[32] Cf. Torfs (2007a:67ff.).
[33] The system in France (4.4.10, *infra*) seems closest to total separation in Europe.
[34] Van Bijsterveld (2000:990-991).
[35] *Id.*:992.
[36] See the discussion at 4.4.10 (*infra*) for an explanation of the implications of multi-tier systems in practice.
[37] Durham Jr. (2010:6).

below some countries have “base-level” associations specifically designed for religious communities.

Overall, the protection of religious freedom and church law is not problematic – tolerance seems to be the general rule. Even though most European countries have a specific tradition concerning relationships between the state and the church, according to Torfs (2007a:67ff.) a common model, characterised by the existence of two clearly distinguished levels with regard to law and religion, can be identified. The first level covers religious freedom as such, comparable to the freedom clause in the USA’s Constitution (*supra*). On the second level the state grants certain advantages or privileges to religious groups. The first level becomes a *conditio sine qua non* for the implementation of the agreements and advantages.

4.4.2 The European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was developed under the auspices of the Council of Europe and entered into force on 3 September 1953. The Convention[38] was designed to give binding effect to some of the rights and freedoms set out in the UDHR and it replicates the wording of the UDHR in several places. The Convention’s primary focus, however, is on civil and political rights.

Article 9 of the Convention, under the heading “Freedom of thought, conscience and religion”, reads as follows:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of

[38] By 2000 the Convention had been ratified by 41 European states, covering a geographical area with a population of some 800 million (Fuhrmann 2000:829).

> public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 (similar to article 18 of the ICCPR) is often invoked in domestic legal procedures in Europe.[39] The first element of the article is absolute and unlimited and may not be subjected to limitations. The second element, the freedom to manifest one's religion, is an external element and may be limited under certain circumstances.[40]

There is a clear recognition that religious communities have a right to legal entity status, grounded in their fundamental rights to freedom of religion. Differential treatment of religious groups may be held to violate anti-discrimination norms of the Convention as set out in article 14 of the Convention. Article 14, under the heading "Prohibition of discrimination", reads as follows:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 10 has also been the subject of legal scrutiny in religious freedom cases.[41] Article 10 reads as follows:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[39] Van Bijsterveld (2001:151).
[40] Cf. Fuhrmann (2000:831). See also *Kokkinakis v Greece* (1994).
[41] See the discussion of *Rommelfanger v Federal Republic of Germany* (1989) in 4.4.11 (*infra*).

Other articles may also find application in church law. It is, for example, quite conceivable that all church tribunals will be held to the standard set in article 6, which, *inter alia*, states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (cf. 4.4.24.2 [*infra*] and 7.3.4 [*infra*]).

4.4.3 The European Court of Human Rights

The European Court of Human Rights (ECHR) was established in 1959 to interpret and apply the Convention. The ECHR is a full-time institution with responsibility for delivering legally binding judgments on whether or not the Convention has been violated. The ECHR has effectively become the constitutional court for greater Europe.[42] The ECHR operates as a guarantee where violations of fundamental rights escape the scrutiny of national review bodies. It never acts as a court of first instance or even a court of appeal, as it would run the risk of being submerged by a massive case load.[43]

The ECHR affords individuals the right to petition an international tribunal with complaints directed against a state or states. It also empowers states to bring before an international body other states, alleged to have violated the rights of their own citizens, and it sets up an enforcement mechanism to ensure that the contracting parties to the Convention respect their engagements. All states that ratify the Convention agree to the ECHR's jurisdiction over human rights cases.[44]

Key decisions of the ECHR, testing the issues of religious freedom in Europe, have come from, *inter alia*, Greece, Turkey, and countries in transition from Soviet rule. The approach of the Court in cases where parties claim an inappropriate relationship between church and state is to focus on the extent to which such relationship is a breach of articles 9 or 14 of the Convention, or, in some cases, other relevant rights such as freedom of association. The focus of the ECHR thus far has been on religious freedom, with a minor proportion on

[42] Greer and Williams (2009:465).
[43] Fuhrmann (2000:830).
[44] *Id.*:829; Evans and Thomas (2006:702).

non-discrimination.[45] Durham Jr. (2010:7) notes the major principles identified by these cases as being, *inter alia*, 1. Mandatory registration laws are not permissible; 2. Religious entities have the right to acquire legal powers for the group to carry out the full range of religious activities; 3. State officials have a strict duty of neutrality and impartiality regarding religious communities; 4. Intervention in internal religious affairs, by evaluating religious beliefs, engaging in substantial review of ecclesiastical structures, imposing bureaucratic reviews or restraints with respect to religious appointments, and the like, should not be allowed; 5. Religious groups shall be allowed to structure themselves in ways that are consistent with their own beliefs about their structure; and 6. Prompt appeal from denial of legal entity status must be available.[46]

These principles, while derived from decisions of the ECHR, are based on the provisions of the Convention regarding freedom of religion and parallel provisions in the ICCPR. As such, they amount to highly persuasive authority on the meaning of provisions pertaining to freedom of religion.

The position of the ECHR regarding permissible church-state relationships was extensively and decisively dealt with in *Refah Partisi v Turkey* (2003) where the Court upheld the banning of a political party that was advocating the introduction of elements of Islamic law into the Turkish legal order.

As far as the permissible scope of state support for religion is concerned, the ECHR held that financial assistance to churches and religious organisations is permitted to the extent that such sponsorship will not interfere with the religious freedom of non-believers.[47] The state may also assist churches by allowing them to collect funding from their members through a compulsory taxation system.[48]

[45] Evans and Thomas (2006:721).
[46] Other principles noted by Durham Jr. (2010:7ff.) include: The registration process should not itself pose a major obstacle to acquiring entity status; the right to live in a system characterised by the rule of law; the process of gaining legal entity status must be non-discriminatory; high minimum membership requirements should not be allowed; foreign status should not be a ground for denying access to legal personality; officials may not delay the process when considering entity status; no discretion on the part of the state is allowed when determining the legitimacy of religious convictions; permissible limitations must be narrowly construed; and, when changing laws, appropriate transition rules should be included to protect vested rights of religious bodies organised under prior law.
[47] Evans and Thomas (2006:713). Cf. 6.13 (*infra*).
[48] Cf. *Darby v Sweden* (1990).

In a number of European states there is a degree of state control over religious leaders, notably the clergy of established churches, who are subjected to a far higher degree of control by government than the religious leaders of groups not associated closely with the state.[49] This seems to be because church law in state churches could be subjected, directly or indirectly, to a form of official control not based solely on religious goals; in some instances even furthering secular objectives. The case of *Knudsen v Norway* (1985) illustrates this point. A minister who was publicly critical of the state abortion laws was disciplined by the government. The European Commission of Human Rights (EComHR)[50] rejected his application because religious freedom does not relinquish his duty to the state.[51] In *Karlsson v Sweden* (1988) the EComHR confirmed this approach in a judgment against an application of a minister who was refused a post because of doubt over his views on female priests:

> The freedom of religion thus does not include the right of a clergyman, within the framework of a church in which he is working or to which he applies for a post to practise a special religious conception. If the applicant's views on women priests and thus his intentions regarding co-operation with female colleagues is found to be incompatible with the view generally held by the church in question the latter is not obliged to accept the applicant as its servant.

The position of state-churches in terms of the Convention has also been a subject of legal scrutiny. The EComHR, in *Darby v Sweden* (1990), conceded that establishment was not a breach of the Convention. Establishment is only prohibited to the extent that it implicates any of the other rights in the Convention. The main reason for this was that a number of states, at the time

[49] Evans and Thomas (2006:717).
[50] From 1954 to 1998 the EComHR's role was to consider whether a petition was admissible to the ECHR. The former was abolished in 1998, the court was enlarged, and individuals were allowed to take cases directly to it (Greer and Williams 2009:465).
[51] The EComHR's finding states that "a clergyman within a State Church system, has not only religious duties, but has also accepted certain obligations towards the State. If the requirements imposed upon him by the State should be in conflict with his convictions, he is free to relinquish his office as clergyman within the State Church, and the Commission regards this as an ultimate guarantee of his right to freedom of thought, conscience and religion" (at 257).

when the Convention was drafted, had established churches,[52] and religious freedom and religious tolerance were protected in the majority.[53]

Some forms of establishment would, however, not be permitted by the Convention, for example, a theocratic or confessional state. Short of this extreme there have been few cases where an established church has intruded too far into the lives of non-believers and the ECHR has struck down the law in question.[54]

Cases where article 9 of the Convention has been tested include *Kokkinakis v Greece* (1994) where the applicant, a Jehovah's Witness who had been convicted by a criminal court for proselytism, claimed there was a violation of the article. The ECHR found that the sentence passed by the criminal court amounted to an interference with the exercise of the right to freedom to manifest one's religion or belief. The court accepted that the right to try to persuade one's neighbour as to religious belief is included in the "right to manifest one's religion".

Additional case law based on the Convention, which is applicable to the aims of this study, will be discussed in the relevant following sections.

4.4.4 Austria

The Republic of Austria's constitutional law is contained in a number of separate acts. The constitutional basis for the recognition of churches was laid down in article 15 of the 1867 Constitution:

> Every legally recognized church and religious society has the right publicly to exercise its religious worship; it regulates and administers its internal affairs independently, remains in possession and enjoyment of its establishments, institutions, and property held for religious, educational, and charitable purposes; but is subject, as other societies, to the general laws of the state.

[52] These included the UK, Sweden, and Norway.
[53] Cf. Evans and Thomas (2006:707).
[54] Cf. *Buscarini v San Marino* (1999) (the ECHR held that a law requiring parliamentarians to take a religious oath was unjustified interference with religious freedom in terms of the Convention). Cf. *Darby v Sweden* (1990) (*supra*) and *Kokkinakis v Greece* (1994) (*infra*).

The right of self-determination, as it is encompassed here, implies the position and status of an incorporated body under public law. In these terms, the Protestant (Lutheran) Church in Austria is categorised as a statutory recognised church with the legal position of a public institution. For the recognised churches as corporations *sui generis*, church law has been developed by way of special laws.[55]

One particular area where self-determination is evident is in the field of church employment. Church employment is part of civil law, and internal church statutes on employment and remuneration remain a matter of contract law adopted by churches and other religious communities as holders of private-law rights (*lex contractus*). Labour law within the church, however, can be modified within optional law and even compulsory labour law is interpreted in the light of self-determination (*supra*).[56]

According to Schinkele (2007:43-44) there is a nexus between the acceptance of the doctrine and teaching of the church, relating to the specific task of the employee in question, on the one hand, and the church's spiritual mandate on the other. Labour law in Austria takes into account the internal affairs of churches by implementing a so-called "consideration clause" (*Tendenschutz*), in terms of which the provisions on the organisation of industrial relations are not applicable (under certain conditions) to enterprises that serve denominational purposes and are charged with managing the internal affairs of recognised churches.

There have been two prominent cases before the ECHR which involved freedom of religion in Austria. In *Hoffmann v Austria* (1994) the applicant, a Jehovah's Witness, alleged violations of, *inter alia*, articles 9 and 14 of the Convention (see 4.4.2, *supra*) because the Supreme Court of Austria awarded custody of her two children to their Catholic father. She complained that she was denied her parental rights on the basis of her religious convictions, which included the right

[55] Garlicki (2001:482); Schinkele (2007:37-38). In 2001 the Protestant Church represented 4.68% of the Austrian population, second to the Roman Catholic Church that represented 73.66%. Other categories of religious communities are state-registered religious communities with legal entity under private law according to a special law on religious associations, and religious communities with legal entity under private law on the basis of the general law on associations (*Id.*).
[56] *Id.*:43.

to refuse to authorise blood transfusions. The ECHR considered the case under article 8 (the right to have family life respected) in combination with article 14 and held that a distinction based on religious considerations was unacceptable.

In *Otto-Preminger-Institut v Austria* (1994) the ECHR ruled in favour of the Austrian government's banning of a film deemed offensive to Catholics. The court found that interference with the applicant association's freedom of expression[57] may be justified in an effort to protect the right to respect one's religious feelings. It seems, therefore, that the ECHR, when deciding between conflicting fundamental rights by means of a balance of proportionality assessment, attaches considerable weight to article 9 interests.

4.4.5 Belgium

The Belgian Constitution,[58] in articles 19 to 21, guarantees religious freedom and the right to exercise it freely:

> Article 19
> Freedom of worship, its public practice, and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished.
> Article 20
> No one can be obliged to contribute in any way whatsoever to the acts and ceremonies of a religion or to observe its days of rest.
> Article 21
> The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever or to forbid these ministers from corresponding with their superiors, from publishing the acts of these superiors, but, in this latter case, normal responsibilities as regards the press and publishing apply. A civil wedding should always precede the blessing of the marriage, apart from the exceptions to be established by the law if needed.

Van Bijsterveld (2000:990) shows how the Belgian government creates a balance in the relationship between church and state. While the state provides

[57] Article 10 of the Convention.
[58] Adopted on 4 February 1831 and entered into force on 7 February 1831 (latest version: October 2007).

for the wages and pensions of the clergy, organisational independence and church autonomy are guaranteed. According to Torfs (2001:83ff.) article 9 of the ECHR is directly applicable in Belgium and the article confirms the principles set out in the Constitution.

In addition to modest salaries (in terms of article 181 of the Constitution) and appropriate housing for ministers of religion of approved parishes, recognition also entails other benefits, including the possibility of receiving state subsidies for the construction or renovation of buildings. Where churches want to benefit from the advantages it is important to have a credible interlocutor with the state. Churches with a strict hierarchical structure, such as the Catholic Church, are in a better position in this regard than Protestant churches.[59]

In order to be part of contractual relationships (including ownership of real estate), religious groups need to constitute themselves as legal persons. Churches and church structures themselves do not enjoy legal personality. Legal personality is attributed to the ecclesiastical administrations responsible for the regular needs of the church.[60] This means that a church, diocese, congregation, or parish cannot be a party in a court case.[61]

Civil courts do not involve themselves in doctrinal issues and only deal with internal church matters where civil law is of concern. It is, however, conceivable that internal doctrinal decisions can, in some instances, lead to civil liability.[62] Torfs (2001:87ff.) identifies and describes an evolution in the attitude of civil courts towards church autonomy in Belgium. Traditionally the generally accepted approach was that control by civil courts was limited to a strictly formal one. The court simply verified whether or not a competent ecclesiastical authority had taken the challenged decision. This tendency was confirmed by the Belgian Supreme Court (the *Cour de Cassation*) in 1975, although the *Cour* left an

[59] Torfs (2007b:46-48).
[60] *Id.*
[61] See Torfs (2001:85ff.) for the ways in which the problems that arose in fields such as property or civil liability are dealt with.
[62] *Id.*:87ff.

opening[63] for possible extended control (to include the right to verify the internal procedure) in its analyses of a judgment by the Court of Appeal of Liège in 1967.

Torfs shows that the real turnabout came in a 1994 decision by the *Cour de Cassation*. The court *a quo* (the Court of Appeal in Mons in 1993) took a three step approach in a judgment: 1. the competent authority should be verified; 2. the internal procedures had to be followed; and 3. the content of the followed procedures should correspond with the principles set out in article 6(§1) of the Convention. In considering the appeal, the *Cour* did not accept the third step and revoked the judgment of the Appeal Court. In 1999 the *Cour* confirmed its earlier approach and judged that article 6(§1) of the Convention is not applicable within the framework of the right to free internal organisation of churches as formulated in article 21 of the Belgian Constitution.

Strauss (2007:207-211) illustrates how the same three steps can, *mutatis mutandis*, be applied in the South African context. It is trite that the first two steps will inevitably form part of any civil court's consideration of a church case. Strauss, in considering the third step, concludes that the South African courts should not ignore the question whether internal procedures are indeed fair and just, as well as based on widely accepted (reasonable) actions and the Bill of Fundamental Rights. The Belgian courts have not yet taken the final leap.

4.4.6 Czech Republic

The Constitution of the Czech Republic[64] does not deal with religion or church law in any direct manner. That is left to the Charter of Fundamental Rights and Liberties,[65] a separate document, but declared as a part of the constitutional order of the Republic. The Charter, in article 2(1), precludes the possibility of a state church: "Democratic values constitute the foundation of the state, so that it may not be bound either by an exclusive ideology or by a particular religious

[63] Torfs (*Id.*:89) is of the opinion that the reasoning of the Appeal Court (regarding the right to verify internal procedures of an ecclesiastical authority) in 1967 has, skilfully, never been confirmed or denied by the *Cour de Cassation*.
[64] The Constitution of the Czech Republic was adopted on 16 December 1992 and entered into force on 1 January 1993. Since adoption, it has been amended five times. The latest amendment was consolidated with the original text in 2002.
[65] Adopted in terms of a resolution of the Czech National Council of 16 December 1992.

faith". Article 15(1) contains a general religious freedom clause[66] while article 16 deals, *inter alia*, with the rights of churches[67] in terms of the constitutional order:

> (1) Everyone has the right to freely manifest their religion or faith, either alone or in community with others, in private or public, through worship, teaching, practice, and observance.
> (2) Churches and religious societies govern their own affairs; in particular, they establish their own bodies and appoint their clergy, as well as found religious orders and other church institutions, independent of state authorities.

State neutrality regarding religious communities is not specifically mentioned in the Charter but can be derived from articles 15 and 16. According to Horák (2010:251-257) Czech scholars widely support the idea of a state that is secular but not hostile to religious communities. There is thus no insistence on a complete separation of church and state, and church-state treaties present in Czech law, on an internal level, indeed show a tendency towards a cooperative model of relations (positive neutrality).

Churches[68] obtain legal personality by state registration only, while parishes and dioceses derive legal personality through the provisions of the churches they belong to.[69] Registration affords church legal persons full legal capacity, which means they can also contract. On registration a church attaches its constitution and other regulatory instruments (statutes) to the application for registration. The church must notify the registering agency of every change to its statutes and provide information about individuals who are empowered with statutory powers, the names of which are held by the Ministry in public registers. A church can worship and manage other religious activities without registration, but it is only by registration that it can possess property and employ people. Registered churches also obtain certain tax benefits and receive financial support from the state for salaries of clergy. Moreover, the employment of workers who are

[66] "The freedom of thought, conscience, and religious conviction is guaranteed. Everyone has the right to change her religion or faith or to be non-denominational".
[67] Limited by law when other rights or public security and order are threatened (Article 16[4]).
[68] The terms "church", "religious society" and "denomination" are synonymous expressions that are used interchangeably in Central Europe (Tretera 2007:55).
[69] *Id*. In 2010 there were 31 registered denominations in the Czech Republic, representing one-third of the inhabitants of country (Horák 2010:251).

directly involved in the spiritual sphere is exempt from governmental labour law and ruled by internal statutes only.[70] To provide an assurance of its (non-profit) religious character, registered denominations must publish an annual financial report.[71]

4.4.7 Denmark

According to the Constitutional Act of Denmark,[72] the "Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State".[73] It also stipulates that the king shall be a member of the Evangelical Lutheran Church[74] and that the constitution of that Church shall be laid down by statute.[75]

General religious freedom is ruled by §67 to §70 of the Constitution:

> §67 Citizens shall be at liberty to form congregations for the worship of God in a manner according with their convictions, provided that nothing contrary to good morals or public order shall be taught or done.
> §68 No one shall be liable to make personal contributions to any denomination other than the one to which he adheres.
> §69 Rules for religious bodies dissenting from the Established Church shall be laid down by statute.
> §70 No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons.

Danish law generally does not require any specific official recognition for the founding of a legal personality. A religious organisation can thus be freely constituted without any official approval. They may be constituted as companies, foundations, or associations, of which the last is generally preferred.[76]

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[70] Tretera (2007:56-57).
[71] *Id.*:59.
[72] Given at Christiansborg palace, 5 June 1953.
[73] Part I §4.
[74] Part II §6.
[75] Part VII §66.
[76] Tamm (2007:61).

The constitutional position of the established church seems to be firm, with an estimated 85% of the Danish population subscribed as members.[77] As the Church forms part of the Danish administrative system, with the Minister of Ecclesiastical Affairs as the chief administrator, it has no independent legal status. It can sue and be sued in terms of contractual or employment matters, but its legal position does not differ from that of other state organs.[78]

In terms of article 67 (*supra*) the government recognises the existence of religious entities, other than the state church. There is no legislation determining the legal status of these entities and therefore they are conceived as private associations subject to general legislation covering these associations. No official registration is required, but certain advantages can be obtained if a religious entity is indeed registered. Reformed congregations (among other denominations, including the Roman Catholic Church and the Methodist Church) received official recognition by a royal decree before 1970. After 1970 the practice of giving recognition by royal decree came to an end and was replaced by official approval of religious entities by the Ministry of Ecclesiastical Affairs.[79]

Benefits derived from approval include a well-protected legal status, the right to perform marriages, the right to dispose of parts of a graveyard for its own use and tax relief under certain conditions. In addition, clergy from such an entity are entitled to permission to stay in Denmark. Clergy have the right of privilege concerning information obtained in an official capacity when called as witnesses in a court of law.[80]

4.4.8 Estonia, Latvia and Lithuania

In this section, the focus is on religious freedom and church legislation in post-Soviet Estonia. The position in Estonia will then be compared to that of the other two Baltic countries, Latvia and Lithuania.

The Estonian Constitution (1992) expressly guarantees religious freedom in section 40:

[77] Van Bijsterveld (2000:991); Tamm (2007:61).
[78] *Id.*:61-62.
[79] *Id.*:62-63.
[80] *Id.*:65-66.

> Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church. Everyone has the freedom to practise his or her religion, both alone and in community with others, in public or in private, unless this is detrimental to public order, health, or morals.

Other constitutional provisions related to aspects of freedom of religion include article 45 (the right of freedom of expression), article 47 (the right of assembly) and article 48 (the right of association). Article 9(2) provides that freedom of religion also extends to legal persons, in addition to individuals. While there is official separation between state and church, Kiviorg (2007:68) shows that there is cooperation between state and church to a certain extent.

As Estonia joined the European Union in 2004, European Union law takes precedence over Estonian law, as long as it does not contradict Estonia's Constitution's basic principles.[81] Churches are regulated by the Churches and Congregations Act of 2002. The purpose of this Act is to provide the procedure for membership of churches,[82] congregations,[83] associations of congregations,[84] monasteries, and religious societies and the regulation of their activities, in order that freedom of belief as ensured by the Constitution may be exercised.

The legal capacity of a religious association commences as soon as it is registered.[85] Congregations that belong to a church or association of congregations do not have legal personality.[86] A registrar shall not enter a religious association in the register if the statutes or other documents submitted

[81] Kiviorg (2007:70-71).
[82] A "church" is defined by the Act as "an association of at least three voluntarily joined congregations which has an episcopal structure and is doctrinally related to three ecumenical creeds or is divided into at least three congregations and which operates on the basis of its statutes, is managed by an elected or appointed management board and is entered in the register in the cases and pursuant to the procedure prescribed by this Act" (chapter 1 §2[2]).
[83] The Act defines a "congregation" as "a voluntary association of natural persons who profess the same faith, which operates on the basis of its statutes, is managed by an elected or appointed management board and is entered in the register in the cases and pursuant to the procedure prescribed by this Act" (chapter 1 §2[3]).
[84] An "association of congregations" is defined by the Act as "an association of at least three voluntarily joined congregations which profess the same faith and which operates on the basis of its statutes, is managed by an elected or appointed management board and is entered in the register pursuant to the procedure prescribed by this Act" (chapter 1 §2[4]).
[85] Chapter 1 §5(4).
[86] Chapter 1 §5(5).

by the religious association are not in compliance with the requirements of law,[87] or if the activities of the religious association affect public order, health, morals, or the rights and freedoms of others.[88] Directives regarding ministers include they are required to have the right to vote in local government[89] and only a person to whom explicit permission has been granted may hold the right to wear the professional attire of a minister of religion prescribed in the statutes of the religious association.[90] Regarding membership it is interesting to note the requirement that a child who is less than fifteen years of age may only be a member of a congregation with the permission of his or her parents or guardian.[91]

State support for registered churches includes assistance in the preservation of their historical buildings and an automatic exemption from tax (income and land). Considerable autonomy regarding employment decisions exists, as labour law does not apply to persons who conduct religious activities, unless a religious organisation chooses to enter into an employment contract with a person (churches as legal persons can enter into various types of contract).[92]

A comparative look at the religious legislation in the Baltic States after the collapse of the Soviet Union reveals some differences between Estonia, Latvia and Lithuania. Whereas Estonia is mainly Lutheran, Latvia is divided between Roman Catholic and Lutheran while Lithuania is predominantly Roman Catholic.[93] Ringvee (2001:640ff.) notes that secularisation of former Soviet countries occurred at a faster rate in Protestant countries than in other countries. This may explain why Estonian legislation has less regulation of the religious field than the legal systems in the other Baltic countries and adopted a different legal model concerning religion and churches.

The Constitution of Latvia (1998) mentions religion only in article 99: “Everyone has the right to freedom of thought, conscience and religion. The church shall be separate from the State”. According to statute, religious organisations must be

[87] Chapter 2 §14(2)(1).
[88] Chapter 2 §14(2)(2).
[89] Chapter 5 §20(1).
[90] Chapter 5 §21(1).
[91] Chapter 2 §10(2). Cf. Christensen (1995:593-594) who discusses the position in Finland.
[92] Kiviorg (2007:74-77).
[93] Ringvee (2001:640).

registered with the Board of Religious Affairs, affording them the status of legal persons. All applications must be accompanied by a charter. By means of the charter religious organisations may also, to a limited extent, regulate internal affairs. Several laws regulate issues related to financial activities, property, and tax relief.[94]

It appears that the Catholic Church in Lithuania has considerable influence on society and the administration of the state, which is reflected in the legislative sphere.[95] In addition to a general freedom of religion clause (article 26), article 43 of the Lithuanian Constitution (2004) contains a comprehensive exposition of the position of churches in the country:

> The State shall recognise the churches and religious organisations that are traditional in Lithuania, whereas other churches and religious organisations shall be recognised provided that they have support in society and their teaching and practices are not in conflict with the law and public morals.
> The churches and religious organisations recognised by the State shall have the rights of a legal person.
> Churches and religious organisations shall be free to proclaim their teaching, perform their practices, and have houses of prayer, charity establishments, and schools for the training of the clergy.
> Churches and religious organisations shall conduct their affairs freely according to their canons and statutes.
> The status of churches and other religious organisations in the State shall be established by agreement or by law.
> The teaching proclaimed by churches and religious organisations, other religious activities and houses of prayer may not be used for purposes which are in conflict with the Constitution and laws.
> There shall not be a State religion in Lithuania.

All religious communities possessing rights of legal personality may receive financial support of some form from the government, including exemption from taxes. Employees of the majority of churches in Lithuania are considered to be

[94] Balodis (2007:149ff.).
[95] Ringvee (2001:641).

civil servants and the normal labour laws are in effect.[96] The extent to which churches are allowed to "conduct their affairs freely according to their canons and statutes" (*supra*) is not clear in the light of the supposedly slow secularisation of Lithuania.[97] It cannot be conclusively determined from the Baltic experience whether or not secularisation (or a predominantly Protestant society) indeed affords churches greater freedom to internally arrange their affairs.

4.4.9 Finland

4.4.9.1 Legal status of churches

The Constitution of Finland[98] deals with freedom of religion and conscience in section 11:

> Everyone has the freedom of religion and conscience. Freedom of religion and conscience entails the right to profess and practise a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one is under the obligation, against his or her conscience, to participate in the practice of a religion.[99]

Provision for the statutory regulation of churches is found in section 76 of the Constitution:

> (1) Provisions on the organisation and administration of the Evangelic Lutheran Church are laid down in the Church Act.
> (2) The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code.

The status of the Evangelical Lutheran Church of Finland[100] is ensured in the Constitution (section 76[1], *supra*). Despite this prominent position, the Church is not considered to be a state church (a status it had enjoyed until 1869) as the

[96] Kuznecoviene (2007:157).
[97] Cf. Ringvee (2001:631).
[98] Adopted on 11 June 1999 and came into force on 1 March 2000.
[99] Unofficial translation.
[100] Approximately 84 percent of the Finnish population belongs to the Evangelical Lutheran Church (Kotiranta 2007:90).

State has neither the power to influence its governance and doctrine, nor to afford any precedence to the Lutheran doctrine in its own acts.[101] Although the nature of the Church's organisation is hierarchical, local parishes function independently from the central church structures. Lutheran parishes derive their income from a church tax, collected by the state for a fee.[102]

Even though the (much smaller) Finnish Orthodox Church is not mentioned in the Constitution, it is regulated by government-enacted law. Government is, however, not bound by the content of the Orthodox Church Act and the influence of the Church in the enactment of laws concerning itself is limited.[103]

While the Lutheran and Orthodox Churches are in a special position *vis-à-vis* the state, this does not affect the activities of the other religious groups. Certain developments have placed the various churches on a more equal footing.[104] Any registered religious association acquires special legal status in terms of the Freedom of Religion Act (2003). Such a body can acquire property, enter into contractual relationships, and be a litigant in court.[105]

4.4.9.2 ECHR litigation

In 1999, the ECHR heard a case that originated in Finland. In *Ahtinen v Finland* (1999) the ECHR dealt with the right of churches to run their own affairs. The applicant was a Finnish national, born in 1949, and living in Rovaniemi (Finland), where he was a parish priest in the Evangelical Lutheran Church for more than ten years. The case concerned, in particular, Rev. Ahtinen's complaint that in November 1998 he was transferred to another parish 100 km. away without his consent and without being heard properly on the real reasons for his transfer. He relied on article 6(§1) (right of access to a court) of the European Convention.

The ECHR noted that under Finnish law the Evangelical Church had the right to run its own affairs and, in particular, could independently decide on such matters as the appointment of its priests, including how long and where they were to

[101] Christensen (1995:585ff.).
[102] *Id.*
[103] Kotiranta (2007:79-83).
[104] Van Bijsterveld (2000:991).
[105] Kotiranta (2007:79-84).

carry out their pastoral duties. On having agreed to serve as a parish priest with the Lutheran Church, the applicant had undertaken to abide by those rules. The court also reiterated that it had already found previously that the judicial determination of issues, such as the continuation of a priest's service, would be contrary to the principles of autonomy and independence guaranteed by, among other things, the Charter of Fundamental Rights and Freedoms. The court concluded that there was no basis either in domestic law or in the court's case-law to hold that the applicant had a "right" within the meaning of article 6(§1) and therefore held unanimously that there had been no violation of that article.

4.4.10 France

Article 1 of the Constitution of France[106] provides that the Republic of France shall ensure the equality of all citizens before the law without distinction of, *inter alia*, religion, and shall respect all beliefs. There is no further mention of religion or churches.[107]

According to Messner (2001:113), the concept of church autonomy, including the freedom of internal organisation and the right of religious institutions to govern themselves by their own laws, is foreign to French law. The principle of equality in France (as set out in the Constitution [*supra*]) implies a uniform legal system where no special rights or freedoms are reserved for specific groups. The right of religious groups to become legal entities without state interference or control is a right that is also extended to non-religious groups.[108]

France has reportedly experimented throughout its history with almost all the existing systems for church-state relations.[109] The idea of separation of the church and the state was quite rigorously introduced in the early twentieth century.[110] The state has definitively abandoned the system of "recognised religions" and no religious denomination is by law allowed to be subsidised by

[106] Adopted on 4 October 1958.
[107] This omission is in contrast to the constitutions of most other countries in Europe as well as the European Convention.
[108] Cf. Ferrari (2007:21). See also Plesner (2001:5) who describes the French system as an "ultra liberal laissez-faire approach" where freedom of religion is mainly a right to freedom *from* state interference.
[109] Robert (2003:638).
[110] Van Bijsterveld (2000:991).

the state. This does however not mean that the state is hostile towards religion. On the contrary, the French state maintains good relations with religious groups.[111] Jurisprudence has even recognised that the religious nature of a minister's work results in a special kind of employment relationship.[112]

The French system of state support of church and religion appears to be the system in Western Europe most reluctant in terms of financial support. The French Constitution is quite explicit on financial relationships between church and state. But, even in France, armed forces and penitentiary institutions have a chaplaincy service paid for by the state.[113] The system of total separation between church and state does not ultimately mean absolute neutrality.

4.4.11 Germany

Religious freedom has a prominent place in Germany's legal system. Freedom of religion is protected before many other freedoms.[114] The Basic Law of the Federal Republic of Germany[115] is the Constitution of Germany. Article 4 governs freedom of faith and conscience in general terms. The article reads, *inter alia*:

> 1. Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
> 2. The undisturbed practice of religion shall be guaranteed.

Article 140 (Law of Religious Denominations) rules that the provisions of articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919[116] shall be an integral part of the Basic Law, and the articles are thus included in the official text of the Basic Law. These articles, under the heading "Religion and Religious Societies", read as follows:

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[111] Robert (2003:639-640).
[112] Messner (2001:115).
[113] Van Bijsterveld (2006:3).
[114] Cf. Robbers (2001b:643ff.).
[115] The Basic Law for the Federal Republic of Germany was adopted, signed and promulgated by the parliamentary council meeting in public session at Bonn am Rhein on 23 May 1949. The most recent major modifications were made in 2008.
[116] The Weimar Constitution (Robbers 2001a:122).

Article 136

(1) Civil and political rights and duties shall be neither dependent upon, nor restricted by, the exercise of religious freedom.

(2) Enjoyment of civil and political rights and eligibility for public office shall be independent of religious affiliation.

(3) No person shall be required to disclose his religious convictions. The authorities shall have the right to inquire into a person's membership in a religious society only to the extent that rights or duties depend upon it or that a statistical survey mandated by a law so requires.

(4) No person may be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath.

Article 137

(1) There shall be no state church.

(2) The freedom to form religious societies shall be guaranteed. The union of religious societies within the territory of the Reich shall be subject to no restrictions.

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the participation of the state or the civil community.

(4) Religious societies shall acquire legal capacity according to the general provisions of civil law.

(5) Religious societies shall remain corporations under public law in-so-far as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and the number of their members give assurance of their permanency. If two or more religious societies established under public law unite into a single organisation, it too shall be a corporation under public law.

(6) Religious societies that are corporations under public law shall be entitled to levy taxes on the basis of the civil taxation lists in accordance with Land law.

(7) Associations whose purpose is to foster a philosophical creed shall have the same status as religious societies.

(8) Such further regulation as may be required for the implementation of these provisions shall be a matter for Land legislation.

> Article 138
> (1) Rights of religious societies to public subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the Länder. The principles governing such redemption shall be established by the Reich.
> (2) Property rights and other rights of religious societies or associations in their institutions, foundations, and other assets intended for purposes of worship, education, or charity shall be guaranteed.
> Article 139
> Sundays and holidays recognised by the state shall remain protected by law as days of rest from work and of spiritual improvement.
> Article 141
> To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons, or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.

In Germany there are two major churches, the Catholic Church with approximately 26.5 million members and the Protestant Church (mainly either Lutheran or Reformed [Calvinist] Churches) with about 26.2 million members. The latter consists of different units, called *Landeskirchen*, which combine to form the Evangelical Church of Germany.[117]

In terms of the German Constitution's advancement of the principle of neutrality, there is no established church in Germany (article 137[1], *supra*) and the state is not allowed to show any preference for a religious community or to judge their beliefs. Religious societies are free to regulate and administer their own affairs (within the limits of general law) independently without interference by the state (article 137[3], *supra*).

However, there is not a total separation between church and state. Officially recognised churches operate as *Körperschaft des öffentlichen Rechts* (corporations of public law, as opposed to private law) and are endorsed by the German government. A person's religion is recorded on their birth certificate. Germany has a state-supported system of church tax collection. Eight percent of

[117] Vletsis *et al.* (2008).

a person's income tax supports the state church. To avoid this tax, Germans must fill out paperwork declaring their intention to leave the church, forfeiting the right to be married and buried by the church.[118]

Registration is not a condition for being allowed to function in Germany as a church, and to enjoy religious freedom under the Constitution. Registration, however, is relevant for the assertion of legal positions as well as general legal actions. The German legal system allows churches and religious communities to obtain legal status in two ways, through either private law or public law. All religious communities may obtain legal status by the general provisions of civil law. All forms of organisation under private law are made available to religious communities, but most of them choose the status of a registered association. The status of a public-law corporation is available to all religious communities that were given a certain legal status before 1919, as well as to other religious communities with a proven durability and membership.[119]

The status of a public corporation has a number of legal advantages, the most notable being a right to raise church tax with the support of the state in the administration and execution of that right, the right to employ civil servants, the parish right,[120] and the right to create public ecclesiastical property, for example, church buildings, to which the public property law of the state applies. Tax benefits are also afforded to religious communities that acquire charitable status. Every taxpayer may reduce his income tax by the amount donated to civil-law communities, as well as church tax paid to public corporations.[121]

Moreover, having the status of a public-law corporation provides the right to establish autonomous legislation in respect of churches' own affairs, which forms a binding part of the legal order of the state. Granting churches legal status as public-law corporations, however, does not incorporate them into the state hierarchy. On the contrary, it is a status *sui generis*.[122]

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[118] Van Bijsterveld (2000:990); Robbers (2010:131ff.).
[119] Mückl (2007:109-111).
[120] The right of the church to oblige *ipso iure* all the members residing in a certain area (*Id.*:112).
[121] *Id.*:111-112.
[122] Robbers (2001b:649-651). Cf. Smit (2005:50ff.) who shows that the "Duitse staatskerkreg erken dat die kerkregering 'n *ius sui generis* is én 'n spesifieke wyse waarop die kerk die belydenis uitleef" (*Id.*:50).

Robbers (2010:121ff.) distinguishes between collective religious freedom and organisational religious freedom in German legal doctrine. The former refers to everybody's individual right to exercise his or her freedoms in community with others. The association, without possessing any rights of its own, would in this case be regarded as an expression of the individual rights of each member to assemble freely. In that way the religious community would represent the freedom of religion of its members.

While this approach to religious freedom does not have much significance in Germany, organisational religious freedom[123] is widely applied. Organisations such as churches enjoy freedom of religion or belief in their own right. Organisations do not only represent the rights of their members, but also have their own proper rights.[124] This stems from the right to freely associate to form a religious organisation in articles 4 and 140 (*supra*).

One of the critical areas of the application of church law within religious communities is found in the field of labour law. Religious communities form the second largest employer (with 1.5 million people in their service), after the state institutions in Germany.[125] To express the special nature of churches as service communities, terms such as service giver and service taker are used as opposed to employer and employee.

Service within the church is determined by the assignment of the church to bear witness to the gospel in words and deeds. Acceptance and non-acceptance of the views, doctrines, teachings, ethics, conduct, and behaviour are of core relevance to each member and staff within the religious institution. In terms of the provisions of freedom of religion, the special conditions, resulting from the religious duties of churches, must be taken into account when examining their labour status. Although to the large majority of employees (in the service of a church) normal state labour laws apply, this is modified in many instances on the

[123] Also known as "corporate freedom of religion or belief" (Robbers 2010:122).
[124] *Id.*:122ff.
[125] Robbers (2010:227).

basis of the church's right to self-determination and its particular religious context.[126]

The churches' right to self-determination allows them, within the limits of the law applying to all, to regulate internal working conditions according to their own terms and to make specific duties of their employees obligatory. When applying the general secular labour laws, the courts shall take due account of the self-understanding of the churches (and indeed all religious communities) in balancing the rights and obligations of the employees and the employers.[127]

As a result of their religious mandate, churches have the right to terminate the employment of an employee who, in his or her public way of life or publicly expressed opinions, acts contrarily to the teachings of the church in question. In cases of dispute, labour courts shall respect the standards of the church in assessing a contractual obligation of loyalty, insofar as the Basic Law recognises the right of churches to determine the matter internally. In the case of a violation of the obligation of loyalty by the employee, the Labour Court is the final judge of whether the termination of employment is justified or not.[128]

In a landmark decision by the EComHR in *Rommelfanger v Federal Republic of Germany*,[129] article 140 (*supra*) was subjected to legal analysis. The employer challenged, in particular, the Federal Labour Court's view that the degree of loyalty of church employees differs according to the measure in which they participate in the specific religious functions of the church (a decision corresponding with the way South African courts deal with a similar situation).[130]

Rommelfanger (the applicant) was employed as a German physician in the hospital of a Roman Catholic foundation. In September 1979, the applicant (and others) signed a letter, related to abortion legislation, to the editor of a weekly magazine. As the views therein were considered to be diametrically opposed to

[126] *Id.*:228.
[127] *Id.*
[128] *Id.*
[129] Delivered on 6 September 1989.
[130] Cf. *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2005) (at 15ff.) where the Equality Court argued along similar lines to the Federal Labour Court in *Rommelfanger v Federal Republic of Germany* (1989) (see 5.5.12, *infra*).

the opinion of the Church, concerning the killing of the unborn, the applicant's employer gave him notice of dismissal.

The Regional Labour Court and the Federal Labour Court (on appeal) held that the dismissal was socially unjustified.[131] The employer lodged a constitutional complaint invoking the fundamental right of freedom of religion under article 4 of the Basic Law and the right of church autonomy under article 140 of the Basic Law, read in conjunction with article 137 of the Constitution (*supra*). The Federal Constitutional Court held that the views of the Church were binding, unless they were in conflict with fundamental principles of the legal system. It found that, in weighing the interests, the Federal Labour Court had not sufficiently taken into account the principle of church autonomy.[132]

Before the EComHR in 1988, the applicant alleged a violation of his right to freedom of expression (claiming that the Federal Constitutional Court adopted an unreasonably wide interpretation of church autonomy) as contemplated by article 10 of the European Convention (see 4.4.2, *supra*). The complaint was rejected. The EComHR noted that, by entering into contractual obligations *vis-à-vis* his employer, the applicant accepted a duty towards the Catholic Church which limited his freedom of expression to a certain extent. In its judgment the Commission agreed with the Federal Constitutional Court with regard to the weight given to the views of the Church concerning the duties of loyalty of its employees. This was necessary in order to safeguard the constitutional right of the Church to regulate its internal affairs. Although the courts were in agreement as to limits to the right of the Church to impose its views on its employees, the requirement to refrain from making statements on abortion, in conflict with the Church's views, was not seen as an unreasonable demand because of the crucial importance of this issue for the Church.

[131] The Federal Labour Court, however, also reasoned that church-employed physicians were required not to speak out publicly against the views of the Catholic Church concerning the inviolability of unborn human life. This duty, in the court's view, did not violate the freedom of expression which had to be weighed against church autonomy which was also protected by the Constitution (*Rommelfanger v Federal Republic of Germany* [at 5]).

[132] According to ecclesiastical law, the killing of an unborn human being was a serious crime which attracted the sanction of automatic excommunication according to the *Codex Iuris Canonici* (cf. 2.4.3.3, *supra*), a doctrine still held by the Catholic Church. Under constitutional law it was this view which had to form the basis for judging the applicant's breach of loyalty (cf. *Rommelfanger v Federal Republic of Germany* [at 7]).

The EComHR clearly attached less weight to the Federal Labour Court's contention (*supra*) that the degree of the expected loyalty of church employees differs according to the measure in which they participate in the specific religious functions of the church (an argument also found in the judgment in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* [see discussion at 5.5.12, *infra*]).

There are, however, limitations to church self-determination. These limitations are only those prescribed by "the law that applies to all" (see article 137[3] of the German Constitution [*supra*]). Robbers (2001a:122-124) shows that the application of the limitation clause in Germany has not been without controversy.

4.4.12 Greece

The relationship between the church and the state is set out in part 1 (Basic Provisions) (article 3) of the Constitution of Greece:[133]

> 1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.
> 2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.
> 3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited.

[133] 1975, as revised by the parliamentary revision of 27 May 2008.

The Constitution also contains a general freedom of religion clause:[134]

> 1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.
> 2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.
> 3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion.
> 4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
> 5. No oath shall be imposed or administered except as specified by law and in the form determined by law.

A religious entity can be constituted in Greece only after approval by the authorities. The Orthodox Church is the established church in Greece. Courts recognise the legal personality of all religious entities thereby empowering the religious entity to act legally. The legal recognition follows a basic distinction between legal persons of public law (for example, the established Orthodox Church) and of private law (the vast majority of non-established churches). Churches may act freely to make contracts, to own real property, and to act as an employer.[135]

In recent years, according to Konidaris (2007:117), law specialists, as well as the Catholic Church of Greece, have supported the creation of a special ecclesiastical legal person, constituting a third category between legal persons of public and of private law. There is no indication that such a legal person *sui generis* has been constituted in Greece yet.

[134] Article 13.
[135] Konidaris (2007:115-117).

4.4.13 Hungary

Article VII of the current Constitution of Hungary[136] reads:

> 1. Every person shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change religion or any other persuasion, and the freedom for every person to proclaim, refrain from proclaiming, profess or teach his or her religion or any other persuasion by performing religious acts, ceremonies or in any other way, whether individually or jointly with others, in the public domain or in his or her private life.
> 2. The State and Churches shall be separate. Churches shall be autonomous. The State shall cooperate with the Churches for community goals.
> 3. The detailed rules for Churches shall be regulated by a cardinal Act.

The free exercise of religion is not bound to any kind of legal form and unregistered groups enjoy the same freedom as registered ones. Registration as a church, however, in addition to a degree of social respect, provides some rights and benefits, including exemption from local taxes and the enjoyment of full legal personality in civil law, meaning that there are no restrictions on contracts, property, or employment.[137]

Church autonomy, however, appears to be the most important benefit of registration. Autonomy, in the strict legal sense, means that registered churches are not subject to any kind of state interference. Whereas a resolution of any other legal entity, such as associations, can be struck down by a court if the internal actions are unlawful, a resolution of a bishop or a synod cannot be challenged before state courts. If a registered church violates the law (not only its internal statutes), the court may call upon the church to restore the unlawfulness of its operation or risk being struck down from the register of churches. The unlawful actions themselves cannot be challenged.[138]

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[136] The Constitution (the Fundamental Law of Hungary) was adopted on 18 April 2011, promulgated a week later and took effect on 1 January 2012.
[137] Schanda (2007:119-123).
[138] *Id.*

Criticism has been levelled at the Hungarian government for introducing a very liberal Church Law after the fall of Communism in 1989, resulting in the registration of 370 groups as Churches.[139] At the end of 2011, the Hungarian government tightened the Hungarian Church Law, limiting the number of faith groups recognised and supported, by the state, to 14.[140] The Law was passed with a two-thirds majority, despite concerns that it would lead to religious policies similar to the former Communist regime. In March 2012 an additional 18 religious communities were added to the recognised number, bringing the total of recognised churches to 32.[141]

Dr. Kálmán Mészáros, president of the Hungarian Baptist Union, holds that there has been no lessening of religious freedom in Hungary, in spite of the new Law. Communities that have lost their registration may continue to hold worship services and pursue other religious activities as registered non-profit associations.[142]

4.4.14 Ireland

The Fifth Amendment of the Constitution Act (1972) removed (along with other subsections of article 44) a reference from the Constitution of Ireland[143] to the special position of the Roman Catholic Church. Subsections of article 44 that remain in the Constitution and are relevant for the aims of this study include article 44.1: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion"; 44.2.1: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen"; 44.2.2: "The State guarantees not to endow any religion"; 44.2.3: "The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status"; and 44.5: "Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes".

[139] Rösler (2012).
[140] Bos (2011).
[141] Rösler (2012).
[142] *Id.*
[143] In operation since 1937, amended 23 times until March 2002.

There is no law requiring that churches in Ireland should be registered and there is no definitive register of churches. Churches are only required to register (as churches) in order to fulfill certain roles (relating to the conducting of marriages), or to comply with specific legislation, or to avail of certain advantages (e.g. exemption from taxes).[144]

All churches in Ireland, none of which is established, are voluntary and unincorporated associations. Unincorporated associations do not, in general, possess legal personality and are not considered to be distinct from their members. Property is accordingly jointly held by the members, rather than the association itself. The members assent to certain rules and regulations and bind themselves to each other to conform to certain principles and rules, the obligation to such compliance resting wholly in the mutual contract of the members, enforceable only in terms of the normal rules of contractual agreements. There is a common-law presumption in Ireland against interference by the courts in church affairs.[145]

It appears that this position has led to a fierce debate, which is still ensuing, between civil authorities and the Catholic Church over government plans to force priests to disclose information on child abuse obtained in the confessional.[146] The inevitable collision is poised between remarks such as "(t)he law of the land should not be stopped by a crozier or by a collar"[147] and "the bond of secrecy attached to Confession had to be respected".[148]

There seems to be a lack of homogeneity with regard to the legal position of churches in Ireland. According to Colton (2007:138), this is particular evident from court actions where plaintiffs have found it necessary to join several parties, jointly and severally, to the same action. As numerous church-related cases have been settled out of court, many of the unclear issues in this area have not been settled.

[144] Colton (2007:132-133).
[145] *Id.*:127-130.
[146] Cf. *The Irish Times*, 15 July 2011.
[147] The Taoiseach (prime minister of Ireland), Enda Kenny (*Id.*).
[148] Archdiocese of Armagh, Dr. Gerard Clifford (*Id.*).

4.4.15 Italy

The Constitution of the Italian Republic contains several articles dealing with religion:[149]

> Article 7
> The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts.[150] Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.
> Article 8
> All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives.
> Article 19
> Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote these, and to celebrate rites in public or in private, provided they are not offensive to public morality.
> Article 20
> No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the grounds of its religious nature or its religious or confessional aims.

In addition, article 117 provides that the state has exclusive powers, *inter alia*, in "relations between the Republic and religious denominations". In terms of article 7 (*supra*) a higher degree of autonomy is granted to the Catholic Church than other religious associations. The position of the latter is founded in national law and they can organise themselves according to their own statutes, provided that the statutes do not conflict with the Italian legal order.[151]

The agreements in 1984 for a revision of the Concordat of 1929 affords the Catholic Church, *inter alia*, jurisdiction in ecclesiastical matters and freedom to

[149] Given in Rome on 27 December 1947.
[150] The "Lateran pacts" refer to a group of agreements in 1929 (the *Patti Lateranensi*), including the Treaty which established the creation of the state of the Vatican City, a Concordat and other minor agreements (Long 1999:1).
[151] *Id.*:1ff.

carry on its pastoral mission. Other religious denominations may also reach certain official agreements with the state that guarantee certain levels of independence regarding their internal jurisdictional functions. From a labour law viewpoint, for instance, the state would not interfere with internal arrangements. The agreements usually only specify that money received by clergy corresponds, for fiscal purposes only, to employment wages.[152]

A comprehensive report by Gianni Long (1999) illustrates the differences that exist in levels of church autonomy in Italy: the maximum autonomy is granted to the Catholic Church (the majority church); strong autonomy is granted to churches having an "Agreement" with the state; less autonomy is granted to churches having legal personality only; and almost no autonomy is granted to others.

As far as church-state relations in Italy are concerned a peculiar issue with respect to the Catholic Church arises, namely, reluctance of the Church to accept state autonomy. This was particularly evident in 1970 with respect to Catholic opposition to the law permitting divorce. A constant tension exists between the Church's right to moral teaching and the fear that the Church could try to impose these teachings on the state and therefore on all citizens. Given the limited number of members, such risk does not exist with respect to other churches.[153]

4.4.16 The Netherlands

4.4.16.1 Churches as legal entities

In the Netherlands, interest in church law flared up briefly during the joining of the three Churches of Reformed descent in that country to form the Protestantse Kerk in Nederland (PKN).[154] Koffeman (2003:105) laments the lack of concern

[152] Long (1999:1ff.).
[153] *Id.*:20. Cf. the *St. Petersburg Times* of 2-12-1970 (page 6) where it is reported that Pope Paul IV has said that the Bill legalising divorce in Italy caused him "profound suffering and damages the 1929 Concordat governing the relations between the Church and state".
[154] Koffeman (2003:104). The PKN was formed in 2004 by the Nederlandse Hervormde Kerk (1,9 million members), Gereformeerde Kerken in Nederland (660 000 members) and the Evangelisch-Lutherse Kerk in het Koninkryk der Nederlanden (15000 members) (*Id.*:103). See *Id.*:106ff. for an overview of the history of the church orders of the latter three Churches that were to develop into a church order for the PKN.

for the importance of church law, saying that "relatief veel wordt overgelaten aan de wijsheid en het improvisasietalent van kerklijke instanties en ambtsdragers". The relation between church law and civil law also seems to be lacking, except for occasional questions regarding the position of churches within the Dutch system of law, or more specifically in relation to developing European law.[155]

Religious freedom in the Netherlands is protected in article 6 of the Constitution of the Netherlands:

> 1. Ieder heeft het recht zijn godsdienst of levensovertuiging, individueel of in gemeenschap met anderen, vrij te belijden, behoudens ieders verantwoordelijkheid volgens de wet.
> 2. De wet kan ter zake van de uitoefening van dit recht buiten gebouwen en besloten plaatsen regels stellen ter bescherming van de gezondheid, in het belang van het verkeer en ter bestrijding of voorkoming van wanordelijkheden.

It is noteworthy that the Constitution extends the protection of religious rights as widely as possible to include "levensoortuiging". The Constitution does not refer to churches or to the institutional dimension of freedom of religion. During the process of revision of the Constitution, however, it was acknowledged that article 6 protects institutions as well.[156] The exercise of religious rights "in gemeenschap met anderen" finds application in article 2 of the Dutch *Burgerlijk Wetboek*[157] (Book 2), which deals with legal entities:

> 1. Kerkgenootschappen alsmede hun zelfstandige onderdelen en lichamen waarin zij zijn verenigd, bezitten rechtspersoonlijkheid.
> 2. Zij worden geregeerd door hun eigen statuut, voor zover dit niet in strijd is met de wet. Met uitzondering van artikel 5 gelden de volgende artikelen van deze titel niet voor hen; overeenkomstige toepassing daarvan is geoorloofd, voor zover deze is te verenigen met hun statuut en met de aard der onderlinge verhoudingen.

[155] *Id.*:106.
[156] Van Bijsterveld (2006:6).
[157] The private law of the Netherlands is mainly founded on Roman law, as codified in the *Corpus Iuris Civilis* of Justinian. The current *Burgerlijk Wetboek* (Dutch Civil Code) is an Act of Parliament, in force as of 1992. It contains more than 3500 articles, divided over the eight books (Goossens 2012).

Congregations, as well as the structures in which churches (denominations) are united, thus have legal personality (in their own category).[158] As legal entities *sui generis* churches are governed by their own statutes in so far as these laws are not in conflict with the law. The general provisions of the law on legal entities are not applicable to churches (an important freedom offered to churches that is not extended to other legal forms such as foundations or associations).[159]

As far as the engaging of a Dutch civil court in a purely church conflict (where both parties are members) is concerned, Koffeman (2009:304ff.) asserts that all "kerkrechtelijke rechtsmiddelen" should first be exhausted before the court may consider a matter, and then "de burgerlijke rechter (doet het) helemaal over". The first question a judge would ask in a church conflict would be "of de betrokke kerk het eigen rechtsstatuut adequaat heeft gevolgd. Zolang dat het geval is, zal de rechter zich van verdere actie onthouden".[160] A civil court, in principle, may not adjudicate over any matter that involves faith or dogma, for example, whether an argument "wel of niet strijdig is met bijvoorbeeld de gereformeerde belijdenistraditie, maar zal zich uitsluitend richten op wat blijkens de kerkrechtelijke bronnen en de rechtsgeschiedenis in de betrokken kerk kennelijk geldt".[161]

Since the Wet op de Kerkgenootschappen of 1853 was formally repealed in 1983 no general obligation to register exists. There are also no requirements as to a minimum number of members. In the absence of a definition of "church", courts have to decide whether a church exists.[162] The Supreme Court attempted to formulate minimum requirements such as that "religion (must be) concerned" and that a "structured organisation" must exist.[163]

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[158] These combined categories enable both decentralised church models (as in the Reformed tradition) and more centralised models (such as the Roman Catholic tradition) to operate on a similar basis under civil law (cf. Van Bijsterveld 2007:173). A "zelfstandige onderdeel" in this context reflects the situation of the (now defunct) Nederlandse Hervormde Kerk (and is currently found in the church structure of the PKN), while the Gereformeerde Kerken in Nederland followed a model where each local congregation formed an independent "kerkgenootschap" (cf. Koffeman 2009:30).
[159] Van Bijsterveld (2001:152).
[160] Koffeman (2003:118).
[161] Koffeman (2009:305).
[162] *Id.*:302; Van Bijsterveld (2007:173).
[163] *Id.*

In the Dutch system of separation of church and state[164] only some special arrangements exist. According to Van Bijsterveld (2007:174) churches, for instance, "are not required to register with a Chamber of Commerce".[165] Churches are also free to establish their own regulations with regard to who is allowed to represent the church in legal actions and are free of an otherwise general duty to have the names of their legal representatives registered.[166] The church status, however, does not provide entitlement to state subsidies, for instance, or to officiate at marriages with legal effect, as the position currently stands in South Africa.[167]

A noteworthy special arrangement for churches is found in the employment field where the category of "spiritual office" is recognised as a distinct category in law. The Equal Treatment Act – which prohibits direct or indirect distinction among people based, *inter alia*, on religion, ideology, race, gender, and sexual orientation – does not apply to legal relationships within churches. This enables churches to make a direct distinction between male or female or discriminate according to sexual orientation when appointing an office holder without adverse legal consequences.[168] Furthermore, the Labour Relations Act makes an exception to its general rules in that dismissals of ministers are not subject to prior public authority review.[169] The concept of church autonomy, however, is still developing in the Netherlands and there is no clear indication of consistency in the way the Dutch civil court system deals with these cases.[170]

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[164] According to Koffeman (2009:294-295) the separation of church and state in the Dutch context is not as clear as it may appear. Ultimately it involves two main issues, namely, 1) the church has no role to play in the functioning of the state ("Hun mogelijkheden zijn niet meer of anders dan die van andere maatschappelijke organisaties"); and 2) the state has no role to play in the functioning of the church ("Zij houdt zich buiten het interne leven van de kerken en geeft de kerken optimale vrijheid om haar eigen zaken te regelen").

[165] The interpretation of the law on this point, however, seems to be somewhat ambiguous. According to Koffeman (2009:302) article 6 of the Handelregisterwet provides that, as far as the PKN is concerned, "de kerk als geheel *moet* worden ingeschreven en dat de rechtspersonen binnen de kerk, zoals de gemeenten, *kunnen* worden ingeschreven".

[166] Koffeman (2009:303). According to Van Bijsterveld (2001:154) it has been acknowledged by the court that such regulations have an external effect. A deficiency in complying with these internal church rules can be held against a third party; in this, the church differs from other legal entities.

[167] Van Bijsterveld (2007:173-175). Cf. the discussion by Koffeman (2009:303) regarding the reasons for this directive in Dutch matrimonial law.

[168] De Beaufort and Van Schie (2008:76). Cf. Koffeman (2003:118; 2009:302).

[169] Van Bijsterveld (2001:155).

[170] Cf. Van Bijsterveld (2007:175). In 1996 the Supreme Court ruled on a case of a student who was refused a Roman Catholic deacon training programme because of her gender. Her

4.4.16.2 Dutch jurisprudence

A brief overview of some of the cases that have come before the civil courts may illuminate certain issues. In 2000 the Rechtbank 's-Gravenhage, in *Hervormde gemeente Aarlanderveen c.s. v De Nederlandse Hervormde Kerk*, heard a dispute that arose with the revision of the Church Order of the Nederlandse Hervormde Kerk in 1991. The case followed after all internal procedures (since the first summons was issued in 1992) were exhausted. Forty-four congregations claimed that they remained "vrij beheer gemeenten"[171] and that the Church had no right to infringe upon their right to dispose of church property and funds as they saw fit. They approached the court to declare that the 1991 revision was void and that decisions taken by the General Commission in 1998 were not binding on them. The congregations pleaded, *inter alia*, that the General Commission had no further jurisdiction as they did not constitute an independent tribunal.[172]

As far as their property rights were concerned the congregations put it to the court that "kerkgoederen eigendom zijn van de gemeenten en dat elke inmenging van de Kerk is te zien als een inbreuk op dat eigendomsrecht".[173] This argument was rejected by the court as the legal personality of the congregations was found to be inextricably linked to their being "zelfstandige onderdelen" within the meaning of Book 2 (article 2) of the Dutch Civil Code (*supra*). They were thus bound by the internal statutes of the Church and fell under the control of the General Synod.

On 12 April 2000 the court dismissed the action. The *Hoge Raad der Nederlanden* (Supreme Court) in 2003 dismissed the congregations' appeal and finally laid the issue to rest: "Daarmee is verworpen, aldus het hof, het standpunt van de Gemeenten dat zij in vermogensrechtelijk opzicht (wat betreft het beheer

application was denied on the grounds of church autonomy. In 1998, however, the Minister of Justice removed a church minister from his profession after a criminal conviction, without taking notice of church autonomy (Van Bijsterveld 2001:155-157).

[171] This meant that, with the acceptance of the Church Order in 1951, ordinances 16 and 18 were not made applicable to the "vrij beheer" congregations (at 1.3).

[172] At 3.6.

[173] At 3.11.

van hun goederen en fondsen), althans hun kerkvoogdijen buiten het kerkverband staan".[174]

Despite this interference by the court in church affairs, the freedom of churches to set down and apply their own rules and regulations is to a large extent respected, as evident from a judgment in 2011 by the *Hoge Raad*:

> Als het gaat om rechtsverhoudingen in een religieuze context, wordt daarbij wel aangenomen dat de beoordeling, door de rechter, met een extra marge aan terughoudendheid moet plaatsvinden. Dat geldt dan met name als in een geschil vragen betreffende de inhoud of uitleg van tot het geloof zelf te rekenen leerstukken ter beoordeling staan.[175]

In terms of the Constitution of the Netherlands, however, the civil courts are obliged to take cognisance of legal disputes within churches where civil rights are concerned.[176] This is particularly evident in the case of labour disputes, and the interests of justice, including fair procedures and the speedy resolve of disputes, will inevitably play a key role.[177] The courts (while retaining their right of review) should, however, respect that the proper "kerkelijke weg" is followed at the outset.[178]

In 2010, the Sector Kanton Rechtbank Zwolle laid to rest a protracted conflict (originating in 1999) when the court ordered the former minister of the Gereformeerde Kerk (Vrijgemaakt) Kampen Noord to vacate the parsonage within three months.[179] The defendants were also ordered to pay the congregation a specified amount to a claim for undue enrichment. The court ruled, *inter alia*, that the church order applied to the minister "omdat hij lidmaat is van de betreffende geloofsgemeenschap én omdat hij met de Kerk een

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[174] At 3.4.1.
[175] *De Boer v Christelijke Gereformeerde Kerk te Zeewolde en Classis Amersfoort der Christelijke Gereformeerde Kerken in Nederland* (2011) (at 34).
[176] Article 112(1). Cf. the Sector Kanton Rechtbank Zwolle in *De Boer v Christelijke Gereformeerde Kerk te Zeewolde en Classis Amersfoort der Christelijke Gereformeerde Kerken in Nederland* (2005) (at 3.1).
[177] Cf. *Hoogendoorn v Gereformeerde Kerk Kampen-Noord* (2007) (at 4.3).
[178] *Id.*
[179] *Gereformeerde Kerk Kampen-Noord v Gedaagde 1 & Gedaagde 2* (2010). The court ruled three years earlier in *Hoogendoorn v Gereformeerde Kerk Kampen-Noord* (2007) (*supra*) that Rev. Hoogendoorn was provisionally allowed to continue living in the parsonage, pending a final judgment.

arbeidsrelatie is aangegaan door aanvaarding van het beroep".[180] This does not mean, however, that the parties thereby forfeit their access to the civil courts if they have followed the "kerkelijke rechtgang" properly, but it does mean "dat voor de burgerlijke rechter daarbij de uitkomst van de kerkrechtelijke procedure het vertrekpunt zal zijn".[181]

4.4.16.3 Financial relationships

Van Bijsterveld (2006:1ff. and 2010:29ff.) analyses the structure of financial relationships between the church and the state in the Netherlands. The Dutch system is, in turn, compared to other Western European church-state models where three systems are identified: 1) the system of an established church; 2) a system of cooperation between church and state; and 3) separation between church and state. In addition to these systems, the Dutch system of separation of church and state is described as one of benign and friendly separation, labelled "positive neutrality".[182]

The doctrine of positive neutrality argues that religious organisations have both rights and responsibilities and it developed from proposals by the Dutch theologian, Abraham Kuyper, who stated: "The sovereignty of the State and the sovereignty of the Church exist side by side, and they mutually limit each other".[183] Religious groups have the right to develop and teach their core beliefs, to shape their members' behavior and attitudes, to provide a wide range of services to members and non-members, and to participate in the policy making processes. With these rights comes a responsibility of religious organisations to accept the legitimacy of the state and to encourage their members to obey all lawful decisions by the authority.[184]

According to the notion of positive neutrality, the government should protect and promote society's various spheres of influence with the goal of advancing justice

[180] At 3.1.
[181] At 3.2.
[182] Cf. Closson (2000) who identifies three prominent views on the relationship between the church and the state: Anti-religious separatism, Christian nation view, and positive neutrality. De Beaufort and Van Schie (2008:63) distinguish between three forms of neutrality as issued by the City of Amsterdam in June 2008, namely, "exclusive neutrality", "inclusive neutrality", and "compensatory neutrality".
[183] Kuyper, quoted by Closson (2000:3).
[184] *Id.*

and the common good. The system of positive neutrality would require tolerance of a wide range of religious practices. The state would have to protect the right of religious institutions to influence public policies, and government should adopt a policy of non-discrimination with regard to financial aid. Positive neutrality requires that religious ideas should never be forced to hide behind secular ones in order to participate in the public sphere.[185]

As for financial relationships between church and state in a system of positive neutrality, such as proposed for the Netherlands, there are a variety of forms of support (although no general financial support for churches exists). Apart from chaplaincy services (for instance, in armed forces and penitentiary institutions), these forms of support are not exclusively aimed at the church or religion. Financing of churches is rarely direct; it is usually masked by a cover of secret payments, public or discrete subsidies, tax exemptions, or payment through the maintenance of historic monuments.[186]

4.4.17 Norway

The Constitution of the Kingdom of Norway[187] establishes a state church in article 2: "All inhabitants of the Realm shall have the right to free exercise of their religion. The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same." Article 4 provides that the King "shall at all times profess the Evangelical-Lutheran religion, and uphold and protect the same". Article 12 requires that more than half of the members of the Council of State should be members of the state church. According to article 16 the king "ordains all public church services and public worship and all meetings and assemblies dealing with religious matters, and ensures that public teachers of religion follow the norms prescribed for them".

The position of the National Church in Norway (Evangelical-Lutheran) as the state church is firmly entrenched in the Constitution (*supra*). The Church has no

[185] *Id.*
[186] Van Bijsterveld (2006:7; 2010:32).
[187] The Constitution was laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently on 20 February 2007.

legal personality but has a national-level steering body that is distinct from the state.[188] Recent church reforms in Norway (including the Church Law that came into force in 1996, applicable only to the state church) aimed to extend the independence of the Church in relation to the state. A Church synod and a permanent church council, with ever-increasing powers to manage matters affecting the inner life of the church, have been developed. However, all the decisions of these structures are still bound by general laws as well as the right of the king to restrict the self-governance of the Church (in terms of article 16 of the Constitution [*supra*]).[189]

The Church Law empowers parishes and this has resulted in a situation where the church at local level has more legal autonomy than the national church bodies. This may even lead to peculiar situations, for example, where a parish institutes litigation against the state for interfering with its own affairs while at the same time the Church Law states that parishes are part of the state church.[190]

Regarding other religious communities, no registration is necessary to operate or to obtain legal personality. Registration only becomes necessary when religious entities need to deal with authorities regarding certain matters, for example, tax issues. A religious entity may establish itself and continue to exist without giving any information to public authorities. Registration, however, holds certain advantages. In addition to tax relief, the state contributes financially to religious entities in relation to their number of members. Only a few and very narrow exceptions to the common labour law, however, are allowed by the government. Whereas other Nordic countries, like Finland and Denmark, require a faith and a ritual for registration, Norway's registration requirements are broad enough to include atheists.[191] The Law on Faith Communities of 1969 underlines the right of individuals of all religious confessions to free exercise of the right to religious freedom, alone or in community with others.[192]

[188] Christoffersen (2007:14). The Church of Denmark is the only other major church in Europe that has no legal personality. The Church also has no steering body at national level (*Id.*).
[189] Plesner (2001:9ff.).
[190] *Id.*:10.
[191] Christoffersen (2007:13-16).
[192] Plesner (2001:13).

4.4.18 Poland

In the Constitution of the Republic of Poland,[193] general provisions regarding freedom of religion are found in article 53:

> 1. Freedom of conscience and religion shall be ensured to everyone.
> 2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.
> 3. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.
> 4. The religion of a church or other legally recognized religious organization may be taught in schools, but other persons' freedom of religion and conscience shall not be infringed thereby.
> 5. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.
> 6. No one shall be compelled to participate or not participate in religious practices.
> 7. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.

In addition to article 53, article 25 states:

> 1. Churches and other religious organizations shall have equal rights.
> 2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlook on life, and shall ensure their freedom of expression within public life.
> 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their

[193] The Constitution was adopted on 2 April 1997 and came into effect on 17 October 1997. It was amended once, in 2006.

> autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
> 4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
> 5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

Although there is no explicit provision in the Constitution prohibiting the institution of a state church, article 25 establishes equal rights between churches. The Constitution, however, separately refers to the Catholic Church[194] (article 25.4, *supra*). The Concordat between Poland and the Holy See, signed in 1993, stresses that Poland recognises the legal personality of the Catholic Church. All church entities created according to canon law subsequently automatically acquire legal personality.[195]

The Statute on Freedom of Conscience and Religion (1989) provides the framework for establishing and registration of churches affording them legal personality. They may thus conclude contracts and own real estate like any other legal person. All registered denominations are subjects of private law[196] and enjoy some tax exemptions and have the right to establish educational institutions and publishing houses. For the purpose of registration, 100 members are required.[197]

Daniel (1995:401ff.) describes the anomaly of the Catholic Church in Poland which, after the communist collapse, experienced a significant reinforcement of its legal position but, concurrently, a significant decrease in its prestige in Polish society. The Catholic Church reportedly unified the society in the struggle against communism and when communism collapsed in 1989 the Church was

[194] 95% of the entire population of Poland belongs to the Catholic Church (Daniel 1995:402).
[195] Rynkowski (2007:180). Cf. Garlicki (2001:485-486).
[196] No option of registration under public law is available to churches in the Polish legal system. The public-law status of the Catholic Church was denied in a judgment of the Supreme Court in 1958 (Rynkowski 2007:177).
[197] *Id.*:177-182.

the unquestioned moral authority in society. Post-communist Poland adopted several laws that strengthened the autonomy of the Church. In the following years, the Polish Parliament also passed regulations concerning the legal position of other major (although minority) denominations in Poland. Daniel ascribes the decline in the prestige of the Church to its political involvement coupled by a general decline in religiosity in modern Poland.

4.4.19 Portugal

Article 41 of the Constitution of the Portuguese Republic (2005),[198] under the heading "Freedom of conscience, religion and worship" reads:

> 1. Freedom of conscience, religion and worship shall be inviolable.
> 2. No one shall be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance.
> 3. No authority shall question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor shall anyone be prejudiced in any way for refusing to answer.
> 4. Churches and other religious communities shall be separate from the state and free to organise themselves and to perform their ceremonies and their worship.
> 5. Freedom to teach any religion within the denomination in question and to use appropriate media for the pursuit of its activities shall be guaranteed.
> 6. The right to be a conscientious objector, as laid down by law, shall be guaranteed.

Moreover, article 288(c) states that the separation between church and state is a matter in which revision shall be restricted.

In accordance with Portuguese law, religious entities in Portugal may have one of the following legal forms: unincorporated associations, private corporations, religious corporations and entities of a special canonical nature,[199] such as the Catholic Church. Religious entities of every legal form have all the rights and

[198] Entered into force on 25 April 1976 (7th revision in 2005).
[199] Cf. Garlicki (2001:486).

duties that they require to pursue their aims, unless restricted by a general law.[200]

As far as the cooperation with the state is concerned, Ferrari (2007:25) identifies a four-tier system in Portugal, Italy, and Spain that has become the target of criticism. In the Portuguese system, the Catholic Church (with a concordat) is found at the top, followed by religious groups that have the status of communities settled in the country, then by the registered religious entities, and finally by the groups that are common-law associations.[201] Each level is characterised by its own legal control with different sets of rights and obligations. The passage from one tier to the next is not consistently regulated in a predictable and transparent way. Ferrari proposes a simplifying of this structure to make it more transparent to external assessment and answer criticisms that imply that the systems found in some European countries are discriminatory.

4.4.20 Slovakia

The Constitution of the Slovak Republic,[202] deals with the position of church law, religious freedom and the position of religious organisations in general terms. Article 24 reads as follows:

> 1. The freedoms of thought, conscience, religion, and faith are guaranteed. This right also comprises the possibility to change one's religious belief or faith. Everyone has the right to be without religious belief. Everyone has the right to publicly express his opinion.
> 2. Everyone has the right to freely express his religion or faith on his own or together with others, privately or publicly, by means of divine and religious services, by observing religious rites, or by participating in the teaching of religion.
> 3. Churches and religious communities administer their own affairs. In particular, they constitute their own bodies, inaugurate their clergymen,

[200] De Sousa e Brito (2007:183). The Catholic Church in Portugal represents 92.9% of the population of Portugal, and the Protestants account for only 2.16% (*Id.*).
[201] The systems in Italy and Spain have only minor differences: In Italy and Spain the second tier consists of denominations that have concluded an agreement with the state and at the third tier Italy has recognised (as opposed to registered) religious entities (Ferrari 2007:25).
[202] Passed by the Slovak National Council on 1 September and signed on 3 September 1991.

> organize the teaching of religion, and establish religious orders and other church institutions independently of state bodies.
> 4. Conditions for exercising rights according to sections 1 to 3 can be limited by law, only if such a measure is unavoidable in a democratic society to protect public order, health, morality, or the rights and liberties of others.

According to the Constitution people are free to profess and exercise their faith. Churches are free to govern themselves in terms of their own church laws. To be acknowledged by the state and acquire legal personality, however, churches need to register in terms of the requirements of statutory law. Through registration a church becomes a specific kind of legal person with its own structure, governing bodies, internal rules and ordinances.[203]

The Department of Churches of the Ministry of Culture determines whether the legal requirements are met. The 2001 census showed that there were 16 registered religious entities in Slovakia, the Reformed Christian Church (109,735 members) being the fourth largest grouping.[204] Privileges and advantages for registered religious entities include financial support by the state, tax exemption for financial contributions from members, relief from real-property tax, special protection for places of worship, and status as special legal entities whose activities are distinguished from legal business entities.[205]

Registered churches and religious organisations are completely independent from government interference with respect to the administration of their internal activity and affairs, subject only to the same restrictions and limitations as all other legal entities in the Republic. They may thus issue and enforce internal rules and regulations without approval of government. They may, for example, appoint and ordain their own representatives, clergy and leaders, and administer their own church laws and ordinances. Churches thus enjoy a fairly autonomous existence, with the state only involved in mutual activities such as education,

[203] Registration is restricted to religious organisations with at least 20,000 adult adherents with permanent residency in Slovakia. This requirement is waived for those religious organisations that were in existence before the enactment of the statutory provision (cf. Dojcar 2001:434; Martinková 2007:191).
[204] *Id.*:194.
[205] Dojcar (2001:431-433); Martinková (2007:192-193).

marriage, divorce and financial issues. The relationship between churches and the state can be described as a partnership.[206]

4.4.21 Slovenia

In addition to a general equality clause,[207] the Constitution of the Republic of Slovenia[208] states in article 7: "The state and religious communities shall be separate. Religious communities shall enjoy equal rights; they shall pursue their activities freely". Religious communities can thus be founded without any prior approval by the authorities and can pursue their activities freely within the limits of the general legal order. Article 41 provides that religious beliefs may be freely professed in public and in private life,[209] while article 42 guarantees freedom of religious assembly. The religious rights entrenched in the Constitution are applied by means of the Religious Freedom Act.[210]

Under the Religious Freedom Act, autonomy of churches and other religious communities in their internal affairs is guaranteed, but public life remains secular. The operation of these communities, however, must conform to the Constitution, statutes, and other regulations.[211] This does not differ from the stance of the Slovenian Constitutional Court in 1993. The court[212] pointed out that the legal personality of churches and other religious communities shall be assessed according to state regulations and will be bound to state law.

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[206] Dojcar (2001:432-435).
[207] Article 14.
[208] Adopted on 23 December 1991 and amended on 14 July 1997 and 25 July 2000.
[209] Article 16(2) of the Slovenian Constitution stipulates that there may be no temporary suspension or restriction of the rights defined in article 41 (e.g. during times of war and states of emergency).
[210] The National Assembly of the Republic of Slovenia passed the Act on 2 February 2007. The Act repealed the previous Legal Status of Religious Communities in the Republic of Slovenia Act of 1976 (except for article 20, which remains applicable). The Religious Freedom Act sets out to "regulate individual and collective exercise of religious freedom, legal status of churches and other religious communities, their registration procedure, rights of churches and other religious communities and their members, rights of registered churches and other religious communities and their members and powers and competences of the authority responsible for religious communities" (article 1).
[211] E.g. article 3(1): "Churches and other religious communities shall act separately from the state and shall be free to organize and pursue their activities. The state shall not interfere with their organization and activities except in cases laid down by the law", article 3(2): "Churches and other religious communities shall have equal rights and obligations. Every church or other religious community shall be independent and autonomous in its organization. The state shall undertake to fully respect this principle in mutual relations and to co-operate with them in the advancement of the human person and the common good", and article 9.
[212] Decision No. U-I-25/92.

Religious communities (including, but not restricted to, churches) that wish to acquire legal status are required to register with the government in order to obtain the status of a special legal entity under civil law. The registration process is governed by articles 13-20 of the Religious Freedom Act. This entity *sui generis* differs from other entities of civil law such as associations, trusts or foundations. Special rights and benefits afforded to registered religious entities include tax exemptions, state contributions and contractual rights.[213]

Since its emergence from Communism, Slovenian law has tended to rely on concepts of strict neutrality in the church-state debate.[214] There have been appeals, however, to redefine Slovenia's position in the area of religious freedom to elevate religious freedom over mere toleration by allowing the state to maintain a cooperative relationship with religious communities[215] (this would amount to positive neutrality that would recognise the beneficial social function of churches and other religious communities).

It is clear that the Government of Slovenia in recent years has progressed significantly to establish cooperation between the state and religious communities. Agreements with statutory force have been concluded with the Catholic Church,[216] the Evangelical Church in the Republic of Slovenia,[217] the Pentecostal Church in the Republic of Slovenia,[218] and the Serbian Orthodox Church.[219] Although these agreements give effect to the constitutional provisions pertaining to the strict separation between church and state in Slovenia, their mere existence provides proof of regular and open dialogue between the

[213] Cf. article 29. See also Prepeluh-Magajne (2007:198-199).
[214] Cf. Religious Freedom Act, article 4(3).
[215] Šturm (2004:607). Cf. article 3(2) of the Religious Freedom Act (*supra*).
[216] Agreement of the Republic of Slovenia and the Holy See on Legal Issues (signed in 2001 and ratified in 2004). Article 1 states, *inter alia*, that in the Republic of Slovenia "the Catholic Church performs its activities freely under the canon law, in line with the legal order of the Republic of Slovenia".
[217] Agreement on the Legal Status of the Evangelical Church in the Republic of Slovenia (2000). The agreement includes the right to, in accordance with the legislation of the Republic of Slovenia, buy, own, exploit, and dispose real estate and movable property (article 1) and competency to form, alter, and cancel any of its individual structures (article 3).
[218] Agreement on the Legal Status of the Pentecostal Church in the Republic of Slovenia (2004). This agreement is essentially identical to the agreement with the Evangelical Church (*supra*).
[219] Agreement on the Legal Status of the Serbian Orthodox Church (2004). This agreement is essentially identical to the agreements with the Evangelical Church and Pentecostal Church (*supra*).

government and religious communities. The important function of the latter as beneficent institutions is thus increasingly recognised.

4.4.22 Spain

Spain, like Italy, combines guarantees for minority churches with the guarantees granted the Catholic Church[220] in the Spanish Constitution.[221] This treatment of the majority church should be viewed as an expression of social reality.[222] The Constitution, in addition to the general equality provisions in article 14, guarantees ideological and religious freedom in article 16:

> 1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.
> 2. No one may be compelled to make statements regarding his religion, beliefs or ideologies.
> 3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.

As is the case in France, independence is the principle idea, but absolute independence seems unattainable. According to Mosquera Monelos (2001:179) the system in Spain is favourable to the Catholic Church which has been granted a greater autonomy than other religious groups.

In Spain the state gave the Roman Catholic Church tax exemptions on property used for worship but refused similar relief to Protestant churches. In *Iglesia Bautista "El Salvador" v Spain* (1992) the EComHR held that this was not a breach of article 14 of the Convention because there was no entitlement to tax-free status. Even if it were discrimination for the purposes of the Convention there would be reasonable grounds for this. Spain had entered into a concordat

[220] Only *ca*. 3% of the population of Spain describe themselves as belonging to a denomination other than Catholic (Motilla 2007:213).
[221] Passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on 31 October 1978, ratified by the Spanish people in the referendum of 7 December 1978, and sanctioned by the king before the Cortes on 27 December 1978. The Constitution was modified in 1992.
[222] Van Bijsterveld (2000:990); Garlicki (2001:483-484).

with the Catholic Church that placed certain obligations on the Church, including the maintenance of some historical places and objects, in return for privileges. This agreement was considered to be sufficient to justify the discrimination between the Catholic Church and other religions.

Notwithstanding the position of the Catholic Church, religious freedom is widely accepted and recognised in Spain. Religious entities need not register in order to act freely within the country. These entities can be constituted as associations under common law from the moment that there is an agreement among three or more natural persons and statutes approving the forming and functioning of the group are formalised in a public or private document. By registering in the Register of Religious Entities, however, religious groups are subject to the Religious Liberty Law[223] which is favourable to their activities (in certain instances analogous to the position of the Catholic Church which does not need to register but rather acquired civil legal person status by direct concessions from earlier covenant agreements).[224]

One of the immediate effects of registration is the recognition of autonomy relating to labour law, notably the freedom to include clauses safeguarding religious identity in employment contracts. Other effects include the protection of the acts, functions and ceremonies by defining as an offence the disturbance of acts of worship, exemption from Value Added Tax in the provision of personnel and certain goods, full capacity to make all types of contracts, and exemption for ministers of religion from the requirement to have a residence permit to reside in Spain.[225]

4.4.23 Sweden

4.4.23.1 Legal status of churches

The Constitution of the Kingdom of Sweden consists of four separate fundamental laws. The first of these laws, the Instrument of Government (1974), guarantees “freedom of worship: that is, freedom to practise one’s religion alone

[223] The 1980 Religious Liberty Law enumerates the individual and group rights entrenched in the Constitution (Morán 1995:538).
[224] Motilla (2007:209-214). Cf. Morán (1995:535-537).
[225] *Id.*:539; Motilla (2007:212-214).

or in the company of others".[226] The same Law states that "(p)rovisions concerning religious communities are laid down in law. Provisions concerning the bases of the Church of Sweden as a religious community shall also be laid down in an act of law".[227]

The principle of *cuius regie, eius religio* (one ruler, one religion) was established in Sweden at the Reformation and the (Lutheran) Church of Sweden was the established state church.[228] Relations between the state and the church in Sweden changed on 1 January 2000 when the Church of Sweden began a new era of independence from the government. Through the enactment of the Denominations Act (which refers to the Swedish Constitution and the European Convention) the former state church was changed into a "registered denomination", and other churches followed suit in obtaining legal status.[229] These developments have placed the various churches on a more equal footing,[230] similar to the position in Finland (cf. 4.4.9, *supra*). According to Edqvist (2000:41), changes (on a non-official level) concerning the relationship between church and state will inevitably take a long time.

The new law makes it possible for each church to define itself legally according to its own self-understanding. The Act, however, is not neutral and has not made other churches equal to the Church of Sweden. The Act states that the Church of Sweden should use the separate Church of Sweden Act, which provides for a separate legal form for the Church. Other religious communities obtain the status by procedure of registration.[231]

There is no requirement for a church to register and no benefit in registration other than the obtaining of legal personality[232] and the use of the tax system for collecting their membership fees. Church tax (called "dues" by the new legislation) is compulsory for Church of Sweden members but voluntary for other registered churches. Religious entities in Sweden are not restricted in their work

[226] Chapter 2, article 1(6).
[227] Chapter 8, article 6.
[228] Edqvist (2000:35).
[229] Friedner (2007:217).
[230] Van Bijsterveld (2000:991).
[231] Edqvist (2000:38-39); Rasmusson (2000:494-495).
[232] Without legal capacity, according to Swedish law, only the persons acting will be bound by contracts, and may personally be held financially responsible (Friedner 2007:220).

– they are free to make contracts, to own real property, and to act as employers.[233]

4.4.23.2 ECHR litigation

The ECHR, in *Darby v Sweden* (1990), had to resolve the question whether or not Sweden had breached its obligations under articles 9 and 14 of the European Convention. During the years 1979-1981 the applicant, a Finnish citizen, had to pay, as part of his municipal tax, a church tax[234] to the Swedish authorities. As he was not registered as living in Sweden, he could not, under the legislation in force at the time, benefit from a reduction in the amount of tax payable afforded to non-members of the Swedish Church. His appeals concerning the obligation to pay church tax were unsuccessful. He alleged a violation of articles 9 and 14 of the Convention.

The court found it more natural to examine the case under article 14 (taken together with article 1 of Protocol no. 1) rather than article 9. The applicant's situation was considered to be similar to that of other non-members of the Church of Sweden. The court found (and the government conceded to this) that the distinction made between persons formally registered as residents and persons not so registered lacked a legitimate aim under the Convention. Accordingly there had been a violation of article 14 taken together with article 1 of Protocol no. 1.

4.4.24 United Kingdom

4.4.24.1 Legal status of churches

The United Kingdom (UK) has no written Constitution and no category of "basic law" having priority over normal legislation. The legal status of international treaties or conventions (including the European Convention) is dependent on parliamentary legislation giving effect to them.[235]

[233] Rasmusson (2000:494-495); Friedner (2007:218-219).
[234] The rate was determined by the local parish council. This system was based on the fact that the Lutheran Church of Sweden was the established church and its parishes had status similar to that of the municipalities, including the right of taxation (at 21).
[235] McClean (2001:129).

The formation and continuation of churches within the UK is entirely unregulated and no official approval or registration is required. There are two established churches, the Church of England (Episcopal Anglican)[236] and the Church of Scotland (Presbyterian). Neither church is considered to be a legal entity.[237] The Monarch is the head of the former and a member of the latter. Legislation dis-establishing the national church has been enacted in respect of Ireland and Wales.[238] The many other churches in the UK, from the Roman Catholic Church to the smallest independent church, are "voluntary associations" in law.[239]

4.4.24.2 The church in Scotland

In Scotland the separate jurisdiction of the Church of Scotland in all spiritual matters is entrenched in law and gives the Church considerable freedom in its government. The Church of Scotland Act (1921) accepts the Church's independence regarding proceedings of the Church, within the sphere of its spiritual government, by recognising the Articles Declaratory passed by the Church General Assembly, which are appended to the Act. Article IV states:

> This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil

[236] The position of the Church of England as an established church is an example of the way the relationship between the church and the state can shape the constitutional identity of a country (see Van Bijsterveld [2000:990]).
[237] McClean (2007:223).
[238] Hill *et al.* (2011:31).
[239] McClean (2007:225).

> authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

The Church of Scotland has been described as being "both established and free",[240] and as having autonomy that is "both meaningful and real".[241] The secular courts have traditionally refused to review the decisions of the courts of the Church of Scotland.[242] The principle of church autonomy was upheld in 1995 in *Logan v Presbytery of Dumbarton*.[243] It is conceivable that, in cases where a civil right is involved, the Church may in future, in terms of Convention rights (as embodied in the Human Rights Act, *infra*), be required to demonstrate that the rights of the individual concerned (for example, the right to a fair trial) have been equivalently protected within the church law.

On the question whether ministers of religion are considered to be employees in Scotland, the Appellate Committee of the House of Lords in the judgment in *Percy v Church of Scotland Board of National Mission*[244] in 2006 confirmed that, in general, clergy are treated as office holders: "The distinction between holding an office and being an employee is well established in English law".[245] The judgment confirmed the exclusive jurisdiction of the Church of Scotland in "spiritual matters" but held that the claim brought before it was not encompassed by the category "matters spiritual". In addition it was held that it was "time to recognise that employment arrangements between a church and its ministers

[240] Hill *et al.* (2011:40).
[241] McClean (2001:131).
[242] Hill *et al.* (2011:41).
[243] Confirming the Church of Scotland's exclusive jurisdiction as embodied in article IV, the court refused to interfere with a presbytery's suspension from office of a parish minister on the grounds of contempt. The court held that the petitioner should have instead appealed to the general assembly against the decision of his presbytery.
[244] The proceedings concerned a sex discrimination claim brought against the Church of Scotland by a former minister of the Church, Ms. Helen Percy. She served as an associate minister in a Church of Scotland parish in Angus. In June 1997 an allegation of misconduct was made against her. She was said to have had an affair with a married elder in the parish. The presbytery of Angus suspended her from her duties. The presbytery began making preparations for bringing a formal disciplinary charge against Ms. Percy. At a mediation meeting arranged by the Church, Ms. Percy was counseled to resign and demit status as a minister which she did in December 1997. The presbytery accepted this. She initiated proceedings in an employment tribunal in February 1998. Two main issues were raised. The first was whether Ms. Percy's relationship with the Church constituted "employment" as defined in section 82(1) of the Sex Discrimination Act 1975. The second issue was whether her discrimination claim constituted a "spiritual matter" within section 3 of the Church of Scotland Act 1921 and, as such, was within the exclusive cognisance of the Church of Scotland and its own courts.
[245] At 15.

should not lightly be taken as intended to have no legal effect".[246] Although, in this case, there was clearly no written contract of employment, there were indications of a specific (and intended) legal relationship. The appointment of a minister thus creates a contract subject to the jurisdiction of the civil courts. The appeal was accordingly upheld in a judgment that could play a major role regarding employment rights of ministers in Scotland (with legal implications throughout the UK).

4.4.24.3 The church in England

The position in England differs significantly from that in Scotland as no formal autonomy exists. Historically, the law of the Church of England was not separated from the law of the country (ecclesiastical law is the subject of a large volume of statutory law) and its courts were part of the national legal system. Most of the internal regulations of the Church are still contained in, or made under, parliamentary authority.[247] Today, however, there are other sources of law pertaining to the Church, some imposed by the state, some by the Church with the concurrence of the state, and others created internally by the Church itself. Its enforcement is divided between the ecclesiastical courts and the temporal courts.[248]

Several courts and tribunals function within the Church, divided into two separate jurisdictions, namely, faculty jurisdiction (handling, *inter alia*, matters concerning consecrated land and matters of doctrine) and clergy discipline. The decisions of the Church's courts are subject to judicial review by the High Court. In addition, all courts and tribunals of the Church are considered to be public authorities and as such must act in a way compatible with European Convention rights in terms of the Human Rights Act of 1998.[249]

The fact that Church of England and its dioceses have no legal personality has implications for the holding of property. Certain special legal devices are in place

[246] At 26.
[247] McClean (2001:130ff.).
[248] Hill *et al.* (2011:33-37).
[249] *Id.* The Human Rights Act gives effect in the national law of the UK to the European Convention on Human Rights. The Act (similar in function and status to all other Acts of Parliament) provides criteria against which other legislation can be judged. There is no legal obstacle to any later repeal of that and similar Acts (McClean 2001:129).

such as the use of corporate bodies or the device of a trust to hold property. These devices entitle churches to engage in the whole range of legal transactions.[250] There is one area within which all churches enjoy autonomy. Churches have exemption from statutory requirements regarding changes to buildings of historic or architectural interest.[251]

Churches within the UK may obtain "private" Acts of Parliament to regulate their governance and property affairs. A recent example is the United Reformed Church Act (2000) that was promulgated to deal with the union of two churches that involved changes in property holdings. Some properties were held by trusts and some by companies and the Act was the only way to effectively deal with the issues.[252]

What appears to be happening in England, according to McClean (2001:140), is a slow and cautious, but deliberate, freeing of the Church of England from state control, by the grant of increasing areas of autonomy. All such efforts are always reversible given the doctrine of parliamentary sovereignty. Notably in the area of senior church appointments, the Crown is reluctant to surrender its involvement.

4.5 Oceania

4.5.1 Australia

The Australian Constitution[253] contains only one reference to religion. Section 116 prohibits the establishing of a state church:

> The Commonwealth of Australia shall not make any law establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Since no Australian church can be established as the national or state church, it follows that under Australian law all churches are treated as voluntary organisations. A common attribute that voluntary organisations share is the

[250] McClean (2007:223ff.).
[251] McClean (2001:135).
[252] McClean (2007:225).
[253] The Constitution of the Commonwealth of Australia (1900).

feature that draws its members together, namely, the pursuit of some common end or interest that stands apart from private gain or material advantage. This is one of the main reasons why the parliaments throughout Australia have seen fit to exempt churches and religious bodies from paying taxation on their income or on their land holdings or on their pay-roll.[254] In addition to opting for an unincorporated (voluntary) association without a distinct legal personality, it is also possible for a church to be incorporated under the Australian Corporations Law, with the legal capacity of a natural person, or to be incorporated as an association according to the Associations Incorporation Act.[255]

The particular legal form a church adopts has a significant influence on the capacity of the courts to intervene in that church's affairs. MacFarlane and Fisher (1996:69ff.) explain that, where churches incorporate either under the Corporations Law or under Associations Incorporations Act, the prospects for judicial intervention are higher than where the church is a voluntary association. According to Cox (2004:166) the civil courts in Australia are not reluctant to hear disputes in respect of church law, at least if property or civil rights and liberties are involved.

A 2011 report by the Australian Human Rights Commission[256] shows that church autonomy in accordance with section 116 remains a moot point in Australian law. In the report the Presbyterian Church in Western Australia, for instance, states that

> in a broader sense, the ability to discriminate on the basis of an organisation's core commitments and values is central to the democratic freedoms of our country. The tendency in some quarters to portray religious bodies as somehow different in this respect from other social institutions is unfortunate. For example, when recruiting staff or appointing officeholders, a political party could be expected to display discrimination resembling that practised by religious bodies. It is reasonable, for example, that a politician from the Left of the Labour

[254] MacFarlane and Fisher (1996:24-25). Legally, religions are charities and thus exempt from nearly all taxation.
[255] *Id.*:35ff.
[256] *Freedom of religion and belief in 21st Century Australia.*

> party might discriminate against individuals with pro-free market views when recruiting staff for her office team.[257]

The question of who should determine the boundaries of discrimination in employment was raised by the Baptist Community Services (NSW and ACT): "It is essential for it to be acknowledged that genuine occupational qualifications cannot be determined externally, in ignorance of the religious mission, values and strategy of a religious organisation".[258]

There was never agreement within consultations on how best to address these issues, or on what mechanisms could be developed to assist with employment discrimination and exemptions. Some participants opposed exemptions altogether in principle (warning against the potential for exemptions to be used to violate the rights of minorities, such as women and persons with a homosexual orientation), while acknowledging that there are positions in organisations where certain requirements are necessary. A minister, for example, has to be of the faith and trained appropriately. It was argued, nevertheless, that exemptions could enable discrimination on the basis of people's faith, which undermines freedom of religion and belief. It was argued strongly that "if there are going to be exemptions, then there needs to be accountability", and that accountability has reportedly been lacking in terms of funding and the services provided. The research data included many arguments against exemptions. It was argued by Liberty Victoria that

> religious belief and practice that is self-regarding, held or engaged in willingly by competent adults, must be respected. Religious practice that affects others, directly or indirectly, should have no special status ... if religious groups sought exemption from laws preventing racial discrimination there would be public consternation. Substituting the word 'black' for women and homosexuals illustrates the point: modern Australia would find such discrimination unacceptable.[259]

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[257] At 37.
[258] *Id.*
[259] *Id.* Other objections against exemptions include that of the Anti-Discrimination Commissioner (Tasmania) who stresses that "in private, people are free to practise their religion and religious beliefs (but) in the public sphere when religious organisations provide employment and service

Many arguments concerning further legislation were either mentioned or presented in the report. These were both in support of and in opposition to additional legislation, which would give effect to section 116 relating to the protection of human rights and the right to freedom of religion and belief in Australia. Arguments ranged from the belief that "such a development will provide a necessary opportunity to strengthen the protections afforded to religious organisations"[260] to the argument that existing legislation is adequate and such additional legislation would be superfluous.[261]

It is important to note that some researchers hold that separation between church and state in Australia is not a clear issue as in some other countries, for example, the USA.[262]

4.5.2 New Zealand

New Zealand does not have a constitution and the protection of rights and freedoms is effected by several pieces of legislation and legal documents, including the New Zealand Bill of Rights Act of 1990.[263] Section 15 provides for religious rights:

> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

In addition to section 15, section 19 states that everyone has the right to freedom from discrimination on prohibited grounds, including religious or ethical belief.

In the absence of a legally entrenched principle of non-establishment or a clause separating church and state, the relationship between the government and churches is even less clearly defined than the position in Australia (see 4.5.1,

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delivery, it is important to ensure that currently unlawful discrimination is not made lawful. This would impinge on many other people's human rights of non-discrimination" (at 38).
[260] The Uniting Church National Assembly (at 43).
[261] Queensland General Consultation (at 46).
[262] Cf. Wallace (2005).
[263] Jefferies (2000:897).

supra).[264] According to Cox (2008:7) the close relationship between church and state has a number of consequences including an exemption from taxes for all places of worship and ancillary buildings. Superimposed on the basic general property law are many special incidents peculiar to ecclesiastical property. If certain laws affect property, or if a church wishes to avail itself of powers additional to those that are enjoyed by other voluntary associations, recourse may be made to the state.[265]

The executive and judicial bodies of the Anglican Church of New Zealand are subject to laws of both church and state (*mutatis mutandis* applicable to other churches). There have been very few reported cases in the civil courts in New Zealand dealing with ecclesiastical laws, however broadly defined.[266] Cox (2008:1) is of the opinion that there has been a conscious reduction in influence of the secular judiciary on the Church in recent years. He cautions, however, that it remains to be seen whether this will be effective in distancing church tribunals from the influence of the common law.[267] The authority of the church remains primarily dependent upon secular statutes, and its procedures (in Cox's opinion) remain legalistic. Attempts to develop a more "theologically based decision-making" still run the risk of correction by civil courts on judicial review.[268]

In conclusion, it appears that, in New Zealand, the civil courts enforce the constitutions and statutes of churches, but, in general, they are reluctant to intervene in church matters, unless there are valid and strong reasons for doing so. In practice, the courts would only become involved where there are offices or property involved.[269]

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[264] Cf. Wallace (2005). Cox (2008:1) implies that different churches in New Zealand have different relationships with the state. Cf. Blain (2009:102) who notes a contention that the Anglican Church in New Zealand is "quasi-established".
[265] Cox (2008:1).
[266] *Id.*:6.
[267] The influence seems to operate in both directions: "(T)he very structure of the Church courts reflect a pre-occupation with the secular legal system" (Cox 2004:148).
[268] Cox (2008:1).
[269] Cf. Cox (2004:147ff.).

4.6 Concluding remarks

A vast range of church-state models exists in different countries, as well as differences within a single country, ranging from unregistered religious groups to established churches. However, there appears to be a universal move towards increased church autonomy and recognition of religious bodies as legal entities of a special kind. Showing an ever-increasing respect for human rights instruments, a majority of modern states now recognise and appreciate the role of churches (and other religious entities) in strengthening the convictions, on which a free democratic society is based, and advocating human values and dignity in private and public life. Sustained efforts to increase the acceptance of the separation of church and state should therefore be part of every country's human rights endeavour.

On the other hand, churches world-wide need to take cognisance of the freedoms afforded them by treaties, case law, and judicial experiences in other jurisdictions. This should inevitably lead to increased freedom to govern themselves according to their own self-understanding, within the limits set by human rights instruments. The church in South Africa also needs to take note of the development in other countries with analogous models of church governance and legal structures, en route to greater sovereignty within the freedoms (and limits) of the Constitution.

The influence of advancement in international human rights instruments is readily apparent in the current South African Constitution. Adjudication by the ECHR gives an indication of the way that church law, as a *ius sui generis* in South Africa, should be dealt with. It is clear, however, that the jurisdictions discussed in this chapter each have their own unique challenges, often emanating from historical precedents.

One of the aspects that was revealed by the international perspective is the concept of positive neutrality as found in the jurisdictions of the Czech Republic (4.4.6, *supra*), and the Netherlands (4.4.16, *supra*). In the case of the former there is no insistence on a complete separation of church and state, and church-state treaties present in Czech law, on an internal level, indeed show a tendency

towards a cooperative model of relation. The structure of financial relationships between the church and the state in the Netherlands and the accompanying goal of advancing justice and the common good (see 6.13.3, *infra*) also hold important lessons for the South African experience.

4.7 Résumé

This chapter provided an overview of the way that church-state relationships in selected countries influence the self-understanding, self-expression, and legal status of churches, and the effect these factors ultimately have on church autonomy and church law in the respective jurisdictions. The following chapter will provide a description of the relationship of the church and the constitutional state in South Africa. The position of church law within the framework of entrenched religious rights will also be discussed.

CHAPTER 5

CHURCH LAW AND THE CONSTITUTIONAL STATE

5.1 Introduction

"The church also has rights" said Willis, J., in the case of *United Apostolic Faith Church v Boksburg Christian Academy* (2011), invoking section 15 of the Constitution.[1] Although the alliance between church and state in the western world has been described as an "unholy one",[2] the idea of human rights had its roots in the reaction to religious persecution.[3] The right to freedom of religion may thus be described (as it has indeed been by the Constitutional Court)[4] as one of the most fundamental of the fundamental human rights in an open and democratic society based on human dignity, equality, and freedom.

The underlying problem in any open and democratic society, based on human dignity, equality, and freedom with a high regard for religious freedom, is how far such democracy can, and must, go in allowing religious associations to define their entities in terms of their own self-understanding. Although churches are entitled to fundamental religious rights, their members cannot claim an automatic right to be exempted from the laws of the land by their tenets, dogma, or beliefs. At the same time, the state should avoid forcing such adherents to choose between their faith and respect for the law.[5] The courts need to show "reluctance to interfere with matters of faith, whether it be procedural or otherwise".[6]

[1] At 39.
[2] De Waal *et al.* (2001:288).
[3] *Id.*
[4] *Prince v President of the Law Society of the Cape of Good Hope* (2002) (at 48 and 114). Cf. Warnink (2001:158). See Malherbe (2008:267-269) for an exposition of the different aspects of the right to freedom of religion that are protected by the Constitution.
[5] *Christian Education South Africa v Minister of Education* (2000) (at 35).
[6] *Taylor v Kurtstag NO and Others* (2004) (see 5.5.11, *infra*) (at 61).

In the quest to describe the role of church law as a *ius sui generis* in South Africa the focus falls mainly on the three traditional Afrikaans Churches of Reformed descent (see 1.2, *supra*).

5.2 The inimitability of church law

5.2.1 Church law – a *ius sui generis*

It is essential that any attempt to explore church law should distinguish between the *ius constitutum* (the law as it is) and the *ius constituendum* (the law as it is supposed to be in terms of God's Word). The *ius constitutum* is the prevailing law as encountered in practice (the existing, fallible law) while the *ius constituendum* is the law that God intended to be the normative law of the church, based solely on the Word of God (the ideal, infallible law). The former is an ongoing process to achieve more and more consistency with the latter. To the extent that the church order of a church reflects the true Scripture-based church law (*ius constitutum*), it constitutes the fundamental essence of the church.[7]

Karl Barth (1958:720) describes church law altogether as a *ius sui generis,*[8] (albeit a *ius humanum* and not a *ius divinum*),[9] "a law which in its basis and formation is different *toto coelo* from that of the state and all other human societies".[10] Church law as *ius in sacra* must therefore be distinguished clearly from the law of church and state, expressed by Barth as *ius circa sacra*.[11]

The church, however, cannot exclude itself from the *ius circa sacra* because it cannot detach itself from the world it exists in.[12] Individual members of the church recognise the authority and jurisdiction of the state and adapt themselves loyally to the *ius circa sacra.*[13] At the same time, the *ius circa sacra* may never,

[7] Smit (1984:73-75); Spoelstra (1989:220); Coertzen (1991:158).
[8] This description is sometimes also applied to other branches of law when there is a unique or peculiar position in relation to civil law. Dupont and Verbruggen (2005:1084) use the phrase when referring to the law of juvenile deliquency: "Daarmee werd de eigenheid (*ius sui generis*) van het jeugdbeschermingsrecht en de grenzen van de daarmee samenhangende bevoegdheden ter discussie gesteld". Cf. Vorster's (1999:1) reference to the unique character of church law as *sui iuris*.
[9] Barth (1958:713).
[10] See also Barth's depiction of church law as a living and growing law which continually calls for reformation and is therefore "unlike any other law, a *ius sui generis*" (*Id.*:714).
[11] *Id.*:687.
[12] Cf. Coertzen (1991:159).
[13] Cf. Barth (1958:688).

without responsible theological reflection by the church, become the *ius in sacra.*[14] The state will never adopt the church's understanding of itself, nor does it need to. The law pertaining to church and state can never be, or try to be, the law of the church, nor can it be accepted or recognised as such.[15]

It is paramount that the church refrains from viewing itself in the same way the *ius circa sacra* often does. State authorities, on the other hand, should not abuse their *ius circa sacra* in order to become involved in the church's *ius in sacra.*

Vorster (1999:1) explains that the distinctiveness of church law (as opposed to civil law) is based on the fact that the Bible and the confessions are its main sources with the primary aim of manifesting the reconciliation in Christ within the church.

5.2.2 The state and the kingdom of God

The imminence of the kingdom of God is manifested in all of Jesus' teachings. Jesus Christ proclaimed that "(t)he kingdom of God has come near",[16] and in fact "the kingdom of God has come upon you"[17] already. For centuries the world outside the church was viewed as a hostile rival of the (consecrated) church and also of the (imminent) kingdom of God, the former representing the latter in the world. The Reformation gradually set out to change this way of thinking.

Martin Luther, in *On Secular Authority* (see 2.5.3, *supra*), describes the power struggle between sacred authority (subject only to God) and secular authority (described as the "sword"). Luther divides the world into two kingdoms: God's kingdom (constituted by true Christian believers) and the kingdom of the world (consisting of the remainder of humanity). The members of God's kingdom are governed by Biblical laws and the Spirit, with no need for the secular "sword" as harmonious living comes naturally. The need for secular law arises because the rest of society does not adhere to the same principles as the believers, and the latter should therefore be protected. In this sense God uses secular law and the civil government to keep believers safe and the world orderly and peaceful. Both

[14] Bronkhorst (1992:45).
[15] Cf. Barth (1958:688).
[16] Mark 1:15 (NIV).
[17] Matthew 12:28 (NIV).

kingdoms are guided by the Word of God. Christians are therefore to obey the orders of secular powers and assist in upholding the secular order, except when the latter legislate on matters of faith, which would be considered to be *ultra vires*. Christians should conform to the civil rule, but the latter should never overstep its parameters by legislating on matters pertaining to faith and religion.[18]

Although Calvin (*Institutes* IV:651 [20.1] [see also 2.5.4.1, *supra* and 8.1, *infra*]) considered the kingdom of God and the civil government to be "things very widely separated", in his view they are not adverse to each other but have complementary concerns. The former begins the heavenly kingdom in us, while to the latter it is assigned to advance worship, defend sound doctrine, uphold civil justice, and cherish peace. According to Strauss (2010:125-126) the current Reformed view of the relationship between the church and the state shows a close relatedness to the Calvinistic tradition, where people as church members as well as citizens of a civil community have complementary responsibilities and duties towards one another.

Modern Reformed thinking on a sound church-state relationship seems to start with the kingdom of God as point of departure.[19] Berkhof (1985:170) aptly proposes that "the purpose of the world is the Kingdom of God, as full realization of human existence through fellowship with God". Coertzen (2008d:221ff.), while upholding the inevitable interconnectedness between the church and the state, considers the kingdom of God to be the primary context for the existence of both the church and the state. For Coetzee (2008:235) the kingdom of God is the (borderless) area of God's command (in contrast with the borders of the church, namely, all believers) with the Sermon on the Mount (Matthew 5 to 7) as the "constitution" to which every believer should gratefully adhere. Therefore everyone, including every worldly authority, will ultimately have to answer regarding their reaction towards the "constitution".

Du Plooy (2008:243ff.), in his theological discussion of the relationship between the church and the state and between church order and the Constitution,

[18] Luther (1523/1991:23).
[19] Cf. Vorster's (1999:8) distinction between church-centred and kingdom-centred approaches to church law.

respectively, also starts with the kingdom of God as point of departure. In terms of his view Christ has complete authority in heaven and on earth and that God in Christ is the only sovereign ruler of the church and the world. He concludes that God has given the church and the state the authority (*potestas*) to rule, but each in its own sphere of influence.[20] The church as an institution *sui generis* is described by Du Plooy as an institution of God Himself, with the mandate and responsibility to govern itself according to the Scriptures. It will have to be obedient to the state in matters unrelated to religion but has the responsibility to witness to the state if it rules contrary to the principles of the kingdom of God. The church acknowledges Christ as its head and God as the supreme ruler of the world, including all spheres of society. Witness towards, intercession for, and co-responsibility with the state lie within the duties of the church.[21]

5.2.3 Church and society

From the perspective of the kingdom of God, with Christ as head of the church and God as supreme ruler of the world, the unique and ever-evolving position that the church holds within society and within the church-state relationship needs to be explored. Hiemstra (2005:28ff.) identifies three basic historic Christian models of church-state relationships.[22] The Constantinian model accepts that political authorities are understood to be dominant over the church authorities. This means that political authorities may assist, influence, and even control church authority. Through coercive power the state can also advance religion – but in doing so it may interfere with the church's jurisdiction. In contrast with the Constantinian model, the theocratic model proposes that church authorities should dominate political authorities and the rest of society. The Christian separationist model suggests that the distinctive roles of the state and the church could and should be separated from each other completely. In practice this meant the church had often withdrawn completely from civil society.[23]

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[20] Cf. 5.2.6 (*infra*).
[21] Oberholzer (1995:14ff.).
[22] There are several models setting out the relationship between the church and the state. See also chapter 2 (*supra*).
[23] Cf. the positions of the Anabaptists and John Locke in chapter 2 (*supra*).

From the above it appears that none of the traditional models of church-state relationships give proper effect to the current role of the church in society. Hiemstra (2005:38ff.) proposes a model that, while developing a healthy understanding of the state, is rooted in the convictions of the kingdom of God, and of the church as an institution. This model, aptly called "institutional plurality", appreciates the complementary responsibilities of multiple overlapping institutions and associations in society that are all human responses rooted in God's creation. The state should not dominate these institutions, but rather recognise, integrate, and protect them in the interests of justice.

With this model, Hiemstra attempts to develop an understanding of the nature and task of the state that honours the central Biblical message of the coming of the kingdom of God and the role of the church as an institution as well as a dispersed community.[24] From this vantage point he argues that Christians should give principled recognition to institutional plurality in society, including the state as institution. The state has the reciprocal duty to promote peace, order, and public justice, thus providing a framework for the church to function in terms of its calling.

The Dutch theologian, Hendrikus Berkhof (1985:343ff.), perceived a threefold character of the church, which seems to relate well to Hiemstra's proposal. Initially the institutional aspect dominated, Berkhof explains. After the Reformation the community aspect surfaced. After that yet a third facet began to evolve, namely, orientation to the world.[25] According to this view, the church stands between Christ and the world, as a mediating agency equally related to both. As the institute mediates Christ to the congregation, so the congregation in turn mediates Him to the world.[26] Berkhof shows how the Reformed Church of the Netherlands revered the re-studying of ecclesiology (and in fact all of theology) from a perspective of its relationship to the world. This development was reportedly spearheaded by Van Ruler as he attempted to view the church

[24] Cf. Coertzen (2008d:222ff.).
[25] Berkhof (1985:349) relates how the majority of studies in ecclesiology show little awareness of the third aspect, the great exception being Karl Barth's ecclesiology that follows the structure of institute, community, and apostolate in successive combination.
[26] Cf. Berkhof's lecture on ecclesiology on 1 May 1962 before the Nederlandse Hervormde Predikantevergadering at Utrecht where he remarked, *inter alia*, that "(h)et abstracte introverte instituut maakt plaats voor het extraverte beweging, gericht op de concrete noden van de wereld" (1962:147).

strictly as a means to the kingdom of God, and thereby also to the world. The position of the church's own place and form in the relationship between the kingdom and the world became notably evident from the Church's 1951 Church Order where apostolate took precedence over confession.

The proposed shift from institute to community and subsequently to apostolate has also found its way into recent South African church history. Vorster (1999:8) explains how Reformed Church polity developed since the Reformation from a "church-centered approach" (based mainly on the church as institute) to a "kingdom-centered approach". Niemandt (2010:92ff.) expounds how policy decisions of the NGK in recent years have been influenced by an emerging missional ecclesiology, including a revaluation of the role of the church as an expression of *missio Dei*. This approach prefigured the views emerging within the NHK and the GKSA in this respect. Dreyer (2013) propagates a paradigm shift away from the traditional presbyterial-synodal model to the creation of a church order for the NHK with a stronger missional orientation to serve a more contemporary and relevant ecclesiology. Van Helden (2013) also reports germinating signs (emanating from research done at the 2012 Synod of the GKSA) of a shift in thought in the GKSA from an introverted institutionalised paradigm to an extroverted missionary focus.

It is not clear how a missional ecclesiology will deal with traditional church polity issues, such as the offices and church discipline or with the development of the fragile church-state relationship in South Africa. There appears, however, to be merit in the rethinking of church law to identify the place of the Reformed church as an institution *sui generis* amongst other institutions sharing in social responsibilities, including assistance to the authorities in sound governance.

Moreover, section 7(2) of the Constitution underscores the state's duty to "respect, protect, promote and fulfil the rights in the Bill of Rights". This would, *inter alia*, entail that the state respect the freedom of the church to define itself according to its own principles and calling. The challenge to the church remains

to redefine itself and its role and position in society in terms of the constitutional rights and freedoms conferred upon it by the Bill of Rights.[27]

Any quest for a constitutional proportionality and diversity test involving church doctrine has to take the self-definition of the church seriously. Any feasible model for a sound relationship between church and state has to consider the self-understanding of the church. The self-definition of the church fundamentally finds corroboration in the Scriptures and the Three Forms of Unity, as well as in tradition and research. The identity and dignity of the church and its members flow from this basis and this leads to the acceptance of God's supreme reign, submission to the triune God, and obedience to the doctrine, complemented by a life *coram Deo* and summarised by the five *solae* of the Reformation: *sola fide*, *sola Scriptura*, *sola gratia*, *solus Christus,* and *soli Deo gloria*. A religious association's right to self-definition based on its self-understanding is a necessary consequence of constitutional religious guarantees, the implication of which will be explored in this and subsequent chapters.

5.2.4 The Belgic Confession

For centuries churches in the Reformed tradition have relied on article 36 of the Belgic Confession which deals with the civil government, elucidating the relation between the church and state authority (see 1.1 [*supra*] for the text of article 36). This article, contemplated in the light of Romans 13:1-7,[28] provides the backdrop for the way churches in the Reformed tradition understand the relationship between the church and civil government. The close relationship between article

[27] Cf. Coertzen (2003:252-253) and Smit (2006:633ff.).

[28] (1) Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. (2) Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. (3) For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. (4) For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. (5) Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience. (6) This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. (7) Give everyone what you owe him: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honour, then honour (NIV). Cf. Strauss (1998:24ff.) regarding the relevance of Romans 13:1-7 (as contemplated by Calvin) for modern day South Africa and the ultimate inference that even illegitimate authorities, as office-bearers of God with a divine right to rule, should be obeyed.

36 and Calvin's theology on church and state is also well documented[29] and commonly accepted.

In a constitutional (religious neutral) state, with all religions being of equal standing, article 36 of the Belgic Confession must come under renewed scrutiny. Even though the article shows a clear theocratic ideal, which can be attributed to the De Brès opposition to the Anabaptists (and the influence of Calvin's view of the relationship between church and state in the thoughts of De Brès),[30] it has also been argued that neither Calvin nor the Belgic Confession should be described as theocratic.[31]

Many theologians, however, are of the opinion that article 36 gives expression to a theocratic form of government that guarantees the self-rule of the church.[32] According to this view, God's absolute sovereignty is transferred to earthly authorities (for example, the church) who are compelled to rule in accordance with a divine revelation. Society is required to honour the revealed truths, facing sanctions in the absence of compliance.[33] In the light of the Confession, Coetzee (2006:149-154) maintains that there is mostly consensus amongst Calvinistic-Reformed theologians regarding the state's duty to advance the kingdom of God[34] and considers a neutral state to be in opposition to these objectives of article 36. It may therefore be argued that the theocratic principle of article 36 and "the advancement of a society that is pleasing to God" are conditions that are not always apparent in society at large.

The article's perspective of a sacral society where there is no separation of church and state appears to create a problem for modern-day practice of church law and governance. It even seems to prevent the very condition it sets out to achieve, rather than to promote the self-rule of the church.

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[29] Cf. Coetzee (2006:148) and Coertzen (2010:333ff.).
[30] Vorster and Van Wyk (2000:121).
[31] Coertzen (2010:333ff.). Cf. 2.5.4.1 (*supra*) for Calvin's view on church and state. See also Coertzen (2008d:221ff.) who suggests that Reformed churches in their relationship with the state move away from both the Constantinian and theocratic models.
[32] E.g. Van Wyk (2005:35); Coetzee (2006:150); Du Toit (2006:679); Fourie (2006:158). See also Coertzen (2008b:349; 2008d:228; 2010:335).
[33] Coertzen (2010:335-336). Cf. the *Oxford Dictionary of English* where theocracy is defined as "a system of government in which priests rule in the name of God or a god". Cf. 2.5.4.1 (*supra*).
[34] Cf. Du Toit (2006:679-680) who describes how Calvinism's assertion that the Christian state has to support the church in its mission provided the theological backing for the erstwhile apartheid ideology. See also Coertzen (2010:334).

As the Reformed Church of the Netherlands (the mother church of the three Churches that form the focus of this study) was seen as the true church, it had the duty to promote the kingdom of God as articulated in article 36. In the early 20th century the Reformed Church of the Netherlands (followed by other Reformed churches) amended the article (in keeping with the central theme of the Reformed tradition: *ecclesia reformata semper reformanda est*) on the grounds that the theology of the Reformed confessions, including the Belgic Confession, supported a different view of the state's role. The Constantinian element of the state's task, which requires it to enforce true religion, had been changed.[35]

It is uncertain though how, in a constitutional state with guaranteed rights to freedom of religion and modern democratic separation between state and church, the "advancement of the kingdom of God" is to be achieved. Landman (2006:178) argues that the Constitution's recognition of polytheism complicates any attempt to accept article 36 of the Belgic Confession as normative for a sound church-state relationship. Fourie (2006:170-171) asserts that article 36 is incompatible with modern forms of church-state relations and that it should be read as an interesting, but historically dated, document rather than to attempt "hermeneutic gymnastics" to deduce a meaningful modern application from it.

These suggestions militate against stern Reformed approaches. Raath (1997:6), for instance, cautions that the (Reformed) churches should be wary not to adapt or reject the church's confession due to non-Scriptural concerns. In addition to rejecting the Confession (partly or in full), the church should also resist the temptation to reinterpret the Confession by means of *reservatio mentalis* (silently giving one's words a different meaning than is normally expected) or by privately interpreting the Confession in a way that differs from the original intention. Coetzee (2006:155) emphasises: "Artikel 36 NGB moet in sy volle draagwydte gehandhaaf word".

When interpreting and attempting to apply article 36 one should take into account that it was written as an apology, at a time when the Roman Catholic

[35] Hiemstra (2005:32-35). The text of the Belgic Confession that is used by the three Churches under discussion retained the directive to promote of the kingdom of Christ and the condemning of the Anabaptist view in article 36.

authorities continually reproached the Reformers for being revolutionaries with no respect for the king. In pleading for mercy from King Philip of Spain and assuring him that the Reformers were loyal subjects who honoured those in authority, De Brès, borrowing from Calvin, used two principles: The Word of God and the *ius naturale*[36] (a thought also subscribed to by Luther).[37] The only thing the Reformers desired was freedom to serve God according to their own understanding of the Bible.

It should also be borne in mind that the thought paradigm[38] prevalent during the time of De Brès (and indeed also of Calvin) and the Belgic Confession was substantially different to the paradigm found in a constitutional state, where fundamental human rights are perceived to be the highest values. Strauss (2010b:327) suggests, nevertheless, that Calvin would have, in the South African constitutional state, insisted on obedience to the state, notably where the worldly authorities afford one the opportunity to freely comply with God's directives in everything holy and secular and the opportunity to advance Christian values and norms.[39] Arguably the same could, *mutatis mutandis*, be said of article 36 of the Belgic Confession. The right to religious freedom does not relinquish the church's duty towards the state.

A Christian's main duty towards the advancement of the kingdom of God is imaginably in closer proximity to a perpetual Biblical-prophetic witnessing than to forceful coercion. It is reasonable to accept that the realities of the pluralistic society, within which the three Churches under discussion function, dictate a renewed appreciation for the rights and freedoms afforded it in a constitutional state. Any proper consideration of Reformed theology and sound discourse on the relationship between church and state (whether the Confession acts as a "gemeenskaplike akkoord" between Reformed Churches [Smit 1984:64; cf.

[36] See Dreyer (2005:888-889). Cf. Coetzee (2006:148).
[37] Raath (2007:170) notes how Luther embraced St. Paul's idea of natural law as a law "written in (men's) hearts". See also *Id.* (footnote 3).
[38] This study uses the concept "paradigm" as a theoretical premise preceding scientific research (cf. Vorster [1999:7-10]).
[39] Strauss (2010b:326) stresses that, even though Calvin would not oppose righteousness and justice for everyone, any humanistic consideration of the values of dignity, equality and freedom (as contemplated in section 7[1] of the Constitution) would be incompatible with his notion that all values should relate (and be of service) to God and his Word.

Strauss 2010:16] or not)[40] will consent to the church's mission to fulfil its Biblical-prophetic calling in a pluralistic, constitutional state.

In a doctoral thesis, Muller (2010) argues convincingly that the fact that South Africa is a constitutional democracy is entirely consistent with the intent of article 36. Moreover, while South African authorities interpret the values and provisions of the Constitution in accordance with humanistic beliefs, he found that the constitutional values and provisions generally agree with Biblical principles.

In the light of the entrenched right to religious freedom, it seems that article 36 would survive any proper constitutional inquiry. Furthermore, it is clear that no conflict need arise between the church and the state from the Churches' continued devotion to the Belgic Confession. As a preliminary observation it seems reasonable to expect that the unique position of church law within the constitutional state should be recognised and protected by the church and the state alike.

5.2.5 Church provisions

As the church and the state are both subject to the authority of the kingdom of God, the church does not receive its juristic competence from the state. One can therefore not argue that a church may not accept a church order that is contrary to the Constitution.[41] Even in the face of its waning supervisory role, the state's interest in the church and church law cannot be denied (see 5.2.3, *supra*) and it seems feasible that church orders enclose a reference to the way the church ought to deal with church-state relations.

To this end, the Church Order of the GKSA, article 28, states:

> Precisely as civil authorities, as institutions of God, are obliged to assist and protect the church and its office bearers, it is likewise the duty of all ministers, elders and deacons to impress upon church members, faithfully and diligently, the need to obey and honor the government. They must also endeavor, in the fear of the Lord, to arouse and retain the

[40] See Van Wyk (2005:165ff.) for the reasons why some theologians within the NHK do not support this view.
[41] Du Plooy (2008:244-247).

> goodwill of the civil authorities towards the churches in the best interest of the churches. Church assemblies must communicate with the government in order to acquire the necessary cooperation of the government and, as the church of Christ, must bear testimony to the government in cases where the need to do so occurs.

Article 36 of the Belgic Confession's insistence that the government uphold "the sacred ministry" is evident in the civil authority's stated obligation "to assist and protect the church", and the duty of office-bearers and church members to obey and honour the civil authorities resembles the Confession's "everyone ... must be subject to the government". Article 28's (*supra*) call to witness to the authorities who, reciprocally, would be found to be open to the prophetic task of the church as would be appropriate in a religious-neutral state, as opposed to a secular state, is also analogous to article 36 of the Confession.

A similar provision is found in the Church Order of the NGK (2011). Article 67 reads:

> 67(1) In die lig van Romeine 13 erken die Kerk die staat as 'n dienaar van God tot ons beswil. Dit is God wat aan die staat die opdrag gegee het om die reg te handhaaf en die kwaaddoeners te straf.
> 67(2) Die Kerk erken dat die staatsowerheid wat deur sy fisiese swaardmag in beheer van 'n bepaalde staatsgebied is, deur God beskik is en as sodanig eerbiedig moet word. Die norm vir die Kerk se deelname aan die publieke regsverkeer en uitoefening van burgerlike regte is die Woord van God.
> 67(3) Christus is die Hoof van die kerk. Daarom beskou die Kerk sy reg op vryheid van godsdiens, wat sy Bybels-profetiese getuienis teenoor die staatsowerheid en die wêreld waarin hy staan, insluit, as onvervreembaar. In die uitoefening hiervan maak hy aanspraak op die regsbepaalde beskerming van die owerheid.

Whereas the NGK opted for an emphasis on the state as servant of God (as described in Romans 13:1-7) in article 67(1), and the power and authority of government (akin to article 36 of the Belgic Confession) in article 67(2), article 67(3) provides a clear contemporary approach to modern church-state

relations.[42] The inclusion of the Biblical-prophetic witnessing to the authorities as its right in terms of religious rights is foreign to the Belgic Confession (as is the whole concept of religious freedom). The foundation of Christ as head of the church in the same subsection as the church's claim to the fundamental right to freedom of religion as entrenched by the constitutional state is therefore significant. The pragmatic consequence of this view is set out in article 2.3:

> Die Nederduitse Gereformeerde Kerk reël sy eie interne orde op grond van sy onvervreembare roeping en interne bevoegdheid as kerk van Jesus Christus en ook op grond van sy reg tot vryheid van godsdiens.

An official policy document of the NGK, *Die NG Kerk en die Grondwet*,[43] confirms the emphasis of the NGK on the prophetic-ethical testimony of the Church towards state authorities. It also endorses the Reformed view that there should not be total separation between the domains of the state and the church, although a clear distinction between the duties and responsibilities of the church and the state, respectively, should be maintained. Christians are also urged to take part in public and governmental processes as long as God's honour is not compromised and Christians act within the constraints of Biblical demands.

The duty of the NHK towards the state in the 2010 Church Order is set out in ordinance 5.7.8 (Getuienis teenoor die owerhede):

> (i) Die Kerk se getuienis op grond van die Woord van God bestaan uit die verkondiging, gesprekke wat lidmate en ampsdraers met owerhede en politieke partye voer, en uit die bekendmaking van besluite van vergaderings van die ampte, en dit word ook saam met ander kerke afgelê.
> (ii) Getuienisse word vanuit die Woord van God teenoor owerhede as instellings van God gelewer oor die Koninkryk, die wil en gerig van God, deurdat God mense aan Hom gehoorsaam wil maak en deur sy Woord wil laat lei.
> (iii) Die Kerk bid vir die owerhede en verseker hulle daarvan.

[42] Cf. Strauss (2010:125-130).
[43] Agenda vir die 13de vergadering van die Algemene Sinode van die Nederduitse Gereformeerde Kerk (2007:111-113), accepted as official policy by the General Synod (Handelinge van die 13de Sinode 2007:213).

In the absence of a provision affirming the state's reciprocal duty towards the church,[44] the prophetic calling to witness to the authorities forms the basis of the Church Order's view on the relationship between the church and the state.[45] Romans 13 and article 36 of the Belgic Confession remain the blue-print for the NHK's view of mutual responsibilities and duties in church-state relations.[46]

In the light of the church orders, Romans 13, and article 36 of the Belgic Confession, it seems reasonable to accept that the three Churches under discussion fully assent to the Constitution of South Africa as the highest law of the country and will do their utmost to adhere to its principles.

5.2.6 Church autonomy and sphere sovereignty

The Dutch politician Groen van Prinsterer's expression "souvereiniteit in eigen sfeer", a phrase he coined in 1862, became the backdrop for early church-state relations in the Netherlands, and later, as a necessary consequence, also in South Africa (Van der Vyver 2004:38). The Calvinist Abraham Kuyper subsequently developed and expanded this notion beyond the reserve of church-state relations to embrace the relationship between all social institutions.[47] In terms of Kuyper's view (as explicated by Van der Vyver [2004:39-41]) each distinct social institution has within itself a supreme (albeit established by God) authority, seemingly not unlike Hiemstra's proposal of institutional plurality (5.2.3, *supra*), although Kuyper seemed to negate what Hiemstra (5.2.3, *supra*) called "complementary responsibilities".[48]

According to Van der Vyver (2004:41ff.) the doctrine of "sphere sovereignty" (pertaining to institutional group rights as opposed to collective group rights [see footnote 123, *infra*]), as currently defined, received its refinement from Herman

[44] The erstwhile *Kerkwet* of the NHK (replaced in 1997 by the Kerkorde) provided in article 14: "Dit is die plig van die owerheid om wet en orde te handhaaf en reg en geregtigheid vir sy onderdane te verseker sodat die Kerk sy dienswerk rustig kan verrig. Dit is die taak van die Kerk om voorbidding vir die owerheid te doen en almal aan te moedig om hulle aan die owerheid te onderwerp, eer en eerbied aan die owerheid te betoon en aan hom gehoorsaam te wees in alles wat nie in stryd met die Woord van God is nie".
[45] Dreyer (2005:892).
[46] Cf. "Getuienis teenoor kerk, volk en owerheid in die Paastyd", issued 28 March 2013 by the Commission of the General Assembly of the NHK.
[47] Van der Vyver (2004:39-41).
[48] As deduced from Van der Vyver's interpretation of Kuyper. A complete perusal of Kuyper's theology falls outside the scope of this study.

Dooyeweerd. Today the doctrine encompasses the relations between all social entities that exist and function within society, and requires of every entity to focus its undertakings on its own characteristic function, and not disregard the territory of other social entities. In this sense the state functions as yet another social entity with its own sphere of influence.[49]

Sphere sovereignty asserts that the possession of executive powers within a social entity derives from the essential nature and structure of the association with no external source. Powers of government within a church and the internal church law are therefore conditioned by the religious calling of the church and must not be seen as a political concession conveyed by the state.[50] The doctrine, much like Hiemstra's institutional plurality (see 5.2.3, *supra*), remains sensitive to, and is in fact based on, the complementary co-existence of different social entities, including church and state within society. It is thus not paramount to separation of church and state.[51]

Van der Vyver (2012:149ff.) therefore draws a distinction between autonomy and sphere sovereignty, the former being exercised by virtue of a concession granted by another organisation (e.g. the state and its organs) while the subordinate entity functions completely within the enclave of a single social structure. True sphere sovereignty, on the other hand, implies the relationship between two or more structurally distinct social entities, such as the church and the state, where the internal spheres of competencies of the institutions are not dependent on respective concessions. The competencies belong to each one independently according to its existence and role within society. Van der Vyver (2012:167) is satisfied that South African law has avoided the dangers of totalitarianism by recognising the competence of religious institutions to uphold their own convictions.

Church autonomy, in the context of this study, falls implicitly within the ambit of "sphere sovereignty" as contemplated by Van der Vyver. The Constitution of the

[49] Cf. Du Plooy (2008:245) who insists that the state, in its relationship with the church, should take into account that "die kerk in 'n ander sfeer werksaam is, aan wie vryheid en ruimte vir die eie bestaan en funksionering ... gegee moet word".
[50] Van der Vyver (2004:42-43).
[51] *Id.*

Republic of South Africa is singled out by Van der Vyver (2004:50) as "one that upholds the principle of sphere sovereignty in almost all of its ramifications".

5.3 The Constitution of South Africa

5.3.1 Enactment

Before 1994 South Africa was, for all intents and purposes, a Christian state. The alliance between the church and the state often blurred the distinction between church law and civil law. The church enjoyed a privileged position and found itself politically protected. This favourable status enjoyed by the church was severely challenged in the wake of the democratic elections on 27 April 1994.

The Constitution was drafted and adopted by an elected Constitutional Assembly. During the preceding two years the Constitutional Assembly considered thirty-four constitutional principles. In order to ensure that the final Constitution conformed to these principles, the Constitutional Court was required to certify the draft final constitutional text.[52]

On 4 February 1997 the current Constitution of the Republic of South Africa (Act 108 of 1996) came into force. Today South Africa, as a constitutional state, has a system of government directed by the Constitution, which is the supreme law of the country. The government derives all its powers from this law. The government's powers are limited to those powers set out in the law.[53] The Constitution incorporates principles such as the rule of law, separation of powers, and protection of fundamental rights.

Chapter 2 (the Bill of Rights) of the Constitution (which has been described as one of profound tolerance and accommodation in respect of religion and diversity)[54] guarantees several fundamental rights which are paramount to the scope of this study. These include section 9 (Equality), section 15 (Freedom of religion, belief and opinion), section 18 (Freedom of association) and section 31

[52] *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* (1997) (at 23-27).
[53] Bekink (2008:481).
[54] Van der Vyver (2012:157).

(Cultural, religious and linguistic communities). As part of the Constitution as highest law of the country, any law or provision that contradicts the Bill of Rights may be annulled by the courts. A limitation on any right in the Bill has to pass the analysis of the general limitation clause (section 36).

The right to freedom of religion includes both free exercise and equal treatment components, both applying to state and private conduct. The former entails a free choice for an individual regarding religious views and practice without state interference. The equality component means that the government shall not favour one religion over another.

Section 34 states that "(e)veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". All members of churches, as well as churches themselves, like all other aggrieved individuals and bodies, have the right to recourse to impartial justice to settle their disputes. This right may only be denied in terms of the provisions of section 36.

5.3.2 The South African legal system after 1994

The promulgation of the Constitution initiated a redesign of the legal system in South Africa.[55] Chapter 8 of the Constitution (sections 165-180) sets out the current court system in the country. The courts are (a) the Constitutional Court (the highest court in all constitutional matters); (b) the Supreme Court of Appeal (may decide appeals in any matter); (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.[56]

The Constitution (thus also the chapter 2 Bill of Rights) is the highest law of the country to which all other laws are subordinate.[57] This means that all other laws

[55] Section 165.
[56] Section 166-170.
[57] See Du Plessis (1996:452-457) for methods of interpreting the Constitution.

and actions are void if they are in conflict with the Constitution and that the courts have the power and authority to enforce this principle. The Constitution provides the ultimate norm in terms of which all actions within the state are evaluated to ensure public order, stability, harmony, and security.[58]

Although South Africa is often described as a secular state,[59] Van der Vyver (2004:50) and Du Plessis (1996:461; 2001:19) are probably correct in asserting that the country can perhaps best be described as a religion-neutral state.[60] With this is meant that the Constitution does not prohibit state involvement in religious affairs (e.g. section 15[2]), but requires that it be done in accordance with the principle of equality that forms part of the constitutional system.

There is a constant need and drive to develop a universal model of co-existence between secularism, constitutionalism, and freedom of religion.[61] The values advocated by the secular sphere, and invoked by the Constitution, are not necessarily in opposition to religious values.[62] Within the South African historical context, however, recourse to secular values appears to have been more effective than religious values in effecting change as fundamental rights have judicial force. In addition, fundamental rights do not have the disadvantage of the doctrinal dissent inevitably attached to religious rights.[63] The Constitution may be seen as the expression of the will of the people and a reflection of the current values within a society.[64]

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[58] Malherbe (2008:264).
[59] E.g. Coetzee (2006:151; 2008:233 [footnote 3]) and Raath (1997:6). Destro (2001:211), while discussing church autonomy in the USA, laments that there is "virtually no case law or commentary that explains the meaning of the term 'secular'", which is arguably not dissimilar to the position in South Africa. He proposes that, in practice, "secular" means "not religious". The *Oxford Dictionary of English* defines secular as "not religious or spiritual". See also Du Toit (2006:677) and Benson (2008:298). Landman (2006:178) is of the opinion that South Africa can hardly be called a secular state because of a clear bias in favour of Christian values in the Constitution.
[60] According to Coetzee (2008:237) this is the way the South African state views itself, but he concludes that the Scriptures and the confession of the church do not recognise a "neutral state". Coetzee's (2006:151 and 153) use of the terms "secular" and "neutral" as synonyms in this context is questionable.
[61] Bekink (2008:497).
[62] According to Du Toit (2006:685-692) there is little difference between secular human rights and religious human rights. Within the African context there is no clear division between the sacred and the secular. From this flows a growing recognition that the secular is not entirely irreligious, and the sacred and secular are often viewed as belonging to the same sphere.
[63] Du Toit (2006:685).
[64] Malherbe (2008:264).

5.3.3 No-establishment

The Bill of Rights as a cornerstone of democracy in South Africa enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[65] The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.[66] In terms of religious rights it is clear that South Africa has not adopted the no-establishment option (erecting a wall of separation between church and state) of the Constitution of the USA (cf. 4.2.11, *supra*). In this sense a duty rests on the state to promote religious rights and to act positively to enable persons (natural or juristic) to claim their religious rights. South Africa resembles the positive neutrality of the system found in the Netherlands in this respect (see chapter 6, *infra*).[67]

Section 15(2) of the Constitution provides that "(r)eligious observances may be conducted at state or state-aided institutions" under certain conditions. This is a significant departure from the USA's "establishment clause"[68] (as described in chapter 4) and confirms that South Africa is not a secular state but should rather be considered a religion-neutral state sustaining religion without preference for any specific faith or church (see 5.3.2, *supra*). There is a definite unwillingness to erect a wall of separation between the church and the state.

This was confirmed by the Constitutional Court in *S v Lawrence; S v Negal; S v Solberg* (1997).[69] Chaskalson, P., cautioned that, in developing South African jurisprudence no "establishment clause" should be read into our Constitution. The primary purpose of the establishment clause in the USA's Constitution is prevention of advancement or inhibition of religion by the state – principles clearly not present in the South African Constitution.[70] O'Regan, J., agreed that our Constitution contains no establishment clause prohibiting the establishment

[65] Section 7(1).
[66] Section 7(2).
[67] See also Malherbe (2008:272) who shows how the traditional approach in Germany relating to the relationship between church and state is also more applicable to South African than the non-establishment model.
[68] Strictly speaking it is more accurate to refer to a "no-establishment clause" but this study refers to the widely accepted and commonly used phrase "establishment clause".
[69] This was the first case before the Constitutional Court to deal with the religious freedom clause, section 14 of the Interim Constitution.
[70] At 99-104.

of a religion by the state,[71] and also noted that the strict approach of the United States Supreme Court to the provisions of the First Amendment, in relation to the separation between state and religious institutions, has been avoided.[72] State endorsement of religious practices, however, is subject to certain qualifications including that it shall not be coercive or compulsory, but always voluntary.[73]

Whereas there is no establishment clause in the South African Constitution, the court argued that the second element of the First Amendment, the "free exercise clause" that provides that the American Congress shall make no law prohibiting the free exercise of religion, is to be found in the South African Constitution. While this could only be achieved where the government acts even-handedly, it does not necessarily demand a commitment to either secularism or complete neutrality. Indeed, giving full protection to freedom of religion may sometimes require specific provisions to protect the followers of particular religions.[74]

5.3.4 Some relevant constitutional provisions

The text of the Constitution contains no reference to or preference for any specific religion or deity. It has been argued though that the preamble shows state bias to monotheism,[75] and indeed that both South African common law and statutory law still show a Christian bias.[76]

Several sections in the Constitution could be described as particularly relevant for churches and church law. Section 9 (Equality) is the first section that refers to religion directly:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other

[71] At 116.
[72] At 118. The First Amendment has led to a jurisprudence which generally prohibits any state endorsement (including the reading of prayers in state schools) or funding of religion (*Id.*).
[73] At 121.
[74] At 122.
[75] Church (2009:82). The Constitution does, however, recognise polytheism.
[76] Cf. Du Plessis (1996:443-445).

measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 15 (Freedom of religion, belief and opinion) contains the individual right to freedom of religion or belief that includes the right to believe and the right to manifest one's belief and the individual right to freedom from discrimination based on religion or belief, which includes an obligation of the state to display in its laws and practices neutrality towards religions and an obligation to outlaw unfair discrimination on grounds of religion. Despite the absence of an explicit reference to that effect, section 15(1) does not exclude the collective and institutional dimension of religion.[77] Section 15 reads:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.[78]

(2) Religious observances may be conducted at state or state-aided institutions, provided that –

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising –

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

[77] See 5.3.6 (*infra*).

[78] Section 15(1) extends religious freedom to also include belief-systems such as agnosticism, scepticism, and atheism. In *S v Lawrence; S v Negal; S v Solberg* the Constitutional Court defined freedom of religion to include both the right to have a belief and to express that belief freely. It also held that an express support of one religion over others was not permitted under the Constitution.

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

Section 18 (Freedom of association) guarantees the individual's freedom to establish, join, or take part in an association and its activities: "Everyone has the right to freedom of association". The freedom of association should not, however, be understood to mean the entitlement to join or take part in the activities of any association.[79] Additionally, the right guarantees a degree of autonomy to an association to run its affairs free from external interference.[80]

Section 31 (Cultural, religious and linguistic communities) deals with the collective group right to self-determination of, *inter alia*, religious communities, which includes the right to practise one's religion in association with others, and the right to form, join and maintain religious associations. It includes an institutional group right to the sovereignty of religious institutions that require the state not to interfere in the internal affairs of religious institutions.[81] The section reads:

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
(a) to enjoy their culture, practice their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

[79] Just as the section 15 right is a right to freely choose a religion, not a right to impose oneself on a religious community (see *Taylor v Kurtstag NO and Others* [2004] [at 48]).
[80] De Waal *et al.* (2001:342). See 5.3.6 (*infra*).
[81] Van der Vyver (2011:1). See 5.3.6 (*infra*).

5.3.5 The application of the Constitution

5.3.5.1 Horizontal applicability

Before embarking in this study on an investigation of the effect constitutional provisions can have on religious institutions, it is important to investigate the applicability of constitutional rules to the church.

The pivotal question is who are the bearers of religious rights? The Bill of Rights, in affirming "the democratic values of human dignity, equality and freedom", enshrines "all people" in South Africa.[82] Fundamental rights extend to include natural and juristic persons. It may also be argued that the reference to "everyone" in section 15 denotes a wider term than "all people", to include not only juristic persons, but also associations (including churches) with no legal subjectivity.[83] Anyone acting in their own interest or in the public interest, or anyone acting on behalf of another person or group of persons, or an association acting in the interest of its members has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.[84]

The Constitution does not only apply in respect of the relationship between the state and other legal subjects, but also in the case of the relationship between legal subjects reciprocally. The horizontal application between private groups or individuals has become established in our law. This has been described as one of the key aspects of the Constitution.[85] Section 8 (Application) reads as follows:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[82] Section 7(1).
[83] Cf. Van der Schyff (2001:44 and 52). See chapter 6 (*infra*).
[84] Section 38. See 5.3.6 (footnote 121) (*infra*) for the text of this section.
[85] Cf. Bilchitz (2011:219) who argues that the main reason for the horizontal applicability was that the private realm had to be purged of discrimination on grounds of race.

> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

The reference to "all law" in section 8(1) (*supra*) ought to apply to the common law and customary law.[86] From the reference to courts, tribunals and forums in section 39, however, it appears that church law does not escape the applicability of the Bill of Rights. That non-state institutions (including churches) are not immune to the supervisory role of the Constitution and are compelled to observe the entrenched fundamental rights were confirmed by the courts.[87]

The Constitution indeed expressly provides for horizontal protection of fundamental rights. The rights of legal persons are protected in a distinctive manner that does not necessarily correspond with the way in which individuals' rights are protected. Reciprocally, there rests on legal persons the obligation of not infringing on the rights of other legal subjects. In the case of legal entities acting as organs of state, this relates to the vertical application of the Constitution in the legal relationship between the state and other legal subjects.

The extent of the horizontal protection of fundamental rights in the case of legal entities relates to section 18. Freedom of association on the one hand means that an organisation may impose discriminatory membership requirements in order to pursue specific objectives and perform certain activities. This also means that individuals have the free choice to decide with whom they wish to associate. The nature of the organisation will have an effect on balancing the interests of the respective parties. Whether or not discriminatory measures are judged as justified, private organisations acting in the public sphere will be

[86] Pienaar (1998:176-177).
[87] E.g. the Transvaal Provincial Division of the Equality Court in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2007).

judged more stringently than associations functioning only in the private sphere. Furthermore, the above principles apply differently in the case of clubs, religious organisations, political organisations, educational institutions, and professional (and industry) associations. This illustrates the principle that the horizontal force of the Constitution is based on a balancing of interests. It is often not possible to lay down rigid principles or to provide final answers – interests worthy of protection in particular circumstances may in other circumstances be subordinated to other interests.[88]

The horizontal application of chapter 2 may, however, not be applied without limits.[89] Section 9 (the equality clause) explicitly states that "(n)o person may *unfairly* discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)" (emphasis added) which, *inter alia*, includes gender and race (see 5.3.4, *supra*).

5.3.5.2 Equality

Equality, dignity and freedom are considered to be core values that lie at the heart of the Constitution.[90] Read with section 9, equality must be considered a preferential right, the interpretation of which should always be informed by the core value of human dignity.[91] When different fundamental rights come into conflict with one another, the conflicting rights have to be reconciled with each other. Where this is found to be impossible, the right to equality (informed by the value of human dignity) seems to prevail, irrespective of the nature of the counter right.

The general approach of the Constitutional Court is summarised by a dictum of Moseneke, J.:

> The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the

[88] Pienaar (1998:176-182).
[89] *Id*.
[90] Section 1(a) of the Constitution. Cf. *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (2010) (at 3).
[91] *Prince v President of the Law Society of the Cape of Good Hope* (2002) (at 50). Dignity is not only a value fundamental to our Constitution – it is also a justiciable and enforceable right (section 10).

> underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.[92]

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000[93] (Equality Act) was promulgated to strengthen the equality principle by giving effect to the prohibition of unfair discrimination (section 9 of the Constitution)[94] and to give meaning to the Constitution's promise of equality for all before the law. The Equality Act not only binds the state, but also all persons, including juristic persons.[95] The point of departure is that churches are not immune to the supervisory role of the Constitution and the Equality Act (see 5.3.5.1, *supra*). Not all differentiation is of course considered to be unlawful. It is necessary to establish whether the discrimination is unfair. If the discrimination is based on one of the grounds specified,[96] there is a presumption that the discrimination is unfair.

If a complainant makes a *prima facie* case of discrimination, the burden of proof shifts to the respondent to prove that the discrimination did not take place as alleged,[97] or that the conduct is not based on one or more of the prohibited grounds.[98] If the discrimination has taken place on a prohibited ground then it is unfair, unless the respondent proves that the discrimination is fair.[99] This onus can only be disposed of through reliance on the factors listed in section 14.[100] The Act effectively makes the right to equality a trump.[101]

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[92] *Minister of Finance v Van Heerden* (2004) (at 26, footnotes omitted).
[93] Amended up to and including the Judicial Matters Amendment Act, 2008 (Act 66 of 2008).
[94] Read with item 23(1) of Schedule 6 of the Constitution.
[95] Section 5(1).
[96] Section 9 of the Constitution. Cf. section 1 of the Equality Act.
[97] Section 13(1)(a).
[98] Section 13(1)(b). Prohibited grounds are listed in section 1 and include gender, race, marital status, sexual orientation, religion, conscience, belief, culture, and language.
[99] Section 13(2)(a).
[100] These factors include the context (section 14[2][a]), whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned (section 14[2][c]), whether the discrimination impairs (or is likely

Consequently there is a discernible drive in some circles to limit freedom of religion and freedom of religious association in favour of an egalitarian form of liberalism and constitutional adjudication.[102] These efforts, however, appear to be often rooted in the fragile history of South Africa rather than in principled considerations.

Van der Vyver (2012:158), in an evaluation of the Equality Act, regards the imposing of the constitutional proscription of unfair discrimination on religious institutions as unfortunate (footnote omitted):

> Many mainline churches still uphold age-old practices that amount to gender discrimination against women, and does one really want to entrust the state with the power and obligation to compel the Roman Catholic Church, the Greek Orthodox Church, Jewish religious institutions, and the *Gereformeerde Kerk* ... to ordain women as part of their clergy? Surely, that would amount to political totalitarianism, which becomes evident when State authority extends into the private enclave of non-State societal circles, such as family life, academic institutions and the sovereign sphere of the churches.

A key issue raised above is whether the exclusion of women (on Biblical-theological grounds) from the office of minister and elder in the GKSA[103] would pass constitutional muster. Both gender and religion are listed as prohibited grounds of discrimination in section 8 of the Constitution. If the equality provision is utilised to evaluate the discrimination, the factors (in terms of section 14 of the Equality Act [see footnote 100, *supra*]) that the courts should take into account include the context, whether the discrimination impairs (or is likely to impair) the person's dignity and whether the discrimination has a legitimate purpose.

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to impair) the person's dignity (section 14[3][a]), the impact (or likely impact) of the discrimination on the person (section 14[3][b]), whether the discrimination has a legitimate purpose (section 14[3][f]) and whether (and to what extent) the discrimination achieves its purpose (section 14[3][g]).

[101] Woolman (2012:125).

[102] E.g. Bilchitz (2011:219ff.).

[103] "Die vergadering besluit ... dat vroue nie in die besondere dienste van predikante en ouderlinge mag dien nie" (Handelinge van die Sinode 2009:665). Objections before the 2012 Synod were not successful (Handelinge van die Sinode 2012:347-375).

The Act provides, *inter alia*, that no person may unfairly discriminate against any person on the grounds of gender, including any religious practice which impairs the dignity of women and undermines equality between men and women.[104] It has, however, been suggested that certain parts of the Act (notably section 8[d]) could be found to be unconstitutional as it impairs a religious community's right to freedom of association and religion.[105] In addition, a rank-ordering of equality rights is not without problems and may even be considered to be unconstitutional.

The Equality Act requires all persons to promote equality,[106] and companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations are required to prepare equality plans to promote equality.[107] Section 13(1) of the Equality Act shifts the normal burden from the complainant (who only needs to show a *prima facie* case of discrimination) to the respondent to prove that a distinction is based on official church dogma or religious tenets.[108]

The absence of the listing of religious institutions may be significant if the apposite protection of the religious fundamental rights, as contemplated by sections 15 and 31, is taken into consideration – a right not afforded in respect of the main function of associations such as sports clubs.

Equality and non-discrimination and the extent to which human dignity is impaired (as contemplated in section 9 of the Constitution) will inevitably play a role in any adjudication regarding fundamental rights. This was the case with corporal punishment[109] and the use of cannabis[110] in cases before the Constitutional Court. In terms of section 31(2) (*supra*), it appears that protection of religious rights (whether from an individual, collective, or institutional perspective) remains qualified by other imperatives in the Constitution.[111] Section 31(2), as a specific limitation clause (similar to section 15[2]), however,

[104] Section 8(d).
[105] Van der Walt (2005:173). See also Van der Vyver (2011:13).
[106] Section 24(2).
[107] Section 27(2).
[108] Cf. Pienaar (2003:119ff.).
[109] *Christian Education South Africa v Minister of Education* (2000).
[110] *Prince v President of the Law Society of the Cape of Good Hope* (2002).
[111] Cf. Olivier (2002:531).

remains subordinate to the general limitations clause and only contextualises the latter.[112]

The proportionality test weighing equality and religious freedom against each other may lead to a notion that the former is more fundamental than the latter.[113] While acknowledging freedom of religion as an "important right" the Equality Court seems to have considered equality to be a core value "foundational to our constitutional order",[114] in other words, more important than religious rights. While this is in accordance with other judgments it seems problematic and could even be considered to be false.[115]

There are even definite merits in the view that religious freedom is the most important of all fundamental rights.[116] The premise, however, is that there should be no presumption of precedence between religious rights and equality prior to the proportionality test balancing the opposing rights.[117] Associational freedom should be considered a right that lies at the core of individual freedom[118] (see 5.3.6, *infra*). Moreover, conditions may exist where the right to freedom of religion prevails over the right to equality (see 5.5.12, *infra*).

The question remains to what extent do the provisions regarding unfair discrimination, in the Constitution and the Equality Act, restrict the autonomy of religious associations and their regulations pertaining to, *inter alia*, employment, gender, marital status and membership, and how would this be adjudicated by the courts.

[112] Van der Schyff (2001:187-197).
[113] Cf. Lenta (2012:82-83).
[114] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2007) (at 10).
[115] Lenta (2012:84).
[116] Hasson (2003:88-89), for example, argues that religious freedom is the "ultimate freedom", the "foundation of the existence of any human right" and the "most fundamental precondition for any intelligible discussion about human rights". He asserts that religious freedom "is not merely one of many rights, but the prototypical human right".
[117] Cf. Lenta (2012:84).
[118] Cf. Woolman (2012:129-130) who laments that the Constitutional Court does not take freedom of association seriously enough.

5.3.6 The communal dimension of the right to religious freedom

Although it is the collective dimension of freedom of religion that may come into confrontation with the modern law-based state order,[119] one of the benefits of religious freedom is that churches have the right to express their religious identity in a society with a plurality of associations, and to be afforded public justice accordingly.[120] The Constitution of South Africa makes specific provision in section 31 (*supra*) for the enforceable right to practise religion in community with others.[121]

Section 31 in the Bill of Rights gives effect to constitutional principle 12[122] in the Interim Constitution. This principle states that:

> Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.[123]

A church as a prime example of a collectively exercised right provides the framework for a sense of identity and dignity. This is arguably the very fibre that keeps society from foundering. The public benefit character of churches is also a

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[119] Warnink (2001:159).
[120] Coertzen (2008d:230).
[121] All the chapter 2 rights are permitted by section 38 to be enforced by any organisation acting in the interest of its members, and a person acting in the interest of a group or class of persons. Section 38 reads: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members".
[122] See 5.3.1 (*supra*). Section 31 of the Constitution is based on article 27 of the ICCPR (see 4.2, *supra*), which, *inter alia*, provides that persons belonging to a religious minority shall not be denied the right to practise their own religion "in community with other members of their group".
[123] At 22. Van der Vyver (2004:71-72; 2012:49) distinguishes between a collective group right and an institutional group right. The former is afforded to individual persons belonging to a specific category such as a cultural or religious community and can be exercised separately or jointly. The latter, on the other hand, vests in a social institution as such and can only be exercised by that entity through its representative organs. In these terms, the right to self-determination of a religious institution is a typical example of a collective right while the right of a religious entity to regulate and administer its internal affairs without interference from outside agencies is by its very nature an institutional right. Both entitlements appear to be afforded by section 31.

notion recognised and supported by statute[124] (although this view of the church is challenged by some).[125] Woolman (2012:128ff.) refers to a "constitutive liberalism" which has to recognise that, as individuals and communities, our social endowments fundamentally determine what gives our lives meaning, and ultimately who we are. In terms of this view, freedom of religion (section 15), freedom of association (section 18) and the right to communal religious practice (section 31) are meant to protect "the various well-springs of meaning that 'make us'". This should be done by granting religious associations the right to freely determine their own rules.

The rights conferred on persons in section 31(1)(b) are considered to be "associational individual rights"[126] – rights that can only be fully and properly exercised by individuals in association with others. There could be a potential conflict of rights when the right to "join" an association interferes with the right to "maintain" the association. Section 31 rights should therefore be balanced and it may become necessary to restrict access by excluding those who fail to meet the association's criteria for membership. The rights protected by section 31 are significant both for individuals and for the communities they constitute. If the community as community perishes, whether through destruction or assimilation, there will be nothing left in respect of which an individual can exercise associational rights.

Section 31 restrains intrusion by the state with an individual's right to belong to a "cultural, religious or linguistic community". According to section 181 the establishment of a "Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities"[127] provides a way to ensure that democratic principles are honoured. Section 185 sets out the Commission's

[124] E.g. section 5(a) of the Ninth Schedule (Part 1) of the Income Tax Act 58 of 1962 (as amended by Taxation Laws Amendment Act 30 of 2002) which states that public benefit activities eligible for tax exemption includes "(t)he promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity".
[125] E.g. Bilchitz (2011:221).
[126] *Certification of the Amended Text of the Constitution of the Republic of South Africa* (1997) (at 23-27).
[127] Section 181(c). Other institutions established by the same clause "to strengthen constitutional democracy in the Republic" (181[1]), are: (a) The Public Protector; (b) The Human Rights Commission; (d) The Commission for Gender Equality; (e) The Auditor-General; and (f) The Electoral Commission.

objects, *inter alia*, "to promote respect for the rights of cultural, religious and linguistic communities".[128] The Commission has the power necessary to achieve its primary objects, "including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities".[129] Landman (2006:179) proposes a dedicated commission for the promotion of Biblical-Christian institutions. This could be achieved in terms of section 185(1)(c) which states that one of the Commission's primary objects is to recommend "a cultural or other council or councils for a community or communities in South Africa".

De Waal *et al.* (2001:472-473) argue that the practice of a religion always presupposes the existence of a community of individuals with the same interests, and is only possible in community with others. An individual's right of participation in this right will be impugned if some harm comes to the community in which that individual takes part and, accordingly, the right contained in section 31 protects both individual and group interests. The interpretation and implementation of section 31 requires the balancing of these two divergent aspects of the right. Although section 31 protects individual interests in affiliation (membership of, participating in, and association with religious communities), the communal aspect of the right may at times be used to support arguments for the exclusion of individuals in the interests of the group's well-being and integrity. A group may wish to set restrictions on the requirements of membership in preserving the identity of the group. The Appellate Division of the High Court in *Mohammed v Jassiem* (1996) indeed confirmed that religious communities may restrict access to conformists and expel those who deviate from accepted doctrine.[130]

In *Christian Education South Africa v Minister of Education* (2000) Sachs, J., described the role of section 31, compared to section 15. Religious practice not only has an individual dimension, but often involves interaction with fellow believers constituting a collective dimension that is often articulated through activities, which are traditional and structured, and frequently ritualistic and

[128] Section 185(1)(a).
[129] Section 185(2).
[130] See also *Taylor v Kurtstag NO and Others* (2004) (see 5.5.11, *infra*).

ceremonial.[131] Section 15 protects religious liberty in the sense of non-interference and non-establishment, mainly from an individualistic point of view. Section 31, on the other hand, protects communal aspects of religious practice and allows the establishment and maintenance of the institutions and infrastructure that gives effect to the practice of a religion. It grants a measure of autonomy to religious communities to establish places of worship, schools, seminaries, publications, and burial sites. Moreover, where a measure or action interferes with a religious community's ability to engage in the practice of its religion, section 31 protects against such interference.[132]

Although section 31 deals with institutionalised religion (notably section 31[1][b] that guarantees the right to form and maintain religious associations), Du Plessis (1996:460) is of the opinion that the section 15(1)[133] right does not exclude the institutional dimension of religion, despite the absence of an explicit reference to a collective claim to the right. This quality of religion is inherently part of section 15(1) due to the very nature of religious freedom which implies that people shall be involved in religious communities of their choice and because section 15(1) should be read with the right to freedom of association as established in section 18. The entrenched freedom of association (section 18) enhances the institutionalised exercise of religious freedom, as does section 15.[134] In a later publication, Du Plessis (2002:214ff.) indeed seems very positive about the promise that development in case law holds for cementing foundations for the protection of religious rights as group rights.

It may sometimes become essential to balance section 31 rights with the right to freedom of association contained in section 18. *Taylor v Kurtstag NO and Others* (2004) (see 5.5.11, *infra*) refers to the associational right to freedom of religion enshrined in sections 18 and 31 of the Constitution in the light of the freedom to exclude non-conformists and to require those who join the association to conform to its principles and regulations. In addition, Malan, J., confirmed that, even though a religious tribunal is subject to the discipline of the Constitution, "its

[131] This aspect is underscored by article 18(1) of the ICCPR (see 4.2, *supra*).
[132] See also De Waal *et al.* (2001:479).
[133] Section 14(1) of the Interim Constitution.
[134] Cf. Du Plessis (1996:458-460).

being a religious body giving effect to the associational rights of its members, must be accounted for".[135]

The right to join social institutions may also be limited by certain internal rules, regulations and dogma. The Churches under discussion all have a process of sacramental baptising, teaching, and confirmation as rites of passage before a member may enjoy full membership status and benefits. This limiting rule is also a form of discrimination and the individual's right in terms of section 18 would have to be balanced against the section 31 institutional right if a conflict arises. A church will have to show that the purpose of the limiting rule is in a direct relation to the unique reason for the existence of the institution.[136]

Although situations may arise where associational and religious rights have to be balanced against each other, one may often find these rights on the same side of the scale. As the freedom to associate also guarantees a degree of autonomy to the association to run its affairs free from outside interference,[137] the strengthening impact of the right to freedom of association on the section 15 and 31 rights should not be underestimated.[138] Associational freedom is an essential part of individual freedom and Woolman (2012:129) considers the value placed on freedom of religion to be a reflection of the importance of civil society, in its vital position between the individual and the state as a counterweight to the power of the latter.

Woolman (2008) identifies four basic grounds for associational freedom: the correlative, the constitutive, capture, and dissociation. By the "correlative" is meant that, even though independent grounds for the right exist, associational freedom is often most powerfully justified by reference to other constitutional guarantees. With respect to some kinds of association (e.g. newspapers and political parties) the correlative rights (expression and political rights) may be deemed so foundational that no recourse needs to be had to the right of association itself. However, other associations, including churches, may be

[135] At 63.
[136] Cf. Landman (2006:178).
[137] De Waal *et al.* (2001:342).
[138] Cf. Woolman (2012:129-130).

sufficiently peripheral to our "constitutional politics" that the correlative rights such as religion may be reinforced or supported by reference to association.

By the "constitutive", Woolman means that associations are integral to self-understanding and are necessary for social cohesion. A court should consider the value of social capital before it attempts to challenge associational freedom. By "capture" it is meant that in order for most associations to function, they must have control over membership policies and the manner in which they order their internal affairs. Without these powers the aims (and ultimately the very existence) of an association could be at risk. By "dissociation" it is meant that individuals must also be free to not associate with others.[139]

Sections 15, 18 and 31, read together, underline the constitutional value of acknowledging diversity and pluralism in our society. Lenta (2012:232) shows how the sort of liberal pluralism which the Constitutional Court has assented to, implicitly recognises the importance of allowing religious institutions to arrange their internal affairs in accordance with the constitutive beliefs of its members. The Constitutional Court has confirmed that these rights collectively affirm the right to depart from a general norm and affords individuals and communities the freedom to express their beliefs in a way that some may regard as unusual or bizarre.[140] It thus seems feasible for a religious institution to invoke the rights in sections 15, 18 and 31 all at once to ensure the proper reverence and protection of their communal constitutional rights.

5.3.7 Content of the right

With no claim to being an exhaustive list, the rights and freedoms churches and church-members may choose to assert should ideally include: The right of churches to choose, expound and teach its own creeds and dogma; the right to develop, promulgate and apply its own laws and regulations; the right to uphold, enforce, alter and retract its official resolutions; the right to define the nature of the church according to its own self-understanding; the right of believers to manifest their religion, to choose a church and to participate in all its activities, including worship, rituals and sacraments; the right of churches to admit,

[139] See also *Cronje v United Cricket Board of South Africa* (2001) (at 2589G-H).
[140] *Christian Education South Africa v Minister of Education* (2000) (at 24).

discipline and expel members; the right to arrange internal affairs according to the doctrine and confession of the church; the right to appoint, protect, control and discipline office bearers according to the church's tenets and regulations; the right to acquire, own, maintain and dispose of fixed property and other assets in a manner prescribed by the church's constitution; the right to adjudicate internal disputes in terms of church law and official internal rules and regulations with no interference by the state and the courts; the right to propagate the church and its beliefs and practices; the right to proselytise and evangelise non-members; the right to witness to state authorities; the right to uphold relationships, marriage and family-life according to the church's (official) understanding of the Scriptures and not being compelled to endorse or sanction any alternatives; the right of churches and its members to freely enter into agreements with one another without being burdened by statutory or other regulations; and the right to certain state benefits including tax relief and support in setting up and maintaining social institutions such as homes for the aged with the state respecting the church's right to determine the admission policy.

5.4 Church law and the limitation of religious rights

5.4.1 Introduction

Freedom of religion is not an absolute right and not all infringements of fundamental rights are unconstitutional. Limitations to the right are commonplace. Malherbe (2008:270) states a few examples of possible reasonable limitations on freedom of religion. These could include a situation where a municipality, for safety reasons, forbids a congregation to use a decrepit building or to baptise people in a contaminated river or where the state forces churches to act in ways contrary to their established beliefs.

Statutes that openly interfere with the autonomy of religious institutions include the Non-Profit Organisations Act 71 of 1997[141] and the Fund Raising Act 107 of 1978.[142] One may contemplate that under certain circumstances proselytism may also be limited. The European Court of Human Rights, however, accepted

[141] If an institution is incorporated under this Act there are requirements relating to its internal structures and relating to reporting (cf. De Waal *et al.* 2001:292).
[142] All religious organisations are subject to the Act in respect of fund raising activities.

that the right to try to persuade another is included in the entrenched right to manifest one's religion (see 4.4.3, *supra*).

5.4.2 Limitation analysis

Similar to other fundamental rights, the right to freedom of religion, including associational religious rights, may not be employed in a manner that is inconsistent with any other provision in chapter 2 of the Constitution. A necessary balance must be found between opposing rights. Section 36 of the Constitution (the general limitation clause) provides for the limitation of rights contained in other sections of the Constitution.[143] Any action encroaching upon section 15, 18 or 31 rights, and, reciprocally, any action attempting to limit rights by relying on section 15, 18 or 31, is thereby required to be consistent with the standards set out in the section that reads:

> (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;
>
> (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.

It seems inevitable that churches would rely on section 36 to limit the applicability of other clauses in the Bill of Rights that may infringe upon sections 15, 18 and 31. If not, some church practices and provisions, including the exclusion of certain groups of people from certain offices (e.g. women and people of a homosexual orientation), may be found to be unconstitutional. Where human rights violations are suspected, a court will, in all probability, rely on the internal rules of the church and the way that the church itself (timeously)

[143] Section 31(2) as a specific limitations clause will always be subordinate to the general limitations clause (Van der Schyff 2001:195).

formulated the framework for a sound church-state relationship.[144] Whether the internal rules and statutes of a religious institution are likely to qualify as a "law of general application" is doubtful as the provision mainly pertains to the legal system applicable to everyone.[145]

Even where there are good reasons for employing section 36 the courts seem to steer away from this clause where at all possible, preferring to rather restrict the scope of the right in question. This could be done by at least three techniques,[146] namely, questioning the sincerity of the claimant's belief,[147] requiring a claimant to show that the prohibited practice is a central tenet of the religion,[148] and the courts not protecting a practice expressly excluded from protection elsewhere in the Bill of Rights.[149]

5.4.3 The two-stage approach

In the very first judgment handed down by the Constitutional Court,[150] Kentridge, A.J., introduced a "two-stage approach"[151] in limitation analysis.[152] The first question that had to be asked was whether there had been a contravention of a guaranteed right. If answered in the affirmative, it should then be investigated whether the contravention was justified under the limitation clause.

The criteria set by section 36(1) (see 5.4.2, *supra*) for any limitation of the rights contained in, *inter alia*, sections 9, 15, 18 and 31, are that the limitation must be "reasonable and justifiable in an open and democratic society based on human

[144] Cf. Landman (2006:173ff.).
[145] *Taylor v Kurtstag NO and Others* (2004) (at 45).
[146] Cf. De Waal *et al.* (2001:293-294).
[147] Cf. *Christian Education SA v Minister of Education of the Government of the RSA* (1999) (at 958E).
[148] *Garden Cities Incorporated Association Not for Gain v North Pine Islamic Society* (1999). The judgment in *Prince v President of the Law Society of the Cape of Good Hope* (2002), however, found it to be undesirable for courts to enter into the debate whether a particular practice is central to a religion: "The believers should not be put to the proof of their beliefs or faith" (at 42).
[149] For example, as section 13 of the Constitution expressly prohibits any form of slavery, the practice of slavery, even if claimed to be motivated by religious belief, will not be protected and no need arises to refer to the limitation clause.
[150] *S v Zuma and Others* (delivered on 5 April 1995).
[151] At 21. This is in contrast to the single stage approach (as in the Constitution of the USA), which may call for a more flexible approach to the design of the fundamental right, while in the two-stage approach a broad rather than a narrow interpretation is given to the fundamental rights enshrined in the Bill of Rights and limitations have to be justified through the application of the limitation clause (*Id.*).
[152] The judgment was in terms of section 33, the general limitation clause in the Interim Constitution.

dignity, equality and freedom", it must be necessary, and it must not refute the essential content of the right. Implicit in the provisions of section 36(1) is the need to weigh up the competing values, and ultimately make an assessment based on proportionality. As no absolute standard of reasonableness and necessity exists, limitation analysis based on proportionality would inevitably call for the balancing of different interests. In this process the relevant factors will include the nature of the right that is limited (section 36[1][a]); the purpose for which the right is limited and the importance of that purpose to such an open and democratic society based on freedom and equality (section 36[1][b]); the nature and extent of the limitation (section 36[1][c]); the relation between the limitation and its purpose (section 36[1][d]; and whether the desired ends could reasonably be achieved through other means less damaging to the right in question (section 36[1][e]). In the process regard must be given to the provisions of section 36(1), and the underlying values of the Constitution.[153]

It is therefore not whether a provision, rule or decision has been shown to be wrong, but whether the decision is justifiable according to the criteria prescribed by section 36. It is not whether the breach of a fundamental right "is not without justification"; it is whether the infliction has been shown to be both reasonable and necessary, and to be consistent with the other requirements of section 36. It is for the legislature, or the party relying on the legislation, provision, rule or decision, to establish this justification, and not for the party challenging it to show that it was not justified.[154]

Differentiation on the grounds set out in section 9, for instance, is therefore *prima facie* unfair discrimination unless it can be shown that the differentiation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into account the relevant factors in section 36(1)(a)-(e).

The Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing, as opposed to the strict

[153] Cf. *S v Makwanyane and Another* (1995) (at 102-104) (also handed down under the Interim Constitution).
[154] *Id.*

scrutiny-test,[155] (although the latter has been suggested as an option in racial and gender discrimination warranting a greater burden of proof).[156] In essence, courts must always engage in a balancing exercise. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. A limitation on a fundamental right can pass constitutional inquiry only if the court concludes that, taking into account the nature and importance of the right and the extent to which it is limited, such a limitation is justified in relation to the purpose, importance and effect of the provision that results in this limitation, considering the availability of less restrictive means to achieve this purpose.[157]

It is conceivable that several fundamental rights will form part of any balancing process. The right to equality and non-discrimination (as contemplated by section 9 of the Constitution and the Equality Act) will probably always form part of this process.[158]

5.5 Religious rights in constitutional adjudication

5.5.1 Introduction

The pertinent question is, how immune are religious institutions to state intervention? Pienaar (2003:126) insists that the government ought to be able to interfere in its internal activities if discriminating measures of a church are not applied on the basis of religious considerations. The South African jurisprudence pertaining to religious rights is still (and ever so slowly) developing, with church law as described above receiving very little attention. The courts (including the Constitutional Court), however, have heard a number of cases involving claimed rights on the grounds of freedom of religion, with a varying degree of relevance to churches and church law. The church's *ius in sacra* cannot, however, detach itself from the *ius circa sacra.* From a synopsis of the arguments and judgments in some of the landmark cases a general trend in religious rights jurisprudence

[155] The strict-scrutiny text is most often found in USA jurisprudence where a challenged law or policy is presumed to be invalid unless the government can demonstrate a compelling interest to justify the law or policy. Cf. Pienaar (2003:125-129).
[156] Cf. Van der Walt (2005:170ff.).
[157] *S v Manamela and Another* (2000) (at 32-33); *Christian Education South Africa v Minister of Education* (2000) (at 29-31).
[158] Cf. Pienaar (2003:124).

and judicial precedence gradually seems to emerge as a basis for future developments.

5.5.2 Holy day observance

In the first case concerning the right to freedom of religion (*S v Lawrence; S v Negal; S v Solberg* [1997]) the Constitutional Court had to decide whether certain provisions of the Liquor Act 27 of 1989, which prohibited the sale of liquor on "closed days" (Sundays, Christmas Day and Good Friday), contained an infringement on the right to religious freedom.[159] As the Act did not compel sabbatical observance and did not promote any particular religion, the court ruled that there was no evidence of interference with the freedom of religion. In a separate judgment Sachs, J., although he concurred with the majority judgment, held that the religious right was indeed infringed but that the infringement was justifiable under the limitation clause.[160]

The principal contribution of this case to the objectives of this study is arguably the confirmation by the court that no "establishment clause" (see 5.3.3, *supra*), preventing the advancement or inhibition of religion by the state, as in the USA, exists in our Constitution.[161] This means that the state's promotion of religious objectives and practices (and ultimately of religious institutions) will be found, in some instances, not to be unconstitutional.

5.5.3 Doctrine of doctrinal entanglement

The marriage (according to Muslim rites) of the parties in *Ryland v Edros* (1997) was not recognised by South African law as it was potentially polygamous and thus in conflict with public policy. In terms of the prevailing practice in Islamic law, the defendant was not entitled to patrimonial benefits upon the termination

[159] The case was decided under the Interim Constitution, where section 14 contained individual religious rights.
[160] In Sach's view any endorsement by the state today of Christianity as a religion worthy of respect above other beliefs not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful discrimination based on religious affiliation (at 152). In his view the identification of Sundays, Good Friday and Christmas Day as closed days for purposes of selling liquor, does involve an endorsement by the state of the Christian religion in a manner that is problematic in terms of the Constitution (at 160). The reasons for his contention that the limitation is justified are given at 164-180, including that the intensity of the invasion of religious rights is relatively slight.
[161] At 100.

of their marriage and she subsequently claimed certain entitlements in terms of the contract arising from a Muslim union.

The Cape Provincial Division of the High Court, in rebutting previous judgments, held that the Constitution required a reconsideration of the values upon which the notion of public policy is based. The court concluded that in light of the values underlying the Constitution, such as that of equality and diversity, the contractual obligations flowing from a monogamous Muslim marriage must be recognised as functionally similar to contracts concluded under the common law. It must therefore be considered to be valid and enforceable.

The court had to consider the critical question whether it was appropriate to pronounce upon matters of religious law. In other terms, should the court follow the example of the Supreme Court of the USA and, so as to avoid entanglement issues, decline to make determinations that call for an investigation into matters of religious belief, even if required in determining issues involving proprietary and other legally recognised interests?[162]

Farlam, J., noted that our courts, prior to the coming into force of the Constitution, would not adjudicate upon doctrinal disputes unless some proprietary or other legally recognised right was involved (see also chapter 3, *supra*). He held that section 14 of the (Interim) Constitution[163] may have changed the position and that "the doctrine of doctrinal entanglement may now be part of our law".[164]

The importance of this dictum for church law can hardly be overestimated. Section 15 of the Constitution and the consequential doctrine of doctrinal entanglement effectively preclude the courts from hearing any matter arising from doctrinal issues, irrespective of the nature of the legally recognised rights involved. Ultimately, this ought to extend to the jurisdiction of courts in disputes

[162] At 701H. See 4.3.11 (*supra*) for the application of the approach of the USA Supreme Court in a property dispute arising from a religious doctrine controversy in *Presbyterian Church v Hull Church* (1969).
[163] Section 15 of the 1996 Constitution.
[164] At 703E, reiterated at 703I-J. The court was ultimately not required to interpret any religious doctrines and there was thus no question of "doctrinal entanglement" in this case.

where religious freedom is in conflict with other fundamental rights (including the right to equality) if the matter arises from doctrinal issues.

5.5.4 Religious activity in private institutions

Wittmann v Deutscher Schülverein Pretoria (1999) dealt with the right of a private school to maintain compulsory religious instruction. A mother, after signing acknowledgements recognising the character of the school she registered her child at and agreeing to abide by its practices, sought to compel the school to desist from insisting that her child participate in certain religious observances that were conducted by the school. She claimed that the requirement was a violation of the right to freedom of religion. The court held that, as the school was not an organ of state, there was no violation of fundamental rights. The court further held that, at any rate, the right to freedom of religion was waived when the child was enrolled. Freedom of association and the right to form independent educational institutions[165] includes the right to exclude non-conformists and the right to require members to conform to the terms, principles and rules of the institution.[166]

The right to form, join and maintain, *inter alia*, religious associations is firmly entrenched in the Constitution.[167] Read with section 15 there is no doubt that the *Wittmann* judgment would extend to religious institutions, affording churches the right to require members to conform to the tenets, rules and discipline of the church and to expel non-adherents.

5.5.5 When religious activity becomes a nuisance

In *Garden Cities Incorporated Association Not for Gain v North Pine Islamic Society* (1999) the extent to which the Constitution has affected the validity and enforceability of contracts had to be adjudicated by the Cape High Court. The applicant, a property developer, sold property to the respondent, who intended to erect a mosque on the property. In terms of the sale agreement the respondent would refrain from activities that would be considered a disturbance to other

[165] Section 32(c) of the Interim Constitution (in force at the time the judgment was given) and section 29(3) of the Constitution.
[166] See also *Taylor v Kurtstag NO and Others* (2004) (at 38).
[167] Section 31(1)(b).

property owners in the area, including the use of sound amplification during the "call to prayer".

Notwithstanding the agreed provisions the mosque commenced broadcasting amplified calls to prayer. In response to complaints from residents of the area, the applicant launched interdict proceedings to prevent the respondent from using the sound equipment. The respondent argued that the "call to prayer", in as loud a voice as possible, was a precept of the Islamic faith and that enforcing the prohibiting clause in the contract would amount to violation of section 15(1) of the Constitution. They contended that the Constitution did not permit the waiver of fundamental tenets of their faith in order to comply with the provisions of a contract. The court rejected the assertion that the agreement infringed the respondent's right to religious freedom. Conradie, J., however, avoided the waiver issue by averring that there was no evidence that the use of sound equipment during the call to prayer was a fundamental tenet of the Islamic faith. The judge held that the agreement merely regulated, by consensus, a particular ritual practised at a particular place in the interests of other members of the community.[168]

It is conceivable that a similar situation may arise involving the practice of the ringing of church bells and the possibilities of disturbance of peace it holds.[169] In these circumstances, rare as they are, it is of paramount importance that a balance is found between the rights of the community and the rights of the church.

5.5.6 Corporal punishment and religious practice

The appellant in *Christian Education South Africa v Minister of Education* (1999) was granted leave to appeal to the Constitutional Court on the grounds that the blanket prohibition in section 10 of the Schools Act (the prohibition on corporal punishment) infringes the following provisions of the Constitution: Section 14 (Privacy); section 15 (Freedom of religion, belief and opinion); section 29 (Education); section 30 (Language and culture); and section 31 (Cultural, religious and linguistic communities).

[168] 271B-C.
[169] Cf. *Schilder v The Netherlands* (2012) before the ECHR.

The respondent, the Minister of Education, contended that it is the infliction of corporal punishment, not its prohibition, that infringes constitutional rights,[170] and the claim of the appellant to be exempted from the prohibition infringes specifically sections 9 (Equality), 10 (Human Dignity), 12 (Freedom and security of the person) and 28 (Children).

The Constitutional Court declined to decide whether the prohibition of corporal punishment was a violation of section 31 but instead embarked on a limitation inquiry, remarking that section 31(2) (the specific limitation) ensures that the concept of rights of members of communities that associate on the basis of (*inter alia*) religion, cannot be used to shield practices which offend other fundamental rights.

The court applied a proportionality analysis and, in dismissing the appeal, came to the conclusion that, all things considered, "the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption".[171]

This case shows that, when individual rights are prejudiced by the practices of the religious community, the protection of those rights may undermine the autonomy and identity of the organisation. Churches therefore have the responsibility to enact provisions allowing a basic respect for the rights of others, while maintaining its own rights and freedoms. Whether churches should be compelled to do so in all circumstances, however, is doubtful. The court underscored the importance of (religious) communities being able to enjoy what has been called the "right to be different" and to depart from a general norm.[172]

5.5.7 Cannabis and religious observance

In 2002, in *Prince v President of the Law Society of the Cape of Good Hope*, the Constitutional Court (with a 5 to 4 majority) ruled that the Rastafarian practice to smoke cannabis cannot be justified in terms of the Constitution, even if it was inspired by religious beliefs. The court conceded that there was indeed a

[170] At 8.
[171] At 52.
[172] At 24.

limitation on the religious rights of Rastafarians, but, in terms of section 36, the purpose of the limitation justified the ban.[173] The limiting legislation was clearly a law of general application as contemplated by section 36(1).

The court once again noted that limitation analysis under our Constitution is based on processes of balancing and proportionality as required by section 36. The court did not accept that constitutionalism means that each and every statutory restriction on religious practice must be invalidated. Limitation analysis under section 36 is rather adverse to extreme situations. What may be required is the maximum harmonisation of all the competing considerations, located in the South African reality yet guided by international experience, achieved without losing sight of the values entrenched in the Constitution.

Bekink (2008:497) suggests that the judgment would have been different if the use of cannabis was indeed a fundamental tenet of the religion. It was, however, not in any genuine dispute that the use of cannabis is central to the Rastafarian religion. All the evidence (accepted by the court), including an affidavit before the court by the appellant's expert, Prof. Yawney (who has written extensively on the Rastafarian religion and its practice), nevertheless confirmed the centrality of the use of cannabis to this religion.[174] The right of equality (as a preferred right) (once again) seems to trump the right to freedom of religion in this case.

The court's dictum that "believers should not be put to the proof of their beliefs or faith",[175] however, is a significant proclamation of the right of church members to freely manifest their religion and creeds without fear that the courts may question the logic and rationale of the tenets and views of their faith. This would be true even to the extent that a particular action, decision or regulation may seem, from a different vantage point, to impair an individual's dignity.

[173] Subsequently, on application, both the African Commission on Human and Peoples' Rights (*Prince v South Africa* [2004]) and the United Nations Human Rights Committee (*Prince v South Africa* [2007]) found no violation of the complainant's rights as alleged.
[174] At 18, 40-43, 63, 102-103, and 152.
[175] At 42.

5.5.8 Same-sex marriages

The tendency in the *Prince* case (*supra*) was confirmed in *Minister of Home Affairs and Another v Fourie and Another* (2006) where the Constitutional Court held that withholding same-sex couples from the same marriage status afforded to hetero-sex couples constituted an unjustifiable violation of the right to equal protection of the law and the right not to be unfairly discriminated against under section 9 of the Constitution. The judgment gave Parliament one year to enact legislation to cure the defect.[176] As a result the Civil Union Act came into force on 30 November 2006.

Two *amici* briefs claimed that same-sex unions would disrupt and radically alter an institution of centuries-old significance to many religions, and would accordingly infringe on the Constitution by violating religious freedom in a most substantial way.[177] Sachs, J., agreed that these arguments underline the fact that in the open and democratic society contemplated by the Constitution (although the rights of non-believers and minority faiths must be fully respected) the religious beliefs held by the great majority of South Africans must be taken seriously.[178] He confirmed that religious bodies are part of the fabric of public life and emphasised that religious organisations accordingly 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.[179]

Justice Sachs indicated his respect for the sincerity with which Biblical passages in support of the view that marriage was a heterosexual institution ordained by God was submitted, but, for the purpose of legal analysis, noted that such appreciation would not imply accepting that those sources may appropriately be relied upon by a court. It was not for the courts to entertain whether or not the

[176] At 156. In the judgment, delivered by Sachs, J., the nine judges of the Constitutional Court agreed unanimously that same-sex couples were entitled to marry, but they disagreed as to the remedy. O'Regan, J., the lone dissenter on this point, was of the opinion that the statute should be altered immediately (at 173).
[177] At 88.
[178] At 89.
[179] At 90.

Biblical texts support those beliefs.[180] From a constitutional point of view, what matters is for the court to ensure that any person will be protected in the right to regard their marriage as sacramental, to belong to a religious community that celebrates its marriages according to its own doctrinal tenets, and to be free to express his or her views in an appropriate manner, both in public and in court. Further than that, Sachs noted, the court could not be expected to go.[181]

Although the Constitution contemplated a mutually respectful co-existence between the secular and the sacred, the judge stressed the qualification that there must be no prejudice to basic rights. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.[182]

It seems, therefore, that the Constitutional Court would always aim at the maximum protection of equality rights without limiting any other rights. As the rights of religious entities to practise their religion were not under direct scrutiny in the case above, it is of limited application in terms of the aims of this study. The importance of the case in the bigger constitutional landscape, however, cannot be overestimated.[183]

The Constitutional Court highlighted some very important characteristics fundamental to religious institutions. First, they play a large and important role as part of the fabric of public life through their various community programmes. Second, they command ethical behaviour from their members. Third, they play a major role in mediating between the state and private agencies. Fourth, they

[180] "Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies" (at 92).
[181] At 93.
[182] At 94.
[183] See Malherbe (2008:275ff.) for a critical appraisal of the judgment in the case. He considers the judgment to be an "eensydige legitimering van 'n humanistiese wêreldbeskouing" made possible by postmodern deconstruction (*Id.*:276). "As godsdiensgemeenskappe getrou aan hulle leer wil wees, gaan dit sonder twyfel nog groot wrywing tussen godsdiens en staat meebring" (*Id.*). No religious practitioner with religious objections, however, will be compelled to conduct same-sex marriages. In this way the state respected the rights of religious institutions (*Id.*). Cf. Coetzee (2008:232ff.) who also finds that the Constitution, the Bill of Rights and other laws are interpreted and implemented from a humanistic world view.

promote culture and community activities, and constitute active elements of the diversity contemplated by the Constitution. The judgment has confirmed that religious institutions have the right to express themselves to government and the courts, and are fully entitled to influence the way laws are made and applied.[184] This influence, however, is likely to be limited by public policy. With regard to the right to express itself, the Churches under discussion have all passed official resolutions endorsing the (exclusive) status of marriage as a union between persons of opposite gender.[185]

5.5.9 Children's religious rights

In a divorce action in *Kotze v Kotze* (2003) the settlement agreement provided that "(b)oth parties undertake to educate the minor child in the Apostolic Church and undertake that he will fully participate in all the religious activities of the Apostolic Church".[186] The High Court refused to sanction the provision. Fabricius, A.J., stated that because the clause denies the child his constitutional guaranteed freedom of thought and of religion it would not be in his best interest that a clause that placed constraints on his rights be inserted. The agreement between the parties would violate the authority of the court. Even if one were able to agree to waive his or her right to freedom of religion, no one could do so on behalf of someone else.

In addition to the recognition of minors as holders of religious rights, everyone's right to exercise religious beliefs and practices without coercion is a significant part of the judgment that churches should take note of.

5.5.10 Culture and religion

When Sunali Pillay returned to Durban's Girls' High School from the spring holiday with a small nose stud, the school decided that she should not be allowed to wear the stud. The Equality Court in adjudicating the matter found that the school had not unfairly discriminated against Sunali. On appeal, the

[184] At 90.
[185] Handelinge van die 14de Sinode van die NGK (2011:168); Handelinge van die 2de Algemene Sinode van die GKSA (2012:162); Besluitebundel van die 69ste Algemene Kerkvergadering van die NHK (2010:130).
[186] At 629C.

KwaZulu-Natal High Court overturned the decision, finding that the school had indeed discriminated against her and that the discrimination was unfair.

Both the school and the Department appealed directly to the Constitutional Court. In *MEC for Education: KwaZulu Natal v Pillay* (2008) the court held that the rule prohibiting the wearing of jewellery had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that same right to others, and subsequently dismissed the appeal. Although the court heard that the wearing of a nose stud was a voluntary practice in the South Indian Tamil Hindu culture (which was inseparably intertwined with Hindu religion), the court emphasised that both obligatory and voluntary practices qualified for protection under the Equality Act. The school had therefore interfered with her religion and culture, and as that burden was not imposed on others, the school's interference amounted to discrimination against Sunali Pillay.

Chief Justice Langa, who wrote the majority judgment, commented that "if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do so, that is something to be celebrated, not feared".[187] The justice commented that it would be perfectly correct for a school, through its code of conduct to set strict procedural requirements for exemption, and found that the absence of such a procedure in the school's code was largely to blame.[188]

Of notable significance to this study is the confirmation that the Equality Act specifically allows for a reasonable accommodation to be made for a group or class of persons. One may assume that a church will also be afforded the same. The case underscores the fact that religion acquires meaning through its communal (and, by implication, institutional) dimension.

5.5.11 Excommunication

The doctrine of doctrinal entanglement, foreshadowed by the court in *Ryland v Edros* (see 5.5.3, *supra*), was cautiously canvassed in *Taylor v Kurtstag NO and*

[187] At 107.
[188] At 110.

Others (2004). The applicant approached the Witwatersrand Local Division of the High Court to set aside a *cherim* (a notice of excommunication) of a Jewish ecclesiastical court (the Beth Din), excommunicating him from the Jewish society. He argued that the *cherim* violated his individual rights to religion and to cultural association.[189] The court held that the limitation of the applicant's rights was reasonable and justifiable in an open and democratic society, as a failure to enforce its rulings would result in the Jewish faith not being able to protect the integrity of Jewish law. The obligations of the faith were found to be voluntarily assumed by members of the faith community and not coerced. The court ruled that "(t)he members of the faith, exercising their own rights in terms of section 31, have the right to protect the integrity of their common bond by disciplining those who do not conform".[190]

Although the judgment represents a noteworthy advancement in favour of the autonomy of religious institutions, a proper application of the doctrine of doctrinal entanglement would probably have required the court to be loath to assume jurisdiction in the matter.

5.5.12 Equality and the church

In 2007 the Transvaal Provincial Division of the Equality Court, in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*, adjudicated a case of the dismissal of a staff member of the Moreleta Park NGK Music Academy on the basis of his involvement in a same-sex relationship. The complainant claimed that he was unfairly discriminated against on one of the grounds expressly proscribed by the Equality Act, while the congregation maintained that it was acting in terms of its (settled and undisputed) religious beliefs and church dogma and therefore exercised its constitutional right to freedom of religion. It was argued on behalf of the church that persons in leadership positions cannot live in a homosexual relationship as it was an inherent requirement that a spiritual leader must uphold church doctrine.[191]

[189] Sections 15 and 31 of the Constitution respectively.
[190] At 58.
[191] At 15.

According to Basson, J., the right to equality of the complainant had to be balanced against the freedom of religion of the Church.[192] In the proportionality probe the judge held that, although religious freedom is an important right,[193] the right to equality is viewed as "foundational to our constitutional order".[194] Therefore, the Constitution would as a general principle counteract rather than reinforce unfair discrimination on a prohibited ground (sexual orientation *in casu*).[195] As a result the court ruled that the right to be free from unfair discrimination and the impact of the discrimination on his right to equality and dignity[196] should transcend the right to freedom of religion and therefore found in favour of the complainant.

The extent to which religious associations ought to be able to discriminate lies at the core of this case. A key aspect of the judgment is the suggestion by the court that the finding would have been different had the complainant been in a position of spiritual leadership with responsibilities relating to the teaching and upholding of religious doctrine and morals.[197] By necessary implication it seems that conditions may exist where the right to freedom of religion prevails over the right to equality.

The principal judgment, however, was not delivered without controversy and prompted intense debate. Referring to major decisions in the USA, the UK, and Canada, Lenta (2009:852-858) proclaims that, even though he finds the Church's discriminatory policy reprehensible, churches might be unreasonably burdened were they prevented from discriminating in accordance with the tenets

[192] At 8. The court correctly dismissed *Taylor v Kurtstag NO and Others* (2004) (see 5.5.11, *supra*) as inapplicable in this case, the former being concerned with the rights of members of a church (the complainant *in casu* not being a member of the NGK but of the NHK [at 20]). Moreover, unfair discrimination was not at issue (at 30).
[193] At 9.
[194] At 10.
[195] At 14.
[196] At 25.
[197] At 17, 19 and 27-28. The respective interests (the work of the complainant and the tenets of the church) in this case were found to be insufficiently proximate to justify the discrimination (cf. the discussion of *Rommelfanger v Federal Republic of Germany* [1989] in 4.4.11 [*supra*]). On 21 May 2013 The Western Cape High Court had the opportunity to test the principles of equality and discrimination pertaining to religious leaders. In *Ecclesia de Lange v The Presiding Bishop of the Methodist Church of South Africa* the court heard that the applicant, a minister of the Methodist Church, was dismissed due to her same-sex marriage in terms of the Civil Union Act (see 5.5.8, *supra*). The court, however, declared the application premature and ruled that the applicant should first submit to arbitration.

of their faith.[198] While stressing the need to take diversity seriously, Lenta (although seemingly hesitantly) argues in favour of greater latitude to religious organisations to allow them to govern their internal affairs and that includes accommodating otherwise illegal work-related discrimination.[199]

Woolman (2012:115ff.), in response to Lenta, is even more convinced that the discrimination in the case, even if morally repugnant for some, is constitutionally permissible. He reproaches Lenta for leaving it up to the courts to decide on a hierarchy of tenets, noting that, where a claimant's interests are purely pecuniary, courts should not delve into questions of the core tenets of faith.[200] Woolman is convinced that, had the Church's reasoning been properly grounded in sections 15, 18 and 31 of the Constitution, the judgment would have been in favour of the Church.

Bilchitz (2011:219ff.), in a critique of Lenta and Woolman, disagrees with the autonomy of religious institutions and argues that equality and non-discrimination should always trump religious rights in order to bolster the vision of a new order enshrined in the Constitution. He firmly takes issue, mainly on historical and contextual considerations, with the weight afforded to religious rights and freedom of association by Lenta and Woolman. He argues furthermore for an "egalitarian form of liberalism"[201] that recognises freedom of practice only to the extent that it does not undermine the freedom of others to do the same.

At this juncture of the debate, De Freitas (2012:260-265) enters the fray and raises the important point that religion is an entrenched equality right itself.[202] He finds the placing of any other equality right above religion, or viewing some other forms of non-discrimination as more important than a person's religion, questionable. De Freitas also considers it to be problematic if sexual conduct as

[198] Lenta (2009:857), however, does not disagree with the ruling in the case, mainly because the "lifestyle requirements" were not expressly stipulated as part of the job description at the time the complainant was hired (in addition to the issue of proximity to the doctrinal core of the church).
[199] *Id.*:859.
[200] This is akin to the doctrine of doctrinal entanglement (*supra*) (although not named as such). Woolman does not commit to any (non-pecuniary) interests that could prompt the courts to consider the tenets of faith.
[201] Bilchitz (2011:222).
[202] Section 9(3) of the Constitution.

an equality norm is forced onto religious institutions as a universal moral right. He considers Bilchitz's "egalitarian form of liberalism" (*supra*) to be based on a "non-egalitarian norm seeking dominance over core religious doctrines that cannot be proven to be less truthful than his own views".[203] In addition, De Freitas, unlike Lenta, does not readily accept that certain functions are not sufficiently close to the doctrinal core of the church.[204]

In a final rejoinder, Lenta (2012:231ff.) defends his assessment of the case and argues that religious institutions should sometimes be allowed to discriminate in their employment practices – more frequently than Bilchitz considers appropriate, but not as often as Woolman permits.

In the light of this case it seems reasonable to expect state authorities to refrain from attempts to use political totalitarianism or legal coercion to modify institutional idiosyncrasies, peculiar characteristics, or manifestations of discrimination that are based on religious convictions.[205] A systematic and context-sensitive process of accommodation, mutual respect and participation in reasonable debate, based on ethical principles and value-based persuasions, will in all probability be more reverent to the Constitution's noble ideals.

5.6 South African Charter of Religious Rights and Freedoms

In 1990 Judge Albie Sachs, then justice of the Constitutional Court of South Africa, wrote: "Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities ... it would be up to the participants themselves to define what they consider to be their fundamental rights".[206] Section 234 (Charters of Rights) of the Constitution of South Africa provides that "(i)n order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the Provisions of the Constitution". The need for a specific dedicated charter for religious institutions, enacted into law and supplementing the fundamental right to freedom of religion, gained momentum as seen from Landman's (2006:178) proposal that religious

[203] De Freitas (2012:265).
[204] Lenta (2009:854-859) uses the example of typists and janitors at a church.
[205] See also Van der Vyver (2011:14-17).
[206] Sachs (1990:46-47).

institutions join one another to formulate a uniform set of internal legal rules applying to all. This is also evident from Malherbe's (2008:278) suggestion that "(m)oontlik kan 'n handves van godsdiensregte waarin die omvang en betekenis van die reg op godsdiensvryheid in meer besonderhede uiteengesit word, bydra om die klaarblyklike dinamiese, ingewikkelde en uitdagende verhouding tussen godsdiens en die staat duideliker te omlyn en die sinvolle hantering van ... omstrede kwessies te vergemaklik", and Coetzee's (2006:155) submission that a section 185 commission (see 5.3.6, *supra*), as a channel to advance the objectives of article 36 of the Belgic Confession, may by extension also be applied to a section 234 charter.

In an initial formal step Coertzen (2007), in an invitation to attend a workshop on a possible Charter of Religious Rights and Freedoms for South Africa, sets out the motivation for a charter. In the motivation it is observed, *inter alia*, that religious institutions should take the initiative of assisting the state to give further content to the right to freedom of religion and use the opportunity to leave their own significant imprint "on the evergreen question regarding the relationship between religion and the state". Further motivating factors include the possible recognition of the autonomy of religious institutions, the positive and impartial accommodation of these entities, and the prevention of unnecessary state interference with religion. The proposed charter is considered to be a foundation for a healthy relationship between religion and the state.[207]

On 14 February 2008 representatives of four religions, several Christian denominations, and various individuals attended the workshop and tried to reach consensus on the proposed charter. Additional meetings were held during 2008, attended by several groups, in addition to the official representatives from the major religions. Interest in, and support for, the charter continued to grow and broad consultations continued. The draft that was publicly endorsed on 21 October 2010 represented the insights, contributions, and suggestions of hundreds of associations and individuals.[208] A steering committee was

[207] Malherbe (2011).
[208] Institutions that have subsequently endorsed the Charter include the NGK, the NHK, the GKSA, the African traditional religions, the Human Rights Commission, the National House of Traditional Leaders, the Buddhist religion, the Rastafarians, the Anglican Church, the Roman Catholic Church, the Bahá'í Faith, the Hatfield Christian Network (representing some 100

subsequently formed that will continue to raise support for the charter and pave the way to the ultimate goal, namely, to have the charter passed into law.[209]

The Charter (draft version 6.0) includes the following rights: The right to choose a faith, worldview or religion (section 1); the right to have one's religious beliefs reasonably accommodated (section 2.2); the right to the protection of the state in respect of religion (section 3); the right to observe and exercise one's religious beliefs (section 4); the right to maintain traditions and systems of personal, matrimonial and family traditions (section 5); the right to freedom of expression in respect of religion (section 6); the right to education in accordance with one's religious convictions (section 7); and every person's right to solicit, manage, distribute and spend funds to conduct relief, upliftment, and social justice in the community (section 12). Section 9 deals with institutionalised religion:

> 9. Every religious institution has the right to institutional freedom of religion.
>
> 9.1 Every religious institution has the right (a) to determine its own confessions, doctrines and ordinances, (b) to decide for itself in all matters regarding its doctrines and ordinances, and (c) in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organisational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.
>
> 9.2 Every religious institution is recognised and protected as an institution that has authority over its own affairs, and towards which the state, through its governing institutions, is responsible for just, constructive and impartial government in the interest of everybody.
>
> 9.3 The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or prescribe matters of doctrine and ordinances.

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churches across the country), the Black Evangelical Leadership, the Jami'atul 'Ulamâ (Council of Muslim theologians), the Religious Editorial Board of the SABC, the Muslim Judicial Council, the Jewish Religion in South Africa, the Apostolic Faith Mission, and the Church of Jesus Christ of the Latter Day Saints (cf. the report of the Executive to the 6th General Synod of the URCSA, 1-7 October 2012).

[209] Benson (2013:9).

> 9.4 The confidentiality of the internal affairs and communications of a religious institution must be respected. The privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected insofar as the interest of justice permits.
> 9.5 Every religious institution is subject to the law of the land. A religious institution must be able to justify any non-observance of a law resulting from the exercise of the rights in this Charter.

Benson (2013:10) is correct in asserting that the Charter shows that religions can cooperate at a high level of discussion and that shared principles can be found en route to the expansion of the content of constitutional religious rights and freedoms. Even more important for the aims of this study is the promise, which section 234 of the Constitution holds for churches, that constitutional development has not become the exclusive domain of a small number of judges and litigation strategists.

Criticism levelled against the Charter includes the contention of Jacques Rousseau (2012) of the Free Society Institute that religious rights are adequately and clearly described in the Constitution, refuting the need for a charter to elaborate on these rights. In addition, Rousseau laments that charters of this kind have a history of allowing discrimination against the non-religious, rather than ensuring equal protection for all and that "once we start creating special protections for one interest group, we have no principle by which to refuse doing so for others". From the examples Rousseau refers to from the draft Charter, however, it seems his criticism negates the protection that the Constitution affords everyone at any rate. When he laments that section 2.5[210] would not apply to "that kid in the classroom who has doubts that women were magically brought into existence from the rib of a man", he apparently disregards the reference to "worldview" in the section, and the protection enjoyed in terms of sections 9(3), 15(1), and (notably) 15(2) of the Constitution to boot. Similar criticisms, including suggestions that the Charter would advance religion to the detriment of the non-religious and seeks to embed religion in schools,

[210] "Every person has the right not to be subjected to any form of force or indoctrination that may cause the destruction of their religion, beliefs or worldview".

universities and state institutions using the power of the state and state funds,[211] also seem to be unfounded.

The Charter is a laudable effort that elucidates many concerns of religious institutions, including churches, in their relationship with the governmental authorities. The Charter allows religious institutions to limit certain rights, provided that those limitations are clearly defined in terms of the entity's tenets and resolutions as unambiguously described in their books of order and other official documents. The responsibility rests with the institutions to define themselves according to their self-understanding and thoroughly motivate their particular claims to certain rights, for instance, the reasonable accommodation of their beliefs as contemplated by section 2.2 of the draft Charter.

What appears to be encouraging in the South African religious freedom debate and the possible role the Charter may play in this respect is the authorities' acceptance of the positive cultural and moral role religion plays within society as an important agent for the common good.[212] Benson (2013:2-3) is also correct in his explanation that litigation is not ideal for expressing all relevant matters pertaining to religious rights.

The lack of emphasis on Christian churches in the Charter ought to be discounted as part of the process of visible cooperation that seems important in giving true meaning to constitutional values in a diverse society. It is encouraging that churches have reacted positively to the process – the General Synod of the NGK, for instance, has already (in 2011) accepted a resolution to include the Charter in their Church Order.[213]

However, one matter of concern still remains, namely, that the Charter's afforded protection may be so widely applicable that it is hard to imagine a situation where church law would benefit from a provision in it that is not directly covered by the Constitution. This issue is persuasively addressed by Malherbe (2011:5ff.) who contends that a pro-active approach is the best strategy as the fragile relationship between religion and the state can deteriorate rapidly. Moreover, the

[211] Cf. an open letter to the South African Council for the Protection and Promotion of Religious Rights and Freedoms by the Freedom from Religion Action group.
[212] See also Benson (2013:2).
[213] Handelinge van die 14de vergadering van die Algemene Sinode van die NGK (2011:117).

Constitution itself creates the space to extend, supplement, and give content to rights that may be described as cryptic, vague, and general – "(t)he intention is that society, including the state by way of legislation and other measures, and the courts through their judgments, should over time flesh out these rights". Parliament, in any event, has already adopted additional legislation to give content to other rights in the Bill of Rights. Malherbe adds that, if religious rights are not properly defined, one is actually accepting that the content of the right will be determined on an *ad hoc* basis by the courts.

It seems feasible for churches to embrace the opportunity to strengthen their position, as well as the position of church law, in terms of the rights afforded by the Constitution. The final hurdle would be to have the Charter promulgated into law by Parliament. That would most likely represent a significant step towards the recognition of church law as a *ius sui generis* in South Africa. It could also be the first step towards a charter dedicated to the rights of Christian institutions.

5.7 Concluding remarks

Communal religious freedom is what enables many individuals in our society to flourish. The important role of religion in the lives of many people, the unique character of the church and widely accepted public benefits of churches (as privately funded associations) can hardly be challenged. Religious practices are constitutionally protected because they are central to human identity and thus also to human dignity, and religious institutions have the right to express themselves to government, at the very least to fulfil their Biblical-prophetic calling.

We live in a culturally, socially, religiously, and linguistically diverse society. The state and the courts increasingly recognise and protect this diversity. Religious liberty and associational freedom should always, as far as the church is concerned, be the highest values and rights in the Constitution. The right of the state to enforce principles such as equality and non-discrimination has to be limited by (the compounding effect of) the rights to freedom of religion and association. Only if extraordinary and compelling circumstances exist the state may interfere with the internal affairs of churches. According to the doctrine of

doctrinal entanglement that has become part of our law, doctrinal issues should be avoided by the courts, even if pecuniary (or any other legal) interests are involved. Churches, on the other hand, should show a strong disinclination to having disputes adjudicated by civil courts.

As the church is the embodiment of exercised fundamental rights providing the framework for a sense of identity and dignity, church law becomes an interest worthy of protection. The courts need to be thoughtful of the church's self-understanding as elucidated by its self-definition in terms of the Bible, its settled tenets, and its understanding of public policy, human dignity and fundamental human rights. This self-definition has as foundation the kingdom of God and the headship of Jesus Christ over the church and the world. The church has a duty and responsibility to obey the authorities while also witnessing to them. The state's minimum duty towards the church is to afford the church ample opportunity to function without being burdened by limitations and coercion related to its core tenets and practices. The importance of religious and cultural rights for a society should be recognised. The church must claim the rights afforded it.

The right to freedom of religion (buttressed by the right to freedom of association and the diversity demands of a pluralistic society) as a (the?) quintessential fundamental right warrants a strong presumption in favour of religious institutions, including the church. The responsibility lies with the church to define its role and position within society, claiming its Biblical-prophetic autonomy and constitutional sanction while still acting within the dictates of human dignity, public policy, and the law.

5.8 Résumé

This chapter provided a description of the relationship of the church and the constitutional state in South Africa. The unique position of church law in terms of the church's self-understanding and the possibilities of church autonomy within the framework of entrenched religious rights were discussed. The legal position of churches in South Africa in terms of the Constitution will be discussed in the following chapter.

CHAPTER 6

THE STATUS OF REFORMED CHURCHES IN SOUTH AFRICA

6.1 Introduction

In the previous chapter it was shown that churches acquired a right to self-definition (based on their self-understanding) as a necessary consequence of constitutional religious guarantees, reinforced by the right to freedom of association. The responsibility lies with the church to define its role and position within society, thereby claiming its Biblical-prophetic autonomy and constitutional sanction while still acting within the dictates of human dignity, public policy, and the law.

The courts and authorities need to be mindful of the church's self-understanding as elucidated by its self-definition in terms of the Bible, its settled tenets and its understanding of public policy, human dignity, and fundamental human rights. The state's minimum duty towards the church is to afford it ample opportunity to function without being burdened by limitations and coercion relating to its core tenets and practices.

The courts have consistently been challenged to consider the uniqueness of churches within the legal community.[1] The church's unique position in society is expressed through the nature of its legal status and position, as a necessary consequence of its self-definition in terms of its theological self-understanding. This is also paramount in terms of its claimed fundamental rights and freedoms.

[1] E.g. in *Burgers v Murray and Others* (1865) it was pleaded in an exception that the church was more than a voluntary association, "it was part of the Church of Christ", which had authority that was not under the control of any civil court. To any member of the church the doors of the courts were therefore shut insofar as matters connected with the internal affairs of the church were concerned (at 262-266). The exception was disallowed. Cf. *Dutch Reformed Church, Van Wijks Vlei v Registrar of Deeds* (1918) (at 377-378).

6.2 Classification of non-profit organisations in South Africa

The juristic framework for non-profit, non-governmental organisations in South Africa can be divided into at least three levels. The first level allows for the establishment under statutory and common law of the following three forms of non-profit organisations: (1) Voluntary associations, established under common law and not regulated by statute (see *infra*); (2) Non-profit trusts, established under statutory law;[2] and (3) Non-profit companies incorporated for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests, established under statutory law.[3]

The second level of legislation allows for the voluntary registration of any of the first level organisational forms to attain the official status of a registered non-profit organisation, if the organisation's sole purpose is altruistic and beneficial to society, with no aim to make a profit. Such organisations are entitled to financial benefits including certain tax benefits. A non-profit organisation (NPO) that is not part of government can apply for registration as a non-profit organisation at a Department of Social Development office. NPOs include trusts, companies, or other associations of persons established for a public purpose. The following bodies may register: Non-governmental organisations, community-based organisations, and faith-based organisations.[4] The third level allows a Public Benefit Organisation (PBO) to apply for the right to tax-deductible donations.[5]

6.3 Legal subjectivity

Legal subjectivity (juristic personality) accrues to a natural person as a matter of course and constitutes the way that individuals participate in legal processes. The attainment of legal subjectivity by associations, on the other hand, is established according to the legal principles whereby the state regulates society. When legal subjectivity is conferred, a body (consisting of people) that is more

[2] Trust Properties Control Act 57 of 1988.
[3] Companies Act 71 of 2008 (as amended by Companies Amendment Act 3 of 2011). See also 6.7 (*infra*).
[4] Non-Profit Organisations Act 71 of 1997.
[5] Schedule 9 (part 1) of the Income Tax Act 58 of 1962 (as amended by the Taxation Laws Amendment Act 30 of 2002), section 5 (Religion, belief or philosophy) provides for: (a) The promotion or practice of religion which encompasses acts of worship, witness, teaching and community service based on a belief in a deity; (b) The promotion and/or practice of a belief; (c) The promotion of, or engaging in, philosophical activities.

than the sum of its constitutive members or administrators comes into being. At common law a juristic person in South Africa is an entity with perpetual succession (which exists irrespective of changes in membership), it is vested with rights and obligations independent of its members; it has the capacity to own property and enter into legal transactions and it can act, sue, and be sued, in its own name and held accountable for its actions. It has the capacity to acquire rights and to incur obligations. It may even be held liable in terms of the doctrine of vicarious liability. Furthermore, it must have a lawful objective that is not *contra bonos mores*. The capacity of a juristic person is not dependent upon the capacities of the individual members of that juristic person.[6]

6.4 Advantages of having juristic personality

Juristic personality holds the key to many potential problems for it is the juristic personality that enables a corporation or association to own real assets under its own name, separate and distinct from those of the constituting members or shareholders. This allows outside parties to enter into contracts directly with a legal body itself, in exactly the same way as entering into contracts with a natural person. Moreover, the independence of the juristic personality enables a body to outlast the lives of individual members or shareholders as long as the shares or membership are handed from individuals to individuals without interruption. Limited liability and the association's juristic personality are intrinsically linked. If the assets owned by a body as a juristic person are separate and distinct from the assets owned by its members or shareholders, then the assets owned by members or shareholders must also be separate and distinct from the assets owned by the juristic person. In addition, the associative legal person can lay claim to personality rights as a persona, and demand satisfaction in some cases of prejudice to those rights.[7]

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[6] Roeleveld (1979:27); Pienaar (1983:320); Du Plessis (1996:445); *Webb & Co., Ltd v Northern Rifles* (1908); *Malebjoe v Bantu Methodist Church of South Africa* (1957); *The Salvation Army (South African Territory) v The Minister of Labour* (2004). The juristic person as an entity cannot only be held liable for lawful acts of the organs, but also for the unlawful acts of the organs, in cases where the juristic person has directed its volition to effecting a certain unlawful action, or acted with unacceptable negligence. As it is possible for the juristic person to form its own volition, it can also disclose a guilty inclination (Pienaar 1983:199-232).

[7] Fourie (1973:32-34); Pienaar (1982:1-11).

Religious groups may enjoy the right to freedom of religion in community with others, and most often also enjoy the status of juristic persons.[8] Religious organisations as juristic persons are routine bearers of the right to freedom of religion in terms of section 8 of the Constitution of South Africa (under the heading "Application"), which in subsection 2 states: "A provision of the Bill of Rights binds a natural or juristic person", and in subsection 4: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".

The Constitution does not prescribe an exhaustive list of bearers of rights, and the rights contained therein may therefore be extended to all associations, regardless of legal personality, under the right to freedom of association.[9] On the basis of section 18 and section 31 rights, churches are not required to attain legal status as a juristic person to acquire all the rights in the Constitution.[10]

Pienaar (1982:324) is of the opinion that the underlying principles of the juristic person at common law present the most appropriate basis on which the legal position of associative institutions in private law, such as churches, can be constructed. In doing this the internal legal relations among the members and external legal actions towards outsiders are accounted for in the most satisfactory manner.

6.5 Acquiring juristic personality

There appear to be different ways in which a religious group may choose to acquire legal status. A religious organisation, at its core, is seen as an association that is joined voluntarily and whereby the activities and membership of the whole are regulated in the pursuit of religious objectives.[11] Such associations may choose to incorporate or not to incorporate. The former would lead to the organisation acquiring the status of a juristic person enjoying a legal existence separate from those of its members or founders. The latter would render the organisation without legal personality, for example, in the case of

[8] Du Plessis (2001:18). See Jurgens (2001:239ff.) for an opposing view.
[9] Cf. Van der Schyff (2001:52-53).
[10] Hiemstra (1946:24-25) and Fourie (1973:23) argue convincingly that sanction by state authorities has never been a true condition for the acquisition of juristic personality.
[11] Van der Schyff (2001:50).

member-churches of the Anglican Communion in South Africa, which followed the example of the mother church in England by conferring the ownership of church property on a statutory trust.[12] The Church as such does not have juristic personality.[13]

Legal subjectivity may be classified into three categories: (i) those instituted by statute, such as universities; (ii) those that must be registered in terms of an Act of Parliament such as banks and companies; and (iii) non-profit entities such as churches that may acquire legal personality by means of a statement to that effect in their own constitutions.[14]

In some instances churches have acquired juristic personality in terms of company legislation, for example, the Pinkster Christen Kerk van Suid-Afrika[15] and in other cases by means of a private statute, for example, the Apostolic Faith Mission of South Africa (Private) Act 24 of 1961, the Apostolic Faith Mission of South Africa (Private) Amendment Act 4 of 1970,[16] and the Methodist Church of Southern Africa (Private) Act 111 of 1978.[17] Even the NGK was once a statutory entity through the Dutch Reformed Churches Union Act 23 of 1911, repealed by the Dutch Reformed Churches Union Act Repeal Act 46 of 2008. No such formalities appear to be essential for a church to become a juristic person.

In *Morrison v Standard Building Society* (1932) the Appellate Division of the High Court approved a spontaneous unregulated creation of a juristic person, not statutory ruled. Wessels, J.A. (at 238), conceding that the position under Roman law and Roman-Dutch law is uncertain, argued that an association of individuals in South Africa does not always require the special sanction of the state in order to enable it to hold property and to sue in its own name. In order to determine whether an association of individuals is a juristic person, the courts have to

[12] The Natal Ecclesiastical Properties and Trust (Private) Act 60 of 1975.
[13] Church (2009:85). Cf. the position of the Boksburg Christian Academy as judged by the court in *United Apostolic Faith Church v Boksburg Christian Academy* (2011).
[14] Church (2009:87, footnote 13). See e.g. the self-description of the Salvation Army in *The Salvation Army (South African Territory) v The Minister of Labour* (2004) (at 1).
[15] Incorporated as a company in terms of section 21 the Companies Act 61 of 1973 (see *Pinkster Christen Kerk van Suid-Afrika en 'n Ander v Jacobs en Andere* [2011] [at 1]). Cf. the dispute in *The Presbyterian Church of Africa and Another v Mokabo NO* (2011) where an entity of a church was incorporated under this section.
[16] Both repealed by the Apostolic Faith Mission of South Africa (Private) Act Repeal Act 45 of 2008.
[17] Repealed by the Methodist Church of Southern Africa (Private) Act Repeal Act 47 of 2008.

consider the nature and objects of the association as well as its constitution. If these show that it possesses the characteristics of a *universitas* then it can own property and sue in its own name.

Hiemstra, J., in *Ex parte Johannesburg Congregation of the Apostolic Church* (1968),[18] held that

> (i)t is not necessary that an association should be created by statute or registered in terms of a statute to possess the attributes of a juristic person. It can derive that quality from the common law, and the answer as to whether it does possess the characteristics of a juristic person which exists apart from its members must always be sought in the rules or constitution. These will show the nature and objects of the association.

According to the judgment, if the association has perpetual succession and if the constitution provides that it may own property apart from its members, then it will be a common-law *universitas*.[19] The existence of these characteristics may always be inferred from the rules.[20]

Ordinarily, the primary source for determining the legal status of an association will be its constitution. This provides evidence of the intention of the members who contracted to form the association.[21] Legal personality may be acquired by means of a standard clause in the official documents of an organisation.[22] In the

[18] At 377E-F.
[19] Cf. *Webb & Co., Ltd v Northern Rifles* (1908) (at 942) (see 6.7, *infra*).
[20] Cf. *Malebjoe v Bantu Methodist Church of South Africa* (1957) (at 466A-B) and *Moloi v St John Apostolic Faith Mission* (1954) (at 942B).
[21] See *United Apostolic Faith Church v Boksburg Christian Academy* (2011) (at 41-43). The court conceded that, where no written constitution exists, legal subjectivity may be determined by way of inference, relying on other considerations, such as the nature of the organisation, its objectives, activities and other characteristics of a *universitas personarum.* The court will, however, not constitute an unincorporated association a persona in law, or vest it with *locus standi* when no compelling reason to do so exists.
[22] The "Reglemente, Beleid, Funksionele Besluite en Riglyne", annexed to the Church Order of the NGK (2011), for instance, states that "(d)ie Nederduitse Gereformeerde Kerk in algemene sinodale verband is 'n regspersoon en die Algemene Sinode of sy gemagtigde(s) is sy orgaan" (reglement 18.1.1); (d)ie Nederduitse Gereformeerde Kerk in sinodale verband is 'n regspersoon en die sinode of sy gemagtigde(s) is sy orgaan/organe (reglement 18.2.1); "(d)ie Nederduitse Gereformeerde Kerk in ringsverband is 'n regspersoon en die ringsvergadering of sy gemagtigde(s) is sy orgaan" (reglement 18.3.1); and "(e)lke gemeente is 'n regspersoon en die kerkraad of sy gemagtigde(s) is sy orgaan" (reglement 18.4.1). The Church Order of the NHK (2010) (ordinansie 4.1.16) reads: "'n Gemeente is 'n regspersoon wat selfstandig kan handel". The Constitution (Grondwet [an official statute of the Church, but subordinate to the Kerkorde]) of the NHK states that "(d)ie NHKA is 'n gemeenregtelike regspersoon. Die gemeentes bestaan afsonderlik van mekaar en van die NHKA as afsonderlike regspersone" (article 5). The Church

absence of such a clause it is almost impossible to deduce that an association intended to take part in legal transactions as a juristic person. In the absence of express legal personality, one should accept that members of an association act on their own behalf. This could, however, lead to suspicions of facile evasion of justice.[23]

As shown above, incorporation may be done at common law. Although the conditions for the acknowledging of legal personality at common law have, in Pienaar's (1982:317-318) opinion, been established satisfactorily in South African case law, it is not always easy to determine whether these conditions are present. Pienaar's proposal that a simple system of registration be introduced for associations and foundations has to be considered from an ecclesiastical point of view.

A statutory system of registration, however, would not affect the legal subjectivity of an association. According to Pienaar (*Id.*) registration serves the purpose of indemnifying members and administrators from being held personally liable for actions taken by the organs on behalf of the juristic person. He proposes three distinct co-operative entities: Registered associative juristic persons (the members and administrators of which cannot be personally held liable for the actions taken by its organs); Unregistered associative juristic persons (the members and administrators of which can be personally held liable for the actions taken by its organs); Clubs or societies that do not qualify for legal subjectivity, because of their contractual nature. This proposal would, however, lead to the untenable anomaly where a juristic person lacks one of the key characteristics of a common-law juristic person, namely, limited personal liability.

6.6 Voluntary associations in South Africa

The voluntary association is a creature of the common law. It is not regulated by statute and no official registry for voluntary associations exists. Establishing a voluntary association only requires that a minimum of three people agree to a common objective that is mainly not-for-profit. An ordinary voluntary association

Order of the GKSA gives no direct indication regarding the juristic status of the denomination and the constituent churches.

[23] Cf. *United Apostolic Faith Church v Boksburg Christian Academy* (2011) (at 40) and *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010) (at 7).

is not a public body and wholly unconnected to the state. It functions privately and not publicly and is governed by private law and not public law.[24]

Historically churches in South Africa have frequently[25] been viewed by the courts as voluntary associations, as judged in cases dating from *Long v Bishop of Cape Town* (1863)[26] up to *The Twelve Apostles' Church in Christ and Another v The Twelve Apostles' Church in Christ and Another* (2010),[27] and several more.[28]

Voluntary associations in South Africa may be classified as follows: Corporate bodies under the common law, known as *universitates*[29] and bodies that remain unincorporated at common law, known as non-corporate associations. In classifying a voluntary association the courts will consider the association's constitution and test this in terms of the recognised requirements. If the requirements are met, the organisations will be considered to be a *universitas* with juristic personality.[30]

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[24] *Cronje v United Cricket Board of South Africa* (2001).

[25] Pienaar (1982:245 and 1986:9) is of the opinion that it is not correct to claim that churches have *always* been judged to be voluntary associations (based on contract). In *Venter, Joubert, De Wet and Andere v Den Kerkeraad der Gereformeerde Kerk Bethulie* (1879) (at 6) the Gereformeerde Kerk, Bethulie, was indeed described as "een geldelijk lichaam ... eene corporatie" (at 6). Pienaar (1986:8), however, concedes that "uit onlangse hofuitsprake kan die afleiding gemaak word dat die howe *alle* kerke as vrywillige verenigings wat op kontrak berus, tipeer".

[26] At 176.

[27] At 7. The appeal in this case (*The Twelve Apostles' Church in Christ and Another v The Twelve Apostles' Church in Christ and Others* [2013]) was dismissed and nothing pertaining to the judgment in the court *a quo* was altered.

[28] E.g. *Van Rooyen v Dutch Reformed Church, Utrecht* (1915) (at 330), *De Waal and Others v Van der Horst and Others* (1918) ("De Nederduitsch Hervormde of Gereformeerde Kerk van Zuid Afrika in the Transvaal, like all other religious societies in the Province, is a voluntary association" [at 281]), *Bredell v Pienaar and Others* (1922) ("The Dutch Reformed Church is a voluntary association" [at 581]), *Du Plessis v Synod of D.R. Church (*1930) (at 141) (the court equated the position of a church to that of a club – both being described as voluntary associations based on an agreement), *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (at 93F-H), *Odendaal v Loggerenberg en Andere* (1961) (at 717B-C; 719D), *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 25F-G), *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (at 557F), *Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur* (1994) (at 194G), *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998) (at 11), *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit and Others* (1999) (at 22) (Basson, J., quoted Heyns who described the church as a voluntary association being a mere "menslike organisasie"), and *Van Vuuren v Van der Merwe and Another* (2005) (at 12).

[29] See Fourie (1973:92-108) for an historical analysis of the *universitas* as a legal concept.

[30] Cf. *United Apostolic Faith Church v Boksburg Christian Academy* (2011) (at 9-11) where the South Gauteng High Court ruled that the United Apostolic Faith Church is a *universitas* with

Although it has been suggested that voluntary associations (as non-profit social entities) by definition do not have juristic personality,[31] such bodies are not precluded from being juristic persons.[32] The United Cricket Board of South Africa (UCB), for instance, describes itself in its constitution as a voluntary association and a body corporate having an existence separate from that of its members.[33] Church (2009:86) indeed confirms that there is "nothing sinister in a 'voluntary association' being entrusted with legal personality".

Hiemstra (1946:25) describes the juristic position of voluntary associations in the first half of the twentieth century, of which the essence substantially holds true today. In order to determine whether an association of individuals is a corporate body with juristic personality, the courts have to consider the nature and objects of the entity as well as its constitution to determine whether it possesses the characteristics of a *universitas.* An association may thus acquire juristic personality without the sanction of the state. The constitution of the body in question clads it with juristic personality, or withholds it from itself.

The notion that the church is a voluntary association has always been problematic and indeed unacceptable to some South African theologians[34] and jurists.[35] The classification of churches as voluntary associations has been criticised for disregarding the origin, authority, and purpose of the church, not taking into account that the church is not founded on human volition but on God's divine calling.[36] Spoelstra (1989:343) considers it to be a result of 18th century law of associations which did not consider the church to be an organism of believers, but an objective entity or institute that could be joined voluntarily.

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perpetual succession and capable of acquiring assets, rights and obligations separate from its members. See also *Morrison v Standard Building Society* (1932).

[31] According to Fourie (1973:21, footnote 66) a *societas*, a voluntary association and an unincorporated body do not possess juristic personality. Brink, J., in *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) claimed that a strong case may be made in favour of the view that the NGK is a juristic person, as opposed to a voluntary association (at 93-H). Cf. Van der Schyff (2001:52) who argues that "(o)rganisations not endowed with legal personality are usually referred to as 'voluntary associations'".

[32] Pienaar (1998:178); Du Plessis (1996:445).

[33] Cf. *Cronje v United Cricket Board of South Africa* (at 2).

[34] E.g. Fourie (1973:21), Spoelstra (1989:343), Van Wyk (2005:35), and Smit (2006:636-637).

[35] E.g. Pienaar (1982:276-277) and Gregan (1994:553).

[36] Cf. Smit (2006:636-637).

6.7 The juristic personality of religious bodies

English law initially influenced court judgments and statutory law regarding the juristic status of churches in South Africa. In English law churches have no juristic personality and member-churches of the Church of England (Anglican Churches) in South Africa followed the example of the mother Church in England by conferring the ownership of church property on a statutory trust (see 6.5, *supra*).

Ordinance 7 of 1843 conferred upon the NGK complete powers of self-government (see 3.5.5, *supra*). Section 8 of Ordinance 7 contains the earliest indications of the history of the legal status of churches in South Africa. Under English law influence, the NGK was initially described in Ordinance 7 of 1843 as a "voluntary association". According to Church (2009:85) this description implied that the Church had no juristic personality, and the NGK also often used trusts for the purpose of administering church property. As seen in 6.6 (*supra*) it is not an inference that can conclusively be made. Fourie (1973:38) is undecided as far as the legal position of the NGK, in terms of the 1843 Ordinance, is concerned.

Under South African law, churches may become juristic persons, having rights and obligations of their own, independent from those of their members. The South African courts have consistently accepted the juristic personality of an entire denomination,[37] a specific congregation,[38] or both.[39]

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[37] *Cassim v Molife* (1908) (at 755). The Roman Catholic Church is described as a juristic person in *United Apostolic Faith Church v Boksburg Christian Academy* (2011) (at 14). In *Malebjoe v Bantu Methodist Church of South Africa* (1957) the respondent Church was found to be a juristic person in the form of a *universitas* (at 467D). Cf. *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde of Gereformeerde Congregation of Standerton* (1893) (the plaintiff [at 72] and the defendant [at 73] were in agreement as to the *universitas* character of the denomination. The court, however, [for considerations of its own] did not find it necessary to consider this notion [at 84]).

[38] *Venter, Joubert, De Wet and Andere v Den Kerkeraad der Gereformeerde Kerk Bethulie* (1879) (at 6); *Prinsloo and Others v Nederduitsch Hervormde or Gereformeerde Church* (1890); *Dutch Reformed Church, Van Wijk's Vlei v Registrar of Deeds* (1918) (at 377-378); *Ex parte Johannesburg Congregation of the Apostolic Church* (1968) (at 377); *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998) (at 12); *Danville Gemeente van die AGS van Suid-Afrika en Andere v AGS van Suid-Afrika en Andere* (2012) (at 18).

[39] Fourie (1973:21-22); Du Plessis (1996:445). "Wat die Nederduitse Gereformeerde Kerk in sinodale verband betref, is dit 'n gegewendheid dat dit 'n *universitas* is" (Fourie 1973:75).

The juristic personality of churches according to the courts is mainly in the form of a *universitas*.[40] Generally all denominations of Reformed orientation could be described as such, e.g. the Uniting Reformed Church in Southern Africa is described by Plaatjies van Huffel (2013:102) as a voluntary association with legal personality in the form of a *universitas*.

The common-law *universitas* should be distinguished from the common-law *societas*. Fourie (1973:39) insists that a church or a congregation can never be seen as a *societas*.[41] Oelofse (1981:50) also concludes that a *societas,* when compared to a *universitas,* is defined as "enige liggaam … wat nie met regspersoonlikheid beklee is nie".[42] A *universitas,* by contrast, is a legal subject, a joining of individuals to form a persona or entity that acquires rights and responsibilities in the same way that an individual does, and with perpetual succession – "'n liggaam wat met regspersoonlikheid beklee is".

In the case of a church the intention is that it shall continue forever and that it shall carry out the purposes of its founders.[43] In *Ex parte Gill and Others* (1955)[44] it was suggested that doctrinal and sentimental reasons justify the perpetual existence of a church, even in the absence of a written constitution. The dissolution of such entity therefore requires the consent of all the members, unless there is a procedure set out in its constitution for its dissolution.[45] Where there is a procedure set out in the constitution, the judgment in *Wilken v Brebner and Others* (1935) still seems to be the standard.[46] An amendment to the constitution (of a voluntary association [a political party *in casu*]) can only be

[40] Fourie (1973:38); Sadler (1979:47); *Bredell v Pienaar and others* (1922). Cf. *United Apostolic Faith Church v Boksburg Christian Academy* (2011) where the Roman Catholic Church is described as a juristic person (at 14).
[41] In addition to concurring that a *societas* cannot have legal subjectivity, Fourie (1973:106) is convinced that the founding of a *societas* (in contrast to a *universitas*) inevitably creates a contract (see 6.8, *infra*).
[42] See also Fourie (1973:107).
[43] *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998) (at 15). Cf. *Wilken v Brebner and Others* (1935) which states that "(i)n the case of a *universitas* or *collegium*, a church or hospital, or what the German jurists call a 'stifftung', the intention is that the association shall continue forever and that it shall carry out the purposes of its founder or founders" (at 184).
[44] At 420.
[45] *The Twelve Apostles' Church in Christ and Another v The Twelve Apostles' Church in Christ and Another* (2010) (at 8).
[46] See *Id*. See also how the SCA, in *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998), relied on the judgment by Stratford, J.A., in *Wilken v Brebner and Others* (1935).

effected in the way provided by the constitution and the revocation of the constitution and disbanding of the association is effected in the same way, expressed by the judgment in *Kahn v Louw NO and Another* (1951) as "the power to amend includes the power to dissolve."[47]

The court in 1908 in *Webb & Co., Ltd v Northern Rifles*, laid down two tests to determine whether an association is a juristic person in the form of a *universitas*, namely, the power to hold property apart from its members, and the right of perpetual succession.[48] Later in that same year, in *Cassim v Molife* (see 3.6.5.11.2, *supra*), Innes, C.J., applied these same tests to determine the legal status of a religious body. He relied on the Mission Society's constitution to find that it did not possess either of these characteristics.[49] The *Webb & Co., Ltd v Northern Rifles* case has been cited in several cases since[50] and relied on by numerous authors.[51] The court in *United Apostolic Faith Church v Boksburg Christian Academy* (2011) recently confirmed that a *universitas* is an aggregation of individuals forming a separate persona capable of acquiring rights and obligations separate from its members and is capable of suing and being sued in its own name.[52]

Furthermore, a *universitas* has perpetual succession and therefore continues to exist even when the individual members comprising it change, as long as one member, whether the original member or not, remains in whom the rights of the

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[47] At 211E-F. Cf. the reservation of Viviers, J.A., in *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (at 15) regarding this view.

[48] "An (sic) *universitas-personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An (sic) *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur liabilities is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members. Amongst the most important rights appertaining to an (sic) *universitas* is the right to acquire and hold property. It continues to exist though the individual members comprising it change, so long as one member remains in whom the rights of the *universitas* vest ... It has what is sometimes termed perpetual succession" (at 464-465).

[49] At 751. There were also other difficulties including that there was no proper assent to the constitution by the congregation (at 751-752).

[50] E.g. *Moloi v St John Apostolic Faith Mission* (1954) (at 942A), *Malebjoe v Bantu Methodist Church of South Africa* (1957) (at 466G), and *Ex parte Johannesburg Congregation of the Apostolic Church* (1968) (at 377F-G).

[51] E.g. Hiemstra (1946:25-26), Fourie (1973:10, 27, 81 and 271), Sadler (1979:45 [footnote 17]), Pienaar (1982:122, 126-127, 169 and 181), Van Coller (2008:153, 154 [footnote 15] and 157 [footnote 34]), and Church (2009:87 [footnote 11]).

[52] At 11.

universitas can vest. A *universitas* can acquire, hold, and alienate property. Since it is a juristic person, its property belongs to it and its debts and other obligations are binding on it alone, and not on its members. A *universitas* can enter into contractual agreements and so become a creditor or a debtor and can injure other persons or be injured by them.[53]

The question to be considered now is the position of the *universitas* in terms of recent statutory developments. The Companies Act of 2008[54] replaced the repealed Companies Act of 1973 and came into operation on 1 May 2011. According to section 8(1) of the Act two types of companies may be formed and incorporated under this Act, namely, profit companies and non-profit companies.[55] Section 8(3) states

> No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members is or may be a company or other form of body corporate unless it –
> (a) is registered as a company under this Act;
> (b) is formed pursuant to another law; or
> (c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962.

Notwithstanding the coming into force of the Act, a common-law *universitas* remains an option for an association whose object is not the acquisition of gain. The *universitas* is a legal structure open to churches that wish to carry on their activities as a juristic person, free from the formalities, requirements and burdens imposed by the Act.

The common-law *universitas* is recognised as a juristic person although it came into existence in terms of the common law and not in terms of statute, e.g. through a process of registration in terms of the Companies Act of 2008. The

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[53] *De Nederduitsch Hervormde Gemeente van Standerton v De Nederduitsche Hervormde of Gereformeerde Gemeente van Standerton* (1893); *The Nederduitsche Hervormde Congregation of Rustenburg v The Nederduitsche Hervormde or Gereformeerde Congregation of Rustenburg* (1895); *Dwane v Goza and others* (1902); *Malebjoe v Bantu Methodist Church of South Africa* (1957) (at 466A-467D).
[54] Act 71 of 2008, as amended by Companies Amendment Act 3 of 2011.
[55] Every provision of the Act applies to a non-profit company, subject to the provisions, limitations, alterations or extensions set out in section 10(2) and in Schedule 1.

universitas as juristic form remains outside the definition of company in the Companies Act of 2008. As a consequence its essentials are not recorded in the register of companies nor does it need to have a memorandum of incorporation that complies with the Act. Its constitution need not even be in writing as long as the intention to form a juristic person is clear.[56]

The common-law principle that a *universitas* continues to exist as a corporate body with full juristic personality, even if it is reduced to one member, has in recent years come under renewed scrutiny. With reference to the case of *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998)[57] in the SCA, Strauss (2007:208) suggests that, in the light of the Constitution, the *universitas* principle probably should be (re)tested in a competent South African court to re-establish its legal validity. As its application currently stands it is quite possible for a minority to hold a majority hostage, and the idea that church property should be transferred from a thousand members to only one or two militates against basic democratic values and fundamental rights.[58]

6.8 Contractual basis of religious entities

The Supreme Court of Appeal in *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) had to rule on the conditions where a court can interfere with the decisions of church tribunals. Jansen, J.A. (Van Blerk, A.C.J., concurring), held that a disciplinary tribunal of a church, as a "contractual tribunal", can be interfered with on the grounds of the basic principles of contract, notably that of good faith,[59] as well as being

[56] *United Apostolic Faith Church v Boksburg Christian Academy* (at 41-43). Cf. *Ex parte Gill and Others* (1955) (at 420).
[57] "Dat een oorblywende gemeentelid die gemeente kan vorm, moet in die huidige omstandighede, in die lig van die bepalings van die kerkorde waarvolgens die kerkraad die gesagsorgaan is wat namens die gemeente optree, moontlik gekwalifiseer word" ([at 18] per Viviers, J.A. [*obiter*]).
[58] Cf. Wessels, C.J., in *Wilken v Brebner and Others* (1935), who suggests (at 181) that an individual member of an association governed by its constitution is completely bound by what the supreme governing body of that association determines. He states, however, that the nature of the voluntary association (a political party *in casu*) is the most important deciding factor in deciding what the rights are of an individual member.
[59] At 3H.

subjected to a standard of reasonableness.[60] Church bodies were thus considered to be judged on the same principles as contractual tribunals of other voluntary associations, which can be interfered with on the grounds embraced by the formal standard as a necessary consequence of the basic principles of contract.[61]

More recently, Justice Harms, in *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998)[62] also maintained that churches in South Africa are voluntary associations where the members are contractually bound by the relevant church orders and as such should be adjudicated in terms of the same rules that apply to other voluntary associations.[63] That the rules of contractual law shall generally apply was recently confirmed in *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010).[64]

In a religious context, an individual who joins an established church is required to subscribe to the beliefs, ethos and convictions of a particular church. Through

[60] Muller, J.A. (Botha, J.A., concurring), held that unreasonableness in itself does not warrant interference with the church tribunal's decisions by the court, unless malice can be proved. This matter was thus not conclusively disposed of in the *Theron* case. Cf. Barrie (2012:361-366) who explains the current position regarding reasonableness (and its connection to proportionality and rationality) in our law. It pertains, however, mostly to just administrative action which falls outside the scope of this study.

[61] At 3G.

[62] This case resulted from the decision by the General Assembly of the Nederduits-Gereformeerde Kerk in Afrika (NGKA) to merge structurally with the Nederduitse-Gereformeerde Sendingkerk in Afrika (NGSK) to form the Verenigende Gereformeerde Kerk in Suider-Afrika (VGK) on 14 April 1994. Some of the members of the NGKA in the Free State (NGKA-OVS) and in the Northern Cape (NGKA-Phororo) were dissatisfied with the union and considered it to be invalid. The VGK brought an application in the High Court in 1996 for a declaratory order that the union in April 1994 was valid, that the NGKA no longer existed, all rights, privileges, properties, assets and liabilities were transferred to the VGK and that a regional synod NGKA-OVS had no legal capacity to act on behalf of the erstwhile NGKA in the Free State province. The court granted the application. On appeal, the SCA held that the General Assembly of the NGKA was not entitled to amend the Church Order to effect a merger. The court further held that the different constituent congregations were juristic subjects and as such each the rightful owner of assets, property and funds. The court found that all the General Assembly's decisions regarding the merger were *ultra vires* and invalid and consequently upheld the appeal.

[63] Also ruled as such in *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (at 551A), *Du Preez en Andere v Nederduits-Gereformeerde Gemeente, De Deur* (1994) (at 194G-H), and *Van Vuuren v Van der Merwe and Another* (2005) (at 13). See also *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 25A-E, 26D-E, 27H, 31E-F, 35H, 37E-F). Cf. Coertzen (2001:117).

[64] At 6. See also *Burgers v Murray and Others* (1865) (at 267), *Constandinides v Jockey Club of South Africa* (1954) (at 44C-D), *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (at 94H-95A), and *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (at 557D-E).

this subscription an individual is deemed to have retrospectively endorsed the original adoption of a constitution of the church. New members then become bound by the constitution in much the same way as the founding fathers of the church concerned.[65]

In the sport realm, courts have consistently ruled that a voluntary association is governed by private law and thus has its origin in contract and not statute. A substantial number of cases regarding sport bodies have come from the horse racing fraternity, one of the first sport codes to become professional. Several cases involving the sport all confirmed that voluntary associations were bound by the rules of propriety.[66] The case of *National Horseracing Authority of Southern Africa v Naidoo and Another* (2010), involving the successor of the Jockey Club of South Africa, recently confirmed that the post-constitutional position of voluntary associations remained unchanged.

In the SCA the Natal Rugby Union was also described as a voluntary association and "(o)n long standing authority the constitution of such a body is a contract entered into by its members".[67] This position was confirmed by the judgment in *Cronje v United Cricket Board of South Africa* (2001) where the UCB was considered to be a voluntary association which had its origin in contract and not statute.[68] This was also ruled to be the position of Motorsport South Africa in *Hare v President of National Court of Appeal No 140 and Another* (2009).

The relationship between a voluntary association and its members is thus undeniably regarded as consensual in nature, and the constitution of each association governs the relationship between the parties. The validity and effect of rules and regulations passed by such an association are not dependent on the legal subjectivity of the entity. Members are bound by the rules and regulations

[65] See *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010) (at 6).
[66] E.g. *Marlin v Durban Turf Club* (1942), *Jockey Club of South Africa and Others v Feldman* (1942), *Constandinides v Jockey Club of South Africa* (1954), *Elsworth v Jockey Club of South Africa* (1961), *Barnard v Jockey Club of South Africa* (1984), and *Turner v Jockey Club of South Africa* (1974). Cf. Cornelius (2002).
[67] *Natal Rugby Union v Gould* (1998) (at 14).
[68] The court, per Kirk-Cohen, J., also held that a natural or juristic person only takes administrative action when exercising public power or performing public functions in terms of an empowering provision and that the Promotion of Administrative Justice Act 3 of 2000 does not (under normal circumstances) apply to voluntary associations. This was confirmed by the judgment of Levinsohn, D.J.P., in *National Horseracing Authority of Southern Africa v Naidoo and Another* (2010). See chapter 7 (*infra*).

on the basis of contract.[69] The constitution of a voluntary association should thus be interpreted according to the normal principles applicable to contractual agreements[70] (including churches).[71]

From the above it can be accepted that the three Churches under discussion are typically regarded as voluntary associations with juristic personality in the form of a *universitas* by the South Africans courts, based on the law of contract.

6.9 The contractual foundation of the Churches under scrutiny

According to Pienaar (1982:320) no authority exists at common law for the supposition that the associative legal person is contractually founded. Pienaar asserts that, as legal subjectivity is not founded on contract, the legal position of the associative legal person should be distinguished from that of the *societas* (an association without legal personality) which is contractually founded. Associations without legal personality would include English clubs where the members are co-owners of the club estate and no distinct legal entity is formed.

Pienaar (*Id.*:39) claims that it was due to the adoption and application by the South African courts of the English concept of a church, that a conflicting situation has arisen by which local congregations (or churches), although they have indeed been defined as common-law juristic persons, at times are considered by the courts to be based on contract. Pienaar (*Id.*:242ff.) asserts that no common-law authority exists for this point of view since juristic persons in terms of Roman-Dutch law are not contractually based, and the English unincorporated associations that are indeed contractually based, are not acknowledged as juristic persons in English law.

The legal position of churches is quite distinctive, but in essence it still complies with the requirements for the acquisition of legal personality at common law. In Pienaar's opinion churches should, for this reason, be acknowledged as legal

[69] Van der Schyff (2001:52); Erasmus (2008:102).
[70] *Constantinides v Jockey Club of South Africa* (at 44C-D); *Turner v Jockey Club of South Africa* (1974) (at 645B-C); *Hare v President of National Court of Appeal No 140 and Another* (2009) (at 2).
[71] *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (at 557D-H); *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (94H-95A); *Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur* (at 195A); *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010) (at 6).

persons at common law. The legal position of associations without legal personality (clubs) should be distinguished from the position of legal persons at common law. Associations without juristic personality, like English clubs, are contractually founded; their members are co-owners of the separate club estate and no distinct entity (persona) is formed.

Smit (1984:65) considers the assertion of a church order as a contract to be a feature of the synodocratic (collegialistic) form of church governance that inevitably leads to the unsatisfactory view of the church order as the foundation on which the church is built.

Pienaar (1982:321) endorses the view that the legal person (*universitas*) is not founded on contract but on internal corporate law ("interne verbandsreg"). From this view (shared by other scholars such as Fourie [1973:143] and Gregan [1994:553])[72] it follows logically that the statute or constitution (church order) does not constitute a contract between the members, but rather the "internal corporate law" on which all legal relations between members mutually, and towards outsiders, is based. As it has not been tested by the courts, it is not clear what the implications of this view are for churches as juristic persons. Pienaar also does not elaborate on how the concept differs from the basis of contract. It seems as if, for all intents and purposes, the two positions essentially come down to the same. Furthermore, legal precedent in South Africa indicates that churches have often and consistently been considered to be legal subjects founded on contractual principles.[73]

Sport and religious associations are often mentioned together, as if they are in the same position *vis-à-vis* the Constitution.[74] A sporting body's powers are

[72] See also Pothier (2008:17).
[73] Cf. *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998) (at 9), *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 25A-B, 26D-E, 27H, 31E-F and 37E-F), *Du Plessis v Synod of D.R. Church* (1930) (at 414, 417 and 426), *Long v Bishop of Cape Town* (1863) (at 176) and *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (at 557E) where it was accepted that a church order constitutes a contract and should be interpreted that way. The church's constitution determines the nature and scope of the church's existence and activities, prescribes the authority of the various officials, demarcates such powers not only those of the individual officials but those of the organs of the church (*African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* [2010]) (at 8).
[74] *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010) (at 6).

indeed those derived from its constitution and conferred in contract.[75] While the right to take part in sport is not a constitutional right, the right to practise one's religion is, and one should therefore be cautious when drawing certain analogies. There seems to be a completely different basis at the foundation of church membership than that found in other associations. This notion was indeed confirmed in the High Court (WLD) in *Taylor v Kurtstag NO and Others* (2004) by Malan, J., who stated in his judgment that "'contract' is an inadequate concept to characterize one's adherence to a religion".[76]

Any attempt to define the nature of the relationship amongst church members should take note that such membership constitutes a unique affiliation. The church is a pious and devout community aimed at the worship and glory of Christ, the head of the church. In the church as the body of Christ, every member is placed, alongside others, in a sacred and spiritual relationship with Christ, and the practical deposition of this relationship is found in the requirements of the Scriptures, the creeds, and the church order, and the demands for adherence thereto. The internal relationship relating to members is non-juridical and cannot be constructed in terms of the normal principles of private law. To equate or conjoin church law and private law is a denial of the unique character of the church (cf. Fourie 1973:136-137).

From the modes of entry of a member to a church and congregation, it appears that no private-law contract between the member and the congregation, or with fellow members, exists. There is no intention to be legally bound to other parties to deliver or do something. With the entry a special relationship between the devout member and Christ arises, in the sense that the member undertakes to persevere in devotion to the creed and confession. The new member does not enter into a juridical relationship with fellow members or with the association but only obtains access to full membership and the ensuing rights and obligations (Fourie 1973:142).

In addition to criticism by Fourie (*supra*), Pienaar (*supra*), Smit (*supra*), Gregan (1994:553), and others regarding the contractual basis of church membership,

[75] *Cronje v United Cricket Board of South Africa* (2001).
[76] At 28.

there are other factors to consider before depicting the relationship between members and the church as one based on contract. The question arises as to whom the contract is with, if a possible contractual action is considered. It cannot, after all, be a normal entry-contract with fellow believers or a church council because membership is a sign and seal of a covenant with God.[77] The fact that members join the church traditionally by means of their confirmation (belydenis van geloof),[78] the primary questions at this occasion are aimed at a relationship with God, not with the institution or with fellow members.[79]

Moreover, assuming that the "contract" in question is concluded at the confirmation of prospective members, it is to be accepted that this event happens in the lives of young people, generally, at the age of sixteen or seventeen.[80] A child, however, acquires capacity to enter into a legal contract only at the age of 18, the current age of majority in South Africa[81] until which age contracts by minors without parental assistance or representation may be invalid.[82] This means that the "contract" between a significant number of members and the church could be found to be void *ab initio.*

Confirmation cannot therefore establish a valid contractual agreement. It nevertheless signifies the full participation of the new member with the fellowship of believers. Not the relationship with the institute, but the relationship with Christ, is the defining standard.[83] The normal means of entry into the church indicates a submission by the confirmed member to the precepts of the Bible and the doctrinal standards. In principle, the confirmation does not actually serve as an admission requirement for membership of the church.

As for the internal relationship between members, it is also incorrect to claim that the relationship is contractual in nature. Members are not juxtaposed in a

[77] Pienaar (1986:33ff.).
[78] See the church orders of the GKSA (2012) (article 61), NGK (2011) (article 50.3), and NHK (2010) (ordinance 5.3).
[79] E.g. the first two questions during the "openbare geloofsbelydenis" of the NHK: "(1) Bely u soos die kerk en saam met die kerk dat u glo in die drie-enige God, Vader, Seun en Heilige Gees, wat ons van die sonde en die dood verlos het? (2) Onderneem u om by hierdie belydenis te bly, u voortdurend tot die Here te bekeer en steeds te bid dat Hy dit in u volvoer?" (emphasis omitted) (*Diensboek* of the NHK 2008:52).
[80] Fourie (1973:135-136); Pienaar (1986:32-33). Cf. Spoelstra (1989:339).
[81] Children's Act 38 of 2005, section 17.
[82] *Id.*, section 18(3)(b).
[83] Cf. Spoelstra (1989:339).

contractual relationship, but find themselves side by side in a special relationship. The content of the relationship is not determined by consensus between the member and the institution, but by the internal corporate law of the *universitas*. The relationship is determined by its own unique set of rules and law.[84] Only the legal recognition of a voluntary association *sui generis* will give effect to this extraordinary covenantal relationship.

6.10 Juristic subjectivity of additional assemblies

As shown in 6.7 (*supra*), legal personality can be conferred on the entire denomination, a specific congregation of the denomination, or on both, and the South African courts have consistently recognised this fact. Fourie (1973:81) considers the congregations of the NGK to be juristic persons, and states that "(t)een die opvatting om die ringsverband van gemeentes as 'n *universitas* te konstrueer, bestaan geen juridiese beswaar nie". Regarding the legal status of the NGK as denomination there are certain qualifications but Fourie (*Id.*:83 and 208) concludes that the NGK could be construed as a juristic person. The same was said of the NHK in *De Nederduitsch Hervormde Gemeente van Standerton v De Nederduitsche Hervormde of Gereformeerde Gemeente van Standerton* (1893). The position of the GKSA, however, is different. Roeleveld (1979:27) and Pienaar (1982:318) argue that the GKSA (as a group of congregations or "churches") is not a juristic person and therefore cannot participate as an entity in legal processes. According to Pienaar, the Administrative Bureau of the Reformed Church(es) and the governing body of the Theological Seminary of the Reformed Church(es) act as common-law juristic persons in order to perform all the legal actions of the individual local churches. The result is that the national synod or denomination itself need not be vested with juristic personality.

The position in the Churches under discussion is that the denomination is brought into being by the congregations (local churches), and not *vice versa*. The congregations are not branches of the denomination, but independent legal entities with their own functions and ways of participation in legal matters. The denomination's only function *vis-à-vis* the ordinary member is that additional

[84] Fourie (1973:135).

assemblies sometimes formulate policies that affect them personally; at other times they may function as appellate bodies (Fourie 1973:132).[85]

A synod (called a general assembly in the NHK), according to Geldenhuys (1951:250-251), "is 'n vergadering van kerke wat saamkom deur middel van hulle afgevaardigdes" and its "bevoegdheid eindig met die uiteengaan van die vergadering". All additional assemblies (presbyteries [ring or klassis], regional and general synods) are only of temporary existence[86] and do not influence the autonomy of the local congregations (or churches). Their authority and competence end when the meeting ends.[87]

This view is, however, not without controversy. Olivier (2002:540-541) shows how the hierarchical nature of certain church structures could prove to be problematic if they are involved in decisions that could potentially impact negatively on a minister. These structures could, for instance, be held liable jointly and severally if actions are against the law or against sound public policy. This indeed happened in the case of *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit and Others* (1999) (see chapter 7, *infra*) where the Labour Court held the congregation, presbytery, and synod jointly and severally liable for the payment of a cost order. The court accepted that the presbytery and the synod can act as employers[88] which could lead to a possible anomaly if they do not have juristic subjectivity (cf. 6.11, *infra*).

This discrepancy in our courts is also found in *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (see 3.7.3.2, *supra*) (where the presbytery acted as respondent), in *Odendaal v Kerkraad van die Gemeente Bloemfontein-Wes van die N.G. Kerk in die O.V.S. en andere* (1960) (see 3.7.3.2, *supra*) (where the first respondent was the church council; the second respondent was the presbytery; the third respondent was the synodal commission), in *Smith v Ring van Keetmanshoop van die Nederduitse*

[85] Fourie (1973:282) is of the opinion that a congregation within the churches under discussion may never leave the denomination. He is convinced that such a resolution would be considered to be *ultra vires* and that the congregation would seize to exist. Roeleveld (1979:34-35) considers this notion to be an absurdity.
[86] Cf. Roeleveld (1979:33) who is not convinced that these structures are only temporary.
[87] *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998) (at 11-13).
[88] At 24 and 27.

Gereformeerde Kerk Suidwes-Afrika en Andere (1971) (where the presbytery and the synod both acted as respondents), and in *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) (where the church council was listed as respondent).

This confusion is dealt with in the 2011 Church Order of the NGK where it is clear that the congregations, presbyteries, regional synods and general synod are juristic persons, legally represented by their respective organs (the church councils, commissions of the presbyteries and synodal commissions) (see footnote 22, *supra*). These organs only act in a representative capacity and never act as juristic persons in the legal domain. Juristic personality always vests in the denomination and in the underlying entities.[89]

6.11 What does it mean to not have juristic subjectivity?

Voluntary associations without juristic personality ("ongeuniversiteerde vereniginge")[90] have certain peculiar characteristics, including: 1. Where the association acts as a litigant in a court, all the members have to be named as plaintiffs or defendants; 2. Since the association is not allowed to own property, all possessions remain the common goods of all the members. In a situation of intent to alienate property the permission of all the members must be obtained as each one owns a portion thereof. At the dissolution of the association the assets are shared equally amongst all the members; 3. An anomalous feature of an association without juristic personality is that normally no individual member becomes liable for any funds beyond the contribution required by the rules of the body, unless the constitution expressly provides otherwise; 4. A change in the rules of the association may strictly only be effected according to the procedure set out in the rules, or following the unanimous consent of all the members.[91]

[89] See also *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1998), Pienaar (1991:305), and Van Coller (2012:41-44).
[90] Hiemstra (1946:26).
[91] *Id.*:26-31.

It has been suggested that being endowed with legal personality also ensures that the church will have *locus standi in iudicio*[92] in a court of law.[93] As a general rule a body without legal personality has no *locus standi*. According to this view an unincorporated entity has no existence of its own and can therefore not own property, and has no *locus standi* to sue or be sued in its own name. At least, this was the position in 1926 when Searle, J.P., in *Rescue Committee Dutch Reformed Church v Martheze*[94] ruled that, in the case of an action being commenced in the name of, or against, an unincorporated association (not regarded as having juristic subjectivity), it would appear that the association can only be party to litigation by bringing all its members before the court. Judicial assistance was only available to someone who had a direct personal interest and without juristic personality it was impossible to have *locus standi*.[95]

Section 34 of the Constitution (Access to courts) provides that "(*e*)*veryone* has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum" (emphasis added). In terms of this provision, *locus standi* is arguably not reserved only for juristic or natural persons. In *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit and Others* (1999) (see 6.10, *supra*) there was no question of the *locus standi* of a presbytery or synod without juristic personality.[96]

It should be borne in mind that it is trite that an organ of a juristic person can act on behalf of the juristic person in litigation. It is the juristic person as litigant,

[92] *Locus standi in iudicio* is concerned with the capability or legal capacity of an entity or person to be a participant in a matter before a court of law, having due regard to the interest of the entity or person in the proceedings before the court (and the assistance sought) and the ability of the individual or entity to launch or defend a legal action (Van Wyk 2010:5-6).
[93] *United Apostolic Faith Church v Boksburg Christian Academy* (2011) (at 15); Fourie (1973:29).
[94] At 300. The case revolved around a committee of a presbytery that sued for the ejection of its tenant. The summons was signed by a member who was also the secretary of the committee. The court *a quo* allowed an objection to the summons related to the *locus standi* of the person acting on behalf of the committee. On appeal the High Court held that the secretary would be personally liable for the costs of a defective summons and therefore had a personal interest in the suit that entitled him to argue the appeal in person.
[95] "Everyone has a right to be heard in his own cause, and no one, save a qualified practitioner, has a right to be heard in the cause of another" (*Rescue Committee Dutch Reformed Church v Martheze* [1926]) (at 300). Only in exceptional circumstances, such as a minor or a person suffering from a disability, a guardian or curator may appear in person on their behalf (at 299).
[96] Cf. *Christian Education South Africa v Minister of Education* (2000) where the appellant (an umbrella body of 196 independent Christian schools) was described as a "voluntary association" (at 2) and there was no further enquiry as to its juristic personality or *locus standi* in the Constitutional Court.

however, that would be bound by the judgment, not the organ (and this should be noted in the pleadings before the court to avoid confusion).[97] Moreover, section 38 of the Constitution (Enforcement of rights)[98] provides, *inter alia*, for actions by someone acting as a member of, or in the interest of, a group or class of persons. The Constitution thus clearly provides for the widest possible protection in matters relating to fundamental rights.

Furthermore, Van Wyk (2010:8-13) shows how legal precedent demands that, where common-law lack of *locus standi* of an association without juristic personality places an unacceptable confinement on an association seeking to vindicate fundamental rights, the common-law rules must be developed as provided for by section 39 of the Constitution.[99]

This does not mean, however, that *locus standi* will be applied without limits. In *United Apostolic Faith Church v Boksburg Christian Academy* (2011) the High Court ruled that, as the Boksburg Christian Academy is not a juristic person (there being no standard clause establishing juristic personality in its constitution), "no order can be made against it or, if it can, it will be entirely toothless".[100]

The question as to how the Boksburg Christian Academy was allowed to be a party in a civil suit without all the members being named separately (as suggested by Hiemstra [1946:26] and the court in *Rescue Committee Dutch Reformed Church v Martheze* [1926]) was addressed by the court.[101] In terms of the High Court rules certain procedural aids (the details of which fall beyond the scope of this study) exist to assist a plaintiff to cite certain parties that do not have any existence separate from their members. It does not, however, operate to provide juristic personality to an unincorporated association, or to vest it with *locus standi* when none exists.

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[97] Pienaar (1991:305). See also 6.10 (*supra*).
[98] See 5.3.6, footnote 121 (*supra*), for the text of section 38.
[99] Section 39(2) reads: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".
[100] At 40.
[101] At 41-42.

6.12 A way forward

6.12.1 Introduction

As shown above, the courts in South Africa have consistently adopted the view that the three Churches under discussion are voluntary associations (with juristic personality) founded on the basis of contract. This view was also shown to be unsatisfactory as it does not take into account the uniqueness of churches and the way they participate in legal matters. The voluntariness of membership, the contractual basis and the *universitas* persona of churches all fail to do justice to the self-understanding of the church, as set out in chapter 5.

Church law as the *ius sui generis* of an association *sui generis* warrants a revaluation of the role of the church as a community based on the personal and direct commission of Christ, which became the mission of the church: "Therefore go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit".[102]

A religious association's right to self-definition based on its self-understanding is a necessary consequence of constitutional religious guarantees. It is the unique character of the church that sets it apart from all other associations and institutions (in addition to the entrenched guarantees).

6.12.2 A Reformed view of the unique character of the church

The Reformed understanding considers the true nature of the church to be the communion of faithful believers called by God into the living body of Christ, joined in their common faith, confession and love with the purpose of worshipping God and proclaiming the redemption in Christ to all of mankind.

John Calvin (*Institutes* IV:281 [1.1]), in an elucidation of article 9 of the "Twelve Articles of the Christian Faith" which states that "I believe in a holy catholic church, the communion of saints",[103] proclaims that those to whom God is a

[102] Matthew 28:19 (NIV).
[103] See text at the Lord's Day 7 of the Heidelberg Catechism.

father, the church "must also be a mother".[104] Calvin (*Id.*:283 [1.4]) explores this notion when he describes how vital and imperative the church (as mother) is in the lives of believers. Calvin (*Id.*:281-288 [1.2-1.7]) distinguishes between the visible (and imperfect) church, which has members scattered throughout the world and contains a large number of hypocrites, and the invisible (and true) church that includes "all the elect of God" who have ever existed. It is the latter, manifest to God's eye only, which is the subject of article 9.

From a Reformed perspective the church is always understood and defined in terms of the authority of the Scriptures. "The Church commands nothing except what it is certain is God's Word" (Martin Luther 1523/1991:24). Perhaps the most prominent Reformed description of the church is from Calvin (*Institutes* IV:289 [1.9]), who said that "(w)herever we see the word of God sincerely preached and heard, wherever we see the sacraments administered according to the institution of Christ, there we cannot have any doubt that the Church of God has some existence". This notion is also found in the Belgic Confession as the "marks of the true church".[105]

The Calvinistic view on the character of the church is probably best summed up in article 27 of the Belgic Confession under the heading "The Holy Catholic Church":

> We believe and confess one single catholic or universal church – a holy congregation and gathering of true Christian believers, awaiting their entire salvation in Jesus Christ being washed by his blood, and sanctified and sealed by the Holy Spirit. This church has existed from the beginning of the world and will last until the end, as appears from the fact that Christ is eternal King who cannot be without subjects. And this holy church is preserved by God against the rage of the whole world, even

[104] This seems to be a reworking of a dictum of the bishop of Carthage, Cyprian, in the third century: "He who is not in the Church of Christ is not a Christian. He can no longer have God for his Father who has not the Church for his mother. There is no salvation outside the Church" (quoted by Kuiper [1951:21]).

[105] Article 29 of the Belgic Confession contains the "marks of the true church": "The true church can be recognized if it has the following marks: The church engages in the pure preaching of the gospel; it makes use of the pure administration of the sacraments as Christ instituted them; it practices church discipline for correcting faults. In short, it governs itself according to the pure Word of God, rejecting all things contrary to it and holding Jesus Christ as the only Head. By these marks one can be assured of recognizing the true church – and no one ought to be separated from it" (the translation presented here is based on the French text of 1619).

> though for a time it may appear very small in the eyes of men … And so this holy church is not confined, bound, or limited to a certain place or certain persons. But it is spread and dispersed throughout the entire world, though still joined and united in heart and will, in one and the same Spirit, by the power of faith.[106]

The Lord's Day 21 of the Heidelberg Catechism that deals with the "holy catholic church of Christ" states "(t)hat the Son of God from the beginning to the end of the world, gathers, defends, and preserves to himself by his Spirit and word, out of the whole human race, a church chosen to everlasting life, agreeing in true faith; and that I am and forever shall remain, a living member thereof" (text references omitted).

Arguably the strongest indication of Reformed resistance to voluntariness of membership of the church is found in article 7 of the Canons of Dort[107] which maintains that election is God's unchangeable purpose because

> (b)efore the foundation of the world, by sheer grace, according to the free good pleasure of his will, God chose in Christ to salvation a definite number of particular people out of the entire human race, which had fallen by its own fault from its original innocence into sin and ruin.[108]

Karl Barth (1958:676ff.), at all times conscious of the *communio sanctorum* (article 9 of the Twelve Articles, *supra*) that is grounded in its own divine calling, criticises Rudolph Sohm and (Barth's contemporary) Emil Brunner after him for viewing the essence of the Christian community as a "voluntary" church.[109] This ultimately leads Sohm and Brunner to negate the church's basic "christologico-

[106] The translation presented here is based on the French text of 1619.
[107] The third of the doctrinal standards of the Reformed faith. The Canons have a special character because of their original purpose as a judicial decision on the doctrinal points in dispute during the controversy in the Dutch churches initiated by the rise of Arminianism. The latter taught election based on foreseen faith, universal atonement, partial depravity, resistible grace and the possibility of a lapse from grace. In the Canons the Synod of Dort (1618-1619) rejected these views and stated the Reformed doctrine on these points, namely, unconditional election, limited atonement, total depravity, irresistible grace, and the perseverance of saints (see the introduction to the text of the Canons of Dort).
[108] Translation based on the only extant Latin manuscript among those signed at the Synod of Dort. Weber (1983:460-464) cautions not to describe (and thereby devalue) the eternal election with normal measurements of the course of time, which tend to bind and constrict God, the "Lord of time".
[109] Barth (1958:679). It should be borne in mind, though, that "voluntariness" may in some instances refer to a condition that has developed as a counter-reaction to the Constantinian model of the relationship between church and state (cf. Berkhof 1985:403).

ecclesiological law",[110] a condition of the uniqueness of the church community. This uniqueness is, *inter alia*, informed by Barth's notion that church law is rooted in liturgy as it originates in the event of divine worship within the *communio sanctorum*.[111]

In a comprehensive exposition of the dogmatic precept, Otto Weber (1983:411ff.) considers the doctrine of election to follow from the grace of God in Jesus Christ, preceding our faith and perception, "defining us and all our existence".[112] Election, as God's act of salvation, is not a mere abstraction but can only be truly and concretely understood as the predestination of the faithful "community", which is the fellowship of believers or the body of Christ – in essence, nothing but the members of the church. This divine election of grace, where some are destined for the covenant which God has established, is effectuated in the calling of believers into the community. The community, therefore, does not legitimise itself; it is legitimised only through Christ – called by Him into life and maintained by Him.

Within the realm of election of believers and calling into the community there can be no question of a "contractual agreement" between members mutually, or between members and the church. While the concept of election can never designate a contractual agreement, people are not entirely free from accountability. Berkhof (1985:483) explains that the confession of election is rooted in a covenantal fellowship which does not only include what God does. The covenant also involves people and their responsibilities, their guilt and their obedience. It is, however, still not a reciprocal agreement between equal partners. In this strange covenant "the One is ultimately not dependent on the faithfulness or unfaithfulness of the other". Any attempt to take the self-understanding of the church seriously has to take into account that the doctrine of the election establishes God's initiative and power, irrespective of the shortcomings and failures of the human covenant partner.

[110] Barth (1958:681).
[111] *Id.*:698.
[112] Weber (1983:438).

6.13 Reflecting on the Dutch approach

6.13.1 The legal position of churches in the Netherlands

It has been argued that a juristic position analogous to that of the church in the Netherlands could provide a feasible solution for South African churches.[113] This seems to be a notion worthy of exploration.

Traditionally religion plays an important role in the Netherlands with a history of pluralism, mainly within a Christian, Jewish, and Muslim context.[114] As a result Dutch culture is characterised by pragmatism that impacts the church-state relationship in more than one way, notably by means of an impact on the laws relating to religion.[115] These laws created an open system, described by Van Bijsterveld (2010:31) as a "positive neutrality" that is friendly and tolerant towards churches and religion, and adaptable to change.[116]

The separation of the church and the state in the Netherlands is founded upon article 6 of the Constitution (*Grondwet voor het Koninkrijk der Nederlanden*) (see 4.4.16, *supra*). The position in the Netherlands is that the church is recognised as a law subject *sui generis* parallel to other legal subjects recognised by civil law.[117] The position of churches is regulated by the Dutch Civil Code (see 4.4.16, *supra*). According to article 2 of the Civil Code churches, independent units of churches, and structures in which they are united, have juristic personality by default, which differs from churches' position within the South African legal system. The article also states that churches are regulated by their own statutes insofar as they are not against the law.[118] The unique and specific juristic personality of churches seems to be a significant factor in the way churches act within the legal system. They act in a unique way and not as any other association "want ze vormen naast verenigingen, bedrijven, stichtingen en

[113] See 4.4.16 (*supra*) and 4.6 (*supra*). See also Coertzen (2001a:119-122) and Van Coller (2011:231-236).
[114] Kennedy (2010); Davelaar *et al.* (2011); Nieder-Heitmann (2012:50).
[115] Van Bijsterveld (2010:31ff.).
[116] Cf. Van Drimmelen (1992:199-201).
[117] Van Bijsterveld (2010:32-33).
[118] See Van Drimmelen (1992:202) for examples of religious actions that could be considered to be against the general legal order.

andere wettelijk erkende rechtspersonen een eigen categorie, de kerkgenootschappen" (Koffeman 2009:301).

Van Drimmelen (1992:203) explains that churches are exempt from the conditions set for other associations to acquire juristic personality, such as registration with the civil authorities[119] or publication of statutes "omdat de overheid zich niet wil bemoeien met de organisatie van kerken". Moreover, churches as distinct legal subjects *sui generis* in the Netherlands are explicitly excluded (in terms of article 5 of the Civil Code) from certain provisions in the civil law. Article 3 of the Equal Treatment Act[120] (the Dutch equivalent of the South African Equality Act [see 5.3.5.2, *supra*]), for instance, states that the Act does not apply to "a) legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature; b) the office of minister of religion".

The provision in the Civil Code section on general principles of legal entities does not apply to churches. Analogous application of the regulations is only allowed in so far as this is not in conflict with a church's statutes or the nature of its internal relations. The court may therefore only annul a church decision if it conflicts with good faith (Van Bijsterveld 2001:152).

Van Drimmelen (1992:199) considers church law to be a "vreemd recht" for the Dutch civil courts and civil judges have no role to play in applying or interpreting it. It does seem, however, according to Koffeman (2009:304-305), that the courts, in some instances, have full powers of review of ecclesiastical matters, precluding ruling on dogma and tenets of faith. It therefore seems unlikely that the doctrine of doctrinal entanglement, which found application in recent South African jurisprudence (see 5.5.3, *supra*), would be applied *in toto* by the Dutch courts. At any rate, given the general freedom of churches from certain laws, it seems that the doctrine (which would hardly be needed) will rarely be tested.

[119] A limited form of registration with the Chamber of Commerce has recently been introduced, applicable to all private-law juristic persons in the Netherlands. In terms of this new development, the PKN as denomination has to register while congregations have the option to choose whether to register. The main aim is to protect parties who deal with churches in normal civil legal matters (Koffeman 2009:302).

[120] Act of 2 March 1994 containing general rules to provide protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (as amended on 9 September 2004).

Freedom of religion in the Netherlands prohibits anyone from suppressing religious practices, even if some may find them offensive or bizarre. The government, may, however, have a compelling interest where those practices would impose costs upon third parties.[121]

A church can organise itself in its own way, provided that this is not contrary to the law. A church order regulates the structure and functioning of churches. According to the situation in the Netherlands the internal statutes or church books of order are binding in terms of the private law. This freedom is respected in all areas of the law, including labour law which affords churches more freedom than any other organisation for hiring and dismissing personnel in order to take certain requirements into account.[122] The legal system of the Netherlands does not recognise clergy as being employees and maintains that no labour agreement exists in terms of the law for the reason that no employer-employee relationship based on authority exists.[123]

The church-state separation in a system of "positive neutrality" and the resulting open attitude towards churches and religion are most notably reflected in various financial relationships between church and state. Vandenberghe (2012:48) explains that state neutrality regarding religion does not require a strict hands-off approach that excludes religious associations from publicly funded assistance. The most directly related to religion are the chaplaincy services that exist, for instance, in the armed forces, penitentiary institutions, hospitals, and homes for the elderly. Individual freedom of religion is the justification for the state paying the salaries of these services.[124] Other types of support are not exclusively aimed at churches or religion. Where the state supports certain activities such as education, religious institutions that provide those activities may not be excluded as a matter of principle. Other kinds of financial support include the maintenance of old church buildings as well as tax relief in a variety of forms. Donations for

[121] Vandenberghe (2012:51-51).
[122] Van Bijsterveld (2010:32). Cf. Van Drimmelen (1992:199-201).
[123] Maeijer in Coertzen (2001b:121).
[124] Government support in these instances should be qualified. Where governmental action has precluded citizens from exercising their religious practices without governmental support (in the military or penitentiary institutions, for example), the government can probably not claim that a refusal to support is "neutral". State support could be misunderstood as promotion of religion while sometimes a denial of certain benefits could amount to an unreasonable and unconstitutional burden on religion (Vandenberghe 2012:53-57).

churches are exempt from taxes or enjoy lower rates. The state thus encourages donations and thereby indirectly supports churches.[125]

As far as possible fundamental right violations in Dutch churches are concerned, Van Drimmelen (1992:201ff.) shows how the relative weight of the protected interests is taken into account, not dissimilarly to the proportionality test (see 5.3.5.2, *supra*) used by South African courts.[126] The Dutch enquiry, however, seemingly goes one step further by taking into account whether the person alleging discrimination happens to be in the situation voluntarily or by force. The exclusion of certain people from the holy communion, for instance, could be justified by the fact that they are not compelled or coerced by any external force to be a member of the discriminating church or congregation.

6.13.2 The role of religion and the church in society

There are two opposing positions with regard to the role of religion in Dutch society. Vandenberghe (2012:53-57) distinguishes between those who argue that religion is beneficial to society and thereby propose that the state should increase its support for religion, and those who are sceptical about the value of religion in modern societies, arguing that authorities should refrain from supporting religious associations, financially or otherwise. Although Vandenberghe seems to be in two minds on whether the promotion of religion can actually provide positive results for society, there is a growing awareness in the Netherlands that churches increasingly add value to society at large and that even a "neutral" state can reap tremendous benefits by promoting religion for secular ends.

In 2011 Davelaar *et al.* conducted a study about the role of "(f)aith-based organisations" (FBOs) and social exclusion (such as poverty, social isolation, homelessness, or undocumented persons) in the Netherlands.[127] The study examined the role of religiously inspired (Christian, Muslim, or Jewish) initiatives at national level and in the cities of Amsterdam, Rotterdam, and Tilburg. Interviews were conducted with 84 organisations. The report concludes that

[125] Van Bijsterveld (2010:33-34).
[126] See also Koffeman (2009:302).
[127] The research was commissioned by the European Commission and also carried out in Belgium, Germany, Spain, Turkey, the UK, and Sweden.

FBOs play a complementary role in combating social exclusion in the Netherlands. They are committed to poverty relief, care and reintegration of vulnerable citizens, they provide care, foster interaction in neighbourhoods, and encourage participation in society at large.[128] In addition, they expose the shortcomings of the official social security efforts.

The report confirms that the principle of separation of church and state in the Netherlands does not prohibit financial aid from the government to certain activities of religious organisations. It is acknowledged that the Roman Catholic and Protestant pillars were basic constitutive elements of the modern Dutch state. They found that the Dutch state itself has never been neutral in respect to religion but indeed always extensively involved with religious expression in public life, despite criticism of the system being too accommodating toward religion.[129]

As opposed to "exclusive neutrality" or "compensating neutrality"[130] in the Dutch system, the legal and historical realisation of neutrality reportedly corresponds mostly to the concept of inclusive neutrality (akin to Van Bijsterveld's "positive neutrality" [*supra*]). This entails that individuals and groups have the freedom and right to speak and act from their own religious convictions, also in the public sphere. The government may offer support to activities of religious organisations (also financially). Activities should meet the goals of the government who may not rank one religion above the other. It is acknowledged that, as churches contribute to the "collective good", they are entitled to extensive tax relief. Dutch authorities subsidise many activities and projects of churches (and other FBOs), either within the context of official policies, or because they have an interest in FBOs providing assistance to certain groups the welfare state does not include, such as homeless or undocumented people. Subsidising activities of religious

[128] Cf. Brand (2012:21-22) who explains that anti-pluralistic practices were rife in the past as could be deduced from the many so-called *schuilkerken* (hidden churches) that can still be seen in the Netherlands today – but only if pointed out by a travel guide. These churches, appearing like normal houses, date from a time when Roman Catholicism was officially banned in the Netherlands, so that Catholics could only worship in secret. However, these *schuilkerken* were not really a secret at all. The authorities were very well aware of them, but deliberately turned a blind eye. The idea was not primarily to eradicate Catholicism but rather to prevent it from having any meaningful influence on society at large. Cf. Barth (1958:662-663) who points out that a church that retracts into the ghetto will inevitably become extinct.
[129] Davelaar *et al.* (2011:75-76).
[130] *Id.*:77.

organisations is advocated because of their social importance. In recent years there has also been an increase in state funding for (inter-religious) dialogue projects.[131] According to the report, FBOs attach a strong value to the fact that the government acknowledges and appreciates their work as "pure gain for society".[132] To this end Van Drimmelen (1992:198) states: "Kerk en staat staan als priester en koning onder het appèl van de profeten opdat zij beide tot zegen zijn voor de samenleving".

James Kennedy, in his book *Stad op een berg: de publieke rol van protestantse kerken* (2010), writes that church members "doen twee keer zo vaak vrijwilligerswerk als niet-kerkelijken".[133] Kennedy describes the rediscovery of the positive influence of churches in the Netherlands by the end of the twentieth century, including the prominent role of churches during times of disaster.[134] There has also been an increase in attention to the social and environmental impact of religion and the church. Since 2005 the interest in churches as institutions adding value to society has gained more momentum. Kennedy (2010:68) refers to a study done in 2006, which found that 57% of the Dutch people believed that the disappearing of churches would lead to vulnerable communities of people being left to their own peril. He also refers to studies done in 2008 and 2009 which confirm that churches increasingly focus on improvement of society. Even church buildings are reported to be used for the common good. The church is "(n)iet langer een staatskerk, maar steeds vaker een straatkerk".[135]

6.13.3 The church and the common good

The policy of the Dutch authorities to respect the autonomy of churches and to grant benefits to religious organisations is inevitably based on a belief that the promotion of religion will provide positive results for society.[136] It is very well conceivable that the position in South Africa could evolve (where it has not done so already) to become analogous to the Dutch situation. As shown in chapter 5,

[131] *Id.*:77.
[132] *Id.*:83.
[133] Kennedy (2010:70).
[134] These disasters include Bijlmer air disaster, the Enschede fireworks disaster, the Volendam fire and the attack on the royal bus in Apeldoorn (*Id.*:67).
[135] *Id.*:70.
[136] Cf. Vanderberghe (2012:44).

the full scope of the right to freedom of religion (entrenched in sections 9, 15 and 31 of the Constitution), supported by associational rights (section 18), and the diversity demands of a pluralistic society, warrants a strong presumption in favour of religious institutions, including the church. This would entail authorities giving recognition to the way the church understands and defines itself. To be viewed as an ordinary voluntary association based on contract certainly does not fulfil the promise of constitutional guarantees. Moreover, Reformed churches increasingly realise the need and answer the calling to contribute to the common good of society. A neutral public domain where only "secular reasons" deserve a hearing is certainly a myth (Brand 2012:21-22).[137]

For Calvin (*Institutes* I:40 [2.1]) God is "the fountain of all goodness" who sustains the world "by his boundless power, governs it by his wisdom" and "preserves it by his goodness". Calvin postulates that one of the functions of the Law[138] is "to curb those who, unless forced, have no regard for rectitude and justice" – a restraining that is "necessary for the good of society".[139] In addition, the Law influences people to know and obey God, aspire to follow God's will, and thereby motivate and prepare them for doing good to all humanity.[140]

Hauerwas (2009:448) enunciates that if a good in common can be found to sustain a common morality (for a worldwide community), "we will need the church". While a common morality is perhaps a fiction, there are merits to the view that a common morality can assist in building a healthy society. Greenfield (2000:148ff.), in search of the contribution that Protestantism makes towards the common good of society, also includes (like Hauerwas) the moral capacity (grounded in the exercise of conscience) of believers.[141] To this Greenfield adds the impact of all the facets of the love commandment. In service of solidarity and civility, the church is called to be, "in Christ's name, a reconciled and reconciling

[137] Cf. Brand's reference to the Dutch s*chuilkerke* (*supra*).
[138] Calvin (*Institutes* II:300 [7.1]) understands by the "Law" not only the ten commandments "which contain a complete rule of life, but the whole system of religion delivered by the hand of Moses".
[139] *Id.*:II:307-308 (7.10).
[140] *Id.*:II:309-311 (7.12-7.14).
[141] Also consider, for example, the lamentation by David Cameron, the English Prime Minister, regarding the slow moving moral collapse in the UK and the call on religious institutions to assist in providing solutions (Vanderberghe 2012:44).

community of love",[142] and to work towards overcoming the divisions in society and to advance goodness, righteousness, and justice in the world.

Although the church, in Greenfield's view, often fails to effectively engage with others in the realisation of the common good, the church's contribution to the common good should not be dismissed, since the common good is central to its identity and mission. The church, through the Christian principles of grace, forgiveness, and reconciliation, combined with the ministries of healing and compassion and the Protestant doctrine of the priesthood of believers, may have a positive impact on society (as has indeed been revealed by history), and not only on itself.

Greenfield (*Id.*:158-159) singles out the principle of the priesthood of believers as laying the foundation of the presbyterial-synodal model of church governance. Protestant church law then becomes a statement or manifestation, not only about what the church is, but also about who Christ is and ultimately this becomes the way, along with the theologies of worship and deeds as fruits of faith, in which Protestants make their diverse contributions to the common good of the wider society.

The (universal) church's commitment to (and quest for) peace should also have a palpable impact on society at large. Peace is, however, preconditioned by Christian unity, the search of which is not only an imperative demanded by the gospel, but also essential to the church's efforts to contribute to the common good. For Hauerwas (2009:457) a combined refusal by churches to be isolated from one another is vital if the world is to have an example of the peace needed for the finding of the good in common.

The church as an agent for good and the importance of the church in the lives of believers prompt one to ask the question about the public role of the church as part of a pluralistic South African society. There seems to be a general view that a plurality of religions in a society creates the potential for conflict and, therefore, religious activity is harmful to unity, peace, and the common good. Therefore religions should be suppressed within a neutral state. The reason for this is

[142] Greenfield (2000:151).

supposedly that conflicting religious commitments cause intolerance and conflict, and this should disqualify religions (including the church) from participation in the public sphere.[143]

According to Brand (2012:27-28), however, the celebration, defence and promotion of plurality should be considered to be a central part of the Christian faith. Pluralism, in his view, is not unchristian but lies at the heart of the gospel. True believers are freed from selfishness which should rather develop into a healthy celebration of difference.

Christians need to find their place in the public sphere on the basis of their faith commitment alongside people with divergent views. Nieder-Heitmann (2012:52-54) focuses on public witnessing as well as cooperation if Christians are to give account of the faith that inspires them towards serving the common good. With regard to particular public issues, churches should participate in accordance with their commitment to the gospel and in so doing bear witness to the gospel through word and deed. He calls on Christians to voice and advance their views in ways that are ethically justifiable in a pluralistic society.

Koopman (2012:35-38) emphasises that all institutions of society have a role to play in actualising the common good. Churches in partnership with institutions in various spheres of public life (e.g. politics and the economy), therefore participate in the quest to realise the common good. The Bill of Rights in the South African Constitution contains the vision of the common good and it entails a life of dignity for all. Constituent elements of this common good of dignity are equality, freedom, justice, and equity. From a South African point of view, Koopman (*Id.*:39) explains that

> the notion of the common good has a rhetorical and inspiring function. It triggers the imaginative and visionary dimensions of our lives. It encourages us to dream, and not to make peace with the status quo of injustice, inequality, oppression and the manifold ways of the violation of dignity. Common good language enables us to imagine a different world. Things need not be as they currently are. Dehumanisation and injustice do not need to have the final word. Common good discourse, therefore,

[143] Cf. Nieder-Heitmann (2012:41).

> encourages us to offer courageous criticism of the wrongs of our societies. It inspires us also to look for what is common to us all.

Reformed theology, according to Coertzen (2012:185-186), requires the church to have a positive influence on the public sphere of life. In a pluralistic society this will (in Coertzen's view) inevitably include dialogue and cooperation between different religions regarding the common good. The church's contribution entails, *inter alia*, the Christian virtues of modesty, humility and tolerance en route to finding that which is best for everyone.[144]

Perhaps Kennedy's image of the church consisting less of extremely pious people living in isolation from the world, and more of members who have a vision of a better tomorrow and actively participate towards the common good of society, contains a view of the future of the South African church:

> Om de stad van God zichtbaar te maken, zal de kerk een contrasterende gemeenschap moeten zijn, waar gemeenteleden elkaar liefhebben, voor elkaar zorgen, waar zij zich oefenen in christelijke discipline, geworteld zijn in hun traditie en hun visie op de wereld en het samenleven op handige wijze naar buiten weten te brengen. Zo kan de kerk een lichtend voorbeeld zijn voor de samenleving, die zij uitnodigt om met haar mee te gaan op reis naar een nieuwe toekomst. Hoewel deze nieuwe publieke rol voor de kerk eigenlijk is afgedwongen doordat de kerk naar de marge van de samenleving is verdrongen, is deze positie geen slechte plaats voor een kerk die – in deze tijd – de belichaming wil zijn van Christus.[145]

6.14 Concluding remarks

The self-understanding of the church is paramount to its self-definition and has to be taken into account by the state as it influences the position of the church assigned to it by society. In addition, the church's communal role, like Kennedy's *Stad op een berg* (*supra*), has to expand to fulfil its true calling.

According to Barth (1958:686ff.) the world will inevitably and always have a very different understanding of the church than the view that the church has of itself.

[144] See also 5.3.6 (*supra*).
[145] Kennedy (2010:165).

The world will always tend to regard the church as "one society with others, and it will necessarily classify and equate it with other groups which have arisen and still arise within its own sphere … (I)t cannot possibly agree – otherwise it would not be the world – to treat with the Church on its own basis (taking seriously its faith and confession)". In terms of Barth's view the church can never accept the world's interpretation and understanding of it, nor should it understand itself in terms of the world's "misunderstanding". This is particularly true of the church's relation to the state as the latter will never adopt the church's understanding of itself. The most that the church can ever expect from the state in practice "is to be assigned a more or less exalted position and function within its own law in relation to corporations and societies" (Barth 1958:687).

Its distinctive role in society, its divine calling, and the constitutional guarantees of the church compel the lawmakers to give special attention to the legal position of the church. The *ius constituendum* and *ius constitutum* contain the full extent of law of the church[146] and members are required to adhere to this law, but it can hardly be enforced by any external authority. The church is a unique community which forms a special kind of juristic person with unique characteristics. This fact should be acknowledged and should be treated as such by the authorities and the legal system. The nature of the voluntary association should be taken into account when assigning rights and obligations to it and its members. The rights constitutionally protected by freedom of religion (individual and associational), supported by the right to freedom of association, must inevitably lead to an institution of a special kind with rights and liberties not afforded other associations.

Discourse on juristic personality and religious rights should not be confined to the terms of pre-constitutional common law but should continually strive to promote the "spirit, purport and objects of the Bill of Rights".[147] When the South African Constitutional provisions regarding religion (notably sections 15 and 31) are taken into account, one may argue that this is already the case in South Africa. If so, the churches have not yet taken advantage of this concession.

[146] Cf. 5.2.1 (*supra*).
[147] Section 39(2) of the Constitution. Cf. the pleadings as referred to in the minority judgment of Wallis, J., in *National Horseracing Authority of Southern Africa v Naidoo and Another* (2010) (at 15).

The traditional views on church and state do not seem to take into account the true nature of the church as faith community bound by covenant and aimed at the common good of society. This unique entity cannot come to full maturity within the normal legal structures applicable to ordinary voluntary associations based on contract. Church law as a *ius sui generis* within an association *sui generis* has to be recognised and respected in terms of the guarantees of the constitutionally entrenched rights and freedoms as set out in chapter 5 (*supra*). This warrants the creation of a juristic person of a special kind, a section 31 association *sui generis.*

6.15 Résumé

The legal status of churches in South Africa, and the consequence of this status in terms of sections 8 (subsections 2 and 4), 15, 18 and 31 of the Constitution formed the focus of chapter 6. Chapter 7 will investigate the judicial position of church law in South Africa and the consequences and possible outcomes for Reformed churches.

CHAPTER 7

THE JUDICIAL POSITION OF CHURCH LAW

7.1 Introduction

"Kerklike gesag is Woordgesag en gesag wat deur die Christelike geloof aanvaar moet word" (Strauss 2008:243). John Calvin (*Institutes* IV:316-317 [3.1]), envisioned a church in which God reserves to Himself all authority, though He chooses to exercise this authority through the ministers of the church. Calvin also argued that the authority that the church received from Christ consisted of doctrine, jurisdiction and enacting laws.[1] The internal authority of the church is therefore not derived from an external authority such as the state, but stems from the uniqueness of the church as the embodiment of Christ's calling of believers into a community *sui generis* (see also 2.5.4.1, *supra*).

In chapters 5 and 6 it was argued that the constitutional guarantees of the church, through its distinctive role and position in society as well as its divine calling, compel the lawmakers to give special attention to its legal position. This could by extension also be said of the whole body of church law. The state's minimum duty towards the church is to afford it ample opportunity to function, without being burdened by limitations and coercion related to its core tenets and practices. The courts, therefore, need to be mindful of the church's self-understanding as elucidated by its self-definition in terms of the Bible, its settled doctrine, and its understanding of public policy, human dignity, and fundamental human rights. In practical terms, this means that church autonomy, the internal authority of the church and its government, rules and resolutions should be respected and protected.

[1] *Institutes* (IV:389 [8.1]).

7.2 Self-rule of the church

7.2.1 Introduction

The quintessential right to freedom of religion (reinforced by the right to freedom of association and the diversity demands of a pluralistic society) warrants a strong presumption in favour of religious institutions, including the church (see chapter 5, *supra*). The church, as the embodiment of exercised fundamental rights, should enjoy the freedom of autonomy with regard to church law. This entails that churches should be afforded a significant measure of self-rule pertaining to matters directly or indirectly related to their doctrine. Church members should be able to enjoy the freedom to believe and to practise their religion as well as associate and disassociate freely,[2] and churches should be able to regulate their internal affairs freely. If this does not happen, religious (and related) rights may be perceived to be perfunctory and superfluous.

No absolute autonomy, however, should be expected. Warnink (2001b:263) indeed cautions that modern society's attitude towards the church and church autonomy should preserve the church today from too much self-confidence regarding its own autonomy. In Belgium, for instance, there appears to be an increasing interest (and a willingness [if not an eagerness] to intervene) in internal church matters shown by civil courts.[3] According to Warnink (2001a:162) this has more to do with the increased attention being paid to fundamental rights in general than to a weakening of religious rights. The question that will be investigated in this section is the extent to which the South African authorities afford (and should afford) churches the opportunity and freedom to govern themselves without undue interference and influence from the state and the courts.

[2] Cf. *Cronje v United Cricket Board of South Africa* (2001) (at 2595G-2598I) where the respondent argued (successfully) that they had no disciplinary jurisdiction on the plaintiff after he had admitted to corruption, and the only option left was to impose their right of non-association in terms of section 18 of the South African Constitution as the contract between themselves and the plaintiff had expired.

[3] See also Torfs' opinion that the courts in Belgium are more and more inclined to get involved in church affairs (in Strauss 2007:205).

7.2.2 Self-governance

In its external relations all legal disputes involving churches are disposed of by the civil courts according to the normal laws, rules and procedures.[4] Internal disputes may arise whenever members of the church come into conflict with each other or with church authorities with regard to conduct deemed to be unlawful, unethical, or irregular, or in any other way against the principles or tenets of the church. De Freitas (2012:263) explains this as follows:

> Membership of a sports club or workers' union for example, due to the nature and purpose of such a club or union, should allow for the accommodation of members reflecting a diversity of 'moral conduct' participators. However, membership of a religious association where the nature and purpose of such an association can be inextricably linked to specific forms of conduct ... qualifies that such an association should be allowed to align its requirements for membership with adherents to a certain form of conduct.[5]

The right to autonomy and self-rule may include the right to establish and maintain one's own religious associations, including the right to define one's own legal position;[6] the right to enjoy the regulation of one's own doctrine and confessions, including the practices that stem from this;[7] the right to arrange admission to membership, selection of offices and appointment of employees, including the freedom to discipline or expel dissenters[8] and dispose of labour issues internally;[9] and the right to own, maintain, and dispose of property according to internal resolutions.[10]

Prior to the Constitution, South African courts would not become entangled in religious doctrine unless some proprietary or other legally recognised right was involved.[11] In *Ryland v Edros* (1997) Farlam, J., expressed the view that the doctrine of doctrinal entanglement may have become part of South African law

[4] Church (2009:89).
[5] See also *Mankatshu v Old Apostolic Church of Africa and Others* (1994) (at 463H).
[6] See chapter 6.
[7] Limited only with regard to general applicable laws (see 5.5.7, *supra*).
[8] See 5.5.11 (*supra*).
[9] See 7.6 (*infra*).
[10] See 7.5 (*infra*). See also Van der Schyff (2001:82-107).
[11] See *Taylor v Kurtstag NO and Others* (2004) (at 39).

(see 5.5.3, *supra*). This was confirmed in other cases such as *Singh v Ramparsad* (2007): "Our courts have tried assiduously not to get entangled in doctrinal issues and it can be safely accepted that 'the doctrine of non-entanglement' is part of our law".[12]

Church orders often contain mechanisms for the settlement of disputes,[13] to avoid members having to go to court as well as to preclude the courts from interfering in churches' internal affairs. Hiemstra (1946:30) states the general rules: If the constitution was strictly followed, if proper notice was given, if each party had a proper opportunity to state their case and if the finding is not manifestly absurd, the courts would generally not intervene, even if it was thought that the decision is wrong.[14] The jurisdiction of the courts in church disputes is, however, a rather convoluted matter and several factors need to be taken into account before it can be established that the church remains the primary authority over its own internal matters – a right firmly entrenched in the Constitution.

7.2.3 Jurisdiction of the courts

7.2.3.1 Church autonomy and the courts

As noted in 7.2.2 (*supra*) there is no dispute regarding actions by or against churches in their normal legal relations with external parties. Such actions are disposed of by the civil courts according to the prevailing laws and legal procedures.[15]

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[12] At 50.

[13] The Kerkorde van die Nederduitse Gereformeerde Kerk – met Reglemente, Beleid, Funksionele Besluite en Riglyne (2011), deals with church discipline in chapter 5 (articles 59-66), further explicated in reglement 16. Provisions and regulations pertaining to discipline are found in ordereël 8 (Dissipline) and ordinansie 8 (Opsig en tug [in all probability an erroneous heading which should read "Dissipline" as the headings of the remainder of the ordereëls and ordinansies in the Church Order are consistently identical]) of the Church Order of the NHK (2010), further explicated in the "Reglement vir die prosedure by die ondersoek van 'n klag". The Church Order of the GKSA (2012) deals with this matter in articles 71-86 under the heading "Church discipline".

[14] It is also conceivable that a claim against the church may be found to be untenable and even absurd. The court in *Mankatshu v Old Apostolic Church of Africa and Others* (1994), for instance, held that the appellant must have known, when he paid his tithe, that his contribution to the church did not entitle him to a claim in the church property.

[15] Church (2009:89).

No general immunity from intervention by civil courts forms part of South African law. In general, however, the courts have ruled that all domestic remedies must be exhausted when disputes arise between the church and its members before relief may be sought in the courts of law.[16]

In the past civil courts assumed jurisdiction in church cases relating to, *inter alia*, the following matters: Interpretation of a church constitution;[17] deciding which of two factions after a schism was entitled to use a specific name;[18] division of property after a schism,[19] and after an amicable division;[20] an application to make the financial records of a church available to a member;[21] a dispute regarding a decision by a church council;[22] and an application to set aside the suspension of a minister.[23]

In principle the courts are open to everyone to have any dispute adjudicated.[24] Any attempt to exclude the jurisdiction of the courts altogether would probably not withstand constitutional muster as it may be found to be against public policy.[25] Church (2009:93) contends that no religious body can totally exclude the jurisdiction of the civil courts. Even in cases where the constitution of a church expressly states that decisions by the assemblies or tribunals of the church will be final, the jurisdiction of a civil court will be limited but not ousted.[26]

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[16] Cf. *Presiding Bishop of the Methodist Church of Southern Africa and Others v Mtongana and Others* (2008) (at 10). There have been several exceptions to the general rule e.g. *De Waal and Others v Van der Horst and Others* (1918) and *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952).
[17] *Jacobs v Old Apostolic Church of Africa and Another* (1992).
[18] *Old Apostolic Church of Africa v Non-White Old Apostolic Church of Africa* (1975).
[19] *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (1893).
[20] *Dutch Reformed Church, Van Wijk's Vlei v Registrar of Deeds* (1918).
[21] *Jacobs v Old Apostolic Church of Africa and another* (1992).
[22] *Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur* (1994).
[23] *Odendaal v Kerkraad van die NG Kerk Bloemfontein-Wes* (1960).
[24] *Wilken v Brebner and Others* (1935) (at 193). Section 34 of the Constitution provides that "(e)veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum".
[25] In *Jockey Club of South Africa and Others v Feldman* (1942), however, it was held that the exclusion of the jurisdiction of the courts on the merits is not contrary to public policy and decisions of domestic tribunals will be considered to be final. It is only where the tribunal has disregarded its own regulations or the fundamental principle of fairness that the court can interfere (at 351).
[26] See also *Louisvale Pirates v South African Football Association* (2012) (at 17).

Hiemstra (1946:30) explains the position prior to the Constitution – courts had no jurisdiction to adjudicate disputes between members, except where some civil rights were at stake.[27] In *Van Rooyen v Dutch Reformed Church Utrecht* (1915) Dove Wilson, J.P., held that there can be no doubt that the civil courts are entitled to interfere in the proceedings of voluntary associations, where it is shown that it has arrived (or proposes to arrive) at a decision which may be prejudicial to the complainant, by methods which are contrary to its own constitution, and to the ordinary principles of justice.[28]

The courts in *De Waal and Others v Van der Horst and Others* (1918),[29] *Bredell v Pienaar and Others* (1922),[30] and *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952)[31] accepted the citation from *Long v Bishop of Cape Town* (1863):[32]

> It may further be laid down that, where any religious or any other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the Association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

In addition, in *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) it was held that a mere breach of the rules and regulations of the church is not sufficient to entitle a court to interfere. A member who alleges a wrong must prove that he or she has been prejudiced thereby and that he or she has a civil right or interest which has been violated and which requires the protection of the court.[33] To the same effect is the dictum by Steyn, J., in *Motaung v Makubela and Another NNO*; *Motaung v Mothiba NO* (1975): "A court of law will, however, not interfere, even when there has been a

[27] See *De Waal and Others v Van der Horst and Others* (1918).
[28] At 330.
[29] At 282.
[30] At 582.
[31] At 94.
[32] At 176.
[33] The court may, however, intervene before an actual violation of rights occurs provided that a possibility exists that a decision which will prejudice a member is about to be taken (at 84A).

clear infringement of the constitutional rules of a voluntary association, unless such interference is necessary to protect some civil or temporal right or interest".[34] This notion has since been confirmed in several cases such as *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976),[35] and *Mankatshu v Old Apostolic Church of Africa and Others* (1994).[36]

With the advent of the constitutional era, however, "civil rights" worthy of protection have received a broader application and include all the rights in the Bill of Rights. The Constitution's section 15 freedom to choose one's religion and section 31 right which, *inter alia*, ensures that persons belonging to a religious community have the right to enjoy their religion with others, should only be interfered with under extraordinary circumstances. The High Court (WLD) in *Taylor v Kurtstag NO and Others* (2004), for instance, emphasised that religious rights do not give anyone a right to impose oneself on a religious community.[37] Limitations of fundamental rights are therefore possible, but only in terms of constitutional provisions, for example within the context of section 36 of the Constitution (see 5.4, *supra*).

It appears that the Bill of Rights intends to protect the internal freedom of social entities, including churches, against external threats.[38] Landman (2006:176), however, avers that it appears that the government increasingly attempts to interfere in the affairs of social institutions such as the state involvement in the affairs of the Noupoort Christian Care Center and the commission of inquiry that became the subject in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (1999). The powers of a provincial department in relation to policies adopted by school governing bodies also seem to confirm Landman's concerns about these bodies as found in the recent case of *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* (2013) – although it may be argued

[34] At 628C.
[35] At 3E. The court noted that a strict compliance with all the procedural rules will not necessarily be required by a court unless somebody is burdened by the deviation.
[36] At 458I.
[37] At 48.
[38] Landman (2006:176).

that a public school falls entirely under the administration of the state in any event.

7.2.3.2 Contractual exclusion of civil jurisdiction

According to Wessels, J.A., in *Crisp v South African Council of the Amalgamated Engineering Union* (1929), the courts will not consider their jurisdiction precluded, even if the rules of the association state otherwise, where the act complained of is *ultra vires* the rules in question, or against the principles of natural justice.[39] Where the rules provide that certain disputes should come before the domestic tribunals, the courts will not as a rule usurp their functions. If, however, a dispute arises which the rules never intended the domestic tribunals to deal with, the courts will not refer the matter to the domestic tribunals, but deal with it themselves.[40] As a rule the courts will refer a complainant back to a domestic tribunal, especially where the rules which constitute the contract between the members clearly exclude the courts of law. It was held that, in these cases, courts of law will not exercise their jurisdiction until the domestic tribunals have dealt with the matter. This does not, however, mean that the courts are excluded altogether as it will always be possible to approach the courts of law, notably where the acts complained about are *ultra vires* or against the principles of natural justice.[41] Several subsequent cases have followed the same reasoning.[42]

Other cases, however, approached the matter in a different way. In *Jamile and Others v African Congregational Church* (1971), a clause in the respondent

[39] At 236.
[40] At 242. See also *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 26).
[41] At 236.
[42] The court in *De Waal and Others v Van der Horst and Others* (1918) also held that "if the plaintiffs have a right of action they have a right to bring it at once without having exhausted their remedies under the Church laws" (at 285). In his judgment De Villiers, J.P., noted that the rule that all domestic remedies must be exhausted before the courts will interfere stems from the courts in the USA where the civil courts consider themselves bound by the decisions of church tribunals on spiritual questions. The court in *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) approached a similar case where the court held that it is not necessary for a member of a church to exhaust all the remedies provided by the domestic tribunals set up by the constitution of the church before approaching the court. The court in *Odendaal v Kerkraad van die NG Kerk Bloemfontein-Wes* (1960) (at 166-167) was also not convinced that an applicant had no right to approach a court where irregularities occurred during a hearing of a domestic tribunal.

church's constitution provided that all members agreed to submit all disputes to adjudication by the church's senior executive committee, subject to confirmation by the annual conference whose decisions and awards were considered to be final and binding in all respects. Although Milne, J., emphasised that there is no room for the argument that the jurisdiction of the courts can be completely ousted, in terms of the respondent's constitution the applicants were precluded at the stage of the trial from invoking the assistance of the courts.

The court in *Presiding Bishop of the Methodist Church of Southern Africa and Others v Mtongana and Others* (2008) heard an appeal on ecclesiastical matters pertaining to the Methodist Church of Southern Africa (MCSA). The appointment of the third appellant as superintendent minister caused outrage from the aggrieved respondents and culminated in an agreement being concluded between them and the executive of the MCSA to submit to the arbitration of the MCSA the question whether the third appellant's appointment, as such, complied with the Laws and Disciplines, and related regulations and practices, of the MCSA. The court heard that the institution of legal proceedings by or against the MCSA is regulated by its Laws and Disciplines and in particular paragraph 5.11 which provides:

> No legal proceedings shall be instituted by any minister or member of the church, acting in their personal or official capacity, against the church or any Minister or member thereof for any matter which in any way arises from or relates to the mission, work, activities or governance of the church. The mediation and arbitration process and forums prescribed and provided for by the church for conflict resolution … must be used by all Ministers and members of the church. If a matter is referred for arbitration, the finding of the Arbitrator shall be final and binding on all Ministers and members of the Church.

On a proper construction by the court the effect of the provisions of the Laws and Disciplines was found to entirely exclude the court's jurisdiction in relation to the matter stated above[43] and the court subsequently granted the appeal. This recent judgment in all probability represents the proper way the courts should deal with church matters where no *mala fides* or gross irregularity is *prima facie*

[43] At 11.

present, notwithstanding the judgment in *Danville Gemeente van die AGS van Suid-Afrika en Andere v AGS van Suid-Afrika en Andere* (2012). In the latter case the Northwest High Court once again ruled that it was not necessary to exhaust all internal remedies before approaching a court of law. The court, *inter alia*, ordered that the termination of the pastoral status of a pastor of the Church should be set aside as the rules of natural justice were not adhered to and the procedure followed had deviated from the procedure agreed upon by means of the mutually accepted constitution of the Church. This judgment seemingly does not take religious rights and the freedom of association (which should include the possibility to contract freely) sufficiently into account. The combination of the rights contained in sections 15, 18 and 31 of the Constitution rights should outweigh the section 34 right by far.

7.2.3.2.1 *Pacta sunt servanda*

In the light of the discussion above the exclusion of the jurisdiction of the civil courts in the terms of the constitutions of voluntary associations, including churches,[44] should be examined more closely.

Wessels, J.A., in *Crisp v South African Council of the Amalgamated Engineering Union* (1929), held that, where a domestic tribunal acts *bona fide* the courts will not interfere with its decisions. If, however, it does not act *bona fide*, the aggrieved person can always resort to the courts to have their rights vindicated – (n)o voluntary arrangement can take that right away".[45] Sadler (1979:181-182), in a similar fashion, states that there is "'n vermoede teen die uitsluiting van die hof se jurisdiksie". These views, however, pertain to the pre-constitutional position and refer to acts of parliament where the powers of review of statutory bodies were excluded.

[44] Article 23.2 of the NGK Church Order (2011) reads: "Lidmate, ampsdraers en amptenare van die Nederduitse Gereformeerde Kerk mag hulle nie tot die burgerlike hof wend in hulle beswaar teen 'n kerkvergadering se besluit(e) nie, voordat hulle nie éérs die kerklike middele tot hulle beskikking aangewend en uitgeput het nie". Similar provisions in the Church Order of the NHK (2010) are found in ordereël 8.3.3: "Lidmate en ampsdraers beroep hulle nie op 'n wêreldlike hof met verbygaan van die opsig nie"; and in ordereël 8.5.3: "'n Lidmaat of ampsdraer wat getug word, mag nie met verbygaan van kerklike vergaderings op 'n wêreldlike hof 'n beroep doen nie".
[45] At 238.

Raath and De Freitas (2002:279), from a constitutional viewpoint, also regard the exclusion of the jurisdiction of the courts of law as acting against the public interest and as a breach of good faith that is central to any contract. According to this view no voluntary arrangement may deny anyone the right to resort to the courts of law to have their rights vindicated and wrongs remedied.[46]

If the Churches under discussion are indeed voluntary associations based on the law of contract, then the freedom to contract and the freedom to waive rights on the grounds of the Bill of Rights should be considered. The parties to a contract are generally free to regulate their contractual agreement in any manner they deem fit. It is, however, often accepted (as shown above) that the parties cannot preclude the jurisdiction of the ordinary courts of law. Any clause in a contract that intends to do so may be contrary to public policy and void as a consequence. Recourse to the courts may then only be postponed while exhausting internal procedures.[47]

The civil courts will, however, take into account if a church order states that a member may not approach the civil court unless all the internal avenues and instruments have been exhausted. Van Blerk, A.C.J., in *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 9D) set out the Supreme Court of Appeal's view:

> Dit staan partye tot 'n ooreenkoms vry om enige wettige ooreenkoms aan te gaan en ons reg sal hul gebonde daaraan hou. So sal dit algemeen gesproke partye tot 'n ooreenkoms ook vrystaan om die jurisdiksie van die Howe in sekere opsigte by ooreenkoms uit te sluit mits dit moontlik in gegewe gevalle – afgesien van onwettighede – nie strydig met die openbare belang is nie.[48]

As the judgment clearly held that public policy would still prevail, the justice quite understandably frowned upon the exclusion of the jurisdiction of the courts.[49] From a constitutional point of view, courts of law are entrusted with the

[46] See also 7.6.3 (*infra*) where the contractual exclusion (via church orders) of legal representation and the challenge in terms of section 34 of the Constitution is discussed.
[47] Cf. Cornelius (2002:7ff.). See *Natal Rugby Union v Gould* (1999) (at 441) where it was held that procedural unfairness is an inevitably reviewable irregularity.
[48] At 9D.
[49] At 9F-G.

protection of everyone within the borders of the country in which they operate. If it is accepted that churches are ruled according to the principles of the law of contract, the constitution of the church being the contract, the influence of the rights entrenched in chapter 2 of the Constitution must be considered.

The influence of the Constitution on the enforceability of contracts remains a controversial topic in jurisprudence.[50] The courts in South Africa have always been reluctant to take the final step and actually declare contracts that tend to limit constitutional rights unenforceable. This is probably because public policy places a high premium on freedom of contract.

The common-law position is that freedom and sanctity of contract should be sternly protected. Recently, in *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* (2013), Zondi, J., also emphasised that "public policy generally favours the utmost freedom of contract".[51] Pienaar (1998:177), however, points out that contracts that do not comply with the principles of good faith, reasonableness, *boni mores*, and public interest will not be enforced by the courts.

In *Garden Cities Incorporated Association Not for Gain v North Pine Islamic Society* (1999) the extent to which the Constitution has affected the validity and enforceability of contracts had to be adjudicated by the Cape High Court. The applicant, a property developer, sold property to the respondent, who intended to erect a mosque on the property. In terms of the sale agreement the respondent would refrain from activities that would be considered a disturbance to other property owners in the area, including the use of sound amplification during the "call to prayer".

Notwithstanding the agreed provisions the mosque commenced broadcasting amplified calls to prayer. In response to complaints from residents of the area, the applicant launched interdict proceedings to prevent the respondent from using the sound equipment. The respondent argued that the "call to prayer", in as loud a voice as possible, was a precept of the Islamic faith and that enforcing the prohibiting clause in the contract would amount to violation of section 15(1)

[50] Hopkins (2007:22).
[51] At 26.

of the Constitution. They contended that the Constitution did not permit the waiver of fundamental tenets of their faith in order to comply with the provisions of a contract. The court rejected the assertion that the agreement infringed the respondent's right to religious freedom. Conradie, J., however, avoided the waiver issue by averring that there was no evidence that the use of sound equipment during the call to prayer was a fundamental tenet of the Islamic faith (see also 5.5.5, *supra*). The judge held that the agreement merely regulated, by consensus, a particular ritual practised at a particular place in the interests of other members of the community.[52]

Currie and De Waal (2005:42) argue that it was not necessary for the court in *Garden Cities Incorporated Association Not for Gain v North Pine Islamic Society* to decide on what constitutes a fundamental precept of the respondent's religion, for if the respondent had waived his right to practise religion in this way, it would have made the decision itself. It remains in doubt, however, whether the waiver would have been binding since it could not have qualified as having been given in full knowledge of the freedom being surrendered as the undertaking was made in 1986, at a time when there was no constitutionally protected right to religious freedom. It remains an open-ended question whether the respondents would have given up their right if it had been constitutionally protected at the time. Of notable significance to this study is the question, leaping out from *Garden Cities Incorporated Association Not for Gain v North Pine Islamic Society*, whether any individual or group should be entitled to waive fundamental rights by means of contract, in line with the principle of *pacta sunt servanda.*[53]

A contract of which the conclusion, performance, or purpose is contrary to common law or statute is, as a rule, illegal and therefore unenforceable.[54] Moreover, contracts are held to be unenforceable when they are contrary to public policy or good morals (*contra bonos mores*).[55] It can be accepted that the fundamental rights in the Constitution contain the *bonos mores* of society, and the Bill of Rights therefore accurately represents the public policy and good

[52] 271B-C.
[53] The sanctity of contract – see 2.4.2.3 (*supra*) for a discussion of the historical origin of this principle.
[54] Van Aswegen (1995:65).
[55] *Id.*:66; Hopkins (2007:23).

morals.[56] From this follows that contracts with conditions that violate provisions in the Bill of Rights without good reason should be deemed unconstitutional and therefore unenforceable.

The SCA in *Afrox Healthcare Bpk v Strydom* (2002)[57] recognised the principle that the courts should not merely enforce contracts but also ensure fairness, including considering potential injustice in the case of unequal bargaining power.[58] Subsequently, the SCA in *Johannesburg Country Club v Stott* (2004)[59] had the opportunity to decide on the constitutionality of so-called "exemption clauses" in contracts. The SCA noticed the scope left in *Afrox Healthcare Bpk v Strydom* to conclude that to permit an exclusion of liability for damages for negligently causing the death of another would be against public policy because it runs counter to the high value the common law and the Constitution place on the sanctity of life.[60] Harms, A.J., questioned the compatibility of exemption from liability (which may involve criminal liability) with constitutional values, and whether growth of the common law, consistent with the spirit, purport and objects of the Bill of Rights,[61] requires the adaptation of a contractual regime which allows this.[62] In dismissing the appeal, the SCA found nonetheless that it was able to decide the matter without having to determine the constitutional validity of the argument.

[56] See for example Hopkins (2007:26) who suggests that the Bill of Rights "is the most reliable statement of public policy that we have".
[57] The respondent signed an agreement containing an exemption clause absolving the appellant, a private hospital, from liability flowing from negligent conduct of its employees. The respondent was confronted with the clause when he sought to claim damages from the hospital resulting from a nurse's negligence during post-operative care. The respondent challenged the exemption clause asserting that it is unenforceable on account of the fact that it violated public policy *inter alia* because it limited section 27(1)(a) of the Constitution (everyone has the right to have access to health care services, including reproductive health care). The SCA rejected the constitutional argument on the grounds that the Constitution had not been in force at the time of the alleged infringement. The court also showed that the Interim Constitution (which had been in force during the signing of the contractual agreement) had no corresponding stipulation (at 17). Brand, A.J., upheld the appeal, but exemption clauses were not tested against the Constitution.
[58] See also *Brisley v Drotsky* (2002).
[59] In that case the wife of one of the members of the appellant, the Johannesburg Country Club, instituted a dependant's action in which she sought damages. The appellant relied on the exemption clause in the membership contract to deny liability for personal injury or harm caused to its members or their children whilst on the club premises.
[60] At 12.
[61] Section 39(2) of the Constitution.
[62] At 12.

Hopkins' (2007:25) argument that the court in *Afrox Healthcare Bpk v Strydom* and *Johannesburg Country Club v Stott* should not have implicated the right of access to health or the right to life, respectively, but instead the right of access to court,[63] had not been tested. The limitation of the right of access to court is a relevant issue also pertaining to church law, as it is not uncommon for churches to have a clause limiting members' recourse to courts of law included in their church orders (see footnote 44, *supra*).

Hopkins (2007:26) submits that the correct approach which the law ought to take can be summarised as follows:

> The common law of contract has for a long time recognised that agreements which violate public policy are unenforceable; The Bill of Rights is the most reliable statement of public policy that we have; If the enforcement of a contractual provision tends to bring about the limitation of a constitutional right then it will be in violation of public policy unless its existence in the contract is reasonable and justifiable.

In *Barkhuizen v Napier* (2006) the Constitutional Court finally dealt with a challenge to a clause that seemed to violate section 34 of the Constitution.[64] The court showed that public policy represents the legal convictions of society. While determining the content of public policy was once fraught with difficulties, in the post-constitutional era public policy is now deeply rooted in the Constitution and the values that underlie it.[65] Whether a term in a contract is contrary to public policy must now be determined by reference to the values expressed in the Bill of Rights.[66] This leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that

[63] Section 34 (see 5.3.1, *supra*).
[64] The applicant instituted legal proceedings against the respondent in the High Court two years after his claim had been rejected by the insurance company. The respondent relied on the time bar clause that stated that the insurance company will be released from liability if summons is not served within 90 days of repudiation, contrary to the normal three year prescription period that generally applies to civil cases. The applicant argued that the clause was unconstitutional and unenforceable because it violated his right to have the matter determined by a court. The High Court upheld this contention after interpreting the principle of *pacta sunt servanda* as a law of general application and subsequently applying the limitation clause to the case. The court found that the limitation was not reasonable and justifiable and had therefore violated his right to rely upon section 34 of the Constitution. The High Court's decision was reversed by the SCA (*Napier v Barkhuizen* [2006]) as it was found that the unfairness of the time bar clause in question was not self-evident and did not entirely exclude access to the courts.
[65] At 28.
[66] At 29.

are in conflict with public policy as determined by constitutional values, even if parties have consented to them. The High Court's approach was found to be wanting.[67] Ngcobo, J., reiterated:

> All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta servanda sunt* is, therefore, subject to constitutional control.[68]

In *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* (2013) the applicant church was involved in a dispute regarding the ownership of three immovable properties. The third respondent (the provincial minister of transport and public works of the Western Cape) claimed to be entitled to enforce its rights against the Church under the notarial lease agreements.[69] The Western Cape High Court held that the agreements were against public policy, void and unenforceable. Although not a church case in the strict sense of the word as the respondents were external parties, the judgment confirms that the application of the principle *pacta sunt servanda* is subordinate to the Constitution and therefore under direct constitutional control. This would be the judicial position in all comparable cases before the courts.

With this decisive shift in the law of contract the courts substantially restrict freedom of contract. Each case involving disputes over contractual agreements before the courts will now have to consider the individual circumstances of a party to the contract and also ask whether a clause in a contract clashes with public norms and constitutional values and whether the contractual term is offensive to public policy. As far as church law is concerned this development

[67] At 30.

[68] At 15. In a doctoral thesis on exclusionary clauses in medical contracts, Henry Lerm (2008) advocates a paradigm shift in the interpretation of contracts in the post constitutional era, and encourages the South African courts to refrain from clinging to the utmost freedom and sanctity of contracts at all costs. He suggests that courts should be encouraged to part with the stereotypical judicial thinking when interpreting contractual agreements and consider the values enshrined in the Constitution such as fairness, reasonableness and good faith as well. It is to be accepted that the principles discussed by the courts in cases of medical contracts are equally applicable to constitutional challenges to contracts or contractual terms outside the insurance context (Lerm 2008:1037-1040).

[69] Clause 16 of each of the lease agreements contained a provision in terms of which the Church was obliged at the end of a twenty-year period to transfer the properties to the House of Representatives (the lessee), free of charge (at 3).

has important potential consequences as the church orders of churches are considered to be contractual agreements between the church and its members (see 6.8, *supra*). The criticism of this notion (see 6.9, *supra*) aside, as the law and legal precedent stands currently, the inimitability of church law and the religious rights, freedoms and values that underlie the Constitution, with the Bill of Rights as a statement of public policy, churches will have to rely on the fundamental religious rights entrenched in the Constitution to ensure that agreements within church structures do not fall prey to considerations aimed at the protection of vulnerable parties in other fields.

As shown in chapter 5 (*supra*) the Constitution is ferocious in its protection of religious rights, individually and collectively. If it is accepted that religious rights are rights and values of the highest order and it is accepted that public policy determines *pacta sunt servanda* while the Constitution and the constitutional values as primary source of public *mores* determines public policy, the agreements within a church as voluntary association of believers requires a stern approach by the courts to uphold the sanctity of such agreements.[70] The courts should therefore be hesitant to interfere with the freedom to contract – in the case of a church member via the acceptance of the church order. The option to declare contracts contrary to public policy should be exercised frugally and only as a last resort except for true cases of abuse of power or serious impairment of fundamental rights.

7.2.3.3 Appeal and review

An appeal is a formal question as to the correctness of a ruling of a court or tribunal. If it is claimed that a court gave a decision against the weight of the evidence before it or not in accordance with the law, the proceedings may go on appeal. As the result of an appeal the original judgment can be affirmed, reversed, or remanded (where the decision is sent back to the court *a quo*). If a question of irregularity of procedure is raised, the proceedings may go on

[70] See also *Uniting Reformed Church, De Doorns v President of the Republic of South Africa and Others* (2013) (at 26).

review.[71] Gardiner, J.P., in *Du Plessis v Synod of Dutch Reformed Church* (1930), explains this as follows:

> Even though an inferior tribunal may have power to decide a question, and finality may be attached to its decision, this Court may have jurisdiction to review its proceedings. But it cannot entertain an appeal by calling it a review. If the proceedings of the church courts have been irregular, they may be reviewed. But the Court cannot interfere with an error in law … nor with the wrong decision on fact … The civil court's jurisdiction to decide matters of dispute in the Church is not ousted, but it is limited.[72]

No appeal to the civil courts from domestic tribunals exists, but they have power of review. The reviewability of the decisions of private entities is not derived from statute but is rather founded on common-law principles.[73] A court can review the decision on two grounds, namely, where there has been a failure to comply with the rules set out in the constitution of the association and where there has been a violation of the principles of natural justice.[74] Review is limited to a determination of whether a proper procedure has been followed and the merits of the matter will not be considered.[75] A court will only in extraordinary circumstances substitute the domestic tribunal's decision with its own – such as where it would be a waste of time to order the tribunal to reconsider the case, where delay would cause prejudice, where the court is in a good position to

[71] The Manual of Faith and Order of the Uniting Presbyterian Church in Southern Africa (2007) (chapter 15); Sadler (1979:176-198).
[72] At 420.
[73] "The decisions of religious tribunals are … subject to the same common-law review jurisdiction as those of other voluntary organisations" (*Taylor v Kurtstag NO and Others* [2004] [at 42]). See also *Klein v Dainfern College and Another* (2005) (at 18-29).
[74] See Sadler (1979:182-194) for a more detailed discussion of the grounds for review, including *ultra vires* acts, acting with fairness and without bias and a tribunal's duty to apply its mind to the matter. See also (Church 2009:93) who contends that courts of law have no jurisdiction in relation to decisions ordinarily taken in good faith, but will intervene where there is evidence of *mala fides*, irregularity or non-observance of the procedures laid down. See for example *Middelburg Rugby Klub v Suid-Oos Transvaalse Rugby Unie* (1978) where a disciplinary committee had not given its decision within seven days as prescribed by the constitution of the association and the High Court held that the charges as a consequence had fallen away (at 487G).
[75] Raath and De Freitas (2002:279) explain that, whereas an appeal is directed at the result of the hearing, a review is directed at the manner in which a result was obtained. In addition, in an appeal the parties are restricted to the record of the proceedings while in the case of a review they may go beyond the record.

make a decision itself, or where the tribunal has exhibited unusual incompetence (Louw 2010:195).

In the instance of contractual agreements, the determination of merits is, however, not a simple matter. In *Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur* (1994) the High Court (WLD) heard an application by members of the respondent congregation for an order declaring that the decision of the church council of the respondent congregation to withdraw from the general synodal structure was invalid and of no force and effect. The dispute hinged on the meaning of "constituent churches" (which would have been at liberty to withdraw from the connection under certain circumstances) in terms of the Church Order of the NGK. The court considered the merits of the case in terms of the ordinary principles of the law of contract. This entails that, where the wording of a contract reveals defects, such as material vagueness, incompleteness, obscurity or ambiguity, relevant background circumstances and other external evidence may (or even should) be taken into account.[76] The court held that, in terms of these principles, it was perfectly clear that the "constituent churches" referred to were the provincial synods of the NGK and not local congregations, and that the respondent's church council had acted beyond its lawful authority.[77] Schabort, J., also applied another basic principle of the interpretation of contracts in determining the true meaning of a rule in a church order. In terms of this rule, extrinsic evidence is admissible of every fact which identifies any person or thing mentioned in the document under scrutiny, and of every fact to which the document refers or may have been intended to refer.[78]

Sadler (1979:73) and Church (2009:92) also emphasise that no appeal lies from a domestic church tribunal to the civil courts and that the latter only possess powers of review. According to these views, the courts should not interfere with the merits of a decision but can review the decision if there are certain formal directives. The criteria include that the powers of the court to interpret a

[76] At 196E-G. See *United Apostolic Faith Church v Boksburg Christian Academy* (2011) where the court also warned against a clause being rendered void for vagueness (at 20).
[77] At a meeting in 1962 of the synods of the NGK of the Cape Province, Natal, the Orange Free State, Transvaal and South West Africa, the Federal Council of Churches was disbanded in favour of a general synod with the aforementioned churches as "constituent churches" (at 192A).
[78] At 197C-198A. See also 7.8 (*infra*).

domestic statute are limited to the meaning attached to it by the tribunal. Courts also have jurisdiction in "jurisdictional issues", such as where a domestic tribunal has exceeded its powers; and they have power of review where a tribunal has failed to apply its mind to the matter, or was prompted by malice.

In the pre-constitutional era all grounds of judicial review were considered to be founded on the broad principle of *ultra vires*.[79] O'Regan (2004:427) shows how administrative-law principles were not only applied to curb the exercise of state power, but also to regulate non-governmental power where the courts had shown a "remarkable willingness" to hold bodies exercising power over individuals to account through judicial review.[80] The common-law principles of judicial review during this era appear to have lacked coherence and consistency.[81] Currently the power to review administrative acts of those in authority stems from the Constitution.[82]

The judgment in *Odendaal v Loggerenberg en Andere* (1961) sets out the traditional formal standard in the case of a review, in terms of which a court of law would only interfere with the decision of a domestic tribunal where there was a clear violation of the rules and regulations as set out in the constitution of the association in the hearing and the judgment, or where the basic principles of justice had been violated and the violation caused prejudice to the accused.[83]

In *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) Jansen, J.A., explained that the application of the formal standard requires that a court concerns itself with the question whether the body clothed with discretion has actually exercised its discretion and not with the question of how such a body has exercised its authority. Therefore a court needs to distinguish between the merits of the act of a body and questions which fall outside the merits, referred to as "jurisdictional facts" or "preliminary or collateral issues". The justice conceded that where the dividing line between pure merits and these other matters lies, was very difficult to determine with precision. As a

[79] O'Regan (2004:426).
[80] See for example *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976).
[81] O'Regan (2004:428).
[82] *Id.*:431. See 7.4 (*infra*).
[83] At 719.

necessary consequence of the application of the basic principles of contract, especially of good faith, an extended formal standard must be applied and therefore a contractual tribunal can be subject to a standard of reasonableness.[84]

Recently, in *Mbombo v Church of the Province of Southern Africa, Diocese of Highveld* (2011) the South Gauteng High Court, after reviewing the decision of a domestic investigating committee, declared a decision of the respondent in terminating the applicant's pastoral services unfair and procedurally defective, and set it aside. The procedure followed was found to have been irregular for lack of compliance with the canons of the Church[85] and the matter was referred back to the respondent (with cost) for a fresh consideration and/or inquiry before a new panel. The court reiterated that, where an applicant's livelihood was at stake, a tribunal should rather err on the side of caution and ensure that the panel or inquiry or hearing complies fully with the canons of the Church – both in form and procedure.[86] The court hereby seems to have applied an extended formal standard in determining the unfairness of the dismissal.

This extended formal standard which includes the standard of reasonableness inevitably implies that courts of law have the power and authority to interpret the regulations of a church order and indeed have the final jurisdiction with regard to such an interpretation. This situation is unsatisfactory, and indeed untenable, and will be revisited in 7.8 (*infra*).

7.2.3.4 Doctrine and the courts

"Geloofskwessies is nie vir geregshowe bedoel nie". Despite this statement by Justice Harms in *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende*

[84] At 3G-H.
[85] The judgment shows that there was no evidence that any of the complainants had taken any oath or affirmation in terms of the canons; equally, the record does not indicate whether any cross-examination was allowed and the report shows that there were two distinct sessions, the second being a closed session where the applicant was excluded (at 36).
[86] At 39.

Gereformeerde Kerk in Suider-Afrika (1996)[87] religious doctrine seems to become the subject of court cases every so often, albeit with some reluctance (in varying degrees) shown by the courts.[88] In recent years the doctrine of doctrinal entanglement, as described in *Ryland v Edros* (1997), *Taylor v Kurtstag NO and Others* (2004), and *Singh v Ramparsad* (2007) became part of our law (see chapter 5, *supra*), and changed the landscape of doctrinal adjudication.

Gardiner, J., in *Du Plessis v Synod of the Dutch Reformed Church* (1930) (cf. 3.7.3.1.2, supra), notes that where parties were not bound by domestic rules and regulations, the court may have to decide what is or is not in conflict with the doctrine of the church. He cites an example where a testator bequeathed an annuity to a journalist to be enjoyed as long as he refrained from publishing anything in conflict with the doctrine of the church. In the case of an alleged breach of the conditions, the court would have to decide whether the published article was indeed in conflict with the doctrine of the church in question.[89] The justice, therefore, does not deny that the court has jurisdiction over doctrinal issues.

There appears to be some inconsistency in the way the courts have dealt with doctrinal matters in the past. In *Nel and Others v Donges NO and Others* (1919), regarding the administration of the sacrament of communion, the court disposed of the case on the grounds that it was a purely spiritual matter (see 3.7.3.2, *supra*). *Old Apostolic Church of Africa v Non-White Old Apostolic Church of Africa* (1975) also serves as an example of a case before the court where only a non-pecuniary interest was at stake. A dispute arose over the issue of the name of a church after a schism. Watermeyer, J., held that there is apparently no suggestion on the papers that there is any particular theology denoted by the words "Old Apostolic". He held "that the name 'Old Apostolic Church of Africa' is

[87] At 2. See also the opinion of Jansen, J.A., in *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 22A) that it may be that "die Kerk outonomie oor leerkwessies geniet".
[88] Cf. *Kotzé v Murray* (1864) where it is conceded (*obiter*) that the court cannot enquire whether the doctrine in question was true or false, but is competent to declare whether or not a claimant adheres to the doctrine (at 43-44). See also the dictum by De Villiers, J.P., in *De Waal and Others v Van der Horst and Others* (1918): "In the case of religious societies Courts of law do not pretend to exercise any spiritual jurisdiction, and only decide questions of doctrine when necessary for the determination of some right in the legal acceptation of the term" (at 282). See also Fourie (1973:159).
[89] At 420.

not descriptive of the theology practised by that church".[90] It would, however, be almost impossible to come to such a conclusion without at least a nominal measure of doctrinal enquiry.

The historical position is that courts of law have no power or authority to determine disputes between members of a church except for the enforcement of a civil right.[91] This position was clearly set out in *De Waal and Others v Van der Horst and Others* (1918) by De Villiers, J.P., who stated that "it is a well-settled principle that courts of law have no power to determine disputes amongst members (of a voluntary association) except for the enforcement of some civil or temporal right".[92] This right could include, *inter alia*, rights pertaining to property, interpretation of a contract, the right to control funds, or rights concerning a delict.[93]

Malherbe (2008:272) indicates that the state is also, in terms of the right to freedom of religion, barred by the doctrine of doctrinal entanglement[94] from exercising authority over the church's sovereign sphere. This means that a church may enjoy autonomy over doctrine, and all the decisions and actions that may result from the doctrine, in a manner that excludes the jurisdiction of the courts. This principle is applied where a religious institution takes decisions (based on its doctrine) which may infringe upon the fundamental rights of persons, or where the state prohibits actions that form an inherent part of a church's doctrine. Although the doctrine has its origin in the USA,[95] the same principles ought to apply in South African church cases.

Liebenberg, J., in *Christian Education SA v Minister of Education* (1999) noted that a court will consider the question of whether the belief relied upon indeed forms part of the doctrine of the church. If the court finds in the affirmative, it will not embark upon an evaluation of the acceptability, logic, consistency or

[90] At 688.
[91] *Long v Bishop of Cape Town* (1863) (at 178-179); *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (at 88).
[92] At 281.
[93] *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (at 88).
[94] Malherbe uses the term "non-entanglement doctrine".
[95] See chapter 4 for the position in the USA where disputes over property arose from doctrinal conflict.

comprehensibility of the belief.[96] The court, however, did not explain how the belief in question would be evaluated without interpreting doctrine.

Courts worldwide are generally wary of becoming involved in doctrinal disputes. This approach is expressed in the judgment in *Mankatshu v Old Apostolic Church of Africa and Others* (1994): "Jurisdiction or the lack of it is an important issue when considering whether a party aggrieved by his church can take the dispute to a civil court. The authorities say that, when there is an absence of civil rights or interests prejudicially affected by a decision of a voluntary association, the civil courts have no jurisdiction".[97] This contention is however challenged by some scholars. Warnink (2001a:167ff.), for example, is of the opinion that civil courts in modern states no longer have the tendency to spare organised religion when other fundamental rights have to be weighed up against religious rights.[98]

Smith (1998:9) correctly asserts that it is unlikely that churches will be required to order their affairs in accordance with the Bill of Rights in the same way required of the state and other social actors: "For religious freedom to be meaningful, the Constitution must permit religious groups to organize themselves around their own doctrines even if these doctrines appear peculiar, chauvinist or biased to others".

7.3 Authority of church assemblies

7.3.1 Introduction

Ordereël 3.1 of the Church Order of the NHK (2010) states: "Vergaderings neem besluite op grond van die Skrif (i) in ooreenstemming met die belydenis van die Kerk en die Kerkorde (ii) met inagneming van die gebruike van die Kerk". To this hermeneutical hierarchy of interpretation may be added, by necessary implication, the binding decisions of previous assemblies.

[96] At 958E.
[97] At 460H. The court found that a non-stipendiary priest had no civil rights or interests entitling him to be heard. See also *Motaung v Makubela and Another, NNO; Motaung v Mothiba, NO* (1975) (at 628C) and *Moses Manzini and 8 others v Guta Ra Mwari Church* (2008) (at 10-11). Cf. *Taylor v Kurtstag NO and Others* (2004) (at 396F, para. 61).
[98] Cf. Strauss (2007:205).

The Church Order of the GKSA (2012) deals with church assemblies in articles 29 to 52. Article 30 provides that church assemblies "shall deal only with ecclesiastical matters and shall do so in an ecclesiastical manner" and article 31 states: "A decision reached at a church assembly by a majority of votes shall be considered fixed and binding, unless it is subsequently proved that it conflicts with the Word of God or the articles of the church order".

Vorster (1999:55) shows how Reformed churches through the ages have not been consistent in their respective definitions of "ecclesiastical matters". Marriage, poverty and human rights, for example, are ethical or political issues but may also be of ecclesiastical concern. The principles of the Word are not spiritual only – neither do they exist in a vacuum. The application of Biblical principles in politics and society can therefore also be seen as ecclesiastical matters that should be resolved in an ecclesiastical manner by the rule of Christ and the Word.[99] Spoelstra (1989:179) also emphasises the unique character of church assemblies: "Kragtens die soewereiniteit, heerskappy (koninkryk) en verordening van God regeer Hy sy kerk deur Christus. Hy doen dit deur sy Woord en Gees en maak gebruik van mense" (references omitted).

In a similar vein, article 20.1 of the Church Order of the NGK (2011) reads: "Die vergaderinge (van die kerk) het, elkeen na sy eie aard en funksie, 'n kerklike gesag deur Christus aan hulle toevertrou".[100] Article 21 adds to this: "Die kerkvergaderinge behandel sake vanuit kerklike perspektief, in die lig van die Woord van God en op kerklike wyse".[101]

Strauss (2008:239ff.) illustrates how article 20.1 (*supra*) stems from the Dutch neo-Calvinism of the 1960s and is closely related to the doctrine of sphere sovereignty (see 5.2.6, *supra*) – a sovereignty that has become cloudy in a constitutional system with its focus on fundamental human rights, horizontal relationships, and democratic decision-making. Strauss reiterates that Christ's church is an institution that has been granted authority by God's Word and the

[99] Vorster (1999:58) shows that, in the GKSA, deputies are sent to major assemblies to convey the points of view of the assemblies they represent.
[100] Earlier versions of the Church Order of the NGK used the word "verleen" where the word "toevertrou" is used in the 2011 Church Order (cf. Strauss 2008:248; 2010:148).
[101] Strauss (2010:10) comments that this article contains an "immergroen beginsel ... dat die vergaderings wat die kerk regeer, na die aard van die kerk moet optree".

Reformed confession. Christ as Head reigns supreme in his church – directly and indirectly. Ecclesiastical authority is a unique authority that reflects the church as a unique institution.

In the light of the firmly entrenched constitutional freedoms and guarantees, as set out in chapter 5, the internal authority of church assemblies remains beyond reproach as long as they stay within the boundaries of their Scriptural and dogmatic foundation,[102] and remain within their scope of authority.

7.3.2 Judicial status of church assemblies

In chapter 6 (*supra*) it was shown that the validity and effect of internal rules and statutes are not dependent on the entity being entrusted with juristic subjectivity (even though its judicial status may be influenced by its legal position). All its (legal) rules and regulations will have a binding effect. The basis of this authority has historically been the contractual nature of the church as a voluntary association. In addition, section 9 of the Constitution affords all churches, and indeed all religious institutions, equitable and unbiased treatment (see 5.3.4 [*supra*] for the text of section 9).

Acts that are beyond the competence of a legislative body are *ultra vires* no matter what their motives are.[103] This would, for instance, also apply to the person signing on behalf of the body. This was illustrated when the South Gauteng High Court heard a case in 2011 involving a pastor who signed a lease agreement on behalf of the Church, without consulting the executive council of the Church. In the case of *United Apostolic Faith Church v Boksburg Christian Academy*, the *ultra vires* action of a pastor may have caused a contract signed by him or her to be null and void. The court criticised this action and affirmed that, in matters temporal, clergy have to operate within a definitive hierarchy of

[102] See also Du Plooy (2012:2).
[103] In *African Presbyterian Bafolisi Church of Southern Africa v Moloi and Another* (2010) the decision of a synod regarding the removal from office of an archbishop was declared invalid by the Free State High Court: "The fact that the synod is the supreme governing body of the church does not empower it to act in a manner that is unconstitutional. The supremacy of the governing structure of the applicant does not serve and will never serve as a carte blanche to legalise flagrant violations of the rights of its members" (at 21). See also *Nederduitse Gereformeerde Kerk in Afrika (OVS) en Nederduitse Gereformeerde Kerk in Afrika (Phororo) v Verenigende Gereformeerde Kerk in Suider-Afrika* (1996) (at 13).

authority. No autonomous powers are conferred upon ministers.[104] The defendants' receipt of a copy of the constitution of the Church was considered to be a significant point in preventing them from relying on the doctrine of estoppel.

The court in *Nederduitsch Hervormde Congregation of Rustenburg v Nederduitsch Hervormde or Gereformeerde Congregation of Rustenburg* (1895) ruled that in a corporation, in addition to the fact that those members who have not consented to the termination of its existence continue to form the old congregation, a majority can only bind the minority in that which lies within the scope and object of the corporation. The court also noted that silence is not always equivalent to consent. Only when it is one's duty to speak out is one bound by one's silence (see 3.6.5.10, *supra*).

The powers a church assembly has are those derived from its church order which (purportedly) constitutes the contract between the church and its members. Its only powers are thus powers conferred to it in the contract. This means that church orders and the resolutions of assemblies are not binding upon outsiders. The church order creates reciprocal rights and obligations between the church and its members only.[105]

7.3.3 Church discipline

It is commonly accepted that discipline within the church is an annoying necessity. This study's primary concern is not the feasibility, fairness, or validity of internal disciplinary approaches and procedures. The study's objective is to investigate the way that the state, through the civil courts, would generally afford the church freedom to discipline its members according to its own rules and statutes, without undue interference.

The *Algemeen Reglement voor het Bestuur der Hervormde Kerk in het Koningrijk der Nederlanden* of 1816, on which the 1824-Ordinance was moulded (see 3.5.3, *supra*), contained a "Reglement op de Uitoefening van kerkelijk

[104] At 22.
[105] Cf. *Cronje v United Cricket Board of South Africa* (2001) (at 2588).

opzicht en tucht voor de Nederlandse Hervormde Kerk". This could be considered to be the predecessor for disciplinary directions today.[106]

Lord Kingsdown in *Long v Bishop of Cape Town* (1863) noted that church tribunals are not courts of law in any sense, as their jurisdiction rests entirely upon agreement of the parties, and therefore they have no power to enforce verdicts and sentences. They have to apply to the civil courts to effect their judgments – a position that still exists today.

Sadler (1979) offers a comprehensive account of the state of affairs in the years preceding 1994. Sadler (*Id.*:3) warns against having too many rules and regulations pertaining to disciplinary procedure as that may hamper a tribunal acting according to its own judgment, resulting in an increased risk of having the decision overturned by a competent civil court. The absence of a proper set of procedural rules, however, may equally prove to be problematic in a civil review.

In *Taylor v Kurtstag NO and Others* (2004) (see 5.5.11, *supra*) the applicant approached the High Court (WLD) to set aside a *cherim* of a Jewish ecclesiastical court, excommunicating him from the Jewish society. He argued that the *cherim* conflicted with his individual rights to religion and to cultural association.[107] The court ruled that the limitation of the applicant's rights was reasonable and justifiable in an open and democratic society as a failure to enforce its rulings would result in the Jewish faith not being able to protect the integrity of Jewish law.[108] The court also held that "(t)he members of the faith, exercising their own rights in terms of section 31, have the right to protect the integrity of their common bond by disciplining those who do not conform".[109]

7.3.4 Church tribunals

It is at the juncture of church discipline where church policy, based on human rights, and other fundamental rights, public order, and the principles of the law-state, may collide.[110] The powers of adjudication of church tribunals are derived

[106] Cf. Sadler (1979:6, footnote 8).
[107] Cf. sections 15, 18 and 31 of the Constitution.
[108] Cf. 5.5.11 (*supra*).
[109] At 58.
[110] Warnink (2001a:159).

from the contractual basis of church membership (see chapter 6, *supra*). These powers should be distinguished from that of statutory administrative bodies whose powers are based on the empowering statute, the intention of the legislature being decisive. In the case of church tribunals the key is the intention of the contracting parties.[111] All members of the Churches under discussion are subject to the jurisdiction of church tribunals through their confirmation and, in the case of ministers, the signing of a legitimising formula (Sadler 1979:44). Disciplinary hearings should not, however, be instituted arbitrarily. Councils may be exposed to claims for damages if they do this. There must be an investigation and only then action may proceed.[112] In *Mbombo v Church of the Province of Southern Africa, Diocese of Highveld* (2011) the court held that, where an applicant's very future and livelihood are at stake, a tribunal should rather err on the side of caution and ensure that the panel, inquiry, or hearing complies fully with the Canons of the Church – both in form and procedure.[113]

It appears that, historically, South African courts have treated domestic tribunals in accordance with the Latin maxim *tu patere legem quam ipse fecisti*, according to which an authority is bound by its own rules if it has acted within the scope of its authority, as long as those rules have not been amended or revoked and are followed consistently and according to the principles of justice.[114] Where the rules of a voluntary association provide that certain disputes should be dealt with by a domestic tribunal, the courts of law will not, as a rule, usurp their functions. If, however, a dispute arises for which the domestic rules do not provide, the courts would not refer the matter back to the domestic tribunal but deal with it themselves.[115] Furthermore, the mere fact that a person has the right to have his dispute heard by a domestic tribunal does not compel him to follow that route. It is only when he is bound to do so that he has no other option.[116]

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[111] Church (2009:89-90). See also *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 21D-F).
[112] *Van Vuuren v Van der Merwe and Another* (2005) (at 39).
[113] At 39. It may, however, not always be necessary to take disciplinary action against a member and an association may rely on its right of non-association in terms of section 18 of the Constitution (cf. *Cronje v United Cricket Board of South Africa* [at 2595G-2596H]).
[114] Cf. e.g. *Long v Bishop of Cape Town* (1863) (see 3.5.4.2, *supra*), *De Waal and Others v Van der Horst and Others* (1918) (see 3.7.3.4, *supra*), and *Taylor v Kurtstag NO and Others* (2004).
[115] *Crisp v South African Council of the Amalgamated Engineering Union* (1929) (at 225).
[116] Argument for the applicant in *Crisp v South African Council of the Amalgamated Engineering Union* (1929) (at 230-231).

Churches often introduce domestic tribunals for adjudicating internal disputes. The SCA in *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) had to rule on the conditions where a court can interfere with the decisions of church tribunals. The case revolved around the correct interpretation of certain articles in the church order of the erstwhile NG Sendingkerk. No general church immunity was pleaded by the respondents,[117] only whether the court could concern itself with the way (thus jurisdictional matters and not concerning the merits)[118] decisions are taken by a body that is clothed with discretion. Jansen, J.A. (Van Blerk, A.C.J., concurring), held that a church tribunal, as a "contractual tribunal" (judged on the same principles as other contractual tribunals of voluntary associations), can be interfered with on the grounds of the basic principles of contractual agreements, notably that of good faith, as well as be subjected to an extended standard of reasonableness. The powers of a church tribunal should therefore not be equated with those of statutory administrative bodies. The latter's powers are founded on the empowering statute (the intention of the legislature being decisive), while a church tribunal is based on contract and should thus be interpreted according to the rules of contractual agreements, the intention of the contracting parties being pivotal.[119]

A problem with church tribunals is that legislative, executive, and judicial powers are consigned to one and the same body. This may lead to conflict between religious rights and other rights, including equality. Warnink (2001a:161) is no doubt correct in asserting that "(e)very attempt at increasing the quality of protection of rights within the church will automatically lead to a restriction of

[117] Cf. *Burgers v Murray and Others* (1865) which seems to have been the last case in South African legal history where an absolute immunity from court interference with spiritual matters was claimed (see 3.5.5, *supra*).
[118] Cf. *Du Plessis v The Synod of the Dutch Reformed Church* (1930) where the applicant attempted to have an appeal heard on the merits of the case.
[119] Cf. Church (2009:89-90). See also *Mazwi and Others v Fort Beaufort United Congregational Church of Southern Africa and Another* (2010) where Mageza, A.J., held that an association has no inherent power to conduct disciplinary proceedings and to punish a member. The constitution (church order in the case of churches) determines which violations of the rules by members warrant disciplinary action being taken against them, how the domestic tribunal entrusted with the investigation of such violations is to be constituted, the procedure to be followed by the tribunal in the exercise of its functions, and the penalties to be imposed for a violation of the rules. The court added that the tribunal must follow its constitution, and where sanctions are provided for, they must be applied according to the letter of the constitution, without undue and irrational deviation. Once an adverse finding is made pursuant to a lawful internal hearing, the legislated sanctions must be fairly and consistently applied (at 24).

collective freedom of religion". Conversely it may be said that preserving the religious rights would (from a civil point of view) result in deficient protection of other rights within the church.[120]

It is to be accepted that it is the conduct of persons in office, or of other church members, which normally becomes the subject of domestic church tribunals. Whether the ethical and moral behaviour of a member is acceptable in terms of the provisions of the church will often inevitably require an exegetical-theological investigation dependent on the interpretation of Scripture. Acceptable conduct could therefore also be construed to be a doctrinal matter and the courts could be disinclined to become entangled in questions regarding the conduct of members of the church, where the behaviour in question is not unlawful. Similar sentiments were expressed in *Taylor v Kurtstag NO and Others* (2004) where the court accepted that it may not be in a position to determine whether someone is morally and religiously fit to carry out certain duties within the church.[121] This remains a religious function which, in principle, precludes the courts from becoming involved.

Religious doctrine may not, however, be used to exclude the jurisdiction of the courts. In *Du Plessis v Synod of the Dutch Reformed Church* (1930) it was held that if the tribunal acts with *mala fides*, the court will protect the individual affected. If, for instance, a church tribunal, in order to acquire jurisdiction, were to label something heresy that the members would not reasonably have considered heresy, then the court would upset their decision, not because the words complained of were not heresy, but because the tribunal acted irregularly, in being governed by *mala fides*.[122] It is, however, not clear how a court of law would determine the issue without a certain measure of entanglement. In order to decide whether a quasi-doctrinal or real doctrinal issue is at stake any court of law will have to consider the merits of the case – a procedural enquiry would, for obvious reasons, not be sufficient. This would, however, be a breach of constitutional guarantees regarding the free exercise of religion and the precedent of non-entanglement.

[120] See 5.4.3 (*supra*) for an analysis of the two-stage approach the courts will follow in balancing opposing fundamental rights.
[121] At 39.
[122] At 422.

7.3.5 Legal representation at church tribunals

The exclusion of legal representation at disciplinary hearings as provided in some church orders[123] is a controversial topic and it is closely related to the principle of *pacta sunt servanda* (see 7.2.3.2, *supra*), church tribunals (see 7.3.4, *supra*), and the church and labour law (see 7.6, *infra*). According to Coertzen (2008:66) regulations that parties in disciplinary hearings within the church are not permitted legal representation could be justified. Deacon (2004:109ff.), however, is of the opinion that legal representation should always be an option for any party during any disciplinary hearing (although it is conceded that the presiding officer should have discretion not to allow legal representation).

In terms of the Code of Good Practice on Dismissal contained in Schedule 8 of the Labour Relations Act (Act 66 of 1995) when an enquiry is held into an employee's alleged misconduct the employee should be allowed the assistance of a trade union representative or fellow employee. It is on this basis that employers allow the accused to be represented by someone within the organisation. However, this right does not extend to the inclusion of the right to be represented by a legal representative, and employers often bar external legal representatives from representing accused employees at domestic tribunal hearings. In terms of our common law, a person does not have an absolute right to be legally represented before tribunals other than courts of law.[124]

In *The MEC: Department of Finance, Economic Affairs and Tourism: Northern Province v Schoon Godwilly Mahumani* (2004), the SCA held that, even if a disciplinary code expressly excludes legal practitioners, it will be for the presiding officer to apply his mind to the need for legal representation, after considering the circumstances of the case. An employee's request for legal

[123] Reglement 16 of the "Reglemente, Beleid, Funksionele Besluite en Riglyne", annexed to the Church Order of the NGK (2011), states at 8.1.5: "Die partye is nie geregtig op iemand wat namens hulle optree nie, maar kan bygestaan word deur 'n NG Kerklidmaat van die eie of 'n ander gemeente" (except in extraordinary circumstances at the discretion of the tribunal). In the "Reglement vir die prosedure by die ondersoek van 'n klag", annexed to the Church Order of the NHK (2010), 2.4(iii) reads: "Dat die klaer(s) en die aangeklaagde(s) hom of haar in die vergadering kan laat bystaan deur 'n lidmaat van die Kerk *mits daardie lidmaat nie enigsins praktiseer as prokureur of advokaat nie*" (emphasis added).

[124] *Dabner v SA Railways and Harbours* (1920) – in the words of Innes, C.J.: "No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none" (at 598).

representation can thus not be summarily dismissed. This does not mean, however, that such requests must always be granted.

According to *Ncgongo v University of South Africa and Another* (2012) a tribunal will always have the discretion to decide whether external representation should be allowed. Basson, J., held that it is unlikely that the court will rule that legal representation can never be permitted under any circumstances, even where a disciplinary code states that external legal representation is not permitted. It remains in the discretion of the presiding officer and is not an absolute right.

The Constitutional Court in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau and Others* (2010), although conceding that the right to legal representation raises a constitutional question, failed to rule on the matter. The court found that it was not in the interests of justice to hear the case because section 140(1) of the Labour Relations Act, which was challenged by the applicant, had already been repealed seven years earlier.

On 20 September 2013, in *CCMA v Law Society, Northern Provinces*, the SCA delivered the most recent judgment pertaining to this matter after it had heard a challenge to the "Rules for the Conduct of Proceedings before the CCMA" which provide that legal representation, in conciliation proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA), is not allowed. The respondent, the Law Society of the Northern Provinces, contended that the rule was in conflict with section 34 of the Constitution. The court upheld the appeal by the CCMA and retained the common-law position that no person has an unqualified right to legal representation in a tribunal other than a court of law. By natural extension this judgment ought to be applicable to the disciplinary hearings conducted by church tribunals as well.

7.4 Administrative law and the church

7.4.1 Introduction

The foundation of administrative law in South Africa changed dramatically after 1994. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (2000),

Chaskalson, P., explains that powers previously regulated by the common law, in terms of the principles developed by the courts to control the exercise of public power, are now regulated by the Constitution of South Africa.[125] There is, however, no clear line between public and private law. Administrative law, which forms the core of public law, is an incident of the separation of powers by which courts regulate and control the exercise of public power in branches of government. In the pre-constitutional era, the common law was the main crucible for the development of these principles of constitutional law. The Constitution shifted all aspects of public law from the realm of common law to the prescripts of a written constitution, which is the supreme law. The well-established principles of common law will, however, continue to inform the content of administrative law, although the Constitution reinforces the powers of the courts.[126]

Article 33(1) of the Constitution provides that "(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair".[127] This poses the question as to the applicability of section 33 to churches. As administrative law forms part of public law, it regulates the activities of organs of state and natural or juristic persons who exercise public powers or perform public functions. This includes prescribing the procedures to be followed when public powers are exercised or public functions performed, and ensuring that such action is within the boundaries of the law. An administrative-law relationship is deemed to exist where there is an administrative authority (namely, the organ of state, natural or juristic person) and a subordinate or lower-ranking individual.[128] Legislation was enacted (see section 33.3 at footnote 127) to give effect to these rights in the form of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

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[125] At 41.

[126] At 45. Cf. O'Regan (2004:424-437) who is of the opinion that administrative law as a constitutional technique to avoid the abuse of executive power was found wanting in the face of apparent abuse of power under the state of emergency in the early 1990s. In what she calls a "seismic shift" all public power must now source itself in the Constitution.

[127] The article also provides: 33(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. 33(3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

[128] Beukes (2010:1-19).

7.4.2 Administrative law in the private sphere

A natural or juristic person only takes administrative action when exercising public power or performing public functions in terms of section 1 of PAJA. Section 33 of the Constitution is, *prima facie*, only applicable to public bodies invested with public power.[129] The question remains whether church domestic tribunals are bound by just administrative action, notably the rules of natural justice.[130]

Section 33(1) of the Constitution guarantees everyone the right to administrative action that is reasonable. PAJA gives effect to the right to reasonable administrative action by giving an individual the capacity under section 6(1) to institute court proceedings for the judicial review of an administrative action that appears unreasonable.

Voluntary associations such as churches are non-statutory bodies. The relationship between the association and its members, however, is similar to the authoritative/subordinate relationship of public law – it is an unequal relationship in which an individual member is subordinate. It has been argued that they are subject to the common-law rules of administrative law because of this very reason.[131] In addition, the power exercised by these associations may be said to be public in nature due to the public interest therein. These associations are, however, not organs of state, they are not created by statute, nor do they possess state authority.

The application of administrative law to voluntary associations, via the provisions of the Constitution and PAJA, remains somewhat uncertain. If there is significant public interest and the conduct of the voluntary association is sufficiently public in nature (and the association effectively exercises public power), the court may

[129] Confirmed by the court in *Cronje v United Cricket Board of South Africa* (2001) (at 2590A-2594D).
[130] Cf. *Kotze v Murray* (1864), *Van Rooyen v Dutch Reformed Utrecht* (1915), *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952), *Odendaal v Loggerenberg* (1961), and *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 3F).
[131] Pienaar (1998:177). See also authorities cited in *Klein v Dainfern College and Another* (2005) (at 19).

justify the application of PAJA.[132] The right to just administrative action[133] does not automatically apply to a disciplinary tribunal of a church. Section 15 guarantees the autonomy of such a tribunal when deciding cases.

PAJA does not confine the definition of "administrative action" to decisions by organs of the state or public bodies. An "empowering provision" is defined as "a law, a rule of common law, customary law, or an agreement, instrument or other document, in terms of which an administrative action was purportedly taken". In terms of these definitions the South Gauteng High Court in *Louisvale Pirates v South African Football Association* (2012) decided that PAJA was applicable to SAFA (found to be performing a public function as the only soccer body governing the game in South Africa, functioning in terms of its constitution that constitutes an empowering provision) and its members in matters concerning disciplinary procedures, although it is a private body or voluntary association.[134] The same applied to the respondent in *TIRFU Raiders Rugby Club v South African Rugby Union and Others* (2006), and the appellant in *National Horseracing Authority of Southern Africa v Naidoo and Another* (2010).[135]

In *Cronje v United Cricket Board of South Africa* (2001), Kirk-Cohen, J., after thoroughly analysing a vast number of authorities, concluded that in the exercise of its powers the UCB was not a public body – it was a voluntary association wholly unconnected to the state; its functions were private not public. In *Hare v President of National Court of Appeal No 140 and Another* (2009) Blieden, J., came to exactly the same conclusion regarding the second respondent, namely, Motorsport South Africa: The mere fact that the organisation is the sole controlling body for motorsport in South Africa "does not render the decisions of

[132] See *TIRFU Raiders Rugby Club v South African Rugby Union and Others* (2006).
[133] Section 33 of the Constitution.
[134] At 29.
[135] The court in *National Horseracing Authority of Southern Africa v Naidoo and Another* (2010) considered the law applicable to domestic disciplinary tribunals. The applicant had convicted the respondent of certain offences and sentenced him to a warning off, and the respondent had challenged these findings in the High Court, with partial success. In an appeal to the Natal Provincial Division, the majority found that the fundamental principles of justice applying to such tribunals should be developed to include the further ingredient of rationality, while the minority (Wallis, J.) raised the important question of whether a decision of such a tribunal can be considered to be administrative action as defined in PAJA. The justice preferred to decide the case on the basis that the respondent was entitled to challenge the decisions of the board of enquiry by way of a rationality review under PAJA, rather than the alternative approach, namely, the common-law concept of natural justice (at 29).

its tribunal an 'exercise of public power' or 'the performance of a public function'".[136] Its decisions therefore do not qualify as administrative action as defined in PAJA and are therefore not subject to judicial review.[137] The contract between the parties, however, had incorporated the rules of natural justice and the remedies available would be contractually founded and not in terms of PAJA.[138] The court in *Klein v Dainfern College and Another* (2005) also held that the decision of a domestic tribunal established in terms of contract does not fall within the definition of "administrative action" as contemplated by PAJA.[139]

In *Mbombo v Church of the Province of Southern Africa, Diocese of Highveld* (2011) the South Gauteng High Court held that the respondent committed a gross procedural irregularity in terms of administrative-law principles and requirements.[140] The court, however, (wisely) stopped short of surrendering to the applicant's contention that the respondent's action was an administrative act which should conform to the prescripts of the Constitution and PAJA.

In *Danville Gemeente van die AGS van Suid-Afrika en Andere v AGS van Suid-Afrika en Andere* (2012) the Northwest High Court ruled that the respondent Church does not exercise a public function and therefore PAJA is not applicable. The constitution of the Church does, however, provide for the application of the rules of natural justice[141] and the court considered that to be sufficient to found jurisdiction on the court's power of review.[142]

7.4.3 Rules of natural justice

It seems reasonable to find that, as voluntary associations wholly unconnected to the state, churches' functions are entirely in the private sphere. However, it has been suggested that a domestic tribunal of a church must act in accordance with two sets of procedural constraints – those laid down in the church order,

[136] At 11.
[137] At 12.
[138] At 13.
[139] At 29.
[140] At 44.
[141] Article 11.2 of the Constitution of the Apostolic Faith Mission of South Africa reads: "During any proceedings care shall be exercised that there is no deviation from the principles of natural justice".
[142] At 11.

and those imposed upon it by the common law, on the basis of natural justice.[143] While it is trite that the former constraint is non-negotiable, there seems to be conflicting opinions as far as the latter is concerned.

The common-law principles of natural justice are commonly expressed in Latin as *nemo iudex in sua causa*[144] and *audi alteram partem*[145] (see 3.5.4.3, *supra*). It should be noted that these rules are not exact or exhaustively defined[146] but still open to further development. This could include the requirement that a tribunal must apply its minds to the matter, must remain within the confines of its authority, and maintain good faith and reasonableness.[147] To this may also be added that the charges should be clear and unambiguous and in written format,[148] and there should be full disclosure of the reasons for any decision reached.[149]

In the case of a statutory tribunal the obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment. In the case of a tribunal created by contract, the courts found that the obligation derives from the expressed or implied terms of the agreement between the contracting parties. The test for determining whether the fundamental principles of natural justice are to be implied, as tacitly included in the agreement between the parties, is the usual test for implying a term in a

[143] Church (2009:90).
[144] "Na my oordeel ly dit geen twyfel dat volgens ons geldende reg die blote skyn van vooroordeel by een of meer lede van 'n verhoor-liggaam op onreëlmatigheid neerkom (*Smith v Ring van Keetmanshoop van die Nederduitse Gereformeerde Kerk Suidwes-Afrika en Andere* [1971], per Hoexter, J. [at 362]).
[145] See, for example, *United Methodist Church of South Africa v Sokufundumala* (1989) where the court held that the respondent was not given an opportunity to state his case and therefore had not received a proper hearing. The court in *Mankatshu v Old Apostolic Church of Africa and Others* (1994) held that the rule does not apply where a party who claims that he or she was denied the opportunity of being heard fails to prove that he or she has civil rights and interests which were prejudicially affected. See also *Bredell v Pienaar and Others* (1922) (at 586) (see also 3.7.3.1.1, *supra*).
[146] *Turner v Jockey Club of South Africa* (1974) (at 646D).
[147] *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976). See also Church (2009:88-89).
[148] "It is one of the most ordinary and elementary rules of the administration of justice by any tribunal of this kind, whether legal or voluntary, that where a person is put upon his trial, or where he is called upon to plead to any charge, he shall, first of all, have the fullest and fairest information as to what it is that he is called upon to meet" (*Van Rooyen v Dutch Reformed Church Utrecht* [1915] [at 331], per Dove Wilson, J.P.). "*Prima facie* the absence of a definite charge must cause serious prejudice to an accused person" (*Bredell v Pienaar and Others* [1922] [at 585] [cf. 3.7.3.1.1, *supra*]). See also *De Vos v Die Ringskommissie van die Ring van die NG Kerk, Bloemfontein, and Another* (1952) (cf. 3.7.3.2, *supra*).
[149] *Bredell v Pienaar and Others* (1922) (at 586).

contract. The test, however, remains subject to the expressed terms of the agreement by which any or all of the principles of natural justice may be excluded or modified.[150] The principles of natural justice may therefore sometimes apply in the sphere of private law, but then only where they are incorporated expressly by contract.[151] Such a right may even be granted to a non-member if the body extends such a right to an outsider in terms of the contract (church order).[152]

In *Van Vuuren v Van der Merwe and Another* (2005) Kruger, J., takes a different view when he states that the principles of natural justice *will* be considered by courts when reviewing cases of church tribunals.[153] Du Plessis (1996:489), while conceding that the constitutional precepts of administrative justice do not bind religious communities,[154] is of the opinion that the requirement that religious communities should comply with the rules of natural justice in instances where the rights of any of their members stand to be affected by decisions, "forms part of the law as it stands". The allowance of the application of fundamental rights to horizontal relationships could very well be taken as entrenching the right of a member of a church to the application of the principles of natural justice in instances where intra-church disputes are to be resolved.

Hiemstra (1946:30-31) emphasises that "(w)anneer die huishoudelike regbank teen die reëls van natuurlike geregtigheid handel ... sal die howe ... ingryp" and if the tribunal acts "grof onredelik", they may even be judged to be liable for the cost of the court case in their personal capacity.

In *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) Hofmeyr, J.A., lamented the violation of the principles of natural justice by the general synodal commission and held that the appellants were thereby deprived of a proper and fair hearing, in view of the fact that the

[150] *Marlin v Durban Turf Club* (1942) (at 125-130); *Turner v Jockey Club of South Africa* (1974) (at 645F-646B).
[151] *United Methodist Church of South Africa v Sokufundumala* (1989).
[152] *Cronje v United Cricket Board of South Africa* (2001) (at 2591C); *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 21D).
[153] At 34.
[154] Even though Du Plessis refers to the Interim Constitution in his discussion, the same principles apply.

appellants were seriously prejudiced by the decision of the circuit.[155] The court held that the review of a quasi-judicial tribunal will always be inevitable if the basic principles of justice are not adhered to. Where these principles are violated the tribunal's decisions could be overturned.

Pienaar (1998:177) is of the opinion that because of the unequal relationship (and potential abuse of power) in the case of voluntary associations (such as churches), contractual preclusion of administrative-law principles may be declared unconstitutional by a court of law. The same line of thinking is followed by Erasmus (2008:109) who shows that the mere fact that a regulation has been introduced in a procedurally correct manner, in terms of the constitution of the body, will not guarantee that it will be binding on its members. An obligation rests on voluntary associations to ensure that the rules and regulations contained in their constitutions conform to the values and principles enshrined in the Constitution.[156]

Although there is no consensus about the matter (as shown *supra* and *infra*), South African courts have on several occasions judged that principles of administrative law are applicable to private relationships in the sport environment.[157] The court in *Turner v Jockey Club of South Africa* (1974), for example, held that a failure of natural justice in the tribunal cannot be cured by a sufficiency of natural justice in an appellate body. In addition to the jockey clubs, other sports bodies have also been subjected to judicial scrutiny which confirms that voluntary associations are bound by the rules of propriety (see 6.8, *supra*). In *Natal Rugby Union v Gould* (1999)[158] the SCA held that it was not necessary to determine whether a tacit term had to be inferred regarding the *nemo iudex in sua causa* principle. Any breach of the principle was found to ordinarily amount to an irregularity in any decision-making process which requires procedural

[155] At 46D-E.
[156] See also Du Plessis (1996:445) and Ungerer (2007:793) who suggest that, as there exists a hierarchical relationship between the parties, common-law principles of natural justice are applicable to the domestic tribunals of the churches.
[157] It is trite that where voluntary sport associations, such as the UCB, SAFA or SARFU, which exercise monopolistic power in the regulation of their respective sport codes, undertake disciplinary action that could have dire consequences for a member's capacity to earn a living, such a person is entitled to a full and fair enquiry into his or her conduct.
[158] The Natal Rugby Union was judged to be a voluntary association and it was held that, on long standing authority, the constitution is a contract entered into by its members (at 440). See also chapter 6 (*supra*).

fairness and would render the process liable to a correction by way of a judicial review.[159]

Even though the relationships within private bodies may be founded on contract, these associations often imply a power imbalance which necessitates the employing of the principles of natural justice. The rules of these bodies on disciplinary procedures require the rules of natural justice to be observed, in other words, the sport body may never assume the power to breach the implied term of the contract with its members, namely, to act fairly. It should be borne in mind, however, that sport is not a protected fundamental human right and as such is not protected in the Constitution – except by reliance on rights such as section 18 (freedom of association). A direct comparison between sport (voluntary) associations and religious institutions cannot therefore be drawn. Furthermore, the doctrine of doctrinal entanglement, which is part of South African law, changed the situation to such an extent that it becomes untenable to draw analogies between churches and other voluntary associations such as sport bodies.

It has also been argued by some scholars that the rules of natural justice are not (necessarily) applicable to domestic tribunals.[160] In cases such as *Jockey Club of South Africa v Feldman* (1942) and *Smith v Ring van Keetmanshoop van die Nederduitse Gereformeerde Kerk Suidwes-Afrika en Andere* (1971) a failure of natural justice was regarded as an irregularity which could be overlooked if no prejudice was proven.

According to Smit (2006:641) an exegetical-dogmatic approach regarding procedure may result in a situation where general legal principles do not apply to the internal application of a specific religious grouping, even to the extent that in a case of conflict “die algemeen aanvaarde reëls van natuurlike geregtigheid ... nie noodwendig deel (is) van die interne prosedure van ’n geloofsgemeenskap nie”.

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[159] At 441. See also *Marlin v Durban Turf Club* (1942), *Jockey Club of South Africa and Others v Feldman* (1942), *Constandinides v Jockey Club of South Africa* (1954), *The Jockey Club of SA v Symons* (1956), *Balomenos v Jockey Club of SA* (1959), *Elsworth v Jockey Club of South Africa* (1961), *Turner v Jockey Club of South Africa* (1974), *Middelburg Rugby Klub v Suid-Oos Transvaalse Rugby Unie* (1978), and *Barnard v Jockey Club of South Africa* (1984).

[160] E.g. Sadler (1979:181) and Smit (2006: 641).

The question could also be raised whether a church (or any other voluntary association) can expressly exclude the application of the principles of natural justice. Milne, J., in *Jamile and Others v African Congregational Church* (1971), in no uncertain terms emphasised that members of a voluntary association may, in terms of its constitution, agree "to modify or even abrogate entirely the principles of natural justice" with regard to enquiries by domestic tribunals.[161] This was essentially also the position of the court in *Klein v Dainfern College and Another* (2005).

In *Cronje v United Cricket Board of South Africa* (2001) the court held that the body regulating cricket is not a public body and therefore does not exercise public power. Consequently its conduct was precluded from the public-law rules of natural justice.[162] The applicant could accordingly not invoke the principles of natural justice in order to set aside the UCB's resolution to ban him from membership of the body. The court found that the applicant had not been entitled to a hearing before the decision had been taken or implemented. An ordinary voluntary association is not a public body and wholly unconnected to the state. It has its origin in contract and not statute. It functions privately and not publicly and is governed by private law and not public law. Its conduct is not subject to public-law rules of natural justice. The dictum by Kirk-Cohen, J., will probably stand up in any court of law: "The rules of natural justice are, in the first place, rules of public law. They are part of the rules of administrative law that regulate the exercise of public power. That was so at common law and, in my view, remains so under the Constitution".[163] This does not, however, mean that the rules of natural justice will never apply in the sphere of private law, but then only when they are incorporated by contract, either expressly or by necessary implication.[164]

The constitutional entrenched rights to freedom of religion (sections 15 and 31) support the argument that churches will be exempt from the directives of administrative law. The principles of natural justice, however, do not require a domestic tribunal to follow the procedure and to apply the technical rules of

[161] At 842. See also *Marlin v Durban Turf Club* (1942) (at 125-130).
[162] Cf. Erasmus (2008:103).
[163] At 2590A.
[164] *Cronje v United Cricket Board of South Africa* (2001) (at 2591C).

evidence observed in a court of law, but they do require such a tribunal to follow a procedure which would afford the person charged a proper hearing and an opportunity of producing evidence and the opportunity to correct or contradict any allegation made against them.[165] While church tribunals may argue that the rules of natural justice are voluntary and could be contractually excluded, it seems feasible for church tribunals to employ it as far as possible. Reasonableness and fairness should be fundamental and non-negotiable characteristics of churches and their tribunals.

7.5 Property

7.5.1 Property rights and ownership

Churches as juristic persons are bearers of the rights in the Constitution.[166] The church therefore may claim rights to property as contemplated by section 25.[167] Recently South African courts have heard several cases involving church property. In 2011, in *United Apostolic Faith Church v Boksburg Christian Academy*, the South Gauteng High Court was called upon to pass judgment in a dispute regarding the immovable property of the applicant church and the lease agreement with a school occupying the premises. In the Western Cape High Court, in *The Board of Incorporators of the Africa Episcopal Church and Others v Heradien and Others* (2012), property rights were at issue when the court ordered the eviction of an expelled minister from a parsonage. The SCA, in a dispute between the parties in *Municipality of Mossel Bay v The Evangelical Lutheran Church* (2013), simply required a normal legal interpretation of the restrictive conditions in a title deed. The SCA found it was incumbent upon the municipality to act in the interest of its residents, in order to fulfil its constitutional mandate towards them, as set out in section 152 of the Constitution of South Africa. The South Gauteng High Court confirmed property rights and the right to sell to anyone, even non-Christians, in *Dutch Reformed Church v Rayan Sooknunan* (2012). In *Uniting Reformed Church, De Doorns v President of the*

[165] *Turner v Jockey Club of South Africa* (1974) (at 646F-G). See also *Motaung v Makubela and Another, NNO; Motaung v Mothiba, NO* (1975) (at 629F) and *United Methodist Church of South Africa v Sokufundumala* (1989) (1058E-I).
[166] Section 8(4).
[167] Section 25(1) reads: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

Republic of South Africa and Others (2013) the court dealt with the freedom to contract (see 7.3.2, *supra*).

In these cases no objections were brought regarding the courts' jurisdiction and no religious doctrine was in question. It is clear that, where churches are involved in property disputes in their normal relations with outsiders, normal civil rules of property apply.

True ownership of church property, however, has also been the subject of court cases involving churches in the past. The court in *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (1893) (at 87) ruled that, while the General Assembly was the legislative body in the Church, according to the evidence of the plaintiffs and the defendants, "the right to dispose of church property rests with the congregation" (see 3.6.5.10, *supra*).

In *Kerkraad van die Nederduitse Gereformeerde Kerk, Gemeente Douglas en 'n Ander v Loots* (1990) the church council applied for an ejectment of the respondent from a farm that was bequeathed to it subject to the respondent's right of lease "on fair terms and conditions". The court refused the application and held that the council had to negotiate with the respondent to determine fair terms and conditions in the light of the court's construction of the will. As this is also, strictly speaking, a dispute with an outside party and therefore not a true "church case", the impression that the church council in this case was the true owner of the property in question is of interest. See the discussion in 6.10 (*supra*) where it was concluded that organs such as a church council only act in a representative capacity and never act as juristic persons in the legal domain.[168]

South African courts have in the past assumed the prerogative to interpret church statutes to adjudicate cases where pecuniary interests were at stake. The court in *De Waal and Others v Van der Horst and Others* (1918), for instance, held that when the property or any other assets of a congregation are diverted from their legitimate use, according to the rules and regulations

[168] See also Pienaar (1991).

contained in the church order, the court has the power of determining the true construction of the constitution and regulations of the church and is not bound by the interpretation placed upon them by the church council. In *Jacobs v Old Apostolic Church of Africa and Another* (1992) the court dismissed an application for an order directing the respondents to make the books of account and financial records of the Church available to a member, where the court held that it was clear that a member of the Church, under its constitution, did not enjoy the right to inspect its books of account and financial statements and that it could not be inferred, by necessary implication from the constitution, that the applicant enjoyed such a right. Whether the courts indeed have a right to interpret church orders, even in cases of pecuniary interest such as ownership, remains a moot point and could, under certain circumstances, be construed to be akin to doctrinal entanglement (see 7.7, *infra*).

7.5.2 Implied trust theory

For religious rights to be meaningfully exercised they should include the right to acquire, own, maintain, and dispose of fixed property and other assets in a manner prescribed by the church's own internal rules. Religious disputes, however, often lead to property disputes.[169] The challenge to churches and the civil courts lies in the intra-church relations where property issues often inevitably play a significant role.

In 4.3.1.1 (*supra*) a property dispute was discussed concerning a case of religious doctrine leading up to the Supreme Court of the USA being called upon to pass judgment in *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* (1969). Under Georgia law, the right to the properties was made to turn on a civil court decision as to whether the parent church had departed from the tenets of faith and practice it had held at the time the local churches affiliated with it, in accordance with the "departure-from-doctrine" element of the so-called "implied trust theory". Georgia law at the time

[169] The courts in *Nederduitsch Hervormde Congregation of Standerton v Nederduitsch Hervormde or Gereformeerde Congregation of Standerton* (1893) and *Dwane v Goza and Others* (1902) held that, in the case of a schism or a secession from a religious congregation, those members of the congregation or denomination who do not join in or consent to the secession are entitled to the church property, even though they might be a minority. Cf. Van der Schyff (2001:104).

implied a trust of local church property for the benefit of the general church, on the sole condition that the general church adhered to its tenets of faith and practice.[170] The departure-from-doctrine element of this implied trust theory allowed civil courts to interpret church doctrines and to determine whether actions of a church constituted a substantial departure from the tenets of faith and practice of the church.[171] In the Supreme Court judgment Justice Brennan explained that

> the First Amendment severely circumscribes the role that civil courts may play in resolving Church property disputes … First Amendment values are plainly jeopardized when Church property litigation is made to turn on the resolution by civil courts of controversies of religion doctrine and practice. If civil courts undertake to resolve controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern … (T)he Amendment therefore commands civil courts to decide Church property disputes without resolving underlying controversies of religious doctrine.[172]

The court ruled that the government could not pass judgment concerning tenets of faith or church law. State authorities had no authority to determine whether a church had departed from its religious doctrine and practice and a civil court could therefore not review a church decision applying a state "departure-from-doctrine" standard.

The major flaw in the implied trust theory and its departure-from-doctrine element is that it is almost impossible to decide on the original principles of a church or religious association without seriously stepping into the fold of judging on religious tenets and doctrine, the very situation that South African courts (and the Constitution) should be inclined to avoid. The value of the theory, in terms of the aims of this study, is that it indicates that intra-church property disputes almost always have doctrinal issues at the core of their argument. This poses exceptional challenges to civil courts of law which should be intent on not getting

[170] At 4.
[171] At 8. See Kauper (1969:349-356) for a comprehensive explanation of this aspect of Georgia law at the time. See also 4.3.1.1 (*supra*).
[172] At 449.

involved in questions relating to doctrine – not even obliquely through the interpretation of a church order (see 7.7, *infra*).

7.6 The church and labour law

7.6.1 Introduction

Coertzen (2003:250) and Smit (2008:63) suggest that churches should have, as guaranteed by the right to freedom of religion, the opportunity to arrange their own internal order (regulated by the church order) regarding the relationship between ministers and congregations, according to their own tenets, confessions and theological principles. This would naturally include the right to arrange their own affairs in terms of the regulating labour laws, if they so choose.[173]

The rights and obligations under labour legislation should be closely scrutinised. Provisions in the Constitution,[174] the Labour Relations Act (LRA),[175] the Basic Conditions of Employment Act (BCEA),[176] and the Employment Equity Act (EEA)[177] may have implications for church law.

At common law a contract of employment could be defined as an agreement where one person places his or her personal services at the disposal and under the control of another person in return for remuneration or other benefits.[178] In the various Acts the definition of "employee" has only a slightly different focus. Section 213 of the LRA defines an employee as "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer".[179] No formal requirement of control by another person is present in the statutory definitions.

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[173] See *Presiding Bishop of the Methodist Church of Southern Africa and Others v Mtongana and Others* (2008) where the jurisdiction of the courts in a labour matter was acceptably ousted by the Laws and Disciplines of the MCSA.
[174] Section 23(1) states that "(e)veryone has the right to fair labour practices".
[175] Act 66 of 1995.
[176] Act 75 of 1998.
[177] Act 55 of 1998.
[178] Olivier (2008:1).
[179] The definitions in section 1 of the EEA and section 1 of the BCEA are essentially identical to the definition in the LRA.

The majority of churches in South Africa recognise their clergy as "employees" as defined in statutory labour law.[180] Although Coertzen (2003:248ff.) suggests that churches should be afforded the opportunity to arrange their internal affairs, he shows that the NGK accepted the labour laws of the country as the laws that regulate labour relations in the NGK. The position of the NGK is, *mutatis mutandis*, also applicable to the relations in the NHK.[181] Reglement 15.1.1 of the "Reglemente, Beleid, Funksionele Besluite en Riglyne", annexed to the Church Order of the NGK (2011), refers to the "diensverhouding tussen die gemeente/kerkverband as werkgewer en die bedienaar(s) van die Woord as werknemer(s)". The NHK contains a similar provision in the "Opgawe van Versorgingsvoordele", annexed to the Church Order (2010). The question that arises from this is whether churches intended to create normal employment relationships between churches and ministers.

7.6.2 Intention of the parties

It is generally accepted that an employment relationship can only exist where it was intended by parties. Therefore, the decisive criterion to determine whether a minister of religion is considered to be an employee is whether there was an intention to enter into a contractual arrangement. In this light, Olivier (2008) submits a strong argument against the applicability of civil labour laws on ministers of religion. The basis of his argument is the presence of an intention (*animus*) to enter into a binding contractual agreement.

In cases where labour law has been found not to be applicable, the absence of an intention to enter into an employer-employee relationship appears to be pivotal. In *Mankatshu v Old Apostolic Church of Africa and Others* (1994) the constitution of the Church was found to be no contract of employment and the pastor in question could be dismissed and excommunicated in accordance with the constitution. For an employer-employee relationship to be in existence, a contract of service needed to be in place.[182] The courts therefore had no jurisdiction in the matter. This case involved a non-stipendiary self-supporting

[180] See for example *Zazaza and Other v United Congregational Church of Southern Africa and Others* (2011) (at 15) and *Danville Gemeente van die AGS van Suid-Afrika en Andere v AGS van Suid-Afrika en Andere* (2012) (at 49).
[181] Cf. Coertzen (2003:256).
[182] *Mankatshu v Old Apostolic Church of Africa and Others* (1974) (at 462I).

priest who was found not to have any civil rights that were prejudicially affected. Whether this judgment should be extended to include pastors who receive remuneration in the form of a stipend was not settled in this case.

The Labour Court in *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit and others* (1999) heard that the applicant, a minister of the NGK, was dismissed by his church council on 2 December 1996. The ensuing proceedings relating to his alleged unfair dismissal lasted for 74 court days. There were complaints about his functioning in the portfolios allocated to him, as one of five ministers of a large urban congregation. The court rejected the respondents' argument that the applicant was not an employee for the purposes of the LRA. A minister in the NGK was thus considered to be an employee of the congregation wherein he or she served.[183] The court found that the respondents had failed to show that there was a fair reason for the applicant's dismissal for incompetence and found that the dismissal was substantively and procedurally unfair. Moreover, the court found that the respondents had not complied with the requirements of item 8 of Schedule 8 (Code of Good Conduct) to the LRA relating to poor work performance. The court ordered that the applicant be reinstated retrospectively in the employ of the second and third respondents.[184]

The Labour Court in *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA and others* (2001), on the other hand, held that a priest was regarded as working for God and the relationship between the priest and the Church could therefore not be regarded as one of employment[185] – the fact that the Church provided all the features of an employment relationship (including benefits such as a monthly stipend) did not make the relationship one of employment and the priest was not considered to be an employee.[186] The court held that there was no intention on the part of either the applicant or the third respondent to enter into a legally enforceable employment contract. The mere fact of an offer and acceptance did not equate to a binding contractual

[183] It is important to note that the defendant did not oppose the notion that the "beroepsbrief" constituted a legal contract between the parties (cf. Coertzen 2003:255).
[184] Because of the breakdown in the trust relationship between the applicant and the other four ministers of the congregation, the court deemed that it would not be in the public interest or fair to all the parties to reinstate the applicant to the congregation (the first respondent).
[185] At 37.
[186] At 10.

relationship.[187] Since a contract of employment is necessary for purposes of establishing an employment relationship and as no legally binding contract of employment existed, the first respondent (CCMA) was found to have no jurisdiction to hear the dispute between the parties.[188]

The difference in the judgments in *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit and others* (1999) and *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA and others* (2001) seems to hinge on the intention of the respective parties to enter into an employment relationship and thereby enter into a legally enforceable contract. Ministers may therefore be appointed as employees and the relationship protected in terms of labour legislation, or parties may choose to exclude labour legislation in terms of a "spiritual relationship".[189] Where parties choose not to enter into an employment agreement it is still possible (and feasible) to incorporate, on a voluntary basis, relevant and acceptable labour relations principles between ministers and their churches, even though the basis of the relationship remains outside the realm of labour legislation.[190]

Olivier (2002:532) shows that, even though the courts have adopted an approach that certain clergy fall outside the normal labour relations framework, compliance with other relevant fundamental rights is still required.[191] In those cases where labour law may be applicable the particular church context of the employment relationship, as well as the constitutional provisions regarding religious rights, may influence the way the relationship should be interpreted.

Church law and internal rules and regulations as contained in church orders and supporting documents appear to be of decisive importance in establishing whether an employment relationship exists. Olivier (2008:4) correctly holds that, while there may be a mutual commitment to the relationship between the minister and the church, it is not a bilateral and enforceable contract but rather an ecclesiastical or spiritual agreement regulated by internal church law and not

[187] At 37.
[188] At 38.
[189] The Labour Court in *The Salvation Army (South African Territory) v The Minister of Labour* (2004) found that a "spiritual relationship" is clearly not one of employer and employee.
[190] Oliver (2002:539).
[191] See chapter 5 (*supra*).

by civil law. Being bound by the provisions of internal church statutes therefore does not flow from a contractual arrangement but from the fact that the minister accepts and submits him or herself to the internal legal framework applicable to the functioning of office-bearers in that church. That the relationship has certain characteristics comparable to a regular employment relationship is irrelevant.[192]

It should also be noted that there is no indication that other church workers would be covered by the "spiritual relationship" that exists between churches and their ministers. Labour law rules and principles would apply irrevocably in their case.[193] This was confirmed by the Equality Court in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2007).

7.6.3 The ministry: An office *sui generis*

As shown above, the unique nature of the relationship between ministers and the church may preclude the presumption that an employment agreement existed.[194] This inimitable relationship is characterised by certain factors: the minister is called by God into service to Him and not into church structures;[195] benefits received by the minister are not considered to be a reward for services rendered – they should be viewed as a stipend[196] (see *infra*), a contribution of the church to enable the minister to carry out his or her calling to office and is not a reward for services rendered.[197] Moreover, the functions (and the holding of the office) of the minister pertains to spiritual and religious matters firmly

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[192] The case of *Ahtinen v Finland* (4.4.9.2 *supra*), regarding the transfer of a minister of the Evangelical Lutheran Church in Finland, holds important lessons for the South African situation. The ECHR noted that under Finnish law the Evangelical Church had the right to run its own affairs and, in particular, was independent to decide on such matters as the appointment of its priests, including how long and where they were to carry out their pastoral activity. On having agreed to serve as a parish priest with the Lutheran Church, the applicant had undertaken to abide by those rules. The ECHR also reiterated that the judicial determination of issues such as the continuation of a priest's service would be contrary to the principles of autonomy and independence guaranteed by, among other things, the Charter of Fundamental Rights and Freedoms.

[193] Olivier (2002:539).

[194] Olivier (2008:3-4).

[195] The process of appointment of ministers is a unique process where a minister is "called" to a congregation to which he or she answers the calling. The service that the minister renders is a response to the calling. Article 12.1 of the Church Order of the NGK (2011), for example, reads: "Die bedienaar van die Woord word vir die uitvoering van die amp of bediening deur 'n kerkvergadering (kerkraad, ring, sinode, Algemene Sinode) beroep en in diens gestel".

[196] A "traktement". See for instance ordinansie 2.1.7(i)(a) of the Church Order of the NHK (2010).

[197] *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA and others* (2001) (at 7).

entrenched in the Constitution, notably sections 15 and 31, and the rights, duties and obligations that apply to ministers are contained in church orders that do not create rights and obligations outside the sphere of the church.

Smit and Du Plooy (2008:51ff.), in an exposition of the position within the GKSA (and which could, *mutatis mutandis*, be extended to other churches as well), are of the opinion that labour laws are not applicable to the ministers of the GKSA. They suggest that ministers of the GKSA cannot be considered to be employees of the Church because of the calling they received as servants of God. As the Church Order regulates the calling of the minister instead of labour legislation, ministers should be exempted from the regulatory function of statutory law, according to this view. This calling is a lifelong commitment and does not only entail one aspect of a person's life, but occupies one's whole life.

What was said about officers answering the spiritual calling into the Salvation Army in *The Salvation Army (South African Territory) v The Minister of Labour* (2004) arguably also applies to ministers: "An Officer does not retire from his calling; devotes his entire life to God and the applicant remains a minister of religion until death".[198] In this case the Labour Court also held that officers join the Salvation Army in response to a call from God to spiritual ministry.[199] The relationship between the organisation and the officers is therefore spiritual and governed by religious conscience and not by labour legislation.

This was also the approach in the judgment in *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA and others* (2001). Waglay, J., while admitting that it may be difficult to comprehend a "calling from God", the applicant and the third respondent agreed that the very basis upon which their relationship existed was that "calling".[200] The letter of calling of a minister should therefore not be considered to be a letter of service regulated by labour law.[201]

Olivier (2002:532-533) lists a number of peculiar characteristics of the relationship between ministers and church structures including: a minister is called by God to office; a minister is not regarded as a servant of the church; the

[198] At 13.
[199] At 4.
[200] At 37.
[201] Smit (2007:571ff.).

benefits received by the minister are not a reward for services rendered; the functions of a minister relate directly to spiritual matters; and the church orders that arrange the relationship between ministers and churches do not create rights outside the sphere of the church. The Equality Court in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2007) gave a strong indication that the courts accept that ministers stand in a special relationship with respect to their churches[202] – a position that could not be superimposed on any other relationship within the church structures (see 5.5.12, *supra*).

Smit (2005:6) also argues that the position of the minister in the GKSA is 'n "andersoortige verbintenis" (*alius generis*), and the relationship between the church as an organisation *sui generis* is an internal matter that falls outside the scope and authority of normal labour relations. Churches need to take this into account in the way they understand and define themselves and their internal relations (see also chapter 6, *supra*). Moreover, the relationship is a complex exegetical-dogmatic relationship which labour legislation does not provide for[203] and it may also be argued that, in terms of the doctrine of doctrinal entanglement, *should* not be provided for by civil legislation, at any rate.

De Waal *et al.* (2001:292), with reference to section 9(4) of the Constitution, submit that religious institutions must be allowed to hire adherents of their own religion. This would amount to "fair discrimination", as would discrimination on grounds of gender and sexual orientation which would be permissible in so far as it is required by the tenets of the religion. Usually this will mean that the institution may discriminate when appointing clergy, but not in respect of other personnel such as administrative staff.[204] Although the LRA does not explicitly exempt religious institutions from the prohibition against discriminatory hiring, it may be argued that adherence to the religion's doctrine is "an inherent requirement of the particular job"[205] (of ministers).

[202] The court ruled that the dismissal of the complainant was unfair but suggested that had he been employed as a minister, the dismissal would have been justified.
[203] Smit and Du Plooy (2008:70).
[204] This was indeed confirmed in 2007 by the Transvaal Provincial Division of the Equality Court, in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.
[205] Section 187(2)(a).

Smit (2004:92) shows that the relationship between a minister and a church is not one of authority and control but rather one of mutual love and respect and that the minister and the council have reciprocal authority in respect of one another. The minister is not an employee but a servant of Christ.[206] Smit compares the relationship between the minister and the local congregation with that of the service of a soldier, whose service is of a unique character, exempted from labour legislation. Article 11 of the Church Order of Dort (1619) follows the example of a soldier's wage when it calls the maintenance of a minister a *stipendia iusta,* a fair treat. This means that it is not a salary in the strict sense of the word, but a means to put him in a position where he is free to carry on his service with no concerns.

It is, however, important to take note of Olivier's (2002:538) caveats. Despite the special relationship between clergy and their respective churches, the Bill of Rights reigns supreme and any action in contravention of any of the fundamental rights may still be challenged. Any claim that an unjustifiable infringement of a chapter 2 right occurred will have to withstand constitutional scrutiny as explained above. Olivier also insists that the courts will interfere where administrative-law principles within the church context are not adhered to. Even though this sounds feasible, it has, however, not been adjudicated conclusively, as shown in 7.4.2 (*supra*).

The calling of a minister and the subsequent service of a minister in response to the calling is a unique process that has no link to any principles and procedures set out in labour legislation. The high regard for religious guarantees in the Constitution affords this office *sui generis* protection against undue claims to the contrary.

7.7 Church order and doctrine

7.7.1 Prerogative of interpretation

The doctrine of doctrinal entanglement that became part of our law[207] ensures the independence and authority of ecclesiastical decisions where doctrinal

[206] John 10:11-13; Ephesians 4:11.
[207] *Ryland v Edros* (1997); *Taylor v Kurtstag NO and Others* (2004); *Singh v Ramparsad* (2007).

matters are of concern, irrespective of whether or not pecuniary interests are at stake. The matter regarding the position of church regulations and statutes arises. Should the civil courts accept the church's interpretation of its own statutes or should the church accept the court's analysis – as commonly happened in the past, for example, in *Deutsche Evangelische Kirche zu Pretoria v Hoepner* (1911) (see 3.7.3.4, *supra*) and *De Waal and Others v Van der Horst and Others* (1918)[208] (see 3.7.3.4, *supra*)? Should the courts get involved in matters of church law at all[209] and is Church (2009:93) correct in asserting that a civil court maintains the capacity to interpret a religious body's constitution? At the core of these questions lies the relationship between doctrine and church order.

The court in *De Waal and Others v Van der Horst and Others* (1918) held that when the property or any other assets of a congregation have been diverted from their legitimate use according to the rules and regulations contained in the church order, each member (having a patrimonial interest in the property) of the congregation has *locus standi* to complain.[210] The court held that it had the power to determine the true construction of the church order and that it is not bound by the construction placed upon it by the church tribunals.[211] In *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) the Orange Free State Provincial Division of the High Court accepted that a

[208] De Villiers, J.P., contended that the court "has the power of determining the true construction of the rules and regulations of the Church, and is not bound by the construction placed upon them by the Ecclesiastical Tribunal" (at 286). See also *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere* (1976) (at 27-28), *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979), *Jacobs v Old Apostolic Church of Africa and Another* (1992), *Du Preez en Andere v Nederduitse Gereformeerde Gemeente, De Deur* (1994) (at 196F-197B) (where it was held that where the words in a church order are vague, incomplete, ambiguous or unclear they may be illuminated with additional information including the context, background and circumstances), and *Van Vuuren v Van der Merwe and Another* (2005) (at 14).

[209] Recently, for instance, in *Petrus v Roman Catholic Church* (2012), Miller, A.J., found that excommunication is entirely a case of church law, but since some civil rights were of concern, including property rights, the court assumed jurisdiction.

[210] "As the property vests in the congregation, each member as long as he remains a member must be taken to have a share in it" (at 284). A word of caution is, however, appropriate here. On the one hand the congregation is (correctly) described as the "owner of its own property and funds, and is represented by a Kerkeraad", which leaves no doubt that it exists as a common-law juristic personality in the form of a *universitas* (see chapter 6, *supra*). In terms of the characteristics of a *universitas*, however, all assets and liabilities are vested in the juristic person as a separate entity. The individual member has no direct personal claim regarding the property or the funds of the congregation.

[211] At 277-278. See 3.7.3.4 (*supra*) for a discussion of the difference in approach between British and American courts regarding this issue.

member of the NGK was competent to approach the court for a decision on a question of law which was concerned with the interpretation of the church order.[212]

The apparent competence and inclination of the civil courts to hear matters pertaining to church orders, the internal affairs of churches, and the resolutions taken by church assemblies during the normal course of their authority, raise certain issues as it seems to assume that church orders and resolutions are matters completely separate from doctrinal matters (generally accepted to fall outside the courts' jurisdiction).

7.7.2 The nexus between *doctrina* and *disciplina*

Calvin (*Institutes* IV:316-317 [3.1-3.2]) emphasises that God governs his church for which He uses the ministry of people. The common doctrine binds those in God's service together in one body. It is therefore hardly possible to separate governance and doctrine, an idea endorsed by article 30 of the Belgic Confession:

> We believe that this true church ought to be governed according to the spiritual order that our Lord has taught us in his Word. There should be ministers or pastors to preach the Word of God and administer the sacraments. There should also be elders and deacons, along with the pastors, to make up the council of the church. By this means true religion is preserved; true doctrine is able to take its course; and evil men are corrected spiritually and held in check, so that also the poor and all the afflicted may be helped and comforted according to their need. By this means everything will be done well and in good order in the church, when such persons are elected who are faithful and are chosen according to the rule that Paul gave to Timothy (1 Tim. 3).

It is to be accepted that church law has as its main sources of study the Bible and the confessions and is concerned with the realisation of the rule of Christ as

[212] The court in *Van Vuuren v Kerkraad van Môrelig Gemeente van die NG Kerk in die OVS* (1979) granted an application forcing the defendant church council to hear the applicant's complaints against certain members of the respondent's congregation. The court found that the applicant was an uncensored member of the NGK within the meaning of the church order of the Church. The respondent accordingly had no grounds for refusing to hear the applicant's complaints against members of the respondent.

the head of the church according to the Scriptures.[213] Van 't Spijker (1992b:99-100) describes Calvin's Church Order as an "Ordnung zur Lehre" aimed at opening the pathways to teaching from the Scriptures: "*Docere* and *discere* zijn correlate begrippen in de gedachtenwereld van Calvijn, evenals *doctrina* en *disciplina*". In this sense church law and church orders promote (and even guarantee) the correct understanding, preaching, and practice of the doctrine.

The *ius circa sacra*, the domain of civil authorities, should never be confused with the *ius in sacra.* In matters concerning the latter, obedience to faith and the Bible is vital. Bronkhorst (1992:46) therefore aptly insists on a "schriftuurlijke kerkorde" to give expression to sound doctrine.

Barth (1958:678) also maintains a close relation between doctrine and order and asserts that the doctrine cannot refrain from considering the standpoints normative for church law. As church law is rooted in liturgy and divine worship in Barth's view (see also 6.12.2, *supra*) it has to be understood as a law which is ordered by (and continually found in) divine service, and tasked to order the latter. For Barth the human response to the Word of God calls for something communal and public. This common response to the common hearing of the Word (a confession commonly spoken) is the first element in the public worship of Christians. As the Word of God is proclaimed, taught, preached, and ultimately heard by the church according to the commission of its Lord, that which is lawful and right takes place in and for the church and the liturgical act of confession gives expression to the law of the church.[214]

Church law as liturgical law, ordering the worship, is considered by Barth to be a living and dynamic (and continually reforming and improving) law,[215] obedient only to Christ and thus not subject to human whims and vacillations or to the spirit of the age or worldly changes. The Holy Spirit necessarily keeps it in motion and therefore

> (n)o dynamic from below can or should have any influence on Church law. To the extent that this takes place, it ceases to be Church law. But it

[213] Vorster (1999:1).
[214] Barth (1958:698-701).
[215] Cf. Berkhof's (1985:388) suggestion that "(c)hurch orders – certainly in our time – should be loose-leaf".

> is certainly not Church law if it is not always wide open to the dynamic from above, both in its development and then in its continuance and application.[216]

Barth points out that church law should not be regarded or treated as (perfect) *ius divinum* but rather as (imperfect) *ius humanum.* As far as church law as a *ius sui generis* (a law in its basis and formation different *toto coelo* from that of the state and all other human societies)[217] is concerned, however, what is demanded *semper et ubique et ab omnibus*[218] is that, as with dogma and creed, thought and decision should always be founded on the lordship of Christ. In a sense theology, preaching and law seem to form an interdependent triangle in Barth's views of a healthy Christian community.[219]

Koffeman (2009:21-22) proclaims "(k)erkrecht en theologie, dat is één zaak", and he also shows that "kerkrecht een zaak van belijden is". For Weber (1983:577) "every Church order is simultaneously a confession" while Berkhof (1985:386) advocates that "church polity is intended to serve the process of mediating the grace of God".

The nexus between church order and doctrine is also found in the views of South African theologians. Pont (1981:10-15) is of the opinion that church order is dependent on the confession but concludes that, in this sense, it is subordinate to the latter. The confession (and the Word by implication) is nevertheless considered to be the source, the root, and the norm of the church order. Therefore Pont considers the "organisatoriese samehang van Skrif, belydenis en kerkorde" to be of fundamental value to the church and this cohesion should therefore ideally not be disturbed. Spoelstra (1989:470), who disagrees with any contra-positioning of church order and confession, considers the confession to be the foundation of church order. For Smit (1984:62) "(word) (d)ie verband tussen kerkorde en belydenis ... in die Heilige Skrif vasgelê". As the confession is considered an answer to the Word, the church order is a confirmation of this answer, in Smit's view.[220] In a similar vein, Coertzen

[216] Barth (1958:711).
[217] *Id.*:720.
[218] Always and everywhere and by all.
[219] Cf. *Id.*:710ff.
[220] Smit (1984:63).

(1991:182) shows how "'n wesentlike eenheid tussen belydenis en kerkorde gekonstateer moet word" where the "kerkorde dien as waarmaker van die belydenis".[221] Also for Du Plooy (2012:2-3) the close relation between Scripture, confession, and church order in Reformed church law is a given. The same applies to the *doctrina* and the *disciplina*. He emphasises that the "gesag van die kerkorde lê nie in homself nie, maar in sy verbondenheid aan die Skrif en belydenis".

It therefore seems fair to assume that courts should not become involved where religious doctrine or church governance and its authority, practices and procedures are concerned, irrespective of the civil rights that are claimed to be in need of protection.[222] Any such interference or involvement would infringe upon constitutionally entrenched religious guarantees. Little more than the natural extension of the doctrine of doctrinal entanglement is required to afford church law its rightful position as a *ius sui generis* that falls outside the authority of the state and the jurisdiction of the civil courts.

7.7.3 Hermeneutics of church law

Consequential to the proximity of doctrine and church law, the hermeneutics of church law should be considered as an invaluable aid to the interpretation of church regulations in the light of the doctrine and tenets. According to Strauss (2010:21) the rules of interpretation of church law during the previous two decades have developed to such an extent that it should be considered to be a subtheme within the discipline of church law. Strauss (*Id.*:24) emphasises the hierarchy of normative interpretation where the Bible should always be the primary source, followed in rank order by the confessional documents, the church order, and decisions by church assemblies. To this may be added a fifth element namely the settled praxis of the church.

"Die kerkorde het nie en pretendeer nie om selfstandige gesag naas die Skrif te hê nie", Du Plooy (2012:7) says. The legitimacy of a church order, as well as its relevance and reasonableness, has to be tried and tested in the light of changed and changing circumstances, and in the light of the Scriptures led by the Holy

[221] See also Coertzen's (1991:35) reference to the professing church law.
[222] See also *Mankatshu v Old Apostolic Church of Africa and Others* (1994) (at 460I-461J).

Spirit. From this flows the logical conclusion that no interpretation of a church order is possible if these factors are negated.

Because of the uniqueness of the church, the hermeneutics of church law is also unique.[223] Van de Beek (1992:60-62) postulates that legal texts are subject to the same hermeneutics as other texts, such as historical and literary documents. There are, however, important differences between legal and other texts including that the law is aimed at the future and has a prescriptive and imperative character. Moreover, legal texts demand an analysis of their own origin, purpose and meaning within their particular community, as well as the added dimension (unique to legal texts) that the imperative, as prescribed by the particular community, and the sanctions, in case the imperative is not met, should be accepted by the particular community. A legal text should be read in the context of the community in which it was sanctioned as such – therefore a legal text is never an individual but always a collective text.

Due to these special properties of legal texts, the hermeneutics of law is considered to be an even more complex issue than that of other texts. As shown above ecclesiastical legal texts are subject to the same hermeneutic processes as other legal texts. One may, for example, never rely on the unique nature of church law to negate the fact that the rule of law is binding. One cannot say that, for the sake of grace that should prevail in the church, the law is invalid. The law, after all, does not exclude grace – it is actually an expression of grace – it does not inhibit freedom, it guarantees it. Law and grace are thus not mutually exclusive and the Christian community must establish a law as an expression of grace (Van de Beek 1992:61-62).

In this sense church law differs significantly from other legal systems and any hermeneutical effort will have to take the nature of church law and the community in which it operates into account. Moreover, it is not only the relation between grace and law, but also the fact that the church does not function as its own legislature but is bound to the Bible that has formal consequences for the hermeneutics of church law. Where other communities gradually, by revolutions, form their own laws, the church is inevitably bound to one external authority.

[223] Du Plooy (2012:4). Cf. Strauss (2010:26).

Therefore, there is not only the hermeneutical circle between the text of the law and the current situation, but both are also placed in a hermeneutic relationship with the Bible. So develops a hermeneutical triangle (or an assembly of three hermeneutical circles) ensuring that the hermeneutics of church law is even more complex than that of any other law. Everything pertaining to ordinary law applies here too, but the unique nature of church law provides additional complicities.[224]

Article 32 of the Belgic Confession (The Order and Discipline of the Church) also contains a very important caveat:

> We also believe that although it is useful and good for those who govern the churches to establish and set up a certain order among themselves for maintaining the body of the church, they ought always to guard against deviating from what Christ, our only Master, has ordained for us. Therefore we reject all human innovations and all laws imposed on us, in our worship of God, which bind and force our consciences in any way. So we accept only what is proper to maintain harmony and unity and to keep all in obedience to God. To that end excommunication, with all it involves, according to the Word of God, is required.

To this should be added the marks of the true church as found in article 29 of the Belgic Confession, namely, the pure preaching of the gospel, the pure administration of the sacraments, and the sound practice of church discipline. This is how the church governs itself according to the pure Word of God, rejecting all things contrary to it and holding Jesus Christ as the only head.

Du Plooy (2012:1-8) shows the importance and urgency of a design for (the often neglected area of) reformed hermeneutics on church law. As far as the interpretation of church orders is concerned, certain factors should be considered, namely, the unique character of a church order, in comparison to and distinguished from legal documents and statutes, the character and nature of hermeneutics of church polity, theories of interpretation in the common-law tradition and their relevance to church polity, and normative presuppositions and

[224] Van de Beek (1992:61-62).

marks for the interpretation and understanding of the text and articles of the church order,[225] as well as the resolutions of church assemblies.

The hermeneutical triangle of Van de Beek (see also Strauss [2010:21]) consists of the text of the church order, the current situation and circumstances, and the Bible. Strauss (*Id.*) contends that this is the very reason why church law is more complex than other kinds of law.

From Van de Beek's "Hermeneutiek van het kerkrecht" (1992:59-72), as refined by other scholars,[226] certain hermeneutical methods are advanced to find the balance between the law and the prevailing circumstances.[227] *Literary hermeneutics* focuses on the text itself and the normal meaning of the words, phrases, grammar, and punctuation. Technical terms pertaining to the church environment should be interpreted within its ordinary literary context. *Structural hermeneutics* focuses on the context in which a certain provision is found. The specific text or provision is understood within the context of the whole. "Het komt overeen met 'Schrift met Schrift vergelijken' in de bijbelse hermeneutiek" (Van de Beek 1992:63).

The aim of *historical hermeneutics* is to examine the history of a specific rule or provision to uncover the *ratio legis* (Du Plooy 2012:7). Koffeman (2009:96-97) distinguishes between *rechtsgeschiedenis* which explores the origin of the rule or provision within the broader church historical context, and *werkingsgeschiedenis* that reveals how a rule or provision has functioned up to now.

Systematic hermeneutics "neemt de visies ágter een tekst liggen in aanmerking" (Koffeman 2009:96). It places the meaning of the rule or provision within the theological tradition of the church. The church orders of other churches within the same tradition may also be consulted. The dogmatic reflection is also of

[225] "Daarom geniet die kerkorde normatiewe status en word dit saam met en in die lig van die Skrif byvoorbeeld gebruik om, wanneer nodig kerklike sake en kerklike besluite ook aan die kerkorde te toets, en om aangewend te word in geval van regspraak en van tug ... Dit besit dus regsgeldigheid of legaliteit" (Du Plooy 2012:7).
[226] See Koffeman (2009:95-97), Strauss (2010:21-26), and Du Plooy (2012:1-8).
[227] "Recht moet altijd weer gevonden worden, door de regelgeving in verband te brengen met de feiten en omstandigheden van een bepaalde situatie. In dat proces spelen de vijf genoemde hermeneutische methoden een rol" (Koffeman 2009:96).

great importance. The church order is one of the forms of expression of the tradition of the church and therefore needs to be read against this background (Van de Beek 1992:64).

According to Strauss (2010:22) *teleological hermeneutics* asks the question: For what purpose was this rule or provision formulated? All of church law is ultimately aimed at the determination and application of the will of God so that his justice will be done. A church order should be a servant of the church and its members – both in its purpose and its interpretation (Du Plooy 2012:7). Church law is not a rigid and inflexible human endeavour, but, faithful to God and the Bible, a constant search for truth, purpose and meaning within a community of love, grace and mercy. For Van de Beek (1992:64) church law's primary purpose is "dat er recht wordt gedaan aan het rechtsgevoel van de gemeenschap, soms redenerend vanuit bestaande juridische regelgeving, soms om te voorzien in leemten in de wet, soms zelfs tegen de letterlijke tekst van de wet in". In this sense the dictum by Hoexter, J., in *Smith v Ring van Keetmanshoop van die Nederduitse Gereformeerde Kerk Suidwes-Afrika en Andere* (1971) remains very significant for church law: "Dit is … 'n fundamentele beginsel van ons eie regspraak dat dit nie genoeg is om reg te laat geskied nie; daar moet ook gesorg word dat dit sigbaar geskied".[228]

The hermeneutics of church law (and notably teleological hermeneutics) shows how church law as a *ius sui generis* could be distinguished from all other legal systems and endeavours. Church law gives effect to rights and freedoms entrenched in the Constitution in its purpose and determination to assist churches in arranging their internal affairs without undue external influence or duress.

7.8 Concluding remarks

John Calvin's (*Institutes* IV:653 [20.4]) intimation that the judicial authorities "have a commission from God, that they are invested with divine authority, and, in fact, represent the person of God, as whose substitutes they in a manner act" has to be reconsidered in a constitutional democracy.

[228] At 362.

Where disputes arise between members that cannot be resolved internally, several issues should be taken into account. In the light of 1 Corinthians 6:1-6[229] it is clear that Christians in general, and church members in particular, are not precluded from litigation. According to article 36 of the Belgic Confession (see 5.2.4, *supra*) the bench is a divine ordination that should be approached freely by Christians if they are aggrieved. In addition, access to the courts of law for everyone is guaranteed in section 34 of the Constitution and a correct interpretation of 1 Corinthians 6 supports the use of the courts by Christians.[230] Scholtz (2001:190) describes the bench as "'n Goddelike instelling tot wie gelowiges hulle kan wend indien hulle onreg aangedoen word en die interne meganismes in die kerk nie aan hulle reg verskaf het nie" (see also Calvin, *supra*).

Du Plessis (1996:459, footnote 63), however, shows that adjudication in the context of religious communities is fraught with problems: "Only time will tell whether the introduction of Chapter 3 (of the Constitution) will add to or help resolve these problems". It seems feasible that churches will become pro-active in assisting the judicial system and the authorities in general, by the way they define and conduct themselves within the boundaries of the rights and freedoms afforded them by the Constitution and, moreover, by its divine calling.

There is a need that churches maintain their internal governance without state subordination. The state, however, can only be unobtrusive regarding the internal regulations and doctrines of churches if churches themselves provide the framework and conditions, in order to create healthy church-state relations (cf. Landman 2006:179). The civil courts approach no one and the right (and urge) to litigate should be approached with utter restraint if churches are to be

[229] "(1) If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people? (2) Or do you not know that the Lord's people will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? (3) Do you not know that we will judge angels? How much more the things of this life! (4) Therefore, if you have disputes about such matters, do you ask for a ruling from those whose way of life is scorned in the church? (5) I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute between believers? (6) But instead, one brother takes another to court – and this in front of unbelievers!" (NIV).

[230] Paul's argument in 1 Corinthians 6:1-6 is not aimed against litigation as such but rather against the vexatious attitude of some believers as well as the fact that the congregants that Paul addressed had resorted to heathen magistrates (Scholtz 2001:190).

taken seriously in their endeavour to remain independent in their own sphere.[231] In the words of Van Coller, J., in *United Methodist Church of South Africa v Sokufundumala* (1989): "I trust that the parties, being church men and women, will try to resolve their differences in the spirit that the Bible teaches us we should adopt, namely the spirit of brotherly love, and I think an attempt should be made, by the parties, to solve this problem and not come to Court" (at 1059E).

7.9 Résumé

The focus of chapter 7 was the judicial position of church law in South Africa and the consequences and possibilities for Reformed Churches in South Africa. In the final chapter concluding remarks will be made and attention will be given to future considerations.

[231] In *Van Vuuren v Van der Merwe and Another* (2005) the Free State High Court was asked to issue two declaratory orders. In the second of the two orders the applicant asked the court to declare that disciplinary proceedings by the NGK church council of Rosendal (the second respondent) against the first respondent be finalised in terms of the church order. Kruger, J., found that there was no merit in the application: "Die lywige stukke verbloem die regspunte. Die Kennisgewing van Mosie is verwarrend. Dit grens aan 'n misbruik van die regsproses" (at 58). The High Court (ECD) in *Zazaza and Other v United Congregational Church of Southern Africa and Others* (2011) was particularly unfazed when a minister objected to his suspension: "There is no justification for the denomination to be out of pocket because the Reverend does not tolerate any challenge to his authority" (at 23). The court ruled that a punitive cost order against the plaintiff minister was warranted under the circumstances. The on-going strife within the Presbyterian Church of Africa has in recent years also been the subject of a number of court applications as a result of intractable internal divisions as is evident in the judgment in *The Presbyterian Church of Africa and Another v Mokabo* NO (2011). In *The Presbyterian Church of Africa v Sihawu and Others* (2013) the court lamented that "(o)ne would hope … that an appeal to the rationality of the protagonists to this dispute and those legal practitioners who represent them, would cause them to seek a solution other than episodic litigation which appears to serve little purpose other than to entrench the enmity and to provide fuel for still more conflict within the Presbyterian Church of Africa" (at 29).

CHAPTER 8

CONCLUSION AND FUTURE CONSIDERATIONS

8.1 A critical appraisal

When Van de Beek (1992:62) says "(a)lles van het gewone recht geldt hier ook, maar de eigen aard van dit recht geeft extra complicaties", he is referring to the intricacies of church law, which gave the impetus to this study. In addition to the complexities of the discipline, the unique character of the institution within which church law functions, and the (often) troubled historical relation between church and state, provided further stimulus to an exploration of church law, within the ambit of the church-state relationship.

John Calvin (*Institutes* IV:651 [20.1]) was fundamentally correct when he stated that "the spiritual kingdom of Christ and civil government are things very widely separated" (see 2.5.4.1 [*supra*] and 5.2.2 [*supra*]). Aware of the risk of over-simplification, this investigation was permeated with a keen sense of the distinctiveness of church law, infused with a constant awareness of its transcendental quality, elegantly reflected by Barth's meritorious assertion that church law must be "spiritual" law – a law which is to be "sought and found and established and administered in the fellowship of the Holy Spirit of Jesus Christ".[1] Barth contends that "all valid and projected Church law, if it is true Church law, will be clearly and sharply differentiated from every other kind of 'law'". From this follows that church law should be described as nothing but a "*ius sui generis*; a law which in its basis and formation is different *toto coelo* from that of the state and all other human societies".[2] Ultimately, church law is nothing less than a statement of faith. It has as its only norm the relationship between the church and Christ as a Biblical reality. As Barth (1958:682) eloquently states:

[1] Barth (1958:682).
[2] *Id.*:720.

“In great things and small, in all things, true Church law arises from a hearing of the voice of Jesus Christ”.

This study, as it unfolded in the preceding chapters, showed that church law, as a discipline firmly rooted within theology, has always curiously revealed the expression of doctrinal tenets in ecclesiastical jurisprudence in the same way civil justice is expressed in civil jurisprudence. This was done with an evaluation of research on the position of church law and governance in South Africa, in terms of the (often fragile) bond between church and state.

The status of church law and the interpretation of church doctrine, regulations, resolutions, and praxis in civil court adjudication, where the church has been one of the litigating parties, lie at the core of the exploration. Since the court ruling in *Kotzé v Murray* (1864) that, where a rule or decree issued by a church assembly affects the civil rights of any person, the validity of such rule or decree may be determined by a competent civil court, and unsolicited comments on spiritual matters by the court (see 3.5.5, *supra*), civil courts have shown a morbid level of ambivalence and inconsistency in dealing with church law. This study has attempted to contribute to the historical discourse and to indicate how church law should be recognised as a *ius sui generis* in South Africa. It has shown that true construction of the rules and regulations of the church does not lie with the court, as often proclaimed, but rather with the church itself. If the courts were found to have the final say in such interpretation, this would deride all the constitutional guarantees and the logical understanding of how they influence the church’s self-rule and general acceptance of church law as a *ius sui generis*.

As public policy dictates the right to freedom of religion, it must be borne in mind that the Constitution, as the revelation of public policy, protects religious rights in no uncertain terms. It was clearly the intention of the drafters of the Constitution to take religious rights seriously. To disregard the uniqueness of church law may even be found to be *contra bonos mores*. Churches have the right to define themselves in terms of their self-understanding and not in terms of external expectations or assessments. The right to freedom of religion (reinforced by related rights and the diversity demands of a pluralistic society), as a

quintessential fundamental right, essentially warrants a strong presumption in favour of the church.

The study confirms that the responsibility lies squarely with the church to define its role and position within society, claiming its Biblical-prophetic autonomy and constitutional sanction while still acting within the dictates of human dignity, public policy, and the law. Also emerging from the study, constitutional values and Biblical values need not be in opposition to each other. The aim of fundamental rights, notably with regard to human dignity, equality and freedom, is also a Biblical aim.

8.2 Doctrine and practice – a reflection

Potential problems that may arise where doctrine and practice are treated as separate issues altogether, reverberate throughout the pages of this study. Many of the inconsistencies in legal adjudication and the challenges church law has posed to civil courts stem from this confusion. State interference in internal matters of churches complicates, rather than solves, potential problems.

Freedom of religion includes both the right to have a belief and the right to express such belief in practice. In addition, religious practice often involves interaction with fellow believers. It is difficult to postulate a firm divide between religious thought and action based on religious belief, and separate the individual religious conscience from the collective setting in which it is frequently expressed.[3] It is equally difficult to imagine a divide between religious doctrine and religious order, structure, and discipline.

The competence of the civil courts to hear matters pertaining to church orders, internal affairs of churches, and resolutions taken by church assemblies during the normal course of their authority, raises certain issues as this appears to presume church orders and resolutions are matters completely separate from doctrinal issues – the latter being accepted as falling outside civil courts' jurisdiction. The integrating relation between church order, Scripture, and doctrine, and the unique hermeneutical principles underlying their association, warrant a revaluation by the state of the independence of churches. The church

[3] See Sachs, J., in *Christian Education South Africa v Minister of Education* (2000) (at 19).

as a collective or institutional bearer of the right to freedom of religion has the right to observe religious doctrine without undue external influence. Section 7(2) of the Constitution directs the state to respect, protect, promote, and fulfil the right to freedom of religion in the Bill of Rights. Natural and juristic persons are also enjoined by section 8(2) not to infringe on the right of the church without constitutionally justified limitation.

The doctrine of doctrinal entanglement (see, *inter alia*, 5.5.3 [*supra*] and 7.2.3.4, [*supra*]) has entered our legal system through litigation relating to non-Christian religions. By natural and logical extension the doctrine has to be applicable to Christian institutions, and, notably, in terms of the aims of this study, the Churches under discussion. It has been shown how the concept "doctrinal matters", as presumed by the doctrine of doctrinal entanglement, should of necessity be extended to include the interpretation of church orders and constitutions, and should indeed be construed to include the whole body of established church law, including the official resolutions taken by church assemblies in accordance with their books of order.

Church law, as the mediator between the *ius constitutum* and the *ius constituendum*, is persistently in the service of Christ and his Church. In terms of the close relation between Calvin's *doctrina* and *disciplina*, church law and church orders promote (and even guarantee) the correct understanding, preaching, and practice of the doctrine. As a church order is at the same time a confession, the close relation between church order on the one hand, and doctrine and Scripture on the other, is a given in Reformed church law.

The doctrine of doctrinal entanglement ensures the independence and authority of ecclesiastical decisions where doctrinal matters are of concern, irrespective of whether pecuniary interests are at stake. The matter regarding the prerogative of interpretation of church regulations and statutes was investigated during the course of this study. Irrespective of views to the contrary, it was found that civil courts, in general, should accept the church's analysis of its own statutes and that the state should not become involved in matters of church law at all, due to the contiguity between doctrine and church order.

Consequential to the proximity of doctrine and church law, the hermeneutics of church law was considered as an invaluable aid to the interpretation of church regulations in the light of the doctrines and tenets. The hermeneutics of law seems to be an even more complex issue than that of other texts. Church law has a specific and unique character that should be borne in mind in theories of interpretation. In addition, the distinct hermeneutical triangle, which consists of the text of the church order, the current situation and circumstances, and the Bible, adds to the notion that church law is more complex than other kinds of law and any hermeneutical effort will have to take the nature of church law and the distinctive institution in which it operates into account. The fact that the church does not function as its own legislature but is bound to the Bible has additional formal consequences for the hermeneutics of church law. It has been shown that their unique character, when compared to legal documents and civil statutes, influences the interpretation of church orders.

The close relation between doctrine and order ensures that the doctrine cannot refrain from considering the standpoints normative for church law (cf. Barth 1958:678). The hierarchy of normative interpretation should always be borne in mind, where the Bible should always be regarded as the primary source, followed in rank order by the confessional documents, the church order, decisions by church assemblies, and the settled praxis of the church. In this sense the uniqueness of church law is also revealed by the hermeneutical relation between the *ius constitutum* and the *ius constituendum.* Notably teleological hermeneutics is the area where church law as a *ius sui generis* can be distinguished from all other legal systems. Church law gives effect to rights and freedoms entrenched in the Constitution in its purpose and determinations to assist churches in arranging their internal affairs without undue external influence or duress.

Church law, as a *ius humanum* rather than a *ius divinum*, should always be treated as provisional and subject to interpretation. Church law as essentially *ius humanum* should, however, be founded on and guided by *ius divinum* and this sets it apart from civil law. The hermeneutics of church law therefore follows completely different rules to civil law.

It thus seems fair to assume that courts should not become involved where religious doctrine or church governance and its authority, practices and procedures are concerned, irrespective of the civil rights that are claimed to be in need of protection. Any such interference would essentially infringe upon constitutionally entrenched religious (and related) guarantees. Little more than the natural extension of the doctrine of doctrinal entanglement is required to afford church law its rightful position as a *ius sui generis* that falls outside the authority of the state and the jurisdiction of the civil courts.

8.3 Church and state relations – a reflection

"What the state needs, within the framework of a particular law of Church and state, is a free Church, which as such can remind it of its own limits and calling, thus warning it against falling either into anarchy on the one hand or tyranny on the other". Expanding on this notion of Barth (1958:689) it may be added that what the church needs, within the same framework, is a state that affords the church the freedom to act according to its own understanding and in terms of applicable entrenched constitutional rights and freedoms. This would require a repositioning of the church within society and a renewed appreciation of the ways the uniqueness of church law influences the relations between church and state in South Africa.

As shown above, the relationship between the church and the state has generally been ill-defined and fraught with problems. An overview of the historical development of the relationship between the church and the state in South Africa, inferred by the way the judiciary have dealt with the church in the past and found jurisdiction in "church" cases, revealed a rather erratic and inconsistent view of churches and church law. The importance, however, for churches and their governance, assemblies, and tribunals to respect their own rules and regulations became evident. Churches which abused their powers, even in the slightest, have historically been dealt with harshly, and justifiably so, by the courts. The primary problem appears to be that, in the case of churches, the legislature (albeit bound to the Bible – see 8.2, *supra*), judiciary, and executive functions, usually separate in other forms of government, rest in the same body.

The Constitution envisages a tolerant society which is sympathetic towards individual and collective religious expression allowing it ample space to function independently from external expectations. The important role of religion in the lives of many people, the unique character of the church, and the widely accepted public benefits of churches (as privately funded associations) can hardly be challenged. Religious practices and communal religious freedom, in the open and democratic society contemplated by the Constitution, are of extreme importance and freedom of religion is one of the key ingredients of any person's identity and dignity. Churches, therefore, have the constitutional right to express themselves to government and fulfil their Biblical-prophetic calling.

The Constitutional Court has acknowledged that religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Religion concerns people's capacity to relate in a meaningful fashion to their sense of themselves and their environment and provides support and nurture and a framework for individual and social stability and growth as well as a sense of right and wrong.[4]

A strong independent church, therefore, does not only benefit the church itself, but, by and large, also the society it serves. No state can afford (or is expected) to be neutral regarding the common good of society. The Dutch system of "positive neutrality" (see chapter 6, *supra*) was found to be a viable option for church-state relations in South Africa. Churches must take the initiative to maintain open communication with authorities within the framework of constitutional values and the Bill of Rights. Church and state need to cooperate for the common good of the society they serve without the senseless rhetoric of gains achieved and losses suffered that often becomes part of church-state debates.[5] Churches will have to be perceived as institutions of peace aimed at the common good, with as little internal and external strife as possible.

As the church is the embodiment of exercised fundamental rights, providing the framework for a sense of identity and dignity, church law is an interest worthy of protection. The courts need to be thoughtful of the church's self-understanding

[4] See Sachs, J., in *Christian Education South Africa v Minister of Education* (2000) (at 36).
[5] Cf. Hunter (2013:1071).

as elucidated by its self-definition in terms of the Bible, its settled tenets, and its understanding of public policy, human dignity and fundamental rights. This self-definition has as foundation the headship of Jesus Christ over the church and the world. The church has a duty and responsibility to obey the authorities while also witnessing to them. The state's minimum duty towards the church is to afford the church ample opportunity to function without being burdened by limitations and coercion related to its core doctrine and practices. The importance of religious and cultural rights for a society should be recognised. The church must claim the rights afforded it.

Its distinctive role in society, its divine calling, and the constitutional guarantees of the church compel the lawmakers to give special attention to the legal position of the church. The *ius constituendum* and *ius constitutum* contain the full extent of law of the church (cf. 5.2.1, *supra*) and members are required to adhere to this law, but it can scarcely be enforced by an external authority. The church is a unique association which forms a special kind of juristic person with unique characteristics. This fact should be acknowledged and should be treated as such by the authorities and the civil legal system. The nature of the institution should be taken into account when assigning rights and obligations to it and its members. The rights constitutionally protected by freedom of religion (individual and associational), supported by freedom of expression and association, must inevitably lead to an organisation of a special kind with rights and liberties not afforded other associations.

The traditional way that the courts view churches within the existing parameters of private-law entities is to see them as voluntary associations based on contract. This view, however, falls short of describing the true nature of church membership and does not seem to take into account the true nature of the church as a faith community bound by covenant and aimed at the common good of society. Authorities need to take cognisance of the ways in which churches view themselves and devise ways to appreciate the unique position of churches in society. Church law as a *ius sui generis* within an association *sui generis* has to be recognised and respected in terms of the guarantees of the constitutionally entrenched rights and freedoms as set out in chapter 5 (*supra*). This warrants

the creation of a juristic person of a special kind, a section 31 association *sui generis.*

While the church remains subject to the state in the regulation of its external affairs it should remain autonomous in the regulation of its internal affairs. Church law should therefore not conform to the *ius circa sacra* but celebrate its uniqueness as *ius in sacra*. Each should enjoy jurisdiction in its own domain. The church should not conform to external expectations but, not unlike Kennedy's "stad op een berg" (see 6.13.2 [*supra*] and 6.13.3, [*supra*]), prominently and generously contribute to the common good of society. This includes public witnessing to give account of the faith that inspires towards serving the common good. The *ius circa sacra*, the domain of civil authorities, should never be confused with the *ius in sacra.* In matters concerning the latter, submission to faith and compliance with the Bible remain vital.

8.4 Future considerations

This study ventured to unfold the intricacies of church law within a constitutional state and described its uniqueness with the additional intent of stimulating debate on these principles and outcomes and serving as an incentive for much needed further research and dialogue in this field. Its distinctive position and the challenges and opportunities it holds warrant a continual reappraisal of church law in South Africa.

As shown above equality is often considered to be the most fundamental of all fundamental rights. However, there seems to be no persuasive reason why a private institution (such as a church) built on the fundamental right of religious freedom should yield to equality (or dignity or any other listed right) as a higher right than religious rights. Religious liberty and associational freedom should always be, as far as the church is concerned, the highest values and rights in the Constitution. The right of the state to enforce principles such as equality and non-discrimination has to be limited by (the compounding effect of) the rights to freedom of religion, expression, and association. Only if extraordinary and compelling circumstances exist, may the state interfere with the internal affairs of churches. According to the doctrine of doctrinal entanglement doctrinal issues

should be avoided by the courts, even if pecuniary (or any other legal) interests are involved. Churches, on the other hand, should show a strong disinclination to having disputes adjudicated by civil courts.

No compelling reason was found during the course of this investigation why churches should fully observe and conform to ordinary civil regulations regarding labour issues, where ministers are involved, or in matters pertaining to, for instance, the law of contract where internal affairs are concerned. The study also found that internal arrangements contained in church books of order should survive constitutional analysis on the basis set out above – provided that they conform to the church's own tenets and are officially endorsed. These include provisions that members of a congregation may not approach a court of law to have their dispute heard before all church avenues have been exhausted, directives that parties in disciplinary hearings are not allowed legal representation, and *prima facie* discriminatory arrangements and actions, such as the appointment of office bearers. The freedom to introduce and promulgate internal rules and regulations, free from civil encumbrance or burden, is of paramount importance in terms of the rights and freedoms of churches, as found in this investigation.

In the course of this study it was shown that adjudication in the context of churches and other religious institutions is still troubled. It seems sensible that churches become pro-active in assisting the judicial system, and the authorities in general, by the way they define and conduct themselves within the boundaries of the rights and freedoms afforded by the Constitution and, moreover, by their divine calling.

In the post-constitutional era it is feasible (and even required) that churches maintain their internal governance without governmental subordination. The state, however, can only afford the church autonomy regarding the internal regulations and doctrines of churches if churches themselves provide the framework and conditions to create healthy church-state relations. Litigation should be considered with restraint, if churches are to be taken seriously in their endeavours to remain independent in their own sphere. The contradictory ways in which churches position themselves and their laws *vis-à-vis* the authorities do

not promote their cause in a positive way. Constant dialogue is imperative in order to arrive at an acceptable level of consensus and consistency.

Discourse on the juristic personality of churches and religious rights should not be confined to the terms of pre-constitutional common law but should continually strive to promote the "spirit, purport and objects of the Bill of Rights".[6] Churches should take advantage of the concession afforded them by the South African constitutional provisions regarding religion, notably sections 15 and 31. In practical terms a dedicated commission for the promotion of Biblical-Christian institutions in terms of section 185, and participation of churches in the formation of a Charter of Religions Rights and Freedoms in South Africa pursuant to section 234 of the Constitution, and even the development of a separate charter for the rights and freedoms of churches seem feasible.

This study has attempted to contribute to the construction of a framework of reference that provides the impetus essential for the autonomy of the church in South African society, notably churches of Reformed descent and theology. To this end there needs to be ongoing discourse between scholars of the Constitution, the Bill of Rights, and other jurists, on the one hand, and theologians and church leaders on the other. Jurists need to take note of the challenges ahead and remain sensitive to the role that churches have to play in society. Churches of Reformed descent should carefully consider the interrelation between theology, (civil and ecclesiastical) jurisprudence, and constitutional theory when constructing church orders and passing official resolutions – without ever compromising their Biblical foundation, doctrinal position, and divine calling.

8.5 Closing thoughts

All churches of Reformed descent consider themselves to be self-governed, according to the pure Word of God, rejecting all things contrary to it and holding Jesus Christ as the only head – in accordance with the marks of the true church as found in article 29 of the Belgic Confession (see 6.12.2, *supra*). To this should be added the important guidance contained in article 32 of the Belgic Confession

[6] Section 39(2) of the Constitution.

that it is “useful and good for those who govern the churches to establish and set up a certain order among themselves for maintaining the body of the church” so to ultimately “maintain harmony and unity and to keep all in obedience to God” (see 7.7.3, *supra*). A healthy church-state relationship seems to be paramount towards the ends of article 36 where the government is tasked to upholding the “sacred ministry”; and to “promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere; to the end that God may be honored and served by everyone, as he requires in his Word” (see 1.1, *supra*).

In the light of this foundation and the discussion and conclusions in this study, it is evident that a proper framework needs to be devised to protect religious rights and freedoms, individually and collectively. Although it has all the potential to be a complex and diverse interactive process, there are no insurmountable obstacles. By drawing all the observations and conclusions together it has indeed been illustrated how church and state can exist respectfully and complementarily alongside each other – each master of its own domain. Any serious study of church law from a Reformed perspective will respectfully heed the words of John Calvin (*Institutes* I:183 [17.1]): “(God) takes care of the whole human race, but is especially vigilant in governing the Church, which he favours with a closer inspection”.

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ABSTRACT

The church-state relationship in South Africa was severely challenged in the wake of the 1994 constitutional dispensation. An analysis of the relationship between the church and the constitutional state reveals the unique position of church law in terms of the church's self-understanding and the possibilities of the self-rule of the church, within the context of entrenched religious rights and a sound church-state relationship. This study sets out to contribute to a framework of understanding that provides the impetus necessary for the autonomy of the church in South African society, notably of the churches of Reformed descent and theology.

Major events in the general history of the relationship between church and state, church-state relationships in other legal systems, and the relationship between the church and the judiciary in South Africa, have shaped church governance and influenced the self-expression and legal status of churches. The study investigates the impact of these influences on church law.

The right to freedom of religion (buttressed by related rights and the diversity demands of a pluralistic society), as a quintessential fundamental right, essentially warrants a strong presumption in favour of the church. To disregard the uniqueness of church law may even be *contra bonos mores*.

The pertinent issue is the status of church law as a *ius sui generis* and the freedom of religious institutions (including churches) to promulgate and enforce their own rules, standards, and regulations. The influence the inimitability of church law has on churches' right to regulate their own affairs pertaining to focus areas such as doctrine, offices, authority of church assemblies, ecclesiastical tribunals, property, membership, discipline, and labour relations is examined in this study. Internal arrangements contained in church books of order ought to survive constitutional analysis – provided they conform to the church's own tenets and are officially endorsed. The legal position of churches in South Africa and the consequence of this position in terms of the Constitution were reviewed critically and the content, application, and limitation of religious rights, as far as these issues pertain to church law, were explored and evaluated.

It is shown that the state and civil courts should not become entangled in matters of religious doctrine. The concept of “doctrine” should of necessity be extended to include interpretation of church orders and constitutions, and indeed be construed to include the whole body of established church law. The courts, in general, must accept the church’s analysis of its own statutes and the state should not be involved in matters of church law at all, owing to the contiguity between doctrine and church order. As the church is the embodiment of exercised fundamental rights, church law is shown to be an interest worthy of protection.

The doctrine of positive neutrality is considered as a feasible model for a sound church-state relationship. Churches have both rights and responsibilities *vis-à-vis* the state, while the state’s minimum duty towards the church is to afford it ample opportunity to function without being burdened by limitations and coercion relating to its core tenets and practices. The courts and authorities need to be mindful of the church’s self-understanding as elucidated by its self-definition in terms of the Bible and its settled tenets. Churches, as associations *sui generis*, have a reciprocal duty to act within the dictates of human dignity, public policy, and the law, while maintaining the right to claim their Biblical-prophetic autonomy and constitutional sanction. In drawing all the observations and conclusions together it is revealed how church and state can exist complementary alongside each other – each sovereign in its own domain – pursuing the same goals of advancing justice and the common good.

OPSOMMING

Die kerk-staat-verhouding in Suid-Afrika het onder groot druk gekom in die nadraai van 1994 se oorgang na ’n grondwetlike bedeling. ’n Ontleding van die verhouding tussen die kerk en die regstaat toon die unieke posisie van kerkreg in terme van die kerk se selfverstaan en die potensiële selfregering van die kerk, binne die konteks van grondwetlik verskanste godsdiensregte en ’n gesonde kerk-staat-verhouding. Hierdie studie poog om by te dra tot ’n verstaansraamwerk om die outonomiteit van die kerk in die Suid-Afrikaanse samelewing, veral met betrekking tot die kerke van Reformatoriese herkoms en teologie, te verseker.

Belangrike gebeure in die algemene geskiedenis van die verhouding tussen kerk en staat, die kerk-staat-verhouding in ander (vergelykbare) regstelsels, en die geskiedenis van die verhouding tussen die kerk en die regbank in Suid-Afrika, het kerkregering bepaal en die selfverstaan en regstatus van kerke beïnvloed. Hierdie studie ondersoek die impak van hierdie invloede op die beoefening van die kerkreg.

Die reg tot godsdiensvryheid (gerugsteun deur verwante regte sowel as die diversiteitseise van ’n pluralistiese samelewing), as ’n wesenlike fundamentele reg, regverdig ’n sterk voorkeur ten gunste van die kerk. Die minagting van die eiesoortigheid van kerkreg mag selfs *contra bonos mores* wees.

Die saak onder die loep is die status van kerkreg as ’n *ius sui generis* en die algemene vryheid van godsdiensinstellings (insluitend kerke) om hulle eie reëls, standaarde en regulasies te promulgeer en toe te pas. Die invloed van die eiesoortigheid van kerkreg op kerke se reg om hul eie sake rakende fokusterreine soos belydenis, ampte, gesag van kerkvergaderings, kerklike tribunale, eiendom, lidmaatskap, dissipline en arbeidsverhoudinge te reguleer, word in die studie ondersoek. Interne reëlings soos vervat in kerkordes en ander amptelike kerklike dokumente, behoort grondwetlike ontleding te deurstaan – mits dit aan die kerk se eie leerstellinge voldoen en amptelik bekragtig is. Die regsposisie van kerke in Suid-Afrika, en die gevolg van hul status in terme van die Grondwet, is krities ondersoek en die inhoud, toepassing en beperking van

godsdiensregte, in soverre hierdie kwessies verband hou met kerkreg, is ondersoek en geëvalueer.

Die prerogatief van interpretasie van die kerk se interne orde is ook in die studie ondersoek. Daar word aangedui dat die staat en die burgerlike howe nie betrokke behoort te raak by kwessies rakende godsdienstige leerstellings nie. Die konsep "leerstelling" moet noodwendig uitgebrei word om ook die interpretasie van kerkordes en ander interne regulasies in te sluit, en behoort inderdaad so vertolk te word dat dit die hele korpus van gevestigde kerkreg insluit. Voortspruitend uit die noue verband tussen leer en kerkorde behoort die howe, in die algemeen, die kerk se interpretasie van sy eie verordeninge te aanvaar, en die staat behoort geensins betrokke te raak by kerkregtelike kwessies nie. Aangesien die kerk die beliggaming is van uitgeoefende basiese regte, word aangetoon dat kerkreg 'n belang is wat beskerm behoort te word.

Die ondersoek dui verder aan dat "positiewe neutraliteit" beskou kan word as 'n geskikte model vir 'n gesonde kerk-staat-verhouding. Kerke het sowel regte as verantwoordelikhede *vis-à-vis* die staat, terwyl die staat minstens die plig het om aan die kerk voldoende geleentheid te bied om te funksioneer sonder om gebuk te gaan onder beperkings en dwang rakende sy kernbeginsels en -praktyke. Die howe en owerhede moet die kerk se selfverstaan soos toegelig in sy selfdefiniëring in terme van die Bybel en kerklike leerstellings in ag neem. Kerke, as verenigings *sui generis*, het die wederkerige plig om te funksioneer binne die voorskrifte van menswaardigheid, openbare beleid en die reg, terwyl hulle terselfdertyd die reg behou om op hul Bybels-profetiese outonomiteit en konstitusionele sanksie aanspraak te maak. Die navorsing en gevolgtrekkings dui aan dat die kerk en die staat komplementêr, met wedersydse respek, kan funksioneer – elkeen soewerein op sy eie terrein – in die nastreef van gemeenskaplike doelwitte, naamlik die bevordering van geregtigheid en die algemene welstand van die gemeenskap.

KEY TERMS

Church autonomy
Church law
Church order
Church-state relationship
Common good
Constitutional adjudication
Doctrinal entanglement
Ecclesiastical authority
Ecclesiology
Legal status of churches
Religious doctrine
Religious freedom
Religious rights
Self-rule of the church