PREACHING FORGIVENESS OR REGULATING THE UNFORGIVABLE: BENEFITS AND SHORTCOMINGS OF PROPOSED REGULATORY MECHANISMS FOR RELIGIOUS LEADERS IN SOUTH AFRICA

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Abstract

South African society is characterised by variable but firm religious associations. The important status of religion within the broad spectrum of human rights is both reflected and upheld by the constitutional dispensation, which protects religious freedoms. Notwithstanding the acknowledged status of religion within South Africa, there have been ongoing and prolific instances of malpractice within the religious sector which have highlighted and questioned its inherent value within society. The most significant investigation and proposal was put forward by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL), which sought to understand the current challenges within the religious sector and respond to same. The CRL published a proposed regulatory model, which generated an outcry from the religious community. This resulted in the CRL publishing a revised model, to respond to the public comments. Religious institutions were still dissatisfied. They formed their own committee to work on solutions that they believed would be effective, the most prominent being the proposed implementation of a uniform Code of Conduct with specific provisions to regulate the conduct of religious leaders. In response, the CRL drafted a Code of Conduct for religious institutions, in which it set out values and general principles for religious leaders to follow.

This dissertation has sought to investigate the points of disjuncture within the religious sector which have "allowed" malpractices to prevail. The perspective taken has been to analyse the current regulatory framework in combatting religious malpractices and to assess if and to what extent, any of the proposed alternates are constitutionally, legally, and logistically feasible within South Africa's constitutional setting. Empirical research, in the form of interviews, has been used to ascertain the internal regulatory processes within religious denominations and to understand the machinations of the model proposed by the CRL. Desktop research has been primarily used to explore the formal regulatory processes, which broadly comprise legislation and case law, regulating malpractices, and to consider the alternates to the current regulatory framework.

Through the exploration of the current and alternate regulatory frameworks, the dissertation has highlighted that there are benefits and shortcomings to both. In summation, the current regulatory framework allows people to exercise their religious freedoms and religious institutions to develop their own regulations. However, parts of some legislation are unclear and haphazard, the self-regulatory nature of the framework enables religious leaders to bypass their legal obligations, and there is a lack of public accessibility to information on the regulatory framework. The proposed alternate initiated by the CRL is beneficial in that it has exposed the problems within the religious sector and initiated the process of reform. However, parts of it are unclear and can be subject to misinterpretation. It presents several administrative challenges, has little support from the religious community, and the CRL and its role does not appear to be widely known amongst the religious community.

While acknowledging that these recommendations are by no means the final and conclusive answer to the contentious and multifaceted problem faced by the religious sector, the dissertation suggests that a standalone piece of legislation, with the Codes of Conduct drafted by religious institutions and the CRL as its basis, could assist in reducing the incidents of malpractice. Inter alia, the legislation could include existing regulations, obligations and penalties for contravening regulations as contained in various pieces of legislation, all religious denominations having to draw up their own written constitutions and book of rules, a provision for it to be compulsory to notify the CRL when forming a religious institution, and the documentation of general principles in relation to malpractices that have applicability to all religious denominations. In addition to the proposed 'new' legislation, existing legislation, which is vague ought to be amended, and the CRL ought to take active steps to make itself and its role better known in religious communities.

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DEFINITIONS RELATING TO RELIGION

The key, recurring terms relating to religion that will be used throughout this dissertation are defined as follows:

Religion/s: *An organised system of beliefs, ceremonies, and rules used to worship a god or group of gods (e.g. Christianity, Hinduism, Islam, Judaism etc.)*

Religious belief: *Belief in a religion's central activities of faith/attitudes*

Religious community: *A gathering of individuals who have common religious beliefs, habits, practices and ideologies about the negotiated order of these gatherings (e.g. Rosebank Catholic Church, Sandton Shul, Houghton Mosque)*

Religious denomination/s: *A subgroup within a religion that operates under a common name, tradition and identity (e.g. Catholic, Methodist, Anglican – some Christian denominations)*

Religious doctrine: *The written body of teachings of a religion that are generally accepted by that religion*

Religious framework: *The structure of the religious sector in South Africa*

Religious institution/s: *Place of worship that exists to support and manage the practice of a specific set of religious beliefs (e.g. Church, Temple, Mosque etc.)*

Religious leader/s: *A person who is recognised within a particular religion as having authority within that body and who plays a key role in leading, inspiring and directing the people who belong to that particular religion (e.g. Rabbi, Priest, Imam, Pastor etc.)*

Religious practice/s: *Observances/traditions of a particular religion including inter alia rituals, wearing religious symbols and refraining from certain activities*

Religious sector: *All the religions and their denominations practiced and/or recognised in South Africa*

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Chapter 1

INTRODUCTORY OVERVIEW

This chapter provides an overview of the collective role and importance accorded to religion within the South African context, evidence of malpractice within the religious sector and the resultant need for a consideration of the existing regulatory framework and potential alternatives.

My earliest religious memory is of going to our local Catholic church, dressed in my Sandton Sunday best, holding my granny's hand. From this initial exposure, I drew conclusions, perhaps naively conceived, that religion provided a loving, protective, affirming, and uplifting dome, an all-good association, beyond reproof, questioning or critique. Fast forward from circa 2005 to 2021 – now a young adult, an aspiring lawyer, a conscious and conscientious citizen – I approach questions of religion with a wider perspective, one still steeped in my personal religious convictions, but with the capacity and interest to examine such with a wider lens.

As it does for me, religion plays a fundamental role in the lives of the vast majority of South Africans.[1] A community survey conducted in 2016 on the religious beliefs of the population revealed that 88% of South Africans hold a religious belief.[2] Only 10.72% of the population do not have a religious belief and 1.27% are unsure about their belief.[3] The importance that South Africans accord to religion is articulately expressed in *Prince v President*:[4]

> 'For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community, and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which forms the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.'[5]

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[1] David Bilchitz & Shaun de Freitas 'Introduction: The right to freedom of religion in South Africa and related challenges' (date) 28 *South African Journal on Human Rights* 141 at 141.
[2] Statistics South Africa *Community Survey on Religious belief by sex for person weight* (2016). Is this the title?
[3] Ibid.
[4] 2002 (2) SA 794 (CC).
[5] Ibid para 48.

Although religion holds a dominant and influential position within South African society and serves a multitude of self-fulfilling functions; in recent times the religious sector has been shown to be in disarray. Evidenced with uncomfortable regularity, escalating incidents of religious leaders implicated in a myriad of repugnant malpractices, which often violate people's constitutional rights, arguably raise questions: What happens when things go wrong? Who is responsible for oversight? How does this all square up with our all-important constitutional dispensation?

The nature of these malpractices is multifaceted and includes harmful acts, forms of abuse and discriminatory practices perpetrated by religious leaders acting both within and outside the confines of religious doctrine. Occurrences of malpractice are criminal, civil, and constitutional in scope. Criminal malpractices include, inter alia, sexual abuse, child abuse, theft, extortion, and the enforced use of harmful substances as a healing medium. To cite a few examples: three Catholic priests were defrocked for sexually abusing children in their parishes; a South African Rabbi was reported to be wanted in Israel for molesting two women – one a minor; a Pastor sprayed Doom into congregants' faces as a means of 'healing' and 'delivering' them; title deeds of religious properties were registered in the name of religious leaders; and money was collected from members of religious institutions and banked into religious leaders' accounts.[6]

Civil malpractices include practices which equate to the commercialisation of religion[7] and the failure of religious leaders to comply with licensing, registration, visa application, and tax obligations.[8] Examples include: religious leaders making it mandatory for members of their congregations to make payment to them before meeting with them for purposes of inter alia seeking advice; selling religious symbols to members of religious institutions at elevated

[6] Lee Gancman 'Fugitive rabbi threatens life of South African chief rabbi' available at *https://www.timesofisrael.com/fugitive-rabbi-threatens-life-of-south-african-chief-rabbi/*, accessed on 28 March 2019; Tebogo Monama 'Three SA priests defrocked over child abuse claims' available at *https://www.iol.co.za/the-star/news/three-sa-priests-defrocked-over-child-abuse-claims-17494206*, accessed on 28 March 2019; CRL Rights Commission *Preliminary Report of The Hearings on Commercialisation of Religion and Abuse of People's Belief Systems* 1 at 26-27; Peter Ramothwala ''Prophet of Doom' asks to serve his sentences concurrently' available at *https://www.timeslive.co.za/news/south-africa/2018-02-27-prophet-of-doom-asks-to-serve-his-sentences-concurrently/*, accessed on 28 March 2019; Queenin Masuabi ''Prophet' of Doom: Pastor claims he can heal people with insecticide' available at *https://ewn.co.za/2016/11/21/pastor-claims-he-can-heal-people-with-doom*, accessed on 28 March 2019.
[7] Examples of commercialisation of religion include blessed water and oils being sold to congregants at a high marked-up price, access to the spiritual leader or traditional healer only being guaranteed by payment of fixed amount of money and bank speed points being used for people to swipe their bank cards during ceremonies.
[8] CRL Rights Commission op cit note 6 at 25-26.

prices[9]; and religious institutions failing to declare their annual turnover to South African Revenue Services (SARS).[10]

Constitutional malpractices include rights-based harms which amount to unfair discrimination prohibited under section 9(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution)[11] and/or the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), such as employees being prohibited from working for a religious institution on the basis of them being female and/or homosexual;[12] and the violation of other rights and freedoms afforded to individuals in the Bill of Rights.

Given the importance that so many South Africans accord to religion and the adverse consequences that such acts have on so many South Africans; the apparent proliferation of religious leaders committing criminal, discriminatory and harmful acts has heightened the need to understand the reasons for such misconduct and to explore the development of effective methods to regulate and combat such practices. Although there are both formal and informal regulatory mechanisms[13] that exist within South Africa's religious and legal frameworks[14] to address instances of malpractice, they are arguably insufficient and ineffective in achieving their desired outcome.

In response, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL)[15] formulated a regulatory model that could be implemented across all religious institutions to address the absence of oversight structures within religious institutions and, in turn, hopefully to reduce the opportunities for malpractice and their escalation within the religious sector.[16] The publication of this model generated varied responses from members of the public and religious institutions. Many criticised it for

[9] Ibid 25.
[10] Ibid 26.
[11] The grounds on which unfair discrimination is prohibited in terms of section 9(3) of the Constitution include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Other freedoms and rights include dignity, expression and association.
[12] *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 (4) SA 510 (EqC).
[13] Formal regulatory mechanisms are those that are established by law. They include inter alia legislation, precedent, policies and proposals. Informal regulatory mechanisms are those that are formulated and implemented by religious bodies themselves.
[14] The legal framework refers to the laws that govern religion in South African society.
[15] The CRL is a Chapter Nine institution supporting South Africa's constitutional democracy. Chapter Nine institutions are State institutions who execute their functions independently of government and other organs of State. They are also intermediary institutions which enable members of the public to articulate their needs via an independent forum.
[16] CRL Rights Commission op cit note 6 at 26.

exceeding its mandate in drafting a model of such a nature and for subjecting the religious sector to too much state interference, which is an attack on constitutional rights to religious freedoms. Overall, it was argued that problems within the religious sector ought to be resolved within the religious sector.[17]

In consequence of the controversy generated by the proposed regulatory model, a number of religious leaders attended a summit in February 2019 to discuss their concerns and recommendations in relation to the regulatory model proposed by the CRL.[18] At the summit, it was decided that a task team, which had been put together to prepare for the summit, should continue its work.[19] A steering committee was accordingly formed, which comprised the members from the initial task team. It was tasked with the responsibility of preparing for prospective national conference and working on strengthening existing measures and the implementation of new measures to reduce the incidents of malpractice within the religious sector.[20]

While there has been a notable response to the CRL's initiatives from religious leaders, organisations, and other related bodies; few academics have evaluated the CRL's regulatory model and its appropriateness within the South African setting. Within this context, this dissertation seeks to fill this gap by: (i) interrogating the nature, scope and efficacy of the current regulatory framework which seeks to regulate incidents of malpractice within the religious sector, as well as the CRL proposals and the debates around them; and (ii) making recommendations as to how current laws and existing responses to such laws can be developed to address the issue of malpractice within the religious sector in ways that best align with constitutional rights and values.

Accordingly, the research questions of this dissertation are:

> **(1) What are the current informal and formal regulatory mechanisms in South Africa to combat incidents of malpractice by religious leaders and how effective are they in achieving their desired outcome?**

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[17] CRL Rights Commission *Report of the Hearings on the Commercialisation of Religion and Abuse of People's Belief Systems* 1 at 28; Anglican Position Paper *The Report on the Regulation of Religion in South Africa: An Anglican Response* (2017).
[18] Thabile Mbhele 'CRL commission, religious sector meet over "abuse scandals"' available at www.sabcnews.com, accessed on 7 June 2019.
[19] Steering Committee Discussion Document *National Consultative Conference of the Religious Sector of South Africa* (2019).
[20] Ibid.

(2) What are the alternative modes of regulation to combat instances of malpractice by religious leaders in South Africa, including proposals by the CRL?

(3) Which of the alternative modes of regulation to combat instances of malpractice by religious leaders are practically, constitutionally and legally feasible in a South African setting, if any?

The dissertation will answer these research questions by:

(1) Setting out a theoretical framework to explain the relationship between religion, the state and the law. This is intended to create the foundation through which to understand the regulatory framework.

(2) Exploring the existing regulatory framework, which comprises the overarching theoretical underpinnings of regulation (State-regulation and self-regulation) and the South African regulatory framework which comprises formal regulations (those established by law) and informal regulations (those developed by religious denominations themselves).

(3) Exploring the alternate modes of regulation to combat incidents of malpractice, with a specific focus on the most prominent alternate being the CRL's proposed amendments to the existing regulatory framework, and the responses from various branches within society in relation to such proposed amendments.

(4) Analysing the existing regulatory framework and its proposed amendments in terms of both substantive and procedural considerations.

(5) Proposing recommendations for both the existing and alternate regulatory frameworks (from the analysis) that could be practically, constitutionally and legally feasible within a South African setting.

Chapter 2

METHODOLOGY

This chapter explains and assesses the chosen methods adopted to answer the research questions and fulfil the research objectives.

Research Process

I began my research by reading extensive literature relating to my topic, much of which has been included in my dissertation. This literature included journal articles explaining the relationship between the state and religion, constitutional provisions relating to religious freedom and its associated limitations, various scholars' opinions on the relationship between freedom of religion and the right to equality, and the extent of state intervention in religious matters, cases relating to a conflict between freedom of religion and other constitutional rights, the preliminary and revised reports issued by the CRL, and the various responses to the reports.

It soon became evident that South Africa has a series of regulations which directly and indirectly emanate from legislation, case law and religious institutions themselves. While one can make inferences about regulations from prevailing legislation, case law and scholarly opinions; there is minimal desktop research on the regulations of religious institutions. Accordingly, I decided that the most appropriate method to research religious institutions' regulations would be to conduct interviews with representatives from religious institutions who have knowledge of their regulations. I decided on interviews because I believed they would provide me with a first-hand, insightful, and holistic account of the regulations.

When reading the reports issued by the CRL and the responses to it, it appeared that various religious institutions are opposed to the model of regulation set out in the report, and instead advocate for self-regulation. I, therefore, decided also to ask the participants about their opinions on the CRL, police and court intervention in religious matters, to elicit a personal account of the extent to which they advocate for state and CRL intervention. Attached as an annexure to this dissertation is an example of the interview schedule I used, marked **"A"**.

The following religions and religious denominations were identified and included within the study:

Table 1: This table illustrates the religions and religious denominations that have been included in the study and illustrates which religions constitute the majority and minority in terms of the religious demography in South Africa.

Name of Religion	**Name of Religious Denomination**
MAJORITY	
CHRISTIANITY	Catholicism
	Anglican
	Methodist
	Rhema
	Greek Orthodox
	Zionist Christian Church (ZCC)
MINORITY	
TRADITIONAL AFRICAN RELIGION	Traditional African Healing
JUDAISM	Orthodox Judaism
	Reform Judaism
ISLAM	Sunni
HINDUISM	Shaivism
BUDDHISM	Tibetan

The primary reason for the selection of these religions and religious denominations is that they are all practised and prevalent within South Africa. This enables the findings to be holistic and reflective of the informal regulations of religious denominations practised in South Africa. A study conducted on the religious demography in South Africa in 2015 revealed that approximately 80% of South Africans are Christian.[21] The reason for the inclusion of six religious denominations within Christianity is because the majority of the South African population is Christian. The same study revealed that approximately 1% identified with ancestral or Traditional African Religions; 1,65% identified as Muslims; 1,1% as Hindu; 0,16% as Jewish and 0,36% as Buddhists.[22] The presence of the aforesaid minority religions in South Africa illustrates the reason for their inclusion in the study.

[21] The Association of Religion Data Archives 'South Africa' available at https://www.thearda.com/international/Data/countries/Country_207_2.asp, accessed on 9 December 2021.
[22] Ibid.

It is a point of contention and, therefore, necessary to address whether Traditional African Healing can be defined as a religion. In an online article in the Harvard Gazette, Anthony Chiorazzi acknowledges that the term 'religion' is problematic for many Africans when speaking about their religions because religion is considered separate from culture, society and environment.[23] However, an opposing view is that religion co-exists with constructs such as culture and society and can never be separated from them.[24] Religion informs multiple aspects of traditional African culture including, inter alia, dress, marriage and diet and therefore, should not be considered separate from it.[25] Moreover, Traditional African Healing is pluralistic and inclusive in nature, in that parts of it adopt Christian religious beliefs, reinforcing the notion that it is pragmatic and regards the incorporation of other faiths as adding 'spiritual potency' to its own spiritual practice.[26] Hence, while it is not conclusive that Traditional African Healing is a religion, there is literature to suggest that it falls within the scope of the definition of religion. It is also a pertinent and relevant consideration within the South African context and has, therefore, been included in this study.

I also believed it was necessary to interview a commissioner from the CRL regarding its proposed model of regulation, to have a personal account and understanding of the functioning of the model beyond the confines of the reports, and to enable me comprehensively to assess the benefits and shortcomings of the model. I also wanted to ask the commissioner about the relationship the CRL enjoys with religious institutions so as to assess impartially CRL-religious institutions relations, and to hear from both interviewees of religious institutions and the CRL. Attached as an annexure to the dissertation is the interview schedule I used for the commissioner, marked **"B"**.

Interview Process

After applying for and obtaining ethics approval from the University of the Witwatersrand, I commenced searching for participants for the study. I went about identifying the participants by an internet search of the contact details of the religious institutions and religious denominations that I intended to interview. I contacted the religious institutions telephonically and briefly explained my research. I asked for an email address to send my participant

[23] Anthony Chiorazzi 'The spirituality of Africa' available at https://news.harvard.edu/gazette/story/2015/10/the-spirituality-of-africa/, accessed on 11 December 2021.
[24] Ibid.
[25] Ibid.
[26] Ibid.

information sheet so that the religious leader could read it and decide whether he/she wanted to be a participant in the study. Attached as an annexure to the dissertation is a copy of the participant information sheet I used for religious leaders, marked **"C"**.

The above method was successful with eight of the religious institutions. However, with four of the religious institutions, I was unsuccessful in contacting their offices telephonically, either because they were not on the internet or were unreachable after contacting them numerous times. In such instances, I asked people, who I know belong to such religious institutions, to give me names and contact details of the religious institutions. I was aware that this could pose a challenge to the anonymity of participants, so I asked for a few names and contact details. As an additional measure, I requested the people who had furnished me with the contact details of the religious institutions to sign a non-disclosure form.

A similar process of obtaining an interview with a commissioner from the CRL was followed. I contacted the offices of the CRL telephonically, briefly explained my research and asked for an email address to send my participant information sheet for the CRL to view. A copy of the participant information sheet I used for the CRL is annexed to this dissertation, marked **"D"**. The offices of the CRL sent me a permission letter to conduct the interview, in accordance with the rules governing CRL interviews, annexed hereto marked **"E"**.

Most interviews were in person – either conducted at the offices of the participants or in private meeting rooms. A hard copy of the participant information sheet that was emailed to the religious leaders and commissioner was given to the participants to read through to keep and agree to before the interview commenced. A written consent form was also completed by the interviewee and signed by him/her and me before commencing the interview. A copy of the consent form for religious leaders is annexed hereto marked **"F"** and for the commissioner of the CRL, marked **"G"**.

Some interviews were conducted telephonically due to Covid-19 and/or geographical constraints. In this case, the contents of the participant information sheet and consent form were read out to the participants and verbal consent was obtained before commencing the interview.

Reflection of the research – Challenges and limitations

The nature of the research gives rise to considerations of positionality, ethics, and limitations.

(1) Pre-conceived opinion

As a woman who has grown up in a staunch Catholic home and been exposed to Catholicism for 25 years, I may well have subconsciously formed an opinion about what I think should happen within the religious sector and use the research to make recommendations that confirm my belief. I could also find myself in a conflicting position, deciding whether to be true to my faith and accordingly, make recommendations in respect of the religious sector that would be pleasing to my faith; or to assess the religious and legal regulatory frameworks impartially and, in turn, make recommendations that, in my opinion, best align with our constitutional dispensation. To address these, I have re-evaluated my response to the research by constantly referring to the basis and objectives of the research when conducting my analysis and revisiting it after writing, always seeking to ensure that my findings are based on the research and not on my pre-existing opinions relating to the topic. I have also often reminded myself that I am writing in my capacity as a researcher, and not as a member and/or advocate of the Catholic church.

(2) Limited application

Although it was intentional only to include religious institutions from an urban setting, the research has limited application for religious institutions within a rural context. The informal regulations are not representative of all religious denominations across South Africa, because a religious leader from every religious denomination was not interviewed (e.g. Jehovah's Witnesses, Nazareth Baptist Church).

In addition, no controversial religious leaders that have engaged in harmful practices (such as spraying Doom on the congregation to 'heal them') have been interviewed. It is apparent that such acts committed by these religious leaders have prompted the discussions and proposals around the regulation of the religious sector. I attempted on numerous occasions to establish contact with a religious leader who could provide an in-depth, first-hand account of such practices, but I was unable to do so.

Nonetheless, notwithstanding the non-inclusion of controversial religious leaders committing harmful practices and the limited application to the rural context; the sample of the participants is large and diverse enough to assess and gain a relatively holistic understanding of the current and proposed regulatory frameworks of the religious sector in South Africa.

This study is also important and relevant for the religious sector in South Africa. Many incidents of malpractice within religious institutions, which have been the subject of media scrutiny and prompted discussions relating to proposals of regulating the religious sector, have formed the basis of the interview questions.

(3) Consent from intended participants

Not all religious institutions consented to the proposed interview. This limits the representation of religious institutions and, in turn, the assessment of the regulatory framework. Nonetheless, only one of the thirteen religious institutions did not agree to participate and, therefore, the representation within the constraints of the sample was limited only to a slight extent.

(4) Subjectivity of responses

The information that the participants disclosed may not have been entirely objective and factual, taking into consideration the internal biases that religious leaders and people associated with religious institutions display towards them and which a commissioner would display towards the CRL. Nonetheless, the interview questions were structured in a hypothetical way to elicit factual and objective responses and to guard against the incrimination of participants. The hypothetical structure prompted factual responses from participants and, when asked, the participants provided an honest opinion, highlighting both strengths and weaknesses of their religions and religious institutions.

(5) Accuracy/quality of information

It cannot be guaranteed that the information which the participants conveyed to me during the interview is completely accurate and reliable. However, I ensured that I interviewed the religious leaders at the offices of the religious institutions. These were all located on the same premises as the religious institution so that I was certain that they were religious leaders for their religions and/or religious denominations. Furthermore, I only used participants whose names and positions were listed on the websites of their religious institutions. If a website was not available for the religious institution, I used the names and contact details that I was given by people whom I know belong to such religious institutions. All participants were religious leaders. Some participants held positions within their various institutions that were regarded as more senior than religious leaders, but they were nonetheless religious leaders. By utilising the above methods, I ensured that the participants were sufficiently knowledgeable and had insight and exposure to the topic under consideration.

It is also worth noting that the interviewees reserved comment for some questions. Some responses which the interviewees provided were also not clear and relevant to the question being asked. Nonetheless, most responses were detailed, relevant and enabled me to gain a holistic insight into the informal regulatory structures underpinning the religious denominations which form part of this dissertation.

(6) Verification of information

Another limitation under consideration is the methods of verifying the information conveyed during the interviews. In all interviews, both in-person and telephonic, the participants provided me with varying forms of supporting evidence as verification of their responses. Some participants furnished me with a copy of the documents to which they were referring, either during the interview or via email after the interview, and other participants referred to the supporting documents whilst conducting the interview. I also conducted my own research to verify the information conveyed to me, where desktop research was available. Another method of verification could have been cross-checking the information with other religious leaders from the same religions and/or religious denominations however, this could pose a risk to the anonymity and confidentiality of participants. This method would have also been challenging to pursue, as there were a limited number of suitable participants to interview for several of the religious denominations. The restrictive nature of the Covid pandemic further limited access and participation relating to the research.

(7) Anonymity/confidentiality

The participants needed to remain anonymous and confidential for them to feel comfortable to answer honestly and objectively, and to know that they would not be subject to scrutiny from their religious institutions and the CRL. While the participants are not anonymous to me, I implemented steps before, during and after the interviews to guarantee anonymity and confidentiality in this dissertation. Nobody, except the offices of the religious institutions and myself, have knowledge of the participants. All in-person interviews were conducted in meeting rooms, where anonymity and confidentiality could be assured. All telephonic interviews were conducted in my study, where anonymity and confidentiality could be assured by me. I password protected all interviews after recording them and locked away transcripts of the interview recordings in a safe place. All references to the participants in the dissertation are either by way of their religious institution or, in the case of the commissioner of the CRL, by his/her title.

Chapter 3

THEORETICAL FRAMEWORK

This chapter sets out the theoretical framework of the dissertation. As such it describes the legal and conceptual framework, which serves as the backdrop to the investigation and informs the conclusions. Broadly, this framework consists of the triad between the state, religion, and the law. More specifically, it comprises the relationship between the state and religion, and between religion and the law; various state-religion models; competing understandings of religious freedoms; the nature of the relationship between religious freedoms and other constitutional rights; the extent to which religious freedoms can be limited; and the extent to which the state and the law is willing to intervene in religious matters. Emanating from competing understandings of religious freedoms and the degree to which religious freedoms can be limited, are considerations of whether and to what extent people can waive their rights and consent to harmful practices.

State, religion, and society

There is no legislation that sets out the relationship between the South African state and religion, but various theoretical models of state-religion relations assist in understanding this relationship. David Bilchitz and Alistair Williams describe and evaluate three models that have been adopted in different societies to govern state-religion relationships: the theocracy, separation, and accommodation/cooperation models.[27]

In the theocracy model, the state and religion are interrelated and dependent on each other.[28] A particular religion enjoys supremacy and the laws of the state are entirely reflective of the laws of that religion.[29] As such, all individuals residing in such a state are compelled to follow the dictates of the religion adopted by the state. For Van Schalkwyk, this model is advantageous in countries where many citizens follow the religion adopted by the state.[30] This enables the citizens to be governed in accordance with their religious beliefs, and to fully experience the ambit of their religious convictions.[31] However, this model presents several challenges. It stifles individuals' ability to follow the religious path that they choose and, in so doing, hinders

[27] David Bilchitz & Alistair Williams 'Religion and the public sphere: Towards a model that positively recognises diversity' (2012) 28 *South African Journal on Human Rights* 146 at 148-158.
[28] Ibid 148.
[29] Ibid.
[30] Cecile van Schalkwyk *The constitutionality of religious observances in South African public schools* (unpublished LLM thesis, Stellenbosch University, 2016) 1 at 17.
[31] Ibid.

the accommodation of diversity within such a society and the ability of the state to accord equal treatment to all people.[32] It can also result in political instability, alienation and ostracisation among minority religious groups which may ultimately lead to a defiance of state laws by these groups and violence, persecution and alienation of such groups.[33] As Van Schalkwyk accurately concludes, based on the constitutional rights to religious freedom, equality before the law and freedom from unfair discrimination on the basis of religion, a theocratic model is not workable within South Africa. It would hinder all the above constitutional rights unjustifiably.[34]

On the other hand, the separation model divides the state and religion into two separate entities.[35] The laws of the state are independent of religious doctrine and the state is often perceived to be skeptical towards religion in its adoption of a secular stance, which broadly entails people 'understanding the world by their own efforts' rather than by 'mysterious incalculable forces' such as religion.[36] In evaluating this model, Bilchitz and Williams suggest that the separation created between the state and religion, and the fact that a state does not prefer a particular religion, enable equitable treatment and freedom for people to follow and practise their diverse religions.[37] However, the state's complete independence from religion in all circumstances can also violate people's exercise of religious freedoms and equitable treatment.[38] It requires religious people to compartmentalise their identities into the private and public spheres, and to leave behind their religion when they enter the public sphere.[39] However, the non-religious in such a society are not confronted with the same problem.[40] For example, a strict separation between state and religion would render it problematic for a person to walk out into the town square wearing religious apparel, and might even prohibit such conduct.[41] While the choice of the person to wear religious apparel falls within the confines of the private sphere, he/she entering into a public place with the religious apparel falls within the public

[32] Bilchitz & Williams op cit note 27 at 148-149.
[33] Van Schalkwyk op cit note 30 at 18.
[34] Ibid 18-19.
[35] Bilchitz & Williams op cit note 27 at 153.
[36] Ibid; Maurice North 'Religion in a Secular Society' (Winter 1974/75) 9 *European Judaism: A Journal for the New Europe* 18 at 19.
[37] Ibid 154.
[38] Ibid 154-155.
[39] Van Schalkwyk op cit note 30 at 23.
[40] Ibid.
[41] Bilchitz & Williams op cit note 27 at 155.

sphere.[42] Such a situation tampers with the person's constitutional right to religious freedom and equality.

In contrast to the theocracy and separation models, the accommodation and cooperation models treat the state and religion as two distinct entities, but adopt the view that it is necessary for the state to accommodate and cooperate with all religions equally in society.[43] More specifically, the accommodation model is premised on the state accommodating the needs of various religions in the form of, inter alia, dietary and holiday exemptions to ensure that people can fully realise their right to religious freedom in the public sphere.[44] The cooperation model entails a working relationship between the state and religion.[45] The state plays an active role in funding church-related activities which include, inter alia, funding religious officials and education, and collecting religious contributions.[46] While the accommodation and cooperation models enable people freely to practise their religions by accommodating and cooperating with all religious denominations equally; state apportionment of religious needs and resources will be unequal across religious institutions in the event of some religions being more resource and exemption-intensive than others.[47] The apportionment of needs and resources are often skewed in favour of the dominant religion within a society, resulting in minority religions being alienated and coerced into conforming with the ideals of the dominant religion.[48]

Scholars differ on which model best fits the relationship between the South African state and religion. Van Schalkwyk maintains that a 'positive recognition model' best describes state-religion relations in South Africa.[49] For Van Schalkwyk, the accommodation model implies the adoption of a passive approach to religious freedom by the state, which is not reflected in South Africa.[50] The state plays a more active role in the realisation of religious freedom. The Constitution creates the framework for all people, regardless of their religion, to be treated equally by the state, and to protect religious institutions from unwarranted state interference and coercion.[51] The state must create environments in which people feel comfortable to express their religious identities and provides for religious institutions of the religious community to

[42] Ibid.
[43] Ibid 156.
[44] Ibid 156-157.
[45] Van Schalkwyk op cit note 30 at 25.
[46] Ibid; Bilchitz & Williams op cit note 27 at 156-157.
[47] Ibid 157.
[48] Ibid 158.
[49] Van Schalkwyk op cit note 30 at 47.
[50] Ibid.
[51] Ibid 48.

come together.[52] Van Schalkwyk argues that the relationship between the South African state and religion is not one of complete separation. There has been never been ‘an intention to erect a wall of separation between the state and the church in democratic South Africa’.[53] There is no establishment clause which creates a strict separation between religion and the state, and it is clear from multiple constitutional provisions that a culture of interaction exists.[54] These constitutional provisions include the ability of religious observances to be conducted at state and state-aided institutions (subject to certain restrictions), the legislative recognition of marriages concluded in terms of religious law, and members of religious communities being able to practise their religion and form, join and maintain religious organs of society.[55] These provisions, together with others, illustrate that religious institutions are not prohibited from expressing their religious views in the public sphere. However, a degree of separation is evident in that the South African state accords equal treatment to all religions and does not coerce people into following a particular religion.[56]

Georgia du Plessis’ view is like that of Van Schalkwyk. There is interaction between the South African state and religion, and the relationship is one of ‘mutual benefit’ where religious institutions are active participants in public life and are involved in the ways in which laws are made and applied.[57] Like Van Schalkwyk, Du Plessis maintains that the relationship is not one of strict separation, partly due to the fact that there is no establishment clause.[58] However, she goes further in saying that the relationship is not one of control of religion by the state nor control of the state by religion, as such an arrangement would be contrary to the Constitution.[59]

Annie Leatt maintains that South Africa is a secular state, in which the rule of law and the polity enjoy primacy over religion.[60] She deems the South African state to be ‘overtly political and legal’, whose secular status is a direct response to the prioritisation of the sacred over the secular under the apartheid regime.[61] Although Leatt regards South Africa as an explicitly secular state, she nonetheless shares similar sentiments to Van Schalkwyk and Du Plessis by

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[52] Ibid 47.
[53] Ibid 43.
[54] Ibid.
[55] Ibid.
[56] Ibid 24.
[57] Georgia du Plessis ‘The constitutionality of the regulation of religion in South Africa – Untoward restrictions of the right to religious freedom?’ 136 *South African Law Journal* 131 at 143.
[58] Ibid.
[59] Ibid.
[60] Annie Leatt ‘Faithfully Secular: Secularism and South African Political Life’ (2007) 20 *Journal for the Study of Religion* 29 at 29 & 35.
[61] Ibid 36.

acknowledging the role of religion in South Africa within the state and the importance that South Africans accord to religious beliefs and practices.[62] Not only does the South African population attach value to religion, but so too do the state and law. This is evident in the Constitution's provision for people to practise their religions and for religious observances to be conducted at state or state aided institutions, subject to limitations.[63] Bilchitz and Williams, like the aforementioned scholars, are of the view that the Constitution places obligations on the state to have an active role in the right to religious freedom.[64] An example of state participation is the state's ability to enact 'legislation recognising marriages concluded under any system of religious law or tradition adhered to by persons professing a particular religion', provided that it is not inconsistent with any other constitutional provision.[65]

An example of an attempt to give a more expansive meaning to the accommodation model is the South African Charter of Religious Rights and Freedoms (the Charter), which a group of religious organisations sought to develop under s 234 of the Constitution.[66] It was drafted by a team of academics, religious leaders and international legal experts in consultation with religious, human rights and media groups.[67] It was first signed in 2010 and signatories, including religious bodies and human rights organisations, continue to be added to the Charter.[68] The South African Council for the Protection and Promotion of Religious Rights and Freedoms was established to oversee the process of the Charter being formally enacted into South African law by Parliament.[69] However, the Charter has not been enacted by Parliament and is, therefore, not legally binding.[70] Despite this, it is an important indicator of this constituency's view of the 'freedoms, rights, responsibilities and relationship between the "State" of South Africa and her citizens concerning religious belief'.[71]

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[62] Ibid 37.
[63] Ibid; Constitution of the Republic of South Africa, 1996 ss15(2) & 31(1)(a).
[64] Bilchitz & Williams op cit note 27 at 163, 164, 167, 168 & 169.
[65] Supra note 63 at s15(3).
[66] Section 234 of the Constitution makes provision for the parliamentary enactment of charters formulated by civil organisations.
[67] South African Council for Religious Rights and Freedoms 'South African Charter of Religious Rights and Freedoms' 1 at 4 available at https://www.strasbourgconsortium.org/content/blurb//files/South%20African%20Charter.pdf, accessed on 28 August 2019.
[68] Ibid.
[69] Ibid 5.
[70] Ibid 5-6.
[71] Ibid 2.

The Charter maintains that the South African state has adopted an 'evolved approach' to religion.[72] While there is a 'jurisdictional distinction between religion and the State', a positive duty is placed on the state (in terms of the Constitution) to create an environment in which everyone is free to exercise their rights.[73] One can deduct from this constitutional obligation that the state is expected to take action to create a positive and safe environment for the exercise of religious freedoms, rather than to leave those exercising their religious freedoms unprotected.[74] Moreover, the state has to be engaged in the religious sector:

> 'In order to level the playing field for everybody and ensure, amongst other things, that the principles of accommodation are present and effective. The only condition is that when the State does act, it must act impartially and not favour any religion or discriminate against any other.'[75]

In reviewing the accounts that scholars and the Charter (as signifiers of the relationship between the religious sector and civil society) have put forward regarding the nature of the relationship between the South African state and religion, it can be said that the relationship is mostly reflective of the accommodation model. While the state and religion are considered separate entities, the state is not a passive or neutral agent in respect to the religious sector. The state has a constitutional obligation to be equally supportive of the needs of all religions, and to play an active role in enabling members within religious institutions to realise their constitutional rights, by accommodating them within a non-hierarchical framework of equality and non-discrimination.[76] The state has, to a large extent, created an environment for the exercise of religious freedoms in the public sphere. For example, there are prayer rooms in public shopping centres for Muslims to use at prayer times, the burka is allowed to be worn in public places, there is a choice of Halaal and Kosher foods at restaurants and grocery stores, and some schools allow their pupils to wear religious apparel and symbols which align with their religious beliefs regardless of the dominant religion practised at the school.

The South African state-religion relationship is also somewhat reflective of the criticisms associated with the accommodation model. State apportionment of needs is sometimes skewed in favour of the dominant religion in the country, being Christianity. Certain national public holidays coincide with religious days of Christianity such as Good Friday, Easter Sunday and Christmas Day – enabling all Christians to observe their religious days without being subject

[72] Ibid 26.
[73] Ibid 27.
[74] Ibid.
[75] Ibid.
[76] Supra note 63 at s15(1)*; S v Lawrence* 1997 (4) SA 1176 (CC) para 146.

to any disadvantages in any other sectors of their lives. Adherents of other faiths do not however, enjoy the same advantage. Their religious holidays are not considered public holidays. For them to observe religious holidays, they would have to incur disadvantages, such as taking days off school and work, unless the school they attend or company they work for caters for the observance of such holidays. Other examples include the swearing-in of key officials and the State President being accompanied by references to God, the preamble of the Constitution ending with the line 'May God protect our people', and the title of the National Anthem translates to 'Lord Bless Africa'. In summation, the relationship between the South African state and religion is one in which there is neither a complete overlap nor total disconnect, but rather one in which religious freedoms and needs are by and large accommodated by the State.

Religion and the law

The relationship between religion and the law is wide-ranging and multidimensional. At the constitutional level, it provides for the right to religious freedom and its associated limitations, and the interplay between religious freedom and the constitutional rights to free association, equality, dignity, and protection of children. These rights are interpreted by courts, and the case law explains the application of the right and the extent to which the courts are willing to intervene in religious matters.

The doctrine of entanglement is a theory which serves as a prelude to understanding the extent and circumstances of court intervention in religious matters. It suggests that courts should not involve themselves in internal matters relating to religion, which include doctrinal and governance-related issues.[77] The reason for the adoption of the doctrine is thought to be that:

> 'The closer courts get to personal and intimate spheres, the more they enter into the inner sanctum and thus interfere with our privacy and autonomy. The Constitution also not only leaves, but guarantees space to exercise our diverse cultures and religions and express freely our likes, dislikes and choices, as equals with human dignity.'[78]

Courts have explicitly referred to this doctrine when justifying their non-intervention in religious cases. By way of example, a High Court judgment, *Taylor v Kurtstag NO and*

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[77] Shaun de Freitas 'Doctrinal Sanction and the Protection of the Rights of Religious Associations: *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* (726/13) [2014] ZASCA 151' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 8.

[78] *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) para 80.

Others,[79] which involved an applicant bringing an application to set aside a practice which forms part of Jewish doctrine, succinctly summarises the progression of the court's use of the doctrine from the inception of the Interim Constitution:

> 'Prior to the Constitution, South African courts would not become entangled in religious doctrine 'unless some proprietary or other legally recognised right was involved' (*Allen and Others NO v Gibbs and Others* 1977 (3) SA 212 (SE) at 218A) In *Ryland v Edros* 1997 (2) SA 690 (C) at 703 (E), Farlam J (as he then was) expressed the view that, in view of s 14 of the Interim Constitution, the 'doctrine of entanglement' may have become part of South African law. This doctrine entails a reluctance of the courts to become involved in doctrinal disputes of a religious character.'[80]
>
> 'In South Africa, in [*Mohamed and Another v Jassiem* 1996 (1) SA 673 A], a case decided after the interim Constitution, but without reference to any constitutionally entrenched right, the Appellate Division, having noted the right of a religious organisation to excommunicate in order to 'safeguard what they regard as fundamental and critical tenets of their faith', eschewed any right to comment on the reasonableness and fairness of procedures integral to the Islamic faith.'[81]
>
> In his minority judgment in *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) (2002 (3) BCLR 231), Ngcobo J said that, 'as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the doctrine. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of a practice.'[82]

De Lange v Methodist Church,[83] a Constitutional Court decision, explicitly cautions against the Court involving itself in doctrinal matters and suggests that arbitration is the appropriate

[79] 2005 (1) SA 362 (W).
[80] Ibid para 39.
[81] Ibid para 40.
[82] Ibid para 41.
[83] *De Lange* supra note 78.

forum to decide on matters 'where the balance between dogma and tolerance should be struck'.[84] Moseneke DCJ expressed that 'it would not be appropriate for the Court to interfere at this stage especially considering that the line is close to the Church's doctrines and values'.[85]

The doctrine has been subject to criticism. Ndivhuwo Moleya, for example, is of the view that the doctrine and the courts' commitment to applying it have been unsuccessful and bear little relevance to our constitutional democratic society.[86] While the rationale behind the doctrine is to uphold and respect the right to religious freedoms; religion is an issue embedded as a right within the Constitution and therefore, not only a matter under clerical consideration but also one which requires legal scrutiny.[87] Within South Africa's constitutional democracy, the judicial branch is regarded as the 'guardian of the Constitution'.[88] The judiciary cannot therefore, adequately 'guard the Constitution' if it has minimal involvement in religion.[89]

(1) Freedom of religion

The Constitution protects religious freedom.[90] Its preamble states that it was enacted to establish a society founded on fundamental human rights, which include freedom of religion, and closes with the line: 'May God protect our people'. Section 15 guarantees 'everyone the right to freedom of conscience, religion, thought, belief and opinion'.[91] It provides for 'religious observances to be conducted at state or state-aided institutions provided that [they] follow rules made by the appropriate public authorities; are conducted on an equitable basis; and attendance at them is free and voluntary'.[92] It also allows for 'legislation recognising marriages under any tradition or systems of religious, personal or family law to be concluded [provided it is] consistent with this section and the other provisions of the Constitution'.[93] Section 31 provides that individuals who belong:

> 'to a cultural, religious or linguistic community [cannot] be denied the right, with other members of that community to enjoy their culture, practice their religion and use their language;

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[84] Ibid para 43.
[85] Ibid para 45.
[86] Ndivhuwo Ishmel Moleya 'Equality for all religions and cultures in the South African legal system' available at http://www.derebus.org.za/equality-for-all-religions-and-cultures-in-the-south-african-legal-system/, accessed on 8 April 2019.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Supra note 63 at ss15 & 31.
[91] Ibid s15(1).
[92] Ibid s15(2).
[93] Ibid s15(3).

> and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'[94]

However, these rights (like all other rights) are subject to constitutional limitations. The rights in s 31 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.[95] Over and above the internal limitation clause in ss 15 and 31, they are also subject to the general limitation clause in s 36(1) which provides that:

> '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.'[96]

Scholars and the judiciary have elaborated on the constitutional rights associated with religion, and the limitations placed on such rights. It is apparent that the scope of the right to religious freedom in the Constitution is wide-ranging. While religious freedom is entrenched and protected in the Bill of Rights; the right to conscience, thought, belief and opinion also forms part of the right to freedom of religion.[97] Lourens du Plessis is of the opinion that the broad scope of the right provides for the protection of both adherents of any religious belief as well as those who do not adhere to any religious belief.[98]

The Constitutional Court in *S v Lawrence* explains that the right to freedom of religion is:

> 'the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'[99]

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[94] Ibid s31(1).
[95] Ibid s31(2).
[96] Ibid s36(1).
[97] *Strydom* supra note 12 para 9.
[98] Du Plessis LM 'Religion, law and the state in South Africa' (1997) *European Journal for Church and State Research* 221 at 221.
[99] *Lawrence* supra note 76 para 92.

This was similarly put in *Christian Education South Africa v Minister of Education*,[100] in which it was said that 'freedom of religion includes the right to have a belief and express such belief'.[101] Van Schalkwyk suggests that the right to religious freedom in the Constitution has both an internal and external component – the internal being the individual's conscience and beliefs, and the external being the expression of the individual's conscience and beliefs through publicly worshipping, practising and teaching one's beliefs.[102]

The High Court has suggested that the right to religious freedom extends beyond the right to have a belief and express such belief. In *Taylor v Kurtstag NO*,[103] the High Court held that the right to freedom of religion includes 'religious institutions' autonomy to set guidelines for the admission of [their] employees' and to 'discipline [their members] to enforce conformity and encourage conduct in harmony with religious precepts and teaching'.[104] It also includes:

> 'religious institutions' power to promulgate and enforce internal religious laws of order, organisation, and orthodoxy; to train, select, and discipline religious officials; to establish and maintain institutions of worship, clarity and education; to acquire, use and dispose of property and literature used in worship and rituals; to communicate with co-believers and proselytes and many other affirmative acts in manifestation of the beliefs of the institution.'[105]

For van Schalkwyk, religious freedom includes the right to religious autonomy, and inherent in religious autonomy is the ability of religious denominations to 'establish their own bodies, regulate their own doctrine and set guidelines for the admission of members to religious organisations'.[106]

Although the Constitution affords religious freedom a wide level of discretion and affirms the importance of its protection in South Africa's democratic society; such freedom is not limitless.

There is an internal limitation clause in s 31.[107] As *Christian Education v Minister of Education* says, this clause ensures that the freedoms afforded to communities in practising and expressing their religious beliefs:

[100] 2000 (4) SA 757 (CC).
[101] Ibid para 19.
[102] Van Schalkwyk op cit note 30 at 52.
[103] *Taylor* supra note 79.
[104] Ibid para 37.
[105] Ibid.
[106] Van Schalkwyk op cit note 30 at 52-53.
[107] Supra note 63 at s 31.

> 'can't be used to shield practices which offend the Bill of Rights. The reason for this is to prevent communities from prioritising constitutionally offensive group practices and immunising them from external legislative regulation or judicial control. This is important because abuse of such protection can lead to achieving exclusivity, privilege and domination. It is also necessary to prevent opposition of internal relationships within communities.'[108]

In addition to the specific limitation clause contained in s 31, the general limitation clause at s 36 is applicable when considering cases concerning religious freedom. *Christian Education v Minister of Education* says that the standard to be applied when determining whether the right to religious freedom should be limited in terms of s 36 requires a 'nuanced' and context-sensitive form of balancing:[109]

> 'The court must engage in a balancing exercise and arrive at a global judgement on proportionality and not adhere mechanically to a sequential check-list. The question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. So, limitations on rights are only acceptable if the court concludes that considering the nature and importance of the right and the extent to which [the right] is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.'[110]

Van Schalkwyk notes that the general rule is that the more important the right that is being infringed, the more compelling the justification for the limitation must be.[111] Where the right has been removed in its entirety, and where the limitation will impact on a vulnerable group in society, a persuasive justification is also required.[112] In evaluating the relationship between the limitation and its purpose, a connection between limiting the right and the reason for limiting the right must be established for this requirement to be met.[113] Whether less restrictive

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[108] *Christian Education* supra note 100 at para 26.
[109] Ibid para 30.
[110] Ibid para 31.
[111] Van Schalkwyk op cit note 30 at 72-73.
[112] Ibid 73.
[113] Ibid.

measures exist to achieve the purpose, requires analysing whether the purpose for limiting the right can still be achieved if less restrictive measures to limit the right were used.[114]

(2) Equality

The right to equality bears relevance to the religious sector in two ways: (1) it serves as a protective mechanism for individuals and communities who are subject to unfair discrimination based on their religion, and against the State engaging in unequal recognition and treatment of religions and (2) it allows protection where the exercise of religious freedoms has been shown to be inconsistent with the right to equality.[115]

(a) The Constitution

Equality is both a value and right in the Constitution.[116] The Constitution was enacted as a means to rectify past injustices and to establish a society based on democratic values and social justice.[117] At the core of democratic values, social justice and the rectification of past injustices is the attainment of equality.[118] Equality is defined as 'the full and equal enjoyment of all rights and freedoms'.[119] Neither the state nor any person may 'unfairly discriminate directly or indirectly against anyone' on grounds including but not limited to race, gender, sexual orientation, religion, conscience, belief and culture.[120] The Constitution goes further to say that 'to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.[121]

(b) The Equality Act

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('The Equality Act') gives effect to the equality clause in the Constitution.[122] It provides mechanisms to combat unfair discrimination, measures to promote the position of people who have been subject to unfair discrimination and remedies for victims of unfair discrimination.[123] It details the nature of proceedings, powers and functions, and appeal and review procedures when an

[114] Ibid 74.
[115] Bilchitz & Williams op cit note 27 at 170.
[116] Supra note 63 at ss7(1) & s9.
[117] Ibid (Preamble).
[118] Ibid.
[119] Ibid s9(2).
[120] Ibid s9(3).
[121] Ibid s 9(2).
[122] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 2(b).
[123] Ibid s 2(c)(f) & (g).

equality matter is brought before the court.[124] The Equality Act applies to all cases where a constitutional remedy is not required. If section 9 is used, then the right to freedom of religion will factor into the s 36 enquiry. If the Equality Act applies, then it will be part of the determination of whether the discrimination is fair or unfair in terms of s 14 of the Act.[125]

(c) Religious freedom versus equality

The relationship between freedom of religion and equality has been an area of contentious debate in scholarship. This debate comprises two parts: the relationship between religious freedom and equality and the role that courts should play in disputes regarding religion and equality. The debate covers a spectrum of viewpoints, with some scholars on one or the other side of the spectrum and others in the middle. In summation, David Bilchitz is on the left of the spectrum and maintains the view that the state should intervene in any matter concerning unfair discrimination within the religious sector. Patrick Lenta is in the middle and believes that state intervention should occur where the nature of the discriminatory practice inflicts serious physical harms on people, is prejudicial to children and/or jeopardises people's safety. The state should also intervene where a discriminatory practice falls within the public sector and/or is not part of the doctrinal core of a religion. Stuart Woolman is on the right and is of the view that there should be minimal state intervention in matters relating to the religious sector. However, a declaratory order should be granted by courts in most cases of unfair discrimination and, where suitable, the party perpetuating the act of discrimination should be required to pay damages. This debate highlights the complex, nuanced and intractable nature of the relationship. It also assists in eliciting the circumstances under which the state can intervene in religious matters, creates a better understanding of the benefits and disadvantages of court involvement in these cases, and provides a meaningful lens through which to consider issues surrounding religious malpractice.

(d) Scholarly opinions on religious freedom versus equality

Bilchitz adopts a contextual approach, which he suggests tends to prioritise equality in South Africa. He believes that history and context should be given primacy when considering the relationship between religious freedoms and equality.[126] At the heart of South Africa's history is apartheid, a regime where unfair discrimination and prejudicial treatment was directed at

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[124] Ibid ss 19-21 & s23.

[125] *Strydom* supra note 12 para 8.

[126] David Bilchitz 'Why Courts Should not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 *South African Journal on Human Rights* 296 at 301.

people primarily on the grounds of their race (which amounts to an infringement of equality).[127] Religion was also used as a means of control by the state.[128] The state's alignment with a particular version of Christianity dictated, amongst others, the education system, public holidays and modes of entertainment.[129] As such, the apartheid state suppressed religious freedoms for religious groups other than Christianity. While Bilchitz acknowledges that religious freedom was curtailed within a number of religious groups under apartheid, he holds the view that it is 'wholly justifiable to recognise a strong presumption in favour of equality and against discrimination' because equality forms the foundation of the present South African constitutional order.[130] The Constitution was drafted with an express intent to achieve social justice and substantive equality. The implementation of the transformation that the Constitution seeks to achieve entails 'rejecting all forms of treatment that arbitrarily discriminate against individuals, particularly where this is based on a fundamental element of individual identity'.[131]

Woolman emphasises religious freedom and the autonomy of religious institutions.[132] He believes that Bilchitz is 'fixated with equality' which, in turn, undermines other constitutional rights and hinders the operations and functioning of religious institutions.[133] For Woolman, religious practices, which are 'designed to further the legitimate constitutional ends of religious associations, and do not have as their aim the denial of access to essential goods', will survive constitutional scrutiny.[134] Granting a religious institution the right to determine its rules creates trust, loyalty and social cohesion among its members and, in turn, enables vulnerable members of society to benefit from the support that it provides.[135] The importance, impact and meaning that Woolman accords to religious institutions is evident in the example he gives of Pope Francis dismissing an organist in the Catholic Church who is a homosexual.[136] Woolman argues that such an act is constitutionally legitimate, as the organist's sexual orientation is inconsistent with the Catholic Church's doctrine.[137] Also, the Catholic Church is 'a literal and

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[127] David Bilchitz 'Should Religious Associations be Allowed to Discriminate?' (2011) 27 *South African Journal on Human Rights* 219 at 225.
[128] Bilchitz op cit note 126 at 302.
[129] Bilchitz & de Freitas op cit note 1.
[130] Bilchitz op cit note 127 at 227.
[131] Ibid 225; Bilchitz op cit note 126 at 300.
[132] Stuart Woolman 'Seek Justice Elsewhere: An Egalitarian Pluralist's Reply to David Bilchitz' (2012) 28 *South African Journal on Human Rights* 273 at 278.
[133] Ibid 278.
[134] Stuart Woolman 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal on Human Rights* 280 at 303.
[135] Ibid 303-304.
[136] Ibid 304.
[137] Ibid.

figurative home to billions of people', the source of meaning for many people and has created networks with other institutions which are beneficial for all members of society.[138] As such, Woolman's justification is illustrative of religious freedom taking preference over equality.

Lenta assumes a more balanced stance to the religious freedom-equality relationship. Like Woolman, he believes that Bilchitz accords too much weight to equality.[139] This results in Bilchitz's inability to assess the importance of religious freedom and the constitutional need to protect such an interest.[140] Woolman, on the other hand, gives religious institutions too much freedom in developing and practising their doctrines.[141] This degree of latitude opens the floodgates for religious institutions to engage in practices which are discriminatory and far removed from the 'doctrinal core' of the religion.[142] For Lenta, when considering the relationship between freedom of religion and equality, one ought to engage in a balancing exercise of the rights: weighing up the interests that each right protects and the importance of each interest in society.[143] The prioritisation of equality should prevail where unfair discrimination has occurred in the public sector and/or where the discriminatory act is not part of the 'doctrinal core' of the religion.[144] Conversely, religious freedom should be prioritised when unfair discrimination occurs in the private sector and/or where the nature of the discriminatory act falls within the ambit of the 'doctrinal core' of the religion.[145]

(e) Scholarly opinions on role of courts in unfair discrimination cases

Another important aspect of Bilchitz, Woolman and Lenta's views is their differing approaches to the involvement of courts in disputes relating to unfair discrimination within the religious sphere.

In line with his emphasis on equality, Bilchitz believes that courts have an active role to play in combatting instances of unfair discrimination within the religious sector. They should

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[138] Ibid.
[139] Patrick Lenta 'The Rights of Religious Associations to Discriminate' (2012) 28 *South African Journal on Human Rights* 231 at 256-257.
[140] Ibid.
[141] Ibid 257.
[142] Ibid. The 'doctrinal core' of a religion are the key tenets of a religion. For example, part of the 'doctrinal core' of the Catholic religion would be prohibitions on the use of contraception and homosexuality.
[143] Patrick Lenta 'Taking Diversity Seriously: Religious Associations and Work-related Discrimination' (2009) 126 *South African Journal on Human Rights* 827 at 836; Lenta op cit note 139 at 240.
[144] Ibid 257. An example of an act of unfair discrimination in the public sector and not part of the 'doctrinal core' of the religion is an Anglican school that does not allow Muslim pupils to wear burkas.
[145] Lenta op cit note 139 at 257. An example of an act of unfair discrimination in the private sector and part of the 'doctrinal core' of the religion is a Catholic Church which prohibits a divorced woman from getting remarried in the Catholic Church.

denounce discriminatory conduct by religious institutions and provide remedies against it.[146] This would entail declaring such conduct unconstitutional and imposing suitable remedies on the relevant religious institutions to prevent the recurrence of such conduct.[147] For Bilchitz, this remedial approach enables religious institutions to uphold the foundational principles of equality and social cooperation in South Africa's constitutional democracy and the tenets of diversity which involve a respect for and inclusion of different identities on an equitable basis.[148]

At the core of Woolman's 'remedial-equilibrium' approach to the relationship between religious freedom and equality is the notion that 'rights and remedies are inextricably intertwined', which means that the nature of the right informs the remedy granted.[149] For Woolman, a finding of unfair discrimination (i.e. a declaratory order) is sufficient in such cases and need not translate into a remedy.[150] To illustrate this point, he gives the example of an Orthodox Shul, where women sit upstairs and men downstairs. The finding of a court of unfair discrimination in such a situation is sufficient in Woolman's opinion.[151] The court imposing a remedy to show its disapproval with the unfair discrimination dealt to Jewish women would amount to the court 'interfering with the well-established distribution of goods within that community' and 'dictating rules that a particular religious community continues to hold sacred'.[152] Not only does Woolman believe that courts' involvement interferes with the dictates of the religious community at hand, but he is skeptical about the courts' involvement in such cases because allowing them to 'determine whether religious institutions meet some indeterminate and necessarily ad hoc notion of equality' results in a 'politicisation' of issues relating to religious freedoms and equality.[153] Accordingly, Woolman maintains that people ought to 'seek justice elsewhere' and not in the courts, in most cases of such a nature.[154]

Lenta argues that courts' involvement in cases of unfair discrimination is dependent on the nature of the harm caused by the discrimination. Religious practices which inflict serious harms on people, are prejudicial towards children, and which compromise people's physical safety

146 Bilchitz op cit note 127 at 228-229.
147 Ibid 229.
148 Ibid 228-229.
149 Woolman op cit note 132 at 291-292.
150 Ibid 292.
151 Ibid 293.
152 Ibid.
153 Ibid 277.
154 Ibid 283.

require the imposition of a court remedy.[155] On the contrary, less serious harms which are not physical and child-related in nature should survive constitutional scrutiny and should not require court involvement.[156] Moreover, 'the protection of diversity' requires that acts which fall within the private sector and which are proximal to the 'doctrinal core' of the religion at hand should also not be subject to a remedial approach by the courts.[157] Bilchitz disagrees with Lenta's labelling of physical harms as more serious harms.[158] He believes that psychological harms are in some instances more serious than physical harms.[159] For example, some forms of humiliating punishments are more harmful than corporal punishment is for children.[160] Both Bilchitz and Woolman disagree with Lenta's definitive categorisation of harms within the private and public sectors.[161] While harms based on unfair discrimination in religion fall within the private sector, they frequently have a major impact on the public sector.[162] They affect the way vulnerable members of a society are treated and can lead to the approval of violence and repression.[163] For example, in Uganda, church groups have strongly influenced the homophobic attitudes of many its people.[164] In such instances, courts should make a declaratory order that such harms are inconsistent with the Constitution and legislation and, where necessary, require the actor inflicting the harm to pay damages to the aggrieved party.[165]

(f) Case law relating to religious freedom versus equality

In addition to various scholarly opinions on the relationship between religious freedom and equality, and the extent to which courts should intervene; case law also deals with religious doctrine conflicting with the right to equality, more specifically on the basis of sexual orientation.

Two cases involve religious institutions' refusal to allow religious leaders to practise because of their homosexuality, and the third concerns the termination of a contract of a member working at a religious institution, based on homosexuality. Collectively, these cases reveal the reliance that courts place on applicants' compliance with informal regulations and the need for applicants to first exhaust all informal processes before approaching the courts. They also

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155 Lenta op cit note 139 at 251.
156 Ibid.
157 Ibid 257; Lenta op cit note 143 at 833.
158 Bilchitz op cit note 126 at 306.
159 Ibid.
160 Ibid.
161 Ibid 307; Woolman op cit note 132 at 273.
162 Bilchitz op cit note 126 at 307.
163 Ibid.
164 Ibid.
165 Ibid.

illustrate that the degree to which the court is willing to intervene in cases of a religious nature is case-specific and subject to the judge's interpretation. Court intervention is generally acceptable in instances where the effect of the unfair discrimination outweighs the prioritisation of religious freedoms and where the nature of the unfair discrimination does not directly impede on the religious doctrine at hand.

In *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*, the applicant taught music to students at the Nederduitse Gereformeerde Gemeente, Moreleta Park (the church) and was independently contracted by the church.[166] The church terminated the applicant's contract on the basis of him declaring and publicly expressing his homosexuality which, it argued, was against its doctrine.[167] Homosexuality is regarded as a cardinal sin based on the teachings of the church.[168] The applicant instituted proceedings in terms of the Equality Act, alleging that the church had unfairly discriminated against him on the ground of his sexual orientation.[169]

The Equality Court deemed it necessary to engage in a balancing exercise between the rights to freedom of religion and equality, and to evaluate the impact that not allowing the dismissal would have on the church versus the impact that the dismissal had on the applicant, in ascertaining whether the dismissal amounted to unfair discrimination.[170] The court held that the effect of 'not granting the church an exemption from anti-discriminatory legislation' was minimal compared to the loss of dignity and emotional and financial suffering that the applicant endured as a result of the dismissal.[171] It also held that:

> '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. [However], the test, where majoritarian and minoritarian positions are involved must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom [because] it is precisely the function of the law and the Constitution to step in and counteract rather than reinforce unfair discrimination against a minority.'[172]

The court also considered the nature of the services that the applicant rendered at the church, the beliefs and values of the applicant, and whether the position of the applicant formed part of

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[166] *Strydom* supra note 12 para 1.
[167] Ibid paras 1 & 12.
[168] Ibid para 12.
[169] Ibid para 1.
[170] Ibid paras 8, 23 & 25.
[171] Ibid paras 25 & 33.
[172] Ibid para 11.

the leadership of the church in reaching its decision.[173] The court was of the opinion that the nature of the applicant's job involved no religious responsibilities, he was committed to Christian values, and his position did not form part of the church's leadership body.[174]

Consequently, the court ruled that the termination of contract amounted to unfair discrimination and ordered the respondent to pay costs for the impairment to the applicant's dignity, emotional and psychological suffering and loss of earnings.[175]

This judgement aligns with Bilchitz's view on the role of courts in discrimination claims, as it suggests that courts should have an active role to play in matters where the fundamental rights of a person or group have been prejudiced by religious doctrine. However, this case warns against courts' intervention in core matters of religious doctrine and highlights the need to conduct a balancing exercise of the competing rights at hand and to consider the surrounding circumstances of an applicant and the centrality of the applicant's position within a religious institution before reaching a decision.

The Constitutional Court case of *De Lange v Methodist Church* involved the Methodist Church (the church) suspending and subsequently discontinuing the applicant's position as an ordained minister after she publicly announced her intention to marry her same-sex partner.[176] The applicant instituted legal proceedings to bypass the internal processes within the church that she was obliged to follow to address her claim.[177] She believed that the internal processes were biased and that partaking in them would be a futile exercise.[178] Broadly speaking, the internal processes entailed the applicant attending an arbitration hearing in an attempt to resolve the matter.[179] Moseneke J concurred with the decisions of the High Court and Supreme Court of Appeal that the applicant could not bypass the internal processes of the church.[180] He held that an applicant would have to show good cause to avoid abiding by such processes and that such a standard is 'not easily met'.[181] All courts held that arbitration would be the ideal forum in which to deal with a matter of this nature, because:

[173] Ibid paras 17-20.
[174] Ibid.
[175] Ibid para 41.
[176] *De Lange* supra note 78 para 1.
[177] Ibid para 16.
[178] Ibid paras 9 &15.
[179] Ibid para 16.
[180] Ibid para 30.
[181] Ibid paras 30(a) & 36.

> 'The sensitivity of the issues – church doctrine and governance related to marriage, a sacrosanct institution – were best left to the Church to determine internally. The determination of who was morally and religiously suited to assume ministerial duties struck at the core of religious function.'[182]

This judgement highlights the courts' insistence on applicants' compliance with all informal regulatory mechanisms before approaching the courts. It also suggests, but does not determine, that the Constitutional Court would have some hesitation in interfering with the appointment of church ministers.

Gaum v Van Rensburg NO and Others[183] involved the setting aside of a 2015 decision taken by the General Synod of the Dutch Reformed Church (the church) to allow ministers to solemnise same-sex civil unions and for homosexuals who are celibate to be ordained as ministers.[184] The applicants instituted proceedings to ask the court to declare the setting aside of the decision unlawful and invalid.[185] The court ruled that the setting aside of the decision was unlawful and invalid because the church had not complied with its own rules and procedures set out in its Church Order.[186] The court held:

> 'When the Church Order provides for mechanisms to amend decisions, these processes must be used. Processes outside the Church Order being used would constitute an irregular process.'[187]

When dealing with the substantive issue of unfair discrimination against ministers on the ground of their sexual orientation, the court held that:

> 'Churches and religion play an important role in public life. A court must recognise the sphere in which the sacred exists and respect the co-existence between the secular and the sacred, not forcing the one into the other. The court is not asked to decide doctrine. The problem is that the moment a church steps into a court, court rules and the application of the law of the land is to be applied by the courts. In this matter, the Bill of Rights is invoked and it is wrong then to employ the religious sentiments of some as a guide to the constitutional rights of others. The sacred is forced into the secular when there is a prejudice to basic rights contained in the Bill

[182] Ibid para 24.
[183] (40819/17) [2019] ZAGPPHC 52 (8 March 2019).
[184] Ibid paras 1, 3 & 4.
[185] Ibid para 4.
[186] Ibid para 60.
[187] Ibid para 59.

> of Rights; unfair discrimination with no supportive evidence of fairness renders the supreme law, the Constitution to be upheld.'[188]

This judgement demonstrates the emphasis that courts place on informal rules and processes when dealing with matters relating to religious doctrine. Another noteworthy aspect of the judgement is the lengthy explanation it provides of the doctrine of entanglement to contextualise the nature of the dispute. While the judgement suggests that the doctrine is premised on courts' reluctance to become involved in disputes regarding religious doctrine, in order to ensure religious freedom and equality, and that the majority of judges are in favour of applying the doctrine; this court is of the view that the law places a duty on courts to intervene in matters concerning prejudice to basic rights.[189]

(g) Freedom of association

The right to freedom of association is an unqualified right provided for in section 18 of the Constitution: 'Everyone has the right to freedom of association.' It goes hand in glove with freedom of religion and its internally unqualified nature gives rise to varying interpretations and positions. *Taylor v Kurtstag* describes it as 'a guarantee of choice, not an absolute right (and the guarantee applies to 'everyone')'.[190] It is 'the right of an individual to choose his associates and the right of a group of individuals to choose their associates'.[191]

Van Schalkwyk, a strong advocate for religious freedom, free from external and internal interference, maintains that it is the right to publicly express that one forms part of a religion without being fearful, and the right to not associate with any religion or to disassociate from a religion, also without being fearful.[192]

> 'It entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules. Once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance.'[193]

[188] Ibid para 78.
[189] Ibid paras 27, 28 & 77.
[190] *Taylor* supra note 79 para 37.
[191] Ibid.
[192] Van Schalkwyk op cit note 30 at 66.
[193] *Taylor* supra note 79 para 37.

(h) Dignity

Dignity is both a value and a right in the Constitution. Section 10 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'.[194]

Prince v President articulates the importance of dignity in our constitutional dispensation:

> 'The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.'[195]

Dignity is a central value underpinning the right to religious freedom.[196] Together with equality, it guards against unequal protection between and within religious communities, and advocates for all individuals within religious communities to be treated with equal dignity and respect.[197] It is thus indirectly implicated when religious malpractices violate constitutional rights, such as equality, whose interpretation is informed by dignity.

The case of *Taylor v Kurstag* has applicability to both the rights of free association and dignity, in that it involves a consideration of these rights being limited by religious doctrine and whether such limitation is legally justifiable.

Taylor v Kurstag involved the transgression of a maintenance order issued by the Beth Din, the Jewish Ecclesiastical court, whereby Mr. Taylor (the applicant) failed to pay maintenance for the three children born out of the marriage between him and his ex-wife, the respondent.[198] Pursuant to a hearing that concluded that the applicant had failed to pay the prescribed maintenance, the Beth Din ordered a *cherem*[199] to be published and given effect to in respect

[194] Supra note 63 at s10.
[195] *Prince* supra note 4 para 50.
[196] Van Schalkwyk op cit note 30 at 62-63.
[197] Ibid 63.
[198] *Taylor* supra note 79 paras 3 & 6.
[199] A cherem is a notice excommunicating a person from the Jewish faith.

of the applicant.[200] The applicant instituted legal action in the courts to have the *cherem* set aside on the basis that it violated his rights to dignity in terms of s 10, and his freedom to enjoy his culture and practise his religion, together with other members of the Jewish community, in terms of ss 18 and 31.[201]

Malan J noted that, while the Beth Din has the authority and jurisdiction to hear and make decisions regarding complaints and disputes that arise, inter alia, in spiritual, religious, commercial, and marriage-related matters among the members of the Orthodox Jewish community, it does not have the 'power to enforce judgements or awards granted by it'.[202]

> 'The Beth Din, like any other religious tribunal, is subject to the common law review jurisdiction of the courts. Although a court may review a decision of a religious tribunal, it won't entertain an appeal.'[203]

Malan J went on to say that the *cherem* forms part of the precepts of Orthodox Judaism, and those who choose to practise Orthodox Judaism are required to comply fully with the dictates of the faith.[204] The applicant was not coerced into being a practising Orthodox Jew and, therefore, he ought to abide by its rules, failing which he will be subject to the associated penalties.[205] Furthermore, the right to freedom of association entitles a religious institution to require its members to conform with its rules and principles, and to exclude non-conformists.[206]

The court also considered the extent to which religious doctrine can be limited by courts. For Malan J, the sacred and important role that religion plays in people's lives meant that religious communities should not be 'put to the proof of their beliefs or faith' by courts if there is not a 'genuine dispute' about the centrality of the religious practice.[207] They also cannot be expected to limit 'a doctrine or two to comply with broader social and political norms.'[208] If this were the case, religious institutions would not be able to ensure conformity with their beliefs and practices and impose sanctions on those members who transgress them.[209] The courts can intervene in religious matters, but 'it must have a high regard for the unique character of such

[200] Ibid para 13.
[201] Ibid para 17.
[202] Ibid paras 30, 31 & 32.
[203] Ibid para 42.
[204] Ibid para 35.
[205] Ibid paras 35 & 36.
[206] Ibid para 37.
[207] Ibid para 41.
[208] Ibid para 49.
[209] Ibid para 58.

associations as well as for the fairly high threshold for such intervention'.[210] As such, courts have the right to intervene in religious matters, but in limited circumstances, and they must take into consideration the 'unique character' of religious institutions. There ought to be a significant justification for warranting intervention.

In addition to the above considerations, the court conducted the two-stage test to determine whether the *cherem* unjustifiably limited the rights of the applicant. Malan J found that the *cherem* limits the applicant's rights.[211] It deprives him of membership of an Orthodox Jewish congregation and amounts to a shunning and infringement of some of his personality rights.[212]

In answering whether the limitation is constitutionally justified, Malan J considered the impact of not limiting the applicant's rights.[213] For him, not limiting the applicant's rights:

> 'will have the result that the Jewish faith and community will not be able to protect the integrity of Jewish law and custom in this case by ensuring conformity therewith. It will be offensive to observant Orthodox Jews to be forced to associate with a person seen by them as deliberately and provocatively flouting Jewish law, custom and authority.'[214]

He also considered whether the limitation itself is an 'oppressive group practice' or 'constitutionally offensive':

> 'I cannot find that the imposition of the cherem is either an offensive group practice or an oppressive feature of the internal relationship members of the Jewish faith. Nor do I find that the terms of the proposed cherem are constitutionally offensive.'[215]

Accordingly, the application to have the *cherem* set aside was dismissed with costs.[216]

This judgement cautions against the courts adopting too low a threshold for determining whether to limit religious doctrine. The criteria for intervention should consider the impact that not limiting the rights will have on the religious institution in question, whether the limitation is an offensive group practice, constitutionally offensive and/or coerces one into membership of a religious institution. If the impact of not limiting the individual's rights will bring the integrity of the religious group into disrepute, and result in non-conformity of religious beliefs and practices, and an inability to impose sanctions in the event of non-compliance with such

[210] Ibid para 49.
[211] Ibid para 57.
[212] Ibid.
[213] Ibid para 58.
[214] Ibid.
[215] Ibid.
[216] Ibid para 65.

beliefs and practices; it is likely that the limitation will be justifiable. If the religious doctrine is shown to be an offensive group practice and is constitutionally offensive, or if it is shown that the person was coerced into being an adherent of the faith in question; the limitation will be unjustifiable and will, accordingly, likely be struck out.

(i) Children's rights

The constitutional protection of children from maltreatment, neglect, abuse, and degradation in terms of s 28 has sometimes conflicted with religious freedoms. This is exemplified in case law which limits religious doctrine by prohibiting corporal punishment in the home and school setting.

Christian Education South Africa v Minister of Education concerned a challenge to s 10 of the Schools Act 84 of 1996 which banned corporal punishment in schools.[217] The challenge alleged that s 10 violated the rights of Christian parents of children in independent schools because corporal punishment is a key aspect of the Christian religion, and biblical guidelines impose a responsibility on parents to administer corporal punishment for the training of their children.[218] The High Court found that s 10 'did not constitute a substantial burden on religious freedom' and that 'corporal punishment in schools infringed the children's right to dignity and security of the person and was accordingly not protected by s 31 of the Constitution'.[219] The case went on appeal.[220]

In the Constitutional Court, Sachs J said that he would 'adopt the approach most favourable to the appellant and assume without deciding that [the] appellant's religious rights under s 15 and s 31(1) are both in issue'.[221] Sachs J then considered whether the limitation to religious freedom in s 10 was justified in terms of s 36 of the Constitution.[222]

> 'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far a democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from

[217] *Christian Education* supra note 100 para 2.
[218] Ibid paras 1 & 4.
[219] Ibid para 6.
[220] Ibid para 7.
[221] Ibid para 27.
[222] Ibid para 28.

> the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'[223]

In making a decision, Sachs J considered the purpose of the legislative provision and the rationale behind the legislation.[224] For him, the Schools Act aimed to break away from apartheid times where educational institutions were not governed by a uniform standard.[225] The purpose of the provision was multifold: to put children at the centre of the school, to protect them from physical and emotional abuse, and to promote respect for their dignity and physical and emotional integrity.[226] It also eliminates the need for the state to regulate corporal punishment in schools and decide on the degree of force.[227] The court also assessed whether it was 'unduly burdensome' for the Christian community to implement the provision.[228]

> 'Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline.'[229]

Sachs J also considered whether the provision forced the parents to make 'an absolute and strenuous choice between obeying a law of the land or following their conscience'.[230] For him, it did not as they were still allowed to administer corporal punishment in the home setting.[231] Accordingly, Sachs J ruled in favour of s 10 of the Schools Act and the appeal was dismissed.[232]

This judgement illustrates the challenges associated with limiting religious doctrine in a democratic society like South Africa. Laws are prescribed at a national level with nationwide application, but there is also widespread accommodation for religious communities to develop and practise their own laws and practices. The problem arises when laws of religious communities do not coincide with the laws of the country. To remedy this problem, there needs to be a compromise: religious communities accepting that the laws of the country are binding

[223] Ibid para 35.
[224] Ibid para 50.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid para 51.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid para 52.

and have application regardless of what their religious laws dictate; and the state doing its best to ensure there is no unnecessary conflict between religious and national laws. Moreover, this judgement helps to interpret the criteria set out in s 36 in relation to religious freedom, including whether the limitation is unduly burdensome for the religious community, and whether it results in having to make an absolute and strenuous choice between following one's religious beliefs and obeying the laws of the land.

Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others[233] involved a father who had viciously kicked and punched his 13-year old son for watching pornographic material.[234] The question before the court was whether the common law defence of moderate and reasonable chastisement of children was constitutionally valid.[235] This defence had originated in scriptural injunctions to 'spare the rod, spoil the child' and the idea that reasonable and moderate chastisement formed an integral part of the exercise of freedom of religion.[236] The High Court declared the common law defence constitutionally invalid and prospectively unavailable.[237] The case went on appeal.[238]

In deciding whether reasonable and moderate chastisement is constitutionally valid, Mogoeng CJ relied on several constitutional rights. Section 12(1)(c) provides that everyone has the right to freedom and security, which includes the right to be free from all forms of violence from either public or private sources.[239] Based on the fact that s 12 aimed to reduce and ultimately eradicate the institutionalised and widespread violence of South Africa's past, its intention was to prohibit all degrees of violence, including that of parental chastisement.[240] Moreover, all children have the right to dignity, and part of their dignity and protection under s 28 involves living in a secure and nurturing environment, free from violence and fear.[241] Accordingly, Mogoeng CJ ruled that the defense of moderate and reasonable chastisement limits children's rights to freedom and security, dignity, and protection from violence under s 28.[242]

233 2019 (11) BCLR 1321 (CC).
234 Ibid para 5.
235 Ibid para 6.
236 Ibid para 34.
237 Ibid para 6.
238 Ibid para 22.
239 Ibid para 36.
240 Ibid para 44.
241 Ibid para 46.
242 Ibid para 48.

In analysing whether such limitation is justifiable, [243] he referred to the vulnerability of children:

> 'Children are indeed vulnerable and delicate. They are not always able to protect themselves and may not always know what to do in the event of the law being broken to the prejudice of their best interests. Some of them are so young that they are incapable of lodging a complaint about abusive or potentially injurious treatment or punishment however well-intentioned it might have been. Even those who are of school-going age might often be ignorant of what they could do to alert the law enforcement authorities to actual or potentially harmful parental conduct they are made to endure.'[244]

He also referred to the best interests of the child. For Mogoeng CJ, the best interests of the child include 'protection from potential abuse and the need to limit [chastisement] because of the good a child and society stand to derive from its retention as a disciplinary tool'.[245] The best interests' standard is not excluded when the religious rights of parents are at stake.[246]

> 'The observations on the utmost necessity of child protection and the importance of the best interests of the child have application regardless of the belief behind the practice that has potentially injurious consequences on the child.'[247]

Accordingly, for the limitation to be justifiable, it would have to be shown that chastisement advances the best interests of the child.[248] In light of the vulnerability of children, and the fact that chastisement does not advance a child's best interests, Mogoeng CJ dismissed the appeal, ruling that 'there is, on the material before us, no justification for its continued existence, for it does not only limit the rights in section 10 and 12 of the Constitution, but it also violated them unjustifiably'.[249]

This judgement highlights that religious doctrine is curtailed, even in the sanctity of the home, when it unjustifiably limits children's rights to freedom and security, dignity, and protection from violence. It also emphasises the importance of considering the protection of children and their best interests in a serious light, regardless the doctrine or religious beliefs, rights and

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[243] Ibid.
[244] Ibid paras 55 & 70.
[245] Ibid para 56.
[246] Ibid para 59.
[247] Ibid para 60.
[248] Ibid para 65.
[249] Ibid para 71.

opinions of parents or guardians, because children are vulnerable and can easily be subject to abuse.

The consideration of 'harm' within the religious sector

With the current situation in which the religious sector finds itself, and the relationship between religion and the law at play; certain pertinent legal and philosophical questions and practical realities (which inform the assessment of regulatory frameworks) ought to be addressed. These include: Do the types of harms in the religious sector necessitate interference? Do people voluntarily consent to being the subjects of such forms of harms, and if so, to what extent? Can people agree to being the subjects of such forms of harms, and if so, to what extent?

(1) Harm

John Stuart Mill's harm principle is universally recognised to provide a theoretical basis for distinguishing between different types of harm, their regulation and effects. His theory is premised on the notion that not all conceptions of harm warrant interference, and are protected by liberty, except where harm is done to others:

> 'Whenever in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.'[250]

Criticisms of Mill's harm principle label it as non-restrictive and undefined.[251] Accordingly, several theories have emerged as to what constitutes 'harm to others' and thus gives rise to interference with liberty. Jonathan Riley has, for example, proposed that harm to others constitutes actions which cause perceptible damage.[252] For him, this is a restrictive conception of harm in that it excludes people's feelings, provided that such feelings do not emanate from perceptible damage like a broken promise or physical injury.[253]

Piers Turner suggests that several scholars namely: David Brink, Wendy Donner, Alan Fuchs and Daniel Jacobson favour a rights-based violation theory.[254] This theory is premised on 'harm to others' constituting an action by a person/s that threatens another person's rights.[255] The justification for this conception of harm and, in turn, interference is two-fold: (1) the harm

[250] Piers Norris Turner '"Harm" and Mill's Harm Principle' (2014) 124 *Ethics* 299 at 305.
[251] Ibid 300.
[252] Ibid.
[253] Ibid.
[254] Ibid 302-303.
[255] Ibid.

principle intends to protect individual liberty and in order to do so, it needs to be restricted so as to limit the extent and circumstances in which interference can occur, and (2) Mill's utterances of justice, rights and the appropriateness of punishment validate the interference of rights-based violations.[256] Advocates of protecting rights also maintain that Mill believed that harms which constitute rights-based violations warrant legal interference and not interference in the form of, inter alia, public criticism and shunning.[257]

The harm principle, in my opinion, has application to the religious sector. It is apparent that criminal, civil and constitutional malpractices identified within the religious sector cause harm to others, in varying forms and to varying extents. The theories (inter alia the perceptible damage and rights-based violation theory) which have emanated from Mill's principle, provide varying interpretations as to the extent, nature and circumstances that warrant interference when harm is done. If one applies Riley's perceptible damage theory, it could be said that interference will follow where a malpractice which causes perceptible damage is committed. If one applies the rights-based violation theory (which is supported by several scholars), one could say that malpractices which threaten people's rights to, inter alia, dignity, equality and children's protection from maltreatment, neglect, abuse and degradation would warrant interference of a legal nature. Despite the theories providing varying interpretations of the application of Mill's harm principle; it is apparent that it would advocate for some form of interference in respect of malpractices within the religious sector, as they cause harm to people (if applying it without considering any of the aforementioned theories).

(2) Voluntary consent to harm

Having established that some types of harms within the religious sector warrant interference, it is now necessary to consider the issue of consent and more specifically, whether harm is justifiable if the victims voluntarily consent to it.

While the question of whether people can voluntarily consent to harms committed within their religious institutions is a contentious and unanswered area of scholarship; scholars and case law provide some direction in this regard. Central to this discussion is the distinction between direct and indirect coercion.

[256] Ibid 303.
[257] Ibid 305.

Ahdar distinguishes between direct and indirect coercion.[258] Direct coercion is the process of where someone, usually in an authoritative position, explicitly places pressure on a person to comply with observances and practices within a religious institution.[259] In the event of non-compliance, the person is subject to a penalty, fine, sanction or loss of benefit.[260] An example is a religious leader who explicitly refuses to allow females in the community to attend religious gatherings unless they have sexual relations with him/her. Direct coercion is rarely seen within the religious sector, which is unfortunate, because its perceptible nature renders it relatively easy to identify and control.[261]

Indirect coercion is often present in the religious sector.[262] It encompasses the social and psychological pressures that accompany non-compliance with religious practices and observances – ranging from peer pressure, to the fear of being ostracised and embarrassed, and being subject to stigma for non-conformity with the norm in a person's intimate and extended social backgrounds.[263] Unlike direct coercion, the consequences of non-compliance are not penal-like measures, but rather psychological and social burdens, which often result in people's compliance with such practices to avert such burdens.[264]

> 'Indirect coercion cannot be eliminated completely, but it can be managed to mitigate its effect. The effects of indirect coercion can be just as damaging as direct coercion. Children are especially vulnerable to religious coercion and may find it difficult to voice their beliefs in the face of a religiously homogenous majority.'[265]

Van Schalkwyk and Ahdar bring to the fore the presence of indirect coercion within religious institutions that often renders participation in practices within such religious institutions involuntary. Van Schalkwyk accurately concludes that 'the collective social impact of the religious observances may cause subtle pressure to conform to the norms of the prevailing religion' and thereby, render attendance at and participation in such observances involuntary.[266]

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[258] Rex J Ahdar 'The nature of religious coercion' available at http://works.bepress.com/rex_ahdar/1, accessed on 11 December 2021.
[259] Ibid 5.
[260] Ibid.
[261] Ibid 16.
[262] Ibid 25.
[263] Ibid 9.
[264] Ibid.
[265] Van Schalkwyk op cit note 30 at 141.
[266] Ibid 110.

O'Regan J in *S v Lawrence* acknowledges the presence of indirect coercion in religious institutions and its associated adverse consequences:

> 'Religious beliefs are a matter of personal faith and commitment which should not be the subject of coercion, whether direct or indirect.'[267]

With the undeniable presence of indirect coercion within religious institutions identified by scholars and case law, one can infer that not all people voluntarily consent to being the subjects of harmful practices within the religious sector. People who belong to vulnerable groups appear to be more at risk as subjects of indirect coercion than those who do not belong to vulnerable groups. As such, people within vulnerable groups find themselves in a more compromised position when it comes to consenting to being the subjects of harmful practices within their religious institutions.

(3) The law's stance on voluntary consent to harm

With the conclusion that people, especially those who belong to vulnerable groups, are prone to being the subjects of indirect coercion and, as such, sometimes do not voluntarily consent to being the subjects of harmful practices; it is now necessary to determine whether the law allows people to voluntarily consent to such harmful practices which equates to a waiver of their constitutional rights. For example: can people agree to being subject to acts of sexual abuse by a religious leader and in turn, waive their rights to, inter alia, dignity and freedom and security, and to redress? Can females and homosexuals agree to being prohibited from working in their religious institutions because of their gender and sexual orientation and thus waive their rights to, inter alia, equality and dignity?

It is apparent from the exploration of the right to religious freedom and its associated limitations, that all constitutional rights can be limited in terms of s 36 and some of them are additionally subject to internal limitations. However, the question of whether a beneficiary of a right can voluntarily waive the application of such right has been explored in scholarship, but no definitive conclusion has been reached.[268] Arguably, Stuart Woolman's approach is sensible and considers the complexity of such a consideration. Woolman maintains that the concept of people waiving their constitutional rights is 'an underdeveloped and confusing area of

[267] *Lawrence* supra note 76 para 138.
[268] S Woolman 'Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on Barkhuizen' (2008) 125 *South African Law Journal* 10 at 12.

constitutional law'.[269] Constitutional rights, unlike contractual rights, cannot be waived.[270] Courts have not sufficiently deliberated on the waiver of constitutional rights and the Constitution itself does not provide for such a waiver.[271] Thus for Woolman, it is a 'category mistake' to speak of a waiver of constitutional rights – what should rather be in question is that of 'interpretation of [constitutional] rights'.[272]

If one adopts Woolman's approach to waiver of constitutional rights, people would not be able to consent voluntarily to being the subjects of harmful practices, that violate their rights, within religious institutions. However, Woolman's approach is only a scholarly viewpoint and there is currently no conclusive stance in South African law as to whether people can voluntarily waive their rights.

Conclusion

In conclusion, when reviewing the South African legal framework and the position that the state adopts in relation to the religious sector, it can be said that an active, yet non-intrusive approach has been adopted. The state has a positive duty to create the space in which all religious groups can equally exercise their religious freedoms without the fear of discrimination. Like the state, the law safeguards religious freedoms, evidenced, inter alia, by the doctrine of entanglement, the wide-ranging interpretation and protection of the right to freedom of religion, and the inclusion of the right to freedom of association in the Constitution. Several cases in this chapter have illustrated the court's reluctance to involve itself in matters relating to religious doctrine and the court's insistence on compliance with the religion's rules and processes and exhausting all other 'internal' avenues before approaching the court for intervention. However, it is apparent that the law also plays an active role in ensuring that people's human rights, to varying extents, are safeguarded in instances when religious freedoms blatantly violate and disregard them. Examples include, but are not limited to, the internal and general limitation clauses in terms of ss 31 and 36(1) respectively and the purpose and provisions of s 9 and the Equality Act.

In addition, the theoretical framework illustrates the varying interpretations of John Stuart Mill's harm principle that elicit different outcomes as to what forms of harm necessitate intervention. However, in accordance with both the original version of the harm principle and

[269] Ibid.
[270] Ibid.
[271] Ibid.
[272] Ibid.

the rights-based interpretation of such principle, religious malpractices necessitate intervention, as they cause harm to others and threaten people's inalienable human rights. It is further concluded that adherents of religious groups, particularly vulnerable members, often do not voluntarily consent to being the subjects of harmful practices and comply with such practices merely for the sake of averting the psychological and social burdens (including peer pressure and stigma) associated with not complying with them. While it has not yet been definitively concluded in law whether members of religious institutions can voluntarily consent to waiving their constitutional rights and, as such, voluntarily consent to harmful practices; scholars such as Woolman have argued that constitutional rights cannot be waived.

Collectively, one can conclude that while the state and law preserve and advance the right to religious freedom and enable religious institutions to practise their doctrines freely and without fear or favor; religious institutions nonetheless fall within the overarching constitutional dispensation. The law, in such instances, must act as a buffer against religious practices which unduly contravene constitutional rights and values.

Chapter 4

REGULATORY FRAMEWORK

Alongside the theoretical framework, one encounters a different paradigm, which is the regulatory framework. This chapter seeks to unravel the regulatory framework of the religious sector. At the outset, it includes a description of the theoretical underpinnings of the regulatory framework which broadly comprises state-regulation and self-regulation models. Thereafter, it sets out the South African regulatory framework which comprises formal and informal regulations. Inherent in formal regulations are criminal, civil, constitutional, other legislative and case law considerations. Informal regulations comprise several religious institutions' regulatory structures and processes, and their approaches to criminal offences, discriminatory practices, harmful acts, tithing and tax obligations. In addition, the opinions of religious institutions in relation to their regulatory structures, police and court intervention are explored to assist in determining when religious institutions deem it acceptable and necessary for the state to intervene.

The regulatory debate is multidimensional and controversial and has been described as 'evasive'.[273] Holistically, regulation is understood to be the state's involvement in various sectors and is necessary to respond effectively to an 'imperfect reality and human limitations'.[274] On the one hand, regulation is said 'to promote economic efficiency, environmental sustainability, morality, and the general welfare of the public'.[275] On the other hand, regulation is said to be subject to manipulation by members within a sector, to the detriment of most of the sector.[276]

The regulatory framework lies at the core of this dissertation, in that it is impossible to achieve the research objective of assessing the proposed amendments to the existing regulatory framework of the religious sector, without an in-depth knowledge and understanding of the machinations of this regulatory framework.

Theoretical underpinnings of regulatory framework

Emanating from competing understandings of religious freedoms are two broad models of regulation: state-regulation and self-regulation. Both these models provide a directive as to the barriers that exist in relation to state intervention within the religious sector, the power of the

[273] Barak Orbach 'What Is Regulation?' (2012) 30 *Yale Journal on Regulation* 1 at 3.
[274] Ibid 10.
[275] Ibid.
[276] Ibid.

state to regulate the religious sector, and the boundaries that exist in relation to religious freedoms. This is a necessary consideration, as it highlights the various models that can be used to assist in the consideration and formulation of a suitable regulatory framework for the religious sector in South Africa, bearing in mind the benefits and shortcomings of each model. It is also instructive in determining which model the various interest groups in the religious sector align with and advocate for, and the reasons for their choice.

(1) State-regulation

State-regulation comprises a theoretical and practical component.

(a) Theoretical component

Within the theoretical component are three theories of regulation: public interest theory, private interest theory and economic theory. While these theories are mainly economic in orientation, they have application to the religious sector. They all propose conditions and rationales for regulation, but common to all three is that state intervention by way of legislation is necessary and leads to a favorable outcome.

i. Public interest theory

The public interest theory is premised on the fact that industries operate inefficiently when left unregulated, and that government regulation is cost effective.[277] Based on this premise, this theory suggests that government regulation is necessary to reach optimum levels of production, and to respond to the market failures and imperfections.[278] By way of example, this theory would advocate for government to develop regulatory policies where there are too many competitors in an industry and not enough demand, which would rationalise the excessive competition, lower the consumer prices, and ensure quality goods and services.[279]

The criticisms of the public interest theory concern costs and administration. Studies have shown that government regulation is not a profitable mechanism in all industries.[280] Regulation

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[277] Richard Posner 'Theories of economic regulation' (1974) 5 *The Bell Journal of Economics and Management Science* 335 at 336.
[278] J den Hertog 'General Theories of Regulation' in B Bouckaert & G D Geest (eds) *Encyclopedia of Law and Economics The History and Methodology of Law and Economics* vol 1 (2000) 225 at 223-270.
[279] Ibid 226-227.
[280] Posner op cit note 277 at 337.

is a costly process – it involves negotiation between several stakeholders and the more wide-ranging and intricate the regulations, the more costly is the formulation and implementation of the process.[281] Regarding administration, the personnel responsible for the drafting and implementation of regulations often delegate their duties and do not oversee these delegated duties efficiently, which results in defective application within regulation.[282]

ii. Private interest theory

The private interest theory (capture theory) emerged because of the criticisms to the public interest theory.[283] This theory is premised on the notion that individuals and groups seek to protect and advance their own interests in a rational way.[284] These interest groups play a dominant role in regulation in that they lobby government to implement legislation that will benefit their interests.[285] However, in turn, a situation is created where various interest groups conflict with each other, competing for legislation to be adopted in their favour.[286]

As with the public interest theory, this theory has been subjected to criticism. It has been said that this theory can be labelled as 'a hypothesis that lacks any theoretical foundation'.[287] It fails to explain under what conditions interest groups succeed in obtaining legislation.[288]

iii. Economic theory

The economic theory can be viewed as an extension of the private interest theory and has been subject to revision. It focuses on the costs associated with regulation and the extent to which various interest groups value regulation.[289] The unrevised version of this theory suggests that all members within an industry must reach agreement on the nature of regulation governing the industry to be protected by the regulation, and to benefit from it.[290] The trend is that the smaller

[281] Ibid 339.
[282] Ibid 340.
[283] Den Hertog op cit note 278 at 235.
[284] Ibid 235-236.
[285] Ibid.
[286] Ibid.
[287] Posner op cit note 277 at 342.
[288] Ibid 341.
[289] Ibid 344.
[290] Ibid 345.

the industry, the easier it will be to coordinate the interests of the members and reach agreement on the nature of regulation that will be imposed in the industry.[291]

The revised version of this theory dispels the premise that coordination of members' interests elicits more favorable regulation. Instead, asymmetry of members' interests in a larger industry brings with it a greater demand for regulation.[292] From a cost aspect, public regulation is cheaper than private forms of regulation, especially in larger industries.[293] The political influence inherent in regulation is a key feature of this theory.[294] The theory posits that it is first necessary to understand the nature of the political system of the jurisdiction in question before making conclusions about political influence.[295] In a democratic system, regulation is implemented based on a vote by the elected representatives.[296] The lack of industry members to cooperate is problematic in this system, because it may lead to an industry not being regulated.[297] The number of members is equally important, because it impacts on the number of votes, which in turn affects whether an industry will be regulated.[298]

This theory has also been subject to criticism. While it provides the general conditions in which regulation applies, it omits specifics, such as the number of members in an industry that will maximise the likelihood of regulation being implemented in that industry.[299] It has also been described as a list of criteria to determine whether an industry will be regulated, rather than 'a coherent theory which yields unambiguous and testable hypotheses'.[300]

(b) Practical component

The practical component highlights the cost and administration-related difficulties associated with the implementation of the state model, as illustrated previously in the *Prince* judgement and the general criticisms of the public interest theory.

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[291] Ibid.
[292] Ibid 346-347.
[293] Ibid 346.
[294] Ibid.
[295] Ibid.
[296] Ibid 347.
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Ibid 349.

The majority and dissenting judgements in *Prince*[301] both considered the financial and administrative implications associated with implementing regulatory measures to regulate a religious-based exemption from a legislative prohibition of the use of cannabis.

Essentially, the implementation of regulatory measures presents several financial and administrative challenges. The set-up, administration, and operation of the regulatory system is likely to be a costly exercise, which would be financially burdensome on the state. The state would have to evaluate whether it has the financial resources to fund such costs.

From an administrative perspective, the religious-based exemption, as referenced in *Prince*, would call for regulatory measures such as: registration with relevant authorities, recording the amount of cannabis purchased, the date of purchase, and where and how the cannabis was used.[302] The issuing of a permit system to possess and use cannabis may also be an assistive regulatory measure, and revocation of the permit in instances where conditions of the permit have been violated.[303]

However, such measures are challenging to administer efficiently. The government department responsible for the administration of the regulatory system, the human resources needed, and the development of guidelines as to the issuing of permits and the expiration and reporting of permits as lost, all form part of the process.[304] Department authority and personnel would have to be made available to administer the exemption.[305] A registration system of recording holders would have to be developed in the form of taking fingerprints and forwarding them to the South African Police Service Criminal Record Centre for identification and processing and to make it more challenging to forge holders of permits.[306]

Sachs J drew the distinction between regulating in a private and public setting. In the case of cannabis, it proves far more administratively challenging to regulate in a private setting like in a home than in a public setting like a place of worship.[307] Chaskalson J highlighted the administrative challenges associated with regulating informal, unorganised religions. For him, well-organised religions have internal regulatory structures and can mount strong lobbies.[308]

[301] *Prince* supra note 4.
[302] Ibid para 64.
[303] Ibid.
[304] Ibid para 66.
[305] Ibid.
[306] Ibid.
[307] Ibid para 148.
[308] Ibid para 160.

Unorganised religions do not have internal structures and, therefore, the administration and enforcement of regulatory measures becomes problematic.[309]

(2) Self-regulation

While state-regulation advocates for state intervention in sectors, self-regulation adopts a hands-off state approach by the state to regulating sectors. Its premise is regulation of an industry by an industry.[310] It is deemed to be a cost effective, efficient, and flexible method of regulation. It eliminates the cost considerations highlighted as a potential challenge to state-regulation and reduces the intense administrative processes of state-regulation because the administrative, monitoring and enforcement processes are internal.[311] The rationale behind self-regulation is that members of an industry have knowledge and expertise of their industry and are in a position to develop standards to benefit their industry and its members.[312] The challenges associated with self-regulation are lack of accountability within the industry, and that the prescribed standards will not be adequately enforced.[313]

Self-regulation varies in the degree of regulation within an industry. Consensual self-regulation, for example, advocates for partial self-regulation and partial state-regulation.[314] Broader, more general areas within an industry are regulated by legislation, but more specific, narrower areas are self-regulated.[315] This type of limited self-regulation has been shown to be ineffective in industries where the risks are uncertain and/or can have adverse effects on third parties. Complete state-regulation is advocated for in such an instance.[316]

Overview of the regulatory framework for the religious sector in South Africa

With this exploration of state and self-regulation as a backdrop, the question is: Where does South Africa fit on the spectrum between state and self-regulation of its religious sector?

Arguably, South Africa's regulatory framework of the religious sector leans more towards the self-regulatory model with partial state intervention. It can be described as a hybrid and ad hoc model that lacks a coherent overall framework. While there is an array of legislation that does

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309 Ibid.
310 Anthony Ogus 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97 at 97-98.
311 Ibid 98.
312 Ibid 97-98.
313 Ibid 98-99.
314 Ibid 101.
315 Ibid.
316 Ibid 102.

and can apply to religious institutions when incidents of malpractice arise, several pieces of legislation do not expressly apply to the religious sector. Aside from the Constitution which directly deals with religious rights and limitations, there is not a single piece of legislation that is exclusively dedicated to the religious sector. However, recent developments have shown that there may be a shift towards a more explicit response to the abuse of religious practices within legislation. Although not yet promulgated, the proposed amendments to the Domestic Violence Act, 116 of 1998, include 'spiritual abuse', defined as 'the denial or use of practice of spiritual or religious beliefs and practices to control and dominate a person', as part of the definition of domestic violence.[317]

There is also case law on the religious sector, which is instructive in explaining the limited circumstances under which the courts will intervene in religious-related matters. The courts often rely on regulations developed within various religious institutions, which are largely self-regulatory in nature. Religious institutions incorporate state rules in the form of legislation and pronouncements from the courts to varying extents and in relation to different malpractices.

The regulatory framework is understood and assessed with reference to (1) formal regulation and (2) informal regulation.

(1) Formal regulation

Formal regulation is established by law and includes legislation and judicial precedent. To understand formal regulation, it is first necessary to distinguish between malpractices of a criminal, civil and constitutional nature:

Religious malpractices of a criminal nature are subject to the same courts, processes, rules, and penalties as any conventional criminal matter. As noted above, examples of criminal malpractice include sexual abuse, child abuse, theft, and extortion. All crimes of an abusive nature are subject to legislation including, but not limited to, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Criminal Law Sexual Offences Act") and the Children's Act 38 of 2005 ("the Children's Act"). Theft and extortion are generally subject to the common law.

Malpractices of a civil nature include practices of commercialisation and the failure of religious leaders to comply with registration and licensing requirements or tax obligations.[318]

[317] Domestic Violence Amendment Bill, s 1(t).
[318] CRL Rights Commission op cit note 6 at 25-26.

Most constitutional religious malpractices involve a violation of constitutional rights, often claims of unfair discrimination arising out of the grounds listed in s 9(3). An example of this would be a priest who refuses to contract a person to manage events because he is homosexual. Such an act amounts to discrimination on the grounds of sexual orientation, and will be heard under the Equality Act, requiring the Equality Court to conduct an enquiry into whether the conduct amounts to discrimination.[319] If the type of discrimination falls within the ambit of the prohibited grounds listed under s 9(3), the discrimination is regarded as unfair and the onus rests on the respondent to prove otherwise.[320] In assessing whether or not the discrimination is fair under s 14 of the Equality Act, the court will effectively conduct a balancing exercise of the rights to freedom of religion and equality, detailed above in section *(c)*.[321]

(a) Legislation

At present, there is some legislation which explicitly ensures that members of religious institutions act in accordance with the constitutional objective of protecting religious freedom, but not on an unlimited and unqualified basis. This includes the Children's Act. However, there is also legislation which indirectly aims to achieve this constitutional objective through its purpose and scope however, it does not directly or explicitly contain clauses which uphold this objective. These include inter alia: The Criminal Law Sexual Offences Act, The Non-Profit Organization Act 71 of 1997 (NPO Act), the Income Tax Act 58 of 1962, the Financial Intelligence Centre Act 38 of 2001 (FICA), and the Basic Conditions of Employment Act 75 of 1997. All traditional healers are subject to the Traditional Health Practitioners Act 22 of 2007.

i. Religious institutions and children

Legislation both implicitly and explicitly places a duty on members of religious institutions to report any knowledge they have of child abuse. Section 54 (1) (a) and (b) of the Criminal Law Sexual Offences Act provides that a person with knowledge that a sexual offence has been committed against a child must report it immediately to a police official, failing which such person will 'be liable on conviction to a fine or to imprisonment for a period not exceeding five

[319] Supra note 122 at s21 (1).
[320] *Strydom* supra note 12 para 5.
[321] Ibid para 8.

years or to both a fine and such imprisonment'. Section 110 (1) of the Children's Act, as amended, extends s 54 (1) (a) and (b) by explicitly including a religious leader in the obligation to report knowledge of child abuse that results in physical injury, sexual abuse or deliberate neglect, and by widening the persons to whom such abuse can be reported to a designated child protection organization and provincial Departments of Social Development

ii. Religious institutions and tax

Religious institutions can voluntarily register as non-profit organisations (NPO) in terms of the NPO and tax laws.[322] Once registered as NPOs, they are required to comply with generally accepted accounting standards.[323] To get preferential tax treatment, they need to apply for an exemption and comply with the requirements of the Income Tax Act, and be approved as a public benefit organization (PBO).[324] However, the registration of religious institutions as NPOs can sometimes result in employees using benefits associated with the NPO to enrich themselves. This amounts to a crime under the NPO Act and can be dealt with as such.

The Income Tax Act can be used by the Commissioner of Inland Revenue in instances where religious leaders engage in tax avoidance and evasion practices including, inter alia, not declaring salaries and hiding other income streams.

iii. Financial accountability of religious institutions

Religious institutions are not identified as accountable institutions under schedule 1 of FICA. Occasionally, the sources of income of individuals associated with religious institutions are unclear and not revealed. Although religious institutions are not identified as accountable institutions, employees within a religious institution nonetheless have a duty to report suspicious monetary activity to the Financial Intelligence Centre (FIC) in terms of s 29, which will in turn investigate. This provides protection against any potential money laundering activities that could surface within a religious institution.

[322] Du Plessis op cit note 57 at 143.
[323] Ibid.
[324] Ibid.

iv. Religious institutions and employment

The Basic Conditions of Employment Act ensures legal and ethical employer-employee practices in religious institutions. These include protecting employees against exploitative labour practices such as unreasonable working hours and salary.

v. Religious institutions and health and safety

The Traditional Health Practitioners Act ensures that all traditional healers engage in rituals and practices which do not compromise the health and safety of members they treat. As such, this Act provides that traditional healers must be registered in accordance with the Act in order to practice.[325] It establishes a regulatory framework to ensure the efficacy, safety, and quality of traditional health care services, it provides for management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners' profession, and for matters connected therewith.[326]

(b) Case law

Case law has not established rules and regulations in relation to the religious sector per se, but several conclusions can be drawn from it as to when courts can intervene in religious matters. From the selected cases in the previous chapter, it is apparent that courts generally do not involve themselves in doctrinal issues when it comes to religion, especially when long-standing procedures and practices are implicated. Courts also do not to intervene when an applicant has not complied fully with the religious institutions' internal regulatory processes.

However, some cases demonstrate that courts intervene in certain circumstances. These include cases which involve a conflict between religious freedoms and the right to equality. Intervention is warranted where the effect of unfair discrimination outweighs the prioritisation of religious freedoms, and where the nature of the unfair discrimination does not directly impede on the religious doctrine. Also included are cases involving a conflict between religious doctrine and constitutional rights. The court will intervene where the rights of the person/group have been prejudiced by doctrine, and where children's rights to freedom and security, dignity, and protection from violence have been unjustifiably limited by doctrine on its own or as

[325] The Traditional Health Practitioners Act 22 of 2007, s21(1).
[326] Ibid, Preamble.

reflected in law. The court considers the impact for the religious community before intervening. Intervention is typically acceptable when the limitation on religious freedom is not unduly burdensome for the religious community, and/or when the limitation does not result in the community having to choose between obeying their faith or the laws of the country.

(2) Informal regulation

Informal regulation is the system of regulation developed by religious denominations themselves. As mentioned previously, there is little to no desktop research available on informal regulation for religions practised in South Africa. It was necessary to gain insight into informal regulation, pertinent to the objectives of this dissertation. Accordingly, semi-structured interviews were conducted primarily with religious leaders from various religious denominations prevalent within South Africa. With reference to Table 1 in Chapter 2, the religions and religious denominations interviewed were: Christianity (Catholicism, Anglican, Methodist, Rhema, Greek Orthodox and Zionist Christian Church (ZCC)); Traditional African Religion (Traditional African Healing); Judaism (Orthodox and Reform); Islam (Sunni); Hinduism (Shaivism) and Buddhism (Tibetan).

The ensuing observations and comments derived from the interviews sought to provide of 'baseline' of operations within the informal regulation paradigm, operative within the religious sector.

Findings from the interviews in respect of informal regulation

In reporting on the findings from the interviews, the religious denominations have been categorised according to 'organised formal', 'semi-organised formal' and 'unorganised informal'. In addition, the approaches that each religious denomination adopts in respect of specific categories of malpractices (criminal, discriminatory and harmful acts) have also been included in the discussion of findings. Further to the above, the opinions of the interviewees in relation to the regulations adopted by the religious denominations they represent; police, court and CRL intervention in matters of a religious nature; and the relationship that the interviewees enjoy with the CRL have all been included in the findings, to furnish the reader with a personal and factual account of informal regulation from the specific viewpoint of the interviewees.

For purposes of referencing, all information relating to informal regulation in this chapter is derived from the interviews.

(a) Categories of religions/religious denominations

i. Organised formal

This category comprises those religions and religious denominations that have a structured hierarchy of internal bodies, and a series of internal processes and penalties that are used to deal with malpractices. They are: Christianity (Catholicism, Anglican, Methodist, Rhema, Greek Orthodox and ZCC); Judaism (Orthodox and Reform) and Islam (Sunni).

Table 2: This table illustrates the internal process used when malpractices arise for these 'organised formal' religious denominations.

Religion/Religious Denomination	**Process followed for malpractice**
CHRISTIANITY	
Catholicism	• **Report complaint to parish priest** • Parish priest to refer complaint to **Deanery**,[327] if not resolved at parish level or complainant not satisfied with outcome at that level • Deanery to refer complaint to **Bishop of the relevant Diocese**,[328] if not resolved at Deanery level or complainant not satisfied with outcome at that level • Bishop to refer complaint to **South African Catholic Bishop's Conference**,[329] if not resolved at Bishop level or complainant not satisfied with outcome at that level • South African Catholic Bishop's Conference (SACBC) to refer complaint to **Vatican**,[330] if not resolved at SACBC level or complainant not satisfied with outcome at that level *If a complaint is directed against somebody who forms part of one or more of the above bodies, the complainant would bypass that 'level' and approach the next 'level' in the hierarchy
Anglican	• **Local parish/congregational level** • **Diocese/provincial level** (complainant can appeal if dissatisfied with outcome from local parish level) *Process for reporting, investigation, follow up and action at both local and provincial levels *Process dependant on nature and severity of malpractice
Methodist	• **Written complaint** must be handed into the Church • **Process of mediation** to commence (Ministers can take part if they do not have a direct/indirect involvement in the case. Mediators are appointed based on their qualification and skill – can be from inside or outside the Church)

[327] A Deanery is a priest appointed for various suburbs. For example, there is a Deanery for the northern suburbs in Johannesburg such as Rosebank, Rivonia, Victory Park and Bryanston.
[328] The Bishop is the Pope's representative in various diocese and archdiocese.
[329] The South African Catholic Bishop's Conference is a body which constitutes all the Bishops in South Africa.
[330] The Vatican is the headquarters of the Roman Catholic Church.

	• Referred to **Disciplinary Registrar of Synod**[331] to assess whether complaint has merit and whether all attempts at mediation have been exhausted, if mediation is unsuccessful or if nature of complaint is disciplinary in nature • Disciplinary Registrar to formulate charges in a way that complies with laws of Church and religious laws of South Africa and refer complaint to **Disciplinary Committee of Synod**[332] in question • Disciplinary Committee to administer inquiry with parties involved and decide on outcome • Referred to **Connexional Disciplinary Committee**[333] to review the decision made by the Disciplinary Committee if any party is dissatisfied with outcome – can confirm or reject decision or ask Disciplinary Committee to review their decision *All Disciplinary Committees comprise both religious and professional members from the Church
Greek Orthodox	• **Report complaint to parish** • Either **priest** or **governing body of parish**[334] to which complaint applies deals with complaint • **Office of Archbishop**[335] also deals with complaints which are material in nature. Complainant can also report complaint directly to Archbishop and bypass parish level, and can appeal to Office of Archbishop, if dissatisfied with outcome at parish level • Archbishop refers matter to **Office of the Patriarch**[336] if unable to resolve the complaint
Rhema	• **Report complaint to pastor of parish** situated within the area in which complainant resides • Pastor refers complaint to **District Office** • District Office refers matter to **Pastoral Care Office**[337] • Pastoral Care Office refers matter to **Rhema Family of Churches**[338] • Rhema Family of Churches refers matter to **International Federation of Christian Churches (IFCC)**,[339] if matter cannot be resolved by board of Rhema Family of Churches

[331] The Disciplinary Registrar is required to have specific legal qualifications and expertise. The Methodist Church is divided into a number of Synods. Each Synod has a Bishop and the Bishop is the Church's representative in various diocese.

[332] The members comprising the Disciplinary Committee must understand and have experience in disciplinary matters.

[333] The Connexional Disciplinary Committee serves as a body of review.

[334] The composition of governing bodies varies based on the needs of the parishioners and size of the parish. They comprise of parishioners and must adhere to the Tenets of the Greek Orthodox Church (developed by Archbishops under the supervision of their respective Patriarchs).

[335] All priests are governed by the Office of the Archbishop who has jurisdiction over the diocese under which they fall. For example, in Gauteng, there is an Archbishop who governs the parishes in Johannesburg and Pretoria. [have deleted to avoid repetition with next note?]

[336] All Archbishops are governed by Patriarchs. For example, there is a Patriarch who is in control of the continent of Africa.

[337] The Pastoral Care Office is responsible for investigating the validity of the complaint reported to the Church, which includes a hearing with the parties involved. Once the investigation has been completed, an independent party (generally a lawyer) will be called in to assess the findings.

[338] Rhema Family of Churches [is this a corporate entity?] comprises senior pastor, Ray McCauley, and members of the Rhema Church with a business background. The Rhema Family of Churches is responsible for reviewing the findings from the investigation conducted at the Pastoral Care Office and making a decision.

[339] The International Federation of Christian Churches is an apostolic body comprising a group of Churches with the same ethos and belief system as the Rhema Church.

<table>
<tr><td></td><td>*Head of Pastoral Care Office and an external, independent person review above process approximately every 3 years</td></tr>
<tr><td>ZCC</td><td>Written complaint (detailing nature of malpractice and parties involved) must be handed to the Church
A hearing convened with parties involved and twenty members from ZCC (ten who are regarded as a reserve body and the other ten who are responsible for running ZCC – minister, second minister, chairperson, second chairperson, general secretary, assistant, financier)
A meeting with twenty members from ZCC to discuss their opinions from hearing and decide how to treat the malpractice
If the twenty members cannot decide and/or agree on a way to treat the malpractice, it is referred to the headquarters of the ZCC to decide (comprises approximately 300 pastors from all branches of ZCC and situated in Pietersburg)
The decision made by headquarters must be communicated and understood by the ZCC branch to which the complaint was initially reported</td></tr>
<tr><td><u>JUDAISM</u></td><td></td></tr>
<tr><td>Orthodox</td><td>Leadership of Synagogue that is directly involved in the malpractice (if Junior Rabbi commits malpractice, dealt with by Senior Rabbi or Board of Synagogue)
Union of Orthodox Synagogues[340]
Beth Din (South Africa)[341] – if Union of Orthodox Synagogues deems it necessary to refer the matter
Beth Din (Israel) – if Beth Din South Africa cannot resolve the matter, which is highly unlikely
*Process is dependant on nature of malpractice and person who commits it
If it is a Rabbi: Union of Orthodox Synagogues and Beth Din handles it
If it is school/education-related: Jewish Board of Education and Beth Din handles it</td></tr>
<tr><td><u>ISLAM</u></td><td></td></tr>
<tr><td>Sunni</td><td>Report complaint at mosque to which the incident relates
Mosque can refer complaint to Council of Muslim Theologians[342] or approach them in an advisory capacity if it thinks it is necessary
Council of Muslim Theologians will investigate the malpractice which includes collating the necessary information relating to the matter and holding a hearing to ensure that both parties are given an opportunity to present their versions
Council of Muslim Theologians refers matter to Muslim Mediation and Arbitration Council (MMAC),[343] if no resolution is reached by the Council</td></tr>
</table>

[340] All Synagogues are affiliated to the Union of Orthodox Synagogues.
[341] Beth Din South Africa is a legal body governing Judaism in South Africa and often works in consultation with professionals like attorneys. To qualify to sit on the Beth Din, a person has to be a Rabbi with specific qualification in some of the finer issues of Jewish business law and marriage and divorce law.
[342] The Council of Muslim Theologians is an overarching advisory body in Islam made of up Muslim theologians who provide guidance to the community and assist with complaints that arise in the community.
[343] The Muslim Mediation and Arbitration Council is a body which carries out conventional mediation and arbitration processes in the community.

Table 3: This table illustrates the penalties imposed for malpractices in respect of these 'organised formal' religious denominations.

Religion/Religious Denomination	**Penalty for malpractice**
CHRISTIANITY	
Catholicism	• **Unclear** from interview
Anglican	• **Laypersons:** removal/suspension from office, suspension from sacraments • **Ordained persons:** o **Formal admonition** – written rebuke either in private or public (depending on what bishop decides is necessary in circumstances) o **Suspension** – up to ten years from performing any ministerial functions (the longer the suspension, the less likely the person is subject to the suspension will be entitled to financial benefits in the form of a stipend) o **Deposition** – suspended from ministry and license taken away for specified period of time o **Degradation** – ordination being completely removed (appeal process available and bishops of province in question have to confirm this penalty before imposed)
Methodist	• **Suspension** and/or **removal** from the ministry • Accompanied by **restorative process** aimed at making perpetrator aware of gravity of his/her misdemeanor *Dependant on nature and severity of malpractice, whether person is a repeat offender and the impact that the malpractice has on society
Greek Orthodox	• **Aligns with penalties imposed by laws of South Africa** for various malpractices (if the law does not impose any criminal sanction for a malpractice, the Church will also not) • Aim to both **correct and reform** the perpetrator, to **protect** the **community from sin** and to **demonstrate to society** that certain acts are inadmissible for everybody
Rhema	• **Unclear** from interview
ZCC	• **Unclear** from interview
JUDAISM	
Orthodox	• **Issuing of public statement** that perpetrator is persona non grata, no longer allowed in community, nobody in community can do business with him/her and/or that perpetrator may not be given honors in Synagogue
ISLAM	
Sunni	• **Unclear** from interview

Table 4: This table illustrates the ways in which the regulations to deal with malpractices are documented and/or publicised in respect of these 'organised formal' religious denominations.

Religion/Religious Denomination	**Regulations – documented/publicised?**
CHRISTIANITY	
Catholicism	• **Documented and publicised** • **South African Bishops Conference** o Documented procedures to follow within the Church for incidents of malpractice o Accessible to the public upon request
Anglican	• **Constitution and Canons of the Protection of Provinces of Anglican Church** o Procedures to follow for various malpractices o Contains time-frame in which written complaint must be made to Church, to whom complaint must be directed and procedure for how various complaints ought to be addressed o Each Church is mandated to have a copy, most clergy have a copy and is available on provincial website of Anglican Church • **Pastoral Standards of the Anglican Church** o Relevant for members who form part of ministry of Church o Outlines code of conduct of ministers, accountability of ministers and the importance of carrying out their duties in line with the constitution, canons and rules of the diocese o Parishes have a summary displayed in their churches and it is a public document
Methodist	• **Laws and Discipline of the Methodist Church of South Africa** (can be accessed on the internet by anybody)
Greek Orthodox	• **Memorandum of Incorporation**, **Memorandum and Articles of Association** or **Constitution** (different for each parish) • **Canons** are also used as a reference point (can be purchased from selected bookstores, but a copy is housed in the offices of every Archbishop and Patriarch)
Rhema	• **Not documented or publicised** o Teaches congregants processes when they convene for meetings
ZCC	• **Not documented or publicised** o Relies on members being familiar with complaint and recourse processes by regularly attending church and being involved in church gatherings o If complainant is not from ZCC, he/she would have to contact ZCC telephonically, physically attend at a ZCC branch or enquire from a member of ZCC about processes
JUDAISM	
Orthodox	• **Unclear** from interview
ISLAM	
Sunni	• **Dependent on the Mosque's structure**

	- All Mosques are essentially autonomous whose organisation structures and rules governing conduct of leaders and members are entirely dependent on the people within the locality of the mosque - Some Mosques have regulations built into their constitutions and others do not

ii. Semi-organised semiformal

This category comprises those religions and religious denominations which have internal bodies and documents to deal with malpractices. However, there is not a multi-level hierarchy of bodies, which serve as avenues of appeal and review for the previous levels which the complainant has already encountered, and as checks and balances to deal with these malpractices. Judaism (Reform) is the only religious denomination which falls under this category.

There is no formal complaints procedure for malpractices in Reform Judaism, but there are various documents and bodies which may be invoked depending on the nature of the malpractice. All Reform Rabbis are bound by the **Central Code for American Rabbi Ethics Code (CCAR)** which is taken from the American context and adapted to the South African context. It is a code which governs the conduct of Reform Rabbis. There are two bodies namely: **The Management Committee** and the **Board of Guardians** that generally handle malpractices, but it is not mandatory to approach them in the event of a malpractice arising. Both bodies comprise laypersons from the community. The Management Committee comprises ten to twelve members at any given time who are re-elected annually. The Board of Guardians has four members at any given time and annually, one member is replaced. The members on the Board of Guardians must have previously served on the Management Committee, are involved in wide-ranging decisions, and are responsible for supervising the work of the Management Committee. It was **unclear from the interview** the nature of the **penalties** that are imposed for the various malpractices. The **procedures** used **to deal with malpractices** within the community are **not documented or publicised**.

iii. Unorganised informal

This category comprises those religions and religious denominations which do not have a structured hierarchy and specific internal bodies which have been developed by religious institutions to deal with malpractices. They are: Buddhism (Tibetan), Hinduism (Shaivism) and Traditional African Religion (Traditional African Healing).

Table 5: This table illustrates whether and what internal processes are used when malpractices arise for these 'unorganised informal' religious denominations.

Religion/Religious Denomination	**Process followed for malpractice**
BUDDHISM	
Tibetan	• **No direct processes** to deal with malpractices, but rules to deal with **conduct of Monks** and **consequences of** their **misconduct**
HINDUISM	
Shaivism	• **No processes** to deal with malpractices, but **core beliefs of Hinduism** are said to serve as deterrents against the committing of malpractices ○ Core beliefs include: what you sow in life, you reap; good will come to find people who do good and people will pay in their own lives for committing bad acts; doing good on earth leads to your soul merging with the ultimate soul • **Aligns with** the ways in which **South African law** responds to malpractices
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• **No internal processes** to deal with malpractices such as a Traditional Healer not helping a person to connect with their ancestors • **Aligns with** the ways in which **South African law** responds to malpractices

Table 6: This table illustrates the penalties imposed for malpractices in respect of these 'unorganised informal' religious denominations.

Religion/Religious Denomination	**Penalty for malpractice**
BUDDHISM	
Tibetan	• **Penalties associated with misconduct by Monks** vary according to their severity ○ Minor offences will result in doing kitchen duty or paying a fine and more serious offences will result in the removal of a monk from the monastery
HINDUISM	
Shaivism	• **Core beliefs of Hinduism** - that one's soul will not merge with the ultimate soul and one will pay in their own life for committing malpractices • **Aligns with** the **penalties imposed by South African law** for malpractices
TRADITIONAL AFRICAN RELIGION	

Traditional African Healing	• **Aligns with** the **penalties imposed by South African law** for malpractices

Table 7: This table illustrates whether the processes and penalties to deal with malpractices are documented and/or publicised in respect of these 'unorganised informal' religious denominations.

Religion/Religious Denomination	**Regulations – documented/publicised?**
BUDDHISM	
Tibetan	• **Document** which **details** the **rules governing Monks** and the **consequences of** each **rule being transgressed** (was unclear whether it is publicly accessible) o Examples include not killing, not stealing, and not engaging in sexual misconduct
HINDUISM	
Shaivism	• **Document** which **details** all the **rules of Shaivism** (accessible to all members) o Examples include not stealing and not reneging on a promise
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• **No documents** which deal with internal processes and penalties imposed for committing malpractices

Analysis: Categories of religions/religious denominations

It is apparent that there are fundamental differences between the categories of regulatory structures, and similarities and differences within the categories.

All the 'organised formal' religious denominations have a step-by-step process they use in the event of a malpractice arising, as opposed to the other categories. Reform Judaism, under 'semi-organised semiformal', has two internal bodies that handle certain malpractices. It is, however, distinguishable from the religious denominations under the 'organised formal' categories because it does not have multiple hierarchical structures which are placed in order of seniority of members within the structure, to deal with malpractices. The 'unorganised informal' religious denominations do not have any direct internal processes to handle malpractices, as evidenced within the religious denominations categorised under 'organised formal' and 'semi-organised semiformal'.

Common to all religious denominations under the 'organised formal' category, are the mandatory structured regulatory processes and penalties that are invoked to respond to malpractices. In addition, the form of the regulatory structures is relatively similar. All these religious denominations follow a hierarchical system in which the more 'authoritative' bodies within the religious denomination are approached later in the complaints process, and the 'less' authoritative bodies earlier on in the process.

However, religious denominations within the 'organised formal' category differ in a number of ways. First, some of them have more bodies/committees within their hierarchical structures than others. For example, the Methodist church has an in-depth structure which goes from the complaint being submitted in writing to the church, to mediation (if possible), to the Disciplinary Registrar, to the Disciplinary Committee and to the Connexional Disciplinary Committee. The ZCC, on the other hand, does not have as many bodies within its structure. The complaint must be submitted to the church, followed by a hearing with twenty members from ZCC and thereafter, further investigation of the matter at headquarters (if necessary). Another difference is that, although all religious denominations under this category have a hierarchical, multi-level structure which comprises a series of bodies; the powers and functions of such bodies vary based on the religious denomination in question. For example, the Methodist church process has space for mediation, whereas other religious denominations within this category do not. The powers and jurisdiction of apex bodies differs. Islam (Sunni) has an overarching advisory body in the Council of Muslim Theologians, but all mosques are independently regulated. Similarly, within the Greek Orthodox church, each parish is governed by its own constitution. However, in Catholicism, the Vatican is an overarching body whose authority extends over all Catholic parishes and their internal regulatory structures globally. There is also a difference in the ways in which the processes and/or penalties to deal with malpractices are documented and publicised. It ranges from the Methodist church which has its processes documented and accessible to the public via the internet, to the Rhema and ZCC churches who teach their members about the processes during church gatherings, but they are not reduced to writing and made accessible to the public via a public media platform.

Reform Judaism, the only religious denomination under 'semi-organised semiformal', is similar to the religious denominations under the 'organised formal' category, in that it has internal structures and bodies to respond to the malpractices, but they differ in that the 'semi-organised semiformal' category does not have a multi-level hierarchical structure. It is similar to the 'unorganised informal' category in that there are rules in place governing the conduct of religious leaders, but no hierarchical structure within the religious institution to deal with malpractices. However, it differs from the 'unorganised informal' category, in that they have no internal bodies to assist in responding to malpractices.

The common thread within the 'unorganised informal' category is that while there are no internal bodies to deal with malpractices, there are rules governing these religious denominations, all of whom draw on the South African law governing malpractices to varying extents. Tibetan Buddhism has a series of rules stipulating the conduct of Monks, Hinduism (Shaivism) has a set of rules which have applicability to all followers of the Hindu faith, and Traditional African Religion (Traditional African Healing) primarily draws on South African law to address malpractices committed by Traditional Healers. However, a noticeable difference is the penalties imposed for malpractices. Tibetan Buddhism has its own penalties to deal with misconduct by Monks, and Hinduism and Traditional African Healing utilise the penalties associated with conventional legal processes.

(b) Criminal malpractices

This section seeks to illustrate the ways in which the various religious denominations deal with criminal-related malpractices within their religious institutions. The malpractices included in this discussion are: (1) sexual assault of an adult (2) sexual assault of a minor and (3) misappropriation of funds belonging to a religious institution by a religious leader. Part of the discussion also includes the degree to which the religious denomination in question encourages reporting of these malpractices to, inter alia, the police. The findings are grouped based on the nature of the malpractice and the category under which the religious denominations have been placed in the previous section, to be able to elicit an analysis of the trends of these malpractices within and between religious denominations.

Table 8: This table illustrates the ways in which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' deal with a complaint of sexual assault of an adult.

Religion/Religious Denomination	**Sexual assault of an adult**
Organised formal	
CHRISTIANITY	

Catholicism	• **Complaint** to be **reported to Bishop**[344] of the diocese in question • **Bishop** to **refer** complaint to the **Vicar General**[345] who will **investigate** (interview parties involved and calling in experts to assist) • If **merit** is found from the investigation, the **Church** will **encourage** complainant to **report** to police and alleged perpetrator will be **ex-communicated** from the Church • If **no merit** is found from the investigation, the Church will ensure that the alleged **perpetrator** is **not serving in** a **position** in the Church which could **pose** a **risk of further cases** of sexual assault
Anglican	• Church would **encourage complainant** to **lay charge with police** • **Report** to **Bishop within 48 hours** of the complaint being brought to the attention of the Church • Bishop appoints an **investigative team**[346] to establish the circumstances surrounding the alleged malpractice, to ascertain whether a case exists and what actions need to be implemented and the way forward • Church has recently established a **safe church mechanism** to respond to malpractices of this nature. Every diocese has a **safe church officer on hand** to investigate and respond to these complaints, in addition to the above investigative team which is appointed
Methodist	• **Obligation** on Church **to report case to police** • Utilising **conventional legal processes**
Greek Orthodox	• **Complainant** must **lay charge** against the alleged perpetrator and **conventional legal processes** must be followed • **Archbishop**[347] **to assist** the **complainant** where necessary • If alleged perpetrator is found guilty, **Church** will **impose penalties** on the perpetrator (**in addition to** those of the **criminal justice system**) which could include defrocking the perpetrator and excluding him/her from receiving communion
Rhema	• Follow **internal complaints process** of Church (specified above) • **Dismissal** if alleged perpetrator is found guilty • **Encourage** complainant to **report matter** to police. If complainant does, Church will **still proceed with** its **internal complaints process** • Church recently conducted a **sexual harassment workshop** for its members to have a better understanding of sexual harassment, to review their existing policies and introduce new policies
ZCC	• **Layperson**: **Suspension** for **3 years** If after 3 years, perpetrator returns and does not commit another malpractice, will remain a member If after 3 years, perpetrator returns and commits another malpractice, indefinite disqualification • **Pastor**: **Immediate disqualification**
JUDAISM	
Orthodox	• Utilising **conventional legal processes** • From **previous cases many years ago** (which is not necessarily the consequences that would ensue today) – **removal** of perpetrator from

344 Interview (Catholic) op cit note 328.
345 The Vicar General is regarded as the CEO of all priests and is responsible for disciplining them.
346 The Investigative Team comprises members from both inside and outside the Church. It includes a cleric, priesthood deacon, lawyer, social worker and somebody with specialised investigative skills.
347 Interview (Greek Orthodox) op cit note 336.

	office, **exposing** perpetrator **publicly** and **forcing** perpetrator **to leave the country** in which malpractice was committed
ISLAM	
Sunni	• Utilising **conventional legal processes** • **Council of Muslim Theologians**[348] will **encourage** the **complainant to report** the matter and provide **psychosocial support to** the complainant
Semi-organised semi-formal	
JUDAISM	
Reform	• Reporting the incident to the **Board of Guardians**[349] to conduct an enquiry into the case and possibly involve psychologists, social workers and support-based organisations such as Family Line • The alleged perpetrator would more than likely be **suspended with immediate effect** • **Written communication** would be addressed **to the members** to inform them that the matter has been brought to the attention of the Synagogue, the measures that have been taken to address the matter and once an outcome has been reached, further written communication would be addressed to the members detailing the outcome
Unorganised informal	
BUDDHISM	
Tibetan	• Monk will be **removed from** the **Monastery**[350] • Malpractice would **not be reported to police** because the Monastery prefers to impose its own penalties for this kind of malpractice
HINDUISM	
Shaivism	• Utilising **conventional legal processes**
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Utilising **conventional legal processes**

[348] Interview (Islam) op cit note 342.
[349] The Board of Guardians has 4 members at any given time and annually, 1 member is replaced. The members on the Board of Guardians must have previously served on the Management Committee, are involved in wide-ranging decisions, and are responsible for supervising the work of the Management Committee.
[350] A Monastery is an umbrella body for Monks (religious leaders in Buddhism). Within each Monastery, there are various subdivisions. Each Monastery has Monks with various levels of expertise. Each Monk has a teacher who has more experience, within the Monastery.

Table 9: This table illustrates the ways in which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' deal with a complaint of sexual assault of a minor.

Religion/Religious Denomination	**Sexual assault of a minor**
Organised formal	
CHRISTIANITY	
Catholicism	• **Complaint** to be **reported to Bishop**[351] of the diocese in question • **Bishop** to **refer** complaint to the **Vicar General**[352] who will **investigate** (interview parties involved and calling in experts to assist) • If **merit** is found from the investigation, the **Church** will **encourage** complainant to **report** to police and alleged perpetrator will be **ex-communicated** from the Church • If **no merit** is found from the investigation, the Church will ensure that the alleged **perpetrator** is **not serving in** a **position** in the Church which could **pose** a **risk of further cases** of sexual assault • **Document** entitled 'Safeguarding the Children' which has recently been released and **deals with clerical abuse of children**
Anglican	• **Same process as sexual assault of an adult**
Methodist	• **Obligation** on Church **to report case to police** • Utilising **conventional legal processes**
Greek Orthodox	• **Complainant** must **lay charge** against the alleged perpetrator and **conventional legal processes** must be followed o If minor does not have a guardian to assist in laying the charge, representatives of the Church will assist • **Archbishop**[353] **to assist** the **complainant** where necessary • If alleged perpetrator is found guilty, **Church** will **impose penalties** on the perpetrator (**in addition to** those of the **criminal justice system**) which could include defrocking the perpetrator and excluding him/her from receiving communion
Rhema	• Follow **internal complaints process** of Church (specified above) • **Dismissal** if alleged perpetrator is found guilty • **Church will report matter** to police. Church will **still proceed with** its **internal complaints process** • Church recently conducted a **sexual harassment workshop** for its members to have a better understanding of sexual harassment, to review their existing policies and introduce new policies
ZCC	• **Immediate indefinite disqualification** for a layperson or pastor
JUDAISM	
Orthodox	• Utilising **conventional legal processes**

[351] Interview (Catholic) op cit note 328.
[352] Interview (Catholic) op cit note 345.
[353] Interview (Greek Orthodox) op cit note 336.

	• Consequences are **more serious than** those that ensue from **sexual assault of an adult** • **Task team formed** within community to deal with this malpractice o One of the tasks involves a movement that has been created **'Moms on the Move'** to **patrol community campuses** and ensure that children are not walking around on their own o **Another movement** within community that is tasked with **investigating and finding predators**
ISLAM	
Sunni	• Utilising **conventional legal processes** • **Council of Muslim Theologians**[354] will **encourage** the **complainant to report** the matter and provide **psychosocial support to** the complainant
Semi-organised semi-formal	
JUDAISM	
Reform	• **Same process as sexual assault of an adult**
Unorganised informal	
BUDDHISM	
Tibetan	• Monk will be **removed from** the **Monastery**[355] • Malpractice would **not be reported to police** because the Monastery prefers to impose its own penalties for this kind of malpractice
HINDUISM	
Shaivism	• Utilising **conventional legal processes**
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Utilising **conventional legal processes**

Table 10: This table illustrates the ways in which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' deal with a complaint of misappropriation of funds of a religious institution by a religious leader.

Religion/Religious Denomination	**Misappropriation of funds of a religious institution by a religious leader**
Organised formal	
CHRISTIANITY	
Catholicism	• **Complaint** to be **reported to Bishop**[356] of the diocese in question

[354] Interview (Islam) op cit note 342.
[355] Interview (Tibetan Buddhism) op cit note 350.
[356] Interview (Catholic) op cit note 328.

	• **Bishop** to **refer** complaint to the **Vicar General**[357] who will **investigate** (interview parties involved and calling in experts to assist) • If there was **merit** found from the investigation, and it was a **large amount of money**, the alleged perpetrator would be **disciplined and dismissed** • If there was **merit** found from the investigation, and it was a **small amount of money**, the alleged perpetrator would be **disciplined by the Bishop** but not likely dismissed
Anglican	• **Investigation** and **disciplinary process** • **Report** to police in **some cases**
Methodist	• Follow **internal complaints process** of Church (specified above)
Greek Orthodox	• Follow **internal complaints process** of Church (specified above) • Penalties such as **defrocking of the perpetrator** and **exclusion from receiving communion** • Process to **recover the funds** from the perpetrator
Rhema	• Follow **internal complaints process** of Church (specified above) • A **member** of the **South African Council of Churches**[358] will be called in to assess the findings from the investigation at the Pastoral Care Office level • **Dismissal** if alleged perpetrator is found guilty
ZCC	• **Layperson: Suspension** for **unspecified period of time** If after suspension period, perpetrator returns and does not commit another malpractice, will remain a member If after suspension period, perpetrator returns and commits another malpractice, indefinite disqualification • **Pastor: Immediate disqualification** • Both layperson and pastor would be required to **pay** the **funds back** to the Church
JUDAISM	
Orthodox	• **Exposed publicly** and **debarred** from serving as a Rabbi
ISLAM	
Sunni	• Utilising **conventional legal processes** • **Council of Muslim Theologians**[359] will **encourage** the **complainant to report** the matter
Semi-organised semi-formal	
JUDAISM	
Reform	• **Suspension** of perpetrator, **inquiry** conducted, and **additional penalties** attached to malpractice depending on severity and intention reported from inquiry
Unorganised informal	

[357] Interview (Catholic) op cit note 345.
[358] The South African Council of Churches is the facilitating body for a fellowship of a number of Christian churches. It includes among its members Protestant, Catholic, Independent and Pentecostal churches, representing the majority of Christians in South Africa.
[359] Interview (Islam) op cit note 342.

BUDDHISM	
Tibetan	• **Investigation** and **dismissal** if alleged perpetrator found guilty
HINDUISM	
Shaivism	• Utilising **conventional legal processes**
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Utilising **conventional legal processes**

Table 11: This table illustrates the extent to which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' advocate for reporting of criminal malpractices to external bodies such as, inter alia, the police.

Religion/Religious Denomination	**Extent of reporting**
Organised formal	
CHRISTIANITY	
Catholicism	• **Encourage complainant** to first **approach** the **Church** • If **Church cannot resolve** the **matter**, it will **encourage complainant to report matter** to police and follow conventional legal processes • If complainant wants to report the matter initially, the Church will not be opposed to it
Anglican	• **Encourage complainant to report** matter to police • Follow **conventional legal processes** • Follow **own processes of investigation** and where possible, reach a conclusion and impose penalty for committing malpractice

Methodist	• Dependent on **nature of malpractice**
	  o Malpractices like **sexual assault of an adult and minor** must be **reported** to police and conventional legal processes must be followed
	  o Malpractices like **misappropriation of church funds** by religious leader will be **handled internally**

Greek Orthodox	• Dependent on **nature of malpractice** o Malpractices where there is a **reasonable possibility that there is criminality** will be **reported** to the police • **Church** will **report matter** to police **if complainant does not** and there is a reasonable suspicion that the alleged perpetrator has committed a crime
Rhema	• Dependent on **nature of malpractice** o Malpractices like **sexual assault of an adult** are **encouraged** to be **reported** to police

	○ Malpractices like **sexual assault of a minor** must be **reported** to police ○ Malpractices like **misappropriation of church funds** will be **handled internally**
ZCC	• Dependent on **nature of malpractice** ○ Malpractices like **murder, rape and assault** must be **reported** to police and conventional legal processes must be followed ○ Malpractices like **theft** will be handled internally and **not reported**
JUDAISM	
Orthodox	• The **Beth Din (South Africa)**[360] would **make a decision** as to whether external reporting is necessary, because the members of the Beth Din are affiliated to the legal community
ISLAM	
Sunni	• **Encourage complainant to report** matter to police • Follow **conventional legal processes**
Semi-organised semi-formal	
JUDAISM	
Reform	• The **Board of Guardians**[361] and the **team of consultants** handling the malpractice (psychologists, social workers, committee members) will decide as to whether reporting of the malpractice is necessary • The Board of Guardians often consults **lawyers** for their opinion when malpractices of a criminal nature are committed • The **complainant** would **not be discouraged from reporting** a malpractice, if he/she indicates that he/she would like to report it
Unorganised informal	
BUDDHISM	
Tibetan	• Dependent on **nature of malpractice** (to decide on a case-by-case basis)
HINDUISM	
Shaivism	• **Some members of** the **community** are likely to **encourage** complainant **to report** the malpractice
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• **Some members of** the **community** are likely to encourage complainant to **report** the malpractice • **Other members** are **afraid to report** malpractices **because** of the **potential harmful consequences** that could ensue ○ Traditional African healers could administer harmful medicines to complainants, if they become aware that they have reported them

[360] Interview (Orthodox Judaism) op cit note 341.
[361] Interview (Reform Judaism) op cit note 349.

Analysis: Criminal malpractices

There are no definitive trends that can be identified between and within the three categories 'organised formal'; 'semi-organised semi-formal' and 'unorganised informal' when it comes to the way in which the religious denominations deal with malpractices of a criminal-related nature.

Each religious denomination utilises conventional legal processes, avenues of reporting and their own internal processes in different ways and to varying extents. However, some similarities between and within the religious denominations can be identified. They are as follows:

(1) Both Orthodox and Reform Judaism make use of consulting legal experts in the process. In Orthodox Judaism, the Beth Din South Africa, the members who are directly affiliated to the legal community, decide whether reporting the malpractice to the police is necessary. In Reform Judaism, the Board of Guardians often liaises with attorneys to ascertain their opinions on how to respond to the malpractice.

(2) The ZCC, the Methodist, Rhema and Greek Orthodox Churches would all report matters of sexual assault but deal with misappropriation of funds internally. The representative from the Greek Orthodox Church indicated that the aspect of criminality would be a determining factor in deciding whether to report the malpractice.

(3) Hinduism (Shaivism) and Traditional African Religion (Traditional African Healing) would draw on conventional legal processes in dealing with malpractices of a criminal nature.

(4) The Catholic Church, Orthodox Judaism and the Rhema Church have all recently responded to the mounting incidents of sexual abuse of minors – either by way of conducting workshops to educate members, drafting a document dealing with the issue or by creating a task team which carries out preventative measures at schools and on community campuses.

Further to the similarities, the following religious denominations have their own unique ways of dealing with the identified malpractices. They are as follows:

(1) The Anglican Church encourages the reporting of criminal-related malpractices, but, in addition, conducts its own internal investigations and imposes additional internal penalties, where necessary.

(2) Tibetan Buddhism would deal with the malpractices internally because the interviewee maintains that it can do so without the need for external intervention.

(3) Islam (Sunni) would utilise the conventional legal processes, but would approach the Council of Muslim Theologians in a capacity only to provide psychosocial support to the complainant, and not to intervene in the process and outcome.

(4) The Catholic Church would encourage members to first allow internal processes to run their course and to only report malpractices if they have not been resolved via internal processes. However, if a complainant indicates that he/she would like to report the incident, the Church would not discourage it.

(c) Discriminatory practices

This section seeks to illustrate the ways in which the various religious denominations deal with discriminatory practices within their religious institutions. The discriminatory practices included in this discussion are: (1) gender and (2) sexual orientation. The findings are grouped based on the nature of the discriminatory practice and the category under which the religious denominations have been placed in the 'Categories' section in this chapter. This will enable an analysis of the trends of the discriminatory practices to be identified.

Table 12: This table illustrates the rights and powers that male and female religious leaders have and, where applicable, the differences between them, in the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal'.

Religion/Religious Denomination	**Gender**
Organised formal	
CHRISTIANITY	
Catholicism	Males: Priests must be
	Females: Priests cannot be

	*Area of debate within the Church
Anglican	• Males and females have equal rights and powers
Methodist	• Males and females have equal rights and powers
Greek Orthodox	Males: Priests must be
	Females: Priests cannot be
Rhema	• Males and females have equal rights and powers
ZCC	Males: Can preach in the evenings Attend to malpractices committed by males
	Females: Cannot preach in the evenings Attend to malpractices committed by females Primary duty is to teach younger females of community
<u>JUDAISM</u>	
Orthodox	Males: Rabbis must be
	Females: Cannot take care of formal rituals within community Takes care of prenatal counselling for women and preparing brides for marriage Responsible for running community projects and doing fundraising
<u>ISLAM</u>	
Sunni	Males: Can officiate services Can head Mosque committees
	Females: Cannot officiate services Head several Islamic organisations Cannot head Mosque committees In scholarship, have an equal opportunity to males Open Mosque in Cape Town affords males and females an equal opportunity
Semi-organised semi-formal	
<u>JUDAISM</u>	
Reform	• Males and females have equal rights and powers
Unorganised informal	
<u>BUDDHISM</u>	
Tibetan	• Males and females have equal rights and powers.
<u>HINDUISM</u>	
Shaivism	• Unclear from interview
<u>TRADITIONAL AFRICAN RELIGION</u>	

Traditional African Healing	Males: Generally lead ceremonies and meet with more members Individually
	Females: Generally do not lead ceremonies and do not meet with more members individually Often subject to patriarchy

Table 13: This table illustrates the rights and powers that heterosexual and homosexual religious leaders have and where applicable, the differences between them, in the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal'.

Religion/Religious Denomination	**Sexual orientation**
Organised formal	
CHRISTIANITY	
Catholicism	Heterosexual: Priests can be
	Homosexual: Priests can be but cannot be in a relationship with a same-sex partner and cannot ordain a homosexual marriage
Anglican	Heterosexual: Religious leader can be
	Homosexual: Religious leader can be but cannot enter into civil union with a same-sex partner *Recent discussions in the Church about the Church's position on homosexuality
Methodist	Heterosexual: Ministers can be.
	Homosexual: Ministers can be but cannot officiate marriages between same-sex partners *Recent discussions in the Church about the Church's position on homosexuality
Greek Orthodox	• Unclear from interview
Rhema	• Interviewee chose to reserve comment
ZCC	Heterosexual: Pastors must be.
	Homosexual: Pastors are not allowed to be.
JUDAISM	
Orthodox	Heterosexual: Rabbis must be.
	Homosexual: Rabbis are not allowed to be.
ISLAM	
Sunni	Heterosexual: Imams must be.
	Homosexual: Imams cannot be. Open mosque in Cape Town which allows for religious leaders to be.
Semi-organised semi-formal	
JUDAISM	

Reform	• Heterosexuals and homosexuals have equal rights and powers. Rabbis can ordain marriages between people of the same sex
Unorganised informal	
BUDDHISM	
Tibetan	• Heterosexuals and homosexuals have equal rights and powers. Monks cannot be in a relationship with another person, as physical attachment is prohibited for them.
HINDUISM	
Shaivism	• Heterosexuals and homosexuals have equal rights and powers
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Heterosexuals and homosexuals have equal rights and powers

Analysis: Discriminatory practices

A few trends can be observed when analysing the treatment of gender and sexual orientation in respect of religious leaders within religious denominations. It is apparent that the stance which each religious denomination adopts in relation to gender and sexual orientation is based on the doctrine underpinning the religious denomination.

With regards to gender, five of the twelve religious denominations, namely the Anglican, Methodist and Rhema Churches, Tibetan Buddhism and Reform Judaism, all afford male and female religious leaders the same powers and privileges. Within two of the religious denominations being Orthodox Judaism and Islam (Sunni), only males can officiate formal services. Females, however, have opportunities to take on other roles in these religious institutions which include, inter alia, running community projects, doing fundraising, and heading various organisations that form part of the religious institution. Within four of the religious denominations, being the Catholic Church, Greek Orthodox, the ZCC and Traditional African Religion (Traditional African Healing), only males can officiate formal services. Unlike Orthodox Judaism and Islam (Sunni), there was no indication from the interviewees within these religious denominations as to the opportunities that females are afforded within their religious institutions. However, the interviewee from the Catholic Church indicated that the status quo regarding females being unable to officiate church services is an area of debate and currently under consideration within the Church. The position that Hinduism (Shaivism) adopts in respect of gender was unclear from the interview.

With regards to sexual orientation, four of the twelve religious denominations, namely the ZCC, Reform Judaism, Hinduism (Shaivism) and Traditional African Religion (Traditional African Healing), treat heterosexual and homosexual religious leaders equally. Three of the twelve religious denominations, being the Catholic and Anglican Churches and Tibetan Buddhism, allow for religious leaders to be homosexual but not to have a relationship with a homosexual. The Methodist and Catholic Churches allow religious leaders to be homosexual but they cannot ordain marriages between people of the same sex. Orthodox Judaism and Islam (Sunni) do not allow homosexuals to be religious leaders. The Rhema Church reserved comment in this regard. It was unclear from the interview the position that the Greek Orthodox Church adopts in respect of sexual orientation of religious leaders.

Further to the above, it is worth noting that some religious denominations, such as the Catholic and Methodist Churches, acknowledge that their stance in respect of gender and sexual orientation is open to debate. The Catholic Church is currently discussing whether females should be allowed to officiate church services and the Methodist Church is reviewing its current stance relating to homosexuality.

It is also worth noting that religious denominations within the same religion vary in their approaches to gender and sexual orientation. By way of example, Christianity, the Catholic and the ZCC Churches do not have female religious leaders, but the Anglican, Methodist and Rhema Churches do. Within Judaism, Orthodox Judaism does not allow female and homosexual Rabbis, but Reform Judaism does. Within Islam, the Sunni sect does not allow female and homosexual Imams but there is an open mosque in Cape Town which allows for same.

(d) Harmful acts

This section illustrates the ways in which the religious denominations included in this study deal with harmful acts. The rationale behind the inclusion of this section is to respond to the reported incidents in the media of harmful acts committed by religious leaders, which include, inter alia, spraying Doom on congregants and feeding congregants snakes. Some of the responses elicited were broad in nature and others were specific, in that interviewees referred to particular harmful acts, including, inter alia, (1) religious leaders encouraging underage drinking, (2) spraying pesticides into the faces of congregants, and (3) administering other harmful medicines on them. The findings are presented based on the general and/or specific ways in which the religious denominations, grouped under the three general categories, respond to harmful acts. This will assist in drawing similarities and differences between the religious denominations in respect of harmful acts.

Table 14: This table illustrates the ways in which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' deal with harmful acts committed by a religious leader.

Religion/Religious Denomination	**Harmful acts**
Organised formal	
CHRISTIANITY	
Catholicism	• **Investigated** by **Vicar General**[362] and if found to have **merit**, alleged perpetrator would be **removed** from his/her position
Anglican	• **Same investigative process** that is **followed with criminal-related malpractices** o Bishop appoints an **investigative team** to establish the circumstances surrounding the alleged malpractice, to ascertain whether a case exists and what actions need to be implemented and the way forward
Methodist	• **Internal disciplinary process**
Greek Orthodox	• **Alleged perpetrator** will be **summoned to superior** and ordered to **refrain** from **committing harmful acts** • If harmful acts run counter to tenets of church, further unspecified steps may be taken against alleged perpetrator
Rhema	• **Alleged perpetrator** will be **reported** by the church **to** the **police** • An **internal investigation process** will be conducted and if the outcome illustrates that alleged perpetrator is guilty, a **dismissal** will ensue
ZCC	• **Unclear** from interview
JUDAISM	
Orthodox	• **Unlikely** to occur • **Dependent** on **nature of malpractice** • Rabbi encouraging community members to **overindulge in alcohol** o **Reprimanded** • Rabbi **offering alcohol to children** o Subject to **disciplinary proceedings**
ISLAM	

[362] Interview (Catholic) op cit note 345.

Sunni	• If **alleged perpetrator** is a **member** of the **Mosque** but not of the Council of Muslim Theologians,[363] the **Council** will **issue** a **public statement** and **broadcast** about and against the harmful act **on** the **local Muslim radio stations** • If **alleged perpetrator** is a **member** of the **Council of Muslim Theologians**, brought before **disciplinary committee** and disciplined accordingly
Semi-organised semi-formal	
JUDAISM	
Reform	• **Dependent** on **nature of malpractice** o **Underage drinking** – **enquiry** and **disciplinary process** o **Spraying** of **pesticides in faces** of congregants (**unlikely** to occur) – **enquiry** and **disciplinary process**
Unorganised informal	
BUDDHISM	
Tibetan	• **Dependent** on **nature of malpractice** and **whether** there was **intent** behind committing it o **Offering alcohol to anybody** is considered **offensive** and will result in **punishment** o **Drinking petrol** is considered **beneficial**, as it **assists with motion sickness**
HINDUISM	
Shaivism	• **Utilise conventional legal processes**
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Typically involves the **abuse** of the **administration of herbal medicines** by Traditional African Healers o If member reports that Healer engaged in sexual acts with him/her, and Healer gains knowledge of the whistle blower, can administer medicines in harmful ways intentionally • **Utilise conventional legal processes** to combat above maladministration of herbal medicines

Analysis: Harmful acts

There are trends that can be identified from the way in which religious denominations respond to harmful acts. They are as follows: (1) internal investigation (2) disciplinary process (3) conventional legal processes and (4) variable dependent on nature of malpractice. The Catholic, Anglican and Rhema Churches all use internal investigation processes, the nature of which all vary based on the religious denomination in question. The Methodist Church and Islam (Sunni) utilise a disciplinary process, the nature of which also varies based on the religious

[363] Interview (Islam) op cit note 342.

denomination. It is worth noting that Islam (Sunni) only makes use of this process if the alleged perpetrator is a member of the Council of Muslim Theologians. If the member is not, but only a member of the Mosque in question, then the publication of the harmful act will ensue to the community. The Greek Orthodox Church also makes use of a disciplinary process in that the alleged perpetrator would be summoned to the superior and be subject to disciplinary measures. Hinduism (Shaivism) and Traditional African Religion (Traditional African Healing) would both primarily make use of conventional legal processes to address the harmful acts. Tibetan Buddhism, Reform and Orthodox Judaism all determine their approach to the harmful act based on its nature. In addition, Tibetan Buddhism indicated that the consideration of intention is a primary factor in determining the approach to the harmful act. It was unclear from the ZCC interviewee the approach that would be adopted if confronted with a harmful act.

(e) Financial-related malpractices

This section seeks to highlight the methods that religious denominations use to respond to financial-related malpractices prevalent within religious institutions. The specific malpractices under consideration are (1) tithing and (2) tax evasion. In broad terms, tithing is the practice of contributing a percentage of monthly income to the religious institution to which a person belongs. Tax evasion involves religious leaders not fulfilling their tax obligations. Similar to the other categories, the findings relating to tithing and tax-related malpractices are grouped according to the categories under which the religious denominations have been placed in the 'Categories' section of this chapter.

Table 15: This table illustrates the ways in which the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' deal with the practice of tithing and non-compliance with tax obligations committed by a religious leader.

Religion/Religious Denomination	**Tithing and Tax Obligations**
Organised formal	
CHRISTIANITY	
Catholicism	Tithing: **Prohibited** **Disciplined** and given **warning first time**, **removed** from position **second time** **Encouraged** to **donate** but **no set amount**
	Tax Obligations: **Below tax threshold**
Anglican	Tithing: **Prohibited** Same **internal investigative process** used as for other

	malpractices (specified in previous sections)
	Tax Obligations: **Utilise conventional legal processes** and **internal investigative processes** – if South African Revenue Services (SARS) found that religious leader was guilty, church would respond by conducting internal investigative processes **Suspended** – depending on **degree of non-compliance** with tax obligations
Methodist	Tithing: **Prohibited** **Inquiry** and **disciplinary process (if necessary)**
	Tax Obligations: **Utilise conventional legal processes** **Church** to **encourage** religious leaders **to be tax compliant**
Greek Orthodox	Tithing: **Not supported** **Investigation** and **depending on outcome**, Archbishop could order **removal** of alleged perpetrator
	Tax Obligations: Income **generally below tax threshold** **Utilise conventional legal processes** and **removal** from position
Rhema	Tithing: **Practised to some extent** – **no set amount** but members encouraged to **contribute whatever** amount they **feel comfortable contributing** If Pastor **encouraging** member to **contribute fixed amount** of income, **dismissal**
	Tax Obligations: **Church administers tax obligations for employees** **Employees** to **submit tax returns** to SARS **Church educates employees** about tax obligations
ZCC	Tithing: **Not supported** – member earnings must be used to support themselves and their families Pastor **disqualified**
	Tax Obligations: **Utilise conventional legal processes**
<u>JUDAISM</u>	
Orthodox	Tithing: **Supported** – **10%** of **member earnings** but **not more** than **20%** If Rabbi encouraging members to **exceed 20% limit**, would be called in front of **Beth Din South Africa**[364] and asked to answer for such conduct
	Tax Obligations: **Utilise conventional legal processes** Held **in contempt of community**
<u>ISLAM</u>	
Sunni	Tithing: **Not supported** Subject to **disciplinary hearing** Members **encouraged to donate to charity** to assist the poor
	Tax Obligations: **Meeting** held at least once or twice a year by Council of Muslim Theologians[365] with various heads of Mosques to **impress on them need to be tax compliant** If **member outside Council** is not compliant,

[364] Interview (Orthodox Judaism) op cit note 341.
[365] Interview (Islam) op cit note 342.

	Mosque will **assist** If **member within Council** is not compliant, **disciplinary hearing**
Semi-organised semi-formal	
JUDAISM	
Reform	Tithing: **Not** a **practice** but Synagogue **asks for donations for events** they host but **entirely voluntary process**
	Tax Obligations: **Unclear** from interview
Unorganised informal	
BUDDHISM	
Tibetan	Tithing: **Supported** – practice of generosity according to ability to contribute is encouraged **Prohibited** if member **donates** for a **specific purpose** and the funds get **used for another purpose**
	Tax Obligations: **Dismissal** **Monastery**[366] to **encourage paying tax** **Contrary to core beliefs** – not paying tax is form of stealing which is considered negative energy and karma will chase after alleged perpetrator
HINDUISM	
Shaivism	Tithing: **Prohibited** **Utilise conventional legal processes** and **core beliefs**
	Tax Obligations: **Prohibited** **Utilise conventional legal processes** and **core beliefs**
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	Tithing: **Unclear** from interview
	Tax Obligations: **Below tax threshold**

Analysis: Financial-related malpractices

There are trends that can be observed between the religious denominations in respect of tithing and non-compliance with tax obligations.

With regard to tithing, three trends are evident, namely: (1) encouraged (2) encouraged to contribute to the religious institution but no set amount and (3) not practised. Within Orthodox Judaism, tithing is a practice, but it is limited to 10%. If it is established that a Rabbi requests more than 20% of earnings, he will be subject to disciplinary measures by the Beth Din in South Africa. Four of the religious denominations, being the Catholic and Rhema Churches, Reform Judaism and Tibetan Buddhism, all encourage their members to donate, but do not

[366] Interview (Tibetan Buddhism) op cit note 350.

specify an amount. Should a religious leader request a set amount, various penalties will ensue, which are specific to each religious denomination and range from disciplinary hearings to dismissal. Islam (Sunni) encourages members to donate to charitable organisations but prohibits donations to Mosques for, inter alia, its running costs. Five of the religious denominations, being the Anglican, Methodist, Greek Orthodox and the ZCC Churches and Hinduism (Shaivism), do not support the practice of tithing and will impose various penalties if committed, ranging from conducting investigative and disciplinary processes to being removed as a religious leader. It was unclear from the interview as to whether Traditional African Religion (Traditional African Healing) advocates for tithing and, if not, the associated penalties.

With regard to non-compliance with tax obligations, the following trends can be noted which primarily relate to the penalties that religious denominations invoke for non-compliance: (1) income below threshold (2) utilising conventional legal processes and internal processes (3) only utilising conventional legal processes and (4) only utilising internal processes. The interviewees from both the Catholic Church and Traditional African Healing indicated that the income earned by their religious leaders falls below the tax threshold hence, tax obligations are not a consideration. The interviewee from the Greek Orthodox Church indicated that generally, the income of religious leaders falls below the tax threshold, but in cases where it does not, conventional legal processes and being removed as a religious leader, if found guilty, will ensue. The Anglican and Methodist Churches and Orthodox Judaism use both legal and internal processes to respond to non-compliance. These internal processes range from being held in contempt of the community to suspension. The ZCC Church and Hinduism (Shaivism) will primarily use legal processes. Tibetan Buddhism, the Rhema Church, and Islam (Sunni) will use primarily use internal processes. The Rhema Church administers the tax affairs of its employees and educates them on their tax obligations. Within Tibetan Buddhism, the Monastery encourages religious leaders to pay their tax. Within Islam (Sunni), annual/bi-annual meetings are held by the Council of Muslim Theologians to educate its employees about compliance with tax obligations. Failure to do so will result in various internal remedies being enforced, which is dependent on the role of the person who commits the malpractice.

(f) Opinion-based responses

In an attempt to gain a holistic perspective from the interviewees, the interview questions were structured in a way to elicit both factual and opinion-based responses. The factual-based questions were intended to elicit a response regarding the informal regulations that have been implemented by the religious denominations to respond to the various malpractices. The opinion-based questions were intended to gain an opinion from the interviewees who are considered knowledgeable in the field on the informal regulations relating to the religious denomination of which they are a part.

To this end, this section seeks, at the outset, to tabulate the opinions that the interviewees conveyed in relation to the **effectiveness of** their **informal regulatory structures and any identified weaknesses** in them. It, thereafter, seeks to tabulate the extent to which the interviewees maintain that **involvement from external bodies, such as the police and courts,** within religious malpractices is considered acceptable to them. These areas of discussion are thought to be assistive in extrapolating the benefits and shortcomings of the current and proposed regulatory frameworks and, in turn, viewing the current regulatory framework in light of constitutional, practical, and legal considerations.

Table 16: This table illustrates the viewpoints that the interviewees for the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' have regarding their informal regulation processes. It also highlights any weaknesses that the interviewees identify in respect of their informal regulation processes.

Religion/Religious Denomination	**Opinion on informal regulation**
Organised formal	
CHRISTIANITY	
Catholicism	Informal regulation as a whole: • Improved drastically over the past three to four decades o Previously, the Church would handle all malpractices internally and, if a priest was found guilty, he would be deported without being held accountable for committing the malpractice • Foster a level of accountability and objectivity • Constantly under review to ensure that regulations align with constitutional objectives
	Areas of weakness: • 'Conflict' between religious doctrine and being held accountable for committing malpractice o Priest admits in the confessional box that he has been sexually molesting young girls who belong to the parish. Priest hearing confession cannot report because confession is sacrosanct. Priest hearing confession can counsel, say that he is forgiven in the name of Jesus Christ and must go and make reparations for his sins.

	Priest cannot, however, subject him to internal or external disciplinary processes, which the law requires.
Anglican	Informal regulation as a whole: • Ensure compliance by its followers in most cases • Church continually extending informal regulation to align with correct and ethical practice
	Areas of weakness: • Malpractices sometimes not handled definitively, and a clear and conclusive outcome not reached • More challenging to hold individuals to account for their misconduct if they hold a position of seniority within the hierarchy of the Church
Methodist	Informal regulation as a whole: • Enable fair treatment and ensure that perpetrators face the consequences of their actions

	Areas of weakness:
	• Too 'legal' and discipline-orientated and not sufficient restorative elements in the regulatory process
	    o Treating people with a level of grace and understanding forms part of the religious doctrine of the Church
	    o Misconduct can be traced back to an element of brokenness within a person

Greek Orthodox	Informal regulation as a whole: • Synergistic non-conflicting relationship between informal regulations and procedures of the South African legal system
	Areas of weakness: • None identified
Rhema	Informal regulation as a whole: • Objective, thorough and ensure that malpractices have consequences that hold perpetrators to account
	Areas of weakness: • Members are not informed about the regulatory processes on a regular basis • Regulatory processes are not always documented, which can be problematic for members to refer to them at a later stage
ZCC	Informal regulation as a whole: • Successful in rectifying malpractices
	Areas of weakness: • No areas of weakness identified
<u>JUDAISM</u>	

Orthodox	Informal regulation as a whole:
	• Transformed drastically over the years into a robust but not perfect system
	    o Beth Din South Africa[367] consults with sound professionals
	    o Representative of transparency, fairness, and constitutionality

	Areas of weakness:

[367] Interview (Orthodox Judaism) op cit note 341.

	• Regulatory structure is, to a large extent, dependent on the extent to which the members of the community respect the Beth Din ○ Problematic in that the only penalties the Beth Din is permitted to enforce relate to being ex-communicated but not to enforce a prison sentence for example
ISLAM	
Sunni	Informal regulation as a whole: • Consistent with laws of the land because often drafted with the assistance of attorneys
	Areas of weakness: • Lack of clearly articulated policy as to how malpractices will be handled and what the consequences will be • Lack of being accountable for malpractices which would be rectified by focusing on implementing and enforcing the consequences which attach to the malpractices • Lack of governance frameworks in the regulatory structures present in the community
Semi-organised semi-formal	
JUDAISM	
Reform	Informal regulation as a whole: • Reserved comment
	Areas of weakness: • Regulations are not written and proscribed, but rather decided on a case-by-case basis • No document which deals with conduct of employees, other than Rabbis, and the consequences of breaching such conduct
Unorganised informal	
BUDDHISM	
Tibetan	Informal regulation as a whole: • Good underlying philosophy
	Areas of weakness: • Lack of enforcement ○ Regulations can easily be defied
HINDUISM	
Shaivism	Informal regulation as a whole: • Utilising core beliefs of the faith, to the extent it does, assists in preventing malpractices
	Areas of weakness: • Educating all members with a holistic understanding of the core beliefs of the faith and conventional legal processes used to combat malpractices
TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	Informal regulation as a whole: • Reserved comment
	Areas of weakness:

	• Not considered a formal and organised religion aside from its members and communities which are knowledgeable about it • No mechanisms to protect members from Traditional African Healers performing acts of witchcraft and black magic on them • Fear among members to report healers committing acts of malpractice, which could result in healers administering medicines on the whistle-blower in harmful ways and performing acts of witchcraft and black magic on them

Analysis: Opinion on informal regulation

Within the 'organised formal' regulation, there are both similarities and differences in the interviewees' opinions on their regulation. The ZCC Church maintains that its regulation is successful. Both Orthodox Judaism and the Catholic Church highlight the positive transformation in respect of their regulation over the years. Both the Greek Orthodox Church and Islam (Sunni) speak of a synergy between their internal regulation and the laws of South Africa. Representatives of Orthodox Judaism, the Methodist and Rhema Churches hold the view that their regulation has an objective element and is fair in outlook. In addition, the Methodist and Rhema Churches emphasise that their regulation ensures that consequences attach to bad conduct. The Anglican Church maintains that although its regulation is a work in progress, it, nonetheless, ensures compliance most of the time.

With respect to the weaknesses in regulations among the 'organised formal' religious denominations, no trends can be identified. The ZCC Church maintains that there are no areas of weakness. Orthodox Judaism says that its internal regulatory body is limited in the penalties it can enforce. The Anglican Church is of the opinion that the regulatory process does not always elicit a definitive outcome, nor ensure that more senior members are held to account. The Methodist Church says that the regulations are often too legal and discipline-oriented, which results in losing sight of the tenets of the faith. The Rhema Church is of the opinion that the regulatory processes are not sufficiently reinforced to members, and the processes not documented. Islam (Sunni) says that there is a lack of clearly articulated policy on malpractices and the consequences of them, and a lack of governance frameworks. The Catholic Church maintains that sometimes a conflict exists between the culture of forgiveness which religious doctrine proscribes and being held accountable for one's bad conduct, as the law proscribes.

Within the 'semi-organised semiformal' and 'unorganised informal' religious denominations, there are also no trends. Reform Judaism identifies the lack of documentation and non-standardised regulations as a weakness. Tibetan Buddhism says that there is a lack of compliance of internal rules. Hindu (Shaivism) maintains that utilising the beliefs of the faith as part of the regulations is useful, but the challenge remains ensuring that members fully understand such beliefs. Traditional African Religion (Traditional African Healing) identifies the fact that it is not widely recognised as a formal and organised religion as a challenge. In addition, the lack of mechanisms in the law to protect members and the fear of members to report malpractices are other identified areas of weakness.

Table 17: This table illustrates the viewpoints that the interviewees for the religious denominations grouped under the categories 'organised formal', 'semi-organised semiformal' and 'unorganised informal' have regarding the nature and extent of police and court intervention in matters concerning religious malpractices.

Religion/Religious Denomination	**Opinion on police and court intervention**
Organised formal	
CHRISTIANITY	
Catholicism	• Intervention is welcomed and necessary
Anglican	• Intervene – criminal malpractices and where the law proscribes that intervention is necessary • Not intervene – religious doctrine and core beliefs of the Church
Methodist	• Intervention necessary to an extent to ensure that religious denominations apply and enforce the laws of the land – it keeps the church balanced and honest
Greek Orthodox	• Intervene – to ensure that criminality is kept under control
Rhema	• Intervene – criminal malpractices • Not intervene – religious doctrine
ZCC	• Intervene – serious malpractices such as rape, assault, and murder • Not intervene – less serious malpractices such as theft • Internal intervention to regulate malpractices is more beneficial than external regulation
JUDAISM	
Orthodox	• Intervene – malpractices that cause danger to a person should be reported to the police • Police intervention not recommended because they are not qualified to understand the subtleties of the different religious denominations • Legal intervention from attorneys recommended but not always from courts
ISLAM	
Sunni	• Intervene – criminal matters
Semi-organised semi-formal	

JUDAISM	
Reform	• Police intervention not recommended because it is sometimes more harmful than assistive • Intervention from attorneys recommended because they have a knowledge of the law and advocate for legal processes to be followed
Unorganised informal	
BUDDHISM	
Tibetan	• Intervene – more serious malpractices such as killing • Police are skilled at conducting investigations and courts know how to determine whether a malpractice has in fact occurred, as opposed to the Monasteries who lack these skills
HINDUISM	

Shaivism	• Police and court intervention is recommended, provided that the members who form part of these bodies understand their roles and execute them properly
	• Police and court often do not prosecute without fear or favour
	  o Policeman who is Christian could display a degree of leniency to a Christian who has been reported for committing a malpractice
	  o A Judge who belongs to a religious denomination could display leniency to a person being prosecuted who belongs to the same religious denomination

TRADITIONAL AFRICAN RELIGION	
Traditional African Healing	• Police intervention – criminal malpractices • Court intervention – courts are not interested in entertaining matters relating to Traditional African Healing and ensuring that they can be subject to legal protection like other religious denominations

Analysis: Opinion on police and court intervention

Definitive trends are identified across religious denominations when considering the opinions of the interviewees on the degree and extent of police and court intervention that is acceptable in cases concerning religious malpractice. Five of the twelve religious denominations, being the Anglican, Rhema, Greek Orthodox Churches, Islam (Sunni), and Traditional African Religion (Traditional African Healing), maintain that intervention is welcomed to deal with criminal-related malpractices. Orthodox and Reform Judaism advocate for intervention by legal practitioners but are not confident in the capability of the police to deal adequately with such malpractices. The ZCC Church and Tibetan Buddhism are of the view that intervention is necessary for more serious criminal malpractices such as, inter alia, murder and rape. The interviewees from the Methodist and Catholic Churches are strongly in favour of police and court intervention. Hinduism (Shaivism) believe that intervention is necessary, provided that the members who serve, in the police and at the courts, understand their roles and make decisions impartially and objectively.

(g) Conclusion

Underpinning the regulatory framework are two broad models of regulation: state regulation and self-regulation. State regulation comprises a few theories which all advocate for the centralisation of sectors. Cumulatively, these theories suggest that state intervention ensures optimum production and efficiency levels, and it is cost effective. State regulation culminates in various interest groups in a sector lobbying for government to implement legislation that will benefit them and, in a democratic system like South Africa, the existence of state regulation is to a large extent dependent on the number of members within a sector and consensus among them. However, state regulation has been criticised for being a costly and administratively-intensive process, and for amounting to a list of conditions that yield regulation but lack coherence and remain untested.

Conversely, self-regulation advocates for a decentralisation of sectors. The rationale behind this model is that it is cost and administratively effective and enables the members within a sector, who are the most knowledgeable about their sector, to develop regulations to which they will adhere. There are varying levels within this model, where some sectors incorporate partial centralisation for general areas within a sector, depending on the risk levels associated with the sector. The drawbacks with this model primarily relate to lack of accountability and enforceability.

When assessing the South African regulatory framework (considering the two regulatory models), it is evident that it is a self-regulatory model which gives rise to partial centralisation. In terms of formal regulations, there is a series of legislation that applies to the religious sector, much of which is not explicit in its application. Arguably, this creates loopholes in legislation and the opportunity for members of religious denominations to bypass adherence to such laws under the guise of being uncertain as to whether such laws apply to them. There is also no stand-alone piece of legislation that regulates the religious sector. Case law is primarily aimed at carving out when state intervention within the religious sector is acceptable and not acceptable, but there is a strong emphasis on compliance with internal regulation before approaching the court, which supports the finding of a self-regulatory model with partial state intervention.

The informal regulations confirm the hybridity, ad hoc, and incoherent nature of the regulatory framework. While trends can be identified among religious denominations, it is evident that there is no one-size-fits-all approach in respect of their approaches to the handling of malpractices. Many religious denominations that were interviewed are regarded as 'organised formal', as they have a structured set of internal regulations and penalties to address malpractices. However, there are some religious denominations which are identified as 'semi-organised semi-formal' (internal regulations but no multi-level hierarchy of bodies to deal with malpractices) and 'unorganised informal' (no internal structures to deal with malpractices).

The different approaches of religious denominations to criminal malpractices, discriminatory practices, harmful acts, and other financial-related malpractices such as tithing and tax obligations, with the incorporation of State intervention in different ways and to different extents, confirm that the regulatory framework is hybrid, ad hoc and self-regulatory in nature, with partial elements of state intervention.

It is also apparent that the interviewees identified both strengths and weaknesses in their internal regulatory structures. While the strengths to some extent fulfil the objectives of a regulatory framework, the extensive list of weaknesses highlight the academic criticisms associated with a decentralised self-regulatory model: lack of accountability and lack of enforcement. Broadly, the strengths include a synergy between regulations and the laws of the land, a positive transformation in regulations over the years, and the objectivity, fairness and success associated with the application of such regulations. Weaknesses include: limited enforcement of penalties, not always eliciting a definitive outcome, not holding senior employees in institutions to account, too legal and discipline orientated, not sufficiently reinforced to members of religious institutions, regulatory processes not being documented and standardised, lack of clearly articulated policy on malpractices and consequences of them, lack of governance frameworks, conflict between tenets of faith and accountability of wrongdoings, lack of compliance with regulations, fear of reporting malpractices, and lack of mechanisms to protect members from harm.

When considering the opinions on police and court intervention from the interviewees holistically, it is evident that religious denominations advocate for state intervention in respect of criminal matters in various circumstances and to varying extents. Some religious denominations believe that intervention is necessary for all criminal malpractices, while others deem it to be necessary only for the more serious criminal malpractices. Some religious denominations would involve the police and courts, whereas others are distrustful of the integrity of the police and, therefore, would only utilise aspects of the legal system. Arguably, the varying opinions in this regard highlight the autonomy that religious denominations have in determining their own regulatory processes, and the ad hoc, hybrid nature of regulations. It also illustrates that, on the whole, religious denominations are more willing for state intervention in criminal rather than civil and constitutional matters, but to varying extents and in different circumstances.

Chapter 5

PROPOSED AMENDMENTS TO THE REGULATORY FRAMEWORK

The prevalence of malpractices within the religious sector, and the absence of a coherent framework to combat same, prompted the CRL to formulate a model in an attempt to regulate the religious sector. This chapter describes the role, powers, functions, and rationale for the regulatory framework proposed by the CRL. It then details the investigative processes of the CRL, its findings and recommendations. In doing so, it explains the evolution of the model: the preliminary model, its critiques, and the revised model. Finally, it describes the responses of various interest groups to the model, as well as their attitudes to and relationship with the CRL. These assist in establishing the level of importance of the CRL within the religious sector, and the nature and extent to which the interest groups want the state to intervene.

Role, powers, functions and rationale behind the CRL model

(1) Powers and functions of the CRL

The CRL is a chapter 9 institution, established to safeguard South Africa's democracy. Its powers and functions are set out in s 185 of the Constitution and in the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 (CRL Act). Its primary objectives in s 185(1) are:

> ' (a) to promote respect for the rights of cultural, religious and linguistic communities;
> (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
> (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.'[368]

The CRL also:

> 'has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on

[368] Supra note 63 at s185 (1) (a-c).

issues concerning the rights of cultural, religious and linguistic communities, [and] may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.'[369]

In addition to its broad investigative and advisory powers set out in the Constitution, the CRL Act lists several other educational, facilitative, mediatory, and intermediary functions, which include:

'(b) conduct programmes to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
(c) assist in the development of strategies that facilitate the full and active participation of cultural, religious and linguistic communities in nation-building in South Africa;
(d) promote awareness among the youth of South Africa of the diversity of cultural, religious and linguistic communities and their rights;
(g) facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state where the cultural, religious or linguistic rights of a community are affected;
(i) make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities;
(j) establish and maintain databases of cultural, religious and linguistic community organisations and institutions and experts on these communities; and
(k) bring any relevant matter to the attention of the appropriate authority or organ of state, and, where appropriate, make recommendations to such authority or organ of state in dealing with such a matter.'[370]

(2) Rationale behind the investigation

According to the CRL commissioner who was interviewed for this study, it was evident that the religious sector was operative within 'a very messy environment'.[371] It was characterised, inter alia, by 'pastors who were feeding their people grass and all those sorts of things, and we had a lot of sangomas that were ripping people off when it came to money and all those sort of things'.[372] It was also apparent that religious leaders 'were utilising scripture to create a

[369] Ibid s185(2)&(3).
[370] The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002, s 5(1)(b-d)(g) & (i-k).
[371] Interview (CRL Commissioner).
[372] Ibid.

doctrinal emphasis that brings the religious sector into disrepute'.[373] For example, if a religious leader claims to be practising under the tenants of Christianity, but at every religious gathering, feeds all his congregants grass or snakes, makes them get undressed in the church or beats them up, he is 'bringing the dignity of Christianity into disrepute which undermines that part of civil society'.[374]

In response, the CRL undertook an investigation into the commercialisation of religion.[375] Through this investigation, the CRL sought to understand the current religious and legal frameworks that regulate the religious sector and their ability to tackle prevailing challenges.[376] It also aimed to make recommendations on how to deal with the issue.[377]

(3) Investigative process

In administering the investigation, the CRL conducted face-to-face interviews with religious leaders (who were randomly sampled) from religious institutions within South Africa.[378] At the end of the interviews, the CRL drafted a preliminary report of its findings and recommendations which it submitted to the National Assembly and published on its website for public viewing and commentary.[379]

(4) Findings from investigation

The CRL found prima facie evidence of commercialisation of religion (a substantive problem) and a failure on the part of religious institutions to address it.[380] Evidence includes, amongst others, payment for prayers, blessings and access to traditional healers and the selling of religious symbols to congregants at a raised mark-up price.[381] It was also found that the registration and licensing of religious institutions is problematic. Some religious institutions operate without being registered and licensed, and the institutions which are do not comply with the annual registration requirements.[382] It was also evident that some religious leaders encouraged their followers to perform acts and engage in practices that do not comply with the precepts of the faith which the religious leaders claim to follow. An absence of oversight structures in the institutions, such as Church Councils, Disciplinary Committees and Peer

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[373] Ibid.
[374] Ibid.
[375] CRL Rights Commission op cit note 6 at 3 & 7.
[376] Ibid 3-4.
[377] Ibid 4.
[378] Ibid 11-12.
[379] Ibid 9.
[380] Ibid 25.
[381] Ibid.
[382] Ibid.

Review Committees, is also prevalent and there are multiple loopholes in legislation, as well as minimal enforcement of such legislation, which collectively creates opportunities for malpractice.[383]

(5) Recommendations based on investigation

The CRL made a number of recommendations to address the enlisted issues. It suggested the development of internal regulatory mechanisms in religious communities to serve as oversight structures and accountability measures to ensure that religious practices do not tamper with constitutional and legal rights, while preventing state interference in religious matters.[384] As the CRL commissioner said:

> 'But because you need the separation between church and State, because you need strong civil society as well as State, you need the balance within society, because if you have too strong a State, then it doesn't work, if you have too strong a civil society, it doesn't work, you need that balance. So we thought how do we assist the religious fraternity to regulate itself, to monitor itself and to ensure that it gets rid of these bad apples? And we thought how do we best maintain the strong civil society and the State without the one impeding on the other?'[385]

It also recommended the revision of existing legislation which deals with religious institutions, and increased enforcement of such legislation.[386]

As a way of implementing the aforementioned recommendations, the CRL proposed a model for the regulation of the sector.[387] The commissioner of the CRL said:

> 'So we came up with a model that you see within the proposal that we put forward and the recommendations that we made. That's the model we came up with – it's a self-regulatory model. You see, we were looking at a model where we could assist the church in regulating itself without the State involvement.'[388]

[383] Ibid 26-28.
[384] Ibid 28.
[385] Interview (CRL Commissioner).
[386] CRL Rights Commission op cit note 6 at 28.
[387] Ibid 31-32.
[388] Interview (CRL Commissioner).

Preliminary proposed regulatory model

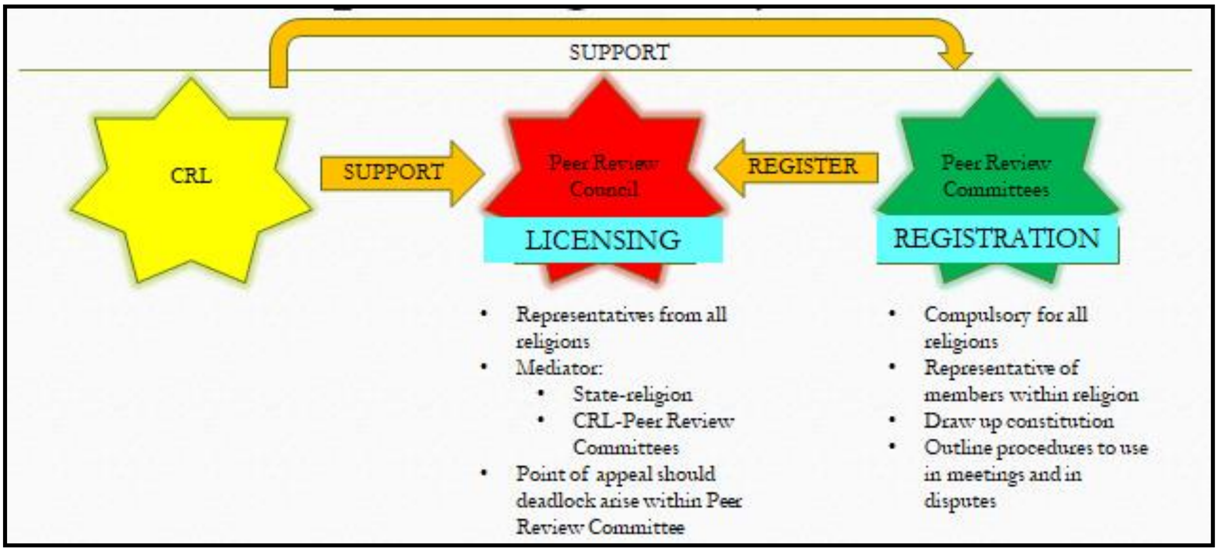

Diagram 1 (above): Preliminary proposed regulatory model by the CRL

Holistically, the model comprises a Peer Review Council, Peer Review Committees, and the CRL. Worship Centres,[389] religious leaders, and institutions are all regulated through the Peer Review Committees, the Peer Review Council, and the CRL.

Table 18: This table illustrates the various bodies and their proposed functions in the preliminary model formulated by the CRL, as illustrated in the above diagram.

Name of Body	Function of Body
Peer Review Committees	• Formed **within every religious denomination** and comprise **members from the religious denomination**[390] • **Register with Peer Review Council** which governs religion of which their religious denomination forms a part[391] • **Draw up** a **constitution** to encourage participation, transparency, and accountability among their members and which outlines procedures for meetings and disputes[392]
Peer Review Councils	• Consist of **representatives from all religious denominations within any given religion**[393] • Act as **mediator** in matters relating to the state and religion, the CRL and Peer Review Committees and as **board of appeal** for matters that cannot be resolved by Peer Review Committees[394]

[389] Worship Centres are used to refer to places of religious worship in the Act.
[390] CRL Rights Commission op cit note 6 at 35.
[391] Ibid.
[392] Ibid.
[393] Ibid 34-35.
[394] Ibid.

	• Responsible for **licensing Worship** Centres that form part of the religion[395]
CRL	• **Umbrella body**[396] • Provides **support to** the **Peer Review Councils and Committees** to ensure their optimum functioning and for the whole model to operate effectively[397]

The model also advocates for the regulation of Worship Centres, which would include registration and licensing.[398] It would entail them being registered with a Peer Review Committee, having their own constitution and all religious leaders within them being registered and licensed.[399] The Worship Centres should be used for religious purposes and should have a compliance certificate from Local Council confirming that all by-laws and ordinances were followed in their construction.[400] They should also have proof that they have sufficient funds for maintenance.[401]

Further to the above, the criteria and procedure for the accreditation and licensing of Worship Centres would be documented.[402] The criteria for accreditation of Worship Centres would be: (1) having a religious text of a defined origin, (2) a significant number of followers, and (3) a set of rules and practices that govern the lives of the followers and from which they benefit.[403] No rule or practice should have a harmful effect on the physical and mental wellbeing of its members or be exploitative in any way.[404] Licences should be issued only once a Peer Review Council is satisfied that the Worship Centres are fully compliant with the criteria of accreditation.[405]

In addition, religious leaders would have to be registered and licensed. The religious leader would need to prove that he/she belongs to a religious institution. The licence acts as 'a stick to enforce any disciplinary action'.[406] In the event of the religious leader acting contrary to the doctrine, practices and/or constitution of the religious denomination to which he/she belongs;

[395] Ibid 34.
[396] Ibid 37-38.
[397] Ibid.
[398] Ibid 36-37.
[399] Ibid 37.
[400] Ibid.
[401] Ibid.
[402] Ibid 33-34.
[403] Ibid.
[404] Ibid 34.
[405] Ibid.
[406] Interview (CRL Commissioner).

his/her license will be withdrawn, which means that he/she can no longer practise as a religious leader.[407]

(1) Functionality of preliminary proposed regulatory model

For example, if a minister from a Methodist Church in Randfontein was forcing the members of the congregation to drink brandy at every church service, and a member from the congregation reports the minister.

In terms of the preliminary proposed model by the CRL, the minister would have to present himself and his reasons for forcing the members of the congregation to drink brandy at every church service before the Peer Review Committee, which comprises members from the Methodist Church.

If the members on the Peer Review Committee reach a joint decision that the practice of forcing members of the congregation to drink brandy at every church service does not form part of the doctrine of Christianity and the constitution of the church, the license of the minister to practice as a minister in the Methodist Church will be withdrawn.

However, the minister can review the decision made by the Peer Review Committee, by approaching the Peer Review Council which, in this case, comprises members from all religious denominations within Christianity. They will decide as to whether the practice of forcing congregants to drink brandy at every church service aligns with Christian doctrine and practice.

If the minister is still dissatisfied, he can take the decision made by the Peer Review Council on review to the CRL Commission, who will also make a finding.

The minister would also have to comply with registration and licensing requirements.

(2) Critique of preliminary regulatory model

The publication of this model generated an outcry from many people and religious communities.[408] The general consensus was that the model was an attack on the religious freedoms in the Constitution, and that problems experienced in the religious sector ought to be resolved within it, and not by the CRL.[409] Critics have cited the registration of religious leaders

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[407] Ibid.
[408] CRL Rights Commission op cit note 17 at 27.
[409] Ibid 28; Thabile Mbhele 'CRL faces opposition from religious leaders' available at www.sabcnews.com, accessed on 7 June 2019.

and Worship Centres as invasive, unconstitutional, and unnecessary, and considered the definition of Worship Centres as prejudicial.[410] Alternate suggestions include the creation of an ombudsman to attend to the disciplining of incidents of malpractice, and to interdict mala fide religious leaders.[411]

In response to the public commentary, the CRL drafted a new model of regulation which eliminated the Peer Review Council, introduced a registered umbrella body, and widened the powers of the CRL.

Revised proposed regulatory model

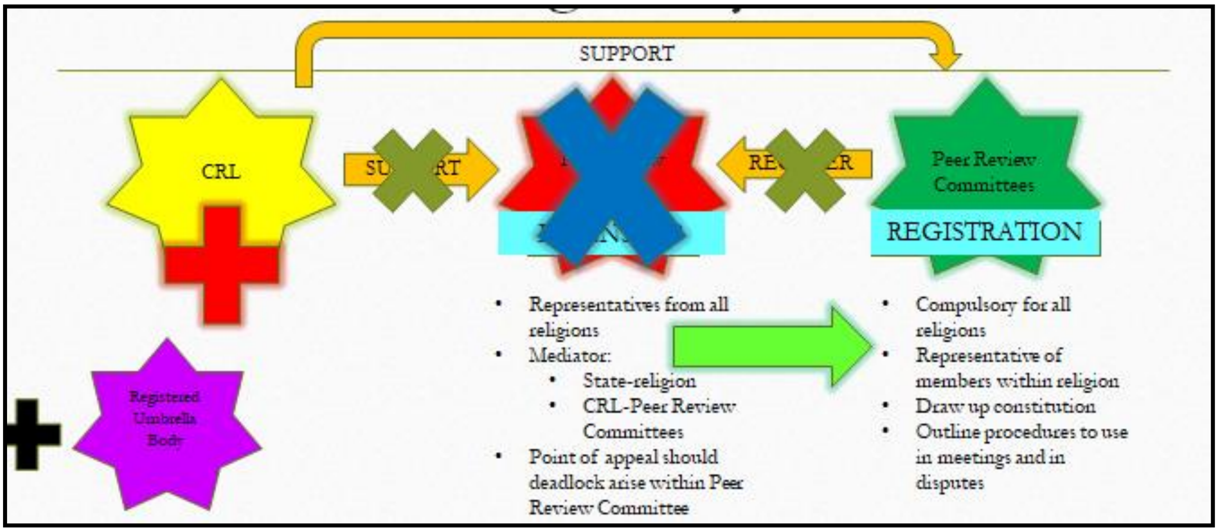

Diagram 2a (above): Revisions to the preliminary proposed regulatory model by the CRL

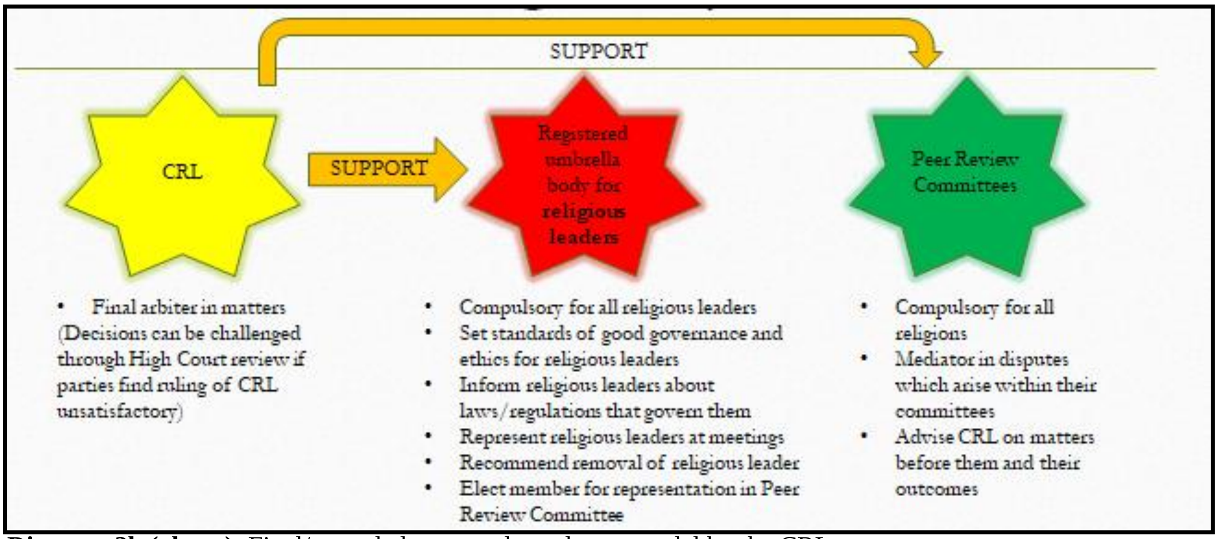

Diagram 2b (above): Final/amended proposed regulatory model by the CRL

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410 Ibid 29-30.

411 Ibid 30.

As illustrated in the above diagram, the revised model comprises Peer Review Committees, a registered umbrella body for all religious leaders, and the CRL. Worship Centres, religious leaders and institutions are all regulated through the Peer Review Committees, the registered umbrella body, and the CRL.

Table 19: This table illustrates the various bodies and their proposed functions in the revised model formulated by the CRL, as illustrated in the above diagrams.

Name of Body	**Function of Body**
Peer Review Committees	**Similarities to preliminary model** • Formed **within every religious denomination** and comprise **members from the religious denomination**[412]

	Differences to preliminary model
	• **Functions** of Peer Review Committees **in this model replicate functions of Peer Review Council in preliminary model**[413]
	  o Act as **final mediators** in disputes which arise in their respective Committees[414]
	  o **Advisory body to CRL** on matters that have been reported to them and on which they have reached meaningful resolution[415]

Registered umbrella body for religious leaders (across all religions)	**NOT INCLUDED IN PRELIMINARY MODEL** • Serves as **supportive body** for religious leaders but does **not play** a **role in adjudicating complaints relating to religious malpractices**[416] • Acts as **spiritual mentor** for religious leaders, **sets ethical standards** for them, and ensures that they are **familiar with** the **laws that govern them**[417] • **Electing** a **religious leader** to **serve on** the **Peer Review Committees**[418] • **Recommending** the **removal of religious leaders to** the **Peer Review Committees and CRL**[419]
CRL	**ADDITIONAL POWERS AS IN PRELIMINARY MODEL** • Considered **final arbiter** in all matters of religious malpractice[420] • **Decisions** can **only** be **challenged through a High Court Review** (if parties find ruling to be unsatisfactory)[421]

412 Ibid 47.
413 Ibid.
414 Ibid.
415 Ibid.
416 Ibid 45-46.
417 Ibid.
418 Ibid.
419 Ibid.
420 Ibid 48.
421 Ibid.

Notwithstanding the public commentary, this revised model still includes the registration and licensing of religious leaders and Worship Centres.[422] All religious leaders and Worship Centres have to be registered and licensed according to the criteria stipulated in the explanation on the preliminary model. However, the registration process in this model is administered through the registered umbrella body, rather than the Peer Review Committee (as in the preliminary model).[423] The reasoning behind the inclusion is that registration not only ensures accountability, but enables the generation of a database of practising religious leaders and Worship Centres.[424]

(1) Functionality of revised proposed regulatory model

Taking the example in the proposed preliminary model of the minister in the Methodist Church in Randfontein forcing the congregation to drink brandy at every church service:

In terms of the revised model, the minister would have to present himself before the members of the Peer Review Committee within the Methodist Church, justifying his actions (as in the preliminary model). If the Peer Review Committee finds that his conduct is contrary to the doctrine, practices and constitution of the Methodist Church and Christianity; he would have his license taken away from him and would no longer be able to practice as a minister in the Methodist Church (as in the preliminary model).

If the minister is dissatisfied with the decision made by the Peer Review Committee, he would be able to appeal to the CRL. There is no point of review to the Peer Review Councils in this model, as in the preliminary model.

The decision made by the CRL could be taken on review to court, should the minister find the ruling to be unsatisfactory.

Responses to the revised regulatory model

(1) Responses from scholars and interviewees

There have been several formal responses to the revised model by academics such as Du Plessis and religious denominations, primarily from the Anglican Church and Islam (Sunni). There are noticeable similarities between these responses, which can be grouped into the following categories: (1) brings religious freedoms under attack, (2) exceeds CRL mandate, (3) existing

[422] Ibid 43-44.
[423] Ibid 45-46.
[424] Ibid 43.

laws are sufficient to deal with malpractices, (4) impact of model is disproportionate to number of malpractices, (5) does not account for fluidity and flexibility of religion, and (6) interferes with religious doctrine. When analysing the contents of the revised report and the interview with the commissioner from the CRL, it is apparent that there are a few discrepancies between them. This has also been included as a response to the revised model.

(a) Constitutional religious freedoms under attack

The Anglican church and Du Plessis argue that the proposed model brings constitutional rights afforded to religious denominations into disrepute.[425] More specifically, the Anglican church maintains that the model disregards the constitutional provision that religious denominations can form, maintain and govern their religious institutions according to their conscience, belief and opinion without state interference, and that limitations on this provision must be done within the prescripts of the rule of law.[426] Following from the position that the Anglican church adopts, Du Plessis focuses on whether the limitations, that the model places on constitutional freedoms relating to religion, are justifiable. For her, the model limits the rights of people relating to religious freedom unjustifiably in terms of s 36 of the Constitution.[427] The scope of the right to religious freedom allows for minor limitations and regulations, not the extensive regulation that the CRL is proposing.[428] She cites the inclusion of compulsory registration, and the CRL as the most powerful body in the model, as specific problematic aspects. Making registration compulsory virtually eliminates the enjoyment of freedom of religion and belief for religions.[429] Part of the right to freedom of religion involves individuals and groups being able to practise their religious beliefs independently of any official status.[430] Allowing the CRL to be the final arbiter on issues arising within religions limits their independence and freedom to deal with their internal matters in terms of their own rules and regulations.[431]

(b) CRL exceeded its mandate

The Anglican church and Du Plessis agree that the CRL has exceeded its mandate in drafting a proposed regulatory model. For the Anglicans, the CRL is not a body, like the Public Protector, which can take appropriate remedial action, nor like the Human Rights Commission

[425] Anglican Position Paper op cit note 17 at 2,3 & 4.
[426] Ibid 5.
[427] Du Plessis op cit note 57 at 146.
[428] Ibid 148.
[429] Ibid 153.
[430] Ibid.
[431] Ibid.

which can take steps to secure appropriate redress where human rights have been violated.[432] It is designed to create an environment where religious, cultural and linguistic communities can flourish, not to enforce its powers like the Public Protector and Human Rights Commission.[433] Moreover, the CRL is not like other Commissions which can enforce compliance directly from citizens.[434] It can only make recommendations to organs of state and bring any matter that affects community rights to the attention of the state.[435] In light of the above powers and functions, the Anglican church maintains that the CRL has the power to recommend the establishment of councils in accordance with national legislation, but not the power to regulate religious communities by legislation.[436] Du Plessis reinforces the argument advanced by the Anglicans. For her, the CRL has interpreted its powers more broadly than the CRL Act allows, and the proposed model subjects religions to too much state control.[437] Chapter 9 and s 185 of the Constitution and ss 4 and 5 of the CRL Act all point to the CRL not being the first and final arbiter of religious matters in South Africa.[438] It can monitor the rights of cultural, religious and linguistic communities and is regarded as an advisory body that can make recommendations and establish committees, but such powers do not equate to the enforcement of a regulatory model in which religions are regulated, registered and licensed.[439]

(c) Existing laws to rectify the problem

The Anglican church, Du Plessis and the interviewee from Islam (Sunni) are all of the view that existing legislation, and its amendment, is sufficient to rectify the malpractices within the religious sector, without the implementation of the CRL model. The Anglicans maintain that existing laws can be used to regulate religious leaders who engage in harmful practices and act in ways which do not uphold esteem, dignity, reputation, and the history of the church.[440] The interviewee from Islam and Du Plessis believe that a more stringent and organised implementation of existing legislation will reduce the incidents of malpractice within the religious sector. More specifically, the interviewee from Islam argues that compliance and enforcement of existing legislation will reduce the kind of exploitation that takes place in the name of religion. For Du Plessis, the implementation of specific regulations within existing

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432 Anglican Position Paper op cit note 17 at 2.
433 Ibid.
434 Ibid 3.
435 Ibid.
436 Ibid.
437 Du Plessis op cit note 57 at 148-150.
438 Ibid 137.
439 Ibid 138.
440 Anglican Position Paper op cit note 17 at 8-9.

legislation will realise the purpose of protecting the vulnerable and those who can easily be subjected to abuse by religions more effectively than implementing the proposed measures of the CRL.[441] Such an approach will also have a less profound effect on the founding values of the Constitution and the right to religious freedom as a whole.[442] Provided that existing laws will not interfere with religious doctrine, and the procedure and organisation of a religious institution, the existing laws can be used to govern religious denominations and their actions.[443]

(d) Measures used are disproportionate to the number of malpractices

Both the interviewee from Islam (Sunni) and Du Plessis maintain that the adverse effects of the model far outweigh the harm caused by the number of incidents of malpractice within the religious sector. For the interviewee from Islam (Sunni), the few incidents of malpractice do not warrant the legislature regulating the entire religious sector. Du Plessis maintains that, although some cases of abuse will be prevented by implementing the model, it is unclear how the measures will be sufficient to further democracy and freedom for society in general.[444] She specifically cites the creation of Peer Review Committees and umbrella organisations as dispute resolution mechanisms to prevent isolated incidents of malpractice as disproportionate and amounting to too much interference.[445]

(e) Fluidity and flexibility inherent in religion

Du Plessis draws on the fluidity and flexibility inherent in religion when responding to the model.[446] According to her, the nature of religion is free-flowing and boundless.[447] By the CRL creating a model which makes it mandatory for religious denominations to implement several structural mechanisms; it is attempting to put them into non-existent boundaries, to some extent eliminating the fluidity and flexibility that characterises them, and limiting their autonomy to structure themselves in ways that best align with their beliefs and organisational needs.[448]

[441] Du Plessis op cit note 57 at 151.
[442] Ibid.
[443] Ibid 159.
[444] Ibid 148-150.
[445] Ibid 153.
[446] Ibid 155.
[447] Ibid.
[448] Ibid.

(f) Interferes with religious doctrine

Du Plessis concludes that the proposed model interferes with religious doctrine.[449] The CRL being the final decision-making body, and umbrella organisations having the ability to set standards of good governance and implement disciplinary procedures for religious leaders, and being able to add or remove members from religious denominations, can potentially lead to interference with their internal workings and doctrines.[450] Also, the power of the CRL to make a decision as to whether a religious belief is for financial gain, reasonable, and meets the standards of good governance, can also potentially lead to doctrinal entanglement.[451]

(g) Discrepancies between the contents of the report and interview

It is worth noting that there are certain discrepancies between the contents of the Report and the interview with the commissioner of the CRL (in relation to the functionality of the model). Contrary to the utterances by the commissioner of the CRL, the Report does not make it clear that the model was not intended to be used for malpractices of a criminal nature, which, according to the commissioner of the CRL, would be subject to conventional legal processes. Furthermore, while the Report makes it clear that the model applies to all religious denominations, the commissioner maintains that religious denominations who already have existing regulatory structures, which are sufficient to satisfy the same objectives as the proposed model, will remain unchanged. For example, the commissioner indicated that the internal processes followed in Orthodox Judaism would remain untouched. The only change that would be required of the processes, followed in Islam, would be the registration and licensing-related requirements as they already have a judicial council in place.

(2) Counter responses from the interview with the CRL commissioner

It also became apparent from the interview with the CRL commissioner that the CRL has counter arguments for the following aforesaid categories: (1) the model placing religious freedoms under attack, (2) the CRL exceeding its mandate, and (3) the model interfering with religious doctrine.

Regarding the model placing religious freedoms under attack, the CRL maintains that the model enables religions to practise in accordance with their constitutional rights. In fact, the

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[449] Ibid 156.
[450] Ibid.
[451] Ibid.

CRL says that the intention of the model is to give religions more powers than they currently have:

> 'All we were actually doing was that we were giving up some of our powers to the church. That's what we were doing. We were saying instead of us doing all the investigations and everything, guys investigate yourselves.'[452]

The only limitation that the model places on religious leaders is that they are restricted from engaging in practices which do not align with the doctrine and practices of the religion to which they claim to be adhering. By way of example:

> 'Pastor Nolo for instance, he started Plenthology. He came out of Christianity and he started a religion called Plenthology – the religion of plenty. He created his own guidelines, his own book, everything. He announced himself as King and he has 30 000 followers. So he has the right to register as a religion but he cannot call himself Christian. He can only call himself Plenthology. And then he has to portray himself as a Plenthologist. You see, so we make room for that.'[453]

> 'But the minute you say I am a Christian, and you sell yourself as a Christian, then you are subject to your fellow Christians, aren't you? So, where does the accountability lie then? With your fellow Christians. If you are doing anything in your actions to bring them into disrepute, then they have the right to say not in our name.'[454]

> 'So, have we restricted religious freedom? No. All we are saying is that a community has the right to dignity, just as much as an individual. So, if there are individuals within that community that are bringing the dignity of an institution into disrepute, that institution has the right to tell them not to do it in their name.'[455]

Regarding mandate, the CRL is of the view that the Constitution gives it the right to be the highest point in the model, and to draft the proposed model that they have drafted:

> 'You see, we have the constitutional right to investigate any matter to do with religion, culture and language – any matter. So if a person comes to us and says these people have done this to us, we can mediate in those processes and come to a recommendation and we can make those recommendations binding by taking it to court. You understand, so we are automatically there.

[452] Interview (CRL Commissioner).
[453] Ibid.
[454] Ibid.
[455] Ibid.

> I mean even in today's situation, we are actually there. You understand, so it is not as if we were reinventing any wheel or anything.'[456]

Regarding the model interfering with religious doctrine, the CRL is of the opinion that it has not interfered with matters relating to religious doctrine when drafting the model:

> 'If you look at religious freedom, the Constitutional Court has already stated that as the State, we cannot get involved in the internal doctrines of the religious institutions. That's fait accompli. It has made that ruling. So, as the CRL Commission, I can't do anything over there.'[457]

(3) Responses from the Steering Committee and CRL

There is another set of responses to the revised model: one being from the Steering Committee, and the other being from the CRL itself.

Due to the dissatisfaction of religious leaders with the models (both preliminary and revised), parliamentary hearings were held after the release of the final model, and it was decided that a national summit should be convened with religious leaders to discuss their concerns and recommendations in relation to the final model.[458] The summit was convened in February 2019, and a task team was established to prepare for it.[459]

The hearings in relation to the CRL model and the formation of the Steering Committee was not aimed at taking over the process of reform that the CRL had initiated. It was an attempt to find alternate methods of reforming the religious sector, in ways that adequately respond to the issues prevalent within the sector, but that do not excessively infringe on the religious freedoms of people.

It was agreed at the summit that the task team responsible for the preparation for the summit continue its work.[460] It was from this task team that a Steering Committee was formed, whose primary responsibility was to prepare for the next national religious conference.[461]

The Steering Committee is comprised mainly of members from the religious denominations within Christianity, but also includes members from the Hindu, Muslim and Jewish religions

[456] Ibid.
[457] Ibid.
[458] Mbhele op cit note 18.
[459] Ibid.
[460] Ibid.
[461] Ibid; Sub-committees were formed within the Steering Committee which included legal, admin, media, finance and research.

and the African Independent Church.[462] The intention of the Steering Committee is to deal with malpractices within the religious sector internally, and to use Parliament to enforce legislation that is internally developed.[463] As such, it aims to convene a National Consultative Conference with all religious leaders in due course, and to agree on a uniform code of conduct that can be taken to and adopted by Parliament, and that will hold all religious leaders in South Africa accountable to a uniform nationwide set of standards.[464] To quote the interviewee from Rhema regarding the Steering Committee proposals:

> 'the code of conduct should be – you can't feed a person a snake – so, all religious should agree on that, you can't misuse money, you can't abuse your community – so those should be our standard. At the moment, we want to produce a document that we adopt and at least 70% or 80% of religious leaders agree to and that we can take it to Parliament and that Parliament can adopt and regulate it so that the police can act based on the code of conduct.'[465]

The CRL responded to the commentary relating to its model, and the debates surrounding the way forward for the religious sector, by drafting a document called the Code of Best Practice for Religious Organisations, which was presented at the February 2019 summit. If religious leaders agreed to implement this Code, it would replace the revised model proposed by the CRL and serve as an additional perspective to all religions over and above their existing internal regulations.[466] To date, it is unknown as to how religious leaders have responded to the proposed implementation of the Code.

The Code highlights the commitment and adherence which religions have to the laws of the land; the protection and promotion of the right to religious freedom and the freedom to associate; respect for all religions; the prevention against harassment, indoctrination or intimidation in relation to religion; the freedom to receive religious instruction, education and training; the ability to receive voluntary gifts, contributions, donations and financial support; the implementation of financial recording and disclosure policies; and the duty to report any criminal activity and to cooperate and assist the state in dealing with those who contravene the law.[467]

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462 Steering Committee Discussion Document op cit note 19.
463 Ibid.
464 Ibid.
465 Interview (Rhema).
466 CRL Rights Commission *Code of Best Practice for Religious Organisations* (2019).
467 Ibid.

Relationship between religious leaders and CRL

Over and above the various responses to the model, part of the empirical research entails ascertaining the involvement that various religious leaders have with the CRL, and their opinions on the CRL's role within the religious sector. The responses are wide-ranging, and can be categorised into the following broad categories: (1) not knowing about the CRL and/or had no personal dealings with CRL, (2) not knowing about the CRL, but after some background information, being supportive of its function within the religious sector, (3) knowing about the CRL and being supportive of its intervention in certain areas, (4) knowing about the CRL and not being supportive of its intervention in any areas, and (5) knowing about the CRL and expressing concern about its composition.

(1) Not knowing about CRL and/or had no personal dealings with CRL

From the interviews, it is apparent that six of the twelve interviewees (ZCC, Orthodox Judaism, Catholic, Methodist, Reform Judaism and Traditional African Healing) have never heard of the CRL and/or had no personal dealings with them. The interviewee from Reform Judaism thought that he/she had dealings with them but was not certain. The interviewee from Orthodox Judaism said that he is virtually certain that the office of the Chief Rabbi or the office of the Beth Din would know more about the CRL, and the circumstances under which they would consult with them, because they comprise the top-level representation of the Jewish religious community. The interviewee from the Methodist church has not personally dealt with the CRL, but the parishioners have previously lodged complaints against the church to the CRL.

(2) Not knowing about CRL but being supportive of its function within religious sector

The interviewee from Tibetan Buddhism said that although he/she has never heard of the CRL, nor had any dealings with them, he/she is supportive of them intervening in religious matters through a regulatory process. In fact, their aim is for their internal rules to be more stringent than the external regulatory measures. The interviewee from the Greek Orthodox church indicated that he is not au fait with the machinations of the CRL, but personally regards it as a meaningful body. He understands the role of the CRL to be conciliatory in nature which is welcomed within the confines of their mandated function. It is also understood that the Greek Orthodox church would like to extend dialogue amongst other religious communities in furtherance of their aims.

(3) Knowing about CRL and being supportive of its intervention in certain areas

The interviewee from the Rhema church mentioned that they have a good working relationship with the CRL. The interviewee personally believes that intervention from the CRL is necessary in criminal related malpractices and to make them aware if a complaint has been lodged against them with the CRL. The interviewee from Islam (Sunni) maintains that the CRL should only intervene when the religious rights of the community have been violated or inhibited in some way, but not in a dispute resolution capacity.

(4) Knowing about CRL and not being supportive of its intervention in any areas

The interviewee from the Anglican church indicated that the Anglican church has made submissions to and consulted with the CRL. However, it does not approve of the CRL intervening in religious matters, because criminal related malpractices should be dealt with in terms of existing legal processes and other malpractices should be resolved through internal regulatory mechanisms.

(5) Knowing about the CRL and expressing concern about its composition

The interviewee from Hindu (Shaivism) is of the view that the composition of the members on the CRL is primarily Christian and not representative of all religions. This, in the opinion of the interviewee, results in a lack of a holistic understanding of all religions when handling cases relating to religious malpractices.

Conclusion

It is evident that the regulatory model proposed by the CRL (acting in its capacity to safeguard the rights of religious communities) is the product of the highlighted need for some sort of reform within the religious sector. While it may not be the answer to the problem and there is uncertainty as to which religious denominations and malpractices the model applies; its formulation is living proof that the existing regulatory framework and/or implementation of it has, in many instances, not had adequate effect in preventing and remedying the existing problems within the religious sector. It illustrates that some sort of intervention, in whatever form, is necessary.

The revised model (after public submissions) includes the establishment of Peer Review Committees within religious denominations, a registered umbrella body to support and regulate the conduct of religious leaders, and the CRL to serve as the final arbiter and provide support to other bodies. The model also includes the registration and licensing of all religious leaders and institutions (referred to as Worship Centres in the model).

However, there have been multiple responses to the proposed model from members of religious institutions, academics and the CRL itself. The consensus among members of religious institutions is that the model brings the religious freedoms afforded to them under attack. It also tampers with doctrinal matters and the adverse consequences and effect of the model far outweigh the isolated incidents of religious malpractices. They also raise the point that the CRL has exceeded its mandate, as set out in legislation. In essence, when considering the various responses holistically; it can be said that the religious sector advocates for religious autonomy and a decentralised framework to regulate it.

The CRL, on the other hand, has defended the arguments that the model attacks constitutional religious freedoms, interferes with doctrine, and exceeds their mandate. The CRL claimed that it was also advocating for a decentralised framework within the sector, but several religious institutions, organisations and academics advanced the view that the model was an example of a centralised framework. From the empirical research, it became apparent that many interviewees had no knowledge of the CRL and that while some interviewees advocate for limited or no CRL intervention within the religious sector, some interviewees are supportive of it. Due to the opposing responses regarding the model, the CRL subsequently drafted a code that religious denominations should adhere to over and above their internal regulatory structures, which includes: (1) promoting adherence to existing laws (2) financial transparency and reporting of criminal activity, and (3) the protection of religious freedoms.

Chapter 6

BENEFITS AND SHORTCOMINGS OF REGULATORY FRAMEWORK AND ASSOCIATED RECOMMENDATIONS

This chapter synthesises and integrates the findings of the research, including the interview outcomes. The conglomerate of information gathered is analysed in conjunction with the research objectives and questions, culminating in a collective critique and proposal.

Under the spotlight is the collective scope of the South African regulatory framework. The existing South African regulatory framework comprises both formal and informal regulations, leaning more towards the adoption of a self-regulatory model with elements of state-regulation. For ease of reference at this juncture, formal and informal regulations are distinguished as follows:

- Formal regulations comprise a series of legislation, which both implicitly and explicitly create the opportunity for limited state intervention in religious matters. It also includes case law, which provides an ad hoc, loose set of circumstances under which the state can and cannot intervene when malpractices occur.
- Informal regulations are the internal structures, rules, and processes which religious denominations have developed to regulate incidents of malpractice, when they arise.

The interview outcomes illustrate that many religious denominations have a structured set of regulations and penalties when malpractices arise. However, the extent to which state intervention is incorporated in these regulations varies, based on the framework and the type of malpractice in question.

In the formulation of a collective assessment of the regulatory framework; a succinct overview of its respective features, both positive and negative, has been included, to generate a platform of comparison.

Benefits of existing regulatory framework

(1) Equal measures of freedom and constraint of religious freedom in principle

Arguably, the existing formal regulatory framework is beneficial in that it gives religious denominations sufficient space in which to exercise their constitutional freedoms in accordance with the rights to freedom of religion and association, in terms of ss 15, 31 and 18 of the

Constitution respectively. At the same time, it constrains such freedoms in accordance with constitutional limitations under ss 31 and 36, and conflicting rights such as equality. The Constitution affords religious denominations a wide level of discretion in their exercise of religious freedom, and courts have confirmed this wide and all-important discretion which is afforded significant protection by the state.

In summation, religious freedom includes the right to conscience, thought, belief and opinion. It includes the right to associate with a religion, have a religious belief and openly express such belief through proscribed practices, worship, teaching and dissemination, without fear. It also includes the right for religious institutions to develop doctrine and disciplinary measures that can be enforced in the event of non-compliance with such doctrine. Our courts have also shown their commitment to safeguarding the ability of religions to exercise their religious freedoms. Their reluctance to involve themselves in doctrinal matters and matters that involve long-standing religious practices and procedures illustrates the courts' adherence to religious denominations being able to practice and enforce their core beliefs and practices, without being unduly undermined by the state. Similarly, the refusal by courts to intervene in matters where an applicant has not first fully complied with internal regulatory processes is indicative of the due regard and respect that the state has for the freedom of religious denominations to develop and enforce their own set of regulations when a malpractice occurs.

Notwithstanding the freedoms that such formal regulatory mechanisms provide to religions in the exercise of their freedoms, the same formal regulatory mechanisms restrain them from unduly exercising their freedoms. Religious freedoms are subject to both the internal limitation clause under s 31 of the Constitution and the general limitation clause under s 36 of the Constitution. Such limitations are thought to guard against a situation where religious practices which contravene other constitutional rights are immunised from legislative and judicial intervention, thereby undermining constitutional tenets.

In addition to the Constitution, there are a number of provisions contained in legislation, including but not limited to the Children's Act, the Basic Conditions of Employment Act and the Income Tax Act, which are all committed to promoting transparency, accountability and adherence to constitutional underpinnings on the part of members of religious institutions. This, in principle, assists in the lessening of malpractices within the religious sector.

In line with the objectives of the Constitution to protect religious freedoms but at the same time, ensure that such protection does not override other constitutional rights; courts have on an ad hoc basis ruled that state intervention is necessary in limited instances. These include: where prejudice to constitutional rights has ensued as a result of the application of doctrine; where rights have been unjustifiably limited by doctrine; when limiting religious freedom is not unduly burdensome for the community and will not lead to the community having to choose between obeying the laws of the land and their faith; and in equality cases, where the nature of unfair discrimination does not directly infringe on religious doctrine and its effect outweigh prioritising religious freedoms.

(2) General informal regulatory structures

The existing regulatory framework is one that largely allows religious institutions to develop and maintain their own regulatory mechanisms. Many religious institutions have developed their own regulatory structures, often over a long period of time, which broadly comprise internal mechanisms to handle malpractices and internal penalties when there is evidence that such malpractices have occurred.

Shortcomings of existing regulatory framework and recommendations

Notwithstanding many religious denominations having developed structured frameworks and the formal regulatory framework, in principle, being effective in achieving the constitutionally desired outcome of protecting yet constraining religious freedoms where necessary; its implementation and enforceability remains questionable. The many cited incidents of malpractice within the religious sector (which are criminal, civil and constitutional in orientation) are all proof that the intended constitutional objective to constrain religious doctrine and practices, which unduly infringe on and compromise other constitutional rights to, inter alia, dignity and freedom and security, has not been achieved.

While the conclusive answer as to why the existing regulatory framework is not sufficiently effective in safeguarding people's fundamental constitutional rights does not lie in a dissertation of this limited scope, a few procedural and substantive shortcomings in the existing framework have been identified to assist in better understanding the limits of the status quo.

(1) Considerations relating to form and content of legislation

Loopholes in legislation and a fragmented legislative framework are shown to undermine the intended impact of the regulatory framework.

(a) Loopholes in legislation

While some legislative provisions indirectly regulate incidents of malpractice through creating mechanisms of transparency and accountability; some of these are not sufficiently explicit and direct in their application to members of the religious sector. This can create confusion, uncertainty, and ignorance among members of a religious institution as to whether such laws apply to them. In so doing, they provide greater latitude for members to bypass such laws and ignore elements of accountability.

By way of example, it is evident from the interviews that religious institutions encounter incidents of money laundering, where sources of income of employees are unclear and/or not disclosed. Some interviewees argued that in such an instance, s 29 of the FICA will have application. This provides that a person who carries on business or who is in charge of or manages such business, and who knows or suspects unusual and suspicious monetary activity, has a duty to report such to the Financial Intelligence Centre, who will in turn investigate. Arguably, the use of the term 'a person' and the lack of clarity in s 1 of the FICA, as to whether religious institutions can be included in the definition of 'business' can result in an employee within a religious institution, with knowledge of such criminal offence, not reporting such to FIC on account of loopholes within such legislation.

Recommendation based on loopholes in legislation

The explicit inclusion of religious institutions within FICA, and the extent and circumstances in which FICA applies to them (taking into consideration the prevalence of such activities and their adverse implications), could assist in remedying this defect and making it easier to enforce penalties for contravention of such duty. Another suggestion could be to conduct an audit of all applicable legislation relating to the religious sector, to identify the gaps and areas of uncertainty, and to rectify them.

Evidence of the aforementioned 'rectification' in legislation can be seen in s 110(1) of the Children's Act as against s 54(a) of the Criminal Law Sexual Offences Act. While s 54(a) places an obligation on 'a person' to report knowledge of abuse against a child, s 110(1) explicitly lists a 'religious leader' as one of the categories of individuals who has an obligation to report such criminal offence. Such explicit inclusion arguably places an unequivocal obligation on religious leaders to report and to be directly responsible to such a provision, making it virtually impossible for them to raise a defense for failing to act upon the instruction of the law.

(b) Fragmented legislative framework

In addition to the ambiguity contained within applicable legislation, provisions relating to the regulation of incidents of malpractice are contained in many pieces of legislation. Arguably, this can make it more challenging for religious leaders to familiarise themselves with the laws that apply to them and the ways in which they apply. Not only can such haphazard citings in legislation present challenges for religious leaders, but they can prove problematic for the broader public to access such laws and know how and when they apply.

Recommendation based on dislocated placement of legislation

Arguably, a standalone piece of legislation which documents regulations and penalties for contravening such regulations, as contained in existing legislation, would create a situation in which religious leaders have a single, user-friendly reference point to familiarise themselves with the laws that apply to them and their institutions. Moreover, it would enable the public to have access to laws that directly implicate them in a way that can be tangibly understood. Public knowledge of the circumstances under which religious institutions are: (1) non-compliant with the laws that apply to them, (2) have an obligation to report, and (3) are legally obliged to hand over a malpractice to a state-regulated institution will hopefully encourage greater public reporting when religious leaders fail to comply with legal rules and processes. This public exposure will, in turn, hopefully result in addressing any lawlessness on the part of religious leaders and, ultimately, the lessening of malpractices within the religious sector.

(2) Considerations relating to the functionality and implementation of the regulatory framework

An examination of the religious sector reveals substantive evidence of misinterpretation, misappropriation and mis- or non-application of the regulatory framework. This undermines the intended outcomes. These include: a) evident contradictions between informal and formal regulations and, therefore, between the religious and legal frameworks, b) a preferential reliance on internal regulatory measures and a reluctance to report offences to the police, and c) the widespread absence of clearly documented regulations and penalties among members which further weakens the prospect of implementation as does the discernable fear of reporting.

(a) Contradiction between informal and formal regulations

Sections 54(a) and (b) of the Criminal Law Sexual Offences Act and s110(1) of the Children's Act place a statutory obligation on religious leaders to report knowledge of child abuse to the relevant authorities. Despite these statutory obligations placed on religious leaders, the interview findings reveal that the internal regulations of only four of the religious denominations (Methodist, Greek Orthodox, Rhema and ZCC) require religious leaders to report incidents of alleged sexual abuse of minors to the police. The interviewees from the Anglican Church and Islam (Sunni) indicated that they would encourage the complainant to report the matter to the police. The interviewees from Orthodox and Reform Judaism said that reporting would depend on the advice given by their internal regulatory bodies. The interviewees from the Catholic Church and Tibetan Buddhism noted that a matter of this nature would be dealt with internally. The Catholic Church would, however, use external processes if the matter could not be adequately resolved via internal processes and would not be opposed to the complainant reporting the matter to the police.

The non-compliance by religious leaders with statutory obligations and their pursuit of alternate internal regulatory processes, illustrates the contradiction between internal and external regulatory processes. Alternate internal processes such as encouraging the complainant to report the matter to the police and the development of additional internal processes to combat the mounting incidents of sexual abuse of minors within religious communities are, arguably, processes which can be implemented by religious denominations. However, these processes cannot contradict statutory laws and should be implemented either simultaneously with and/or after statutory obligations have been fully complied with.

Recommendation based on contradiction between informal and formal regulations

In light of the above, a possible remedy could also be a standalone piece of legislation which documents existing regulations, obligations and penalties for contravention of same, so as to make it easier for both the public and religious leaders to familiarise themselves with such laws and to know the circumstances in which they have to be applied. It will also, hopefully, create awareness among the public so that they report such abuse to the relevant authorities and refer the matter to the religious denomination, to which they belong, for psychosocial support.

Another possible solution is for the CRL to conduct programs to educate members of religious institutions, including both employees and members, about the existing laws that apply to them and when it is necessary for them to be invoked. Such an initiative would arguably align with the educational and facilitative functions of the CRL, as contained in the CRL Act, which include, but are not limited to, promoting respect for and protecting community rights and developing strategies that facilitate the full and active participation of communities.

(b) Lack of use of relevant laws and authorities

It is apparent from the interviewees that religious denominations prefer to use internal disciplinary processes, rather than invoking common law and legislative processes when dealing with malpractices in which the primary external body is the SA Police Service (the police). These include: misappropriation of funds, harmful acts, and tithing. By way of example, five of the twelve religious denominations (Catholic, Methodist, Greek Orthodox, Rhema and ZCC) all indicated that they would use internal processes to deal with misappropriation of funds from their religious institutions. The interviewee from the Anglican Church said that the Anglicans also use internal processes, but occasionally report it to the police. In respect of harmful acts, eight of the twelve religious denominations (Catholic, Anglican, Methodist, Greek Orthodox, Islam (Sunni), Reform Judaism, Orthodox Judaism and Tibetan Buddhism) would use internal processes to respond to the reporting of harmful acts. The interviewee from the Rhema Church indicated that Rhema uses both internal and conventional legal processes to respond to harmful acts. When considering tithing, eight of the twelve religious denominations (Catholic, Anglican, Methodist, Greek Orthodox, Rhema, ZCC, Orthodox Judaism and Islam (Sunni)) would use internal processes to respond to incidents where it can be shown that the money given to the religious institution does not align with the proscribed rules relating to tithing in respect of the religious denomination at hand.

However, the opposite seems to be true when considering the approach that religious denominations use in respect of non-compliance with tax obligations, in which the primary body dealing with same is the South African Revenue Services (SARS). Five of the twelve religious denominations (Methodist, Greek Orthodox, ZCC, Orthodox Judaism and Hinduism (Shaivism)) indicated that they would utilise conventional legal processes to deal with non-compliance of tax obligations. The interviewee from the Anglican Church said that Anglicans use both legal and internal processes. This is a significant number of religious denominations, when taking into consideration that two of the twelve (Catholic and ZCC) are excluded because their religious leaders do not earn an income which meets the tax threshold.

While it is promising that religious denominations have confidence in using legislative authorities when it comes to tax matters, it is concerning that many of them do not have the same confidence to report malpractices to the police, when taking into consideration the dire consequences which malpractices have, including but not limited to criminal and harmful acts on the victims of these malpractices. The cited reliance on internal processes in the above instances, and not on external processes, can in turn result in the weaknesses that some religious leaders identify in their informal regulations. These include: lack of accountability and enforcement, limited enforcement of penalties, not holding senior employees in institutions to account, and lack of compliance with regulations.

Recommendation based on lack of use of relevant laws and authorities

A greater involvement by external disciplinary authorities such as the police will, to some extent, rectify the identified weaknesses in respect of informal regulations. Use of such authorities would enable handing over alleged perpetrators of such acts to the criminal justice system and holding them accountable in terms of penalties and other like enforcement measures proscribed by legal offices, should they be found guilty. This creates an increased level of accountability and impartiality. The malpractice will be removed from the confines of the institution and the perpetrator, if found guilty, no matter how senior his/her position in the institution. Compliance with the proscribed penalty would be mandatory because it is not an 'in-house' enforcement mechanism that can be subject to maneuvering. Involvement of external authorities would also hopefully create a greater public awareness of the prevalence of such malpractices within religious institutions. The public exposure of such malpractices, together with an increased level of accountability and hopefully, absolute and stringent enforcement mechanisms, would cumulatively serve as a deterrent against subsequent malpractices of this nature within such institutions.

Notwithstanding such recommendation, the law provides that acts such as misappropriation of funds, drinking of petrol and encouraging of underage drinking are common law malpractices. There is no statutory obligation on religious institutions to invoke the criminal justice system in respect of these malpractices, thereby affording the religious institutions greater autonomy in deciding how to handle these malpractices.

(c) Conflict between religious and legal frameworks

It is apparent that some religious practices conflict with constitutional and legal provisions. This is especially prevalent in malpractices of a discriminatory nature. By way of example, within six of the twelve religious denominations (ZCC, Traditional African Healing, Catholic, Orthodox Judaism, Islam (Sunni) and Greek Orthodox), males enjoy more privileges than females, to varying degrees and in varying aspects. In many of these religious denominations, such privileges include the officiating of formal services. Similarly, six of the religious denominations (Catholic, Anglican, Methodist, Orthodox Judaism and Islam (Sunni)) did not pronounce equal treatment for homosexual and heterosexual religious leaders. In most cases, homosexual religious leaders either cannot be in a relationship with a same-sex partner and/or ordain marriages between partners of the same sex.

The distinction in treatment between males and females and homosexuals and heterosexuals is arguably in conflict with the equality provision in the Constitution which provides for the full and equal enjoyment of all rights and freedoms and not unfairly discriminating (directly or indirectly) against anyone on grounds including gender and sexual orientation.

As has been previously mentioned in chapters 3 and 4, religious denominations and scholars are divided on the treatment of such conflict. Bilchitz, for example, maintains that such conflict undermines the underlying purpose for which our Constitution was created – to achieve social justice and substantive equality – and, accordingly, rejects all forms of treatment that unfairly discriminate against individuals, particularly where it is based on a fundamental element of individual identity. Woolman, on the other hand, advocates against intervening in such conflict, because it is necessary to allow religious denominations the autonomy to determine their own rules. Lenta similarly suggests that such conflict should not be tampered with, because such discrimination occurs in the private sector and such discriminatory acts are part of the 'doctrinal core' of religious denominations and do not impose physical harm on the victims. When considering case law dealing with the conflict between religious practices and grounds of unfair discrimination, it is clear that the courts wish to stay out of tampering with doctrine, but will intervene where there is evidence of the implementation of doctrine resulting in prejudice to the human rights of a person, subject to the facts of the case at hand.

Aside from the conflict that exists in the constitutional arena, conflicts arise between the religious and legal frameworks which impact on criminal laws. For example, the interviewee from the Catholic church mentioned that a situation could arise where a person admits in the confessional box that he/she has been sexually abusing children. In such a situation, the priest hearing the confession cannot report knowledge of such a malpractice because the seal of confession is such that no confessed sins can be divulged, notwithstanding his mandatory statutory obligation to report knowledge of such a malpractice in terms of s 54(a) of the Criminal Law Sexual Offences Act and s 110(1) of the Children's Act.

The conflict between doctrinal practices and constitutional and other legislative provisions undoubtedly undermines the envisaged objective of equality and the protection of children that such legislation seeks to achieve. It is psychologically harmful to the victims of such discrimination and both psychologically and physically harmful to the victims of child abuse. However, the question is: How does one safeguard practices within religious institutions which form part of the core of the doctrine of such religion, whilst at the same time upholding the laws of the land?

Recommendation based on the conflict between religious and legal frameworks

While the holistic answer to the aforesaid question does not lie in this dissertation, it can be said that the courts are circumspect about intervening in doctrinal matters so as to give way to religious freedoms which include the right for people within religious institutions to develop, express and enforce their beliefs. As such, there are limited circumstances in which the courts can intervene, and intervention requires significant justification. However, with that being said, it is equally apparent that the right to religious freedom is not immunised from legislative and judicial control. Accordingly, there are instances where doctrine necessitates intervention and these include, inter alia, where the doctrine causes prejudice to one's basic human rights, where the impact of not limiting the doctrine is outweighed by the impact of limiting the doctrine and where the doctrine causes harm to the victim/s of the implementation of such doctrine.

While John Stuart Mill's conception of harm, as explored in Chapter 3, is premised on the principle that harm to others requires intervention, it is wide-reaching and, as such, has been subject to various interpretations to qualify its meaning. A rights-based interpretation suggests that any harm which threatens one's rights is subject to intervention, which Bilchitz would arguably agree with, as he maintains that physical and psychological harms should be subject to intervention. Conversely, Lenta is of the view that only physical harms require intervention.

In light of the above, it is respectfully submitted that some degree of conflict between religious practices and legal provisions is inevitable and a fact that has to be accepted in a constitution where rights to religious freedoms and equality coexist. However, such conflict has to be carefully considered and managed so as to avoid a situation where constitutional underpinnings are made a mockery of, so as to protect religious freedoms, or where constitutional values and rights are prioritised to the extent that the core beliefs of religious institutions are forced to dissipate. As such, while practices which place females and homosexuals on an unequal footing may well cause psychological harm to the victims of such discrimination and are contrary to the tenets of s 9, the impact of rendering such doctrines void arguably outweighs the impact of keeping them.

Moreover, advances seen both within religious institutions and legislation over time are promising and illustrate a regard for the equal society we strive towards. By way of example, the Methodist and Anglican churches are currently working towards the promulgation of homosexuality laws and the Catholic church is debating the accommodation of female religious leaders. There are also alternate avenues for victims who fall foul of such discrimination and belong to such religious institutions. For example, within Judaism, while Orthodox Judaism does not allow for female and homosexual leaders and homosexual marriages, Reform Judaism does. Similarly, while most mosques do not allow for female and homosexual Imams, there is an open mosque in Cape Town which is more liberal and allows for same. The recent repeal of s 6 of the Civil Union Act 17 of 2006 which enables a marriage officer to object to solemnise a civil union on the grounds of conscience, religion and belief by writing to the Minister of Home Affairs, and the amendment of placing an obligation on the Minister to ensure that there is a marriage officer available to solemnise such a union, is arguably more aligned with the envisaged purpose of s 9 of the Constitution.

However, a practice such as that of a priest who is forced to choose between the laws of his religion and the laws of the land, and which ultimately results in the non-divulgence of a child being subject to abuse, arguably should be dealt with differently. Where a doctrine or practice, regardless of how core it is to a religious denomination, is in contravention of a statutory obligation, such doctrine must, in the circumstances, be set aside and the statutory obligation must take precedence. While an argument could be advanced that passing such a law requires certain religious denominations to rid themselves of certain longstanding doctrines that they deem to be fundamental and, in so doing, unduly infringes on their rights to religious freedoms; the application of s 36 and other limitation tests developed in terms of the common law makes it apparent that such doctrine ought to be limited to further the ends of justice, as required by our Constitution. A statutory obligation is passed to prevent an identified misuse in an area of society that has gone undetected and has wide-ranging, adverse implications on a person or group of people. This ought to cease.

In the case of sexual abuse of a minor, its prevalence in religious institutions is widely known and its adverse implications on the victim are unimaginable. When considering the impact of limiting religious doctrine as against not limiting it, the latter arguably outweighs the former. Limiting doctrine in this instance does not render the seal of confession null and void in that it only has applicability to specific malpractices. Not limiting doctrine, on the other hand, has countless adverse implications for the protection of minors and directly conflicts with South

African secular laws. It enables a situation where perpetrators of such a malpractice can be forgiven for committing a grave criminal malpractice, but escaping accountability, all in the name of protecting religious doctrine. This non-accountability can lead to the perpetrator committing subsequent acts of the same nature. If the remedy that the church invokes to counter such an act is him/her being moved to another position, which does not involve dealing directly with children, there is still an imminent risk of the perpetrator committing subsequent acts.

There are also, arguably, no less restrictive means to achieve the purpose of adhering to statutory laws to hold alleged perpetrators of sexual abuse against minors to account, other than reporting them and allowing an investigation to be conducted in accordance with conventional legal processes. While courts acted to safeguard doctrine, they have not done so in cases where doctrine causes basic prejudice to human rights and where the impact of protecting it is outweighed by the counter impact. An inability to enforce laws, which have been put in place to protect a legitimate interest and a vulnerable group within society, has sinister implications and brings into question the extent to which laws are enforceable. It makes a mockery of laws and sets the tone for religious leaders to willfully not comply with their legislative and judicial obligations without any consequence.

(d) Lack of knowledge among members who belong to religious institutions

Identified weaknesses of informal regulations by religious leaders include: (1) insufficient reinforcement to their members (2) not being documented and standardised and (3) a lack of clearly articulated policy and the associated consequences. Arguably, the primary method of ensuring that regulations, whether formal or informal, are implemented, is by enabling people with a direct and indirect interest to have access to them. Out of the twelve religious denominations, only two (Anglican and Methodist) have clearly documented regulations and penalties that are easily accessible to their members. The Catholic and Greek Orthodox churches have documented regulations to deal with malpractices, but they are not easily accessible to members of the public. Islam (Sunni) and Tibetan Buddhism have documented rules relating to the conduct of religious leaders and members, and Hinduism (Shaivism) has rules relating to its core beliefs.

An argument could be advanced that members within religious institutions must have access to the regulations that have a bearing on them, either by way of being taught the regulations within the confines of their religious institution or being able to go and ask the office of such institution for them. Such forms of access are arguably not the forms that encompass the meaning of access that our Constitution demands in [add section]. Being taught regulations is subject to a subjective interpretation of what regulations the 'teacher' deems to be important and necessary for the members to know. Similarly, expecting a layperson who belongs to a religious institution to access the regulations by reading thousands of pages of canons, that were developed thousands of years ago, is an unreasonable expectation and something that the weekly attendant at his/her religious institution is unlikely to ask for.

Recommendation based on lack of knowledge among members who belong to religious institutions

Access to regulations could rather take the form of a clear and concise written document stating the regulations which apply to each malpractice within the religious denomination and the associated procedures and penalties for committing such malpractice. This document could be easily accessible to all members within the religious institutions by, for example, making it available on the website of the institution and/or within the institution itself. For example, booklets of the regulations could be printed and made available at the entrance that members can take with them, or publicized on a placard at the premises which is easily visible. These regulations and penalties ought to be made available in English and at least one other language spoken by most members attending the religious institution. These measures will ensure that members not only have easy access to the regulations, but can also understand them. This recommendation would not only ameliorate the aforesaid identified weaknesses by documenting, standardising, and reinforcing regulations to members within religious institutions, but it would make it more difficult for employees within religious institutions not to be accountable for, and comply with, their internal regulations. It would also educate the members who are willing and interested to know about the regulations and penalties that govern their institution, both at an internal and national levels. This would enable members to act within their rights and use the legal mechanisms available to them when such regulations are not properly being applied to a malpractice. Public knowledge coupled with religious institution-accountability will ultimately assist in lessening malpractices within such institutions.

(e) Fear associated with reporting malpractices

This aspect is discussed with particular reference to the findings on Traditional African Healing. It relates to the fear of members to report traditional healers for committing malpractices due to the risk of retaliation, which includes but is not limited to administering harmful medicines to the whistle blower. The theoretical research conducted on the voluntary consent of harmful practices in Chapter 3 bears testimony to this scenario. It speaks about the prevalence of psychological harm inflicted on members within religious institutions for not complying with proscribed practices, no matter how harmful they may be.

A few initiatives have been put in place to prevent questionable rituals and ensure open avenues of reporting where such rituals occur. For example, the Traditional Health Practices Act provides a regulatory framework which, inter alia, manages and controls registering, training and the conduct of traditional health practitioners. Its purpose is to ensure that the rituals and practices in which traditional healers engage do not compromise the health and safety of the members they treat. However, the interviewee reported that its members are fearful of reporting a criminal malpractice committed by a healer because of the risk of the healer administering rituals and practices that compromise their health and safety. Such fear illustrates that the purpose for which the Traditional Health Practices Act was created, has not been fulfilled and that its enforceability and implementation remains ineffectual in this respect.

Recommendation based on fear of reporting malpractices

Within this paradigm, a remedy for consideration may include a more active role from the CRL, whose purpose is to protect religious and cultural communities. It could monitor and investigate this problem within Traditional African Healing. It could also seek the intervention of the South African Human Rights Commission to address the infringement of the freedom and security rights of those victims whose health and safety is compromised by the risk of harmful rituals by such healers for reporting criminal malpractices. The CRL could also conduct voluntary educational programs for members of Traditional African Healing so that they can better understand the existing legislation that impacts on their communities and the avenues of reporting malpractices that minimise risks of retaliation by Traditional African Healers. This would, in turn, reduce the level of fear associated with reporting such malpractices, which will ultimately hopefully result in more criminal malpractices being reported, more perpetrators being brought to task, and the lessening of such malpractices within Traditional African Healing, because guilty perpetrators would be held directly accountable by the prescribed penalties of the criminal justice system.

A similar remedy could be used to address the psychological fear associated with non-conformity to harmful practices. The CRL could conduct voluntary programs for victims who are experiencing indirect coercion to adhere to harmful practices. Such programs could be aimed at discussing the indirect coercion to which members are being subjected and suggesting meaningful solutions. While this issue cannot be completely resolved by educational programs (as stigma and peer pressure will almost always inevitably exist for the non-conformists), these programs can assist victims in better understanding their rights and changing their mindsets as to why it is necessary for them (both as individuals and as part of their collective religious community) to stand up against such harmful practices and not participate in them. This education will, in turn, assist individuals in making use of bodies such as the CRL, and not participating in harmful practices. The more members refuse to participate in these harmful acts, the fewer malpractices will be seen.

Summation of current regulatory framework

In summation, the current regulatory framework enables people to exercise their religious freedom within their chosen religious denomination and to develop their own regulations which align with their frameworks within the current loose and malleable regulatory framework. While this arrangement has to some extent 'worked', the proliferation of malpractices within the religious sector is sufficient proof that such an arrangement is not entirely workable and ought to be reviewed. Religious leaders have themselves identified weaknesses in their own regulations which include, but are not limited to lack of enforceability, accountability, compliance, standardizing, documentation and clearly articulated policies on malpractices and their consequences.

Over and above the aforesaid identified weaknesses, it is evident that there are several shortcomings (when assessing the current regulatory framework) which arguably contribute to the prevalence of malpractices. In essence, the unclear, indirect, and haphazard citing of legislation applicable to the religious sector creates greater latitude for the employees within religious institutions to plead ignorance of such laws and/or uncertainty as to whether such laws apply to them. This, in turn, creates a greater risk of such laws not being enforced. Moreover, the malleable and self-regulatory nature of the current regulatory framework has, to some extent, resulted in people within religious denominations taking the law into their own hands and not having regard for legal obligations placed on them. This is despite secular laws enjoying primacy over religious laws in South Africa. Furthermore, information on the regulatory framework, to which members of the public should have access, has been shown to be not easily accessible or tangibly understood. This is problematic, as these regulations are directly applicable to them, and one of the fundamental underpinnings of a democratic society is transparency, to foster accountability.

Alternate regulatory framework

In response to the mounting incidents of malpractice within the religious sector, the CRL deemed it necessary to conduct an investigation into the commercialisation of religion to understand the religious and legal frameworks that regulate the religious sector, the ability of the religious and legal sectors to tackle prevailing challenges, and to make recommendations on how to deal with such challenges.

This investigation exposed evidence of commercialisation of religion and a failure on the part of religious leaders to address it. It also found significant lack of oversight structures within religious institutions, loopholes within related legislation, and a lack of enforcement of existing legislation intended to guard against the prevalence of malpractices within the religious sector.

In response, the CRL attempted to remedy the prevalence of malpractices by creating a model of oversight mechansisms to rectify the lack of enforcement of accountability and laws within the religious sector – both from within the confines of religious institutions themselves and from the CRL. The religious sector was opposed to the model, even in its amended form, on the basis that it did not want the state to intervene in religious matters. It favoured self-regulation and would only accept state regulation on the basis that it made its own proposals for such that regulation.

Benefits of alternate regulatory framework

Initiated reform in the religious sector

Arguably, the investigation and reports by the CRL have exposed the problems inherent in the religious sector, created public awareness about such malpractices and, in turn, prompted responses, counter-suggestions, and even the creation of committees (such as the Steering Committee) amongst various interest groups within the religious sector. While it has not provided a definitive, conclusive answer to the issues experienced within the religious sector, it has at the very least highlighted the need for some sort of intervention. It may thus still serve as a ‘springboard’ for reform in the religious sector.

Shortcomings of alternate regulatory framework and recommendations

(1) Considerations relating to form and content of the alternate recommendations

(a) Misinterpretation of the model

It is evident that the intention of the CRL in formulating the model has not been accurately reported and reflected, assuming that the responses provided by the interviewees were accurate. By way of example, the commissioner from the CRL indicated that malpractices of a criminal nature would not be subject to the regulatory model, but rather the existing laws in place that regulate conventional criminal malpractices. The report, however, does not make this clear.

Moreover, the commissioner said that the model would apply to those religious denominations whose existing regulations do not sufficiently satisfy the objectives of the proposed model, whereas the report explicitly indicates that the model applies to all religious denominations. Not only have discrepancies been noted between the CRL's intention and the CRL's report in relation to the operation of the model, but differences in the rationale for the implementation of the model have also been identified. One of the key criticisms in relation to the model put forward by the religious community is that it paves the way for too much state interference. Conversely, the commissioner maintains that the model was created to assist the religious community to regulate itself, calling it a self-regulatory model. The inconsistencies in the rationale and operations of the model illustrate that the model is not clearly and collectively understood either by its creators or by those to whom it is intended to apply. This would prove problematic, if implemented, as various religious denominations would implement the model based on their subjective interpretations, thereby defeating the purpose of an across-the-board regulatory model to curb incidents of malpractice within the religious sector.

(b) Administrative burden

The implementation of the CRL model presents a series of administrative challenges, which can be drawn from the *Prince* judgement regarding a religious-based exemption for cannabis. The personnel, guidelines and general set up of licensing and registering of religious leaders and institutions is a costly and administratively burdensome exercise. The CRL would need to develop a database of all religious leaders and institutions, which is administratively intensive and costly for the state. It entails locating and employing computer software teams to install the database and additional employees to administer the database. The employees administering the database also need to be trained to effectively run the database and to assist

Peer Review Committees where necessary. While it is not as administratively challenging to regulate in a public setting like a place of worship, it is going to prove to be more administratively challenging to regulate the informal, unorganised religious denominations such as Tibetan Buddhism, Hindu (Shaivism) and Traditional African Religion (Traditional African Healing) due to the lack of existing internal structures as opposed to the formal organised religious denominations. Thus, while the CRL model has brought to the fore a legitimate pressing issue within the religious sector and sought to address it, the financial and administrative implications associated with implementing the model for the state, the CRL and religious institutions constitute a significant barrier to its implementation and could well result in the model, in its present form, being unattainable to implement.

(2) Considerations relating to functionality and implementation of the alternate recommendations

(a) Minimal support from the religious sector

It is apparent that the religious community, as a collective, is dissatisfied with the suggested implementation of the CRL's proposed model of regulation. This is problematic as the model is aimed at regulating the religious sector. Due to the large-scale antagonism towards the model from the religious sector, it is likely that they will continue to contest it. There is a limited probability that they will enforce and abide by it, to the extent that they should, for it to be effective. While antagonism from the religious community is not a sufficient reason to discard the CRL model; public opinion remains a factor for consideration in any flourishing democracy. The widespread aversion towards the model by the CRL, in its present form, is therefore, sufficient reason for it not to be accepted.

(b) Minimal knowledge of the CRL

It is evident from the interviews that half of the interviewees had never heard of the CRL and/or had any personal dealings with them. The CRL is a Chapter 9 institution established to safeguard South Africa's democracy and to protect religious institutions from state overreach. Its objectives (in terms of the CRL Act) are aimed at, inter alia, promoting respect for the rights of cultural, religious, and linguistic communities; monitoring, investigating, researching, educating, lobbying, advising, and reporting on issues concerning the rights of cultural, religious, and linguistic communities; conducting programs to create a public understanding of the CRL and assisting in developing strategies that facilitate the full/active participation of communities. It is clear from the aforesaid that the CRL is intended to play an active, supportive, and facilitatory role in respect of religious communities. However, it is noteworthy that, despite the active, supportive role that the CRL is supposed to play in the lives of religious communities, only half of the interviewees had knowledge of its existence. While it could be argued that the response was based on a few participants selected from the religious sector and is, therefore, not an accurate representation of the relationship that religious leaders enjoy with the CRL; this does not detract from the point that most religious leaders in South Africa *should* have knowledge of the Chapter 9 institution which is intended to protect, promote, and support their communities.

Accordingly, the CRL ought to invest its energy and efforts into carrying out their functions listed in the CRL Act through, inter alia, developing support mechanisms that are easily accessible to victims of malpractices within religious communities and conducting educational programs to create awareness amongst all members of religious communities about the role of the CRL and the ways in which it can support and protect the religious community against malpractices. This could, in turn, serve as an anonymous 'helpline' for victims of religious malpractices and create an awareness among victims that alternate assistance, outside the ambit of their religious institution, exists. It could also educate religious communities, whether members or employees, about conduct that is constitutionally compliant or defiant. It could serve as a supportive and facilitatory body to religious communities to ensure that their conduct safeguards, rather than retards, the tenets of South Africa's constitutional democracy.

Analysis of current and alternate regulatory frameworks

Considering the aforesaid, it is apparent that both the existing and alternate regulatory frameworks contain both benefits and shortcomings, when assessed within South Africa's constitutional setting.

The existing regulatory framework, in principle, gives religious institutions sufficient leverage to exercise their constitutional religious freedoms and, at the same time, limits such freedoms in accordance with constitutional limitations. With the existing framework in place, which affords religious denominations a significant degree of autonomy in which to exercise their religious freedoms; many religious denominations have nonetheless, of their own accord, developed internal regulatory structures with an accompanying set of penalties to tackle malpractices that arise within their religious institutions. However, the many incidents of malpractice reported within the religious sector demonstrate that the implementation and enforceability of the existing regulatory framework is questionable.

Although one of the criticisms addressed to the CRL model is that its impact is disproportionate to the isolated number of malpractices within the religious sector, it is evident from the CRL's investigation and the media that incidents of malpractices within the religious sector are prevalent across established and non-established religious institutions and range from criminal malpractices to harmful acts and discriminatory practices. Condoning such malpractices, on the basis that they are limited in number, is arguably contrary to the tenets of South Africa's constitutional democracy which is committed to ensuring that human rights are protected and upheld for all people. The prevalence of malpractice within the religious sector undoubtedly violates people's human rights and is contrary to the intention and spirit of legislation which intends to protect human rights while, at the same time, affording religious freedom. As such, it is something that simply cannot be neglected.

The CRL has drawn attention to the lack of implementation and enforceability of the existing regulatory framework, and has exposed the problems inherent in the religious sector and the need to address them. However, the question is whether the model, in its present form, and any counter-responses to the model are constitutionally, legally and/or practically feasible in a South African setting.

The CRL has powers in terms of the Constitution and the CRL Act to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities; to report on matters that fall within its powers and functions to the South African Human Rights Commission for investigation; to make recommendations about existing legislation which impacts on communities; to establish and maintain databases of communities; to bring relevant matters to the attention of the necessary organ of state and where appropriate, to make recommendations to the organ of state.

It appears from the legislation that the intention is for the CRL to provide a facilitatory and supportive role to religious communities and to safeguard religious communities by ensuring that their rights are protected and upheld. The CRL also has an educational and advisory role, to educate communities regarding their rights and advising them where necessary. However, part of supporting religious communities, and ensuring that they are constitutionally safeguarded, involves the CRL having a monitoring and investigative role and being able to make recommendations about legislation which impacts on communities and, where appropriate, to the relevant organ of state. It is arguably in line with the CRL's monitoring and investigative role and ability to conduct an investigation into commercialisation of religion and to make recommendations in the report which contained the regulatory model and which was released to the public for their opinion. As such, the investigation, together with the release of the report, falls within the CRL's mandate. It was based on an investigation ultimately to protect religious communities.

When reviewing the contents of the model, it can undoubtedly be said that the CRL is directly involved in the regulatory process. In the revised model, it is considered the final arbiter in all matters relating to religious malpractice and its decisions can only be challenged through a High Court review, should the parties find the ruling to be unsatisfactory. While it can be accepted that the CRL intended to create a self-regulatory model, as both the Peer Review Committee and registered umbrella body for religious leaders are internal bodies for each religious denomination; should an issue arise that cannot be resolved within the religious denomination, the CRL would be approached. As such, the model is not entirely self-regulatory in nature nor is it free from CRL intervention. When considering the CRL's power in the revised model in relation to its legislative mandate, it does appear to be excessive. While it has a facilitatory, supportive, investigative, educational, and monitoring role, and the ability to make recommendations on existing legislation and to a relevant organ of state; the scope of this does not include being elevated to the level of a final arbiter in all matters relating to religious malpractice.

Moreover, when considering the theoretical framework, courts have shown a heavy reliance on, and respect for, internal regulations and longstanding doctrines of religious denominations. While it is uncertain whether the CRL's regulatory model was intended to have across-the-board application, as contained in the report, or only apply in the absence of internal regulations, as indicated by the commissioner; it is unlikely that it would be deemed satisfactory to impose a blanket regulatory model on all religious denominations and, in turn, disregard their internal regulatory mechanisms, which have been developed based on the practices, beliefs and doctrines of each religious denomination. Should it be the case that the model would be implemented, to varying degrees, based on the internal regulations in place, it would be a challenging exercise to determine which religious denominations require which parts of the model and who would be tasked with this exercise. This would surely result in a haphazard application of the model, which could lead to complications such as perceptive bias.

In essence, the CRL has conducted a necessary and useful investigation and exposed pressing issues, with far-reaching consequences, which need to be addressed. While the CRL was fully within their mandate to conduct the investigation and make recommendations as released in a report, the contents of the model are seemingly problematic in that the powers afforded to the CRL exceed their legislative mandate. The model is also not reflective of the fluidity and flexibility within the ambit of religion. The proposal of a blanket regulatory model across all religious denominations does not take into consideration the internal regulatory mechanisms which have been carefully thought out and implemented to cater for the specificities of each religious denomination. It also does not accord with the theoretical framework which illustrates the latitude that religious denominations have in acting autonomously and the courts' reliance on the internal regulatory mechanisms of the various religious denominations. The CRL also does not seemingly have the mandate or the requisite knowledge of the regulations of each religious denomination to adequately determine the extent to which the model should apply to each religious denomination, because the specificities, factors and circumstances governing internal regulatory mechanisms are not the same. Therefore, applying a uniform model disproportionately to various religious denominations is not ideal.

The model also presents a series of practical shortcomings which present significant challenges to the implementation of the model. These include: lack of interest group support, discrepancies in interpretation within the report, and the implementation being administratively burdensome for the CRL, the state and religious communities.

As such, it is necessary to consider whether there is an alternate that can achieve the desired outcome of reducing incidents of malpractice in a legally, constitutionally, and logistically feasible way.

The Steering Committee, which proposed that a uniform code of conduct should be put before parliament and to which all religious denominations would be bound, has merit in that it was drafted by members of religious denominations and, therefore, would be supported by them. It also has the effect of enforcing a code of conduct at a state/legislative level which infuses a level of accountability and enforceability for religious leaders and other employees within religious institutions who commit malpractices. By elevating the issue to a state level and beyond the confines of religious institutions, it creates a heightened awareness among society of the magnitude of the problem and, as a result, the need to address it via legislative means.

However, this proposal also presents a few problems. The code of conduct was formulated by a committee which primarily comprises members from religious denominations which form part of Christianity. As has been shown in this dissertation, South Africa has a multitude of religions. While Christianity is the dominant religion, a code of conduct of this nature should either be redrafted with representatives from religious denominations across South Africa, or the existing code be approved by them, to align with the tenets of representativity and ensuring that the religious denominations to which the code of conduct will apply are satisfied and have participated in the process. Moreover, it was understood from the empirical research that the code would have specific provisions. The interviewee gave the example of pastors not being allowed to feed parishioners snakes. The inclusion of specific provisions directed at specific acts could unjustifiably infringe on religious freedoms, more specifically, the right to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. Any person ought to be able to form, join and maintain a religious belief and institution without being unduly limited, however, there ought to be mechanisms in place to ensure that the formation of such beliefs and institutions do not tamper with people’s human rights. Therefore, a code of conduct should be drafted in a way that can regulate misconduct, which reduces malpractices, but at the same time, does not unjustifiably infringe on the religious freedoms of people.

Chapter 7

CONCLUSION

In conclusion, it can be said that ,while the CRL model in its present form is in some respects neither legally nor logistically feasible in a South African setting, the underlying rationale for the formation of the model and its desired effect remains pertinent. In an attempt to rectify the shortcomings of the existing and alternate regulatory frameworks, which seek to protect religious freedom while ensuring that such protection is not abused by tampering with people's rights; it is suggested that a standalone piece of legislation is put forward which is broad in nature, but which entrenches the commitment of religious leaders to reduce incidents of malpractice within the religious sector.

Arguably, the uniform code of conduct drafted by the Steering Committee, together with the code of best practice drafted by the CRL in response to the Steering Committee, could form the basis of such legislation. The legislation should include existing regulations, obligations, and penalties for contravening regulations, as contained in various pieces of current legislation, which relate to the protection against diverse malpractices within the religious sector. Such an inclusion would assist members of the religious sector because it would constitute a single, accessible reference point for them. It would also make it more challenging to plead ignorance of the laws relating to the religious sector.

Additional inclusions in the standalone legislation could be a clause which requires all religious denominations to draw up their own written constitutions and book of rules. This could contain internal regulations for the various malpractices and the penalties for contravening such regulations in each religious denomination. The written constitutions and book of rules should be easily accessible to all members.

The legislation should also make provision for compulsory notification of the CRL when forming a religious institution so that it can keep an updated database of all religious institutions in South Africa This is entirely in accordance with the CRL's legislative mandate and, at the same time, addresses the issue of Worship Centres operating without anyone's knowledge. While registering and licensing of religious leaders and institutions serves a legitimate purpose, its administrative burden arguably outweighs its purpose.

Moreover, the standalone legislation should also document general principles in relation to malpractices that have applicability to all religious denominations. In the event of there being a statutory obligation on a religious leader or institution to act in a certain way, no deviation from such obligation should be tolerated, and no doctrine nor internal regulation should take precedence. While scholars have acknowledged the role of religion in the South African state and the importance that South Africans, the state and law attach to religion; South Africa is a secular state in which the rule of law and the policy enjoy primacy over religion, and such a principle ought to be invoked in this instance. When dealing with common law offences, religious denominations ought to be able to rely on their internal regulations but, at the same time, should have a concurrent obligation to adhere to the laws proscribed in terms of the criminal justice system, whether they deem it necessary or not. Once again, while one seeks to protect religions and their internal regulations from undue interference, it cannot be at the expense of the South African legal system which enjoys primacy over religion. The call is to ensure that citizens are sufficiently protected, especially in criminal-related malpractices. Failure to provide such oversight will inevitably cause irreparable harm to the victim/s of religious malpractices and will compromise the public interest and public policy.

Further to the standalone legislation, existing legislation that is vague ought to be amended so that there is clarity as to whether provisions have applicability to religious leaders and institutions. Such an amendment strengthens the enforceability of laws.

In addition, the CRL ought to be committed to making itself and its role known in religious communities. It should be required to conduct programs to educate the community on the rights and laws that have application to them and the circumstances under which they can be invoked. It should aim to dispel the stigma associated with reporting malpractices to ensure that people's constitutional rights are safeguarded in the religious sector and to create an increased knowledge of these rights among people within the religious sector. The CRL also needs to implement measures to reflect its mandated supportive role to religious communities. This may include but not be limited to developing meaningful ways to serving a source of psychological assistance and remedial advice to victims of malpractice who fear reporting incidents of malpractice.

These recommendations are by no means the final answer to a debate that has spanned decades and been explored by notable academics, professors, and the like. However, they bring to the fore the unfortunate reality that the religious sector is currently facing a mounting, prevailing problem which threatens inalienable human rights and, in turn, our constitutional democratic society. As has been illustrated, no single framework nor proposal alone is sufficient to solve the problem which the religious sector is facing.

While acknowledging that this is work-in-progress and a multifold problem, due consideration of the benefits and shortcomings of all proposals put forward in light of the existing religious and legal frameworks, should be assistive in enabling us to step a little closer to creating a religious sector which aligns with our constitutional democracy to a greater extent.

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"A"

Interview Schedule (Religious leaders)

Sample Introduction

Good morning/afternoon.

Thank you for accommodating my request for an interview relating to my research project. I am most appreciative of your time and input and am assured that these will contribute meaningfully to my project.

The format of the interview consists of 24 questions and is scheduled to last an hour-and-a-half. It is structured as a question-answer type response.

The overall purpose of the interview is to gain an insight into prevailing regulatory mechanisms within your religious group when incidents of malpractice arise, and to ascertain the nature of the relationship between your religious group and constitutional bodies such as the CRL.

All the questions which follow are premised to relate specifically to your religious context and within your capacity in your religious context. You may refuse to answer any question/s which you do not wish to answer and may withdraw from the interview anytime during or after it without incurring any penalty.

Sample Interview Questions

1. Can you outline the basic procedure for handling formal complaints in your religious institution in the event of a malpractice arising?

2. Is the complaints procedure documented and if so, where?

3. Is the complaints procedure publicized and if so, how?

4. What would be the recourse if a religious leader in your community sexually assaulted an adult member of your community?

5. What would be the recourse if a religious leader in your community sexually assaulted a minor in your community?

6. What would be the recourse if a religious leader in your community deposited money intended for the maintenance of your religion into his/her personal bank account?

7. What would be the recourse if a member of your community asked a religious leader in your community to pray for one of his family members and the religious leader refused to do so unless the member paid the religious leader R500?

8. What would be the recourse if a religious leader in your community expressed that they were homosexual after serving as a religious leader in your community for a period of 5 years?

9. What would be the recourse if a female applied to be a religious leader in your community?

10. What would be the recourse if a religious leader in your community advised community members to engage in activities that have negative effects on their health?

11. What would be the recourse if a religious leader in your community promised the members of your community that if they contribute half of their annual earnings to the religious community, their wealth and blessings will multiply?

12. What would be the recourse if it was found out that a religious leader who had been serving your community for the past 10 years had evaded his/her tax obligations?

13. In the event of the procedures prescribed within your religion not being successful in rectifying the malpractice in question, what subsequent steps would you take, if any?

14. In the event of the procedures prescribed within your religion not being fully complied with to address a malpractice, what would be the consequences, if any?

15. Are all of the aforementioned recourse measures documented and if so, where?

16. Are all of the aforementioned recourse measures publicized and if so, how?

17. What do you consider to be 3 key areas of weakness when evaluating your regulatory mechanisms and procedures as a whole?

18. Under what circumstances, if any, would you refer a matter brought to you to the police?

19. What is your opinion on police and court intervention in matters relating to religious malpractice?

20. Under what circumstances, if any, would you refer a matter brought to you to a constitutional body like the CRL?

21. What is your opinion on the CRL's intervention in matters relating to religious malpractice?

22. Are you satisfied that the existing procedures of regulation ensure both constitutional compliance and the prevention of malpractice within your religion? Why/why not?

"B"

Interview Schedule (CRL)

Sample Introduction

Good morning/afternoon.

Thank you for accommodating my request for an interview relating to my research project. I am most appreciative of your time and input and am assured that these will contribute meaningfully to my project.

The format of the interview consists of 11 questions and is scheduled to extend over an hour-period. It is structured as a question-answer type response.

The overall purpose of the interview is for me to gain an understanding of the alternative model to regulating religious leaders and institutions proposed by the CRL in the report released on commercialisation of religion, and the relationship that exists between the CRL and religious groups. You may refuse to answer any question/s which you do not wish to answer and may withdraw from the interview anytime during or after it without incurring any penalty.

Sample Interview Questions

1. What are the key objectives of the alternative model to regulation formulated by the CRL?
2. Which groups are you predominantly targeting in the formulation of the model – religious leaders, religious institutions, the perpetrators of the acts of malpractice and/or the victims of the malpractice?
3. Do you think that the implementation of the model is logistically feasible? Why/why not?
4. Do you think that the implementation of the model would in any way tamper with the rights to religious freedom granted to religious leaders, institutions and individuals in the Constitution? Why/why not?
5. Do you think that the model should have uniform applicability to all religious groupings in South Africa? Why/why not?
6. Do you think that the formulation of the model is part of your mandate as a constitutional body? Why/why not?

7. Can you please explain why you have used peer-review mechanisms in the model?

8. If you had to change any aspects of the model, what would they be? Why would you suggest such changes?

9. Do you work in conjunction with religious leaders and institutions and if so, under what circumstances?

10. Do you work in conjunction with the courts and if so, under what circumstances?

11. Has the CRL responded to prevailing critiques of the model, as reflected in the final report on commercialisation of religion? If so, in what ways?

"C"

UNIVERSITY OF THE
WITWATERSRAND,
JOHANNESBURG

15 November 2019

Dear Sir/Madam,

My name is Yvonne Attieh. I am currently registered as a full-time Masters in Law (by Dissertation) student at the University of the Witwatersrand. The degree requires me to develop and present a dissertation on a chosen field of interest. The title of my dissertation is 'Preaching Forgiveness or Regulating the Unforgivable? Benefits and shortcomings of proposed regulatory mechanisms for religious leaders in South Africa'.

The research is intended to understand and analyse existing and alternative proposed regulatory mechanisms aimed at combatting malpractices within religious institutions. The research also plans to develop a number of recommendations which will serve to explain as to how the prevailing regulatory framework may be amended (if necessary) to better align with constitutional rights and values.

The success of my research is significantly dependent on gaining a detailed account of the prevailing internal regulatory mechanisms and procedures within various religious groups, as well as the nature of the relationship between religious groups and constitutional bodies such as the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL). Such information will enable me to understand the regulatory frameworks across different religions, and in turn make recommendations as to how and whether the prevailing regulatory frameworks can, or should, be adjusted.

In light of the above, I invite you to take part in my study as a representative of your religious group. Participation would take the form of a semi-structured interview, estimated to last approximately an hour and a half, and carried out within the precinct of your religious premises (provided that a meeting room is available to ensure confidentiality). I would like to record the interview using a digital device solely as a point of reference when drafting my dissertation, but will only do so provided that you consent to the recording.

Your participation in my study is entirely voluntary. You will receive neither direct benefits nor penalties for participation or non-participation. You may withdraw from the interview at any time before, during or after the interview without penalty and may refuse to answer any question during the interview without incurring any penalty.

Your participation in my study is also anonymous and confidential. All information will at all times only be worked with by me and held securely by me. I will lock away my recording device in a cabinet to which nobody else has access to but me after the interview. I will delete the interview recording from my recording device as soon as I have uploaded it onto the cloud of my password protected computer. All documents saved on my computer will be password protected and all hard copy documents will be locked away in a place to which nobody else has access to but me. No personal identifying information of yours will be disclosed to anybody or in my dissertation. I will only make use of the religious group to which you are affiliated to represent the information you provide me with in my dissertation. I will also use participant identification numbers, instead of participation names on all documents and recordings relating to the interview.

My study will be written up as a dissertation which will be made available on the University of the Witwatersrand's library website. My study may also be made available in academic journals/papers, should it be published and at seminars/conferences, should it be presented.

Should you have any questions before, during or after the interview about my research, please do not hesitate to contact either me or my supervisor on the contact details provided below. Should you wish to receive a summary of my research, please indicate so to me via the contact details presented below. Should you have any concerns or complaints regarding the ethical procedures used in my study, please contact the Human Research Ethics Committee (Non-Medical) at the University of the Witwatersrand. Their details are as follows:

Shaun Schoeman
Shaun.schoeman@wits.ac.za
(011) 717-1408

Charmaine Khumalo
Charmaine.khumalo@wits.ac.za
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Yours sincerely,

Yvonne Attieh

Contact details

Yvonne Attieh (researcher)
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Professor Catherine Albertyn (supervisor)
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0832673675

"D"

UNIVERSITY OF THE
WITWATERSRAND,
JOHANNESBURG

15 November 2019

Dear Sir/Madam,

My name is Yvonne Attieh. I am currently registered as a full-time Masters in Law (by Dissertation) student at the University of the Witwatersrand. The degree requires me to develop and present a dissertation on a chosen field of interest. The title of my dissertation is 'Preaching Forgiveness or Regulating the Unforgivable? Benefits and shortcomings of proposed regulatory mechanisms for religious leaders in South Africa'.

The research is intended to understand and analyse existing and alternative proposed regulatory mechanisms aimed at combatting malpractices within religious institutions. The research also plans to develop a number of recommendations which will serve to explain as to how the prevailing regulatory framework may be amended (if necessary) to better align with constitutional rights and values.

The success of my research is significantly dependent on gaining an understanding of the meaning, functionality and practicalities associated with the alternative model to regulating religious leaders and institutions proposed by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL) in a report released by the CRL on commercialisation of religion, and the relationship that exists between the CRL and religious groups. Such information will enable me to understand the proposed alternative model and the dynamic between the CRL and religious groups, which will in turn assist me in making recommendations as to how and whether the proposed alternative model can, or should, be implemented and/or adjusted.

In light of the above, I invite you to take part in my study as a representative of the CRL. Participation would take the form of a semi-structured interview, estimated to last approximately an hour, and carried out at the offices of the CRL in Braampark. I would like to record the interview using a digital device solely as a point of reference when drafting my dissertation, but will only do so provided that you consent to the recording.

Your participation in my study is entirely voluntary. You will receive neither direct benefits nor penalties for participation or non-participation. You may withdraw from the interview at any time before, during or after the interview without penalty and may refuse to answer any question during the interview without incurring any penalty.

Your participation in my study is also anonymous and confidential. All information will at all times only be worked with by me and held securely by me. I will lock away my recording device in a cabinet to which nobody else has access to but me after the interview. I will delete the interview recording from my recording device as soon as I have uploaded it onto the cloud of my password protected computer. All documents saved on my computer will be password protected and all hard copy documents will be locked away in a place to which nobody else has access to but me. No personal identifying information of yours will be disclosed to anybody or in my dissertation. I will only make use of the phrase 'Commissioner from the CRL' to represent the information you provide me with in my dissertation. I will also use a participant identification number, instead of your name on all documents and recordings relating to the interview.

My study will be written up as a dissertation which will be made available on the University of the Witwatersrand's library website. My study may also be made available in academic journals/papers, should it be published and at seminars/conferences, should it be presented.

Should you have any questions before, during or after the interview about my research, please do not hesitate to contact either me or my supervisor on the contact details provided below. Should you wish to receive a summary of my research, please indicate so to me via the contact details presented below. Should you have any concerns or complaints regarding the ethical procedures used in my study, please contact the Human Research Ethics Committee (Non-Medical) at the University of the Witwatersrand. Their details are as follows:

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(011) 717-1408

Charmaine Khumalo
Charmaine.khumalo@wits.ac.za
(011) 717-1788

Yours sincerely,

Yvonne Attieh

<u>Contact details</u>

Yvonne Attieh (researcher)
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Professor Catherine Albertyn (supervisor)
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"E"

C R L
Rights
Commission

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

33 Hoofd Street Forum IV, Braampark
Braamfontein, Johannesburg
Private Bag X 90 000, Houghton, 2041

Tel. 011 358 9100
Fax. 011 403 2098
www.crlcommission.org.za

Date: 28 August 2019

Attention Ms Yvonne Attieh

Email: 714215@students.wits.ac.za

Dear Ms. Attieh

Re: REQUEST FOR PERMISSION TO CONDUCT INTERVIEWS WITH THE CRL RIGHTS COMMISSION CHAIPERSON/COMMISSIONERS REGARDING ITS CONSTITUTIONAL MANDATE ON THE PROTECTION & PROMOTION OF RELIGIOUS COMMUNITIES

This letter serves to inform you that your request for permission to conduct interviews with the CRL Rights Commission regarding its constitutional mandate on the protection and promotion of religious communities has been granted.

The Commission will request you to sign the declaration form to assure that under no circumstances you will disclose the confidential information to unauthorised people including the media.

Please provide the Commission with the schedule and timeframes pertaining to your interviews.

For more information, please do not hesitate to contact the Chief Executive Officer on 083 613 1790 or email: eddie@crlcommission.org.za

Yours Sincerely

Mr. TE Mafadza
CEO: CRL Rights Commission

"F"

Consent form (Religious leaders)

I agree to participate in Yvonne Attieh's study, which forms part of her dissertation entitled 'Preaching forgiveness or regulating the unforgivable? Benefits and shortcomings of proposed regulatory mechanisms for religious leaders in South Africa.'

Please indicate your response by way of a **tick** under the YES **or** NO column for **each** of the statements below:

	Statement	**YES**	**NO**
1.	The researcher has provided me with a brief description of her research, which I fully understand.		
2.	The researcher has provided me with the objectives of her research, which I fully understand.		
3.	The researcher has provided me with reasons for conducting her research, which I fully understand.		
4.	The researcher has clearly explained the value that conducting an interview with me will add to her research, which I fully understand.		
5.	The researcher has clearly explained the reason for selecting me as an interviewee as part of her study, which I fully understand.		

By participating in this study, I agree to the following (please indicate your response by way of a **tick** under the YES **or** NO column for **each** of the statements below):

	Statement	**YES**	**NO**
1.	To be interviewed by the researcher for approximately an hour and a half within the precinct of my religious premises (provided that a meeting room is available to ensure confidentiality).		
2.	For the researcher to record the interview using a digital device solely for ease of reference when drafting her dissertation.		
3.	For my participation in the study to remain anonymous and confidential.		
4.	For only the religious group to which I am affiliated to be used to represent the information I provide the researcher with in her dissertation.		

Signed by ____________________ (full name) on this ______ (day) of ____________ (month) 2019 at ____________________ (place).

____________________(signature)

Researcher: Yvonne Attieh

____________________ (signature) ____________________ (date)

"G"

Consent form (CRL)

I agree to participate in Yvonne Attieh's study, which forms part of her dissertation entitled 'Preaching forgiveness or regulating the unforgivable? Benefits and shortcomings of proposed regulatory mechanisms for religious leaders in South Africa.'

Please indicate your response by way of a **tick** under the YES **or** NO column for **each** of the statements below:

	Statement	**YES**	**NO**
1.	The researcher has provided me with a brief description of her research, which I fully understand.		
2.	The researcher has provided me with the objectives of her research, which I fully understand.		
3.	The researcher has provided me with reasons for conducting her research, which I fully understand.		
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5.	The researcher has clearly explained the reason for selecting me as an interviewee as part of her study, which I fully understand.		

By participating in this study, I agree to the following (please indicate your response by way of a **tick** under the YES **or** NO column for **each** of the statements below):

	Statement	**YES**	**NO**
1.	To be interviewed by the researcher for approximately an hour at the offices of the CRL in Braampark.		
2.	For the researcher to record the interview using a digital device solely for ease of reference when drafting her dissertation.		
3.	For my participation in the study to remain anonymous and confidential.		
4.	For the phrase 'Commissioner from the CRL' to be used to represent the information I provide the researcher with in her dissertation.		

Signed by ______________________________ (full name) on this ______ (day) of

______________ (month) 2019 at ______________________________ (place).

______________________(signature)

Researcher: Yvonne Attieh

______________________ (signature) ______________________ (date)