THE CANON LAW FRAMEWORK FOR ARBITRATION OF DELICTUAL DISPUTES IN THE ROMAN CATHOLIC CHURCH OF SOUTH AFRICA: A CRITICAL AND COMPARATIVE STUDY

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CERTIFICATION

This is to certify that the dissertation *The Canon Law Framework for Arbitration of Delictual Disputes in the Roman Catholic Church of South Africa*: *A critical and comparative study*, submitted in fulfillment of the requirement of a Doctoral degree in Theology, is my original research and has never been submitted to any other university.

DATE:

ABSTRACT

In his analysis of conflict resolution in the church sector, Professor Coertzsen (1998:69) points out that disputes occur also within the churches. While some of the disputes are purely doctrinal, others fall into the category of civil disputes. Professor Rik Torfs in an article (1998:27) observes that the Catholic Church is increasingly becoming a site of civil dispute. These include delict claims. Examples of these are: financial loss as a result of unfair suspension or dismissal from a clerical position; financial loss or loss of reputation resulting from unfair dismissal from a religious congregation; damage to a child or adult arising from being sexually abused by a priest or religious or lay person.

When delictual disputes occur, state courts have civil jurisdiction over them. At the same time, the South African Arbitration Act 42 of 1965 allows the parties to a delictual dispute to arbitrate their case as an alternative to civil litigation. This trend is gaining currency in the post-apartheid South Africa. In principle, therefore, church members may refer their delictual disputes for arbitration, instead of entering into civil litigation. Church members, thus, have the choice to have their case arbitrated, and church leaders need to make it clear to members that they also have the right to bring their case to the state courts.

This study highlights the need for the churches to have an office of conflict resolution. The office may then advise church members who have a delictual dispute on the options available to them. The office may have a list of lawyers (Christian lawyers) who are willing and able to arbitrate on matters referred to them by other Christians. When the parties decide to have their delictual case arbitrated by lawyers, the determination as to whether a person is legally liable for damage repair requires a legal framework. Unlike the situation in civil litigation, the parties who opt for arbitration have the freedom to decide on the legal framework that the arbitrator should use in determining liability. Catholic Church members who are parties to a dispute may, for example, jointly agree that the arbitrator employ the internal law of the Catholic Church, namely the canon law framework.

This study envisages a situation where the parties have jointly agreed to the employment of canon law for the arbitration of their case. When the disputants and the arbitrators engage in discussion and decide on whether to use canon law, they need to ask themselves the following questions:

(1) What principles and rules of law has canon law established for the determination of the issue at dispute?

(2) How do the standards of justice in canon law differ from those in secular law? What provisions invoked by the arbitrators would result in gross injustice to the claimant?

(3) If the provisions of canon law would result in gross injustice to the claimant, the church members who are parties to a dispute may choose to rectify and supersede the limitation inherent in canon law. The question arises: to what provisions in secular law are the arbitrators and Church members able to resort to compensate for the limitations of canon law?

(4) How do the standards of justice in canon law differ from Biblical standards? To what biblical messages might the arbitrators and the church members resort to overcome the limitations in canon law ?

While recognising the value of the fourth question, this study limits itself to the first three. It is hoped that future studies will address the fourth question. The present study attempts to answer the first three questions by means of a critical comparative analysis of the framework that canon law has established for determining the various possible issues at dispute. In the study it is argued that the employment by an arbitrator of some of the provisions in canon law would result in gross injustice. The disputants need to take note of these before they mandate the arbitrator to apply canon law in their case.

OPSOMMING

In sy analise van konflikoplossing in die kerk, wys professor Coertzen (1998:69) daarop dat geskilpunte ook binne kerke plaasvind. Terwyl sommige hiervan suiwer leerstellig is, ressorteer ander onder die kategorie van siviele dispute. In 'n artikel verwys Professor Rik Torfs (1998:27) daarna dat die Katolieke Kerk toenemend 'n plek van siviele dispuut word. Hieronder word onregmatige eise ingesluit . Voorbeelde hiervan sluit in: finansiële verlies as gevolg van onregverdige skorsing of afdanking van 'n geestelike pos; finansiële verlies of verlies aan reputasie wat spruit uit onregverdige ontslag van 'n godsdienstige gemeente; skade aan 'n kind of volwassene wat spruit uit seksuele mishandeling deur 'n priester, 'n godsdienstige of leke persoon.

Wanneer onregmatige dispute plaasvind, het staatshowe siviele jurisdiksie daaroor. Terselfdertyd laat die Suid-Afrikaanse Arbitrasie Wet 42 van 1965 toe dat partye tot 'n onregmatige dispuut hul saak kan laat arbitreer as 'n alternatief tot siviele litigasie. In Suid-Afrika het hierdie neiging toegeneem in die postapartheid era. Dus, in prinsiep, mag kerklidmate hul onregmatige dispute verwys vir arbitrasie, in plaas daarvan om hul te wend tot siviele litigasie. Dus het kerklidmate die keuse om hul sake te laat arbitreer, en kerk leiers moet dit aan lidmate duidelik stel dat hulle ook die reg het om hul sake na die staaathowe te neem.

Hierdie studie bring die noodsaaklikheid na vore die vir kerke om 'n kantoor te hê vir konflik-beslegting. Die kantoor mag dan kerklidmate wat 'n onregmatige dispuut het adviseer aangaande die alternatiewe wat vir hulle beskikbaar is. Die kantoor mag 'n lys hou van Christelike prokureurs wat gewillig en bevoeg is om te arbitreer oor sake wat deur ander Christene na hulle verwys word. Wanneer die partye besluit om hul onregmatige saak deur prokureurs te laat arbitreer, het die vasstelling of 'n persoon wetlik aanspreeklik is vir reparasie van skade 'n wetlike raamwerk. Anders as in die geval van siviele litigasie, het die partye wat besluit op arbitrasie die keuse om te besluit watter wetlike raamwerk die arbiter moet gebruik om aanspreeklikheid vas te stel. Lidmate van die Katolieke Kerk, wat partye tot 'n dispuut is, mag, by voorbeeld, gesamentlik besluit dat die arbiter die interne reg van die Katolieke Kerk gebruik, naamlik die kanonieke regsraamwerk.

Hierdie studie beoog 'n situasie waar die partye gesamentlik besluit het om die kanonieke reg vir die arbitrasie van hul saak te gebruik. Wanneer die disputante en die arbiters in gesprek tree en besluit of die kanonieke reg gebruik sal word, moet hulle hulself die volgende vrae afvra:

(1) Watter prinsiepe en reëls van die reg het die kanonieke reg ingestel om die saak van dispuut wat ter sprake is, te bepaal?

(2) Hoe verskil die standaarde van die reg in kanonieke reg van dié in burgerlike reg? Watter voorsienings ingestel deur die arbiters sou uitvloei in erge onreg aan die eiser?

(3) As die voorsienings van die kanonieke reg sou lei tot erge onreg aan die eiser, mag die kerklidmate, wat partye tot die dispuut is, kies om in die kanonieke reg die beperkings reg te stel en te vervang. Die vraag ontstaan: na watter voorsienings in die kerklike reg kan die arbiters en kerklidmate verwys om te vergoed vir die beperkinge van die kanonieke reg?

(4) Hoe verskil die standaarde van die reg in kanonieke reg van die bybelse standaarde? Na watter bybelse boodskappe mag die arbiters en die kerklidmate verwys om die beperkinge in die kanonieke reg te oorkom?

Terwyl die waarde van die vierde vraag erken word, word hierdie studie beperk tot die eerste drie. Daar word gehoop dat toekomstige studies die vierde vraag sal aanspreek. Die huidige studie poog om die eerste drie vrae te beantwoord deur middel van 'n krities-vergelykende analise van die raamwerk wat die kanonieke reg ingestel het om verskeie moontlike sake van dispuut vas te stel. In hierdie studie word aangevoer dat die indiensneming deur 'n arbiter van sommige van die voorsienings van kanonieke reg sou kon lei tot erge onreg. Die disputante moet kennis neem hiervan voordat hulle die arbiter die mandaat gee om die kanonieke reg in hul geval toe te pas.

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CHAPTER ONE: GENERAL INTRODUCTION

1.1 THE NATURE OF THE STUDY

This study provides a critical comparative analysis of the principles and rules of law that canon law in the Roman Catholic Church has established to determine whether a respondent is liable for repairing damage. It envisages a situation where the disputants who are church members seek to arbitrate their case by applying canon law. As the disputants and the arbitrator examine the suitability of canon law as an applicable rule of law, one of the criteria is whether a grave injustice would be done by applying canon law. This study, therefore, examines the capacity of the rules of law in canon law to provide justice and protect the rights of the disputants when used by an arbitrator as a sole tool for determining delictual liability. In this analysis canon law is compared with state law in South Africa. Hence the title of the study: *The Canon Law Framework for Arbitration in the Roman Catholic Church of South Africa: A Comparative Study*. In the study it is argued that, since a gross injustice would sometimes result when canon law is applied as a rule of law in arbitration, arbitrators and disputants seeking to apply canon law to their case need to know the possible inadequacy of canon law for delivering justice. This chapter states the problem, offers a hypothesis, describes the methodology and outlines the study.

1.2 PROBLEM FORMULATION

1.2.1 MAIN PROBLEM: CANON LAW FRAMEWORK FOR DELICTUAL CLAIMS

In his analysis of conflict resolution in the church sector, Professor Coertzen has pointed out that disputes occur also within the churches. He says : "Conflicts, mutual differences, complaints about fellow Congregationalists, dissatisfaction with decisions taken by Church meetings are all part of the Church's existence. These issues also occur in all sections of the Church: between members themselves, between members and office-bearers, between office-bearers, between Church assemblies, from Church commissions as well as between commissions themselves. This is not to say that these conflicts are what the Church consists

of – far from it. But they are realities in the existence of any Church that have to be taken into account." (1998:69) It should be noted that, while some of the disputes in the churches are purely doctrinal, others are civil disputes.

In an article, Professor Rik Torfs (1998:27), for example, observes that the Catholic Church is increasingly becoming a site of civil dispute.[1] [2] Such disputes include, amongst others, delict claims, which are the concern of this study. Examples are: financial loss resulting from unfair suspension or dismissal of members of the clergy: financial loss or loss of reputation resulting from unfair dismissal from a religious congregation; damage to a child or adult as a result of being sexually abused by a priest or other religious or a lay person.

When delictual disputes occur, state courts have civil jurisdiction over them. At the same time, the South African Arbitration Act 42 of 1965[3] allows the parties to a delictual dispute to arbitrate their case as an alternative to civil litigation. The trend to arbitration is gaining currency in post-apartheid South Africa (Scharf and Nina 2000:10). In principle, therefore, church members involved in delictual dispute may refer their dispute for arbitration, instead of resorting to civil litigation. Church leaders should make it clear to members that they have the right to choose whether to take their case to the state courts or to have it arbitrated.

This study highlights the need for the churches to have an office of conflict resolution that may advise members who have a delictual dispute on the options available to them. The

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1 The nature and forms of delictual disputes arising within the domain of the Catholic Church are listed and discussed in chapter three.

2 The Church is also becoming a site of criminal justice disputes. Some of the acts in the Church sector constitute both a delict and a crime in terms of the state law. The focus in this paper is, however, on the delictual and not the criminal component of such acts. Since crime belongs to the domain of public law, the Church arbitration tribunal is not vested with criminal jurisdiction. The outcome of a criminal justice dispute, namely the determination of guilty and the appropriate sentences, requires the employment of the criminal justice system in the state law.

3 Unlike state law, the internal regulatory regime in the Catholic Church, known as canon law makes provision for arbitration (*compromissum in arbitros*) as an internal dispute resolution mechanism in the Catholic Church. Canon 1713 of the 1983 Code of Canon Law, for example, stipulates: in order to avoid judicial disputes, settlement or reconciliation can profitably be adopted, or the controversy can be submitted to the judgment of one or more arbiters.

office needs to have a list of lawyers (Christian lawyers) [4] who are willing and able to arbitrate matters referred to them by other Christians. When the parties decide to have their delictual case arbitrated by Church lawyers, the determination of whether a person is legally liable for damage repair requires a legal framework. Contrary to what is the case in civil litigation, the parties involved in arbitration are free to choose the legal framework for the arbitrator to use in determining liability. Parties to a dispute who are members of the Catholic Church can, for example, jointly agree that the arbitrator employ the internal law of the Catholic Church, namely canon law. [5]

This study envisages a situation where the parties have jointly agreed to the employment of canon law as a framework for the arbitration of their case. When the disputants and arbitrators consider whether to use canon law, they need to ask themselves the following questions: (1) What principles and rules of law has canon law established for the determination of the disputed issue? (2) How are the standards of justice in a canon law framework different from the standards in secular law? Do they allow for the protection of rights and delivery of justice? What provisions invoked by the arbitrators would result in gross injustice to the claimant? (3) If the provisions in canon law would result in gross injustice to the claimant, the church members who are parties to a dispute can choose to supersede the limitation inherent in the canon law framework. Hence the question: What secular law provisions can the arbitrators and the Church members resort to overcome the limitations of canon law ? These three questions constitute the main problem of this study.

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4 Besides resorting to canon law and state law, it is important to provide a theological justification of an arbitration process conducted by a Christian lawyer. For Coriden (1986:70), such justification is found in the Biblical passages that call for internal mechanisms for the resolution of disputes in ecclesial communities.

5 The internal regulatory regime of the Catholic Church has two codes of canon law, namely the Latin Code (hereinafter designated as the 1983 code) and the Eastern code. The Catholic Church in South Africa is largely regulated under the 1983 code and it is, therefore, to this code that this study refers.

1.2.2 SUB-PROBLEM ONE: PRINCIPLES OF DELICTUAL LIABILITY IN CANON LAW

One of the important elements in a substantive framework for the determination of delictual claims is the principle of delictual liability. This requires further elucidation. The principles of delictual liability should be understood against the background of the nature and purpose of a delictual system. The delictual system in Church law creates a legal duty that the one who has caused damage to another repair that damage.[6] Various authors have inserted this legal duty into the theological framework. In his article on the transposition of the law of delict in secular law into the Church law, Folmer (1984:64) has, for example, placed the law of delict within the framework of the Gospel demands of love. The law of delict in the Church is not grounded in the individualistic need to provide an absolute protection of private interests against the intrusion of others, but in the Gospel's demands of love. "In the spirit of evangelical charity, one must not damage the interests of others. *Alterum non laedere*"(ibid.). The major purpose of the law of delict in the Church is, therefore, to provide a legal environment in which the parties who have wronged and harmed each other will forgive and be reconciled to each other.[7] The legal duty to repair damage is to be understood against this functional background.

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6 The incorporation of the law of delict in canon law is an innovation that emerged with the promulgation of the 1983 code. The previous code, the code of 1917, did not have a canon that regulated delicts within the Church. During the draft process of the 1983 code, the absence of the law of delict in the 1917 code was considered an anomaly that needed to be overcome. William Onclin, the chairperson for the draft commission on the revision of general norms, therefore, announced in 1974 that "the obligations of making amends for the infliction of damage caused by a juridical act or indeed by any other act is affirmed in the proposed revised law. Such a prescription is lacking in the law of the Code on juridical acts, and it seemed to the consultors to be definitely necessary." (cited in *Communicationes*, 6, 1974:103)

7 Another author, Krukowski (1986:231) has employed the notion of the common good as a theological basis for the justification in the Church of the legal duty to repair damage. The injury to an individual within the Church sector is an affront against the common good of the Church institution. "In the atmosphere of the growing consciousness of the Church about herself as a community of the people of God and about subjective rights belonging to all Christians, it became clearer that damage done to one member of the Church community at the same time violates the common good of the whole community. That is why this damage must be repaired." (ibid.) One also needs to have regard to the attempt of secular law to base the law of delict on the demands of the Gospel. Lord Atkin's

The legal duty to repair damage gives rise to a corresponding right, the right of the prejudiced party to claim compensation for the damage caused to his or her interests (Neethling et al. 2001:3;Van Der Walt and Midgley 1996:2; Simmermann 1990). The focus in this study is, however, on legal duty, without minimising the notion of right. The notion of the duty to repair damage is, however, not absolute. Maintaining a harmonious balance of interests in the Church, does not require that every harm inflicted calls for a legal duty to repair that harm. This is where the principles of delictual liability play a vital role.

The principles of delictual liability seek to provide minimum requirements[8] respectively for a respondent to become a bearer of the legal duty to repair and for the claimant to become a bearer of the legal right to compensation. According to Neethling et al (2001:3) the principles of delictual liability "determine the circumstances in which a person is obliged to bear the damage he has caused another or, in other words, when he may incur civil liability for such damage." The principles of delictual liability answer questions such as these: When is the person who has allegedly caused harm to another legally responsible for repairing the damage? In the cases of damage, who must bear the loss? Should it be the wrongdoer or the aggrieved party?

"Neighbour Principle", for example, makes the Gospel's demands of love a ground for the negligence test in the law of delict. "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. (Foreseeability) Who, then, according to the law is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act (Proximity) that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[8] Krukowski (1986:26) has rightly argued that, in the Church domain, what is provided in the law of delict is merely a minimum requirement. The demands of love and reconciliation require that one goes beyond the minimum requirements. This study, however, since it addresses itself to the legal duty to repair damage, focuses on the minimum requirements, and not on the moral duty that arises from the demands of love and reconciliation to repair damage.

This brings us back to the principles of delictual liability for the resolution of the delictual claims in the substantive framework. In the context of a trial or arbitration, the principles of delictual liability, therefore, provide a core element of the substantive framework within which the disputants present and defend their claims. To elucidate this point: a claimant filing a claim before an arbitration forum needs to file it in such a way that it has not only a factual but also a legal basis. This also applies to the respondent's response to the claim. The principles of delictual liability provide a fundamental legal basis both for claims for damages and for defence. The principles provide a legal framework within which the disputants present their claims and defence. The legal framework also informs the arbitral hearing, including the determination of issues at dispute, the terms of reference, the arguments in the case and the determination of delictual liability (Finsen 1993:190-191).

In the domain of canon law, the principles of delictual liability are delineated in canon 128. If the disputants and arbitrator choose canon law as the source of the standard substantive framework for their case, canon 128 will form a core provision in the substantive framework. The canon reads:

> Whoever unlawfully causes harm to another by juridical act, or indeed by any other act which is malicious or culpable, is obliged to compensate for the damage done

Commenting on canon 128, Eduardo Molano (1993:144) identifies three categories of harm that evoke delictual liability. (1) the unlawful infliction of harm by the administrative decision of a Church administrator; (2) the intentional infliction of harm by a personal act; (3) the negligent infliction of harm by a personal act. Generically formulated, these three categories translate into five sources of delictual liability: (1) harm or damage to the claimant, (2) causation or infliction, (3) lawfulness (in cases of harm arising from an administrative

decision), (4) intention and (5) negligence (the latter two in cases of harm arising from personal acts)[9] [10]. This can be diagrammatically represented as follows.

Textual formulation of the canon 128	Principles of delictual liability	One incurs delictual liability when:...
Whoever... causes harm	Legally recognised damage	When the plaintiff suffers some harm.
Whoever unlawfully causes harm to another by juridical act...	Unlawfulness	When an administrative decision that has inflicted harm to the plaintiff is unlawful
Whoever...causes harm	Causation	When there is a causal relationship between the respondent's act and the claimant's damage or loss
Whoever... causes harm by any other act which is malicious...	Intention	When the personal act that caused damage was intentional

[9] An act can, in its own terms, serve as a principle of delictual liability. One is liable for damage when one commits an "act" in the legal sense of the word. In its legal meaning, the act has to be a voluntary act or a willed act. One is, therefore, liable if one had complete command of one's bodily movements. That is, one is not liable and has no legal duty to repair damage when the bodily movements that caused the damage were not controlled by one's will and/or mind. (Neethling et al 2001:28; Van Der Walt and Midgley 1997:51; Boberg 1984:41; Snyman 1995:49-54) The defence that the respondent can raise against the requirement of voluntary conduct is called automatism. Examples of cases where one is not able to subject one's bodily movements to one's will and mind, making possible the defence of automatism, include: absolute force, somnambulism, a sneezing fit, a mental black-out, an epileptic fit. (Neethling et al 2001:29-32; Snyman 1995:53-55) Canon 1323, 3° in the penal section of the 1983 code cites one such case, that of absolute force, as a factor that excludes penal liability. The canon reads: "No one is liable to a penalty who, when violating a penal norm, acted under physical force or under the impetus of a chance occurrence which the person could not foresee or if foreseen could not avoid." There is little likelihood that one would raise the defence of automatism in the delictual claims that arise in the domain of the Catholic Church. This study does not, therefore, cite an act as a principle of delictual liability.

[10] The five requirements resemble the ones in South African state law. In state law, "a delict is the act of a person which in a wrongful and culpable way causes harm to another."(Neethling et al. 2001:4; See also Van Der Walt and Midgley 1997:2; Boberg 1984:1; Burchell 1985:10). This factor provides us with a basis for engaging in a comparative analysis. Another factor that supports comparative analysis is the fact that delictual liability in both canon law and state law in South Africa is governed by a generalising approach as distinct from the casuistic approach in the English system. That is, liability for every form of delict is determined in terms of the general principles or requirements. In the casuistic approach each specific delict or group of delicts (torts or *delicta*) is regulated by its own rules and principles of liability. (Neethling et al. 2001:4; Van Der Walt and Midgley 1997:18; Boberg 1984:26-27)

Whoever... causes harm to another ...by any other act which is ...culpable,	Negligence	When the personal act that caused damage was negligent
Is obliged to compensate for the damage inflicted	Damage	The nature and quantum of the damage caused

One of the criteria available for the disputants and the arbitrator to decide on whether to apply the principles of delictual liability in canon law is the capacity of the principles to allow for the protection of rights and delivery of justice. To what extent would the principles allow space for the arbitrator to protect rights and deliver justice?

1.2.3 Sub-Problem Two: The Canon Law Framework For Testing Legally Relevant Damage

In terms of canon 128, one incurs delictual liability only when one has inflicted damage. Damage is, therefore, central to the delictual claim. To harmonise interests in the Church, canon law employs the concept of legally relevant damage. This means that not every instance of damage attracts liability, but only that damage which is legally relevant. One of the areas of dispute in a delictual claim is whether a particular loss suffered by the claimant constitutes legally relevant damage. Damage qualifies as delictual liability if it entails an infringement of legally recognised rights. An arbitrator asked to determine whether damage is legally relevant may conduct two tests: of whether the interest or right is legally recognised and of whether or not the right has been infringed. These tests require a legal framework. If the disputants and arbitrator decide to employ canon law, the Bill of Rights in the 1983 code emerges as a legal basis for performing the two tests.

When the disputants and arbitrators decide on whether to use the Bill of Rights in the 1983 code as a legal framework for determining legally relevant damage, they need to ask themselves: (1) How are the standards of justice in the Bill of Rights in the 1983 code

different from the standards in secular law? What provisions in the bill would result in gross injustice to the claimant if invoked by the arbitrator for determining legally relevant damage? (3) If the provisions in the canon law framework would result in gross injustice to the claimant, the church members who are parties to a dispute can choose to rectify and supersede the limitation inherent in the canon law framework. Hence the question: What secular law provisions can the arbitrators and the Church members resort to so as to rectify the limitation in the Bill of Rights?

1.2.4 Sub-Problem Three: The Canon law Framework for Testing The Unlawful Infliction of Harm by an Administrative Decision

In terms of Canon 128, an administrative decision[11] by a Church administrator can serve as a source of a delict. The administrator will incur delictual liability if his or her decision is substantively and procedurally unlawful. In a delictual dispute, therefore, liability is decided by applying the tests for substantive lawfulness and procedural lawfulness. Both tests require a legal framework. As the disputants and arbitrators decide whether to apply canon law, they need to ask themselves: (1) What principles and rules of law has canon law established for the determination of the substantive lawfulness and procedural lawfulness? (2) How do the standards of justice in the canon law framework differ from those in secular law? What provisions employed by the arbitrators in determining substantive and procedural lawfulness would result in gross injustice to the claimant? (3) If the provisions in canon law would result in gross injustice to the claimant, church members who are parties to a dispute can choose to rectify and supersede the limitation inherent in canon law. Hence, the question:

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11 Canon 128 speaks of a juridical act. Sheehy et al (1995:72) define a juridical act as "an externally manifested act of the will by which a certain juridical effect is intended." The category, juridical act, is, therefore, wide, and it includes more than the decision of a Church administrator. In discussing delictual liability in this study, however, we limit the application of the concept of juridical act to the decision of a Church administrator.

What secular law provisions can the arbitrators and the Church members resort to so as to overcome the limitation of canon law?

1.2.5 Sub-Problem Four: the Tests For The Culpable Infliction of Harm by a Private Conduct

Canon 128 recognises fault (intention and negligence) as one of the principles of delictual liability. The canon, however, applies the culpability requirement only to personal acts. An arbitrator will, in some disputes in the Catholic Church, therefore, be called upon to perform tests that determine whether the infliction of damage was intentional or negligent. The arbitrators, in deciding whether to invoke canon law, need to ask: (1) What principles and rules of law has canon law introduced for testing intention and negligence? (2) How are the standards of justice in canon law different from the standards in secular law? What provisions invoked by the arbitrators might result in gross injustice to the claimant? To what secular law provisions can the arbitrators and the Church members resort so as to prevent gross injustice?

1.3 Hypothesis

In his study of social structures, Bernard Connor (1999:254) includes law as a social structure. Law is a medium through which the members of the society act and interact.[12] Connor insists that social structures, including law, are endowed with a duality of constraint and enhancement (ibid. 1998:86). While some elements in a social structure provide an enabling environment for the members of the society to perform an action, others have the

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12 It is interesting to note that Connor insists that social structures are a necessary requirement for social interactions. Actions and interactions cannot occur in a structural vacuum. A social structure "links [the] members [of society], enables them to undertake various activities and gives those activities a certain bent. If that were not at least minimally present, there would simply be no society and no capacity for people to interact at all." (1995:344) Law as a social structure is essential for the actions and interactions in the society to occur.

effect of blocking it. While some elements enhance social interaction, others "impede and block the normal sociability, required for people to build one another up as human beings" (1998:85).

Connor in his analysis of the duality of a social structure invokes the image of a room in a building. A social structure operates like a room in building. "Like rooms, social structures may offer scope for initiative or be confining." (1998:86) While some elements in a kitchen as a room are structured in a way that allows cooking as an activity, others in the same room may emerge as a disabling environment for cooking as an activity. Analogously, in a legal framework, some elements provide a space that is conducive to the protection of rights and delivery of justice of the claimants, while other elements in the one and the same legal framework provide a disabling environment for the protection of rights.

Bernard Connor's notion of the duality of a social structure can serve as a basis for the hypothesis of this study. The main question that the study addresses is whether the employment of canon law for the hearing of delictual claims would result in gross injustice to the claimants. The application of Bernard Connor's notion of social structure to canon law for the arbitration of delictual claims yields, as the main hypothesis of this study, that:

Canon law as a room designed for the protection of the rights of the delictual claimants is endowed with both enabling and disabling elements. Given the enhancement and constraint duality that marks canon law as a room or space, some elements in canon law as a framework for the hearing of delictual claims would make for grave injustice to the claimants and other elements would not.

In other words, canon law has both strengths and limitations for the protection of rights. These strengths and limitations will come to light in a comparison of canon law with state law.

Just as four sub-problems arise from the main question asked in the study, so four sub-hypotheses arise from the main hypothesis, put forward in response to the main question. One may, therefore, claim that both the principles of delictual ability in Canon 128 (the first sub-problem) and the applicable rule of law in Canon Law that an arbitrator can invoke to perform the tests for legally relevant damage (the second sub-problem), unlawfulness of an administrative decision (the third sub-problem) and the culpability of personal acts (the fourth sub-problem) are endowed with both strengths and limitations in so far as the vindication of the rights of the claimants is concerned.

The main body of the study seeks to test the main hypothesis as well as the sub-hypotheses. It identifies the principles and rules of law that canon law has established to test the legally relevant damage (chapter three), the unlawful infliction of harm by an administrative decision (chapter four) and the culpable infliction of harm by personal acts (chapter five). In each chapter, the study provides a comparative and critical analysis of canon law to determine its likelihood to cause gross injustice if applied as a rule of law in an arbitration process.

1.4 The Methodology to Test The Hypothesis

In his study on the protection of rights within the Church sector, Professor Coertzen (1998:92) has highlighted the need to have a Church law or order that is not only theologically but also juridically accountable if it is to be able to deliver justice. According to him:

> In seeking order/law in the Church, it is indeed important that this order/law must be theologically accountable. One must add that, especially in the writing and application of the procedural rules, it must also be *juridically accountable* (1998:79) (italics added).

With the term, "juridical accountability," Coertzen conveys the notion of legitimacy. Hence, in seeking order/law in the Church, it is indeed important that this order/law must be theologically legitimate. One must add that, especially in the writing and application of the procedural rules, it must also be juridically legitimate. Rik Torfs conveys the notion of legitimacy in his use of the term "credibility." (1999a:11) The laws of the Church need to be juridically credible in the eyes of the state and in the eyes of the lay persons within the Church. Both Coertzen (1998:80) and Torfs (1999a:11) have identified the minimum standards of justice in state law as one of the rules for measuring legitimacy. The lack of juridical accountability or credibility in Church law is brought to light when one compares the juridical standards in Church law with the minimum standards of justice in state law.[13] The extent to which the Church norm is able to deliver gross injustice becomes evident when it is compared with the minimum standards of justice in secular law.[14]

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[13] Both Coertzen and Torfs emphasise that the requirements of legitimacy (juridical accountability and credibility) call for a narrowing of the gap between the juridical standards in Church law and the minimum standards of justice in state law. For Rik Torfs, for example, the widening gap between the two standards poses a threat to the credibility of Church law. Church law "can only cope with a limited form of tension between its own system and secular legal thinking. There can be a difference, but not a gap. A gap endangers the credibility of the system." (1999b:11) To narrow the gap, Coertzen advises: "In addition to this theological accountability, the Church and theology will have to take account of developments in the field of jurisprudence and the particular form of expression it takes in a country's specific legislation...In South Africa, this will mean the Church law will have to take note seriously of the Country's new Constitution with its bill of human rights (Constitution, 1996, Chapter 2). Specifically as far as the Church's procedural rules are concerned, it will have to take account thoroughly of the new 1995 labor legislation that came into effect in 1996.(1998:80-81)

14 In this statement, the minimum standards of justice in state law serve as a principle for the evaluation of the juridicality of the legal framework in the Church sector. This brings to light the notion of the regulation of non-state law, including Church law as a non-state law. Nina (2001:10) identifies two models of regulation of non-state law, namely internal regulation by the micro-sovereignty that operates in non-state law and external regulation by the state. In this study, we posit internal regulation as the preferable mode of regulation in the case of Churches, as it would lead to less tension both between Church and State and between the Churches and the human rights and subjective rights of the members of the Church which are protected by the state. In the self-regulatory model, it is

The main aim of this study is to examine the extent to which canon law provides for the delivery of justice if the disputants decide to refer to it as an applicable rule of law in a delictual hearing. Drawing on Coertsen's argument, one may see that the extent to which canon law is capable of delivering justice emerges with complete clarity when one analyses the rules of law in canon law in the light of the comparable points in state law. This endeavour falls within the category of comparative law methodology (Van Laer 1998), which is the methodology applied for this study. It should be remembered that the main body of the study seeks to test the hypothesis that canon law framework has both strengths and weaknesses in the vindication of the rights of claimants. Accordingly, the appropriate methodology for the testing of the hypothesis is comparative.

Comparative law methodology needs further elucidation. In comparative law, methodology is applied especially at a micro level at which the legal principles and rules of law that operate in the two domains are analysed, evaluated and compared..[15] Comparative law methodology is well developed in international law, especially in international human rights law. It is a field in which the human rights standards of international law are applied to those of State law, evaluating the latter in the light of the former. Studies of this kind are usually motivated by the same concerns as those inherent in this study. They are dominated by questions like the

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assumed that the Churches, as non-state actors operating the non-state mechanisms of dispute resolution, would take the initiative to apply a juridical accountability test to their rules of law and seek legal reforms to improve the capacity of the rules of law to administer justice. This is the subject of this study.

15 Debates have raged on whether comparative law is a methodology or a distinct scholarly discipline in law. Djalil Kiekbaev rightly asks: Is comparative law "a scientific method, or an autonomous science or a purely educational discipline?" (2003:1) This study proceeds from the vantage point of comparative law both as a methodology and a scholarly discipline. With regard to the latter as applicable to the discipline of canon law, the faculty of canon law in Louvain, Belgium has coined the term "comparative canon law" with respect to the Monsignor Onclin Chair for Comparative Canon Law. (Torfs 1998) For ease of treatment, this study will, however, employ the term, "comparative law," and not "comparative canon law."

following: Would the performance of human rights tests in terms of the provisions in the state law help the courts to protect the human rights of the claimant? To what extent do the human rights standards in State law allow for a vindication of human rights and a delivery of human rights justice? (Alston 1999; Barnett 1999)[16]

Following work in international human rights law, this study employs the methodology of comparative law. The subjects of comparison are, however, state law in the Republic of South Africa and canon law as a non-state law. This methodology subjects the provisions in canon law for the resolution of delictual claims to a critical comparative analysis with state law. This can be represented diagrammatically as follows:

Principle of delictual liability	The general tests that an arbitrator would perform in light of each principle	The specific tests and the possible terms of references	The applicable rule of law in canon law	The applicable rule of law in South African law
Damage (CHAPTER THREE)	Testing harm in the form of the infringement of legally recognised rights	Testing whether an interest or right of the claimant as allegedly injured by the respondent is legally recognised in law	The listing of rights in the Bill of Rights in canon law	The listing of subjective rights in the law of delict in South Africa
		Testing whether a legally recognised interest has factually been infringed	the internal scope of rights in the Bill of Rights in canon law	The internal scope of the rights in the constitution and in the common law in South Africa
The lawfulness	Testing the substantive	Testing whether a disciplinary	The rules (*ius*	The rules (*ius acceptum*, *ius*

[16] These studies may also be referred to as conformity studies since they seek to answer the question: to what extent do the human rights standards in state law conform to the minimum standards of human rights in international law?

of an administrative decision, especially decisions in a context of a disciplinary hearing (CHAPTER FOUR)	lawfulness of a disciplinary decision	decision is lawful in terms of the principle of legality	*acceptum*, *ius praevium*, *ius strictum*) inherent in the principles of legality in canon law	*praevium*, *ius strictum*) inherent in the principles of legality in criminal law in South Africa
		Testing whether a disciplinary decision is lawful in terms of the legal convictions of the community	The limitation clause in the Bill of Rights in canon law	The limitation clause (principles of proportionality, necessity etc) in the constitutional law and in the administrative law in South Africa
	Testing the procedural lawfulness of a disciplinary decision	Testing whether the decision is procedurally lawful in terms of the principle of legality	The legality requirement in canon law	The legality requirement instate law
		Testing whether the decision is lawful in terms of the requirements of fairness and equity	The tests for procedural fairness in canon law	The tests for procedural fairness in terms of the principles of natural justice in the administrative law in South Africa
Fault (CHAPTER FIVE)	The culpable infringement of a claimant's rights by a private conduct (CHAPTER FIVE)	Testing whether the infringement of the right of the claimant is intentional	The applicable rule of law for the test for intention in canon law	The applicable rule of law for the test for intention in the state law
		Testing whether the infringement of the rights of the claimant arose out of negligence	The applicable rule of law for the negligence test in canon law	The applicable rule of law for the negligence test in the state law

1.5 De-limitations And Scope of the Study

The scope of the present study is limited in several ways. Several kinds of disputes may need to be arbitrated in situations in which the disputants are church members. These are claims-based delicts: claims based on contracts and claims based on unlawful and unfair labor practice (Jagwanth 2001:228). This study limits itself to the first category of claims, namely the claims based on delicts; it covers only situations of dispute arising from delictual damage suffered by claimants who seek delictual remedy. Other categories of claims are excluded.

Given the voluntary nature of the arbitration process, the disputants can agree to use canon law as an applicable rule of law. The disputants who are church members need to apply two criteria when they decide whether to use canon law. The first criterion is conformity to the Biblical. The questions they need to answer are: Do the provisions of canon law for the determination of delictual liability accord with the letter and spirit of the Bible? Would the arbitration result in parties' reconciliation and forgiveness? The second criterion is the protection of rights. The questions here are: Would the application of the provisions of canon law result in gross injustice to one of the parties to the conflict? While recognising the value of both criteria, only the treatment of the second criterion falls within the scope of this study. It is hoped that future studies will deal with the first criterion.

In considering the legal framework for arbitration, the present study does not deal with the procedural framework and limits itself to treating the substantive framework for arbitration with a focus on the substantive framework in terms of principles of delictual liability. This study also omits consideration of the the principles of delictual liability themselves. Besides wrongfulness and culpability, the principles of delictual liability include causation and the test for the quantum of the damage. Although these could be tested in an arbitration process, they fall outside the scope of an essentially comparative study. The criterion for deciding the

inclusion or exclusion of a principle of liability from the scope of the study has been its comparative value. The Code of Canon Law does not have explicit provisions that regulate the quantum of damages and the causation.17 Since a comparative analysis is not, therefore, possible, these two delictual principles are excluded from the study.

Lastly, in its comparative exercise, the study limits itself to comparing state law in South Africa with the 1983 code. The norms in the other countries and in international law are cited in so far as they relate to state law in South Africa. Given that the legal system in South Africa is a hybrid, the study limits its comparison undertaking to some components of state law: the constitution, the statutes, and common law. Case law, customary law and African indigenous law as part of state law in South African are duly excluded from the comparative exercise.

1.6 OUTLINE

Chapter one provides a general introduction and outline. It states the problem, formulates a hypothesis, and describes the methodology and unique contribution of the study. The main body of the study analyses the capacity of canon law to serve as an instrument of justice. Before embarking on the task, it is necessary to consider if the theoretical framework of Canon law allows for canon law as an instrument of justice. This is done in Chapter two. If the paradigm allows this, the general thesis of the study will be vindicated.

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17 Canon law does not provide criteria for the causation test. Helmuth Pree (1998:505), therefore, advises that the Church tribunals have regard to the tests as performed in secular law. State law in South Africa delineates two causation tests: the factual and the legal. The arbitration tribunal would need to profit from these tests.

The body of the thesis begins with Chapter three. The focus is on the first provision for delictual liability: the concept of harm as the infringement of legally recognised interests or rights. The chapter identifies the types of tests that an arbitrator would conduct to determine infringement. It also offers a critical analysis of the Bill of Rights of the 1983 code to establish the extent to which the provisions in the bill would allow for the delivery of justice. The infringement of interests is not enough for the incurring of delictual liability: it must be an unlawful infringement. Chapter four describes the tests for the unlawful infringement of rights by an administrative decision. A focus in the chapter is on disciplinary hearings and decisions as administrative acts. Liability in the case of personal acts arises from culpable infringemente manner. Chapter five discusses the tests for culpable infringements of rights by personal acts. In the discussions of the tests in chapters four and five, the study identifies the applicable rule of law in canon law that is required for the performance of the tests.

CHAPTER TWO: THEORETICAL FRAMEWORK FOR CANON LAW AS AN INSTRUMENT OF JUSTICE

2.1 INTRODUCTION

Restorative justice has been described as new lens for reviewing the criminal justice system and delictual justice system in the state law. I think it can also be used as a principle for reviewing canon law and make it more theologically accountable. Restorative justice principles provides a rethink in the mechanisms in canon law for handling conflicts and wrong doing and make way for a paradigm shift. The goal of the restorative justice is to restore relationships in a way that provides healing and reconciliation. The focus is on the relationships, and not on abstract principles of liability or lack of liability to repair damage. The study therefore employs the restorative justice principles as a tool to challenge the handling of conflicts and wrong doing in terms of abstract principles of delictual liability. It therefore makes a critical analysis of the principles of delictual liability in canon law and argues that the conduct of hearings of conflicts and wrong-doing in terms of principles of delictual liability does not offer much space for communal participation, healing of the victim, reconciliation and sense of responsibility by the perpetrator.

2.2 PARADIGMS IN CANON LAW

This chapter derives its inspiration from the canonical work of Professor Rik Torfs. The principal motif in Rik Torfs's canonical work (1999a and 1999b) has been the provision of a systematic explanation of the changes in canon law in the twentieth century. He has, especially, been interested in the changes in the mode of interaction between canon law and secular law. Resorting to paradigm theory as an explanatory tool for the changes, he depicts the changes in the encounter between canon law and secular law in terms of paradigm shifts.

In his work, Torfs does not, however, elaborate on the concept of a paradigm as applied in the domain of canon law.

Kuhn's explanation of a paradigm sheds some light. Kuhn has defined a paradigm as "entire constellation of beliefs, values, techniques and so on shared by members of a given community" (1970:175). A paradigm seeks to serve as "concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." (1970:175) Transferred into the domain of canon law, the canon law paradigm appears as the "entire constellation of beliefs, values, techniques and so on" shared by members of the canon law community with such beliefs, values, etc. providing the community with the lens through which they view particular realities in the Church as legal problems and seek resolutions of problems. A paradigm shift for the canon law community would entail a change in the "constellation of beliefs, values, techniques and so on", a shift occasioned by the inadequacy and irrelevance of a particular "constellation of beliefs, values, techniques and so on" for handling the legal problems confronting the Church.

Proceeding from an epistemological point of view, Laudislas Orsy (1983) has used the term, "epistemological horizon," to convey aspects of canon law, an approach that throws light on the concept of a canon law paradigm. The extent to which a reality is known is dependent on the horizon or space within which one's mind operates; all knowing depends on the field of vision to which one has access. "In other terms, the meaning of everything that happens or is in the mind of a given person can be fully grasped only if the extent of the field of vision of that person is taken into account." (Orsy 1988b:432) Laudislas Orsy transfers this concept of knowledge from the individual person to the canonical community. "As every person has his horizon, so has every community." (1983:119). Each canonical community in a historical epoch is also situated in a particular mental horizon or field of vision. Orsy refers to this

field of vision as a *habitus mentis*. In each historical epoch, similarly, the mental horizon informs and shapes the way the canonical community views both the nature and purposes of canon law in the Church and the legal problems and legal solutions.

The concept of a paradigm shift in canon law also finds its expression in Orsy's notion of a *habitus mentis* or mental horizon. For Orsy, the history of canon law is a history of changing mental horizons or paradigms. "An adequate and critically correct history of canon law can never be written without including the history of changing horizons." (1983:436). In any epoch, one finds that the legislators and those who apply the law think and act within a given horizon. The mental horizons or field of vision may either expand or shrink. "As Christians achieve a better understanding of who they are, what their community is, what the role of their community is in this large world, their horizon expands."(1983:120)

For Laudislas Orsy (1988b:431), a paradigm shift in canon law, therefore, entails the expansion of a particular mental horizon. When the field of vision or mental horizon widens, it accommodates into its space realities which were initially outside the scope of vision. When these realities enter into the field of vision, they give rise to "new legal questions to which no answer could be found within the old field of vision" (1983:435). A crisis that results from this condition prompts a paradigm shift, an adoption of new set of beliefs, values, etc. that enable the community to handle the new legal questions. A paradigm shift, therefore, entails an adoption of a *novus habitus mentis*, "a new habit of mind or more loosely but not less exactly as a mind with a new disposition; also quite simply and still faithfully as a new mentality or a new mind" (1988b:429).

The history of canon law is replete with the appearance of the *novus habitus mentis* or paradigm shifts. Orsy identifies two paradigms in the twentieth century: the 1917 paradigm in which the canonical community was located in the mental horizon that viewed the Church as a perfect society and canon law as an instrument at the service of the Church as a perfect society and the 1983 paradigm in which the canonical community operates within the horizon of the Church as a communion and canon law as an instrument at the service of the Church as a communion (1983. 437). Rik Torfs calls the 1917 and 1983 code paradigms "snapshots" in the encounter between canon law and secular law in the twentieth century. Each paradigm deserves some analysis.

2.3 The 1917 Code Paradigm:

2.3.1 Its Nature: Canon Law At the Service Of the Church As Perfect Society

A paradigm provides a set of "beliefs, values, techniques and so on," that serve as a conceptual framework for the resolution of a variety of issues that arise in the church and in the church law. An understanding of church and church law issues therefore requires an appreciation of the paradigm. Rik Torfs situates the 1917 paradigm within the context of issues that arose in the church in the eighteenth and nineteenth centuries. The latter centuries were marked by trends challenging the freedom of the Catholic Church from the state interference. Rik Torfs cites such two trends: (1) The first, inspired by the theory of Samuel Von Pufendorf (1632-1694), took the form of integrating the Church into the sovereign domain of the emergent states, thereby constituting them as state Churches and reducing the Church as collegium within the state. This constituted an affront to the juridical independence of the Church. (2) The second trend took the form of the political movements that legitimise state interference within the domain of the Catholic Church. These movements included

Josephinism in Austria, Febronianism in Germany and Gallicanism in France in the eighteenth century; the latter originated in the four Gallican Articles published by the general assembly of the clergy in 1682 and implemented by Louis XIV.

The 1917 paradigm provided the Catholic Church with a set of "beliefs, values, techniques and so on" that enabled the Catholic Church to handle the issues of the time. Concretely, the paradigm sought to promote the imaging of the Catholic Church as an entity that is as autonomous as the state. The sovereignty and autonomy of the state found its expression in the term, perfect society. A society was deemed perfect in a juridical sense by reason of the completeness of its end and the sufficiency of its means to attain such an end (Orsy 1988b: 437). As explained by Ottaviani, the perfect society is the one "which has a complete good in its order as its end, and has by right all the means to attain that end; and it is self-sufficient and independent in its order, that is, fully autonomous" (Ottaviani 1958: 46). A state was regarded as autonomous in this sense. It was believed that a proof of the Catholic Church as a perfect society would have the effect of proving the autonomy of the Catholic Church. Being a perfect society like the state, the Catholic Church was seen as equally autonomous and free from external interference of the state. James Provost (1985:126) elaborates on this line of argument: the state is autonomous in the terms of the perfect society; if the Catholic Church fell within the category of a perfect society, then it would be as autonomous as the state.

According to James Provost, the different apologetics of the Catholic Church in the nineteenth century issued treaties on the applicability of the term "perfect society" to the Catholic Church. In the arguments, the Catholic Church was considered a perfect society by reason of the completeness of its end and of its being endowed with sufficient means to attain its end. It was considered a perfect society in the sense that it "contains within itself all the means necessary to achieve its end (hence "perfect") as contrasted to imperfect societies that

are subject to the sovereignty of the state and in some way depend on outside resources (e.g. the state) to achieve their proper end" (Provost 1985:126). In the words of Callisto Augustine, the Church was a perfect society

> whose autonomy or sovereignty is vested in the Roman Pontiff, under whose authority the bishops enjoy a divinely established power. The end of the Church is spiritual, supernatural, religious, viz. the realisation of the Kingdom of God, though in a visible way. The means are proportionate to the end: the visible government, the infallible teaching office, the sacred ministry, which convey truth and grace (1931:192-193).

The issue of the autonomy of the Catholic Church found its resolution in the conceptual framework of the Church as a perfect society. This means that the 1917 paradigm was in conformity with the ecclesiological paradigm of the Church as a perfect society. In his work on the ecclesiological models, Avery Dulles (1978:26) cites the Church as a perfect society as a paradigm since it operates as a dominant model. It is "a total ecclesiology, on the basis of a single model," which has "proved successful in solving a great variety of problems and is expected to be an appropriate tool for unraveling anomalies as yet unsolved." Given the intricate marriage between canon law and ecclesiology, the ecclesiological paradigm of the Church as a perfect society provides a basis for the 1917 paradigm, namely the paradigm of canon law in the service of the Church as a perfect society (Alesandro 1985:8).

2.3.2 Implications of the 1917 Paradigm For THE Protection of Rights and Partnership with State Law

It should not be forgotten that at the core of this chapter is the analysis of the extent to which a canon law paradigm allows both for the state law as a serious partner of canon law and for canon law as an instrument of justice. Does the 1917 paradigm allow these concepts? The 1917 paradigm offered a fertile environment for the comparative interaction between state law and canon law. The concept of the Church as a perfect society had the effect of making

the Catholic Church comparable with the state: the Church was considered a sovereign society through the comparative lens of the state as a sovereign society. This practice found its "more perfect expression" in canon law (Torfs 1999a:21). Canon law, as providing order and protection of the spiritual goods in the Church as a perfect society, was perceived through the lens of secular law as providing a function analogous to that of the state as a perfect society. As Alesandro explains:

> Though the Church was a supernatural society and the state a natural one, their legal systems were looked upon as parallel and comparable, thus placing them on the same plane and, in a way, on an equal footing. Civil and canonical jurists spoke the same language though they might be interested in different subjects (1985:9).

Consequently, the paradigm of canon law in the service of the Church as a perfect society made possible an interaction between canon and secular law. It provided a framework within which state law and canon law could engage in serious dialogic partnership. Torfs had perceived the comparative legal interaction in terms of reception and legal borrowing. Naturally, its reception was based on the premises of the perfect society. After all, "there is no better way to show that the Church is a perfect society than to prove that one uses exactly the same legal tools and techniques also used by secular societies." (Torfs 1999b:6) Torfs outlines the three areas of reception.

> (1) Firstly, the arrangement of law in a code was received from secular law. The nation states in the twentieth century encoded their laws . Canon law, inspired by the perfect society concept, emulated this trend when it encoded its laws. Laudislas Orsy says: "the idea of the perfect society became the vehicle of the transfer of secular modes of thought, institutions and proceedings to a religious community. A classical example of this process is the first Code of Canon Law; under several aspects it was conceived and composed on the model of civil codes." (1988b:437)

(2) Secondly, the nation states arranged their codes in terms of general norms, things, persons, time and benefits. The 1917 code emulated this format.

(3) Thirdly, besides the code and its arrangement, canon law adopted legal concepts and rules of law from state law. Legal concepts were employed, for example, to provide legal support and protection of theological items like sacraments. As Rik Torfs explains: "The 1917 code is a consistent working out of the theory of the *societas perfecta*. For those who adhere to the Church, it is a total society, like any other. It is not merely contained within society; it is a society itself, with its own laws which treat sacraments as real things, just as real as the houses that populate profane society in the 19th and early 20th centuries" (Torfs 1999a:20-21).

While the 1917 paradigm provided scope for the partnership between state law and Church law, it failed to provide a similar space for the operation of canon law as an instrument for the protection of the rights of the Church members. There are two reasons for this: Firstly, as Rik Torfs (1998:24-25) has emphasised, the 1917 paradigm was structured in the terms of public rather than private law. Its major orientation was the resolution of a problem of public law, that is, the freedom of the Church from the external interference of the state. Rik Torfs enumerates some of the public law questions that prompted the 1917 paradigm:

> How free was the internal organisation of the Church when it came to the appointment of bishops? Who enjoyed ultimate control in matters related to a person's civil status and, more specifically, in matters related to the institution of marriage? Did the Church have a role to play in public life? (1998:25)

Through the lens provided by the paradigm, the canonical community regarded state interference of the internal affairs of the Church as a pressing issue. The paradigm was concerned with the protection of the rights of the Church and it left little space for the serious

consideration of the protection of the rights of the individual Church members. Legal techniques and tools for the protection of the rights of the Church members were lacking.

Secondly, the legal consciousness inherent in the 1917 paradigm emphasised the rights of the clergy rather than the rights of the other members of the Church. Indeed, the Church was identified by its clergy, and the protection of the rights of the clergy amounted to the protection of the rights of the Church. As the clergy were identified with the Church, the protection of the rights of the clergy was considered as a public law problem of protecting the Church from state interference. Highlighting this factor, John Beal writes: "Thus, the 1917 code has much to say about the powers and prerogatives, the rights and obligations of the hierarchy, but little to say about the rights of the faithful...Canon law had no room for rights of the faithful since it was a law for public order only." (1993:47)

2.4 The Paradigm Shift From 1917 Paradigm To 1983 Paradigm

A paradigm shift is often occasioned by the inadequacy and irrelevancy of a contemporary paradigm to respond to changes and problems in the environment. Torfs explains the shift from the 1917 paradigm to the 1983 paradigm in terms of the changes in the legal and ecclesiological environments. Two trends, therefore, prompted the paradigm shift. Firstly, within the legal environment, the post-second world human rights movement ushered in a new model of legal argument for the autonomy of the Church. In the light of this human rights movement, international law and domestic laws affirmed the Church as a collective subject of the freedom of religion. On account of this development, the freedom of the Church from state interference could be argued in human rights terms. There was no further need for the employment of the concept of the Church as a perfect society as the basis of the legal argument for the freedom of the Church against secular interference (Torfs 1998:26).

Secondly, during the Second Vatican Council, the model of the Church as a perfect society was denounced for its over-emphasis on the institutional elements of the Church. Its insistence on the institutional dimension of the Church had paved the way for formalism, institutionalism and triumphalism in the Catholic Church. The theological mystery dimension of the Church did not find an adequate place in an ecclesiological model. Biblical images of the Church as a mystery were, therefore, adopted to replace the notion of the Church as a perfect society. The new ecclesiological paradigm stressed the inclusion of the theological and mystical elements into the conceptualisation of the Church. The Church would then be perceived, not solely in the institutional and legal terms of the perfect society, but as a union of the institutional and theological elements. It is the theological element that marks it off from the state and other secular entities. The theological specificity of the Church was thus emphasised in the ecclesiology of the Second Vatican Council.

As law defined in terms of being at the service of the Church, the concept of canon law in the perfect society paradigm did not fit into the new ecclesiological environment of the Second Vatican Council because it lacked theological specificity. There was a need for a shift in the paradigm in canon law to a paradigm reflecting conciliar ecclesiology with its insistence on theological specificity. There was a need for a new paradigm in canon law, a new set of "beliefs, values, techniques and so on," that provides the framework for the theological specificity of canon law. The 1983 paradigm provided this framework.[18]

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[18] Laudislas Orsy explains the paradigm shift from an epistemological perspective as a change in horizon. Orsy identifies two types of changes of horizon. (1988b:438) In every horizon, there is a subjective and objective pole. The former applies to the manner in which one thinks and acts. A paradigm shift occurs at this level when the way of thinking and acting, the field of vision and knowledge of a person or a social grouping changes. For Laudislas Orsy, the paradigm shift in canon law was realised at both levels. At the first level, during and after second Vatican council, the canon lawyers made a shift in the way of making and interpreting the laws. They now proceed according to

2.5 THE 1983 PARADIGM

2.5.1 ITS NATURE: THEOLOGICAL SPECIFICITY OF CANON LAW

Laudislas Orsy (1985) has described the 1983 paradigm as a *novus habitus mentis*. But what is the newness that constitutes the 1983 paradigm? For Gerard Sheehy (1995:viii), the dominant its newness lies in its attention to the theological specificity of canon law. Unlike the old paradigm, the 1983 paradigm recognises canon law as a legal system that is radically distinct from secular law. Gerard Sheehy bases his notion of the newness of the canon law paradigm on Pope John Paul II's address to the Canon Law Society of Great Britain and Wales. In the address, Pope John Paul II notes that

> Because the Church's social structure stands at the service of a deeper mystery and communion, canon law – precisely as the law of the Church – must be acknowledged as unique in its means and in its ends (Pope Paul II as cited in Sheehy et al, 1995:xv-xvi).

Laudislas Orsy also locates the newness of the 1983 paradigm in the element of theological specificity. The space or horizon within which canon law is located requires theological specificity. Orsy identifies ecclesiology as one of the spaces within which the canonical mind operates. In this way, the changes in the ecclesiological space or horizon during the Second Vatican Council influenced the paradigm of canon law. Before the Second Vatican Council admitted the institutional dimension of the Church to the exclusion of its mystical dimension.

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the natural law approach. "Canon lawyers can enter into the new horizon in the manner of their operations in the processes of making and interpreting the laws. In each case, this means to justify the law critically by the value that it intends to uphold" (1988b:439). At of the second level, canon law incorporated new fields, such as theology, into its new vision and knowledge. Orsy's explanation of the paradigm shift only covers the second factor, namely the changes in ecclesiology, and not the first factor, the changes in secular law.

The second Vatican council expanded the horizon of ecclesiology to include the concept of the mystical dimension of the Church. He explains:

> Through Vatican Council II, we have achieved a broader understanding of the Church. It is a communion of the people of God. This perception has replaced many others: the Church as primarily a hierarchical organisation, or principally a perfect society, set above kings and princes, and so forth. The new understanding expanded our horizons; the walls which used to limit our perception were pushed outwards. In consequence, every structure, from the parish to the papacy, must now be reinterpreted in the new context. Legal institutions cannot remain in their old places and play their old roles; they do not fit anymore. They must be redesigned and rearranged to be in harmony with the new space (1983:119-120).

The new ecclesiological space prompted by the Second Vatican Council admitted the theological specificity of the Church. For canon law to be "redesigned and rearranged to be in harmony with the new space," it required the affirmation of this specificity. For Orsy, theological specificity plays itself out at the different levels of operations in canon law. Orsy identifies the three levels of operation in canon law: the drafting of the law, its interpretation and application and its abrogation and amendment. The three levels correspond to the life cycle of legal norms: the law "is conceived, it is born; it lives; it dies or fades away" (Orsy 1992:40).

Theological specificity has provided the conceptual framework for the three levels in the operation of the law. The canonical community drafts and promulgates,[19] interprets and

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[19] In the drafting of canonical text, elements from theology are received and employed as constructive categories. Theology, especially conciliar theology, provides the agenda and the raw materials for the canonical drafting of the code. This spirit has been expressed in its crude form by the drafting of the canonical norms in the code in terms of reception and translation of the elements from the theological text, namely the conciliar texts, into canonical texts. Hence, in his apostolic letter for the promulgation of the Code, *Sacrae Disciplinae Leges*, Pope John Paul II complimented the 1983 code for its reception and translation of the conciliar elements into the domain of canon law: "This new Code can be viewed as a great effort to translate the conciliar ecclesiological teaching into canonical terms" (Pope John Paul II 1983: 53).

applies,[20] evaluates[21] and reforms the rules of law in canon law in the light of the theological specificity of canon law.

2.5.2 1983 PARADIGM IN TERMS OF A *IUS PERFECTUM* DESIGN: ITS IMPLICATIONS

While affirming the value of the theological specificity of canon law, Rik Torfs (1999a:64)notes the limitations and weaknesses of the 1983 paradigm.[22] In its intent to underline the theological specificity of canon law, Torfs argues, the 1983 paradigm has degenerated into a *ius perfectum*, (a perfect law), a phenomenon that is similar to the *societas perfecta* that defined the 1917 paradigm. The *ius perfectum* is grounded in the notion of the theological specificity of the Church and canon law defined in exclusive terms. Aspects that are not purely theological are excluded from the concept of the nature and purpose of canon law. In the process, canon law as *ius perfectum* operates autonomously. This has negative

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[20] The interpretation of the 1983 code paradigm has entailed the employment of theological elements, especially elements, as metaphors for interpretation. John Alesandro insists: "The interpretation must be truly theological and historical if the code is to promote a 'new way of thinking'. Even when the texts of the 1917 code are retained verbatim or in a slightly amended form, they may not be interpreted in precisely the same way in which they were sixty years ago. Now they must be re-examined, related to the other canons, placed in context, and studied in the light of the Council as well as the canonical tradition." (Alesandro 1985:10)

[21] Similarly, the task of evaluating the legal text of the 1983 code paradigm has been expressed in theological terms, especially conciliar terms, as evaluative categories. The legitimacy of the legal texts are often measured according to their conformity to theological standards, especially the standards outlined in the conciliar and post-conciliar texts. Examples abound: Thomas Green's (1980) evaluation of the 1977 schema on the People of God; Giuseppe Bologna's evaluation of the *Lex Fundamentalis* to demonstrate the points of discontinuity and dissonance between the theological standards in the proposed text of *Lex Fundamentalis* and the theological standards in the conciliar text.

22 Laudislas Orsy has also emphasised the limitations of the 1983 paradigm, but from a different perspective. He critiques the paradigm for being too idealistic on two scores. Firstly, the paradigm presumes that canon lawyers are well versed in theology and theological values and able to draft, interpret and apply the laws in the light of theological values. The reality is different from this ideal. Secondly, the paradigm presumes that the canon lawyers have made a mental shift from the legalistic mode to the natural law mode of operation. This, again, is not the case in reality (1988b:443). Rosalio Castillo Lara (1984:32) has expressed similar views. Although the new paradigm requires a new kind of canonical thinking and operation, one commonly sees people reading the canons in the 1983 code as if they were still in the context of the 1917 paradigm.

implications for canon law as an instrument of justice and for secular law as a partner of canon law. This is evident on two fronts.

Firstly, as already intimated, the operation of the 1983 paradigm as *ius perfectum* places canon law in an autonomous zone. It is here that the points of similarity with the *societas perfecta* that defined the 1917 paradigm begin to emerge. While the *societas perfecta* defined the Church as an autonomous zone, "*ius perfectum* creates an autonomous field of activity in a way that is not so different from the *societas perfecta*" (ibid. 2001:64). While *societas perfecta* signified a Church endowed with all the necessary means for the attainment of its spiritual end without state interference, *ius perfectum* signifies a law endowed with all the means for the attainment of its theological end without external interference and interaction with secular law. It is complete in itself and does not require recourse to the secular to complete it. *Societas perfecta*, operating the Church autonomously without the external interference of the state, has been replaced with *ius perfectum*, the autonomous operation of Church law without the external interference of secular law, a law that autonomously develops along theological lines "without being disturbed by norms and trends in the secular law." (Torfs 1999b:10) The concept of secular law as a serious dialogic partner of canon law has, therefore, no place in the 1983 paradigm in terms of *ius perfectum*.

Secondly, one has to look at the definition of the autonomy of canon law as *ius perfectum*. On account of the theological specificity of canon law, the autonomy of canon law is theologically defined and is, therefore, restricted to the theological zone. It is the theological elements, and not the purely juridical elements, that differentiate canon law from secular law and render it autonomous. In the attempt to emphasise the autonomy that comes with a theological specificity, the *ius perfectum* model has placed theology at the center of scholarly debate and legal practice. Other issues are relegated to the periphery.

Further to elucidate this, the operation of the 1983 paradigm as *ius perfectum* has placed issues relative to canon law like sacraments and matrimonial tribunals high on the agenda of scholarly debate and legal practice (Torfs 1999b:1; ibid. 2001:64). The canon law issues endowed with purely juridical elements, including those that deal with protection of rights and administrative justice, are relegated to the periphery of scholarly debate and legal practice. The structures and mechanisms that canon law has provided for purely juridical issues, including mechanisms for the protection of rights and administration of justice, are likewise relegated to the periphery.

The Catholic Church in South Africa is laden, for example, with theologically-related structures such as matrimonial tribunals, but does not operate any tribunal that addresses the protection of rights and administration of justice. The Church members are schooled in the canon law sections that deal with theological elements without any reference to those that deal with the administration of justice.

2.5.3 A Return To The original design of the 1983 paradigm: Pope Paul VI's Design And its Implications

The 1983 paradigm of *ius perfectum* distorts the original idea of the paradigm. In its original form, the paradigm sought to incorporate the concept of canon law as an instrument of justice and that of secular law as a dialogic partner of canon law. The *ius perfectum* model excludes these two concepts. This is evident when one reads the words of Pope Paul VI identified by both Frank Morrisey (1979) and Laudislas Orsy as the architect of the 1983 paradigm.

Pope Paul VI depicted canon law as an instrument in the service of the Church as a communion. The Church as a communion represents the integration of the theological and the institutional aspects of the Church. Canon law posited as an instrument in service of the Church as communion emerges as an instrument of the theological and institutional dimensions of the Church. Pope Paul VI, therefore, rejected a reductionism that dichotomises canon law as law in service of the theological dimension of the Church and that of canon law as law in the service of the institutional dimension. In his address to the officials of the Roman Rota tribunal in February 1977, he insisted:

> Thus the new code will avoid the danger of disastrous separation between spirit and institution and between theology and law, since law and pastoral authority will be understood as means of spreading the peace of Christ, which is the work of God's justice (1977a:177).

In this sense canon law is, on the one hand, an instrument of the theological reality of the Church requiring the placing of canon law in a position of dialogic partnership with theology. In his own words, in the post-conciliar epoch, "the close relationship between canon law and theology is raised, therefore, with urgency" (Pope Paul VI 1973:289-290). On the other hand, canon law is an instrument of the juridical-institutional reality of the Church. The law, therefore, needs to be an instrument of justice.

2.5.3.1 The Implications Of Original Design On Canon Law As Instrument Of Justice

In his analysis of Pope Paul VI's notion of canon law, Frank Morrisey refers to canon law as a "sign value of justice in the Church" (1979:35). Canon law stands as a sacrament of justice in the Church, As a sacrament, it is endowed with both an expressive and generative function: it

expresses and brings about the experience of justice within the Church. 23 Pope Paul VI strongly urged that justice be administered in the Church for a number of reasons. Firstly, he posited justice as a requirement for peace within the Church (Pope Paul VI 1965:233). Justice, and consequently the juridical life of the Church are needed for building peace and stability within the Church. "There is no true peace except in justice" (Pope Paul VI 1970:374). Pope Paul VI believed that there was a need for peace, not only in the society, but also in the Church. In the same way, justice was an antidote for peace, not only in society, but also in the Church. "If then, the peace of Christ is the work of justice, this peace, which is divine and, therefore, transcends human understanding, must ever fill all the members of the ecclesial communion" (Pope Paul VI:1977a:179).

Secondly, in his address on 4 February 1977, he spoke of the administration of justice as a requirement for the communion of the Church. "The communion of the Church embraces both the faithful and their pastors. The communion of the Church is such that all have a right to justice and an obligation to provide for it, and not just something to be used on the level of those in authority"(Pope Paul VI 1977b:174). Thirdly, Pope Paul VI posited justice as a requirement for the protection of human dignity as created in the image of God. To this end, canon law "is characterised, indeed, by the essential and indispensable requirements of order, and at the same time by the progressive discovery of the dignity of the human person to which the Church today leads us" (Pope Paul VI 1974:80).

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[23] Pope Paul VI also stressed the importance of including justice in the job description of canon lawyers. To this end, the lawyers are to operate as "priests of justice" (Pope Paul VI 1967:142). A canon lawyer has a special duty to develop a sense of justice in the Church "against the weaknesses caused by attention to special interests"(Pope Paul VI 1975:179).

An analysis of Pope Paul VI's insights on the nature and purpose of canon law therefore indicates his inclusion of justice, and not only of theological aspects in the nature and purpose of canon law. In Denis Doyle's analysis of Pope Paul VI's concept of canon law, he shows that Pope Paul identified justice as one of the values, over and above the theological values. Just as it is an expression of theological values, so "canon law should be an expression of justice and a means for administration of justice in the Church"(1990:132). For Denis Doyle, the only danger that Pope Paul VI cautioned against was legalism in the administration of justice. That is why he insisted on equity, the balancing of justice and mercy, in the Church's justice system.[24] Just as there is a bond between canon law and justice, so there is a bond between canon law and equity. "The relationship of law to justice was strong in Paul VI's mind and so was the notion of equity, that is justice tempered with the sweetness of mercy...Justice and equity, as described by Paul VI, were to replace the trademarks of pre-conciliar law – rigorism and legalism" (ibid.: 133).

2.5.3.2 The Implications of the Original Design Of State law As a Partner Of Canon Law

Just as Pope Paul VI did not exclude justice from the nature and purpose of canon law, so he did not exclude the possibilities of partnership with state law. He, however, advocated a shift from the exclusive and absolute partnership with state law that marked the 1917 paradigm. The novelty that comes with the 1983 paradigm is not an exclusive partnership with theology and exclusion of the justice element but a deviation from these.

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24 In his address on 28 January 1971, Pope Paul VI for example, concluded: "Law is therefore not for law's sake, nor judgement for the sake of it, but both law and judgement are at the service of truth, justice, patience and charity" (Pope Paul VI 1971b:135; italics added).

Firstly, Pope Paul VI advised against a stance that considered secular law as the sole dialogic partner of canon law to the exclusion of theology: the partnership with other disciplines should not be limited to secular law; theology should also be considered as a serious dialogic partner. In his speech to the participants in the Second International Congress on canon law, on 17 September 1973, Pope Paul VI, therefore, declared: "With the Second Vatican Council there has ended, once and for all, the ti.uBnwhen ertain canonists refused to consider the theological aspect of the disciplines studied, or the laws that they applied" (1973:263).

Frank Morrisey has misconstrued this statement as advocating an exclusion of partnership with secular law: "Once we move away from a law patterned on civil law, we move to a law based on doctrine. This, I believe, is the very point of Pope Paul's projected renewal" (1979:25). It should be noted that, seen in its proper perspective, Pope Paul VI's statement is an affront against "certain canonists [who] refused to consider the theological aspect of the disciplines studied, or the laws that they applied."[ibid.] It is critical of the canonical studies which ignore "the theological aspect of the disciplines studied, or the laws that they applied" and concentrate on the juridical aspect of canon law. It criticises a canon lawyer who, in Pope Paul VI's words, is "accustomed to basing his teaching for the most part on a centuries-old, unquestioned tradition and to supporting it with a comparison to and contribution from Roman law first of all and then with the laws of the nations" (Pope Paul VI 1971:72; italics added).

Secondly, Pope Paul VI advised against an uncritical partnering with secular law. The partnership and reception of aspects of secular law had to be pursued in a critical and cautious way. The failure to do this had in the history of the Catholic Church led to the absorption of negative aspects from secular law into canon law. In his speech on 28 January 1971, Pope

Paul VI, therefore, remarked: "It cannot be denied that the Church, in the course of her history, has taken from other cultures (Roman law is a well-known example, but it is not the only one) certain norms for the exercise of her power, whether judicial (procedural) or coercive (penal), have in the course of the centuries borrowed from civil legislations certain serious imperfections, even methods which were unjust in the true and proper sense, at least objectively speaking" (1971a:46). Critical and cautious partnership[25] with secular law is required by the theological specificity of the Church, a uniqueness that marks it off from secular society.[26]

2.6 RESTORATIVE JUSTICE AS OFFERING NEW LENS

2.6.1 NOTION OF RESTORATIVE JUSTICE

Tony Marshall (1999:20) offers a workable *description* of restorative justice in practice: "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." This description is very open. Its lack of specificity leaves

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[25] In the same way, Pope John Paul II in his address to the canon law society of Great Britain and Wales in May 1992, advised against uncritical partnership with secular law: "Canonical theory and practice always need to be informed by a sound ecclesiological understanding, and efforts must always be made to avoid *any undue accommodation of ecclesial norms and structures to the prevailing ethos of civil society*" (in Sheehy et al, 1995:viii; italics added). Pope John Paul II, therefore, admits due "accommodation of ecclesial norms and structures to the prevailing ethos of civil society." In his speech on 28 January 1978, he said: "We hope, instead, that juridical activity – to which the Church has made such outstanding contributions, first by bringing to bear on it the transcendent light of the Gospel which grounds the dignity of man, then by her mediation as historical link with the heritage of Roman law as well as by her monumental structure of canon law – will always continue to flourish abundantly in the world." (1978:163) In his speech in 1993, he emphasised the prudence that comes with partnership with secular law. "It would be prudent not to over-emphasise the uniqueness of the Church over against secular societies and to be open to but still critical of the contributions that secular law can make to the promotion of a more just ecclesial society" (1993:55).

26 Various authors have argued for critical and cautious interaction with the secular law. James Coriden, for example, argues: "Borrowing from secular cultures and civil law models for our Church law formulations is justified and has a long tradition, but the borrowing must be done with great discretion, after careful reflection, and must be regularly reviewed" (1981:10).

several questions open -- who is to be restored? To what are they to be restored? Although Marshall's definition is general, its open nature holds important clues for the nature of a restorative justice theory. Restorative justice does not force situations to fit theory. Rather, as a theory, it is open and flexible enough to apply on a variety of levels and to different contextual imperatives. John Braithwaite [2002:10] recognizes this in his own response to the questions restore who? to what? In answer to the `who' question he says, "...restorative justice is about restoring victims, restoring offenders and restoring communities." To the `what?' inquiry, he suggests "...whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime."[ibid.] His response makes clear the way in which restorative justice is sensitive to context and thus appropriate to a variety of situations. A restorative approach is also not limited to an individual level but can be applied with respect to groups and at the institutional level.

Daniel Van Ness [1997:23] moves beyond *description* of practice to identify some of the defining elements of restorative justice. He notes certain common elements in the small but growing body of literature on restorative justice. Namely, "a definition of crime as injury to victims and the community peace, a focus on addressing the personal-relational injuries experienced by all parties as well as the financial and legal obligations of offenders, and a commitment to including all parties in the response to the crime." These common elements of restorative justice practices offer some insight into the conception of justice behind such practices. A more nuanced description of restorative justice is found in Zehr's work on restorative justice. According to Zehr [2003:12], restorative justice revolves around three concepts: Harm, obligation, and engagement. It says what really matters about the wrongdoing is the harm that has been done. One goal is to meet the needs of those who have been harmed. The second goal is to hold people accountable to meet obligations. A third is to

involve those impacted to the extent possible because being engaged is such an important part of the experience of justice. The goals are to meet victims' needs and the offenders' needs.

2.6.2 BIBLICAL FOUNDATION OF RESTORATIVE JUSTICE

Christian faith communities, particularly Mennonites, have been a major force behind the restorative justice movement. In Christian communities, however, the idea of restorative justice has its origins in biblical concepts of justice. As with the concepts of aboriginal justice, one cannot speak of one Christian view. In fact, David Cayley [2001:23], in *The Expanding Prison,* traces the history of the crime and punishment model of justice to reforms in the Christian church of the eleventh century. According to Howard Zehr, however, biblical justice provided one foundation for the restorative approach to justice. Many think of the expression, "an eye for an eye", when talking about biblical justice. This expression has been misinterpreted as a call for retaliation through English and European translations of the Hebrew text. [2003:23] According to Zehr and other theologians, however, the principle of "an eye for an eye" was intended as a limit on retribution, i.e. "[d]o this much, but only this much", and as a tool for compensation, i.e. "the value of an eye for the value of an eye"[ibid.] In addition, even if the expression was a call for retribution, it is not the overriding principle of biblical justice. The term *lex talionis* or "eye for an eye" only appears only 3 or 4 times in the Old Testament. [Ibid]. The concepts of *shalom* and covenant are much more prevalent concepts in biblical justice.

Zehr traces the roots of restorative justice to Biblical concepts of shalom and covenant. [Ibid.] These concepts form the essential themes of both the Old Testament and the New Testament. Shalom is defined as "a condition of 'all rightness,' of things being as they should be, in

various dimensions"[ibid.] The dimensions referred to include: 1) health and material prosperity and an absence of physical threats such as illness, poverty, and war; 2) people living in right relationships with on another and with God, including living in just economic and political relationships, and 3) straightforwardness which refers to honesty or absence of deceit in dealing with one another, and to a condition of blamelessness (i.e., being without guilt or fault) [ibid.] The rightness or fulfillment of these three dimensions defines the vision of shalom.

Flowing from the vision of *shalom,* the concept of covenant provides a basis for and a model of how humans can understand and work towards *shalom.* Covenants are binding agreements between people and imply a relationship premised on mutual responsibilities and commitments. The foundations of such relationships are salvation and liberation as demonstrated by "God's righteous acts of salvation in the Old Testament and the life, death, and resurrection of Christ in the New Testament." [Cayle 2001:34] In addition, God and Christ did not give because people deserved or earned it, but rather in the name of love and mercy. Therefore, the concept of covenant requires that humans reciprocate such acts of love and mercy in their relationships with God and among themselves. In doing so, humans are fulfilling their covenant obligations and working towards *shalom,* both of which run counter to a system based on retributive justice.

Retributive justice is premised on the assumption that justice means fairly distributing punishment according to how much a person deserves such consequences.64 From this perspective, offenders do not deserve the love and mercy of others. Although there is a recognition that "tit-for-tat" justice plays some role in society, the Bible demonstrates a clear rejection of such an approach to justice. Because God and Jesus gave according to need, not merit, justice is not defined by "whether the right rules applied in the right way" [Ibid.]

Instead, it is measured by whether the outcome serves to restore the dimensions *of shalom,* making the situation right or better. Therefore, restitution, forgiveness, and satisfaction, rather than retribution and punishment, are important concepts in biblical justice. To the extent that punishment plays a role, *shalom* ensures that it is not an end in itself, but is rather aimed at restoration or vindicating the oppressed. [ibid.] In fact, all Biblical laws are intended as means to a better society, rather than ends in themselves. Law is "an instrument for building shalom, for building relationships that right" and "its characteristic purpose not to punish but to redeem, to make things right"[Ibid.] Unlike the modern justice system, Biblical justice is about the future, not the past.

2.6.3 RESTORATIVE JUSTICE IN AFRICAN TRADITIONS

One of the advantages of using restorative conceptions of justice in the Catholic Church in South Africa is the fact that it is rooted in the African values. Van Ness notes that many pre-colonial African societies "...aimed less at punishing criminal offenders than at resolving the consequences to their victims. Sanctions were compensatory rather than punitive, intended to restore victims to their previous position"(1997:34). One of the main functions of precolonial law, as Mqeke describes it, was "...the restoration of the disturbed social equilibrium within the community" (2001:12). The African concept of *ubuntu* is the philosophy of personhood underlying the traditional conception of justice. Providing a precise definition of *ubuntu* is difficult. It denotes a sense of humanity, of the natural connectedness of people. *Ubuntu* is commonly described through the saying "I am because you are" or "my humanity is tied up with your humanity." The effect such a conception of humans must have on one's understanding of justice is clear. If one's humanity is tied up with the humanity of all others what makes others worse off also brings harm to oneself. Thus, responses to wrongdoing must aim to repair the damage, to make the wrongdoing better off for it is only in doing so that one can address the harm the victim(s) suffered. In other words, restoration

requires attention to each part that suffers, for restoration is impossible if a part of the whole is harmed.

2.7 CONCLUSION

The chapter has discussed the two twentieth-century paradigms in canon law, the 1917 and the 1983 paradigms. The 1983 paradigm is to be understood in the light of the weaknesses of the 1917 paradigm. The minimal interest and attention to the theological specificity of canon law stands out there as a major weakness, and it is this weakness that precipitated a crisis in the 1917 paradigm and occasioned the emergence of the 1983 paradigm. The chapter has also underlined the distinction between the *ius perfectum* design and the original design of the 1983 paradigm. The former does not allow much space either for the notion of canon law as an instrument of justice or for that of state law as a serious partner of canon law. A design of this kind would not, therefore, provide a framework for the legitimacy test as conceptualised in Chapter one and as elaborated in the main body of this study. The original design of the 1983 paradigm, however, accommodates the notion of the law as an instrument both of justice and of partnership with secular law. The situating of canon law as an instrument of justice and in partnership with state law in the main body of this study appears justifiable and grounded in the 1983 paradigm. As we have established, the 1983 paradigm accommodates canon law as an instrument of justice, and it now remains for the main body to examine the extent to which the norms in the 1983 code provide for the protection of rights and delivery of justice. Similarly, having established that the 1983 paradigm does not exclude partnership between secular law and canon law, it is opportune for the main body to engage secular law and canon law as dialogic partners and to evaluate the latter in the light of the former. The legal principles for the determination of the factual infringement of legally recognised interests constitute the point of departure for this undertaking. The next chapter provides a test.

CHAPTER THREE CANON LAW FRAMEWORK FOR TESTING LEGALLY RELEVANT DAMAGE

3.1 INTRODUCTION

The concept of damage is central to a delictual claim. One can succeed in one's delictual claim if one has not suffered any loss or harm. At the same time, not every harm results in delictual liability. Harm that results in liability needs to involve legally relevant damage. Legally relevant damage may, in some cases, require verification and testing. The disputants may require that the arbitrator determine whether loss suffered by the claimant constitutes legally relevant damage. This chapter discusses two tests for legally relevant damage: the tests for legal recognition of a right and for infringement of the right. The performance of the two tests for legally relevant damage, however, requires a legal framework. If the arbitrators and disputants decide to use canon law as a basis for the tests, the Bill of Rights in the 1983 code will emerge as an applicable rule of law.

Before a Bill of Rights is used as an applicable rule of law, the arbitrators and the disputants need to determine whether the Bill of Rights in the 1983 code allows the arbitrator to vindicate the rights of the claimant and to deliver justice. Preempting this task, this chapter provides a critical analysis of the Bill of Rights in the 1983 code. In the analysis, the chapter indicates the strengths and weaknesses of the Bill of Rights in providing the delivery of justice through the two tests for damage. Strengths and weaknesses emerge against the background of the analysis of the Bill of Rights in the light of state law.

3.2 Testing Whether Damage is Legally Relevant: Possible Issues At Dispute

Neethling et al emphasise the centrality of harm in a delictual claim: "A delict is a wrongful and culpable act which has a harmful consequence. The element of damage is fundamental to a delictual action for damages" (2001:211). If a respondent's act did not result in any harm or loss, one's delictual claim is lacking on legal and factual grounds and one will not succeed in one's delictual action[27]. Also, not any form of harm results in liability. The harm that results in liability has to be legally relevant damage.[28] The concept of legally relevant damage provides a setting for one of the possible issues at dispute. Given that it is not every form of harm, but only legally relevant damage, that attracts liability, the respondent can, in a statement of defence, argue that the damage suffered by the claimant is not legally relevant. One of the possible issues at dispute that an arbitrator can be asked to determine is, therefore, whether a particular harm suffered by the claimant constitutes legally relevant damage (ibid. 217). Is it a loss or harm that is recoverable through delictual action?

If the parties decide to use canon law for the determination of an issue of dispute, they need have to ask themselves what provisions in canon law allow for such a determination? In some legal systems, the definition of damage includes the criterion for determining the harm that

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27 Although harm or loss is a vital element in a delictual claim, it is important to note that one can suffer damage without its being a basis for a delictual claim. To this end, Boberg (1984:475) makes a distinction between three forms of damage, namely the damage which may be recoverable through an insurance policy, that which may be recovered *ex contractu* and those recovered *ex delicto*. (see also Neethling et al 2002:6-7)

28 The notion of legally relevant damage delimits the scope of delictual liability so that it is not excessive and disruptive to the social harmony of the society (Van Der Walt and Midgley 1997:24). One also need to recognise Patrick Schiltz (2003) who argues that excessive liability and litigation where the Church is party to a civil suit has the effect of eroding the freedom of worship and intensifying the tension between the state and the Church. Such state and Church tension would, however, manifest itself in the context of a state court, and not in a Church arbitration tribunal, since a tribunal constitutes an internal mechanism of the Church, and not an organ of the state.

constitutes legally relevant damage. Canon 128 does not provide a definition of damage, but the Committee on Conciliation and Arbitration of the National Conference of Catholic Bishops in the United States has defined legally relevant damage as "infringement of rights recognised as such in the law of the Church or in the documents of the *magisterium*." (Committee on Conciliation and Arbitration 1988; annotation 3). When the arbitrators are asked to apply canon law to determine whether damage is legally relevant and able to result in a duty to repair, they have to ask: Does the harm constitutes an infringement of right as recognised in church law? [29]

Two further questions arise The phrase, "infringement of rights as recognised by the law" has two components: "infringement of rights" and "rights as recognised by the law." In the test for legally relevant damage, the arbitrator tests for the legal recognition of a right and for the infringement of that right. When the issue at dispute is legally relevant damage, the disputants have to choose the component that the arbitrator has to test. This may be illustrated as follows:

(1) A respondent can aver that the claimant has not suffered legally recognised damage since the interest or right allegedly injured is not listed in the law as a legally recognised right. In other words, the respondent can say that the injury to a claimant's particular interest does not constitute damage as required for the purposes of delictual liability. If the claimant disputes this, the respondent and the claimant may refer their dispute to the arbitrator with the following terms of reference: to determine whether a

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29 The same concept appears in South African state law. Harm that is subject to compensation or satisfaction is that which constitutes an injury to legally recognised interests or rights. Boberg defines delict as the "infringement of another's interests."(1984:1), and Neethling et al (2001:4) fault this definition for its lack of precision. Boberg's definition fails to specify that it is not any interest that constitutes an element in a delict, but only legally recognised interests. In this definition, "an erroneous impression is created that all individual interests, and not only those that are legally recognised and protected, are relevant in this regard." Nevertheless, in this study, although not expressly mentioned, we consider Boberg's reference to interests as covering the legally recognised interests.

particular interest allegedly injured by the respondent is listed and given recognition in law as a right that is worthy of protection.

(2) A respondent can assert that the claimant has not suffered legally relevant damage because the claimant's legally recognised interests or rights were not violated. In other words, the internal scope of the right, allegedly injured by the respondent, is textually framed in such a way that it does not cover the claim. If the claimant disputes this, the respondent and claimant can refer their dispute to the arbitrator with the following terms of reference: to determine whether the internal scope of the right, as internally demarcated by the textual formulation of the right, covers the claim.

The two factors may be diagrammatically represented as follows:

The respondent argues that the harm that the claimant has suffered is not legally relevant damage and bases one's argument on:	The terms of reference for the arbitrator	The category of the test for the legally relevant damage
The interests or rights of the claimant allegedly injured by the respondent are not legally recognised	To determine whether the interests or rights of the claimant are legally recognised	Testing the fact of the legal recognition of a particular interest or right
The interests or rights of the claimant, although legally recognised, have not factually been infringed by the respondent	To determine whether the interests or rights of the claimant have been infringed	Testing the fact of infringement of a particular right or interest

The performance of these two tests, however, requires a legal framework. If the disputants and the arbitrator choose canon law as a framework for the tests, they need to determine the following: the provisions canon law has established for the tests; whether the provisions allow

for the delivery of justice to the claimant? The next two sections will deal with these two tests.

3.3 Testing Whether or A Particular Right is Legally Recognised

The focus in this section is on the first test for legally relevant damage: the test of whether a particular interest or right is legally recognised and protected. The question is: what criteria would the arbitrator use for determining whether the injured right or interest of the claimant is legally recognised in canon law? An answer to this question requires the placing of the issue in a broader framework and posing a further question: what criteria do legal systems use for determining whether an interest is legally recognised as being worthy of protection? This broader question needs further elaboration. Van Der Walt and Midgley (1997:54) emphasise that the concept of the legal recognition of interests brings to the fore the notion that it is not the legal system that creates the interests or rights. Rather, the interests are morally and factually due to the persons prior to the legal recognition. What the legal system does is to elevate some interests to the level of legal recognition. As Boberg shows: "the law does not create individual interests but merely provides juridical recognition of interests which exist in fact even before legal recognition takes place" (1984:475).

In the domain of canon law, Rosalio Castillo Lara subscribes to the concept of the legal recognition of rights. He argues that the rights listed in the Bill of Rights in the 1983 Code were already due to the members of the Church by the virtue of their baptism and human dignity prior to their recognition in the code. Accordingly, the rights in the Bill of Rights "are recognised, not granted, by the norms."(1986:20) The Bill of Rights does not create the rights: it merely grants legal recognition. The concept of the legal recognition of rights, as distinct from the creation of rights, as pursued in state law and as advocated by some scholars in canon law, has the effect of creating two distinct categories of interests: interests that have

gained legal recognition and others that have not gained legal recognition. This raises the question: How does one distinguish between an interest that is not legally recognised and one that is recognised?

In many legal systems, a right is deemed to be legally recognised and protected, if it is expressly listed in its section on substantive law. Given the hybrid nature of state law in South Africa, legally recognised interests are cited in sources of substantive law such as the constitution, the statutes, common law and case law(Kleyn and Viljoen 2000:50-70). Canon law, however, operates according to the Continental system, which deems interests to be legally recognised if the legislator incorporates them into the list of recognised rights in the code or in other legal instruments. In the 1983 code, the legislator did provide a listing of rights in the Bill of Rights.(Folmer 1984:46)[30] [31] If the disputants and the arbitrators decide to resort to canon law for the test of whether a right is legally recognised, the Bill of Rights will provide an applicable rule of law.

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30 The inclusion of the Bill of Rights in the 1983 code is a product of the guiding principles for the drafting of the 1983 code that were approved in the synod of Bishops from 30 September to 4th October 1967. For the text and a summary of the discussion of the principles at the synod, see *Communicationes*, 1,1969:77-108; For a critical analysis of the principles, see Cunningham 1970 and Bassett 1970:200-201. Bassett, in particular, critiques the capacity of such principles to engender institutional reform of the Church in the spirit of the Second Vatican Council. The principles themselves were subjected to a diversity of interpretations, resulting in conflicting opinions during the drafting process. (Canon Law Society Of America 1978) The sixth principle reads: "A very important problem must be solved in the future Code of Canon Law, namely, how can the rights of persons be defined and safeguarded?...The rights of each and every faithful must be acknowledged and safeguarded, both the rights which they have by natural law and the rights contained in divine positive law, as also the rights which are duly derived from these laws because of the social condition which the faithful acquire and possess in the Church. Everyone does not have the same function in the Church and the same statute or law does not apply to all in the same way. It has, therefore, been rightfully proposed that in the future Code of Canon Law, because of the radical equality which exists among all the faithful by reason of their human dignity and of their baptism, a juridical statute (Bill of Rights?) common to all the faithful should be legislated, before the rights and duties which pertain to the various ecclesiastical offices are listed." (Hite et al 1980:75-76)

31 The Bill of Rights is found both in the 1983 code in form of canons 208-223 and in the 1990 code of canons of the Eastern Churches in form of canons 10-26. Our study focuses on the Bill of Rights in the 1983 code.

On scanning the list of rights in the Bill, it becomes evident that its scope is not wide enough to cover the interests or rights that are often subject to delictual injury in Church-sponsored institutions such as schools, hospitals, NGOs, religious institutes. The Bill lists the following non-ecclesial[32] rights: freedom of expression; (Canon 212§3); freedom of association and assembly (Canon 215); academic freedom to engage in scientific research (Canon 218); right to privacy; (Canon 220); right to good reputation (Canon 220) and the right to fair trial (Canon 221)33 34 The list of the kinds of legally relevant damage is too circumscribed and

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32 The Bill of Rights in the 1983 code is made up of two categories of rights: ecclesial and non-ecclesial rights. The former are rights owing to persons for enhancing of their lives and their mission as Christians. They include rights such as the right to receive the word of God and the sacraments.. These rights are premised on doctrinal and theological grounds. It is advisable that the infringement of the rights does not form a cause of action in the arbitration tribunal. Given the doctrinal and theological grounding of ecclesial rights, the hearing of claims based on ecclesial rights could easily degenerate into doctrinal controversies. While the arbitration tribunal is not an appropriate forum for the settlement of doctrinal controversies in the Church, some non-ecclesial rights are, within the Church context, coloured by doctrinal elements. The right to freedom from discrimination and the right to equality, for example, easily slide into the domain of doctrine. This is the case especially with the claims of discrimination in the cases of the non-admission of women or homosexuals to ordination. Thomas Green (1979:634), therefore, argues that the question of non-admission of women to priesthood is not a human rights issue that can be advanced in the same way as the rights of women in secular society: It is a human rights issue that should be expressed in wider terms. For example, "the question of the ecclesial position of women is actually part of the broader question of the legal status of the laity." See also Coriden 1977.

33 McGrath (2001:195) and Bertram Griffin (1982:64) cite canon 208 as legislating the right to equality. The purpose of canon 208 is, however, rather to serve as a preamble stating the radical equality that derives from the common condition of all the faithful than to legislate the right to equality. (Hervada 1993:190). The canon reads: "Flowing from their rebirth in Christ, there is a genuine equality of dignity and action among all of Christ's faithful. Because of this equality, they all contribute, each according to his or her own condition and office, to the building up of the Body of Christ."

34 The list of human rights as proposed by various authors for the Bill of Rights in the Church is interesting. It may be of interest to compare the lists proposed by such authors with the list in the Bill of Rights in the 1983 code. Pedro Lombardia, for example, as early as 1969, proposed the inclusion of the right to information and the right to education in the bill. (1969:44) The Concilium documentation on human rights, as edited by the general secretariat, included the right to equality in the administration of justice, the right to an independent and impartial tribunal, freedom of thought, conscience and religion, the right to take part in the government of the Church, and the right to one's culture. (1969:83-85) A symposium for CLSA on a "Declaration of Christian Freedoms," held in 1968 listed the following additional rights: the right to freedom in the search for the truth, without fear of administrative sanctions, the rights of persons employed by, or engaged in the service of the Church to conditions of work consonant with human dignity, their right to professional practices comparable to those in society at large, the right to entitlement to all the rights and freedoms of Christians without

restrictive. Much of the harm or loss that people experience in the Church-based institutions (schools, hospitals, NGOs etc) is not considered legally relevant.[35] Gross injustices, therefore, arise if the parties to a dispute mandate an arbitrator to be solely reliant on the Bill of Rights in the 1983 code.

3.4 TESTING WHETHER A PARTICULAR RIGHT IS INFRINGED

Other than testing whether a particular interest is recognised to qualify as legally relevant damage, the disputants may also ask the arbitrators to determine whether a legally recognised interest has been infringed. If the disputants decide to use canon law for the determination, they need to ask themselves: What provision has canon law made for testing the infringement of a right? What does the test for infringement of rights represent? State law has provisions that answer these questions. In state law, the courts or tribunals determine whether or not there has been an infringement through an interpretative process that takes into account the formulation of a particular right by a legal text. This test is referred to as an interpretative

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discrimination on the basis of race, colour, sex, birth, language, political opinion, or national or social origin. (CLSA Consensus Paper, in Coriden 1969:5-14)

[35] The question in this section concerns the application of the Bill of Rights in the context of a delictual claim. If the Bill of Rights is employed as an applicable rule of law for delictual claims that arise from such Church-based institutions as schools, hospitals, parishes, will it allow much space for the delivery of justice? Other authors have labored with another dimension of the application question, namely is the Bill of Rights applied to cases in constitutional or statutory terms? A study committee for the Canon Law Society of America on the procedures for the protection of rights of persons in the Church, for example, asked: "The meaning of "rights" in the new code –are they "constitutional," or merely "functional" derivations from obligations and responsibilities?" (The Canon Law Society of America 1988: 287) If they are considered constitutional, they will be applied for the purposes of determining the constitutional validity of norms and conduct in the Church. If considered statutory, they will be applied for the purposes of delictual and other civil claims. This study considers them in terms of the second option. That is: The Bill of Rights first featured in canon law within the context of *Lex Ecclesia Fundamentalis.* They were codified in norms 10-24 of the *Textus Prior* and norms 10-25 of the *Textus Emendatus,* In the context of the *Lex Ecclesia Fundamentalis*, they served as constitutional norms and other Church laws including that of conduct were invalid if they did not conform to the standards of the Bill of Rights. When the project of *Lex Ecclesia Fundamentalis* was cancelled, the Bill of Rights was transferred to the ordinary code of the Church, the 1983 code. The Bill of Rights is thereby applied as a statutory, and not as a constitutional instrument.

test. For Van Heerden and Neethling (1995:80), the hermeneutical activity is informed by the principle of the relativity of rights. The exercising and protection of rights in society is not absolute: in order to balance interests and create public order, rights are subject to certain limitations.

Even subjective rights such as privacy and reputation are not themselves absolute. The relationship between the legal subject and the legal object (one's privacy, reputation, dignity etc) is not absolutely free from disturbance (Boberg 1984:479; Neethling et al 2001:51). One of the limits to the exercising and vindicating of a right lies in its the textual formulation. The Bill of Rights and other legal instruments in state law formulate each right in such a way as internally to demarcate the scope for its exercise and protection. Boberg (1984:479) identifies two aspects of a right that can be placed in a protected zone. Each aspect requires elucidation:

> (1) Firstly, the textual formulation of a right may place an aspect of the legal object into the protected zone. That is, each interest that has been elevated to the level of a subjective right has a legal object, or simply the object of a right. When the textual formulation of the right demarcates the zone of protection, it places some, but by no means all of the aspects of the legal object into the zone. Not every aspect of the legal object is subject to legal protection, but only the aspect that is in the protected zone. Infringement of a particular right occurs when there is interference with the legal object's protection.
>
> (2) Secondly, textual formulation can place an aspect of the legal relationship between the legal subject and the legal object into the protected zone. When an interest is elevated to the level of a subjective right, the relationship between the subject and his or her interest is elevated to the level of a legal relationship between a legal subject and

legal object. The subject exercises some control and power over the legal object. Neethling et al express this succinctly: "The subject-object relationship provides the holder of a right with the power to use, enjoy and alienate the object of his right; in other words, the holding of a right confers powers of enjoyment, use and disposal in respect of a legal object. The content and extent of these powers are determined and regulated by the rules and norms of the law" (2001:51). More precisely, it is the textual formulation of the right that determines "the content and extent of these powers." The textual formulation of the right demarcates the protected zone; it places some aspects of the powers of use, enjoyment and disposal, but not all aspects, into the zone. Infringement of a particular right occurs when the aspects of the legal relationship within the protected zone are disturbed.

In the light of these factors, when an arbitrator is asked to test whether a legally recognised interest has been injured, there will be a two-phased enquiry. (1) Firstly, the arbitrator may ask the following two questions: What aspects of the legal object are, in terms of the textual formulation of the right, free from external disturbance? What aspects of the subject-object relationship are, in terms of the textual formulation of the right, free from external disturbance? 36 (2) Secondly, the arbitrator may ask: Does the the interest of the claimant injured by the respondent constitute the aspect of the right or interest that is, in terms of the legal text on the right, located in the protected zone? Did the conduct of the respondent disturb the aspect of the subject-object relationship that the legal text has placed into the

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[36] When the tribunal tests the infringement of the right to privacy, for example, it asks: What aspects of the legal object, privacy, are located in the protected zone and are therefore free from external disturbance? What aspects of a subject's relationship with his or her privacy and good reputation, for example, are located in the protected zone and are therefore free from external disturbance? From another angle, one may also ask: Which aspects of the power that a subject exercises over his or her privacy are, in terms of the textual formulation of the right, located in the zone of protection and are thereby free from undue limitation and external disturbance?

protected zone of the right?37 If the answer in this second phase of the enquiry is affirmative, there has been an infringement of the right and the respondent is liable for repairing the alleged harm (Neethling et al 2001:54).[38]

3.5 Limitations of The Canon Law Framework For The Infringement test

The performance of the interpretative test as depicted above requires a legal framework. That is, in determining whether a particular condition of the claimant falls within the protected zone of a particular right, the arbitrator needs a legal text which will be subjected to interpretation, and infer the internal demarcations of the right. The disputants have the freedom to decide on the legal texts to provide the framework.

Some of the legal norms for rights in the Bill of Rights are of delictual significance. These include personal rights such as the right to privacy and reputation. The disputants may choose the legal texts that the arbitrator can use to determine infringement. In choosing the legal texts in the 1983 code, the disputants need to check the scope of a particular right. Does the textual formulation of a particular right by a particular canon in the 1983 code allow much scope for the delivery of justice to the claimant? Negatively framed: is the zone of protection

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[37] In testing for the infringement of the right to privacy, the tribunal will ask: Does the privacy, for example, that has been violated constitute the aspect of privacy that is, in terms of the legal text on the right, located in the protected zone of the right to privacy? Has the conduct of the respondent injured the aspect of privacy that is located within the scope of protection of the right?

[38] In relation to constitutional litigation, John De Waal speaks of the textual formulation of the right as having the effect of demarcating a protected area for the right. The courts have, therefore, to determine whether the applicant's conduct falls within the protected area. If it does, there has been an infringement of the right: "Demarcations circumscribe or place certain conditions on the use of the right. The right to assemble is, for example, protected on the condition that the assembly is peaceful and unarmed. The condition demarcates the right and, in terms of the two-stage analysis, it is a first stage matter to determine whether the applicant's conduct falls within the demarcated scope of the right" (2001:164).

of a particular right provided by the textual formulation of the right so narrow that it would frustrate the delivery of justice if the arbitrator used it as an applicable rule of law? To answer the question, one needs to be aware of the ways in which the legal texts demarcate the zone of the protection of rights.

Duard Kylen and Frans Viljoen (2000:50) identify two ways in which the legal texts internally demarcate the zone of protection. Firstly, one may internally demarcate the zone negatively by incorporating the claw-back clauses into the legal text on the right. In the Bill of Rights in the 1983 code, this is especially evident with respect to human rights. Secondly, one may demarcate the zone by formulating the right positively. This is the case with personal rights. There is a need to elaborate on the two modes. In the former, the elaboration will be accompanied by a critical analysis of the textual formulation of the freedom of expression in the Bill of Rights. In the latter, the analysis will focus on the right to privacy.

Before embarking on the analysis of these two rights, it is important to mention that the first mode of internal demarcation, the negative mode, has widely attracted the attention of canon law scholars. The positive mode has not enjoyed similar attention. Various explanations are advanced for the negative mode.[39] In critiquing the excessive claw-back formulation of the rights, Thomas Green, for example, ascribes this to the excessive fear of individualism that has marked human rights litigation in state courts. He writes:

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39 Other authors have critiqued the claw-back clauses without offering an explanation. La Due, for example, laments: "although it is most heartening to see the schema has included a presentation of the rights of all the faithful, it must be noted that nearly every declaration of a right in these canons is accompanied by a statement of qualifications and limitations of the right. It is true that legal and moral norms are not absolutes, but are restricted by competing values. The fact, however, that every legal right is limited does not mean that the limitation should be expressed as forcefully as the right itself in the very constitutional provision which declares the right. This tends to dim and weaken the right, rendering it ineffectual." (1970: 39-40) Also of relevance are James Provost (1992:49), Paul Griffin (1992:63) and Johannes Mets. (1972:90)

> The formulation of rights is overly conditioned, so that their limitations appear essential to the rights themselves and not related to their responsible exercise. There seems to be a needless fear of abuse resulting in multiple qualifications of the rights, contrary to the clarity and simplicity of their affirmation in conciliar and other sources (1979:634).

For Denis Doyle, the crowding of the Bill of Rights with claw-back clauses mirrors the attempt to compromise and reconcile conflicting opinions on the introduction of rights into the Church's legal system. Doyle says : "These rights are new and the way that they are phrased reflects the tension that their introduction causes within the traditionally stratified ecclesiology of the Roman Church. They are couched in cautionary language which portrays a hesitant tone. The expression of a right is almost accompanied by a phrase such as 'each according to his or her own condition' or 'provided it is in accord with Church teaching' and 'with due allegiance to the *magisterium* of the Church.' The excessive use of qualifiers is daunting."(1990:135)

3.5.1 Canon Law Framework For Testing Whether Or Not The Freedom of Expression Has Been Infringed (Canon 212 § 3)

One of the fundamental freedoms in the Bill of Rights of the 1983 code is freedom of expression.[40] It is embodied in canon 212, §3 which reads:

> Christian faithful have the right, indeed at times, the duty, in keeping with their knowledge, competence and position, to manifest to the sacred pastors their views which concern the good of the Church. They have the right also to make their views known to others of Christ's faithful, but in doing so they must always respect the

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40 Freedom of expression is intimately connected with freedom of opinion; the freedom to form and hold one's opinion interfaces with the freedom to express one's opinion. The formulation of the canon limits itself to the expression of opinion. It does not address protection of the formation and holding of one's opinion. The canon on freedom of opinion was omitted in the draft of the 1983 code on the grounds that freedom of opinion is a subjective condition that cannot sufficiently be subject to objective verification and testing in the Church courts or tribunals. It was submitted that there are no verifiable indicators that the Church tribunal would test. (Provost 1985:151)

> integrity of faith and morals, show due reverence to the pastors and take into account both the common good and the dignity of the individuals.[41] 42

Canon 212 §3 serves as a rule of law in the disputes where a disputant alleges the infringement of his or her freedom of expression. One of the situations that qualify for the application of canon 212§3 is a case where a claimant seeks compensation for damages after being (e.g. dismissed or suspended from a Church entity such as a Church association, a Church choir, institute of religious life or a diocese, seminary and other Church institution of higher learning) for expressing dissenting opinions about an administrative or disciplinary matter. The arbitrator provides a hearing for such disputes and relies on canon 212§3 as an applicable rule of law. This brings us back to our question: Will claimants in such and similar cases succeed in their plea for vindication of their freedom of expression if canon 212§3 is employed as the legal basis for their claims?

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41 This canon derives from two documents: the Vatican II Document, Lumen Gentium 37 and Canon 12 §3 of the 1980 draft of *Lex Ecclesiae Fundamentalis*. The formulation of the canon is not distinct from its sources *(fontes)*. Hence, the ultimate source of the canon, Lumen Gentium reads: "Like all Christians, the laity have the right to receive in abundance the help of the spiritual goods of the Church, especially that of the word of God and the sacraments from the pastors. To the latter the laity should disclose their needs and desires with that liberty and confidence which befits children of God and brothers (sic) of Christ. By reason of the knowledge, competence or pre-eminence which they have, the laity are empowered – indeed sometimes obliged – to manifest their opinion on those things which pertain to the good of the Church. If occasion should arise, this should be done through the institutions established by the Church for that purpose and always with truth, courage and prudence and with reverence and charity towards those who, by reason of their office, represent the person of Christ." .And the proximate source of the canon, namely canon 21 §3 of the *Lex Ecclesiae Fundamentalis* reads: "Because of the knowledge, competence, and quality which they enjoy, all the faithful have the right and sometimes the duty to manifest to the sacred pastors their opinion concerning matters which pertain to the good of the Church. Keeping in mind the integrity of faith and morals, the common good, and the dignity of persons, the faithful should make their opinions known to the other faithful." For the history of the drafting of canon 12 of *Lex Ecclesiae Fundamentalis*, refer to Boelens 2001:29

42 This canonical text is a reproduction of the text from the Vatican II Documents. It needs to be noted that, in 1969, Pedro Lombardia cautioned against the canonisation of the human rights references in the Vatican II into canonical norms: "As was expected, given the nature of its documents, the last Ecumenical Council did not provide an exhaustive list of the fundamental rights of the faithful, even though certain individual ones were outlined with remarkable clarity; much less could the Council provide solutions to all the problems of Canon Law relative to the protection of those rights by positive ecclesiastical law" (1969:43-44; see also ibid. 1971:119).

To answer this question, two sections in canon 212§3 need to be noted. The textual formulation in canon 212§3 categorises the freedom of expression as the expression of one's opinions to the Church authority and to the other faithful.[43] This categorisation opens up two lines of possible freedom of expression enquiries by the arbitrator. The two enquiries seek to determine the following doubts:

The *dubium* in the enquiry	The corresponding section of canon 212
Whether one's expression of opinion to the Church authorities falls within the protected zone as demarcated by the textual formulation of canon 212	Christian faithful have the right, indeed at times, the duty, in keeping with their knowledge, competence and position, to manifest to the sacred pastors their views which concern the good of the Church.
Whether one's expression of opinion to other members of the Church falls within the protected zone as demarcated by the textual formulation of canlWg k2	They have the right also to make their views known to others of Christ's faithful, but in doing so they must always respect the integrity of faith and morality, show due reverence to the pastors and take into account both the common good and the dignity of the individuals

In determining these doubts, the arbitrator will take account of the claw-back clauses in the corresponding section of the textual formulation. A cursory look at the text shows that both sections of canon 212§3 contain a multiplicity of claw-back clauses. What are the effects of claw-back clauses on the protection of freedom of expression? In his commentary on canon 212§3, William Woestman (1998:18) refers to the claw-back clauses as modifiers in the

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43 The canon contains two categories of subjects of freedom of expression: freedom of expression of those expressing their opinion to the Church authorities and one for those expressing their opinion to the other faithful. Lumen Gentium 37, which is the source of this canon does not make this distinction. (Provost 1985:146) The distinction is superfluous in that it does not serve any positive juridical purpose. On the surface, the canon seems to attach different juridical consequences to the two categories, giving the impression that the law seeks to provide firm protection when freedom of expression is exercised and enforceable against the Church authority. Closely looked at, it is evident that the formulation in the canon seems to focus more on protection of the Church authority than on the protection of the subject of freedom of expression. Where the focus is on the individual's freedom of expression, the distinction between the exercise of one's freedom of expression directed to the Church authority and to others respectively is unnecessary.

exercise of freedom of expression rather than to the limitations of the protected zone for freedom of expression: "The various qualifiers in the Code in no way diminish the right and duty treated, but they indicate the mode to be used in exercising it." Woestman's focus is on the Bill of Rights as an instrument that regulates the exercising of the rights rather than as an instrument that protects rights. When one proceeds from the vantage point of the Bill of Rights as a protective mechanism, the multiple claw-back clauses in canon 212§3 emerge as factors that gravely narrow the zone of protection of freedom of expression.[44] The protected zone for freedom of expression contained in canon 212, §3 is heavily circumscribed and constraining, leaving many forms of expression of opinion outside the protected zone. The two tables below, one on the protected zone when one is expressing one's opinion to the Church authorities and the other on the protected zone when one is expressing one's opinion to the other faithful, illustrate this.

EXPRESSION OF ONE'S OPINION TO THE PASTORS

Conduct that falls within the protected zone of freedom	Corresponding issue at dispute to be determined by the arbitrator
* CONDUCT WITHIN THE PROTECTED ZONE: The expression of opinions grounded in "knowledge, competence and position." *CONDUCT OUTSIDE THE PROTECTED ZONE: Expression of opinion to pastors is illegal and, therefore, not protected if it is not grounded in "knowledge, competence and position."	Whether the claimant's expression of views/opinions to the pastors is grounded in knowledge, competence and position

44 Another attempt to downplay and canonise the negative effect of the multiple claw-back clauses is found in the first edition of the CLSA Commentary. The commentary on canon 212§3 reads: "The legislator has inserted a number of qualifiers in the conciliar material, considered necessary to provide the basis for a proper legal interpretation when the Council's statement is read as part of canon law. To appreciate the significance of these qualifiers, the substance of the canon must first be understood"(Provost 1985:146).

*CONDUCT WITHIN THE PROTECTED ZONE: The expression of opinion on issues that are for the good of the Church *CONDUCT OUTSIDE THE PROTECTED ZONE The expression of opinions to the pastors is illegal and, therefore, not protected if it is on issues that are not for the good of the Church.	Whether the claimant's expression of views/opinions to the pastors concerns issues that are for the good of the Church

EXPRESSION OF ONE'S OPINION TO THE OTHER CHRISTIAN FAITHFUL

Conduct that falls within the protected zone of the freedom	Corresponding issue at dispute to be determined by the arbitrator
CONDUCT WITHIN THE PROTECTED ZONE: Expression of opinion in a way that respects the integrity of faith and morals CONDUCT OUTSIDE THE PROTECTED ZONE One's expression of opinions to the pastors is illegal and therefore not protected if it is done in a way that is disrespectful of the integrity of faith and morals	Whether the claimant's expression of views or opinions toe other Christian faithful is done in a way that disrespects and impairs the integrity of faith and morality
CONDUCT WITHIN THE PROTECTED ZONE: Expression of one's opinion that "take account the common good." CONDUCT OUTSIDE THE PROTECTED ZONE:Expression of opinions to the pastors is illegal and, therefore, not protected if it does not take into account the common good	Whether the claimant's expression of views or opinions to the other Christian faithful is done in a way impairs the common good
CONDUCT WITHIN THE PROTECTED ZONE: Expression of opinion that is respectful of the Church pastors	Whether the claimant's expression of views or opinions to the other Christian faithful is done in a way that is disrespectful of the pastors

CONDUCT OUTSIDE THE PROTECTED ZONE: Expression of opinions to the pastors is illegal and, therefore, not protected if it is done in a way that is disrespectful of the Church pastors	
CONDUCT WITHIN THE PROTECTED ZONE: Expression of opinion in a such a way as to "take account [of] the dignity of others." CONDUCT OUTSIDE THE PROTECTED ZONE: Expression of opinions to the pastors is illegal and therefore not protected if it is done in a way that does not take into account the dignity of others.	Whether the claimant's expression of views or opinions to the other Christian faithful is done in a way that impairs the dignity of others

Given the multiple claw-back clauses in canon 212§3, it is hard to envisage how subjects who are victimized for being a voice of dissent can secure a vindication of their freedom of expression on the basis of canon 212§3. Conversely, given the narrowed of liability demarcated by the multiple claw backs in canon 212§3, it is hard to envisage a situation where the arbitrator will find a particular respondent (a Church leader or another party in the Church) liable for violation of a respondent's freedom of expression. The multiplicity of the claw-back clauses blocks and closes off many lines of liability and excludes many of the conditions for freedom of expression of opinion from the protected zone.

The normative contents of some of the claw-back clauses are as constraining as the multiplicity of claw-back clauses. To elucidate this further: when an arbitrator is conducting a violation enquiry in a dispute on the freedom of expression, the content of the claw-back clauses will have to be determined to ascertain whether a particular condition of the claimant falls within the zone of protection excluded by the claw-back clause. Some of the claw-back clauses in the canon are formulated in a way that does not allow for their objective testing. In

the absence of a specific standard for testing, the task of determining whether a claimant's expression of opinion, in the face of the claw-back clause, falls within the protected zone will prove daunting for the arbitrator. The following two tables illustrate this problem.

THE CLAW-BACK CLAUSES WITH PROBLEMATIC NORMATIVE CONTENT

THE PROBLEMATIC CLAW-BACK CLAUSE	PROBLEM IN THE NORMATIVE CONTENT OF THE CLAW=BACK CLAUSE
THE CLAUSE: Christian faithful have the right, indeed at times, the duty, *in keeping with their knowledge, competence and position*... CORRESPONDING ENQUIRY: Whether the claimant's expression of views/opinions to the pastors was grounded in "knowledge, competence and position"	FOCUS AREA IN THE ENQUIRY: The arbitrator will have regard to the cognitional condition of the claimant at the time of expression of opinion. POTENTIAL PROBLEMATIC AREA ONE IN THE ENQUIRY: What standard would the arbitrator have to apply to determine, from a particular case, whether the degree of "knowledge and competence" that the claimant held at the time of expressing opinions was high enough to merit a lawful expression of opinion? This will be difficult for the arbitrator to determine since canon 212,§3 does not delineate the standard of "knowledge, competence" required for the lawful expression of opinion. POTENTIAL PROBLEMATIC AREA TWO IN THE ENQUIRY: What standard will the arbitrator have to use to determine a position (*praestantia*) in the Church that entitles lawful expression of opinion? This will be difficult to determine since canon 212§3 does not indicate the nature of the positions in the Church that entitle one to a lawful expression of one's opinion[45]
THE CLAUSE: Christian faithful have the right, indeed at times, the duty....to manifest to the sacred pastors *their views which*	FOCUS AREA IN THE ENQUIRY: The arbitrator would have regard to the subject matter or object of the claimant's expression of opinion to

45 The word "*praestanitia*" as predicated of the subject of the freedom of expression seems to obscure the meaning. The Spanish-Canadian commentary translates it as "position" and the American commentary as "pre-eminence." According to James Provost (1985:145) the word can refer to "outstanding ability or an outstanding quality in the individual." Even then, what standard would the tribunal employ in determining an outstanding quality as a requirement for lawful exercise of freedom of expression?

concern the good of the Church. CORRESPONDING ENQUIRY: Whether the claimant's expression of views/opinions to the pastors concern issues that are for the good of the Church	ascertain whether or not it is for the good of the Church. POTENTIAL PROBLEMATIC AREA IN THE ENQUIRY What standard will the arbitrator use to measure whether an issue is for the good of the Church? This will be difficult for the arbitrator to determine
THE CLAUSE: They have the right also to make their views known to others of Christ's faithful, but in doing so they must always *respect the integrity of faith and morals*... CORRESPONDING ENQUIRY: Whether the claimant's expression of views or opinions to the other Christian faithful is done in a way that disrespects and impairs the integrity of faith and morals	FOCUS AREA IN THE ENQUIRY: The arbitrator will have regard to the effect of the expression of the claimant's expression of opinion on the integrity of a particular faith and morals POTENTIAL PROBLEMATIC AREA IN THE ENQUIRY: What standard will the arbitrator have to use to determine whether, in a particular circumstance, integrity of faith and morals has been impaired. This problematic translates into the following two questions: What constitutes "integrity of faith and morals?" What degree of impairment of integrity is required for the Church authority lawfully to suppress the freedom of expression? Such questions will be difficult for an arbitrator to answer.
CLAUSE: They have the right also to make their views known to others of Christ's faithful, but in doing so they must always ... *show due reverence to the pastors* .... CORRESPONDING ENQUIRY: Whether the claimant's expression of views or opinions to the other Christian faithful is done in a way that gives "due reverence to the pastors."	FOCUS AREA IN THE ENQUIRY: The arbitrator will note the effect of the claimant's expression of opinion on the "due reverence to the pastors." POTENTIAL PROBLEMATIC AREA IN THE ENQUIRY: What standard will the arbitrator use for determining whether the claimant's expression of opinion lacks "due reverence to the pastors"?

3.5.2 Canon Law Framework For Testing Whether One's Privacy has Been Infringed (Canon 220)

The canon on the right to privacy is formulated in terms of a legal obligation. A right is then inferred from the obligation, which reads: "No one may unlawfully harm the good reputation

which a person enjoys, or violate the right of every person to protect his or her privacy."(Canon 220) Privacy is a personal right that is at the same time a human right. The textual formulation of canon 220, therefore, demarcates the extent to which the legal object, one's privacy, is legally protected by canon law. The canon is framed in a way that is open-ended, devoid of significant claw-back clauses. Given such a lack of significant claw-back clauses, on the surface it would seem that the canon does not set any limits to the exercise and vindication of one's privacy within the Church and to provide ample space for the right to privacy. But a closer look at the wording of the canon can bring one to a very different conclusion.

A closer inspection of the formulation of canon 220 shows an internal demarcation that places two elements into the protected zone of the right to privacy. The table below illustrates this.

THE TEXTUAL FORMULATION	THE CONDUCT THAT FALLS WITHIN THE PROTECTED ZONE
No one may *unlawfully* ...	This phrase means that the intrusion into one's private life is lawful in so far as the law does not decree otherwise. The law determines the area of private life that may be violated in view of protecting the public interests in the church. The law authorises intrusion in such cases
.....the right of every person to protect his or her privacy	This phrase means that the sector of one's private life to be protected by the right is to be determined by the legal subject. The subject determines the area of private life that he or she wishes to protect from external intrusion. The intrusion is therefore lawful if it is authorised by the subject. It is lawful if it is accompanied by consent.

In the light of these two categories, the disputants and the arbitrator have to determine whether the formulation of canon 220 will allow ample space for the vindication of the right

to privacy if the arbitrator uses the canon as an applicable rule of law. Frank Morrisey (1997:126-128) has listed the instances of infringement of privacy in the domain of the Roman Catholic Church. They include: psychological assessment, HIV testing, inquiry into sexual orientation, interference with one's letters and other means of communication. In this chapter, we shall focus on the HIV testing of candidates to priesthood or religious life. In the Roman Catholic Church, some of the dioceses and religious congregations have the policy of admitting candidates to the priesthood and religious life on condition that they have been tested for HIV and the results have been disclosed. Will the question as to the delivery of justice arise when a Church member, who has been excluded from admission to priesthood or religious life on the grounds of his or her HIV status, relies on canon 220 as the legal basis of his claim?

Frank Morrisey (1997:126-128) argues that, in terms of canon 220, HIV testing does not constitute an infringement of the right to privacy. The aspects of privacy that are injured in the HIV testing of candidates for the priesthood lie outside the zone of protection. This is evident in two areas:

(1) Firstly, Canon 220 admits intrusion into another's privacy if it is done lawfully. HIV testing in a diocese or religious congregation is conducted in terms of canon 642. Canon 642 stipulates that, when persons seek admission into the religious life, their "health, disposition and maturity are to be established, if necessary even by the use of experts, without prejudice to canon 220." As such, the HIV testing for a candidate to religious life falls outside the scope of protection as afforded by canon 220.

(2) Secondly, in terms of canon 220, the infringement of privacy does not occur when the intrusion is done with the consent of the owner. In HIV testing, this requirement is satisfied by the consent document that the candidate signs prior to the testing. The church is not, therefore, liable for the repair of damage in the case of HIV testing if the claimant signed a consent document.

It is evident from Morrisey's position that the lawfulness and consent arguments, grounded in canon 220, lean heavily towards the respondent. The two arguments, already legally grounded in terms of canon 220, leave much space for abuse and injustice if they are employed in an arbitration. Firstly, the lawfulness argument focuses on formal justice, without taking into consideration substantive justice. The focus is on the interests of the institution, and not on the harm that the person suffers on account of being excluded from the priesthood or religious life on account of his or her HIV status. The interests of equity require that an arbitrator hears such cases beyond the lawfulness requirements in canon 220.

Secondly, the consent argument does not take into consideration the context within which the consent for testing is elicited. The signing of consent documents is sometimes accompanied by internal or external compulsion, including the fear of being dismissed as a student for the priesthood or a candidate for the final profession or for fear of being considered immoral in case his refusal to be tested is a sign of immorality and fearfulness about being tested HIV positive. This kind of situation and the impairment of free will that results from it, raises doubts about the validity of the consent document. Neethling et al emphasise the influence of circumstances of this kind on the validity of consent. According to them: "There are many cases of violation of privacy where consent is indeed given, but it can seldom be considered voluntary as a result of some form of coercion. This is the case, for example, where a prospective employee, as a prerequisite for employment, is compelled to undergo polygraph

or personality tests. Because of such coercion the consent should be invalid and consequently the violation of privacy wrongful" (1996:275).

3.5.3 Remedies for the Limitation of Rights in THE Bill of Rights

3.5.3.1 First Remedy: Resort to Other Parts Of The Code And Other Legal Instruments in Canon Law

It is evident from the critical analysis of the bill above that grave injustice will arise if the disputants mandate the arbitrator to be solely reliant on the Bill of Rights for the determination of the two tests for legally relevant damage: the test for whether a right is legally recognised and the test for whether the right was infringed. In the face of this limitation, how will the arbitrators and the disputants proceed? Some scholars have noted the limitation and have proposed solutions. It is important to evaluate each proposed solution. The first solution is not to consider the Bill of Rights in the 1983 code as *numerus clausus*. Aida McGrath (2001:195) and the Committee on Conciliation and Arbitration in the United States (1988) have advocated this option. In terms of this solution, the Bill of Rights in the 1983 code is not "a comprehensive compendium of all the rights" that the Church considers to be worthy of protection (Committee on Conciliation and Arbitration 1988; annotation 3). This option opens up two avenues. Each avenue is, in itself, problematic.

Firstly, as the list of rights in the bill is not considered exhaustive, the arbitrator will need to take account of the rights and interests that are listed in the other parts of the 1983 code. When testing whether a particular right is legally recognised, the arbitrator will, therefore, have regard both to the Bill of Rights and to the listing of rights in the other sections of the code. This approach will be unfruitful for two reasons.

(1) Firstly, at a practical level, the approach is valid only for guaranteeing rights that are purely procedural in nature, given that these guarantees are scattered in the other

sections of the code.46 The same cannot be said of the non-ecclesial rights that are purely substantive and the guarantees of which are only in the Bill of Rights, and not in the other sections of the code.

(2) Secondly, at a philosophical level, the interests of legal certainty suggest otherwise. In the interests of legal certainty, a Bill of Rights should contain an exhaustive listing of the rights that the legislator considers to be worthy of protection in the Church. In the words of Pedro Lombardia (1969:44), as a minimum requirement, the bill should contain "a high degree of stability and a certain measure of irreformability." Church members will then be able to order their conduct and legal action in the light of rights exhaustively listed and entrenched in the bill. Where a listing of rights in the Bill of Rights is indeterminate, a situation of legal uncertaintywill arise, opening a way to crude and destructive forms of casuistry.

While the first avenue resorts to rights listed in other parts of the 1983 code, the second avenue encourages the search for rights listed in legal instruments of the Church other than the 1983 code. The Committee on Conciliation and Arbitration for the National Conference of Catholic Bishops, for example, identifies the doctrinal documents of the Church as a source of listed rights. It declares:

> While in civil society the sole source of recognised rights is the positive law of the society, such is not the case in the Church. In addition to universal and particular law, the Church also has the *magisterium* as a source of the Church's understanding of the rights of its people - human rights (flowing from the dignity of the human person and

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46 One of the positive achievements of the 1983 code is its reinforcement of procedural rights for the benefit of fair trial of the accused. Procedural guarantees are not comprehensively articulated in the Bill of Rights. Other guarantees are incorporated into the formal procedures in the various sections of the code. It will be interesting to see how, in the contemporary as well as the next decade, the integrity of formal guarantees for the protection of the rights of the accused will prevail, given the rising sensitivity to the rights of the injured parties in the Church and the Church's excessive fear of civil liability, especially in the sexual abuse cases, that has at times the propensity to override and erode the rights of the accused.

> often said to be dictates of the natural law), ecclesial rights (flowing from baptism) and ecclesiastical rights (flowing from a particular office or responsibility in the Church). The documents of Vatican II, for example, are replete with teaching on all three categories of rights (Committee on Conciliation and Arbitration 1988; annotation 3).

This option gives rise to two problems. Firstly, the listing of rights in the conciliar and post-conciliar documents lack normative content and intent. These documents do not indicate an interest on the part of the Church authorities in the legislation and creation of human rights and personal rights for the purposes of delictual enquiry. If there had been an interest the subject matter relating to human and personal rights would have been reordered and abrogated in terms of canon 6.[47] Secondly, the reference to human and personal rights in the conciliar documents would be a problem when it comes to testing the infringement of the rights. There are cases where the Bill of Rights and the *magisterium* delineate different scopes for the same human or personality right. This raises problems for the arbitrators, especially when the two disputants in a case base their legal arguments on two different conceptions human and personal rights.

3.5.3.2 Second Remedy: Application Of The State Law

As the first solution is inherently problematic, it is better to explore the second possible solution. Given the limitations in the canon law framework, the disputants may agree to mandate the arbitrator to use the state law framework for the purpose of determining whether a right is legally recognised. Given also the voluntary nature of arbitration, the disputants

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[47] Canon 6 reads: "When this code comes into force, the following are abrogated: (1) The Code of Canon Law promulgated in 1917; (2) other laws, whether universal or particular, which are contrary to the provisions of this code, unless it is otherwise expressly provided in respect of particular laws; (3) all penal laws enacted by the Apostolic See, whether universal or particular, unless they are resumed in this code itself; (4) any other universal disciplinary laws concerning matters which are integrally reordered by this code."

may then decree that, for the purpose of determining whether the right of the claimant is legally recognised, state law should stand as an applicable rule of law. A decision to apply state law is limited to the cases of particular disputants and do not extend to the whole church.

3.6 CONCLUSION

The chapter has stressed the notion of legally relevant damage. The harm or loss is recoverable only in so far as it constitutes legally relevant damage. If the disputants decide to mandate the arbitrator to test whether a loss suffered by the claimant is legally relevant damage, they need to choose the legal framework that the arbitrator should use for the determination. If they choose canon law, they need to note that canon law subscribes to the notion of legally relevant damage as infringement of legally recognised interest. Two tests are needed to establish legally relevant damage: the test for whether the right of the claimant allegedly injured by the respondent is legally recognised and a test for whether legally recognised interest was indeed infringed by the respondent. Both tests require a legal framework. The chapter has provided a critical analysis of the framework that canon law has established for the performance of both tests. The chapter has sought to examine the capacity of the Bill of Rights to deliver justice if it is used by an arbitrator as an applicable rule of law for the two tests.

In considering the testing of whether the right of the claimant is legally recognised, the chapter noted the limited listing of rights in the bill. Most of the rights of delictual significance for Church-sponsored institutions (schools, hospitals, religious institutions) are not included in the bill. A miscarriage of justice would result if the disputants mandate the

arbitrator to use the Bill of Rights as the sole legal instrument for testing the legal recognition of rights. In considering the testing of whether a right has been infringed, the chapter noted that the internal scope of some of the rights is severely restricted. Some of the legal texts offer limited protection of rights. The claimants will not find justice if these norms are applied as a legal framework for the infringement test. . The chapter argued that if the disputants choose to use the canon law framework, they need to be aware that some elements in canon law do not make for the delivery of justice. If they still want to apply canon law, irrespective of its limitations, it is important that they mandate the arbitrator to apply state law in the areas that canon law is defective.

The chapter has established that harm or loss is a vital element in a delictual claim. Some cases may require testing to ascertain legally relevant damage. Although they constitute a vital element in the delictual claim, the tests for legally relevant damage are inadequate for declaring liability. After ascertaining that the harm or loss that the claimant has suffered constitutes legally relevant damage, the arbitrator needs to determine the other requirements for liability. In terms of canon 128, where the complaint pertains to an injury by an administrative decision, the arbitrator has to go beyond the tests for legally relevant damage to examine the lawfulness, or the lack thereof, of an administrative decision. Was the administrative decision of the respondent who caused legally relevant damage to the claimant lawful and therefore justifiable? The next chapter examines the tests for the lawfulness of the administrative decision as well as the canon law framework for such tests.

CHAPTER FOUR: THE CANON LAW FRAMEWORK FOR TESTING THE LAWFULNESS OF AN ADMINISTRATIVE DECISION IN A DISCIPLINARY HEARING

4.1 INTRODUCTION

The faith-based institutions in the Catholic Church (e.g. schools, colleges, universities, seminaries, associations, parishes, institutes of consecrated life, societies of apostolic life, choirs, finance committees, board of directors/trustees of Church schools or hospitals) are regulated by a Church administrator or by administrative boards.[48] These entities often vest administrators with powers to take disciplinary measures, in the form of reprimand, dismissal or suspension,[49] against some forms of misconduct. Such disciplinary measures can give rise to civil claims. The disputants can decide to refer disputes to an arbitrator rather than to a civil court. They can also decide that the arbitrator should employ canon law as a framework for deciding their case. This decision would have to be qualified by the distinctions in the disciplinary hearing. The category of disciplinary hearing in the Church-based institutions is wide and, therefore, requires division into two sub-categories.

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48 Church administrators and administrative boards have different names in different Church entities. In their religious congregation, for example, they are designated as superiors and councils respectively. For ease of treatment, the study will use the generic designation of Church administrator and administrative board for all Church entities.

49 It is important to note that there are, within the domain of the Catholic Church, two categories of arguments for the inclusion of penalties. To the first category belong authors (Arias 1993:818-820; Thomas Green 1979:607) who argue for penalties from a purely theological point of view. Such authors cite biblical texts as grounds for penalties in the Church. The second category is represented by authors who argue from point of view of natural law. Stanislaus Woywod and Callistus Smith (1957:325) for example cite dismissal from religious organisations as a mechanism to protection the order and preservation of the organisation. According to them: "By the natural law, every society, even an imperfect one, must have the right to defend itself against its members who by their scandalous lives impede the work and progress of the others, and constitute a threat of harm to the religious organisation itself as well as inflicting grave harm upon themselves."

(1) On one hand, there are disciplinary hearings that take place in the context of an employer-employee relationship. Where the issue of dispute results from the dismissal or suspension of a church member or a non-church member who is an employee in the church institution, the arbitrator will hear the action in terms of the labour law in South Africa.

(2) On the other hand, relationships between the Church administrator and a church member can exist outside the scope of the employer-employee relationship, that is, for example the relationship between a priest and a bishop or between a leader of a religious congregation and a member of the congregation. If the priest or member of the religious congregation seeks delictual remedies following a disciplinary hearing, the arbitrator will hear the action in terms of the canon law on delict.[50] The disciplinary hearings in religious institutions, dioceses, parishes, Church associations (choirs, youth movements etc) fall neatly into this category since most of the administrator-subject relationships fall outside the scope of employer-employee relationships.

The focus in this chapter is on the second category. Canon law recognises arbitration as one of the forums for hearing administrative justice[51] disputes. (Green 1979:638) When the

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[50] Canon law recognises three categories of mechanisms for hearing administrative justice disputes. Conciliation, that is, agreement between the parties is the first kind of mechanism. Arbitration is a second and its remedy is compensation for the harm or loss as a result of an administrative injustice. Another mechanism is an appeal proceeding or hierarchical recourse, with the remedy available being modification, confirmation, or nullification of the decision that is injurious to the applicant. Lastly, there is a review proceeding by administrative tribunal. The remedies available are either nullification or confirmation of the injurious decision. The choice of the mechanism for hearing the administrative dispute is dependent on the remedy sought by an aggrieved party. (Punderson 2000:26)

51 The administrative justice system, as a legal system, is an innovation in canon law. Spearheading the innovation, Pope Paul, in his speech on 4 February 1977, declared that the law of the Church "must state that the principle of protection by the law applies equally to superior and subject, so that even the suspicion of arbitrariness may be eliminated from ecclesiastical government." (Pope Paul VI 1977:178). Accordingly, the seventh principle for guiding the drafting of the 1983 code reads: "Nor is it enough to say that the safeguarding of human rights is adequately provided for in our legislation. We

disputants decide to mandate the arbitrator to use canon law as a framework, canon 128 will constitute a vital element in the case. Canon 128 identifies legality as the criterion for determining delictual liability. Accordingly, a Church administrator might incur liability for repairing the damage inflicted by the decision to punish (suspend or dismiss) the claimant if the decision is unlawful. The question arises: what form of unlawfulness tests would the arbitrator perform when called upon to resolve the disputes? In other words, what criteria would the arbitrator employ in determining whether an administrative decision is unlawful and therefore delictually liable?

The chapter argues that the test for lawfulness should cover both the substantive and procedural component of the disciplinary hearing. The chapter identifies the tests and provisions that canon law has made available for determining substantive and procedural lawfulness. The chapter also examines the extent to which these tests and provisions provide for the delivery of justice.

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must acknowledge the truly personal subjective rights, without which a juridically organised society cannot be imagined. In canon law we must, therefore, proclaim that the principle of the juridical protection of rights applies with equal measure to superiors and subjects alike, so that any suspicion whatsoever of arbitrariness in Church administration may completely disappear. This can only be brought about by means of recourses wisely provided for by the law, so that if anyone thinks that his rights have been violated at a lower instance, he can effectively have them restored at a higher instance. Although it is generally thought that recourses and judicial appeals are sufficiently provided for in the Code of Canon Law according to the demands of justice, it is nevertheless the common opinion of canonists that administrative recourses are still lacking considerably in Church practice and in the administration of justice. Hence, the need is everywhere strongly felt to set up in the Church administrative tribunals of various degrees and kinds, so that the defence of one's rights can be taken up in these tribunals according to proper canonical procedure before authorised officials of different ranks." (Hite et al 1980: 76) Thomas Green comments as follows on the innovation: "The penal law schema seems to reflect an implicit view of the Church as an unequal society of those who govern and those who are governed, with an emphasis on penalties for the latter. On the contrary, those in leadership positions frequently are a greater threat to the integrity of the community. Hence, a greater effort should be made to specify possible abuses of official trust." (1979:645)

4.2 Two categories of Lawfulness: Substantive and Procedural lawfulness

Canon 128 indicates that the administrator incurs liability if the decision is unlawful. The canon does not, however, provide a criterion for determining the lawfulness or the lack thereof. The norms regulating the supreme tribunal in the Catholic Church, known as the Apostolic Signatura, have delineated elements to be considered in the determination of lawfulness. The norms fall into two categories of lawfulness: substantive and procedural lawfulness. Article 123 of the special norms (*Normae Speciales*) of the Apostolic Signatura, for example, identifies an administrative decision as unjust "when the contested act has violated a certain law in its manner of its making a decision or in its way of proceeding." (*Supremum Tribunal Signaturae Apostolicae* 1968:249) An administrative act is unjust if there is an error in law and "error in law – the fact that the act does not conform to a norm – may be an error in procedure, i.e. the violation of some procedural norm; it may be an error in decision." (*Pontificia Commissio Decretis Concilii Vaticani II Interpretandis* 1971:330)

Joseph Punderson (2000:28-29) connects these two categories of lawfulness to the requirements of canon 1737, §1. The canon reads: "A person who contends that he or she has been injured by a decree can for any just reason have recourse to the hierarchical superior of the one who issued the decree." The canon stipulates that the act of challenging a decision of an administrator requires a just reason. For Punderson, the violation of the law in terms of the two categories constitutes a just reason: "Certainly, a violation of the law in regard to the procedures used and the substance of the decision would be a just reason for challenging a decision on the part of someone who is directly affected by it."(ibid.)

When the disputants mandate the arbitrator to hear their case in terms of canon law, they have to specify the category of administrative lawfulness that should be tested in the arbitration process. Do they wish the arbitrator to test either the substantive or the procedural lawfulness of the administrative decision? Do they wish the arbitrator to cover both categories? They also need to ask: What criterion has canon law made available for measuring substantive and procedural lawfulness? Would the application of the criterion be likely to ensure the delivery of justice?

4.3 Testing the Substantive Lawfulness In Terms Of Principles Of Legality

If the disputants decide to mandate the arbitrator to test the substantive lawfulness of a decision, they need to be aware of the problems that arise with the substantive lawfulness test. In his work on the administrative justice system in the Catholic Church, Joseph Punderson has, for example, highlighted two problems. Firstly, Punderson argues against the employment of the substantive lawfulness test because it touches on the merits of the decision and thereby encroaches on the discretionary powers of the Church administrators:

> In regard to the legitimacy of a decision, the question of a violation of the law in *procedendo*, in regard to the procedure is pretty straightforward, while the question of a violation in *decernendo*, in regard to the substance of the decision is not always easy to distinguish from the question of the merits of the case (2000:40).

Punderson's argument is flawed in several respects. The need to make a distinction between review and appeal only comes to the fore when the claimant is seeking an administrative review. This need does not arise where the claimant approaches the arbitrator to seek compensation for damages. The substantive lawfulness test is, therefore, appropriate for delictual cases. At the same time, as Cora Hoexter (2002:170) rightly argues, the distinction

between review and appeal comes to the fore in the test for the substantive reasonableness of a decision, and not in the test for the substantive lawfulness of a decision.

Secondly, as an argument against the substantive lawfulness test, Punderson believes that canon law has not stipulated the substantive criteria required for the lawfulness of an administrative decision. "For many administrative decisions, canon law has no particular requirements concerning the reasons for the decision; for these decisions it is sufficient that there is a just reason." (ibid:41) Accordingly, it would be difficult for an arbitrator to establish a criterion for the determination of whether a decision is substantively lawful. Against such a line of thinking, one might argue that canon law prescribes some substantive requirements that have to be satisfied for the legitimacy of a decision, especially for a disciplinary decision

The substantive requirements come to light when canon and state law are compared. It is important to note that both canon law (Hervada 1993:196) and state law (Hoexter 2002:126) have availed themselves of the benefits of the principle of legality. Both have recognised the need to control the administrative powers and regulate their discretionary capacities (Beal 1986 and 1989 and Hoexter 2002). The principle of legality inherent in both systems serves the purpose of providing a check and balance to the discretionary capacity that comes with the administrative power. In terms of the principle, the exercise of administrative power in a way that injures other people's interests or rights must be carried out within limits set by the law. The administrators must operate within the bounds of power conferred upon them by the law. The decision of the administrator is, therefore, substantively unlawful if it exceeds the limits set by the law. These limits are formulated in terms of legal principles and rules. The testing of the substantive lawfulness of a decision is thereby done in terms of the principles and rules. The rules include the *ultra vires* and the *nulla poena sine lege* rule. Both rules require tests

for substantive lawfulness. If the disputants decide that the arbitrator use canon law for testing substantive lawfulness, the disputants and the arbitrator will need have to choose an applicable test. Does their case require the *ultra vires* test or the *nulla poena* test?

4.3.1 TESTING THE SUBSTANTIVE LAWFULNESS IN TERMS OF THE *ULTRA VIRES* TEST

4.3.1.1 THE *ULTRA VIRES* TEST IN STATE LAW

In state law, one of the rules that the administrative justice system uses for the testing of the substantive lawfulness of an administrative decision is the *ultra vires* rule. A tenet of this rule is that an administrator requires legal authority to perform an administrative act. A decision is illegal if the administrator lacks the legal authority to make a decision. As Cora Hoexter emphasises with respect to state law:

> They may exercise no power and perform no function beyond that conferred upon them by law. As we have seen, public bodies have no powers of their own; every incident of public power must be inferred from a lawful empowering source - usually legislation. The logical concomitant of this is that an action performed without lawful authority is illegal (2002:127).

When the substantive lawfulness of an administrative decision to impose a penalty is measured in terms of the *ultra vires* test, the decision is considered substantively unlawful on two grounds: either the administrator lacked legal competence to conduct the disciplinary hearing and issue a penalty, or, in spite of having legal competence, the administrator exceeded the bounds of legal authority in making the decision.

4.3.1.2 CANON LAW FRAMEWORK FOR PERFORMING *ULTRA VIRES* TEST: STRENGTHS AND LIMITATIONS

If the disputants decide that the arbitrator employ the *ultra vires* test in terms of canon law, canon 124§1 of the 1983 code will form a vital element. The canon reads: "For the validity of a juridical act, it is required that it be performed by a person who is legally capable of placing it." In commenting on this canon, Sheehy et al (1995:72) include legal competence as essential for performing a juridical act. Canon 124§1, therefore, creates an obligation on the part of the Church administrators to perform a juridical act only when they are endowed with the necessary legal competence. In the context of a disciplinary hearing, the canon obliges the Church administrators to conduct a disciplinary hearing and impose a particular penalty only when they are authorised by the law to do so (Swoboda 1941:84). Canon 2215 of the old Code of Canon Law, the 1917 code, emphasised this obligation. The canon defined an ecclesiastical penalty as "deprival of some good, *imposed by a lawful authority* in order to correct the offender and to punish the offence."

Canon 124§1, therefore, provides for the performance of the *ultra vires* test. The test will be performed when the claimant bases a delictual claim on the alleged fact that the decision, disciplinary or otherwise, that injured his or her legally recognised interests was substantively unlawful because it was made by an administrator who lacked competence in terms of the 1983 code and/or in terms of the constitutions of the Church-sponsored entity (Church choir, school, religious institute etc.). When the respondent disputes the allegation and the case is referred to an arbitrator to decide, the arbitrator will need to perform the *ultra vires* test. According to Arrowsmith (1992:234), the interests of justice require that the person incur delictual liability in terms of the *ultra vires* test only on two accounts: firstly, when the administrator knew at the time that he or she lacked the legal power to do that which was

done, and, secondly, that he or she knew at the time that the act would cause damage to the claimant. In the *ultra vires* test, as performed in terms of canon law, an arbitrator will therefore need to test three factors: namely whether the administrator had the legal competence, either in terms of the 1983 code or in terms of the constitution, to make a disciplinary decision; whether the administrator knew at the time that he or she had no legal power for the decision, and, thirdly, whether he or she knew that the decision would cause damage to the claimant.

4.3.2 Testing The Substantive lawfulness in Terms of Nulla Poena Tests

4.3.2.1 *Nulla poena* Tests In The State Law

Besies having the authority to make a disciplinary decision, the administrator needs to satisfy other substantive requirements for a lawful decision. Cora Hoexter has referred to the requirements as "jurisdictional facts"(2002:138). The exercise of power to perform a specific act depends on these requirements. If the requirements are met, the administrator may perform the act: "If x, then the administrator may do y" (ibid.). If the requirements are not met, then the administrator may not legitimately make the decision. "If the jurisdictional facts are not present or observed (or to put it differently, if the administrator makes a mistake of fact), then the exercise of power will as a general rule be unlawful" (ibid.).

The legal requirements, therefore, prescribe the limits or boundaries within which the administrator may exercise his or her powers. According to Cora Hoexter, they delineate "the boundaries of their jurisdiction or their entitlement to act"(ibid.). When an administrator fails to satisfy the legal requirements that the law has set out for the lawfulness of a particular decision, he or she exceeds "the boundaries of [his or her] jurisdiction, which is simply another way of saying 'powers' or 'authority to act'"(ibid.).

In carrying out the disciplinary hearings, the administrator needs to have regard to the fulfillment of the substantive requirements that the law demands for a dismissal or suspension for misconduct. Otherwise, the administrator will operate outside the boundaries of jurisdiction or powers to impose a penalty for misconduct. But then, what are the substantive requirements that have to be satisfied in a disciplinary hearing? To answer this question, one needs to appreciate the analogy between the criminal justice system and the disciplinary hearings in non-state organisations, including Church-based organisations. Snyman (1995:10) has highlighted the analogy. In the light of the *nexus*, some of the substantive requirements in criminal law may be applicable in the disciplinary hearing. The criteria and tests employed in determining the substantive lawfulness of a court decision in a criminal case might, therefore, be useful in an analogous undertaking in the non-state sector.

The criminal justice system boasts of rules that act as indicators of the substantive lawfulness of a decision. These rules concretise the principle of legality. For Snyman (1995:26), both the rules and the principle of legality are found at two levels of the criminal justice system: at the level of the conviction of the accused and at the level of sentencing the party found guilty of the offence. Related to the conviction, the principle is known as the *nullum crimen sine lege* principle, which literally means no crime without a legal provision. Related to the sentencing, the principle is known as *nulla poena sine lege* rule, which literally means no penalty without a legal provision. Snyman formulates the principle of legality applicable at the level of conviction and sentencing as follows:

> An accused ought not to be found guilty of a crime and sentenced unless the type of conduct with which he is charged (a) has been recognised by the law as a crime, (b) in clear terms and (c) before the conduct took place, (d) the particular conduct of the accused can be brought under the definition of the crime without interpreting the words or concepts in the definition too widely (ibid.:34).

Each point in the definition reflects a rule related to the principle of legality, namely (a) the *ius acceptum* , (b) *ius certum* (c) *ius praevium* and (d) *ius strictum* rules. The principle of legality finds its concrete expression in these rules. The table below shows the rules:

Name of the Rule	The corresponding legal obligations on the court during conviction	The corresponding legal obligations on the court during sentencing
Ius acceptum Rule	A court may find an accused guilty of a crime if the kind of act performed is recognised by the law as a crime. A court is not free to create its own crimes.	A court is not free to impose a sentence other than the one authorised in the law
Ius praevium rule	A court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission	The court must impose a sentence that is recognised by the law at the time of the commission of the crime
Ius certum rule	Crime should not be formulated vaguely.	The court must impose a sentence that is determined in clear terms by the law
Ius strictum rule	A court must interpret the definition of a crime narrowly rather than broadly	The court must interpret the words defining the punishment narrowly rather than broadly

When these rules are transferred to the domain of the disciplinary hearing, they become rules for testing the substantive lawfulness of a penalty. One may, therefore, speak of a *ius acceptum* test, *ius strictum* test and *ius praevium* test.[52] In this study, we shall discuss the first two tests. Before discussing them, it is important to emphasise the significance of the rules and the substantive lawfulness tests that flow from them. Hugh Corder (2002:9) has advised that, in state law, the rules, and the corresponding tests, be grounded in the assumption that an act by an organ of the state that is injurious to the rights of the subjects is

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[52] The 1983 code does not contain a canon that clearly expresses the *ius certum* rule. The *ius certum* rule is presupposed by the *ius strictum* rule. One would be able to interpret the criminal norm strictly if the law were formulated with clarity and precision.

legitimate in so far it is carried out within the limits set by a law of general application. Rights will thereby be limited only in terms of this general formula. This requires that the penalties be imposed generally for a particular kind of misconduct, rather than selectively and discriminatively on specific individuals. For Ranka, this concept translates into equal treatment before the law for all of the accused both before and after conviction. That is, all of the accused are treated as equals before the law and are subjected to the same standards of criminal liability. According to Ranka, this is an obligation against discrimination.

> It forbids discrimination by law, that is, treating persons similarly circumstanced differently or treating those not similarly circumstanced in the same way, or, as has been pithily put, treating equals as unequals and unequals as equals (2001:68).

The equal treatment of the accused before the law, in turn, translates into freedom from administrative arbitrariness and bad faith. As all the accused are subjected to the same standards of criminal liability, the administrator or judiciary may not impose penalties arbitrarily at his or her own discretion or in terms of vested interests. Describing this in terms of the state law in South Africa, Snyman observes that, on account of the operation of the principle of legality: "A court may not convict a person and punish him [sic] merely because it is of the opinion that his conduct is immoral or dangerous to society or because, in general terms, it deserves to be punished." (1995:26) Similarly, in the context of an arbitration process, the performance of the substantive lawfulness test according to the rules for the principle of legality enables the claimants to obtain justice and reparation for damage in cases, where administrative decisions that are grounded on arbitrariness and bad faith cause injury to the subjects (Hervada 1993:196; Provost 1985:155).

4.3.2.2 CANON LAW FRAMEWORK FOR PERFORMING THE *IUS ACCEPTUM* TEST

4.3.2.2.1 THE STRENGTHS OF THE CANON LAW FRAMEWORK

If the disputants agree that the arbitrator apply the ius acceptum test in terms of canon law, canon 221, §3 and canon 1321§1 will provide substance for the test. Canon 221§3 reads: "Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law" (canon 221, §3). Sheehy et al (1995:125) expressly refer to the *ius acceptum* rule when interpreting canon 221§3: "if no penalty is stated in the law, then none can be imposed". The norm creates an obligation that the administrators do not initiate a disciplinary hearing and issue a penalty unless the offence is punishable. If the 1983 code and the constitutions of the Church-sponsored entities do not recognise a particular kind of misconduct as punishable, then the accused should not be dismissed or suspended from the Church-based entity (Church choir, parish council, religious institute, etc). In the same way, the norm prohibits the creation by the administrator or administrative board of their own punishable offences (Hervada 1993:196; McDonough 1987:388). Applauding this positive element in the 1983 code, the commentary on the 1983 code by the canon law society of Great Britain and Wales is: "The 1917 code, in its c. 2222, gave to ecclesiastical authorities quite extensive powers to impose penalties. The current code is more restricted in this sphere: if no penalty is stated in the law, then none can be imposed." (Sheehy et al. 1995:125)

The *ius acceptum* principle is also expressed in canon 1321§1, which reads: "No one is punished unless the external violation of a law or precept, committed by a person, is gravely imputable by reason of malice or negligence." (Can. 1321, §1) The commentary of the canon law society of Great Britain and Wales on canon 1321§1 distinguishes three elements that are constitutive of an offence, namely the objective element (external violation of a law or precept), the subjective element (the violation that is gravely imputable by reason of malice or

of culpability) and the legal element (the penal sanction) (See also Woywod 1957:447 and Swoboda 1941:82). The canon contains the *ius acceptum* rule. Sheehy et al therefore comment:

> The legal component of an offence means that not every external violation of a law or precept is punishable, even if gravely imputable by reason of malice or culpability. Only the violation of a law which expressly provides for a penal sanction may be punished...Hence, the long-established maxim: "nullum crimen, *nulla poena sine lege*." (1995:754)

Innocent Swoboda (1941:83) expressed the same idea from the perspective of ecclesiastical punishment as a defence against social disorder in the Church. The criterion for a punishable offence in the Church is, therefore, whether the offense is likely to cause social disorder in an ecclesial grouping. "The legislator does not consider all transgressions of the moral or ethical order as crimes, but only such which as a matter of public policy are considered to constitute a danger or *damnum* to the social order. It is this disturbance of the external social order or the violation of public rights which penal laws strive to prevent."(ibid.) On these premises, Innocent Swoboda seeks to include the *ius acceptum* rule or the legal component of a canonical penalty. He concludes:

> Not every external violation of the social order constitutes a crime. There must be a second element, called the legal element. This latter consists in the penal sanction or penalty placed by the lawgiver or commanding authority upon the violation of the law (1941:83-84).

In other words, not every violation of the social order is punishable, but only those that the legislator recognises as punishable. Stanslaus Woywood (1957:447) expresses the same concepts more succinctly. Not every violation of law is a punishable offence, but only the violation of those laws which have a penalty attached to them.

When an arbitrator is asked to perform the *ius acceptum* test, the provisions of the two canons need to be observed. In terms of the two canons, the elements for the test are illustrated in the table below.

Legal rights due to the accused that flow from the principle and legal obligations binding on the administrator that flow from this principle	Possible issues of dispute and doubt that flow from the principle	Possible terms of reference for the issue of dispute
*For the accused: The right not to be punished except for offences that are legally recognised as punishable.	*The claimant alleges that the administrator punished him/her for an offence that is not recognised as punishable in terms of canon law	To determine whether the alleged misconduct for which the claimant was punished is legally recognised as a punishable offence in terms of the 1983 code and/or in terms of the constitutions of the faith-based institution.
*For the administrator: The obligation to impose punishment only for the offences that are recognised as punishable by canon law;	The administrator argues to the contrary	The test to determine this doubt can be referred to as *IUS ACCEPTUM* TEST

4.3.2.2.2 THE LIMITATIONS OF THE CANON LAW FRAMEWORK

As the disputants and the arbitrator decide to apply canon law in the *ius acceptum* test, they need to take note of some of its limitations, which are evident in two areas. Firstly, the *ius acceptum* test entails a determination of whether a misconduct for which a complainant was punished is recognised as punishable in terms of the law. The conduct of the *ius acceptum* test, therefore, requires that a legal system contain a list of offences that the law recognises as punishable. In the absence of a list, the arbitrator does not have a legal basis for determining whether a punishment that the administrator imposed on the subject was grounded in capriciousness and bad faith.

In order to conduct that *ius acceptum* test, the arbitrator needs a list of punishable offences. Most of the Church-sponsored institutions (schools, hospitals, Church choirs, parish councils

etc) do not, in their internal regulations, have the penal norms listing the misconducts considered punishable in their domains. The 1983 code, however, does contain a listing of punishable offences. Canons 1364-1399, for example, contain a list of offences that are legally recognised as punishable in the Catholic Church. Similarly, canons 694-704 of the law on consecrated life contains a list of offences that are recognised as punishable by dismissal from an institute of consecrated life.

The second limitation in the canon law framework relates to canon 1399, which reads: "Besides the cases stated here or in other laws, an external violation of a divine or ecclesiastical law can be punished by a just penalty only when the particular seriousness of the violation demands punishment and there is an urgent need to preclude or repair scandal." This canon has the effect of violating the principle of *nulla poena sine lege*. Juan Arias laments: "The principle of legality forms the basis of all the penal canons, except for c. 1399, where the discretionary principle overrides the principle of legality" (1993:825). The canon grants wide discretionary powers to the administrators to punish a subject for offences that are not listed and recognised as punishable by the law. A person injured by an administrator who has imposed a punishment in bad faith would not easily succeed in a claim, as the administrator could easily justify the legality of the decision in terms of canon 1399. Sheehy et al have sought to downplay the detrimental effects of this canon, citing the checks and balances that the formulation of the canon provides to the discretionary powers to create punishable offences. He comments:

> Some might see this as a dangerous principle, inviting arbitrary action on the part of the ecclesiastical authorities which would offend against the right of the faithful enunciated in canon 221,§3. This is not so: the canon strictly qualifies this faculty, requiring two specific conditions to be fulfilled before any such action can be taken.(1995:810)

Thomas Green, however, disagrees. For Green, the canon "provides for a penalty even if the offense is not specified in law, provided that there is scandal and the offense is especially

serious. The use of the phrase '*de re valde gravi*' does not seem to adequately preclude possibly arbitrary discretion of superiors and the abuse of the rights of individuals." (1979:639) The canon formulates three conditions that have to be satisfied before the administrator imposes punishment for the offences that are not listed as punishable in the code: that there should be an external violation of ecclesiastical law or divine law; that the violation should be grave; and that there should be an urgent need to repair the scandal that has arisen from the offense. The last two requirements are subjectively determined by the administrator and make it difficult for the injured person to argue a case in the circumstances where the administrator acted of bad faith. Although the decision to impose the penalty was made in bad faith, the administrator could easily prove his or her case on the basis of this canon, claiming that the offence constituted a grave violation of the law and that the scandal that resulted from the offence was such that it required urgent attention.

4.3.2.3 CANON LAW FRAMEWORK FOR PERFORMING *IUS STRICTUM* TEST

4.3.2.3.1 THE STRENGTHS OF THE CANON LAW FRAMEWORK

In canon law, the legal basis for the *ius strictum* test is contained in canon 18, which is, therefore a vital tool for disputants and arbitrators who decide on the *ius strictum* test. This canon stipulates that "the laws which prescribe a penalty...are to be interpreted strictly." It is based on the ancient maxim, *regulae iuris* no. 15 in 1298 that declares that adverse laws are to be restricted, favorable ones amplified (*odia restringi et favores convenit ampliari*). The laws that impose a burden require a strict interpretation and those that grant powers or favors a broad interpretation (Sheehy et al 1995:18). The penal norms are those norms that impose a burden, and therefore require a strict interpretation. The administrator must give and "insist on benign or favorable readings when punishments are involved" (Coriden 1981:300).

According to the commentary of the canon law society of Great Britain and Wales, strict interpretation means "to give to the words of the law a minimum of extension, while still respecting the meaning of the words" (Sheehy et al 1995:18). Later, in commenting on canon

1313, Sheehy et al make a connection between interpretation and application. Strict interpretation translates into strict application of the penal law. "Penal law is to be interpreted strictly, i.e. in such a way as not to enlarge the scope of its application" (ibid.:289). The subjection of penal norms to strict interpretation and application means that the scope of the application of the crime is not to be extended to cases not covered by the meaning of the crime. According to James Coriden:

> strict or narrow interpretation means restricting the sense of the law and limiting the scope of its application to the greatest extent possible without rendering the law meaningless or absurd (1981:300).

Concretely, canon 18 obliges Church administrators in the process of a disciplinary hearing to have regard to the meaning of a particular punishable offense. Having ascertained that the misconduct is listed in canon law as a punishable offence, the administrator needs to check the text of the law that establishes it as punishable, so as to determine whether the alleged misconduct fits within the scope of punishable offence as stipulated in the text of the law (Sheehy et al 1995:18; Lombardia 1993:91-92). The misconduct must be recognised by the law as a punishable offence without its being necessary to interpret the words in the definition of the crime broadly to cover the accused's conduct. If the interpretation is broad, the decision is substantively unlawful and indicates delictual liability.

4.3.2.3.2 The Limitations Of the canon Law Framework

The performance of the *ius strictum* test requires that the *ius certum* rule be observed by the legislators as they draft the penal norms. In terms of the *ius certum* rule, the norms that establish penalties should be written with clarity and precision. Where the penal norms are formulated with clarity and precision, an arbitrator, in carrying out the *ius strictum* test, can readily determine whether the misconduct of the claimant punished by the Church administrator, who is the respondent in the case, falls within the scope of punishable offence

demarcated as the penal norm Canon law contains some penal norms that are so ambiguously formulated as to make it difficult for an arbitrator to perform the *ius strictum* test.

Canon 601 contains an example of an ambiguous norm that specifies the legal meaning of disobedience as a ground for dismissal from religious institutes. The canon reads: "The evangelical counsel of obedience, undertaken in the spirit of faith and love in the following of Christ, who was obedient even unto death, obliges submission of one's will to lawful superiors when they give commands that are in accordance with each institute's own constitution." Astrid Kaptijn emphasises that the canon is unclear about the form of obedience that is punishable by dismissal. The canon is strong in that it establishes the legal object of obedience, namely the commands of the lawful administrator who issues commands in accordance with the norms in the constitution. It is weak in that it fails to establish the legal form that expresses obedience to the commands of the lawful superior. The canon identifies the submission of the will to the command as a legal form for expressing obedience. Submission of the will, as a legal form, is, however, an internal act that is not easily subjected to external verification. In the words of Astrid Kaptijn,

> when one speaks of the submission of will, this is especially an attitude of the person, an internal act. As such it cannot be grasped by the law. Law intervenes only at the moment when the submission becomes perceptible, that is, at the moment when it is expressed by means of external acts(1996:313).

This raises the question: how does the Church administrator ascertain disobedience and dismiss a subject when the lawful response required for obedience is subjective and hidden? "Given that canon 601 requires the submission of will to superiors (*obligat ad submissionem voluntatis*), when can one speak of the violation of the law of obedience?" (ibid.:307) The ambiguity in the meaning of disobedience that marks canon 601 makes it difficult for the

arbitrator to perform the *ius strictum* test when hearing a case where a person is dismissed on the grounds of disobedience.

4.3.3 Remedy For Limitations Of *Ius acceptum* Test And *Ius strictum* Test: Testing The Reasonableness Of The Decision

Besides the test for the substantive lawfulness of a decision, state law contains a test for the substantive reasonableness of an administrative decision. Section 33 of the 1996 Constitution of South Africa includes not only the right to an administrative act that is lawful, but also "the right to an administrative act that is...reasonable."[53] The limitations of the substantive lawfulness test necessitate the employment of a substantive reasonableness test.[54] The specific limitations have been covered above. Other than these, the disputants and arbitrators need to take note of the general limitation of the lawfulness test. The substantive lawfulness test covers two objections. Firstly, the test partially covers subjectivity, including the possibility of bad faith, on the part of the Church administrator. Although the decision may proceed from bad faith, the administrator escapes liability on the basis of having observed all the legal requirements for making the decision. Secondly, the substantive lawfulness test

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53 The wording of the equivalent clause in section 24 of the 1994 interim constitution is more explicit in that it states: "the right to administrative action... is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened." (Constitution of the Republic of South Africa Act, 200 of 1993)

54 In state law, the courts employ the reasonableness test in the context of administrative reviews. This raises the problem of the distinction between review and appeal. When a review tribunal performs the reasonableness test, it touches on the merits of the decision, thereby diluting the line of distinction between review and appeal as well as between the executive and the judiciary. As Cora Hoexter explains, "Deciding what is reasonable or unreasonable is often thought to be an incurably substantive undertaking, and thus quite inappropriate to the business of judicial review. The fear is that such decisions inevitably draw courts into the merits of administrative decisions, thereby breaking down the crucial distinction between appeal and review."(2002:170) The Church arbitration tribunal does not however operate as a review tribunal in administrative justice cases. Nor does it operate as an appeal tribunal. Thus, the tension between review and appeal does not arise. In the arbitration tribunal, the injured party seeks relief by setting aside the decision reached by the review proceedings not by overturning the decision and issuing a new one provided by the appeal proceedings, but by compensation for damage incurred on account of an administrative injustice.

does not cover the impact that the decision has on the accused. The imposition of dismissal or suspension from Church-based organisations, in most cases, entails some form of injury or harm to legally recognised interests or rights of the accused. The injury or harm that the person suffers under the pain of the penalty is considered lawful in so far as the administrator complied with the substantive requirements as set out by the law. In the substantive lawfulness test, the arbitrator would not consider the justifiability of the injury or harm that results from the dismissal or suspension. In support of the test, Helmuth Pree declares:

> the harmful effect is not be regarded as unlawful *(illigitime)* if the damage was the unavoidable consequence of a lawfully performed juridical act or a lawful procedure or any action performed in a lawful manner at the public as well as the private level. For instance, one might note the damage to the reputation of a pastor in consequence of his removal from office or of any person in consequence of a lawful penal procedure. Disadvantages of this kind that the person concerned has to bear for real reasons of the *bonum commune* are *damna legitima* provided that the legal prerequisites and procedures (see cc. 50-58) have been observed(1998:504).

There is, thereby, no liability for the repair of damage even if there is, for example, no rational connection and proportionality between the good that the dismissal seeks to achieve and the harm that has resulted from the dismissal. In the light of these two limitations, it is advisable that the disputants mandate the arbitrator to apply the reasonableness test in the cases where gross injustice will arise if the hearing limits itself to the substantive lawfulness test.[55]

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55 State law refers to this condition as a case of symptomatic reasonableness that arose in the context of the tension between review and appeal forming an intimate part of the reasonableness test. To mitigate the tension, some schools of thought have decided to consider the unreasonableness of the decision, not as a separate ground for review, but as a symptom of another ground for review, namely substantive lawfulness (Hoexter 2002:50). In this study, the performance of the reasonableness test is not for the purposes of review, but rather for the purposes of determining delictual liability. At the same time, the study cautions against the excessive use of the reasonableness test, preferring it to be used only in cases where a grave injustice would arise if the hearing limited itself to the substantive lawfulness test.

4.3.3.1 A CANON LAW FRAMEWORK FOR THE REASONABLENESS TEST: ITS STRENGTHS

It is evident from the discussion in the previous section that the substantive lawfulness test is limited in its provision of substantive justice. The substantive reasonableness test may provide an enabling environment for substantive justice. The incorporation of the test into the arbitration process would, however, require a legal basis in canon law. Canon 221 §2 can provide the basis. It reads:

> If any members of Christ's faithful are summoned to trial by the competent authority, they have the right to be judged according to the provisions of law, to be applied with equity.

The canon imposes two obligations on the Church administrators conducting a disciplinary hearing. Firstly, as a requirement that comes with the principle of legality, the administrator needs to comply with the substantive and procedural requirements that the law has prescribed for a particular punishment. The *ius acceptum*, *ius praevium* and *ius strictum* requirements readily meet this obligation. Secondly, the canon obliges the Church administrator to apply legal requirements with canonical equity. This second obligation provides a legal basis for the substantive reasonableness test. To appreciate this concept, the meaning of canonical equity in the canon law needs to be understood.

Pope Paul VI has been an ardent advocate of canonical equity in canon law.[56] This Pope considered canonical equity to be an attitude of mind that the administrator needs in meeting

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56 The commission for the drafting of the 1983 code also addressed the notion of canonical equity. Pope Paul VI, however, expanded on the notion. The commission made the following statement on canonical equity: "It is necessary that the Church's law be in harmony with the attainment of the supernatural end by all. Hence, the laws of the Code of Canon Law must shine forth with the spirit of charity, temperance, humanity, and moderation, which, like so many supernatural virtues distinguish

the legal requirements for a penalty. Canonical equity is "an attitude of mind and spirit that tempers the vigour of the law. It is a human corrective element and a force for proper balance" (Pope Paul VI 1974:79). With this attitude, the administrator must seek to soften the rigour of the law with the requirements of charity so that the outcome of the disciplinary decision is positive and humane. In his address of 8 February 1973, Pope Paul VI called upon the Church administrators to

> take into account the human person, the exigencies of the situation which, though sometimes imposing on the judge the duty of applying the law with greater severity, ordinarily lead to administering the law in a more humane and more understanding manner (1974:62).

Canonical equity, therefore, requires a balancing act on the part of the administrator. The administrator needs to have one eye on "the duty of applying the law with greater severity" and the other eye on "the human person, the exigencies of the situation which ...ordinarily lead to the administering of the law in a more humane and more understanding manner" (ibid.). While one eye is trained on the justice requirements of the situation, including the need to preserve order in the Church-based entity (school, hospital, choir, religious institute), the other eye needs to be cast onto the mercy requirements of the situation, taking cognisance of the circumstances that prompted the misconduct and the injury that the accused would suffer as a result of the dismissal or suspension. Pope Paul VI expressed this in the maxim, "Justice must be tempered with the sweetness of mercy" (Pope Paul VI 1974:73). [57]

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the laws of the Church from every other human or profane law." (as cited in *Communicationes*, 1, 1969:79)

57 James Coriden (1981:283) argues that the notion of justice tempered with mercy constitutes only one dimension of canonical equity. Through the centuries, canonical equity has been reduced to two concepts. The first concept, derived from Roman law, is that of realising perfect justice in juridical practice so as to ensure fairness. The second concept, derived from Christian sources, is that of justice tempered with mercy. It implies a softening of the rigour of the law under the influence of charity. Scrutinised closely, the two concepts are linked. The first concept calls for fairness in the administration of justice. Fairness would arise in the balancing of justice and mercy.

In canon 221 §2 which obliges the administrators in a disciplinary hearing to apply the provisions of the law with equity, canon law creates an obligation on Church administrators in a disciplinary hearing, to have regard, not only to the legal requirements for issuing a dismissal or suspension, but also to the requirements of mercy and charity, taking into account the circumstances that occasioned the misconduct and the effect that dismissal or suspension could have. [58] A decision is considered unjustifiable if the facts of the case demonstrate a lack of balance between the benefits of the dismissal or suspension and the harm that arises from dismissal or suspension.

4.3.3.2 A CANON LAW FRAMEWORK FOR THE REASONABLENESS TEST: ITS LIMITATIONS AND REMEDIES

Although the concept of canonical equity provides a legal basis for the reasonableness test, it fails to specify an objective criterion that an arbitrator may use for determining whether the harm or loss that the claimant suffered on account of the dismissal or suspension was justifiable?[59] What are the indicators of justifiability in an administrative decision? The concept of canonical equity does not specify these. Given the limitation, the disputants may need to mandate the arbitrator to take note of the indicators in state law.

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58 The obligation to provide a reasonable decision has its corresponding right,: the right to receive a reasonable decision. This right is exercised against the background of a sister right, namely the right to be given the reason for an administrative decision that is injurious to one's interests or rights (Corder 2002:3). The South African constitution legislates this right. The 1994 Interim Constitution, section 24 refers to this right as "the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public" (Section 24 of Constitution of the Republic of South Africa Act, 200 of 1993). Section 33 of the 1996 constitution has described the right in these terms: "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons." This right is juxtaposed with the right of access to information (Corder 2002:8).

59 The study prefers to perceive reasonableness as justifiability. Hence the reference to justifiability. Hugh Corder too refers to the reasonableness test as "a test of justifiability." (2002:8). For a discussion of the relation between reasonableness and justifiability, see Hoexter (2002:179).

Cora Hoexter (2002:181) identifies two indicators: rationality and proportionality in the test for reasonableness. Considering rationality and proportionality as indicators of the justifiability and reasonableness of a disciplinary decision, an arbitrator tests whether disciplinary decisions are, to quote Hilary Axam, "rational in their nature and proportional in their extent"(2001:323). As a minimum requirement, then, the decision to dismiss or suspend a subject from a Church-based entity must have a reasonable aim (the rationality requirement) and the means employed to achieve it must also be reasonable (the proportionality requirement). The two requirements deserves to be treated separately.

The rational connection between means and ends is considered an indicator for the reasonableness or justifiability of a decision. "Unless[sic] the means rationally serve their ends, there can be no good reason to permit the infringement of rights to persist" (Axam 2001:323). In state law, section 6(2)(f)(ii) of the Promotion of Administrative Justice Act has given concrete meaning to this indicator by empowering the courts to review "an action that is not rationally connected to: (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator." If the disputants and an arbitrator adopt the indicator concretely expressed in the Promotion of Administrative Justice Act, the decision to dismiss or suspend a person from a Church-based entity will be considered unjustifiable if there is no rational connection between the decision and the four points:

The rational connection between the decision to dismiss or suspend and:	The questions that an arbitrator will seek to answer:
"(aa) the purpose for which it was taken;"	What purpose did the administrator seek to achieve by this dismissal or suspension? To what extent was the dismissal or suspension of

	the claimant rationally connected to the purpose?
"(bb) the purpose of the empowering provision;"	What is the purpose behind the norm that establishes a misconduct as a punishable offence and recognises dismissal or suspension as an appropriate punishment? To what extent was the dismissal or suspension of the claimant rationally connected to the purpose of the penal norm?
"(cc) the information before the administrator;"	What information was before the administrator making the decision? To what extent was the decision to dismiss or suspend rationally connected to the information before the Church administrator?
"(dd)the reasons given for it by the administrator."	What reason was given by the administrator for the suspension or dismissal? To what extent was the decision rationally connected to the reasons? [60]

The decision is reasonable if there is proportionality between the adverse and beneficial consequences of the decision. As emphasized in state law, one should not use "a sledgehammer..to crack a nut" (Axam 2001:326). An arbitrator mandated to perform a proportionality test needs to determine whether there is a balance between the injury that the claimant suffered through the dismissal or suspension and the good that the administrator sought to achieve through the dismissal or suspension (Corder 2002:11; Hoexter 2002:182).

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60 This conforms to the principle that a decision is justifiable in terms of reasons given for it or in terms of the benefit that results from it. The outcome of the decision is determinative of the justifiability of the decision. The Breakwater declaration on administrative power in 1993 defines a justifiable decision in the same way.. Decisions that are justifiable are "decisions the reasons [of] which plausibly meet the objections to the decisions taken, on plausible grounds discard the alternatives to the decision taken, and disclose a rational connection between the premises of the decision and the decision itself" (cited in Corder 2002:4).

Discussing the concept of proportionality in human rights litigation, Hilary Axam (2001:323) emphasises the need that a church tribunal have regard not only to the extent of damage that the person has suffered, but also, to the availability of less restrictive means of achieving the purpose that the punishment intended to achieve. The concept of proportionality, therefore, invites that of necessity. The arbitrator needs to include the concept in the test for proportionality. A decision is considered justifiable if there is no less restrictive way of achieving the same purpose. Arbitrators mandated to perform the necessity test, have to determine whether a decision other than dismissal and suspension could achieve the same purpose with less harm or no harm. Could the same result have been achieved by measures other than the dismissal or suspension?

4.4 Testing Procedural Fairness

4.4.1 Canonical Equity As Canonical Law Framework

Besides testing the substantive component of the disciplinary hearing, the disputants may mandate the arbitrator to conduct a test that touches on the procedural elements. If the disputants decide on tests prescribed by canon law, the arbitrator needs to consult canon 221 §2, which obliges the administrator to observe the right of the accused "to be judged according to the provisions of law to be applied with equity." The "provisions of law" cited in the canon include the procedural norms. As indicated above, the canon imposes two obligations on the administrators: firstly, to comply with the legal requirements as set out for a decision, in this case, the procedural requirements and, secondly, to apply the requirements with equity.

Unlike the situation with the substantive section of the study, the first obligation will not require a delictual test. It is for a claimant to use procedural unlawfulness as a basis for

compensation for harm or loss on account of a dismissal or suspension. The harm suffered through dismissal or suspension would have arisen even if the administrator had complied with the procedural requirements as set out by the law. The second obligation: to apply the procedural norms with equity, will, however, form a stable basis for delictual liability. Unlike the first obligation, the second affects the substance of the decision of an administrator. There is a causal connection between the injury that one has suffered and the lack of observance of equity in the proceedings. Had the administrator observed equity in the proceedings, the claimant would not have been dismissed or suspended and would not, therefore, have suffered the harm that comes with dismissal or suspension.

To understand the *nexus* between the lack of equity and damage, there is a need to appreciate the connection between the concept of equity and the principles of natural justice. Pope Paul VI refers to canonical equity in terms of the principles of natural justice. The application of the procedural norms with equity, as stipulated in canon 221 §2, thereby, translates into the application of the procedural norms with reference to the principles of natural justice. This creates an obligation, on the part of the administrators, to conduct the disciplinary proceedings in such a way that one eye is on the procedural norms, also referred to as the requirements of justice, and the other eye is on the principles of natural justice, also referred to as the requirements of mercy, charity and fairness.[61] Pope Paul VI, therefore, states:

> A judge will never ignore the basic criterion of natural law – that is, what is just and human – nor the observance of the law now in force, the ius scriptum, which is

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61 In his address of 8 February 1973, Pope Paul VI described the methodology for applying the law in terms of canonical equity. The approach is that of natural law that seeks to transcend the the letter of the law and to reach the spirit behind the law. He commented: "The judge will take into account, thanks to canonical equity, all that charity suggests and permits in order to avoid the rigor of the law, the rigidity, that is, of its technical expression. He will see that the letter does not kill, so as to inspire his interventions which that charity, the gift of the Holy Spirit, which liberates and vivifies." (1974:62) Pope Paul VI, thus, related canonical equity to the natural law approach.

> presumed to be a reasonable expression of the demands of the common good (Pope Paul VI 1971:52).

While one eye is on "the observance of the law now in force, the ius scriptum, which is presumed to be a reasonable expression of the demands of the common good," the other eye needs to be trained on " the basic criterion of natural law – that is, what is just and human." The "basic criterion of natural law" finds its content and expression in the principles of natural justice. According to Pope Paul VI, equity in terms of the principles of natural justice seeks to ensure that the administrator in a disciplinary hearing, as well as in any other injurious decision, is aware of the circumstances of the accused. In Pope Paul VI's words, canonical equity, therefore, implies

> a strict evaluation of the matter being judged. That is, modern court procedures, whether canonical or civil, pay so much attention to the psychology of the parties in the case and to subjective elements, also evaluating the circumstances, the environment, the family background, sociological factors, and so forth (1971:52).

Two points are implicit. Firstly, the administrator should be able to access the facts of the circumstances of the accused, if the accused is given an opportunity to present his or her version of the misconduct. Secondly, as emphasised in Pope Paul VI's treatise on canonical equity, the administrator should be completely objective. According to Pope Paul VI, "a judge is the interpreter of objective *ius*-law, in other words, through the use of his own subjective *ius* – which means the *potestas et libertas* that he should possess in the highest degree. It follows that he must have great objectivity in judgement, together with fairness, so that he can evaluate all the factors that he has patiently and persistently come to know, and so that he can, as a result, judge with an imperturbable, impartial balance" (1971:52). These two factors – objectivity and fairness – constitute the two rules that form the principles of natural j

> (a) a person directly affected by an impending decision must be afforded a fair hearing prior to the decision being made; this requirement is condensed in the maxim, *audi alteram partem*

(b) The decision maker should be impartial, devoid of any bias or interest, a requirement condensed as *Nemo iudex in sua propria causa.*

When these two principles are not observed in the proceedings, and thereby lack equity, the circumstances of the accused are hardly given the serious attention that they deserve. This affects the disciplinary decision in that, if equity were observed, and led to the circumstances of the accused being brought to bear on the decision of the administrator, there is likelihood that the accused would not have been dismissed or suspended and would not have suffered the harm that comes with dismissal or suspension. It is on this basis that the respondent as an administrator in the case will be found liable for repairing the harm suffered by the claimant.

Given the two principles of natural justice as an expression of equity in procedural matters, if the arbitrator's mandate includes an enquiry into equity or procedural fairness, an enquiry would have to be made in by means of two tests, the *audi alteram* and the *nemo iudex in sua causa* tests.

4.4.2 Audi alteram partem Test: Limitations Of Canon Law Framework And its Remedies

Audi alteram partem literally means that "the other party must be heard before a decision is taken." Fairness requires that any party affected by a decision of an administrator must be given a full and proper opportunity to be heard before a decision is made, enabling the administrator seriously to consider the matter. An arbitrator asked to perform the *audi partem* test will need to consider whether the administrator allowed adequate opportunity for the claimant to be heard. The administrator would then be liable for the repair of the damage if the administrative decision injurious to the legally recognised interests were effected without an adequate opportunity for a hearing.

But, then, what criteria would the arbitrator employ to determine an adequate opportunity for a hearing? state law has developed indicators of an adequate opportunity for a hearing. They include the following: adequate notice and sufficient time to prepare; a pre-decision hearing, either documental or oral; a clear statement of the decision, including the reasons for the decision and an adequate and timely notice of the right to appeal or review. Section 3(2)(b) of the Promotion of Administrative Justice Act outlines the requirements of procedural fairness that express the audi principle. It stipulates that the person whose rights have been adversely affected by an administrative act has the right to:

> (a) adequate notice of the nature and purpose of the proposed administrative action; (b) a reasonable opportunity to make representations; (c)a clear statement of the administrative action; (d) adequate notice of any right of review or internal appeal, where applicable; and (e) adequate notice of the right to request reasons in terms of section 5.

Canon law contains only two indicators. Canon 50 prescribes an opportunity for a person whose rights are injured to make a representation. Canon 51 calls for a clear statement of the decision, including the reasons for the decision. The framework is, therefore, limited in several respects.62 It is important for the disputants and the arbitrators to take note of these limitations if they decide to use canon law as a basis for the *audi partem* test. Firstly, canon law does not, for example, explicitly prescribe the requirement of notice. Nor does it indicate the criteria for determining the adequacy of the notice. State law would be helpful in this

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62 John Beal lists five characteristics of fair administrative procedures that resemble the principles of natural justice: (1) an important decision maker, (2) timely notice of proposed administrative action (3) meaningful opportunity to address, refute or supplement the information on which the decision maker intends to rely; (4) an open record (5) a reasoned decision based on the record (1986:89-104)

respect. State law, for example, considers notice as adequate if it contains enough information to enable preparation of a defence.(Baxter 1984:546; Hoexter 2002:198)

The criterion for determining the adequacy of the notice is whether the contents of the notice were such that the accused is able to access three requirements for self-defence: that is, "to make representation on his own behalf, or to appear at the hearing or inquiry (if any), and effectively to prepare his own case and to answer the case he has to meet."(Ranka 2001:71) This will include the details of the alleged offence, especially the material upon which the administrator will rely and take into consideration in making a final decision. For oral hearings, a notice is considered adequate if it specifies the time, date and place of the hearing. [63]

Secondly, although canon law does refer to providing an opportunity for representation, it does not fully recognize the value of oral hearings, and is more emphatic about documentary representation. [64] Although the *audi partem* rule does not make personal appearance obligatory, the conduct of a hearing in the absence of the accused has often given the

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63 Ranka (2001:171) has enumerated the requirements for an adequate notice. Some resemble those in the discretionary dismissal from religious congregations. For Ranka, an adequate notice should be in writing and delivered personally to the individual concerned; clearly describe the nature, particulars and basis of, the alleged breach; clearly set out the sanctions which may be imposed if the occurrence of the alleged breach has been determined; clearly specifyt the time, date, and place at which, the tribunal will conduct the hearing; give the composition of the tribunal; advise the petitioner on whether he or she has the right to attend and speak at the meeting, and to submit to the tribunal written representations regarding the alleged breach; and, finally, advise whether the petitioner is entitled to representation at the tribunal hearing. It is important to note that no natural justice requirement entitles a person to legal representation.

64 Ranka has argued that the hearing, required by the principle of natural justice, may assume various forms. "The words of being heard would only denote representation either written or oral or both by the assessee. As per the Oxford Concise Dictionary, the meaning of the word, 'heard' is given as 'given audience' Therefore, it is argued that there is no question of not giving personal audience. It is further argued that the word 'hear' and 'heard' only means hearing a person either personally or over the phone or through a radio message." (2001:73)

impression of capriciousness in the decision making of the governing bodies. While an oral hearing is not an essential principle of natural justice, its conduct for serious cases allows more space for "a reasonable opportunity of being heard."(Ranka 2001:72; Hoexter 2002:201-202)

4.4.3 NEMO IUDEX IN SUA CAUSA TEST: LIMITATIONS OF THE CANON LAW FRAMEWORK AND ITS REMEDIES

The term literally means that no one should be a judge in their own cause.Three principles are involved: principles besides that no person shall be a judge of their own cause are that justice should not only be done but be seen to be done, and that decision makers should be above bias and above suspicion. The *Nemo iudex* principle is, therefore, sometimes referred to as the rule against bias (Hoexter 2002:191). Various conditions qualify as bias. Ranka has remarked that "the word bias has come to mean prejudice, show of favour or disfavour, antagonism, spite, and hostility that sway the mind" (2001:75). In terms of South African common law, the bias that violates the principles of natural justice include financial interest, personal interest and bias about the subject matter.

What are the indicators of bias? What criteria should an arbitrator use to determine bias? Cora Hoexter (2002:192) gives the following indicators applicable in state law.

> (1) There must be a suspicion that the administrator might be biased. This suspicion must be that of a reasonable person in the same position as the claimant. The suspicions must be such that a reasonable person would have.

(2) The suspicion must have reasonable grounds. This requires an identification of the source of the bias, including personal interest, financial interest, and bias about the subject matter of the case.

The canon law framework refers to the second indicator to be found in canon 1448§1 which reads: "a judge is not to undertake the adjudication of a case in which the judge may have some interest due to consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line, due to functioning as a guardian or trustee, due to close friendship, due to great animosity, or due to a desire to make some profit or avoid some loss." In terms of the canon, the interests that make for a bias include consanguine relationship, friendship or enmity and financial interests. Pope Paul VI emphasises the second indicator in his address to Church judges. He advises: "You need impartiality and that presupposes a profound and unmistakable honesty. You need disinterestedness, because there is a danger that Church tribunals can be under pressure from extraneous interests." (1971:52)

The canon law framework is limited in that it does not refer to the first indicator, which constitutes a vital element in the test for bias. According to this indicator, the interest that makes a person liable for bias does not have to be great as the test for bias "is not whether the judge is actually biased or in fact decides partially, but whether there is real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted by bias but that the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision."(Ranka 2001:75) The test for bias, therefore, focuses, not on whether there actually is bias, but on whether a reasonable person would have suspected that the administrator was biased and was likely to decide against the accused. It is in this sense that the *nemo iudex* principle includes the principle that justice must not only be done but must also appear to be done.

Since the canon law framework does not accommodate this concept, it is important that the disputants mandate the arbitrator to have regard to its development in state law. In canon law itself, James Provost indirectly refers to this principle. He indicates the need for administrators to conduct themselves in such a way as apparently – if not actually – to avoid conflicts of interest and thereby to give an appearance of impartiality and lack of bias. According to him: "The conflicts of interest are usually unintentional and frequently unrecognised by those involved, but they nevertheless lead to a certain distrust of this approach on the part of those who feel aggrieved. For the persons taking recourse, the system can seem to be stacked against them. The appearance of impartiality is weak, even when the superior is most fair and is highly competent in dealing with the recourse." (1992:15)

4.5 Conclusion

One of the sources of injury in the church is the administrative decision. A dispute arising from this may be referred for arbitration. The chapter has highlighted two tests for determining the legality of an administrative decision of which an arbitrator needs to take note. Firstly, the chapter showed that, when the issue at dispute concerns substantive elements of the administrative decision, it will be useful for an arbitrator to conduct a reasonableness test over and above the legality test. The performance of the reasonableness test will enable an arbitrator to operate as an instrument not only of formal but also of substantive justice. The justice of an administrative decision is tested not only for its compliance with the legal norms, but also for its effect on the affected parties and the reasonableness of its effect.

Secondly, the chapter has shown that, when the issue at dispute concerns the procedure of the administrative decision, it will be useful for an arbitrator to conduct the procedural fairness

test over and above the procedural lawfulness test. The principles of natural justice would provide for a fairness test. Although canon law provides for a fairness test, it needs to complement its limitations with comparable points in state law.

CHAPTER FIVE: THE CANON LAW FRAMEWORK FOR TESTING FAULT IN PRIVATE CONDUCT

5.1 INTRODUCTION

In the previous chapter, the focus was on the requirements for liability in cases of harm inflicted by an administrative decision in the institutions in the Catholic Church. This chapter deals with the requirements for liability in cases of harm that is inflicted by private conduct. The disputants in a case of loss inflicted by private conduct may refer their case to an arbitrator and can mandate him or her to apply the canon law framework. If the arbitrator does opt for recourse to canon law the arbitrator and the disputants need to refer to canon 128 which identifies culpability or fault (*mens rea*) as a ground for liability. One is liable for the repair of damage inflicted by one's private conduct if one is blameworthy. In the culpability test, an arbitrator having considered the person's characteristics and circumstances at the time of the offence, determines whether the person can be blamed for the infliction of legally recognised damage and be made to repair the damage.

Canon 128 identifies two criteria for determining the blameworthiness of a person: intention and negligence. [65] An arbitrator may be asked to conduct a culpability test for intention or for negligence or for both This chapter provides a critical analysis of the provisions that canon law has established for the two tests. [66]

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[65] Besides blameworthiness, one may speak of imputability or responsibility. Boberg refers to fault as a factor "which induces the law to impute a man's wrongful conduct to him in the sense of holding him responsible for it."(1984:268-269) In this sense, one may assert that the existence either of intent or of negligence is sufficient for holding a person responsible for damage.

66 Innocent Swobodwa (1941:2-4) has noted that the inclusion of culpability as a requirement for delictual liability is of greater benefit to the respondent than to the claimant. It ensures more justice for the respondent than for the claimant. This is obvious when one notes that, in including culpability as a principle of delictual liability, the duty to repair damage does not depend solely on the extent of harm

5.2 Testing Intentional Infliction Of Harm

5.2.1 Canon Law Framework For Testing Intention: Its Strengths

Some delictual cases in the church require the testing of intention. As the disputants and arbitrator decide to test intention in terms of canon law, they need to ask themselves: What criterion or standard has canon law established for the determination of whether the respondent's infliction of harm or loss was intentional? Does it allow enough space for the delivery of justice? In their study on the law of delict, Van Der Walt and Midgley (1997:40) indicate that the criterion for determining the intentionality of the infliction of harm is inherent in the meaning that the legal system accords to intention. In seeking a criterion within the framework of canon law, the legal meaning of intention in canon law needs to be taken into account. Canon 128 on delict does not provide the legal meaning. The 1983 code, however, contains another reference to intention in its section on disciplinary norms in the Church. Canon 1321§1 reads: "A person who intentionally violated a law or precept is bound by the penalty prescribed in that law or precept."

The purpose of the canon is to establish the criterion for determining whether a person who has allegedly committed a punishable offense is liable for punishment. Persons are held liable for intentional offenses or misconduct. As the canon is designed for disciplinary hearings, would it be legally correct in terms of canon law to transfer the meaning of intention in canon 1321§1 into the arbitration process and apply it for to a delictual hearing? Helmuth Pree (1998:496) believes that the transference is legitimate considering that the concept of

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that the claimant has suffered, but also on the blameworthiness of the respondent in harming the claimant.

intention falls within the same legal system, although in different sections of the law.[67] In principle, it is permissible and legally correct for the disputants and an arbitrator to transfer the legal meaning of intention, unearthed from canon 1321§1 of the disciplinary law, and introduced into the domain of arbitration in a delictual hearing.

What legal meaning of intention, then, emerges in canon 1321§1? Is the legal meaning framed in a way that will provide an arbitrator with raw material for testing intention? Various commentaries on canon 1321§1 have done little to explicate the legal meaning of intention in a way that might usefully be applied in a hearing. In commenting on the canon, Juan Arias (1993:825) has, for example, defined an intentional offense as "deliberate violation of a penal law or precept." In his definition, intention is considered synonymous with deliberate. This definition is defective on two fronts. Firstly, it does not take into account the fact that, in its technical meaning, the word "intention" is stronger than "deliberate." Secondly, the interpretation does not convey a meaning of intention useful, in the context of a hearing, for testing intentional violation of a disciplinary norm, or intentional infliction of harm. It is necessary to find a legal interpretation that will overcome these two limitations.

Robert Morrissey's interpretation of canon 1321§1 seems to meet this requirement. For Morrissey (1995:43), one is considered blameworthy according to canon law if one directly wills the criminal offense or the harm as an end in itself. This interpretation is useful when its emphasis on an abitrator's establishing if there was a desire to bring about the consequences of the act, and thereby to injure the legally recognized interests of the claimant.

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67 Neethling et al (2001:13) have done the same with state law. As criminal law and the law of delict have concepts in common, Neethling et al have interpreted the concepts relative to the law of delict and has given them a legal meaning understood in the criminal law.

Morrissey's interpretation of intention is limited in that it covers only the volitional component of intention. The formation of intention requires two components. Before harm can be desired, fairly certain knowledge that harm and wrongfulness will from one's conduct is necessary.. Neethling et al comment thus on the concept in state law:

> Knowledge of wrongfulness as a requirement of intent indicates that it is insufficient for the wrongdoer merely to direct his will at causing a particular result; he must also know (realise) or at least foresee the possibility that his conduct is wrongful (that is, contrary to the law or constituting an infringement of another's rights)(2001:126).

The volitional aspect of intention requires and presupposes the cognitive. One desires and wills the harm only once one knows and appreciates that harm will follow Morrissey's interpretation of intention covers the volitional aspect and excludes reference to the cognitive aspect.[68]

In their commentary on intention as referred to in the canon, Stanislas Woywood and Callistus Smith (1957:404) point out that intention "presupposes, on the part of the mind, the knowledge of the law and on the part of the will, freedom of action". Persons are considered delictually liable if they intentionally inflict damage with substantial certainty that a particular harm will result (cognitive element) and if they direct their will towards the harmful result (volitional element). Given the legal meaning of intention, the culpability test of intention has two legs: the cognitive and the volitional . If the disputants decide that the arbitrator employs this legal meaning of intention, the arbitrator will have to test whether the

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68 Elisabeth McDonough has also included the two elements in her definition of intention: intention is "constituted by a deliberate intention to violate the law and thus could be defective either by lack of knowledge or of freedom." (1988:731)

respondent had substantially certain knowledge of the probability of harm to the claimant likely to be caused by the conduct.

5.2.2 Canon Law Framework For Testing Intention: Its Limitations And Remedies

5.2.2.1 Situating Accountability In The Canon law framework

As the disputants and the arbitrator decide on whether to apply canon law for testing intention, they need to ascertain if the test would provide sufficient likelihood of the delivery of delictual justice to the claimant. This requires placing oneself in the position of a respondent and envisaging the possible legal defence that could be proposed in the two-legged test. The extent to which the defence leaves room for the respondent to escape liability needs then to be considered. In state law, a defence in the test for intent is the lack of accountability (Neethling et al 2001:121; Boberg 1984:271; Van Der Walt and Midgley 1997:125). The disputants and an arbitrator have to determine whether accountability is admissible as a defence in the test for intention in the arbitration process. The determination requires consideration of two factors: whether the canon law framework allows for the accountability test and whether the inclusion of accountability on the list of defences against intent would service the interests of justice for the claimant.

Some points are applicable to the first criterion. It needs to be noted that canon 128 does not make any express reference to accountability as a requirement for blameworthiness. In spite of this it can be inferred from two sources. Firstly, the reference to intention and negligence as a requirement for delictual liability in canon 128, in itself, presupposes accountability. Boberg (1984:271) emphasises this presupposition. Accountability is determinable firstly, from the mental capacity of the person to appreciate the wrongfulness of the act and,

secondly, the mental capacity for conduct in accordance with such appreciation (Neethling et al 2001:121). Accordingly, one is considered blameworthy and therefore liable for damage repair if one is mentally capable of distinguishing right from wrong and conducting oneself accordingly.

Before a person can be said to be blameworthy on account of either intention or negligence, it must be clear that the person is endowed with the mental capacity to appreciate and differentiate the wrongfulness or unlawfulness of the act and to conduct him or herself accordingly. A person's mental capacity must be such that intention or negligence may be imputed to him or her. In the words of Neethling et al, "where a person is not accountable, he cannot have fault in the juridical sense and will not be delictually liable"(2001:121). Intention and negligence therefore presuppose accountability. The reference to intention in canon 128 implicitly includes accountability as a requirement for delictual liability.

Secondly, one can infer the requirement of accountability from the 1983 code of canon law in the section on disciplinary norms. Although canon 128 does not make an express reference to accountability as a requirement for delictual liability, the section on disciplinary norms cites accountability as a requirement for liability to punishment in a disciplinary hearing. Although the disciplinary hearing and the delictual hearing are distinct, as indicated above, the two spheres may draw upon each other. The notion of accountability inherent in the disciplinary norms may be transferred to the delictual norms.

To understand the reference to accountability in the disciplinary norms, one needs to appreciate the conditions that impair the mental capacity to distinguish right from wrong. Various legal systems have named three conditions: insanity, youth and psychic condition

(Neethling et al 2001:121). In case of insanity, minority and certain psychic conditions there is a likelihood of a lack of the mental capacity to distinguish right from wrong and to act accordingly. The two canons that regulate liability to punishment in the Church, namely canon 1322 and canon 1323,1° identify insanity and minority as conditions that exclude liability. Canon 1322 reads: "Those who habitually lack the use of reason, even though they appeared sane when they violated a law, are deemed incapable of committing an offence." According to Canon 1323,1°, "No one is liable to a penalty who, when violating a law or precept has not completed the sixteenth year of age." Although the canons do not mention it expressly, the reason for this exclusion is lack of accountability to which Sheehy et al (1995:755) have referred.

5.2.2.2 Accountability As Defence in Cases Of Minors: Limitations in Canon law

Although lack of accountability is recognised in canon law as a factor that excludes intention and could be considered as a legitimate defence in an intention test, the disputants may agree to regard it as inadmissible in their particular case. Gross injustice might arise if it is admissible in two situations: in legal action against an adolescent learner who has inflicted physical harm on another child in a Church-based school and in the claim against intentional infliction of emotional distress by a paedophilic priest or religious in a sexual abuse case. The two situations need to be handled separately.

The first situation arises when legal action is taken against a minor who molests and inflicts bodily harm or emotional distress on another minor in a Church-based school. Lack of accountability could be cited as a ground of defence by the minor if the case is referred to the arbitrator. According to canon 1323 1° the presumption that minority excludes accountability is irrebuttable: "No one is liable to a penalty who, when violating a law or

precept, has not completed the sixteenth year of age." This provision means that there would be a miscarriage of justice if claimants were given a hearing.

An arbitrator needs to take cognisance of the provisions in state law. State law has three provisions relating to delictual liability of a child(Van Der Walt and Midgley 1997:127). Accountability is presumed to be lacking between the age of one to seven and this presumption is considered irrebuttable. Between the age of seven and fourteen, accountability is presumed to be lacking unless the contrary is proven. This presumption is, thus, subject to rebuttal in the light of circumstances and evidence. The onus of the proof rests with the claimant.

5.2.2.3 Accountability As Defence in Paedophilia Cases: Limitations Of The Canon law framework

According to Bertram Griffin (1988:69) paedophilia belongs to the category of lack of accountability. This becomes clear when the paedophile is defined as a person who acts on the impulse of a passion.[69] For Griffin, canon law framework distinguishes the three categories of the effect of passion on liability.

The category of passion	The conditions to be satisfied
The passion that excludes liability	Those who act under the impulse of serious passion if the passion destroys their mental deliberation and consent of will. (Canon 1323, 6°

[69] Other than sexual desire as passion, Sheehy et al (1995:758) have identified anger, hatred, jealousy as indicators of passion in terms of canon law.

The passion that does not exclude liability but has an effect of mitigates the penalty or amount to be paid in damages	Those who act under the impulse of serious passion that does not, however destroy the use of reason and that is not deliberately excited. (Canon 1324§1, 3°)
The passion that does not exclude liability	The passion that is been deliberately aroused cannot be used to seek escape from liability for either punishment or duty to pay for the damage. (Canon 1325)

For Griffin, paedophilia may fall into the first category, and the defence of a lack of accountability may be made. Accountability entails the mental capacity to appreciate right from wrong and to conduct oneself accordingly. For Snyman (1995:156), the first component of accountability refers to a defective mind and the second to a defective will. Betram Griffin has identified paedophilia as having an adverse effect on the second component, namely the capacity to resist the passion and to conduct oneself with appreciation of the wrongfulness of the sexual abuse of a minor. Canon law, therefore, provides a basis for the defence of a lack of accountability for paedophilia. Grave injustice would, however, arise if the disputants and the arbitrators admit a lack of accountability as ground for the defence of a paedophile. It is important that the arbitration process considers the imposition of strict liability in such cases so that the pedophile is considered liable even if not blameworthy.

Neethling et al have outlined the factors that justify liability without fault, namely "the creation of a high risk of damage; the advantages which the creator of the risk draws from his products; the greater degree of care occasioned by an increased liability; the possibility of transferring the risk by way of insurance to an insurer; the fact that the wrongdoer exercises

general"(2001:90). The latter factor, namely the consideration of fairness, determines strict

liability for cases of paedophilia. Considering the degree of harm that comes with sexual abuse, equity and justice demand that the person who has injured another through sexual abuse be held liable even if there is no accountability because of his psychic condition.

5.3 Testing Negligent Infliction of Harm

5.3.1 Canon Law Framework For Testing Negligence: Its Strengths

Canon 128 includes the negligent infliction of harm as a cause for delictual liability. Did the harm or loss arise from an act performed negligently or carelessly? Did the respondent fail to take reasonable care to prevent foreseeable harm to others? As in the case of intention, as the disputants and the arbitrators decide on whether to use canon law to test negligence, they need to establish the criterion that canon law has established for determining whether the harm or loss caused by negligence.

The disputants and the arbitrator will not find a criterion in canon 128, which does not define the legal meaning of negligence. As is the case with intention, the section of canon law that deals with disciplinary principles contains a canon on negligence. In terms of canon 1321,§3, one is not negligent for the purposes of a disciplinary hearing if one "acted …in virtue of a mere accident which [one] could not foresee or if foreseen could not avoid." Innocent Swoboda (1941:106) identifies two conditions for negligence which flow from a general duty: the legal duty that it is incumbent on all to see to it that no harm comes to the public or private good from their actions or failure to act. The general duty may be subdivided into two legal duties: the duty to foresee the harmful effects of one's act and the legal duty to prevent the harmful result. Over and above the two conditions, Stanislas Woywood (1957:404) adds a

third requirement for negligence.[70] There is negligence "if the offender foresaw the infraction of the law and nevertheless neglected to use those precautions which any prudent person would have employed". Woywood's statement contains three conditions for negligence:

(a) foreseeability of the damage ("if the offender foresaw the infraction of the law..."),

(b) preventability of the damage ("...neglected to use those precautions...") and

(c) a reasonable person as a standard of care "which any prudent person would have employed".

The first two conditions refer to two moments in the generation of harm or loss, that is, foreseeing the harm and taking precautions against its happening. The harm occurred because the respondent did not foresee it and/or did not take steps to prevent it. The negligence test covers two moments: estimating the negligence at the moment of foreseeing the harm (testing whether the likelihood of harm was foreseen) and estimating the negligence at the moment of preventing the harm (testing whether steps were taken to prevent the harm). In Woywood's analysis, the two moments are tested against an objective standard, the "prudent person" placed in circumstances similar to those of the respondent. Hence, in terms of Woywood's interpretation, the negligence test includes the testing of two moments in the causing of harm

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70 The 1983 code refers to negligence also in canon 1326,§1, 3°, which includes the third definition, that of the prudent person. For Sheehy et al (1995:758), the definitions of the meaning of negligence in canon 1326,§1, 3° are applicable to canon 1321,§3. Canon 1326,§1, 3° speaks of a negligent offender as one "who, after a penalty for a culpable offence was constituted, foresaw the event but nevertheless omitted to take precautions to avoid it which any careful person would have taken." When this is transferred to a delictual hearing, one is considered negligent if the respondent should have foreseen the harm and, if foreseen, should have taken steps to avoid it as any prudent person would do.

or loss and this test is held up against an objective standard, namely that set by the prudent person.

If the disputants and arbitrator decide to draw upon this legal meaning of negligence, they need to consider the inclusion of two legs to the negligence test. [71] The notion of two moments of negligence involves testing whether the respondent as a reasonable person foresaw the harm and whether the respondent as a reasonable person took steps to prevent the harm. We refer to the former as the reasonable foreseeability test and the latter as the reasonable preventability test.

The arbitrator commences with a test for reasonable foreseeability . For this test, the arbitrator asks whether the prudent person, in the same profession or with the same kind of education as the respondent, (e.g. a prudent priest or prudent teacher in a school or a prudent doctor in a hospital) could have foreseen the possibility of harm to the claimant through an act or an omission. If the answer is negative, there is no negligence and therefore no liability. If positive, the arbitrator asks whether the chance of the risk materialising was so remote that a reasonable person would have been justified in disregarding it.

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71 The concept of the reasonable person or prudent person is merely a fiction that the law creates to personify the objective standard of reasonable care. (Neethling et al 2001:131; Van Der Walt and Midgley 1997:52) From the prudent person is expected a reasonable standard of care and, in the negligence test, the arbitration tribunal measures the conduct of the respondent against this standard. One may thus speak of a reasonable bishop in a diocese, a reasonable priest in a parish, a reasonable teacher in a school, a reasonable doctor or nurse in a clinic or hospital. In legal literature, the reasonable person is also referred to as a *bonus paterfamilias* (which literally means a good father of the family) or *diligens paterfamilias* (a diligent father of the family).

If the reply is in the affirmative, there is no case of negligence. If negative, the arbitrator proceeds to the second leg of the test, that of reasonable preventability. In this test, the arbitrator asks what steps a reasonable person – a reasonable doctor or nurse, teacher, priest or bishop – would have taken to prevent the foreseeable harm. Then, the arbitrator asks if the respondent took these steps. If the answer is in the affirmative, then there is no negligence. If the respondent failed to take reasonable steps, then he or she is negligent and liable.

5.3.2 Canon Law Framework For Testing Negligence: Its Limitations

The test for negligence inherent in canon law is sufficiently broad to enable its accommodating the various situations that might arise in the Catholic Church. It is, therefore, an asset in the arbitration process. The negligence test in canon law will, for example, cover the claims for damages in cases of medical negligence arising in the Church-sponsored hospitals or clinics. It will also furnish an arbitrator with a standard for judgeing the complaints of negligence in Church-sponsored schools. The canon law test for negligence is problematic when establishing the liability of a diocese or religious institute for the sexual abuse of its priests or religious. The principle of vicarious liability traditionally applies to the employer-employee relationship (Neethling et al 2001:373; Wicke 1997:233).[72] It has often been argued in the Catholic Church that vicarious liability does not extend either to a priest-diocese relationship or to a religious- religious institute relationship since such relationships fall outside the scope of the employee-employer relationship (Schiltz 2003:958). The priest is

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72 Wicke (1997:233) removes juristic persons like companies from the category that requires strict liability. He, however, proceeds with an argument distinct from the one applicable to Churches, to the effect that the companies are considered as directly liable, and not vicariously liable for the delicts as committed by persons in control of the company, especially the directors of a company. Such persons are known as the "directing mind" or the "alter ego" of the company. It should be accepted that this argument can be extended to liability for delicts committed by Church leaders (bishops or religious superiors (where a diocese or religious institute is registered as a section 21 company).

not employed by the diocese: he is merely offering his ministerial services to the diocese. The bond between the bishop and the priest is not that of an employer-employee, but that of a chief pastor and assistant pastor in a context of a calling and a ministry. This bond has been referred to as incardination and is not governed by labor relations. The diocese cannot, therefore, be held liable for the harm that the priest has inflicted on minors or majors during his ministry.

As the disputants decide to refer a sexual abuse case to an arbitrator for the application of the canon law negligence test, they need to establish whether the interests of justice will be served if vicarious liability for Church institutions is inadmissible in the arbitration process. In his analysis of the sexual abuse cases in the Catholic Church, Patrick Schiltz (2003) points out that it is the institution of vicarious liability that enables the victims of sexual abuse to gain compensation for the injury that they have suffered. It is, therefore, proper that the disputants and arbitrators decide that vicarious liability be admitted in the arbitration process. The admissibility will then need to be grounded on arguments other than the employer-employee argument. Patrick Schiltz identifies two arguments: the principal-agent and the duty-of-care arguments.

5.3.3 First Remedy For The Limitation: Principal-Agent Argument For Vicarious Liability

Patrick Schiltz (2003:958) refers to this argument as a "no-fault" argument since, armed with this argument, a diocese or Church institution is held liable regardless of whether it is at

fault.[73] The principal-agent argument provides an alternative to the argument for vicarious liability for a priest or religious on the grounds of the employer-employee relationship. The argument places the relationship between a diocese and a priest into a principal-agent framework. An "agent" is a person who is authorised by an entity or another person to act on its behalf and to be subject to its or his or her control. The person or entity giving the authority and having the right to control the agent is called the "principal." An agent plays a representative and vicarious function, acting on behalf of the principal. In principle, when an agent acts on behalf of the principal, it is the principal that is acting. From this notion of agency, it is argued that when a priest as an agent of a diocese or religious institute sexually abuses a minor or an adult, the diocese or religious institute as a principal should be held financially responsible. The issue of fault on the part of the diocese is not taken into consideration. "The plaintiff can make the Church pay for her damages, whether or not the Church was at fault in any way." (Schiltz 2003:958)

The argument has its strengths and weaknesses. Patrick Schiltz focuses on the strength of the argument. In his opinion, the principal-agent relationship is easier for the Catholic Church to prove because it is hierarchically organised. The principal-agent relationship can easily be held against the Catholic Church:

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73 Neethling et al have included the principal-agent argument as a sub-section of strict liability in South African state law: "Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons. Two such relationships are important, namely that of employer-employee, principal-agent" (2001:373). In placing the principal-agent argument and the concept of delictual liability within the category of strict liability, Neethling et al seem to assume that vicarious liability can occur outside the scope of strict liability. As demonstrated below, it is possible to have vicarious liability with fault.

> Churches organise themselves differently. Some churches - such as the Roman Catholic Church - are so hierarchical that there is no question that priests function as the agents of dioceses. Other churches - such as the Southern Baptist Convention - are so congregational that there is no question that pastors function as the agents only of their congregations. But many large American denominations - for example, the United Methodist Church, the Evangelical Lutheran Church in America, and the Presbyterian Church (U.S.A) - fall in between these two extremes. Their congregations and pastors have more autonomy than Roman Catholic parishes and priests, but not as much as Southern Baptist congregations and pastors (2003:958-959).

In the hierarchical setting of the Catholic Church, it is easier to prove that a priest in a parish holds either actual or apparent authority to act on behalf of the principal, namely the diocese. Actual authority is deducible from letters of appointment, while apparent authority may be argued from the diocese placing the priest in a a situation such that any reasonable person could be justified in assuming the priest had the authority to act on behalf of the diocese.

The principal-agent argument has limitations as a tool for delivery of justice. An arbitrator needs to have regard to its weaknesses if it is decided to adopt the "no-fault" argument. The weaknesses also form a basis for defence if a claimant employs this argument in the arbitration process. The limitations emerge when one notes that the principal-agent argument may give rise to troubling and vexing questions at two levels. Firstly, the notion of agency implies that the agent is authorised by the principal to perform a specific act on behalf of the principal. Neethling et al define an agent as "someone who is authorised to perform a legal act - usually concluding a contract – on behalf of his principal" (2001:380). The priest's agency on behalf of a diocese pertains to pastoral ministry in a parish or Church institution. The agency of the priest on behalf of a diocese does not cover every aspect of his life and

activities.[74] The agency is limited to the ministry that the priest exercises on behalf of the diocese. A priest does not act within the scope of his agency when he sexually abuses a child or an adult. Sexual activity is not an inherent requirement and activity in a priest's ministerial work. It therefore falls outside the scope of a priest's agency on behalf of a diocese or religious institute. This gives rise to the question: should a principal be held vicariously liable when an agent injures others through an activity that lies beyond the scope of his or her agency?

Secondly, the agent enters into a fiduciary relationship with the principal. There is a relationship of trust between the principal and agent. This relationship incurs obligations on the part of the agent,one of which is always to act in the best interest of the principal. The principal is not held liable for the personal acts of the agent that are to the detriment of the principal's interests. When a priest commits sexual abuse, he is pursuing his own interests, and not those of the principal, the diocese. Hence the question: should the principal be held liable when an agent acts in the pursuit his or her own interests, and not the interests of the principal? Both this question and the question that arose from the account of the first weakness, suggest that the principal –agent argument could make it difficult for a claimant to succeed.

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74 Theologically, it is held that priesthood in the Catholic Church is not limited to the ministry and liturgical activities that the priest performs. It embraces the totality of his life. It is a way of life rather than something that he does. Considered from this theological perspective, agency covers one's way of life. The priest is authorised by the principal to undertake a particular way of living. But even if one holds this view, it might still be argued that sexual abuse falls outside the scope of the priestly or religious way of life that is authorised by the principal.

5.3.3 First Remedy For The Limitation: Duty-Of-Care Argument For vicarious Liability

Vicarious liability can be argued from the perspective of duty of care. Patrick Schiltz (2003:959) refers to this argument as a "fault" argument: a diocese or religious institute is held vicariously liable because of its negligence. Four conditions must exist for liability for negligence: firstly, the bishop must have a duty to protect the minors or other Church members from unreasonable risks; secondly, the bishop must have failed in that duty by not exercising a reasonable standard of care; thirdly, there must be a causal connection between the breach of the duty to care and the resulting injury, and, fourthly, actual physical or mental injury must result from the negligence. In the test for vicarious liability, all these four conditions must be proven before damages will be awarded for negligence. The first three conditions require separate analysis.

5.3.3.1 Duty To Protect

It will be easy for the claimants to prove that the bishop has the duty of care with respect to minors, that is, that he surely, a has the duty to protect the minors who come to Church institutions against sexual abuse. A similar argument cannot easily be applied to the sexual abuse of adults. Patrick Schiltz (2003:96) points out that in the United States courts the duty of care with respect to adults in cases of sexual abuse or other forms of injury has, at times, been argued from the point of view of fiduciary duty. These relationships induce fiduciary duties, including the duty to advance and protect the interests of the Church members. One of the interests due to the Church members is freedom from bodily and emotional harm. The duty of care therefore flows from the notion of fiduciary duty. In line with this argument,

there is a fiduciary relationship between a bishop as the minister to his church members and his Church members. If it fails to meet its fiduciary duties, a diocese is held liable. A fiduciary relationship requires that a party in the relationship act in utmost good faith and in the interests of the other party.

Patrick Schiltz has noted a limitation in the fiduciary duty argument, requiring the attention of the disputants and arbitrators. Fiduciary law is designed to regulate the duties that flow from confidential professional relationships like the doctor-patient and psychologist-client. Relationships of this kind require that the parties be aware of the relationship and in contact with each other. The fiduciary duty argument for the vicarious liability of a diocese does not include the notion of mutual awareness and contact between the diocese and the Church member. It stresses only the effect of the fiduciary relationship of trust and confidence and of acting in the best interests of the other, without proving the legal grounds for placing the two in a fiduciary relationship. What entitlement does the claimant have to being in a fiduciary relationship with the diocese of a priest who committed sexual abuse? This question is not addressed in the argument. In criticism, Patrick Schiltz declares:

> Although fiduciary law is intended to address duties in confidential, one-on-one relationships (such as parent-child or doctor-patient), at least one court has found that a Catholic diocese and a Catholic parishioner were in a fiduciary relationship—that is, 'a relationship . . . "characterized by a unique degree of trust and confidence between[them]"— even though the diocese was not even aware of the existence of the parishioner and the two had no contact with each other. This standard imposes upon Church officials affirmative obligations toward people whom they have never met and requires Church officials to act 'solely for the benefit' of people who have sharply conflicting interests—such as, for example, a priest who commits sexual misconduct and a child he abuses, both of whom, under this boundless interpretation of fiduciary law, are in a fiduciary relationship with the diocese (2003:961).

Although Patrick Schiltz's criticism is reasonable, one has to admit that the fiduciary duty argument may arise in cases where a bishop failed to act in good faith and in the interests of the claimant after the claimant has reported the sexual abuse to him. It is from this angle that the arbitration process could admit vicarious liability in terms of the fiduciary duty argument. Patrick Schiltz picks up on this angle later in his article. He concludes: "The final major development is that plaintiffs increasingly have sued bishops—not (or not just) for damages caused by the pastor's sexual abuse—but for damages allegedly caused by the bishop in his handling of the plaintiff's complaint of abuse. The plaintiff argues that, when she came forward to tell the bishop that she was abused by the pastor, the bishop and she entered into a fiduciary relationship. When the bishop did something that she did not like—for example, did not offer her money or enough money, or did not refer her to a counselor or to the right counselor—the bishop breached his fiduciary duty." (2003:962)[75] Despite its limitations, it could, in adjudicating cases of vicarious liability, serve as a useful concept for the arbitration process.[76]

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75 Patrick Schiltz, however, cautions against the pastoral implications of employment of this angle of the fiduciary duty argument. When pastoral care of victims of sexual abuse is considered in terms of a fiduciary relationship and results in delictual liability, bishops will hesitate to offer pastoral care to the victims of sexual abuse so as to protect themselves from liability. "If providing pastoral care to a person creates a fiduciary relationship, and if creating such a relationship leaves open every aspect of one's ministry to judicial second-guessing (and potential six- and seven-figure verdicts), then many pastors will decide that providing such care is not worth the risks. They will devote their energies to worship services and other group activities, leaving victims of sexual abuse and others who seek care and comfort to look elsewhere"(2003:970-971).

76 Schiltz implies that it is the priest who abuses his fiduciary duties to the victim, and not the diocese since "in committing sexual misconduct, a pastor takes advantage of a position of trust conferred upon him by the Church" (Schilts 2003:958).

5.3.3.2 Failure To Exercise a Reasonable Standard Of Care

The second requirement to be proven in the duty-of-care test is whether the bishop failed to exercise a reasonable standard of care in his duties to the Church members. Failing to exercise reasonable care to protect Church members from sexual abuse, the bishop is negligent and the diocese is vicariously liable. The duty-of-care test corresponds to the negligence test. An arbitrator will measure the bishop's conduct against the care that a "reasonable" bishop in a similar situation will have exercised. The two legs of negligence test are applicable: reasonable foreseeability and reasonable preventability. An arbitrator will, therefore, seek to answer the following question: could the sexual abuse have been foreseen and prevented by a bishop if a reasonable standard of care had been exercised?

Negligence may occur at several levels. The bishop or Church administrator could be held negligent in: (1) screening the candidate in the seminary and later ordaining the person as a priest (negligent screening) (2) hiring the priest to work in a parish without conducting a proper background check (negligent hiring); (3) failing to monitor and supervise him so that minors will be protected from sexual molestation (negligent supervision); (4) doing nothing to stop the priest from engaging in inappropriate sexual conduct with minors even after his propensity for deviant behaviour had become known to them; (5) in retaining and allowing the priest to continue in the ministry, in spite of their awareness of his injurious conduct and tendencies, by not dismissing him and only transferring him from one parish to another (negligent retention).

The diocese will be held liable if a "reasonable bishop", placed in the same circumstances as a concrete, individual bishop would have taken reasonable care in screening, hiring, retaining

the injurious priest. A reasonable bishop would, during the screening, hiring and at other moments, have foreseen the likelihood of the priest's causing harm to minors and would have taken precautions to prevent that from happening, for example, by not ordaining a candidate to the priesthood, not appointing him to a parish or other ministry where he would be in direct contact with minors. According to Patrick Schiltz, "plaintiffs have pursued several fault-based theories against Churches, including negligent ordination, negligent training, negligent hiring, negligent supervision, and negligent retention. Most often, plaintiffs argue that it was negligent for the Church to ordain, hire, or retain a pastor after it knew, or should have known, something about the pastor that disqualified him from ministry. Typically, that 'something' is sexual misconduct"(2003:959).

Several points have been argued. Firstly, "negligent ordination, employment, supervision, and retention claims are based upon an argument that the Church knew, or should have known, of something bad about the pastor—something that disqualified him from ministry." This is easier to establish when there is proof that the respondent was involved in a sexual abuse case prior to the one under adjudication and that the bishop or leader of a religious institute knew of the incident. In that case, the "reasonable bishop" placed in the same circumstances as the bishop in question should have foreseen the likelihood of recurrence and should have taken steps to prevent its happening.

The same does not apply when, at the time of the abuse, the priest had never been involved in abuse or molestation. Patrick Schiltz reports cases in the United States where a diocese was found negligent although, prior to the case of abuse, the priest had never been involved in sexual abuse. In such cases, the courts have raised the standard of care expected of a reasonable bishop, saying that a bishop should exclude a priest from the ministry if he observes even minute signs like depression, alcoholism, or stress: "Churches are now paying

large verdicts and settlements in cases in which the Church knew of no prior sexual misconduct by the pastor—indeed, in cases in which there was no prior sexual misconduct by the pastor—but the Church knew of certain 'attribute(s) of character' that purportedly rendered the pastor unfit for ministry. In one case that resulted in a jury verdict of over $1 million, those 'attributes'" included depression, low self-esteem, problems with authority, and a 'sort of struggle in the area of sexual identity'. In another case—a case in which the jury awarded compensatory and punitive damages totaling almost $700,000—those 'attributes' included the fact that the pastor had a drinking problem and had been through a nasty divorce many years earlier" (2003:960).

Raising the standard of care to such excessive and dramatic proportions does not reflect the realities in the pastoral field. According to this excessive standard of care, a reasonable bishop is one who removes a candidate from formation to priesthood, does not ordain a person and hire him for ministry, removes a priest from the ministry if he is perceived to be under stress. Being under stress is considered as an indicator that a priest would, with some substantial certainty, engage in a sexual abuse and should therefore be removed from the ministry lest he harm a minor or an adult by sexually molesting them. In following this excessive standard of care, a "reasonable bishop" would spend all his time and energy supervising his priests so as to identify the ones likely to commit sexual abuse and to remove them from the ministry.

Patrick Schiltz says, on the excessive standard of care, "the plaintiffs argued that it was *nonsexual* conduct that should have put the Church on notice, such as the fact that the pastor had suffered from depression or alcoholism or had recently suffered a significant loss

in his life. It is, however, impossible for bishops to supervise pastors closely, both because of the nature of Churches and because of the nature of ministry. A typical bishop may have responsibility for hundreds of pastors scattered over thousands of square miles. Most bishops have small staffs and are themselves quite busy. They have little time to be 'in the field' supervising pastors—and, even if they had more time, they could, at most, spend a few hours with each pastor. Pastors who have no difficulty hiding their sexual misconduct from their families and congregants—people who spend hundreds of hours with them each year—obviously will have little difficulty hiding their sexual misconduct from their bishops. Moreover, even if every bishop were responsible for supervising only one pastor, the bishop would still have difficulty monitoring the day-to-day work of that pastor. Much of what pastors do is necessarily done in private—in their offices, in the homes of congregants, at hospital bedsides. Indeed, pastors are often required by law to maintain the confidentiality of much of what they do" (2003:967-968).

Secondly, Patrick Schiltz maintains that, when advanced in the context of a secular court, the duty-of care-argument has the effect of putting the secular courts in conflict with the freedom of religion as enjoyed by a diocese or religious institute. "A court is barred by the First Amendment from interfering in the ordaining, training, hiring, supervising, or retaining of clergy... The fact that most courts are willing to assess the reasonableness of a decision by a Church as to whom will serve in its ministry—as to whom will teach and preach in its name—has obvious implications for religious liberty. It could be that the courts are acting constitutionally. And it could be that such interference in religious freedom is the lesser of two evils—the other evil being failing to compensate victims of clergy sexual misconduct. It is clear that litigation over these claims has substantially burdened the religious liberty of Churches and those who belong to them" (2003:959-960). This argument would, however, be difficult to advance in the case of an arbitration process.

5.3.3.3 PROXIMATE CAUSE

The third circumstance that must be proven in a negligence case is whether there was a connection between the breach of duty by the bishop and the sexual abuse, that is, whether the bishop failed to exercise a reasonable standard of care (requirement two) and this breach of duty resulted in subsequent injury to the Church member (requirement four). This requirement, referred to as proximate cause, often hinges on foreseeability. That is, was the Church member's injury something that could have been anticipated by a bishop? If the injury could have been foreseen and prevented by a bishop if a reasonable standard of care had been exercised, a logical connection and, therefore, negligence may exist. To answer questions about proximate cause, an arbitrator will need to ascertain if the injury was a natural and probable cause of a wrongful omission (i.e. failure to supervise), and ought to have been foreseen in light of the attendant circumstances.

5.4 CONCLUSION

The chapter has discussed the canonical framework for testing intention and negligence. It has been claimed that canon 128 does not express the legal meaning of intention and negligence. The legal meaning may be deduced from canon 1321 which specifies intention and negligence as requirements for liability for ecclesiastical penalties. The chapter has also argued that the legal meaning of intention and negligence applicable in the disciplinary hearing can be transferable to the delictual hearing.

Intention in terms of canon 1321 refers to two concepts: knowledge and freedom. In a delictual hearing, the test for the intentional infliction of damage proceeds on two legs: the test for knowledge and the freedom of the respondent at the time of the infliction of harm. An arbitrator mandated to test intention in terms of canon law would, therefore, find a person delictually liable for intentional infliction of harm if the respondent had substantially certain

knowledge that his conduct would be likely to cause harm to the claimant and yet directed his will towards the harm. The canon law test for intent has a limitation in that it admits lack of accountability as excluding delictual liability for paedophile priests in sexual abuse cases. To overcome this limitation, the chapter has argued for the requirement of strict liability in paedophile cases.

Besides intention, canon 1321 the chapter identifies two conditions for negligence: reasonable foreseeability and reasonable preventability. An arbitrator asked to test negligence in terms of canon law, will find a person delictually liable for negligent infliction of damage if the prudent person, in the same profession or with the same kind of learning as the respondent, (e.g. a prudent priest or prudent teacher in a school or a prudent doctor in a hospital) could have foreseen the possibility of harm to the claimant from an act or omission and taken precautions to prevent it. The chapter points to the limitation that results from not admitting vicarious liability. To remedy this, the chapter has suggested the inclusion of vicarious liability from the perspective of the principal-agent argument and the duty-of-care argument. The interests of justice will be served in arbitration if the disputants and arbitrator consider vicarious liability as admissible.

CHAPTER SIX: GENERAL CONCLUSION

This study envisages a situation in which disputants who are church members agree to bring their delictual disputes to an arbitrator and to use canon law as an applicable rule of law. One of the criteria that the disputants and the arbitrator must use when they decide on whether to use canon law to determine delictual liability is the capacity of canon law to deliver justice. The main question in the study has therefore been: would gross injustice result if the arbitrator of the dispute is tasked to use canon law?

The study has demonstrated that some elements of canon law provide for justice and that others are either limited or deficient. This has come to light against the background of a critical analysis of canon law and a discussion of comparable points in state law. Elements in canon law that have limitations or deficiencies for delivering justice could be corrected in the light of comparable points in the state law. The methodology of the study, therefore, required adopting the strategy of a dialogic partnership between canon law and state law. It was concluded that canon law be adopted as an instrument of justice. The two notions required theoretical justification before employing them in the main body of the study. Chapter two engaged in theoretical analysis. The chapter discussed the two paradigms in twentieth century canon law: the 1917 and 1983 paradigms. The 1983 paradigm is assessed in the light of the weaknesses of the 1917 paradigm. Minimal attention to the theological specificity of canon law stands out as a major weakness of the 1917 paradigm, a weakness that brought about a crisis in the 1917 paradigm and occasioned the emergence of the 1983 paradigm. The chapter has also emphasised the difference between the *ius perfectum* design and the original design of the 1983 paradigm. The former does not allow for canon law as an instrument of justice or for state law as a serious partner of canon law. Unlike the 1917

paradigm, the 1983 paradigm accommodates the concept of the law both as an instrument of justice and as a partnership with secular law. Using canon law as an instrument of justice in partnership with state law in the main body of this study appears justifiable and grounded when the original design of the 1983 paradigm is adopted. The study calls for the delivery of justice as one of the outcomes of the arbitration proceedings and for the application of canon law in the light of state law as the methodology in the proceedings. This study has argued that this outcome and methodology is based on the original design of the 1983 paradigm.

One of the tests that an arbitrator performs is the test for legally relevant damage. This was covered in Chapter three, which indicated some of the strengths and the weaknesses of canon law for testing legally relevant damage. Harm or loss constitutes legally relevant damage when an infringement of a legally recognised interest or right is entailed. An arbitrator, therefore, tests legally relevant damage on two fronts: that is, on whether the right is legally recognised and on whether the right has been infringed.

ha Both tests require a legal framework. C pter three noted the limited number of rights specified in the canon law Bill of Rights. Most of the rights of delictual significance in Church-sponsored institutions (schools, hospitals, religious institutes) are not included in the bill. A miscarriage of justice will, thus, arise if an arbitrator employs the Bill of Rights for testing the legal recognition of rights. Where an important right has been violated in a Church-based institution, which is not listed in the Bill of Rights, the chapter proposes that an arbitrator remedies this by considering the rights legally recognised in state law.

For testing if a right has been infringed, the chapter noted that the internal scope of some of the rights is very restricted. Some legal texts offer limited protection of rights. It is proposed that to overcome the limitations in canon law arbitrators refer to state law.

The study also covered the test for the unlawfulness of an administrative decision. The infringement of interests is not enough for one to incur delictual liability. Additionally, it requires that the infringement be placed unlawfully. Chapter four describes the tests for unlawful infringement of rights by an administrative decision. The focus in the chapter was on disciplinary hearings and administrative decisions. The chapter threw light on the need for the arbitrator and disputants, when the disputed issue concerns substantive elements of the administrative decision, to conduct the tests for substantive lawfulness and for reasonableness.

When it is evident that the substantive lawfulness test would result in a grave miscarriage of justice, the arbitrator should employ a reasonableness test. The reasonableness test will enable the arbitration process in terms of canon law to operate as an instrument, not only of formal justice, but also of substantive justice. An administrative decision will be considered just not only for its compliance with the legal norms but also for its effect on the affected parties and the justifiability of the effect. Chapter four also argued for the inclusion of procedural fairness as a ground for delictual liability. The principles of natural justice provide a framework for a fairness test.

In the substantive lawfulness test, the reasonableness test and the procedural fairness test, canon law appears to have limitations. The canon law framework for the *ius acceptum* test, for example, is limited by canon 1399 that justifies the imposition of penalties for an offence

that is not recognised as punishable in canon law. Similarly, the lack of precision and clarity in some penal norms frustrate the employment of the *ius strictum* test. The lack of indicators for reasonableness in canon law limit the capacity of an arbitrator to conduct the reasonableness test. The procedural norms do not have adequate indicators for performing the procedural fairness test in terms of the principles of natural justice. In the light of such limitations, it is important that an arbitrator has regard to comparable points in state law. Otherwise, a miscarriage of justice will arise.

Having discussed the lawfulness tests for administrative decisions, the study proceeded to cover culpability tests of private conduct. Chapter five discussed the tests for intention and negligence. The chapter showed that canon 128 does not give the legal meaning of intention and negligence. One can deduce the legal meaning from canon 1321 which describes intention and negligence as requirements for liability for ecclesiastical penalties. The chapter also argued that the legal meaning of intention and negligence applicable in the disciplinary hearing is transferable to the delictual hearing.

Intention in canon 1321 involves the concepts of knowledge and freedom. Transferred into a delictual hearing, intentional infliction of damage is determined by the tests for the respondent's knowledge and freedom at the time of the infliction of harm. An arbitrator finds a person delictually liable for intentional infliction of harm if there was substantially certain knowledge of the likelihood of causing harm to the claimant and, in spite of this, a directedness of the will towards the harm. The canon law requirement for the test on intent is limited in that it admits lack of accountability for excluding delictual liability for the paedophile priests in sexual abuse cases. To overcome this limitation, this chapter has argued for strict liability in paedophile cases.

Besides, canon 1321 refers to negligence, liability for which is seen as dependent on reasonable foreseeability and reasonable preventability. An arbitrator will find a person delictually liable for negligent infliction of damage if the prudent person, in the same profession or with the same level of learning as the respondent, (e.g. a prudent priest or prudent teacher in a school or a prudent doctor in a hospital) could have foreseen the possibility of harm to the claimant by an act or an omission and could have taken precautions to prevent it. It was shown that canon law is limited in its failure to admit the notion of vicarious liability. To remedy this, the inclusion of the concept of vicarious liability was suggested from the perspective of the principal-agent argument and the duty-of-care argument. The interests of justice will be served if an arbitrator considers vicarious liability as admissible in the delictual hearing.

It is evident from the study that the application of canon law by an arbitrator will result in justice if the arbitrator and disputants direct one eye to the application of the canon law and the other to state law remedies. Concretely, this means that an arbitrator must apply canon law as a legal basis for the claims and defence and, where canon law is either limited or deficient, the disputants and an arbitrator need to refer comparable points in state law. This study has highlighted the limited or deficient aspects of canon law and the comparable points in state law that can serve as remedies. It is only when both canon and state law are referred to that arbitration can serve as an instrument of justice and stand the test of legitimacy in the eyes of the disputants and state law.

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